IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	No. 08-cr-231 (EGS)
THEODORE F. STEVENS,	)	
Defendant.	)	

SENATOR STEVENS'S REPLY IN SUPPORT OF MOTION TO DISMISS OR FOR A NEW TRIAL, OR IN THE ALTERNATIVE, MOTION TO HOLD GOVERNMENT IN CONTEMPT FOR VIOLATING COURT'S JANUARY 21, 2009 ORDER

I. The Government's Continued Defiance of the Court's January 21, 2009 Order.

The government argues that the Court's January 21 Order required it to produce only documents related to "its knowledge regarding Agent Joy's whistleblower status and protections." Dkt. 292 at 8 (emphasis added). But the Court:

> ORDERED that the government produce all communications to, from, or between anyone in OPI, and any other office within DOJ, including but not limited to the OIG, OPR, the FBI, and the U.S. Attorney's Office of the District of Alaska, between November 15, 2008 and the present, regarding the complaint filed by Agent Joy, to be filed under seal with the Court . . . by no later than January 30, 2009.

Dkt. 274 at 18 (emphasis added). If the government truly found the Court's January 21 Order ambiguous or imprudent, *see* Opp. at 16, it should have asked for clarification or reconsideration. Instead, the government chose to defy the Court's Order, and it remains in defiance.

In addition, the government provided no documents at all to the defense, even though the Court ordered that a "copy" be "provided to the defendant" and previously directed the parties not to engage in *ex parte* communications even with the Court's law clerk. Dkt. 245

at 2; Dkt. 287 at 2 (citing Court's directive). The government does not even attempt to argue that this provision is ambiguous. It is not. The Court:

> ORDERED that the government produce all communications to, from, or between anyone in OPI, and any other office within DOJ, including but not limited to the OIG, OPR, the FBI, and the U.S. Attorney's Office of the District of Alaska, between November 15, 2008 and the present, regarding the complaint filed by Agent Joy, to be filed under seal with the Court, with a copy provided to the defendant pursuant to the protective order already in place in this case, by no later than January 30, 2009.

Dkt. 274 at 18 (emphasis added). The government's *ex parte* submission is not only contemptuous, but also "contrary to the most basic concepts of American justice." *United States v. Rezaq*, 899 F.Supp. 697, 707 (D.D.C. 1995) (*quoting United States v. Presser*, 828 F.2d 330, 335 (6th Cir. 1987)). *See also United States v. Barnwell*, 477 F.3d 844 (6th Cir. 2007) (*ex parte* communications between government and trial judge constituted reversible error).

II. The Court Should Dismiss the Indictment or Grant a New Trial on the Current Record.

The defense stands by its suggestion that *United States v. Omni* should be a guidepost for this Court.[1] 634 F. Supp. 1414 (D. Md. 1986). After a 28-day evidentiary hearing

[1] Contrary to the government's suggestion, *Omni* has not been overruled or disapproved. The cases in the so-called negative history listed on Lexis and Westlaw merely distinguish the listed cases from *Omni*. The entirety of that so-called negative history on Westlaw and Lexis consists of the following five cases: *United States v. Bouchard*, 886 F. Supp. 111, 119 n.6 (D. Me. 1995) (distinguishing *Omni* because "[t]hat case is quite different from the case at bar since it addresses the occurrence of post-indictment prosecutorial misconduct, causing actual prejudice to the defendant"); *United States v. Derrick*, 163 F.3d 799 (4th Cir. 1998) (distinguishing *Omni* on grounds that *Omni* dismissed the indictment without prejudice); *Allnutt v. C.I.R.*, T.C. Memo 2002-311, WL 31875119 (U.S. Tax Ct. Dec. 26, 2002) (noting that petitioner's reliance on *Omni* is "misplaced because [that case] involved sanctions for prosecutorial misconduct in criminal prosecutions"); *United States v. Rozin*, 552 F. Supp. 2d 693, 700 (S.D. Ohio 2008) (factually distinguishing *Omni* by "reject[ing defendant's] assertion that the agent's actions in this case were more egregious than the actions of the agents in *Omni*"); *Jonathan Corp. v. Prime Computer, Inc.*, 114 F.R.D. 693, 700 (E.D. Va. 1987) ("The facts of *Omni* simply and clearly do not correlate with the facts of this case where an employee voluntarily produces a document during the ordinary course of business.").

and the testimony of a retired FBI document examiner, the defense was able to demonstrate in *Omni* that government agents secretly altered government memoranda and produced them to the defense without disclosing that they had been altered. Caught red-handed, the government "concede[d] that it was wrong to prepare memoranda as had been done," but argued "almost a 'harmless error' approach as a sanction for this egregious error, contending that no harsh remedy should follow because all underlying documents were finally produced to the defendants." *Id.* at 1439.

Given the severity of the government's misconduct, Judge Black was rightly offended by this argument. But he conceded that a showing of prejudice was required: "If the defendants demonstrate actual prejudice, the indictment can be dismissed under the supervisory power." *Id.* at 1437.[2] Judge Black then determined that the "[d]efendants and the Court clearly suffered prejudice from this misconduct." *Id.* at 1438. He emphasized that "all of the documents were finally produced only . . . because of the . . . defendant's strenuous efforts" and that "[d]efendants should not be forced to conduct lengthy hearings to learn the basic essential facts needed as a predicate to a pretrial motion." *Id.* at 1439-40. Judge Black held that the

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[2] Nonetheless, Judge Black also correctly noted that the case law governing prejudice was unsettled for "truly extreme cases." *Omni*, 634 F. Supp. at 1437. Nor was the *Omni* court the only court to note this distinction. In *United States v. Santana*, 6 F.3d 1, 11 (1st Cir. 1993) – a case cited by the government in its Opposition – the court noted that:

> [T]he use of supervisory power to dismiss an indictment, in the absence of injury to the defendant, may not be entirely a dead letter. The Court's reasoning in *Hasting* may be read to leave open the possibility that the goal of deterring future misconduct would justify using the supervisory power to redress conduct not injuring defendants if the conduct is plainly improper, indisputably outrageous, and not redressable through the utilization of less drastic disciplinary tools. *See Hasting*, 461 U.S. at 506, 103 S.Ct. at 1979. Be that as it may, we leave the qualification's fate and dimensions for another day, as this is plainly not such a case.

supervisory power "doctrine operates to vindicate a defendant's rights in an individual case, [but] is designed and invoked primarily to preserve the integrity of the judicial system." *Id.* Accordingly, Judge Black dismissed the indictment without prejudice. *Id.* at 1441.

Just as the "defendants and the Court clearly suffered prejudice" in *Omni*, Senator Stevens and the Court have suffered prejudice in this case. Our system of justice is dependent upon prosecutors making accurate representations to the Court and the defense. Here the government made false representation after false representation, and the defense spent hundreds of hours preparing for trial based on that false information. Opening statements, cross-examinations, direct examinations, and trial themes are not developed on the fly during trial. If defense counsel had known before trial what it knows now, it would have prepared a different case. Moreover, defense counsel spent hundreds of hours during trial trying to extract from the government information to which it was entitled. Sometimes the defense was successful in doing so, but other times (as we now know from the Joy Complaint) it was not. What is clear is that those hundreds of hours should have been spent preparing the defense based on information that the government should have provided well before trial. As Judge Bates said in *United States v. Quinn*, 537 F.Supp.2d 99, 108 (D.D.C. 2008), "the government must disclose *Brady* information 'at such a time as to allow the defense to use the favorable material effectively in the preparation and prosecution of its case, even if this criterion requires pretrial disclosure.'" *Id.* *(quoting United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir. 1973)).

The government represented repeatedly that it understood its discovery obligations and that it had fully complied with them. *See e.g.*, Tr. (Sep. 12) at 41 ("THE COURT: It's probably fair to ask you, if you had anything else you'd be producing it right now? MS. MORRIS: That's absolutely right, Judge. We know that there's a continuing duty. If

something else comes up we provide it."). The government even mocked defense counsel's efforts to obtain full discovery with a humorous "sound bite" that was widely reported by the national media: "This is a defendant like any other defendant and just because he has 'U.S. Senator' before his name doesn't mean that we have to drink out of a fire hose every time they call us." Tr. (Sept. 12 p.m.) at 22. Sadly, the government did not take its obligation to provide discovery to this Senator seriously. Nor did it take its obligation to provide truthful information to the defense and the Court seriously.

The government's insistence that its misconduct caused no prejudice to the defense requires yet another recitation of the government's misconduct. Much of this misconduct is laid out in other pleadings filed with the Court, which the defense incorporates by reference. *See* Dkt. Nos. 103, 126, 130, 142, 249, 276, 287. But the defense sets forth below additional context that it hopes will put to rest the government's misguided refrain that the defense was not prejudiced by the government's misconduct.

The government's discovery production was an exercise in misdirection. The government dumped reams of insignificant and disorganized documents on the defense, which occupied hundreds of hours of preparation time.[3] At the same time, the government was intentionally withholding documents that went to the heart of the case. For example, the government knowingly failed to produce the check that it alleges Bill Allen used to purchase the 1999 Range Rover. The government sprang the check on the defense after the defense had

[3] For example, the government began discovery by dumping over 2,800 audio recordings and more than 6,200 video recordings (more than 250 DVDs) on the defense without even providing a simple index. This was especially egregious considering the government only used 6 audio records at trial, making the government's tactic the equivalent of turning over a haystack in response to a straightforward request for a few needles. The government's electronic document production was just as problematic. The government produced over 115,000 pages without the electronic equivalent of a single staple, paperclip, folder, or document division.

inquired at length about the alleged $44,000 price tag and had introduced a business record, DX 4001, showing the dealer invoice price for the Land Rover as $37,515. Tr. (Sept. 20, p.m.) at 81.

This tactic was prejudicial to the defense in several ways. First, the defense expended many hours looking through the government's production for evidence related to the purchase of the Land Rover. This time was wasted. Second, four different defense attorneys conducted interviews in Alaska attempting to learn the purchase price of the Land Rover. This time was also wasted. Third, the defense retained an expert to estimate the price of the Land Rover. That expert was able to obtain DX 4001, which reflected the invoice price of the Land Rover. That effort was wasted. Fourth, and most importantly, the government's use of this undisclosed check unfairly undermined defense counsel's cross-examination of Mr. Allen and thus bolstered the credibility of the government's most critical witness. Had the check been disclosed prior to trial and had the defense been able to confirm that this in fact was the check used to pay for the Land Rover,[4] the defense never would have conducted this cross-examination or provided this opportunity to the government. This incident damaged defense counsel's credibility in the eyes of the jurors. It made the government's star witness look good, and it made defense counsel look foolish. It clearly prejudiced the defense. *See, e.g., United States v. Cunningham*, 145 F.3d 1385 (D.C. Cir. 1998) (reversing conviction because jury inadvertently exposed to unredacted 911 call that bolstered testimony of key witness).

Senator Stevens was similarly prejudiced by the government's tardy, false, and incomplete *Brady* disclosures. The defense prepared for trial based on a so-called *Brady* letter from the government dated September 9, 2008. That letter proved to be false in a number of

[4] The defense understands that Bill Allen bought many vehicles from the Land Rover dealer to whom the check was written during the relevant time frame, and the defense is not convinced that this check corresponds with the correct vehicle.

critical respects. If defense counsel had known before trial the information that was misstated and intentionally withheld from disclosure in the September 9, 2008 "*Brady* letter," they would have prepared for trial differently. They would have developed different themes and prepared differently for witness examinations. Mr. Sullivan would have emphasized in opening that Bill Allen believed that Senator Stevens would have paid any bills that were sent to him. Mr. Sullivan would have emphasized in opening and closing the inappropriate meetings between Senator Stevens and Agent Kepner, and defense counsel would have elicited evidence of these meetings during witness examinations. Given this inappropriate relationship, Mr. Sullivan also would have cross-examined Allen about his knowledge of other government investigations into Allen's conduct and about who gave him that information. And this inappropriate relationship would have been especially helpful in attacking the most important testimony in the case: Bill Allen's testimony that Bob Persons told Bill Allen that Senator Stevens was simply "covering his ass" when he asked for bills.

Defense counsel also would have elicited evidence of the government's inappropriate investigative practices, and would have opened and closed with an attack of the government's investigation. Certainly, if the defense had known that the VECO accounting documents were not reliable business records, defense counsel would have objected to their admission at the time they were offered and they never would have qualified as reliable business records. If defense counsel had known that GX 177 was utterly false when government counsel emphasized the $188,000 figure in her opening statement, Mr. Sullivan would have attacked it in the strongest terms in his opening.

Senator Stevens was similarly prejudiced by the government's disclosures regarding whether Dave Anderson had been promised immunity. The government represented in

its September 9 *Brady* letter that Anderson had not been promised immunity and that his March 2008 affidavit to the contrary was false. Anderson testified consistently with this letter at trial. Based on the government's September 9 representation and Anderson's testimony, defense counsel chose not to cross-examine Anderson. After trial, however, Anderson informed the Court that his testimony regarding immunity was "simply not true" and that the government instructed him "on how to sugar coat [the informal immunity agreement] and get it swept under the rug during the trial." Dkt. 243-2 at 1-2. Moreover, he asserted that paragraph 16 of the September 9 *Brady* letter was "not true" and "completely false." *Id.* at 1. Had defense counsel been aware of this information, Mr. Cary would have cross-examined Anderson on these issues.

This is just the type of prejudice that Courts have found justifies dismissal or a new trial. In *United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008), the Court of Appeals for the Ninth Circuit had no difficulty finding prejudice where the government failed on three occasions to make timely production of impeachment material. As the court there found, the "record contains numerous arguments by defense counsel demonstrating how the defendants were prejudiced by the discovery violations and how alternative remedies would have been inadequate to remedy such prejudice. One attorney noted that she would have opened the case differently had she known about the impeaching information. Another explained that if he called back witnesses who had already left the stand in order to present the impeaching information, the jury would have likely viewed it as browbeating." *Id.* at 1083.

Similarly, in *Quinn*, Judge Bates found that undisclosed *Brady* information that would have given the defense the ability to attack a government investigation is just the type of prejudice that requires a new trial at the least. In *Quinn*, the government failed to disclose to the defense that it had become highly suspicious of the truthfulness of a government witness it

intended to call. *Id.* at 109-10. The government decided before trial not to call the witness, but instead of informing the defense of its concerns, allowed the defense to deliver an opening statement based on the assumption that the witness would testify and that the government believed that the witness was truthful. *Id.* at 105. Defense "counsel was left to formulate the defense theme and opening statement on the erroneous belief that the 'critical' government witness would be appearing." *Id.* at 109. When the witness did not in fact testify, the government argued that there was no prejudice to the defendant. *Id*. at 112-13. Judge Bates disagreed. He found that if the information had been disclosed, the defendant "could have presented a very different opening and closing argument and could have conducted stronger cross-examinations, particularly of [a government agent] to great effect." *Id*. at 116. Citing the Supreme Court's decision in *Kyles v. Whitley*, 514 U.S. 419 (1995), the Court found that this information could have been used to conduct a "pointed attack on the government's investigation." *Quinn*, 537 F. Supp. 2d at 115-16. As the Tenth Circuit has observed, "[a] common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation." *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986); *see also Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (granting new trial because withheld *Brady* evidence carried with it the "potential . . . [for] the discrediting . . . of the police methods employed in assembling the case.").[5]

[5] The cases cited by the government in its opposition merely support the proposition that on the facts before those courts, a showing of prejudice was required before dismissal was appropriate. The conduct at issue in those cases was less severe than the government's conduct here. *See, e.g.*, *United States v. Hasting*, 461 U.S. 499, 510-11 (1983) ("prosecutor's allusion to the failure of the defense to proffer evidence to rebut testimony of victims"); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988) ("isolated episodes [before a grand jury] in the course of a 20-month investigation" including giving unauthorized oaths to IRS agents, allowing agents to

It is in this context that the Court should view the government's shenanigans with respect to the Joy Complaint: its refusal to comply with the Court's order, and its shifting and admittedly false representations regarding (1) Agent Joy's status as a whistleblower and (2) the desires or objections of FBI agents that their names be made public. The defense, like the Court, has spent many days and nights trying to figure out what is going on. We do not know. We do know this: the defense has no confidence at all in the representations of the government; no confidence (despite the Court's Herculean efforts) in the integrity of this trial which necessarily relied on representations of the government; and no confidence that to this day the defense has received that to which it is entitled under the Constitution, the law and the rules.[6] It is impossible to tell for sure (because the government has defied the Court's order for the government to provide a complete set of documents to the Court and any documents at all to the defense), but the defense finds it very hard to believe that there is not additional *Brady* material in the documents that the Court ordered the government to produce to the Court and the defense. How

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summarize evidence not in the record, berating an expert witness, providing "pocket immunity" to witnesses, and permitting IRS agents to present evidence in tandem); *United States v. Gartmon*, 146 F.3d 1015, 1027-29 (D.C. Cir. 1998) (FBI agent's and postal inspector's brief conversation with alternate juror during accidental meeting); *United States v. Derrick*, 163 F.3d 799, 809 (4th Cir. 1998) (instances of government misconduct were unsubstantiated); *United States v. Van Engel*, 15 F.3d 623, 630-31 (7th Cir. 1993) (pre-indictment delay caused by government's frivolous investigation of defendant's attorney); *United States v. Santana*, 6 F.3d 1, 11 (1st Cir. 1993) (government's failure to recover heroin after sting operations); *United States v. Isgro*, 974 F.2d 1091, 1098 (9th Cir. 1992) (failure to turn over *Brady* material that "was in the end made available to the defense well before trial").

[6] Indeed, the government recently represented to the Court that it had determined that it should produce three additional documents to the defense and that it would do so by February 2. *See* Dkt. 277 at 15. Ten days later, the defense has not received those or any other documents from the government.

could it be that the government has been investigating the Joy Complaint since early December 2008 and has not generated or uncovered any additional *Brady* material?[7]

Just as in *Omni*, the defense has been forced to engage in "strenuous efforts" to learn "essential facts." *Omni*, 634 F. Supp. at 1439-40. These efforts have taken hundreds of hours before trial (that should have been sent preparing the defense), hundreds of hours during trial (that should have been spent preparing for the next trial day), and hundreds of hours after trial. The defense believes that it has still not learned all of the essential facts. But it has learned enough to know that it would have tried a different case if it had known before trial what it knows now. The Court needs to take stern action to vindicate the rights of Senator Stevens and to deter prosecutors from doing to other defendants what it did to Senator Stevens. The Court may dismiss the case with prejudice as the *Chapman* court did. The Court may dismiss this case without prejudice as the *Omni* court did. Or the Court may order a new trial, as the *Quinn* court did. The integrity of the judicial system requires nothing less than one of these three remedies.[8]

III. The Work Product Doctrine Does Not Prevent Disclosure of the Communications.

The government says the communications concerning the Joy Complaint are not discoverable by the defense because they are work product. As an initial matter, the government has waived any work product protection by (a) failing to object or move to reconsider the Court's January 21 Order requiring full disclosure to the defense; and (b) failing to submit a privilege log

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[7] The government's privilege log demonstrates that the government still does not take its duty of candor to the Court and the defense seriously. Eight privilege log entries predating December 15, 2008, refer to "defendant's motion to dismiss" that was not filed until December 22, 2008. Indeed, a number of the entries referring to defendant's motion to dismiss predate December 11, 2008, the day that the Joy complaint was provided to the defense.

[8] If the Court orders a new trial as opposed to dismissing the indictment, it should also impose an appropriate remedial sanction for the government's refusal to comply with the Court's January 21 Order.

on January 30 when the production came due. *See In re Papst Licensing GMBH & Co. KG Litig.*, 550 F. Supp. 2d 17 (D.D.C. 2008) ("Papst argues that the sanction of waiver of [*inter alia*, work product] privileges is unduly harsh. As a general rule, when a party fails to object timely to discovery requests, such objections are waived."). Even when the government did eventually submit a privilege log, the log did not comply with the requirements of this Circuit, as identified in the Court's February 3, 2009 Order. The government was ordered, consistent with *Tuite v. Henry*, 98 F.3d 1411 (D.C. Cir. 1996), to provide a "detailed specification of the information for which the privilege is claimed with an explanation why it properly falls within the scope of the privilege." Dkt. 281, at 3-4 (*quoting Tuite*, 98 F.3d at 1418). At least 32 entries in the government's log do not contain this information; they are simply blank. Accordingly, the government cannot "sustain a claim of privilege" as to those 32 documents by any stretch of the imagination. *Id.* at 3 (*quoting Tuite*, 98 F.3d at 1418).

In addition, the government waived any work product protection by affirmatively putting forward its side of the story in an effort to further its interests in this case. The government proffered argument about Agent Joy's whistleblower status, a letter from OPR to Agent Joy, and other alleged facts and circumstances under which it "mistakenly" made false representations to the Court. *See* Dkt. Nos. 264, 277, 285. The government is not entitled to use privileged information as both a sword and a shield. Having put forth its version of events, including some of the supposedly "work-product" communications, the government is required to disclose all of the documents regarding that same subject matter so that the defense may test the truth of its representations. "[A] litigant cannot use the work product doctrine as both a sword and shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion." *Frontier*

Refining, Inc. v. Gorman-Rupp Co., Inc., 136 F.3d 695, 704 (10th Cir. 1998). *See also Koch v. Cox*, 489 F.3d 384, 390 (D.C. Cir. 2007) ("The prohibition against selective disclosure of confidential materials derives from the appropriate concern that parties do not employ privileges both as a sword and as a shield." (citations omitted)); Edna S. Epstein, *2 The Attorney-Client Privilege and the Work-Product Doctrine* 933 (5th ed. 2007) ("When either party expressly or tacitly puts an attorney's mental processes into issue, generally, the work-product protection will be stripped. One cannot use work product as a sword and refuse to reveal it at one and the same time.") (collecting cases).

Even if the government had not waived work product, the documents should be provided to the defense as a remedy for the government's contempt of the Court's Order. *See, e.g.*, *In re: Fannie Mae Securities Litig.*, No. 08-5014, 2009 WL 21528 (D.C. Cir. Jan. 6, 2009). Certainly there was no "substantial compliance" with the Court's Order and no "good faith," as the government contends at Opp. 16 – this was a blatant and intentional defiance of the Court's clear Order. *See supra* at 1-2.

Finally, even if the government were entitled to invoke the work product doctrine, these documents are not protected under settled law governing application of that doctrine. As discussed in detail below, some of the government's documents, as described in the Opposition brief, are flatly not work product; while others, which may be work product, do not qualify for protection in this case.

A. Many of the Government's Documents Categorically Are Not "Work Product."

The government claims that the documents comprise four categories of communications: (i) communications pertaining to Agent Joy's whistleblower status, (ii) communications pertaining to the Court and the defense regarding the Joy Complaint,

(iii) communications regarding the disclosure of the Joy Complaint within the Department of Justice, and (iv) communications regarding both the investigation of the Joy Complaint's allegations and the response to Senator Stevens's December 22 motion to dismiss. Opp. at 5-7. All of the documents within categories one and three, and the documents in category four pertaining to the government's investigation of the Joy Complaint's allegations, do not qualify as work product and should be immediately disclosed to the defense.

A document can qualify for work product protection only if it was prepared in anticipation of litigation. "The work product rule does not extend to every written document generated by an attorney; it does not shield from disclosure everything that a lawyer does. Its purpose is more narrow, its reach more modest." *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 775 (D.C. Cir. 1978) (en banc), *overruled in part on other grounds, Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc). A court therefore must determine "whether, in light of the nature of the document or the factual situation in a particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." *EEOC v. Lutheran Soc. Servs.*, 186 F.3d 959, 968 (D.C. Cir. 1999) (emphasis added). In determining whether a document has been prepared because of the prospect of litigation, courts examine two concerns – one is temporal, the other motivational. *Willingham v. Ashcroft*, 228 F.R.D. 1, 4 (D.D.C. 2005). There must be a "real and imminent" threat of litigation (temporal), and the documents must have been prepared because of that threat (motivational). *U.S. Fire Ins. Co. v. Bunge North America, Inc*., Slip Op., No. 05-cv-2192-JWL-DJW, 2008 WL 2548129, at *7 (D. Kan. June 23, 2008); *see also* Epstein, *supra*, 825–26.

Specifically, with regard to the motivational concern, the document must have been prepared with the reasonable expectation that specific litigation would occur and "to

advance the party's interest in the successful resolution of that litigation. . . . [T]heir creation at a time when litigation was anticipated does not automatically render them privileged. The purpose of preparing for the anticipated litigation is critical, lest the rule be interpreted to protect everything a lawyer or party does when litigation is anticipated even though the lawyer or party did not create the document to advance the client's interest in the litigation." *Willingham*, 228 F.R.D. at 4; *see also Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987). In other words, if a document would have been created in a similar form regardless of the litigation, it cannot be found to have been created "because of" litigation.

Any documents regarding (i) Agent Joy's whistleblower status, (ii) the disclosure of the Joy Complaint within the Department of Justice, and (iii) the investigation into the Joy Complaint's allegations do not qualify as work product. They were not prepared in anticipation of any litigation, including this one. Rather, the Department would have investigated Agent Joy's allegations, considered who in the agency was entitled to learn of the Complaint, and determined whether Agent Joy qualified for whistleblower protection as a matter of course, regardless of whether the Stevens litigation, or any other litigation, was ongoing or anticipated.

> [I]n cases where the investigating agency itself is the party asserting work-product doctrine, courts have held that a government investigation alone does not imply anticipation of litigation. In *Peterson v. United States*, 52 F.R.D. 317, 321 (S.D. Ill.1971), the court rejected the assertion of the government that Internal Revenue Service investigatory and settlement memoranda were trial preparation materials, stating that "[p]resumably [the documents] are prepared in the assessment and review process and, if they be held to be in anticipation of litigation, it is hard to see what would not be. Litigation cannot be anticipated in every such case when relatively few result in litigation."

Iowa Protection & Advocacy Servs., Inc. v. Rasmussen, 521 F.Supp.2d 895, 907–08 (S.D. Iowa 2002) (*citing SEC v. Nat'l Student Mktg. Corp.*, 18 Fed. R. Serv. 2d 1302, 1305 (D.D.C. 1974)). *See also* "Office of Professional Responsibility Policies and Procedures," *available at*

http://www.usdoj.gov/opr/polandproc.htm. Accordingly, these documents are not work product and should be disclosed in their entirety to the defense.[9]

B. The Remaining Documents Are Not Shielded by the Work Product Doctrine Under the Circumstances of This Case.

The documents in category two and the documents in category four concerning the government's response to Senator Stevens's December 22 motion may have been prepared "in anticipation of litigation." That does not guarantee their protection from disclosure, however, for it is axiomatic that the protections derived from the work product doctrine are not absolute. *See, e.g., In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982); *Judicial Watch, Inc. v. U.S. Dept. of Commerce*, 196 F. Supp. 2d 1, 5 (D.D.C. 2001). And in fact, under settled law, the documents are not protected here, because the allegations in this proceeding revolve around the conduct of government counsel.

There are two types of work product: "fact work product" and "opinion work product." Fact work product is nonprivileged factual information that may be compiled by or at the direction of an attorney in anticipation of litigation. *See Judicial Watch v. Dept. of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005). Opinion work product includes the mental impressions, opinions, and legal theories of counsel. *Id.* To overcome the protection for fact work product, the party requesting disclosure must show "substantial need" for the information and an inability to obtain the same information without undue hardship. Opinion work product, on the other hand, is protected unless the requesting party can show "extraordinary justification" for production. *See In re Sealed Case*, 124 F.3d 230, 235–36 (D.C. Cir. 1997), *overruled on other*

[9] Even if the Court were to conclude that these documents are work product, they would not be protected from disclosure for the reasons discussed in the next section.

grounds, Swidler & Berlin v. United States, 524 U.S. 399 (1998); *In re HealthSouth Corp. Securities Litig.*, --- F. Supp. 2d --- (D.D.C. 2008); *Judicial Watch, Inc.*, 196 F. Supp. 2d at 5.

In this case, the requirements for obtaining work product are easily satisfied, because it is precisely the mental impressions of the attorneys that are at issue. *See* Opinion & Order (Jan. 21, 2009) [Dkt. 274]. "'[W]hen the activities of counsel are inquired into because they are at issue in the action before the court, there is cause for production of documents that deal with such activities, though they are 'work product.'" *Hager v. Bluefield Regional Medical Center, Inc.*, 170 F.R.D. 70, 78 (D.D.C. 1997) (*quoting 4 Moore's Federal Practice* § 26.64[4]). "If the attorney's conduct is a central issue in the case, the work-product protection does not apply." Epstein, *supra*, at 1004; *see also Judicial Watch, Inc.*, 196 F. Supp. 2d. at 7 (affirming Magistrate Judge's order that government produce documents containing mental processes of counsel because "it is this misconduct by the [Department of Commerce] itself that has made both production of the documents and disclosure to Judicial Watch necessary"); *Nat'l Student Mktg. Corp.*, 18 Fed. R. Serv. 2d at 1305 ("[W]here the activities of counsel are being inquired into because they are at issue in the action before the court—a rare exception to the rule of nondisclosure applies"). Because the facts and mental impressions concerning government counsel's activities are the substance of the current dispute, the government may not seek refuge in the work-product doctrine. "[W]hen a party seeks a greater advantage from its control over work product than the law must provide to maintain a healthy adversary system," protection is denied. *In re Sealed Case*, 676 F.2d at 818.[10]

[10] Similarly, under the ordinary test for "fact work product," the documents should be produced because the documents the Court ordered disclosed are the only ones that speak to the truth of the government's representations regarding the Joy Complaint, and it would be an "undue hardship" – indeed, it would be impossible – to obtain the same information elsewhere.

Thus, none of the documents ordered by the Court to be disclosed to the defense is protected under the work-product doctrine.[11] If this case is not dismissed outright (as it should be), the documents should be turned over to Senator Stevens in their entirety.

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Respectfully submitted,

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[11] If they were otherwise protected, the defense believes that, in light of the government's misconduct and its many misrepresentations to the Court, the documents would be subject to disclosure under the crime-fraud exception. The defense reserves the right to make a supplemental submission on this issue if necessary.