To Be Argued by
Elena Ruth Sassower

#04-CM-760
#04-CO-1600

DISTRICT OF COLUMBIA COURT OF APPEALS

ELENA RUTH SASSOWER,

Appellant,

-against-

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF

[filed after this Court (per Chief Judge Washington) adhered to the due process-less, unprecedented, and completely fraudulent October 27, 2005 barring order of Judges Reid, Glickman, and Nebeker by rejecting, *without filing*, Appellant's March 16, 2006 motion for permission to file her unopposed motion for an extension of time to file her reply brief]

On Appeal from D.C. Superior Court [#M-4113-03]
Judge Brian F. Holeman

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* The materially false and misleading citation to legal authorities in the U.S. Attorney's "Argument" – including with respect to applicable standards for review – will be presented separately. This, because the local law library at the Westchester County Supreme Court, where Sassower does her research, was closed for renovations during the three-week period she had for preparing this reply – a fact Sassower noted in her unopposed March 16, 2006 motion for an extension of time to file her reply brief.

THE U.S. ATTORNEY'S "ISSUES PRESENTED" IS IMPROPER

The U.S. Attorney's "ISSUES PRESENTED" is improper[1] and a concession that he cannot confront Sassower's own presented issues, which he therefore conceals.

As to the U.S. Attorney's Issue I: the U.S. Attorney asks whether Judge Holeman abused his "discretion" in denying Sassower's two motions for his disqualification – and answers his question by purporting that the motions "did not allege any facts which supported her contention that the judge was biased or appeared to be biased".

This substantially expurgates Sassower's own first issue where the two disqualification motions were subsumed within a larger question:

> "As evidenced from the course of the proceedings before Judge Holeman, was appellant entitled to his disqualification for pervasive actual bias meeting the 'impossibility of fair judgment' standard articulated by the U.S. Supreme Court in *Liteky v. United States*, 510 U.S. 540?"

Thereby eliminated is Sassower's first and transcending appellate issue of Judge Holeman's pervasive actual bias, separate and apart from the sufficiency of her two motions for his disqualification. Likewise eliminated is whether Judge Holeman's "pretrial, trial, and post-trial rulings" were factually and legally supported, as to which an asterisk to Sassower's first issue had expressly stated:

> "Encompassed in this issue is whether Judge Holeman's rulings, individually and collectively, were so egregiously 'erroneous' and prejudicial as to require reversal."

Moreover, as to Sassower's two motions for Judge Holeman's disqualification, the U.S. Attorney has transformed her stated issue, which was not about whether Judge Holeman abused his "discretion" in not disqualifying himself, but whether his disqualification was mandated *as a*

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[1] As the U.S. Attorney did not file any appeal or cross-appeal, he was not free to frame his own appellate issues. Rather, he was bound by the issues presented by Sassower, as to which he was free to demonstrate that the facts and law do not entitle her to reversal or vacatur.

matter of law by reason of the legal sufficiency of the motions pursuant to D.C. Superior Court Civil Procedure Rule 63-I, "divesting him of jurisdiction to 'proceed...further'".

As to the U.S. Attorney's Issue II: the U.S. Attorney eliminates from Sassower's issue of whether D.C. Code §10-503.18, the venue provision of the "disruption of Congress" statute, entitled her to removal/transfer to the U.S. District Court for the District of Columbia the additional factor she had identified as entitling her to such relief: the record herein establishing

> "a pervasive pattern of egregious violations of her fundamental due process rights and 'protectionism' of the government".

As to the U.S. Attorney's Issue III: the U.S. Attorney keeps intact Sassower's issue as to whether the "disruption of Congress" statute, D.C. Code §10-503.16(b)(4), is constitutional, *as written and as applied*, though burying it in his assertion that the Court should decline to exercise its "discretion" to hear it because it is an "unpreserved claim", being presented "for the first time on appeal", and because the statute is "clearly constitutional, both on its face and as applied to appellant's case".

As to the U.S. Attorney's Issue IV: the U.S. Attorney conceals Sassower's specific issue:

> "Whether, when Judge Holeman suspended execution of the 92-day jail sentence he imposed upon appellant, his terms of probation were appropriate and constitutional and whether, when appellant exercised her right to decline those terms, pursuant to D.C. Code §16-760, it was legal and constitutional for him to double the 92-day jail sentence to six months?"

Instead, he frames a non-specific issue that Sassower's "arguments challenging her sentence" should be dismissed as moot because she "fully served her sentence" and because she "conceded in pleadings" that "her sentencing claims would become moot upon completion of the service of her sentence".

THE U.S. ATTORNEY'S "COUNTERSTATEMENT OF THE CASE" IS MATERIALLY FALSE AND MISLEADING:

The U.S. Attorney's "COUNTERSTATEMENT OF THE CASE" (at p. 1) does not deny or dispute a single aspect of Sassower's "STATEMENT OF THE CASE" (at p. 1). Rather, it puts forward three sentences which are materially misleading and incomplete as to what is before the Court on appeal.

First, Judge Holeman's sentencing of Sassower was not limited to "six months' imprisonment" – the statutory maximum. He also imposed a maximum $500 fine and maximum $250 assessment under the Victims of Violent Crime Compensation Act of 1981. As these were identified by Sassower's "STATEMENT OF THE CASE" (at p. 1), the U.S. Attorney's concealment of them reflects his knowledge that her entitlement to reimbursement of such monies undercuts his fourth issue: mootness of her "arguments challenging her sentence"[2].

Second, Sassower filed more than the "timely notice of appeal" date-stamped June 29, 2004 [A-1]. She also filed a notice of appeal on December 21, 2004 [A-8-9] from Judge Holeman's November 22, 2004 order [A-10] denying her motion to correct his illegal sentence pursuant to D.C. Criminal Procedure Rule 35(a) and D.C. Code §23-110(a). As this was identified by her "STATEMENT OF THE CASE", the U.S. Attorney's concealment of Sassower's second appeal reflects his knowledge that she is entitled to a determination as to whether the November 22, 2004 order substantiates her first issue: that Judge Holeman's post-trial rulings, like his pretrial and trial rulings, manifest his pervasive actual bias, entitling her to his disqualification[3].

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[2] The U.S. Attorney acknowledges such monetary impositions only in his "Background" section to his Issue IV, purporting to describe the June 28, 2004 sentencing (at p. 43). His subsequent "Analysis" (pp. 46-7) is silent as to how this affects his mootness argument.

[3] The U.S. Attorney acknowledges this second appeal only in his "Background" section to his Issue IV (at p. 45), without citing the December 21, 2004 notice of appeal [A-8-9].

Third, Sassower's June 29, 2004 notice of appeal -- the only notice to which the U.S. Attorney cites -- was amended by Sassower on July 27, 2004 [A-5] and her "STATEMENT OF THE CASE" quoted the text of this amendment in its entirety, so as to highlight that every aspects of the case is being challenged on appeal – including "the issue of probable cause".

The U.S. Attorney's "COUNTERSTATEMENT OF THE CASE" then continues with a section entitled "THE TRIAL" (at p. 2), broken down to two subsections: "The Government's Evidence" (at pp. 2-6) and "The Defense Evidence" (at pp. 6-11). Altogether omitted is any section entitled "PRE-TRIAL", wherein Judge Holeman made a multitude of rulings, and any section entitled "POST-TRIAL", wherein Judge Holeman also made rulings. Indeed, as to the U.S. Attorney's "TRIAL" section, none of Judge Holeman's trial rulings are disclosed.

The U.S. Attorney's inclusion of this "TRIAL" section in his "COUNTERSTATEMENT OF THE CASE" is improper. It belonged in his "COUNTERSTATEMENT OF THE FACTS", which his brief omits.

THE U.S. ATTORNEY PROVIDES NO "COUNTERSTATEMENT OF THE FACTS"

The U.S. Attorney provides no "COUNTERSTATEMENT OF THE FACTS" – and no explanation for its omission. Nor does he otherwise deny or dispute the accuracy of Sassower's "STATEMENT OF THE FACTS", which identified that on June 28, 2005 she had filed with this Court a 119-page appellant's brief and 161-page supplemental fact statement.

Sassower's 161-page supplemental fact statement gave the U.S. Attorney the benefit of a chronological recitation of the course of the proceedings before Judge Holeman, substantiating the four issues presented by her 119-page brief, whose legal argument was buttressed by its own copious presentation of facts. These four issues are identical to those presented by her 50-page

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Sassower's showing as to the fraudulence of the November 22, 2004 order, factually and legally, is uncontested by the U.S. Attorney and appears, with greatest particularity, at pages 98-101 of her June 28, 2005 brief.

"conforming brief on the merits", filed on November 7, 2005 pursuant to this Court's October 27, 2005 order.

The U.S. Attorney's failure to provide a "COUNTERSTATEMENT OF THE FACTS" is a concession that he cannot offer the facts in any chronological, contextual fashion, without exposing the fraud he is perpetrating by his opposition to the appeals. Thus, a "COUNTERSTATEMENT OF THE FACTS" could not begin with the supposed evidence at "TRIAL". It would have to start with pre-trial proceedings: if not the underlying prosecution documents, as Sassower's supplemental fact statement had (at pp. 1-2), then with facts showing that the case was properly brought to trial and was trial-ready. However because the pretrial facts reveal that neither Sassower's October 30, 2003 discovery/disclosure/sanctions motion nor other pre-trial issues were properly adjudicated and substantiate Sassower's two pretrial motions for Judge Holeman's disqualification and change of venue, the U.S. Attorney had to isolate his highly selective presentation of false and misleading facts into separate sections of his brief, *to wit*, his "TRIAL" section of his "COUNTERSTATEMENT OF THE CASE" (at pp. 2-11) and his three separate "Background" sections of his "ARGUMENT" (at pp. 12-17; 26-29; 41-46).[4]

As to the U.S. Attorney's recitation of "Evidence" at "TRIAL" (at pp. 2-11), it is a flagrant deceit. The U.S. Attorney well knows that no trial evidence can be used to sustain a conviction unless the trial proceedings – and the pretrial proceedings – have comported with due process. Yet, he fails to even claim that Sassower's due process rights were respected – let alone show any facts in support thereof. This, in face of the explicit assertions at the outset of Sassower's brief (at pp. 2-4) of Judge Holeman's violations of her rights pretrial, at-trial, and

[4] Because of the 20-page limit on the length of reply briefs, which this Court would presumably enforce inflexibly as to Sassower (as evidenced, *inter alia*, from its rejection of her consented-to November 6, 2005 motion for a procedural order to exceed page limits for her "conforming brief on the merits"), Sassower is unable to detail the myriad of false and misleading "facts", characterizations, and innuendos presented by the U.S. Attorney's brief, including those of a purposefully scurrilous nature.

post-trial, "obliterating due process, equal protection, and the rule of law" – with the ensuing 31 pages of her brief (pp. 4-35) particularizing his pre-trial abuses, substantiated by legal authority.

With respect to the purported "Government's Evidence" at "TRIAL" (at pp. 2-6), consisting exclusively of witness testimony, Sassower was not charged with any crime other than "disruption of Congress", *to wit*, an alleged "disruption" of a May 22, 2003 Senate Judiciary Committee hearing to confirm the nomination of New York Court of Appeals Judge Richard C. Wesley to the Second Circuit Court of Appeals. The unimpeachable evidence of what occurred at that hearing – against which witness testimony falls -- is the videotape, which the Government introduced into evidence at trial [A-880, A-907] Yet, the U.S. Attorney does not mention the videotape in his subsection relating to "The Government's Evidence" (pp. 2-6). Instead, he relies on the trial testimony of Officer Jennings and Sergeant Bignotti (at pp. 5-6) – whose falsity and perjuriousness is exposed by the videotape.

The U.S. Attorney's only disclosure of the videotape is in "The Defense Evidence" (at pp. 6-11) – where it is cited at the end (at pp. 10-11), essentially in passing and in the context of describing Sassower's trial testimony of her analysis of it. As to this analysis [A-1565, A-1574; A-1604], the U.S. Attorney affirmatively states: "Appellant's 'analysis' of the videotape substantially corroborated the government's evidence" (at p. 10). This is an outright fraud.

Sassower's analysis of the videotape [A-1565, A-1574; A-1604] – whose accuracy has never been challenged by the U.S. Attorney -- resoundingly puts the lie to the trial testimony of Officer Jennings and Sergeant Bignotti, as likewise to the underlying prosecution documents [A-84-89, 93, 101], which Judge Holeman *sua sponte* and without notice barred Sassower from introducing into evidence at trial [A-916-7] Even now, the accuracy of Sassower's analysis remains unchallenged by the U.S. Attorney, who was free to offer his own analysis of the videotape, which he has not done.

The videotape is "celluloid DNA" as to the events at issue in the "disruption of Congress" charge. It establishes that the prosecution's case was bogus, malicious, and brought on materially false and misleading prosecution documents – an assertion Sassower explicitly made in her October 30, 2003 discovery/disclosure/sanctions motion [A-47-8], without contest from the U.S. Attorney. Such uncontested assertion itself required any fair and impartial tribunal to throw out the case on the papers, *as a matter of law*. Specifically, the videotape establishes that the so-called "disruption" consisted of Sassower respectful request to testify in opposition to Judge Wesley's confirmation – a request not made until after the presiding chairman, Senator Saxby Chambliss, had already announced the hearing "adjourned".

It is to conceal such devastating documentary facts that the U.S. Attorney misrepresents Sassower's analysis-based testimony. Thus he states (at p. 10):

> "Although appellant initially asserted that she began speaking at the hearing only 'upon its being adjourned' ([4/19/04 transcript] at 654), she later admitted that she started speaking 'as Chairman Chambliss was saying [']thank you very much['],' and that their words were 'simultaneous' (id.)"

In fact, the cited page 654 of the transcript [A-1247] shows that Sassower testified, from the analysis, that Chairman Chambliss had announced the hearing "adjourned" before saying "thank you very much". Thus, her so-called "admi[ssion]" that she began speaking simultaneous with Chairman Chambliss saying "thank you very much" does not mean that she was contradicting herself as to the hearing being "adjourned", as the U.S. Attorney implies.

Additionally, the U.S. Attorney states (at p. 11):

> "Appellant conceded that after she was removed from the hearing room, the videotape showed Chairman Chambliss speaking further before concluding the hearing (id. at 656, 674)."

The inference is that Chairman Chambliss had not adjourned the hearing because he was "speaking further". In fact, pages 656 and 674 of the transcript [A-1249, 1265] identify precisely what Chairman Chambliss' "speaking further" consisted of – followed by his words, "Again, we

will stand adjourned." [A-1574]. "Again" constitutes Chairman Chambliss' acknowledgment that he had previously adjourned the hearing, which is what the videotape shows.

Actually, the U.S. Attorney's deliberate distortion of Sassower's testimony begins with his very first assertion , "Appellant testified in her own defense" (at p. 9). As the trial transcript reflects, other than allowing Sassower to present her analysis of the videotape, which he interrupted, truncated, and denigrated [A-1244-1268], Judge Holeman *sua sponte* and without notice stopped Sassower's chronologically-ordered testimony [A-1217-1244] before it ever reached the May 22, 2003 Senate Judiciary Committee hearing – such that she was prevented from directly testifying as to what had occurred at the hearing, including her intent. Indeed, Judge Holeman stopped her just as she was about to testify as to her 35-minute May 20, 2003 phone conversation with Senator Clinton's Counsel Leecia Eva and Legislative Assistant Joshua Albert—whose one-sided testimony the U.S. Attorney includes in his "TRIAL" evidence section (at pp. 2-11), as likewise the one-sided testimony of Special Agent Lippay and Detective Zimmerman, whose May 21, 2003 phone conversations with Sassower, purportedly spanning over two hours, she was prevented from testifying about by Judge Holeman's ruling.

Judge Holeman's preclusion of Sassower's right to testify in her own defense requires reversal of the conviction, *as a matter of law*. The U.S. Attorney's concealment of the fact of this ruling bespeaks his knowledge that there is no legal authority that would allow Sassower's conviction to stand under such circumstances.

THE U.S. ATTORNEY'S "ARGUMENT" IS BASED ON BRAZEN FALSIFICATION OF THE FACTUAL RECORD – AND IS TOTALLY NON-RESPONSIVE TO THE FACTS, LAW, AND ARGUMENT IN SASSOWER'S BRIEF

The U.S. Attorney's Issue I (at pp. 11-26) – and Sassower's Issue I (at pp. 4-35):

The U.S. Attorney's first issue – and his opposition to Sassower's first issue -- rest on brazen falsification of Sassower's brief and the record on which it is based. He states:

> "appellant's allegations of bias are based solely on dissatisfaction with reasonable rulings and procedures established by Judge Holeman in appellant's case. Because there is no evidence that the judge was biased or appeared to be biased, appellant's claim clearly must fall." (at p. 12, underlining added)
>
> "Although appellant writes at length about her disagreement with the trial judge's rulings, she has not alleged any facts that show that the judge was biased or appeared to be biased." (at p. 18, underlining added)
>
> "Although appellant contends that other pre-trial rulings by the court 'confirm' her allegations of bias (Appellant's Brief at 16, 17-35), her discussion of those rulings fails to illuminate the issue at hand....none of the court's rulings cited by appellant show any particular favoritism or antagonism..." (at p. 25, underlining added).

These are outright deceits. The opening pages of Sassower's first issue (at pp. 6-11) demonstrated that Judge Holeman's February 25, 2004 and April 6, 2004 orders [A-407, A-468] denying her two disqualification motions [A-265; A-375] were "factually and legally insupportable, unsupported, and fraudulent". Such fact-specific, law-supported showing as therein presented is entirely undenied and undisputed by the U.S. Attorney, who instead substitutes (at pp. 12-14; 15-16, 22-24) a grotesque misrepresenting of the February 23, 2004 and March 22, 2004 disqualification motions so as to make Judge Holeman's orders denying them seem proper. The U.S. Attorney's falsification of these two legally-sufficient disqualification motions is *readily-verifiable* from the most cursory examination of them [A-265; A-375], including Sassower's three initial letters to Judge Holeman [A-291-299], which the U.S. Attorney so maligns, as likewise Sassower's three memoranda for supervisory oversight [A-426-430; 435-441; A-454-456; A-450-452], each not only annexed as exhibits to the disqualification motions, but physically reproduced in them [A-269-73; A-380-388; A-391-394].

The immediate ensuing pages of Sassower's first issue (at pp. 11-15) identified that the March 22, 2004 motion "provides the requisite detail and substantiating record references, all uncontested" as to four additional orders of Judge Holeman, "all either without reasons or, to the limited extent that reasons were given, readily revealed by the record as 'outright judicial lies'"

[A-380, 385]. The U.S. Attorney confronts none of this "detail" and record proof. Instead, he recites (at pp. 14-15, including fn. 4) the existence of these four orders, unaccompanied by even an assertion that they were factually and legally proper. Likewise he does not confront any aspect of Sassower's following pages of her first issue (pp. 13-15) as to "Judge Holeman's Wilful Violation of Sassower's Pretrial Discovery Rights, 'Protecting' the Government". Rather, he notes, in passing, Sassower's complaints about discovery -- as to which he makes no claim.

Similarly, the U.S. Attorney does not confront any aspect of the balance of Sassower's first issue (pp. 16-35), particularizing the factual and legal baselessness of four more rulings by Judge Holeman before being cut off (at p. 36) by this Court's refusal to permit the full exposition of her 119-page June 28, 2005 "non-conforming" brief. Not one of these four pivotal rulings, encompassing a panoply of other rulings, is even mentioned by the U.S. Attorney's brief, which is also silent as to the litany of Judge Holeman's further pretrial and trial rulings whose insupportable, abusive nature is chronicled, with his post-trial rulings, by Sassower's "non-conforming" June 28, 2005 brief (at pp. 38-101) in substantiation of her first issue: Judge Holeman's pervasive actual bias meeting the *Liteky* standard, entitling her to his disqualification.

It is after not having addressed any aspect of Sassower's factual and legal showing as to any of Judge Holeman's rulings that the U.S. Attorney has the audacity to purport -- in a footnote (at p. 21, fn. 8) and after conceding that the U.S. Supreme Court in *Liteky* recognized that there are "'rare' instances" where a court's bias or prejudice is "so extreme as to display clear inability to render fair judgment" -- that "Clearly, however, this case does not present that 'rare' instance of 'extreme' bias." Yet, the U.S. Attorney's wholesale deceit does not end with this. He goes on to assert (at pp. 25-6), "appellant should have appealed the rulings [of Judge Holeman] on their merits, instead of arguing that the court's alleged errors prove bias" and "Even in appellant's original, non-conforming brief on the merits, which was 119 pages long, appellant

did not challenge the trial court's rulings on their merits." (at p. 26, fn. 11). This, in stark disregard of the asterisk to Sassower's first issue – both in her "conforming" brief and original "non-conforming" brief -- expressly identifying that her first issue encompasses "whether Judge Holeman's rulings, individually and collectively, were so egregiously 'erroneous' and prejudicial as to require reversal."

The U.S. Attorney's Issue II (at pp. 26-33) – and Sassower's Issue II (at pp. 36-37):

The U.S. Attorney – with his infinite legal resources -- has implicitly conceded the truth of Sassower's assertion at the outset of her second issue (at p. 36), "It does not appear that this Court – or any other – has ever interpreted D.C. Code §10-503.18 – the section of the District of Columbia Code pertaining to prosecutions for offenses committed on 'Capitol Grounds' under D.C. Code §10-503.16." This, by his failure to cite any legal authority from this or any other court interpreting the statute.

He also concedes (at p. 32) – albeit grudgingly – that the statute "allows prosecution of misdemeanor disruption-of-Congress charges either in the United States District Court or in the Superior Court." (underlining in his original). He thereby establishes the inapplicability of the legal proposition put forward by Judge Abrecht's September 4, 2003 memorandum [A-460] that "Controlling case law in the District of Columbia is that change of venue is not available because the Superior Court of the District of Columbia sits as a unitary judicial district" – relied on by Judge Holeman in his March 29, 2004 order [A-466] denying the second branch of Sassower's March 22, 2004 disqualification motion to remove/transfer this case to the U.S. District Court for the District of Columbia pursuant to D.C. Code §10-503.18 [A-375]. Such reliance by Judge Holeman's March 29, 2004 order was notwithstanding Sassower's March 22, 2004 motion had detailed [A-399-402] the memorandum's inapplicability, both legally and factually, in the context of demonstrating that Judge Holeman's February 25, 2004 order [A-411] denying the

change of venue sought by her February 23, 2004 disqualification motion was "another insupportable deceit".

The U.S. Attorney does not deny or dispute any aspect of Sassower's particularized showing as to the fraudulence of Judge Holeman's aforesaid February 25, 2004 order [A-411]. Nor does he deny or dispute any aspect of Sassower's showing as to the fraudulence of Judge Holeman's March 29, 2004 order [A-466], as to which Sassower's brief (at p. 37) and her referred-to April 6, 2004 petition for a writ of mandamus, prohibition, certiorari and/or certified questions of law (at p. 3, 19-20) had provided further detail.

As hereinabove stated, the U.S. Attorney does not deny or dispute any aspect of Sassower's showing that the gamut of Judge Holeman's orders and rulings are factually and legally unsupported or insupportable. Nor does he deny or dispute Sassower's affirmative assertion – made as part of her second issue (at p. 36) -- that "the record establishes a pervasive pattern of egregious violations of her fundamental due process rights and 'protectionism' of the government" – and that such additionally entitled her to removal/transfer to the U.S. District Court for the District of Columbia pursuant to D.C. Code §10-503.18. Indeed, by expurgating Sassower's second issue to delete whether such record would entitle her to removal/transfer pursuant to §10-503.18, he concedes her entitlement on that ground.

It is obvious that where, as here, the uncontroverted record establishes a court's egregious violations of a criminal defendant's due process rights and its "protectionism" of the government, such that its orders are "'so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment', *Garner v. State of Louisiana*, 368 U.S. 157, 163 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960)" (Sassower brief, at p. 12), the U.S. Attorney is without "prosecutorial discretion" with respect to removal/transfer. Were it otherwise, the U.S. Attorney would have made argument addressed to

such circumstance. Plainly, his "prosecutorial discretion" does not trump his mandatory duty under ethical codes of professional responsibility to safeguard the integrity of the judicial process – and he does not purport otherwise.

The U.S. Attorney's Issue III (at pp. 33-40) – and Sassower's Issue III (at pp. 37-46):

Unlike the U.S. Attorney's other three issues, he provides no "Background" section to his third issue. Instead, and what he fails to mention under his heading "Appellant failed to preserve her claim" by his reference (at pp. 35-36) to Sassower's July 2, 2004 supplemental brief in support of her motion for bail pending appeal and by his footnote reference (at p. 36) to Sassower's July 16, 2004 motion for reargument, reconsideration, renewal, and other relief, with its annexed memorandum of law "which argued that Section 10-503.16(b)(4) was unconstitutional" is that his opposition papers never claimed that Sassower's challenge to the constitutionality of the statute was being raised for the first time on appeal and, therefore, unavailable to her as a grounds for appellate reversal and, thereby, release from incarceration.

Rather, the U.S. Attorney responded to the July 2, 2004 supplemental brief by stating, "The government recognizes the seriousness of any constitutional claim". For his proposition that D.C. Code §10-503.16(b)(4) is constitutional and had been "repeatedly upheld", he cited – prefaced by an inferential "See" -- *Armfield v. United States*, 811 A.2d 792 (D.C. 2002), and *Smith-Caronia v. United States*, 714 A.2d 764 (D.C. 1998). Sassower's answer, by her July 16, 2004 motion, challenged the U.S. Attorney to confront her annexed memo of law as the unconstitutionality of the "disruption of Congress" statute, *as written as applied* – pointing out that her memo highlighted the inapplicability of *Armfield* and *Smith-Caronia*, "neither [of which] involved a public congressional hearing or conduct that would be consistent therewith" (at ¶18).

Without explanation, the U.S. Attorney ignored Sassower's challenge and draft memo in his continued opposition to Sassower's release, likewise ignoring the affidavit annexed to the

motion as Exhibit C. Such affidavit, which Sassower had begun writing within the first hour of waking up on June 29, 2004, the first morning of her incarceration in D.C. Jail, identified that she had intended to hand the memo up to Judge Holeman at the June 28, 2004 sentencing and stated:

> "The memo largely rests on a quote from the U.S. Supreme Court in Grayned [v. City of Rockford, 408 U.S. 104, 116 (1972)] that in restricting First Amendment rights:
>
> > 'the crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.'
>
> Such quote came to my attention [during trial] through Judge Holeman himself when he presented me and the U.S. Attorney with his already-signed 'Elements of the Offense', where the quote was cited with an attribution to this Court's decision in Armfield.
>
> From such quote, it should have been obvious to Judge Holeman that, as a matter of law, 'a citizen's respectful request to testify at a public congressional hearing is not – and must never be deemed to be – 'disruption of Congress'' – and certainly not in the case at bar. I so-argued throughout my trial and, I believe, as part of my dismissal motions which Judge Holeman denied.
>
> Also annexed [] in substantiation of the unconstitutionality of the statute as applied – are affidavits from persons involved in the disruptive and provocative incidents at Senate Committee hearings, to which I referred at the sentencing to show that such persons were not arrested for conduct that clearly fell within the statute, whereas I was arrested for conduct that did not."

Examination of the transcript of the June 28, 2004 sentencing [A-1707-1731] shows Judge Holeman's abusive conduct toward Sassower, wrongfully cutting her off from speaking and, in so doing, from presenting her memo of law in support of a stay of sentence pending appeal. What she managed to say, however, and what she managed to say during her trial where, likewise, Judge Holeman wrongfully cut her off from what he knew from his "Elements of the Offense" [A-1403] were constitutional arguments -- was sufficient as challenges to the constitutionality of the statute, *as written and as applied.* This includes what Sassower said in her two motions for judgment of acquittal [A-1027-33] [A-1325-29], in particular, the second, and by her requested jury instructions as to the defense theory of the case, which Judge Holeman rejected [A-1307-14; discussed in Sassower's "non-conforming" brief, at pp. 90-93].

Sassower's constitutional arguments were also implicit in her October 30, 2003 discovery/disclosure/sanctions motion – and any fair and impartial judge rendering such "responsive, written adjudication" as Sassower sought by her February 23, 2004 and March 22, 2004 motions for Judge Holeman's disqualification [A-265, A-375] would have recognized that the case had to be thrown out, on the papers, by reason of the constitutional issues, quite apart from the U.S. Attorney's misconduct. As set forth in the February 23, 2004 motion [A-288]:

> "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 [], 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' [fn]." [capitalization and underlining in the original].

Consequently, the U.S. Attorney's argument that this Court should reject Sassower's constitutional challenges to the statute as not having been made below is knowingly false, misleading, and in bad faith – and all the more so because the statute is so "clearly unconstitutional" that, even now, the U.S. Attorney cannot confront Sassower's original memo of law or its largely identical successor, Sassower's third issue (at pp 37-46).

Thus, under his heading "The statute is not 'clearly unconstitutional'" (at p. 36), the U.S. Attorney does not deny or dispute any aspect of Sassower's third issue, which he fails to address, except by flagrant deceit. He continues to rely on *Smith-Caronia* and *Armfield* for the statute's constitutionality (at p. 36). Even in thereafter acknowledging (at p. 37) Sassower's contention that her facial challenge is "not governed by precedents of this Court", he conceals that *Smith-Caronia* and *Armfield* are those "precedents". He calls this contention "frivolous" because "The

statute plainly applies to 'any hearing before...any committee or subcommittee of the Congress or either House thereof" – when, as he knows, Sassower's contention is not that the statute applies to such hearings, but, rather, that the statute cannot constitutionally do so, while simultaneously applying to sessions of the House and Senate chambers which have disparate "normal activity". And notwithstanding the U.S. Attorney's further assertion (at p. 37) that Sassower is contending that hearings entitle "any member of the public to interrupt...to speak at will", which is also not her contention, he does not deny that public hearings of congressional committees and subcommittees have disparate "normal activity" as compared with Senate and House sessions – which is Sassower's focal contention with respect to the facial unconstitutionality of the statute. In short, comparison of the U.S. Attorney's two-paragraph argument (at. pp. 36-37) on the constitutionality of D.C. §10-503.16(b)(4), *as written*, to Sassower's 3-1/2 page presentation on its unconstitutionality (at pp. 37-41) shows that to limited extent he refers to any of her arguments, it is by completely falsifying them.

Likewise, comparing the U.S. Attorney's 3-1/4 page argument (at pp. 37-40) on the constitutionality of D.C. §10-503.16(b)(4), *as applied*, to Sassower's 6-page presentation on its unconstitutionality (at pp. 41-46) shows that to the limited extent he refers to any of her arguments, it is by completely falsifying them. Actually, this falsification begins in his first sentence under the heading "The statute is not 'clearly unconstitutional'" (at p. 36), where his citation to *Smith-Caronia* and *Armfield* is not only for the proposition that "the constitutionality of the statute in question has been upheld" *as written*, but as "applied to conduct similar to appellant's". As detailed by Sassower's third issue (at p. 39-40), the conduct of the defendants in *Smith-Caronia* and *Armfield* is NOT similar to hers, first because it occurred in Senate and House galleries; second because their conduct, unlike hers, was not compatible with the "normal activity" of congressional committee/subcommittee hearings, whereas hers, consisting of a

respectful request to testify, is; and third because their disruptions occurred when the Senate and House chambers were in session, whereas hers occurred after the Senate Judiciary Committee hearing had been adjourned. Indeed, Sassower's presentation under the heading "*The Statute is Unconstitutional as Applied*" (at p. 41) explicitly begins: "The instant case is unprecedented. No decisions have been located with any facts remotely resembling those at bar...".

Because what occurred at the Senate Judiciary Committee's May 22, 2003 hearing is videotaped – and therefore incontrovertible – the U.S. Attorney conceals the very existence of the videotape in asserting, at the outset of his argument (at pp. 37-38):

> "Appellant's and amicus's claim that the statute was unconstitutionally applied in this case rests on FACTUAL ASSUMPTIONS THAT ARE NOT SUPPORTED BY THE RECORD – i.e., that appellant made a 'respectful request to testify' after the hearing had been 'adjourned' or 'wrapped up' (Appellant's Brief at 41; Brief of D.C. National Lawyer's Guild at 3-4). [fn]" (capitalization added)

His argument then rests on discounting the existence of what the videotape documentarily establishes. Thus he states that the jury "was entitled to disregard appellant's interpretation of what transpired" (at p. 38) – never identifying that that "interpretation" rested on the videotape, for which Sassower had provided a written analysis [A-1574, A-1565, A-1604] whose accuracy was uncontested by the U.S. Attorney. Indeed, in purporting that:

> "The UNCONTESTED EVIDENCE established that appellant loudly interrupted the Chairman of the Senate Judiciary Committee, before the hearing was actually over. Appellant conceded in her testimony that she spoke 'simultaneous[ly] with the Chairman, and that after her interruption, he twice directed the Capitol Police to 'restore order' (4/19/04 Tr. 654-656, 673)." (at p. 39, capitalization added, underlining in the original)

he falsifies Sassower's testimony, resting on her analysis of the videotape.

The videotape is not supplanted by the adverse jury verdict. It is dispositive proof that what Sassower actually did could never support a "disruption of Congress" charge – without rendering it unconstitutional *as applied*. This is why, at every stage of this case, the U.S. Attorney has concealed what it shows, including in claiming, in a footnote to this issue (at p. 41)

that the trial testimony was "clearly sufficient to support appellant's conviction for disruption of Congress.".

Finally, the U.S. Attorney (at pp. 39-40) fails to confront – except by misrepresentation -- Sassower's arguments (at pp. 40-3, 46) as to the unavailability of "effective alternative means of communication" and the lack of evidence as to her "intent". And he altogether ignores her extensive presentation (at pp. 42-46) as to the grounds delineated by the Supreme Court in *Grayned* for striking down a statute for being unconstitutionally vague and overbroad, demonstrated by Sassower to be fully applicable to this case.

The U.S. Attorney's Issue IV (at pp. 41-47) – and Sassower's Issue IV (at pp. 47-50):

The U.S. Attorney's fourth issue is based on deliberately ambiguous, misleading language and juxtapositions, incorrect citation references, and materially incomplete descriptions of the record. Thus, although his "ISSUES PRESENTED" refers to Sassower's "arguments challenging her sentence" (at p. 1) – with his title for his fourth issue (at p. 41) similarly implying all aspects of the sentence are moot – his issue's first three sentences, excepting by their record references, reflect that he is only referring to the six-month sentence:

> "Appellant and amici curiae – Professor Andrew Horwitz and the District of Columbia National Lawyers Guild – argue that the six-month sentence imposed by Judge Holeman was illegal and unconstitutional (Appellant's Brief at 47-50; Brief of D.C. National Lawyers Guild at 4-5; Brief of Professor Andrew Horwitz at 4-25). Because appellant has already served her sentence in its entirety, however, those arguments are moot." (at p. 41, underlining in original)

It is from here that the U.S. Attorney, without explanation, leaps to the more expansive "Accordingly, the Court should dismiss all claims related to appellants' [sic] sentencing." (at p. 41, underlining added) – a nonsequitur he conceals by not disclosing that the cited pages challenge more than the legality and constitutionality of the six-month sentence.

This deceitfulness is replicated by the U.S. Attorney's "Background" (pp. 41-46) and "Analysis" (pp. 46-47) subsections. The "Analysis" (at p. 46) starts off:

> "As amicus curiae concedes, appellant has fully served her six-month sentence of incarceration (Brief of Professor Andrew Horwitz at p3). Thus, appellant's sentencing arguments are moot and should be dismissed by this Court."

This "Analysis" does not discuss, or even identify, any of Sassower's "sentencing arguments" – or those of the *amici* – supposedly mooted by completion of her six-month jail sentence. Instead, the U.S. Attorney cites two cases, for which he gives summarized descriptions to imply that Sassower's challenge to Judge Holeman's probation terms is mooted because she served her full jail sentence -- but without so-stating, or even claiming that those cases present facts comparable to those at bar. Assuredly, they do not.

The U.S. Attorney follows this with an assertion that Sassower "may not contest the mootness of her sentencing claims because she conceded, in pleadings filed in this Court and in the trial court, that these claims would become moot if she completed service of her sentence", citing -- with an inferential "See" -- two cases, each for the proposition "appellant may not take one position at trial and a contrary position on appeal". In fact, Sassower did not concede that her "sentencing claims" would "become moot if she completed service of her sentence". Indeed, the U.S. Attorney's elaborating detail (at pp. 43-44) is false in purporting that on September 23, 2004, Sassower, through counsel, filed with Judge Holeman an "Unopposed Emergency Motion for Defendant's Release to Preclude Mootness of Appellate Issue", in which she "conceded that any appeal of her sentence would become moot if she served the entire sentence before her appeal was resolved..." and that by her "emergency appeal" to this Court of Judge Holeman's denial of the motion, she "again conceded that her sentencing issues would become moot if she served her full sentence."

The true facts are clear from the September 23, 2004 motion [A-1732-1737], which expressly sought Sassower's release "to prevent mootness of one of her principal issues on appeal – *i.e.* the validity of any sentence exceeding 92 days' imprisonment." [A-1732]. It was

counsel's position that if Sassower served her full six-month sentence "one substantial issue she will present on appeal – whether a sentence in excess of the 92 days initially announced is lawful – will become moot." [A-1736]. Counsel cited no legal authority for such proposition of mootness – nor cited any in its emergency appeal, based thereon. More importantly, both Judge Holeman and this Court impliedly rejected counsel's legally unsupported mootness argument: Judge Holeman, by his September 24, 2004 order denying the motion for release to preclude mootness [A-1738] and this Court, by its October 14, 2004 order, *sua sponte*, dismissing the emergency appeal "as unnecessarily duplicative of appeal no. 04-CM-760", with no mention of the mootness issue. In so doing, this Court must be deemed to have accepted that the legality and constitutionality of the six-month jail sentence would be live issues on "appeal no. 04-CM-760" – and equitable principles would estop the Court from a contrary position.

The U.S. Attorney concludes (at p. 47) by urging that the Court's dismissal of "all claims related to appellant's sentencing" include "the separately filed appeal of appellant's sentence in Case No. 04-CO-1600". Yet, that appeal – as likewise other aspects of the sentencing – are not moot for a further reason. They are all integral to Sassower's first appellate issue of Judge Holeman's pervasive actual bias, manifested throughout the course of the proceedings before him, including by his post-trial rulings.

CONCLUSION

The U.S. Attorney's opposition brief is an outright "fraud on the court", intended to subvert the appellate process on Sassower's consolidated appeals. Unless immediately withdrawn, it reinforces this Court's mandatory disciplinary responsibilities pursuant to Canon 3D of the Code of Judicial Conduct for the District of Columbia Courts to sanction the U.S. Attorney and refer him for disciplinary and criminal investigation and prosecution.

CERTIFICATE OF SERVICE

I certify that on the 4th day of April 2006, I served a copy of my reply brief by first class mail upon:

(1) Kenneth L. Wainstein, U.S. Attorney for the District of Columbia, at 555 Fourth Street, N.W., Washington, D.C. 20530, with a coverletter addressed to him, entitled "NOTICE OF INTENT TO SEEK SANCTIONS AND DISCIPLINARY & CRIMINAL REFERRALS" (copy annexed);

(2) Professor David M. Zlotnick, Counsel for *Amicus Curiae* Professor Andrew Horwitz, Roger Williams University School of Law, 10 Metacom Avenue, Bristol, Rhode Island 02809; and

(3) Jonathan L. Katz, Esq., Counsel for *Amicus Curiae* District of Columbia National Lawyers Guild, 1400 Spring Street, Suite 410, Silver Spring, Maryland 20910.

Elena Ruth Sassower

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April 4, 2006

Kenneth L. Wainstein, U.S. Attorney for the District of Columbia
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RE: NOTICE OF INTENT TO SEEK SANCTIONS
AND DISCIPLINARY & CRIMINAL REFERRALS
Elena Ruth Sassower v. United States of America
"Disruption of Congress" Appeals
D.C. Court of Appeals: CM-760 & #04-CO-1600

Dear U.S. Attorney Wainstein:

This is to give you notice that my enclosed reply brief in the above consolidated appeals demonstrates that the government's opposing brief – bearing your name, though not your signature -- is "an outright 'fraud on the court', intended to subvert the appellate process".

Such opposing brief is signed by Assistant U.S. Attorney Florence Pan, who is handling the appeals. In addition to signing for herself, she has signed for you, for your Appellate Division Chief -- Assistant U.S. Attorney Roy W. McLeese, III -- as well as for Assistant U.S. Attorneys Aaron Mendelsohn and Jessie Liu, who handled the case in D.C. Superior Court.

Please advise as to whether you actually had knowledge of and approved the government's brief when it was filed with the D.C. Court of Appeals on March 10, 2006 – and whether you approve of it now. If so, affix your signature to the brief – and have Assistant U.S. Attorneys McLeese, Mendelsohn, and Liu do likewise.

Under such circumstance – and unless you promptly withdraw the brief -- I will seek sanctions against you and your culpable staff, as well as disciplinary and criminal referrals.

So that I may be guided accordingly, please advise by "Law Day", May 1, 2006. This should give you ample time to personally review my 50-page "conforming brief on the merits", if not my original 119-page brief and 161-page supplemental fact statement.

Thank you.

Yours for a quality judiciary,

Elena Ruth Sassower

ELENA RUTH SASSOWER, Appellant *Pro Se*

cc: D.C. Court of Appeals
Amicus Curiae:
Professor Andrew Horwitz
D.C. National Lawyers Guild