

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	No. 88-6545
	:	
GIZELLA POZSGAI	:	
Defendant	:	

**DEFENDANTS MEMORANDUM OF LAW IN SUPPORT OF MOTION
TO DISQUALIFY PURSUANT TO 28 U.S.C. § 455(a)**

INTRODUCTION

Assistant U.S. Attorney Landon Y. Jones, III (“AUSA Jones” or “Jones”) currently represents the Plaintiff federal agency, the U.S. Army Corps of Engineers, in the longstanding action at bar, which had previously been assigned to this Court on December 8, 2016. (ECF No. 166). More than one year after having introduced himself to Defense counsel on September 7, 2018, and more than three months after having entered an appearance in this case on June 12, 2019, AUSA Jones finally disclosed to Defense counsel on September 16, 2019, that he had formerly served as a law clerk of this Court approximately 14 years ago.

While that mere past relation to the Court would ordinarily not be a cause of concern, Defense counsel undertook his own further inquiry to ascertain the extent and nature of this Court’s relationship with its former law clerks, including AUSA Jones. Defense counsel’s research revealed several publicly available extra-judicial statements made by and about this Court regarding its former law clerks. They included a Federal Bar Association-published article in the May 2016 issue of the *Federal Lawyer* magazine, a February 23, 2017 Columbia University Law School news item, and a February 24, 2017 Columbia University Law School Annual Luncheon/Medal for Excellence Announcement and a related Medal for Excellence acceptance

speech this Court had contemporaneously delivered. These extra-judicial statements publicly expressed the Court's strong familial sentiments toward and admiration for, and sense of obligation and responsibility for mentoring and providing life advice to, its former law clerks, presumably including AUSA Jones, whom the Court has continued to treat and memorialize in photographs displayed in Chambers as members of its extended family. AUSA Jones further disclosed that, during the 14 years since the completion of his clerkship, he has maintained a professional and personal relationship with the Court that likely amounts to more than a casual social acquaintance and presumably continues to the present day. Defense counsel's research also revealed the longstanding recognition by the legal academy of the similarity between judges' law clerks and judges' personal family members.

While the likely ongoing close professional and personal relationship between this Court and its former clerks, including AUSA Jones, is admirable, a reasonable person, with knowledge of all the facts, would conclude that the Court's impartiality in the case at bar might reasonably be questioned because of the perception of bias. While such appearance of impartiality might be cured by AUSA Jones withdrawing as counsel for the Plaintiff, he has refused to do so. Hence, Defense counsel reluctantly found it necessary to file this motion to disqualify the Court instead.

THE MATERIAL FACTS

A. AUSA Jones' Belated Disclosure of Former Clerkship with the Court

On September 16, 2019, approximately one year from the time AUSA Jones had first introduced himself to Defendant's counsel via telephone and email on September 7, 2018, and approximately three months from the time AUSA Jones first made his appearance in this case on June 12, 2019, AUSA Jones informed Defense counsel that he had previously clerked for this Court for approximately one year, from September 2004 to August 2005, but had "had no

involvement in this matter as a clerk.” (Ex. A – Jones Letter to Defense Counsel (9-16-19)). AUSA Jones’ letter also sought to reassure Defense counsel that, despite his former clerkship, he had “no doubt that Judge Brody will serve as a neutral arbiter in this matter.” (Ex. A – Jones Letter to Defense Counsel (9-16-19)).¹ AUSA Jones’s former clerkship with this Court by itself, did not concern Defense counsel. However, Defense counsel became justifiably concerned when he subsequently discovered publicly available information on the internet regarding the Court’s past and current relationships with its former law clerks, including AUSA Jones, from which a reasonable person, with knowledge of all the facts, would conclude that this Court’s impartiality in the case at bar might reasonably be questioned.

B. Defense Counsel Response to Belated Disclosure Reveals Extra-Judicial Statements Conveying Apparent Court Bias (Partiality) in Favor of Former Law Clerks and Requests AUSA Jones’ Recusal

On September 19, 2019, Defendant’s counsel expressed his concerns by letter to AUSA Jones. (Ex. B – Defense Counsel Response to AUSA Jones Letter (9-19-19)). Chief among those concerns was a Federal Bar Association-published May 2016 *Federal Lawyer* magazine article (Ex. C – Federal Lawyer Magazine May 2016 Judicial Profile)² conveying the Court’s strong sentiments toward and mentoring of its former law clerks and its effective treatment of them as members of its extended family. (Ex. B – Defense Counsel Response to AUSA Jones Letter (9-19-19)). Defense counsel also raised concerns regarding AUSA Jones’ belated disclosure of his prior relationship with the Court, in that he had entered his appearance in the case on June 12, 2019, well before his September 16, 2019 disclosure. (Ex. B – Defense Counsel Response to

¹ As will be demonstrated, the presence of *actual* bias is not the test for disqualification.

² See Lesley Wolf, *Judicial Profile - Hon. Anita B. Brody, Judge, U.S. District Court for the Eastern District of Pennsylvania*, *The Federal Lawyer* (May 2016) at: <http://www.fedbar.org/PDFs/Past-Judicial-Profiles/Third-Circuit/1/Brody-Hon-Anita-B.aspx>.

AUSA Jones Letter (9-19-19)). Defense counsel emphasized that, despite AUSA Jones' knowledge of said article and its contents, he had failed to disclose his former clerkship for and professional and personal relationship with this Court prior to September 16, 2019. (Ex. B – Defense Counsel Response to AUSA Jones Letter (9-19-19)). Defense counsel also requested that AUSA Jones recuse (disqualify) himself from this case to save this Court from being faced with an otherwise unnecessary motion for disqualification. (Ex. B – Defense Counsel Response to AUSA Jones Letter (9-19-19)).

C. AUSA Jones Refused to Recuse Himself to Save the Court from Disqualification Even Though He Admitted Having a 14-Year Professional and Social Relationship With the Court Following His Clerkship

On September 23, 2019, AUSA Jones replied to Defense counsel's September 19, 2019 response correspondence. He stated in no uncertain terms that, "I decline your request that I withdraw from this matter. [...] No reasonable observer would question Judge Brody's impartiality in this matter on the ground that I served as her law clerk more than a decade earlier." (Ex. D – AUSA Jones Reply Letter (9-23-19)). Notably, AUSA Jones did not address any of the facts presented regarding this Court's continued affection for its former law clerks, including having their photographs *in Chambers*. AUSA Jones, however, admitted in response to Defense counsel's inquiry that he has "interacted with Judge Brody on occasions both professional and social over the fourteen years since the completion of my clerkship" with this Court which, presumably, continues to this very day. (Ex. D – AUSA Jones Reply Letter (9-23-19)).

D. Defense Counsel's Further Inquiry Reveals Additional Extra-Judicial Statements Conveying the Apparent Court Bias (Partiality) in Favor of Former Law Clerks

Since AUSA Jones' September 23, 2019 reply, Defense counsel became aware of additional publicly available extra-judicial information on the internet from which a reasonable

person, with knowledge of all the facts, would conclude that this Court's impartiality in the case at bar might reasonably be questioned. This additional information included a Columbia University Law School news item (Ex. E – Words of Wisdom, Columbia Law News (2-23-17)³), a related Columbia University Law School Annual Luncheon/Medal of Excellence Announcement (Ex. F – Columbia Univ. Law School 2017 Luncheon/Medal Announcement (2-24-17),⁴ and the related audiotaped acceptance speech this Court delivered contemporaneously during that awards ceremony. (Ex. F – Columbia Univ. Law School 2017 Luncheon/Medal Announcement, at Speech (2-24-17).⁵ Each of these extra-judicial statements further discussed this Court's strong sentiments toward and admiration for its former law clerks and the type of personal life advice the Court has provided to them as effective members of its extended family.

THE CONTROLLING LEGAL STANDARD FOR DISQUALIFICATION

Section 455 of Title 28 of the United States Code provides:

(a) Any justice, judge, or magistrate judge of the United States *shall* disqualify himself [herself] in any proceeding in which his [her] impartiality *might reasonably be questioned*. (emphasis added).

“The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.” *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 (1988). Congress enacted subsection 455(a) to “promote confidence in the

³ See Columbia Law School News, *Words of Wisdom From Judge Anita B. Brody '58 – Medal for Excellence Winner Ruled on NFL Concussion Case* (Feb. 23, 2017), at: <https://www.law.columbia.edu/news/2017/02/judge-anita-brody-medal-excellence>.

⁴ See Columbia Law School, *2017 Winter Luncheon/Medal of Excellence* (Feb. 24, 2017), at: <https://www.law.columbia.edu/alumni/events/alumni-event-photo-galleries/2017-winter-luncheon-medal-excellence#/0>.

⁵ See Anita Blumstein Brody, *Speech*, Columbia Law School 2017 Winter Luncheon/Medal of Excellence (Feb. 24, 2017), at: https://cdnapisec.kaltura.com/index.php/extwidget/preview/partner_id/1758691/uiconf_id/38497331/entry_id/1_dp09ipml/embed/dynamic.

judiciary by avoiding even the appearance of impropriety whenever possible,” *Id.* at 864-65, and in Section 455(a) “broaden[ed] and clarif[ied] the grounds for judicial disqualification.” *Id.* at 849 (quoting 88 Stat. 1609). Avoiding the appearance of partiality is so important that it does not matter “whether or not the judge actually knew of facts creating an appearance of impropriety.” *Id.* at 859-60. Thus, avoiding the *appearance* of judicial partiality is of paramount importance in our judicial system.

The Third Circuit Court of Appeals has held that, “[t]he test for recusal under § 455(a) is whether a reasonable person, with knowledge of all the facts, would conclude that the judge’s impartiality might reasonably be questioned.” *In re Kensington Int’l Ltd.*, 353 F.3d 211, 220 (3d Cir. 2003). “[A] federal judge *must* self-disqualify from ‘any proceeding in which [her or] his impartiality *might reasonably be questioned.*’” (emphasis added). *Weinstein v. United States*, Civ. Action No. 18-0894-AET (D. N.J. 2018), slip op. at 2, quoting *United States v. Kennedy*, 682 F.3d 244, 258 (3d Cir. 2012) (quoting 28 U.S.C. § 455(a)). “[T]he test for disqualification under § 455(a) is not *actual* bias; it is the *perception* of bias. *See [Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 162 (3d Cir. 1993) (‘For purposes of § 455(a) disqualification, it does not matter whether the district court judge actually harbors any bias against a party or the party’s counsel.’)]*” (emphasis in original). *In re Kensington Int’l Ltd.*, 368 F.3d 289, 294 (3d Cir. 2004), quoting *Alexander v. Primerica Holdings, Inc.*, 10 F.3d at 162. *See accord In Re School Asbestos Litigation*, 977 F.2d 764 (3d Cir. 1992), slip op. at 21, 22 (holding that “Section 455(a) clearly requires that judges shall disqualify themselves where such a taint appears, rather than attempt creative alternative remedies such as disqualification of witnesses), and citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. at 859-861 (1988) (“The Supreme Court has squarely held

that a judge need not have had actual knowledge of facts creating an appearance of partiality to violation subsection 455(a).”⁶

“‘An objective inquiry, this test is not concerned with the question whether a judge actually harbors bias against a party.’ *Kennedy*, 682 F.3d at 258. ‘Because § 455(a) aims not only to protect both the rights of the individual litigants, but also to promote both the public’s confidence in the judiciary, our analysis focuses on upholding *the appearance* of justice in our courts.’” (emphasis added). *Weinstein v. United States*, Civ. Action No. 18-0894-AET (D. N.J. 2018), slip op. at 3, quoting *United States v. Kennedy*, 682 F.3d at 258. *See also Liteky v. United States*, 510 U.S. 540, 548 (1994) (holding that subsection 455(a) disqualification is “evaluated on an *objective* basis, so that what matters is not the reality of bias or prejudice but its appearance.”) (emphasis in original); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883 (2009) (“the Due Process clause has been implemented by objective standards that do not require proof of actual bias”). Therefore, recusal is required “whenever ‘impartiality might reasonably be questioned.’” 556 U.S. at 888 (quoting 28 U.S.C. § 455(a)).

ARGUMENT

I. The Publicly Available *Federal Lawyer* Magazine Article Discussing the Court’s Professional and Personal Relationship with its Former Law Clerks Creates a Reasonable Question About the Court’s Impartiality

⁶ *See* Cathleen M. Devlin, *Disqualification of Federal Judges - Third Circuit Orders District Judge James McGirr Kelly to Disqualify Himself so as to Preserve the Appearance of Justice under 28 U.S.C. 455*, 38 Vill. L. Rev. 1219, 1221 (1993), at: <https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2848&context=vlr> (citing 977 F.2d at 770, and explaining that, “[i]n *In re School Asbestos Litigation*, the United States Court of Appeals for the Third Circuit issued a writ of mandamus pursuant to section 455(a), ordering Judge James McGirr Kelly of the United States District Court for the Eastern District of Pennsylvania to disqualify himself from an extraordinarily complex nationwide asbestos class action suit. This decision reveals that even in the context of massive megalitigation, the Third Circuit will not hesitate to disqualify a presiding district judge in order to fulfill the central congressional goal of section 455(a) – to maintain an appearance of impartiality and thereby sustain public confidence in the judicial system.”). (emphasis added).

Contrary to AUSA Jones’ assertion that “[n]o reasonable observer would question Judge Brody’s impartiality in this matter,” Defense counsel’s September 19, 2019 response correspondence revealed that the contents of the publicly available *Federal Lawyer* magazine article set forth relevant and material information from which a reasonable person would conclude that this Court’s impartiality might reasonably be questioned. (Ex. C – Federal Lawyer Magazine May 2016 Judicial Profile Article).⁷ For example, the *Federal Lawyer* magazine article expressed this Court’s admiration for its current and former law clerks whom it takes and has taken pride in mentoring, whom it treats and has treated as part of its extended family,⁸ and whose pictures it hangs prominently in the hallway leading to its chambers and places on the bookshelves lining its office. “Rather than stark walls or high-class artwork, the hallway leading to chambers is adorned with photographs. Not photographs of nature or of Philadelphia’s stately historic sites, but portraits of Judge Brody and her law clerks – one for each year she’s been on the federal bench, 23 in total.” (Ex. C – Federal Lawyer Magazine May 2016 Judicial Profile Article).⁹ This article also

⁷ See Lesley Wolf, *Judicial Profile - Hon. Anita B. Brody, Judge, U.S. District Court for the Eastern District of Pennsylvania*, *The Federal Lawyer* (May 2016) *supra* 1, at Ex. C.

⁸ See *Id.*, at 2. (“[...] Judge Brody thinks one of her most important and enjoyable roles is as a mentor to her law clerks. ‘Getting to work with my law clerks is one of the most exciting parts of my job, because I have, over the years, had such wonderful clerks,’ Judge Brody says. (p. 1). [...] In May 2015, Judge Brody celebrated her 80th birthday. When looking for a special way to commemorate the occasion, her current law clerks found inspiration in the photographs they walked past daily. A plan was hatched, an email went out to all former law clerks, and clerks’ family pictures were collected and loaded onto a digital frame. As much as she delighted in the pictures, Judge Brody was even more delighted by the accompanying notes and birthday wishes, as she reveled in the professional and personal accomplishments of her clerks. [...] She treats her law clerks as individuals, each with distinct talents, goals, and needs. That does not mean that Judge Brody neglects the fundamentals; former law clerks expressed strong gratitude for the time and energy Judge Brody spent helping them to develop their legal writing skills. [...] Maya Sosnov, a permanent law clerk says that Judge Brody is uncommonly committed to making her clerks into great writers, recognizing the importance of writing skills on the other side of a clerkship. Her personal attention – she does not issue memos to her law clerks but sits down for face-to-face discussions about the substance and style – enhances the quality of both the writing and the clerkship experience.”). See also *Id.*, at 3. (“Judge Brody’s former law clerks are awed by her devotion and approachability. [...] Many of her former law clerks are now mentoring and advising younger attorneys themselves. They try to emulate the nearly impossibly high example set by Judge Brody.”).

⁹ See *Id.*, at 1 (“Any lawyer who has ever been in the chambers of Judge Anita B. Brody of the U.S. District Court for the Eastern District of Pennsylvania will tell you there’s something unusual about the experience. Rather than stark walls or high-class artwork, the hallway leading to chambers is adorned with photographs. Not photographs of nature

emphasized how and “why she places so much value on these relationships.” (Ex. C – Federal Lawyer Magazine May 2016 Judicial Profile Article).¹⁰ Thus, a reasonable person, with knowledge of all the facts, – i.e., AUSA Jones’ former clerkship with this Court and those facts set forth in this article, would conclude that this Court’s impartiality in the case at bar might reasonably be questioned. This Court might not actually harbor any bias against Defendant or Defense counsel, as Government counsel insists. However, this article, when combined with Government counsel’s former clerkship with this Court, casts the reasonable perception of this Court’s bias *in favor of* AUSA Jones his client, the U.S. Army Corps of Engineers, and thereby undermines the appearance of justice in our courts.

II. AUSA Jones’ Belated Disclosure of His Former Clerkship and His Continuing 14-Year Current Professional and Social Relationship with the Court Since His Clerkship Suggests That Even He Was Aware That Relationship Creates a Reasonable Question About the Court’s Impartiality

Defense counsel’s September 19, 2019 response correspondence also revealed and raised concerns about AUSA Jones’ late disclosure of his prior relationship with this Court. (Ex. B – Defense Counsel Response to AUSA Jones Letter (9-19-19)). Defense counsel emphasized that, despite AUSA Jones’ very likely knowledge of the May 2016 *Federal Lawyer* article and its contents, he had failed to disclose his former clerkship for and professional and personal

or of Philadelphia’s stately historic sites, but portraits of Judge Brody and her law clerks – one for each year she’s been on the federal bench, 23 in total. Entering her office, which doubles as her conference room, attorneys are greeted with more of the same. Learned treaties line the bookshelves alongside wedding photos of former clerks and more than a few pictures of their children and Judge Brody’s own family.”).

¹⁰ *See Id.*, at 3. (“Working with her law clerks remains at the heart of her enthusiasm for her job, so much so that one of her grandchildren recently joked that she prefers her law clerks to her children because she actually gets to hand-pick her law clerks. While anyone who has seen Judge Brody beam with pride while talking about her children and grandchildren knows that isn’t the case, her love of her role as mentor to her clerks is not far behind her passion and commitment to her family. As for why she places so much value on these relationships, Judge Brody says, ‘Some people are always looking above them to determine what their legacy will be, but it’s really more important to look toward the next generation of lawyers.’ Those who have had the privilege to serve as one of Judge Brody’s law clerks couldn’t agree more.”).

relationship with this Court prior to September 16, 2019. (Ex. B – Defense Counsel Response to AUSA Jones Letter (9-19-19)).

More specifically, AUSA Jones had failed to disclose his former clerkship and his likely knowledge of the *Federal Lawyer* article to Defense counsel, when: (1) Jones had filed his appearance in this case on June 12, 2019; (2) the parties had filed pleadings in this case during July 2019; (3) the parties had exchanged communications between themselves and Judge David Strawbridge whom this Court had assigned to mediate this case during August-September 2019; and (4) from September 8, 2018 through June 11, 2018 – i.e., beginning from the time AUSA Jones first introduced himself in this matter via email to Defense counsel, to Defendant Gizella Pozsgai’s filing of her Notice of Motion with this Court. (ECF No. 190). (Ex. B – Defense Counsel Response to AUSA Jones Letter (9-19-19)). Clearly, AUSA Jones’ failure to make these disclosures to Defense counsel prior to September 16, 2019, and his failure, thereafter, to disclose to Defense counsel his continued professional and personal relationship with the Court, suggests his brief notice of simply serving as this Court’s law clerk years ago was a last minute effort to make a token notice of a possible bias without actually disclosing all the pertinent facts.

AUSA Jones also asserted, in his September 23, 2019 reply to Defense Counsel’s September 19, 2019 response, that “[n]o reasonable observer would question Judge Brody’s impartiality in this matter” (Ex. D – AUSA Jones Reply Letter (9-23-19)). However, AUSA Jones also expressly admitted in his reply that “I have interacted with Judge Brody on occasions both professional and social over the fourteen [14] years since the completion of my clerkship” (emphasis added), which, presumably, continues to the present day. (Ex. D – AUSA Jones Reply Letter (9-23-19)). AUSA Jones’ first-time admission of *both* a prior and a current ongoing professional and personal relationship with this Court further reveals, at least, *the appearance of*

bias. Thus, a reasonable person, with knowledge of all the facts, – i.e., AUSA Jones’ former clerkship with this Court and AUSA Jones’ recent written admission that he has maintained a professional and personal 14-year relationship with this Court since the completion of his former clerkship which presumably continues to the present day, would conclude that this Court’s impartiality in the case at bar might reasonably be questioned. This Court might not actually harbor any bias against Defendant or Defense counsel, as Government counsel insists. However, AUSA Jones’ admission of an ongoing 14-year professional and personal relationship with this Court (which, presumably, continues to the present day), when combined with AUSA Jones’ former clerkship with this Court, casts the further reasonable perception of this Court’s bias in favor of AUSA Jones and his client, the U.S. Army Corps of Engineers, and thereby undermines the appearance of impartial justice in our courts.

III. The Publicly Available Columbia Law School News Item, Excellence Award Announcement and Recorded Court Speech Discussing its Relationship with its Former Law Clerks Creates a Reasonable Question About the Court’s Impartiality

Defense counsel uncovered additional material and relevant information about the relationship between AUSA Jones and this Court that includes a 2017 Columbia University Law School news item (Ex. E – Words of Wisdom, Columbia Univ. Law School News (2-23-17)),¹¹ a related Columbia University Law School Annual Luncheon/Excellence Award ceremony announcement (Ex. F – Columbia Univ. Law School 2017 Luncheon Announcement (2-24-17)),¹² and the Medal For Excellence acceptance speech this Court contemporaneously delivered at that luncheon. The speech publicly conveyed the Court’s strong sentiments toward and admiration for

¹¹ See Columbia Law School News, *Words of Wisdom From Judge Anita B. Brody '58 – Medal for Excellence Winner Ruled on NFL Concussion Case* (Feb. 23, 2017), *supra*, at Ex. E.

¹² See Columbia Law School, *2017 Winter Luncheon/Medal for Excellence* (Feb. 24, 2017), *supra* at Ex. F.

its former law clerks and the type of personal life advice it has provided to them as effective members of its extended family. The news item stated that, “in her chambers, she is legendary for sharing her opinions on life and law with her clerks,” and that, “[a]s a trailblazing lawyer and judge, Brody feels duty-bound to be a mentor to her clerks...” (Ex. E – Words of Wisdom, Columbia Univ. Law School News (2-23-17)).

The news item also stated that, “[w]hen Brody turned 80 in 2015, her current clerks contacted all of her former clerks and asked them to send remembrances and family pictures for a digital album, because Brody has always counseled that a personal life should never be sacrificed for professional ambition. ‘Your family is more important than your career, but success in one area is not exclusive of success in the other,’ she has advised a generation of clerks.” (Ex. E – Words of Wisdom, Columbia Univ. Law School News (2-23-17)). Furthermore, the news item stated that, “Brody’s chambers at the U.S. District Court are a testament to her belief that you should never ‘be afraid to tell people how important being a parent is to you.’ Her bookshelves are full of photographs of her children and grandchildren, as well as photographs of her clerks and their families. The hallway leading to her office is lined with two-dozen portraits of Brody and her law clerks – one for every year she’s been on the bench. ‘Getting to work with my law clerks is one of the most exciting parts of my job,’ she has said. ‘they are exceptional lawyers and human beings.’” (Ex. E – Words of Wisdom, Columbia Univ. Law School News (2-23-17)). “Leading by example, she always shares with her clerks the secret of success. ‘The first principle of being a good lawyer is being a good person,’ she likes to say. “‘Integrity is what matters.’” (Ex. E – Words of Wisdom, Columbia Univ. Law School News (2-23-17)).

The publicly available Columbia University Law School news item (Ex. E – Words of Wisdom, Columbia Univ. Law School News (2-23-17)) appeared on the internet weblinked to the

announcement of Columbia University Law School's 68th Annual 2017 Winter Luncheon. The luncheon was held on February 24, 2017 at the infamous former Waldorf-Astoria Hotel, where this Court was awarded the Columbia Law School Medal for Excellence – "Columbia Law School's equivalent of an Olympic gold medal." (Ex. F – Columbia Univ. Law School 2017 Luncheon Announcement (2-24-17)).

An audio recording of the Court's acceptance speech delivered contemporaneously at the Columbia University Law School 68th Annual 2017 Winter Luncheon also appeared on the annual luncheon/award announcement webpage. It, too, revealed this Court's special sentiments toward, admiration for, and relationship with its former law clerks. (Ex. F – Columbia Univ. Law School 2017 Luncheon/Medal Announcement, at Speech (2-24-17)).¹³ "What also makes this occasion special is that I am joined by my former law clerks, most of whom attended Columbia Law School."¹⁴

Thus, a reasonable person, with knowledge of all the facts, – i.e., AUSA Jones' former clerkship with this Court and those facts set forth in the Columbia University Law School news item, annual luncheon/award announcement, and this Court's acceptance speech, would conclude that this Court's impartiality in the case at bar might reasonably be questioned. This Court might not actually harbor any bias against Defendant or Defense counsel, as Government counsel insists. However, the extra-judicial news item and annual luncheon/award announcement quoting and discussing the Court's relationship with its former law clerks, and this Court's contemporaneous internet-recorded speech concerning same, combined with AUSA Jones' former clerkship for this

¹³ See Anita Blumstein Brody, *Speech*, Columbia Law School 2017 Winter Luncheon/Medal of Excellence (Feb. 24, 2017), at: https://cdnapisec.kaltura.com/index.php/extwidget/preview/partner_id/1758691/uiconf_id/38497331/entry_id/1_dp09ipml/embed/dynamic.

¹⁴ *Id.*, at 0.48:00–0.53:00.

Court, casts the reasonable perception of this Court's bias in favor of AUSA Jones and his client, the U.S. Army Corps of Engineers, and thereby undermines the appearance of justice in our courts.

IV. The Legal Academy Has Long Compared Law Clerks to Court Relatives

At least one legal commentator had closely studied the relationship between judges and their former law clerks more than 25 years ago. She observed that “[j]udges simply act differently when a former law clerk appears in the judge’s court, regardless of the nature of the relationship between the judge and the former clerk.”¹⁵ According to this commentator, “former law clerks are in a situation factually comparable to a judge’s relatives” which can “threaten[] the integrity of the judicial process.” (emphasis added).¹⁶ Clearly, this legal commentator’s analogy between judges and their law clerks and judges and their personal family members rings true in the case at bar. Each of the revelations discussed above individually and collectively confirm the existence of an ongoing professional and personal relationship between this Court and its former law clerks, including AUSA Jones, that is analogous to an extended family relationship. Given the family-like dynamic of this relationship, it had been incumbent upon AUSA Jones to have disclosed to Defense counsel all of the material and relevant information about this ongoing special relationship, discussed above, *much earlier than* September 16, 2019 *and* September 23, 2019.

AUSA Jones intentionally chose to withhold from Defense counsel all of this relevant and material information concerning this special relationship between he and this Court. He only

¹⁵ See Leslie W. Abramson, *Specifying Grounds for Judicial Disqualification in Federal Courts*, 72 Neb. L. Rev. 1046, 1079 (1993), at: <https://pdfs.semanticscholar.org/1d0d/1cbf9cdd905d64011f9606d384f2f9bbe578.pdf>.

¹⁶ See *Id.*, at 1080. (“[F]ormer law clerks are in a situation factually [comparable to a judge’s relatives, whose presence in the judge’s court as a party, counsel, witness or possessor of an interest in the proceeding requires the judge’s recusal. Judicial recusal is mandated not because all judges love and will favor all of their relatives. Rather, the practice of presiding over a case in which close relatives are involved threatens the integrity of the judicial process. Likewise, the intense professional relationships between judges and their clerks support a definite, predictably applied criterion for conduct. Moreover, with close relatives, the judge is disqualified not as a result of any personal fault, but simply as a result of the ‘fortuity’ of the relative’s presence in the judge’s court.”) (emphasis added).

disclosed his mere clerkship with the Court from 14 years ago, and even then, waited to do so until after *one-year* had expired from the time AUSA Jones first introduced himself to Defendant’s counsel, and until after *three months* had expired from the time AUSA Jones first made his appearance in this case. Clearly, AUSA Jones’ failure to disclose such material and relevant information prior to his September 16, 2019 and September 23, 2019 correspondences strongly suggests that AUSA Jones and his employer, the United States, had hoped that this closer professional and personal relationship with the Court would not be discovered by opposing counsel.¹⁷ Thus, AUSA Jones’ withholding of such material and relevant information from Defense counsel arguably *constitutes an implied admission of the appearance of bias* from which a reasonable person would conclude that this Court’s impartiality in the case at bar might reasonably be questioned.

V. The Two Extra-Circuit Cases AUSA Jones Cites Do Not Absolve This Court of the Need for Recusal (Disqualification)

In his September 23, 2019 correspondence to Defense counsel, AUSA Jones cites two cases outside the Third Circuit – *Smalls*¹⁸ and *In re Cooke*¹⁹ – that he believes absolves this Court of the need to recuse itself from this case, but each is inapposite to the case at bar.²⁰ (Ex. D – AUSA

¹⁷ Since having received AUSA Jones’ September 23, 2019 reply letter, Defense counsel, based on information and belief, has become aware that AUSA Jones had previously withheld the disclosure of his former clerkship with this Court from opposing counsel in, at least, one other action in which Jones represented the United States – *Solow v. Lynch*, 2-15-cv-05148 (dismissed Dec. 6, 2016). In *Solow v. Lynch*, for example, Plaintiff’s counsel in that case informed Defense counsel that AUSA Jones had withheld his *verbal* disclosure of that relationship until the parties had already been *in-Chambers* attending a conference (where a photograph of AUSA Jones was likely displayed). See *Solow v. Lynch*, Docket Entry Nos. 5, 11, 12 Entered 12/02/2015, 05/172016, 06/22/2016).

¹⁸ See *Smalls v. Lee*, No. 12-cv-2083, 2016 WL 5334986, *17 (S.D.N.Y. Sept. 22, 2016).

¹⁹ See *In re Cooke*, 160 B.R. 701, 707 (Bankr. D. Conn. 1993).

²⁰ Unlike the movant in *Smalls*, Defense counsel, in the case at bar, has not filed this motion merely because AUSA Jones formerly served as this Court’s law clerk 14 years ago, or because of Defense counsel’s dissatisfaction with any ruling or order of this Court. And, whereas, in the case at bar, AUSA Jones admitted that he and this Court have maintained a professional and personal relationship during the 14 years since AUSA Jones completed his clerkship with the Court (“I have interacted with Judge Brody on occasions both professional and social over the fourteen [14]

Jones Reply Letter (9-23-19)). These two cases hold that a counsel's mere former clerkship with a judge before whom he/she now represents a party, and a judge's mere casual social acquaintances with an attorney present before the court and his client provides insufficient grounds, *alone*, to give the appearance of bias.²¹ These cases are easily distinguishable on their facts from the case at bar. Indeed, the case at bar is replete with indisputable evidence of AUSA Jones' longstanding 14-year professional and personal relationship with this Court (that, presumably, continues to the present day), which is more akin to a long term close friendship than to a mere casual or passing social acquaintance.²² And, this more intimate type of relationship is reaffirmed by this Court's ongoing publicly expressed extra-judicial statements conveying strong familial sentiments toward and admiration for, and a sense of obligation and responsibility for mentoring and providing life advice to, its former law clerks (presumably including AUSA Jones), whom it has continued to treat and memorialize in photographs displayed in Chambers as it has members of its extended family.

VI. AUSA Jones' Withdrawal of His Appearance and Reassignment of This Case to Another AUSA Would Not Entail a Substantial Waste of Government Resources

years since the completion of my clerkship"), the Court, in *Smalls*, "ha[d] no relationship with Ms. Denig, professional or otherwise." *Smalls v. Lee*, No. 12-cv-2083, slip op. at 36. In *In re Cooke*, unlike the case at bar, the judge and his wife "[were] at most casual social acquaintances of the debtor and the movant. [He had] never been to their home and they ha[d] never been to [his home]." In the case at bar, however, AUSA Jones admitted that, "I have interacted with Judge Brody on occasions both professional and social over the fourteen [14] years since the completion of my clerkship." Yet, AUSA Jones refused to address the extra-judicial statements contained in the *Federal Lawyer* magazine article, and he "decline[d] to provide [Defense counsel] with 'a list and description of all forms of contact and communication [he has] had with Judge Brody since the completion of [his] clerkship,'" as Defense counsel had requested. Consequently, although AUSA Jones admitted his maintaining a long-term professional and social relationship with this Court, and although this Court's extra-judicial statements convey that the Court has maintained more than mere casual social acquaintances with all of its former law clerks (presumably including AUSA Jones), it may reasonably be concluded, without evidence to the contrary having been proffered, that AUSA Jones and the Court may very well likely have developed a close personal friendship where each has been to the other's home.

²¹ *Id.*

²² See Merriam-Webster Dictionary, *Acquaintance*, at: <https://www.merriam-webster.com/dictionary/acquaintance> (defining an acquaintance as "a person whom one knows but who is not a particularly close friend."); Cambridge Dictionary, *Acquaintance*, at: <https://dictionary.cambridge.org/us/dictionary/english/acquaintance> (defining an acquaintance as "a person whom you know but do not know well and who is therefore not exactly a friend", or "a person that you have met but do not know well – a business acquaintance.").

Finally, AUSA Jones asserts that the withdrawal of his “appearance and reassignment of the matter to another AUSA would entail a substantial waste of government resources.” (Ex. D – AUSA Jones Reply Letter (9-23-19)). Much to the contrary, the facts strongly suggest that AUSA Jones’ assertion is meritless. In fact, AUSA Jones had not invested much time in the action at bar prior to the June 12, 2019 filing of his appearance. Aside from an introductory phone discussion and email to Defense counsel dated September 7, 2018, and brief email exchanges with Defense counsel dated April 2, 2019, June 10, 2019, and June 11, 2019, concerning Defendant’s forthcoming expert wetland delineation report, AUSA Jones has not invested a substantial amount of time in preparing for this matter. (Ex. G – Email Exchanges Between Defense Counsel & AUSA Jones (2018-2019)). The evidence instead reveals that *AUSA Gregory David* was the only Government attorney who had invested substantial time in this matter since March 2017.²³ This included AUSA David’s exchange of numerous emails with Defense counsel, attendance along with Defense counsel at the October 2017 settlement meeting, and preparation with input from Defense counsel of the parties’ initial joint communication on the status of confidential settlement negotiations during 2017-2018.

Contrary to AUSA Jones’ assertion, he has been directly involved in this matter only since the filing of his June 12, 2019 notice of appearance, and then, only minimally. His work on this matter has consisted merely of his participation in two less than one-hour telephone status conferences convened by Judge David Strawbridge on July 3, 2019 and August 9, 2019 (ECF Nos.

²³ The record clearly demonstrates that, since March 2017, AUSA Gregory David has prepared and filed or otherwise dispatched to the Court the following documents: (1) United States’ Status Conference Memorandum (ECF No. 170) (3-16-17); (2) United States’ Praecipe to Attach Exhibit to Status Conference Memorandum (ECF No. 172) (4-12-17); (3) United States’ Unopposed Motion for Extension of Time to Show Cause Why Motion to Dismiss Action Against John Pozsgai Should Not be Granted (ECF No. 185) (10-6-17); (4) The Parties’ Stipulation to Dismiss John Pozsgai (ECF No. 189) (11-2-17); and (5) United States’ Response to Pozsgai’s Notice of Motion (ECF No. 193 (6-21-19)).

200, 203), the drafting of a one-sentence transmittal letter dated July 26, 2019 to Judge Strawbridge (Ex. H – AUSA Jones Transmittal Letter (7-26-19)),²⁴ and the drafting of two one-page responses (during August and September 2019) to the confidential near-final and final settlement demands Defendant had prepared pursuant to the Court’s order of August 9, 2019. (ECF No. 202). In fact, AUSA Jones admitted during the July 3, 2019 status conference that he had not prepared much for the July 3, 2019 status conference and possessed little knowledge of or experience with federal wetlands law or science.²⁵ Consequently, AUSA Jones’ withdrawal (recusal) from this case and the case’s reassignment to another AUSA would not entail a substantial waste of government resources.

CONCLUSION

In sum, reasonable persons with knowledge of all the facts (i.e., AUSA Jones’ belated disclosure of his former clerkship with this Court from 2004-2005, AUSA Jones’ admission to an ongoing 14-year “professional and personal relationship” with this Court (which presumably continues to the present day), and the publicly available discussions about this Court’s ongoing professional and personal relationships with all of its former law clerks (including, presumably, AUSA Jones), as set forth in the publicly available May 2016 *Federal Lawyer* magazine article, the February 2017 Columbia University Law School news item and Annual Winter Luncheon/Excellence Awards announcement and this Court’s contemporaneous internet-recorded award acceptance speech), would conclude that this Court’s impartiality in the case at bar might

²⁴ AUSA Jones assisted AUSA Gregory David in the preparation of United States’ Response to Pozsgai’s Notice of Motion (ECF No. 193) (6-21-19). AUSA Jones also prepared a less than one-page transmittal letter to Judge Strawbridge, dated 7-26-19, enclosing a copy of the 7-17-19 letter the U.S. Army Corps of Engineers had prepared responding to and expressing its refusal to process Defendant’s previously filed Request for an Approved Jurisdictional Determination supported by an expert wetland delineation report and professional land survey.

²⁵ Defendant’s counsel has ordered production of the transcript from the July 3, 2019 status conference and will provide the Court with a copy of its relevant excerpts upon its forthcoming delivery.

reasonably be questioned based on the “appearance of bias,” which undermines the appearance of impartial justice in our courts. (*See In re Kensington Int’l Ltd.*, 368 F.3d 289, 294 (3d Cir. 2004) “[T]he test for disqualification under § 455(a) is not *actual* bias; it is the *perception* of bias.” (emphasis in original)).

Given the record, AUSA Jones’ refusal to recuse himself from the action at bar despite Defense counsel having provided him with sufficient grounds to do so²⁶ and having shown this Court that his recusal would not entail a substantial waste of government resources, and considering that the purpose of 28 U.S.C. § 455(a) is to preserve the public’s perception in the integrity of the judicial system, this Court should properly recuse itself from the current matter.

September 30, 2019

Respectfully submitted,

<p>THE KOGAN LAW GROUP, P.C.</p> <p><u>By: /s/ Lawrence A. Kogan</u> LAWRENCE A. KOGAN Pro Hac Vice (NY # 2172955) 100 United Nations Plaza, Suite #14F New York, NY 10017 (212) 644-9240 lkogan@koganlawgroup.com</p> <p>Attorney for Defendant Gizella Pozsgai</p>	<p>LIEBMAN FAMILY LAW</p> <p><u>By: /s/ David Sowerbutts</u> DAVID SOWERBUTTS PA ID # 36458 The Atrium, 4 Terry Drive, Suite 4 Newtown, PA 18940 215-860-8200 dsowerbutts@liebmannfamilylaw.com</p> <p>Attorney for Defendant Gizella Pozsgai</p>
---	--

²⁶ While it is not uncommon for former law clerks to appear as counsel before judges for whom they worked, the Eleventh Circuit Court of Appeals has ruled on more than one occasion that, “[i]f a clerk has a possible conflict of interest, it is the clerk, not the judge who must be disqualified.” (emphasis added). *See Byrne v. Nezhad*, 261 F.3d 1075, 1101-1102 (11th Cir. 2001), quoting *Hunt v. American Bank & Trust Co.*, 783 F.2d 1011, 1016 (11th Cir. 1986) (as discussed in two recent Federal Judicial Center publications). This is a common-sense rule with which reasonable prudent persons would agree.

CERTIFICATE OF SERVICE

I, Lawrence A. Kogan, hereby certify that the foregoing document was served via the Court's ECF system to all counsel of record on this 30th day of September, 2019.

By: /s/ Lawrence A. Kogan
LAWRENCE A. KOGAN