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January 17, 2017

Response to Motion for Recusal: Filed Under Seal

The Honorable Sue E. Myerscough
United States District Judge
319 U.S. Courthouse
600 E. Monroe Street
Springfield, IL 62701

Re: *United States v. Schock*, No. 16-CR-30061

Dear Judge Myerscough:

As the attorney for the United States of America in the above-entitled matter, I respectfully submit this response to the sealed January 12, 2017, letter to Your Honor from Mr. George Terwilliger III (who is not counsel of record), requesting that Your Honor recuse herself from participation in further proceedings.

We respond first to respectfully advise Your Honor that the United States does not join in the request for Your Honor's recusal, nor do we recommend that it be allowed. The policy of the Department of Justice is that "[n]o motion to recuse or disqualify a justice, judge, or magistrate (*see, e.g.,* 28 U.S.C. 144, 455) shall be made or supported by any Department of Justice attorney, U.S. Attorney (including Assistant U.S. Attorneys) . . . without the prior written approval of the Assistant Attorney General having ultimate supervisory power over the action in which recusal or disqualification is being considered." 28 C.F.R. §50.19(a). The United States had no prior notice of the letter request for Your Honor's recusal and does not support it.

We further respond to respectfully express the United States' concerns with regard to the manner in which the letter request for recusal was submitted for Your Honor's consideration. Specifically, we further address: (1) the letter request was authored by an attorney who is not an attorney of record in the *Schock* matter and was filed as a letter and not a proper motion; (2) the inaccurate factual assertions in the letter request; (3) the letter request was submitted under seal, with an offer to Your Honor for it to remain under seal if recusal is allowed; and (4) the submission of the letter request following a ruling on a pretrial motion for intra-district transfer to the Peoria Division may be untimely.

1. The Letter Request for Recusal was Authored by a Non-Attorney of Record and Should Have Been Filed as a Motion

First, the letter request for recusal was filed under seal by an attorney of record (Mr. Bittman), but it is authored by Mr. Terwilliger, advising that he is "counsel for Mr. Schock in the captioned matter now pending before Your Honor." (*See Letter from George Terwilliger III, dated January 12, 2017,* at 1). This representation is incorrect.

Local Civil Rule 83.5(H) provides that "[a]ll attorneys who appear in person or by filing pleadings in this court must be admitted to practice in this court in accordance with this Rule." In addition, Local Criminal Rule 57.3 provides that "[n]o attorney may appear on behalf of a criminal defendant unless the attorney is admitted to practice in this court and has filed a written entry of appearance in the case."

In this case, the United States is unaware of any admission of Mr. Terwilliger to practice in the Central District of Illinois, nor is it aware of any filing by Mr. Terwilliger of a written entry of appearance on behalf of Mr. Schock. Thus, the filing of the letter request for recusal appears to be inconsistent with this Court's local rules. The filing is more problematic because one of the grounds cited for Your Honor's recusal is the recent engagement of Your Honor's daughter to an attorney who is not involved in the *Schock* matter, but who is employed by the same firm, McGuireWoods, that employs three of Mr. Schock's attorneys. That issue, however, was directly addressed by Your Honor to Mr. Schock and two of his attorneys of record at Mr. Schock's arraignment on December 12, 2016, and expressly waived by them. Thus, the letter request for recusal is in part directly in conflict with the waiver of Mr. Schock and two of his attorneys of record in this criminal matter.

Finally, the request for Your Honor's judicial recusal pursuant to 28 U.S.C. §455(a) is inappropriately submitted in a letter format. It should have been filed as a proper motion by an attorney of record.

2. Factual Errors in the Letter Request for Recusal

Second, the letter request for Your Honor's recusal contains factual errors. The letter represents that its "suggestion for recusal at this time is prompted by the government's recent production of documents to Mr. Schock's counsel." (*See Letter from George Terwilliger III, dated January 12, 2017,* at 1). That representation is repeated in different forms on four additional occasions in the letter and accompanying memorandum of law. (*See id.,* at 1) ("These recently disclosed documents"); (*id.* at 2) ("The documents discussed above are a set of emails (attached to this letter) the

government produced to us on December 7, 2016."); (*see Memorandum of Law,* at 3) ("The evidence disclosed by the government indicates"; "It is not necessary that Judge Myerscough knew of Mr. Schock's actions, though the government has now disclosed them"). These repeated factual representations are misleading.

Contrary to the representations in the letter request, the "factual basis," as the letter asserts, upon which the request for recusal is based, consists almost entirely of Mr. Schock's actions in 2011 and other matters in 2008, and Mr. Schock's personal emails, which he undoubtedly has always been aware of and which he almost entirely declined to produce to the government during the Grand Jury litigation in 2015. (*See generally, In Re: Grand Jury Subpoena,* 15-3005) (filings of Mr. Schock and the General Counsel for the U.S. House of Representatives (House)).

Specifically, the first two documents consist of emails in 2011 received by Mr. Schock at his personal aol.com account, or sent or received by his Chief of Staff, Steven Shearer, at Mr. Shearer's house.gov email account. (*See Documents Submitted in Support of Letter Request for Recusal)*. These emails were produced in August 2015 by counsel for Mr. Schock (of McGuireWoods) to the government (*See* Exhibit A).[1]

In addition, the third document, which references Mr. Schock's actions in 2011 concerning his preference for the order of Chief Judge in this district, consists of another 2011 email exchange between Mr. Schock and Mr. Shearer. (*See Documents Submitted in Support of Letter Request for Recusal)*. This email exchange again involved messages from Mr. Schock's personal aol.com email account, and the message was produced to the United States by Mr. Shearer, not Mr. Schock.[2] Mr. Schock has largely declined to produce his personal emails with Mr. Shearer to the government and has even expressed a desire for the government not to obtain them. During a consensually-recorded conversation between a cooperating witness and Mr. Schock on March 30, 2015, Mr. Schock, in referring to "six years of emails" and to Mr. Shearer, advised the witness that "DOJ's not gonna have his emails." (*See* Exhibit B)

Finally, the remaining documents attached to the letter request consist of emails of Mr. Shearer and other former staff members of Mr. Schock's Congressional staff from their house.gov email accounts.[3] As reflected in the attached correspondence from the General Counsel for the House to Mr. Terwilliger during the Grand Jury litigation in 2015, Mr. Schock and his counsel obtained a "substantial volume of electronic data that belong[ed] to the Congressman" prior to his resignation in March 2015. (*See* Exhibit C)

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[1] These emails are Bates-Stamped with numbers "MW-DOJ-00014625" and "14626".
[2] This email exchange is Bates-Stamped "Shearer_Steven_194_00001772".
[3] The remaining emails are Bates-Stamped with the prefix "CAO-Emails".

(May 18, 2015, Letter from House General Counsel to George J. Terwilliger III, Esq.*)* These remaining documents are the same documents Mr. Schock claimed during the Grand Jury litigation are "owned" by him and that the House produced to the government and again to Mr. Schock and his counsel in March 2016, only after the government filed motions to compel their production. (*See In Re: Grand Jury Subpoena,* 15-3005, at R.127) (government's motion to compel email records); (Exhibit D) (March 2016 letters from House Counsel Kerry W. Kircher to the government concerning House production of house.gov email records).

On December 7, 2016, prior to Mr. Schock's first appearance and Your Honor's ruling on his motion for intra-district transfer, the United States disclosed to Mr. Schock's counsel that it had "recently reviewed" the email previously produced by Mr. Schock's counsel and certain other emails produced by others. (Exhibit E). The United States advised Mr. Schock's counsel: "[w]e wanted to bring them to your attention prior to the hearing next week. We leave the question of relevance to your judgment. As we continue our review, we will disclose any additional related matters that come to our attention. Thank you." (Exhibit E). The email documents the United States identified to Mr. Schock's counsel as being produced by others are the same house.gov email documents that were the subject of the Grand Jury litigation and were produced by the House to Mr. Schock and his counsel and to the United States in March 2016. (*See Documents Submitted in Support of Letter Request for Recusal)*; (Exhibit D).

Thus, in addition to Mr. Schock's own actions in 2011 and emails from his personal aol.com email account, which he and his counsel were undoubtedly aware of, the foundation for the recusal request consists of house.gov emails "owned by" Mr. Schock that were produced to him and his counsel by the House in early 2015 and again in March 2016. It is somewhat misleading to suggest to Your Honor that the basis for the request for recusal was only in the possession of the government until it was "recently disclosed"; rather, the documents have always been in the possession of Mr. Schock and were only identified to Mr. Schock's counsel as being "recently reviewed" by the government.

3. The Letter Request for Recusal was Filed Under Seal

Third, the letter request was filed under seal without any exceptional circumstances for doing so, asking Your Honor to take judicial action and offering Your Honor the option of continued sealing of the letter and supporting documents in the event Your Honor allows the recusal request. The United States submits that the initial filing under seal and the offer for continued sealing are without justification.

The Supreme Court has held that "the press and general public have a constitutional right of access to criminal trials." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982). "The presumption of access is based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice." *United States v. Amodeo,* 71 F.3d 1044, 1048 (2d Cir. 1995). Moreover, the Seventh Circuit has also made clear that full disclosure is the presumptive rule, and that a withdrawal of part of the judicial process from public view "requires rigorous justification." *Hicklin Engineering, L.C. v. Bartell,* 439 F.3d 346, 348 (7th Cir. 2006). Following this directive, this Court's practice of allowing sealed filings electronically expressly cautions litigants that: "The Court does not approve the filing of documents under seal as a general matter . . . Sealing of documents is an exceptional measure, and certain standards must be met before the Court will allow documents to be filed under seal." (*See "WARNING!"* to litigants in filing sealed documents at ecf.ilcd.uscourts.gov).

The United States submits there is no exceptional reason for the filing under seal of a letter request for Your Honor's judicial recusal. We also believe that the letter's offer to Your Honor to continue sealing the letter and supporting documents and any sealed briefing by the United States in opposition to the request are without justification. As noted above, the United States does not join in the request for recusal or support it. The United States is prepared to brief the matter in a public filing and explain why the request for recusal should be denied.

4. The Letter Request for Recusal Appears to be Untimely Submitted Following an Adverse Ruling

Finally, the United States believes that the request for Your Honor's recusal, following Your Honor's presiding over the Grand Jury investigation since April 2015 and issuing a ruling on Mr. Schock's motion for intra-district transfer, may be untimely. Most federal courts of appeal require that a motion for disqualification be brought "at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification." *Travelers Ins. Co. v. Liljeberg Enters., Inc.,* 38 F.3d 1404, 1410 (5th Cir. 1994); *see also United States v. Barnes*, 909 F.2d 1059, 1071 (7th Cir. 1990); *In re Nat'l Union Fire Ins. Co.*, 839 F.2d 1226, 1232 (7th Cir. 1988); *Union Carbide Corp. v. U.S. Cutting Service, Inc.,* 782 F.2d 710, 716-17 (7th Cir. 1986); *United States v. Murphy*, 768 F.2d 1518, 1539 (7th Cir. 1985); *but see SCA Services, Inc. v. Morgan*, 557 F.2d 110, 117 (7th Cir. 1977). A principle that has been applied by courts is that a party may not withhold "a recusal application as a fall-back position in the event of adverse rulings on pending matters." *In re IBM Corp.*, 45 F.3d 641, 643 (2d Cir. 1995); *see also Union Carbide Corp.,* 782 F.2d at

716-17. Indeed, the Fifth Circuit has stated that "[t]he most egregious delay—the closest thing to per se untimeliness—occurs when a party already knows the facts purportedly showing an appearance of impropriety but waits until after an adverse decision has been made by the judge before raising the issue of recusal." *United States v. Vadner*, 160 F.3d 263, 264 (5th Cir. 1998).

In this case, Your Honor presided over the entire Grand Jury litigation involving Mr. Schock that was initiated in April 2015, and has presided over this criminal proceeding since its inception. Although Mr. Schock certainly has been aware of the "factual basis" for the request for recusal since as early as 2015, the request for recusal was not made until after Your Honor's denial of Mr. Schock's motion for intra-district transfer to the Peoria Division. Thus, a motion for recusal may be untimely and may reflect an attempt to circumvent Your Honor's ruling.

Accordingly, for the reasons stated above, the United States respectfully requests that Your Honor strike or deny the letter request of recusal with supporting documents as inappropriately filed under seal in letter format. The United States has no objection to Your Honor granting leave for Mr. Schock to publicly refile an appropriate motion for recusal by an attorney of record. The United States is further prepared to brief any motion for recusal and explain why it should be denied.

Thank you, Your Honor, for your consideration of this responsive letter.

Very truly yours,

PATRICK D. HANSEN
ACTING UNITED STATES ATTORNEY

s/Timothy A. Bass
Timothy A. Bass
Assistant United States Attorney

Cc: George J. Terwilliger III, Esq.
Robert J. Bittman, Esq.
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Encl: Exhibits A, B, C, D, and E.