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CONGRESSIONAL REFERENCE  
TO THE  
UNITED STATES COURT OF FEDERAL CLAIMS

fax  
202 383-6

Congressional Reference No. 98-887 X

RICHARD M. BARLOW,  
of Santa Fe, New Mexico,

(Senior Judge Bruggink)

THE UNITED STATES

PLAINTIFF'S APPENDIX D NOTICE OF EXCEPTION

Plaintiff Richard M. Barlow ("Barlow") submits this notice pursuant to paragraph 8 of Appendix D of the Rules of the United States Court of Federal Claims. The Plaintiff takes exception to the Hearing Officer's report, but has decided not to pursue his appeal to the three-judge panel because he believes that the circumstances surrounding his termination by the Department of Defense and the suspension of his security clearance, and his charge that Executive Branch officials misled Congress about the nature and extent of Pakistan's nuclear program, can only be fully investigated by the Congress of the United States.

Mr. Barlow's July 8, 1998 Congressional Reference and Private Relief Bill asked the Hearing Officer to report findings of fact and recommendations of law to Congress sufficient to inform it of the nature, extent, and character of his claims for compensation due to:

- (1) personnel actions taken by the Department of Defense affecting Mr. Barlow's employment at the Department (including Mr. Barlow's top secret security clearance) during the period of August 4, 1989 through February 27, 1992; and

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(2) Mr. Barlow's separation from service with the Department of Defense on February 27, 1992.

S. 2274, 105<sup>th</sup> Cong. § 1 (1998); S. Res. 256, 105<sup>th</sup> Cong. (1998):

A Congressional Reference permits equitable relief even when a stringent application of the law does not. An equitable claim need only be rooted in a legal wrong and need not meet all of the elements of a legal cause of action. An equitable claim is established where "the government has engaged in wrongdoing, and the court's evaluation of that wrongdoing involves a legal determination." *Menominee Indian Tribe v. United States*, 39 Fed. Cl. 441, 456-57 (1997) (quoting *Estate of Brunde v. United States*, 35 Fed. Cl. 99, 109 (1995)).

I. **THE DOD TERMINATED MR. BARLOW BECAUSE HE DISCLOSED EXECUTIVE BRANCH OFFICIALS' EFFORTS TO CONCEAL INTELLIGENCE FROM CONGRESS**

Mr. Barlow's DOD supervisors terminated him because he disclosed efforts by Executive Branch officials to withhold intelligence regarding Pakistan's nuclear program from Congress the Solarz and Frestler Amendments. Mr. Barlow's immediate supervisor, Gerald Brubaker, wrote two memoranda in early August 1989 documenting his reasons for recommending his termination. Both memoranda include Mr. Barlow's mid-July disclosures among the reasons for his termination:

Mr. Barlow said he had learned that CIA and State representatives had created a misleading picture of Pakistan's activities.

On or about July 19, 1989, Mr. Barlow said that he had learned of a briefing of Congressmen and staff of the House Committee on Foreign Affairs to be presented by the CIA on nuclear activities. . . . He said that he subsequently talked with those State officials present and had learned that Congressman Solarz and Congressional staff had been given a misleading and incomplete picture regarding Pakistan's illicit procurement activities in the U.S. He noted in particular that his former supervisor at the CIA, [REDACTED], had made misstatements.

Joint Trial Exhibits 6 and 8. Mr. Brubaker testified that those disclosures contributed to his decision to recommend Mr. Barlow's termination. Mr. Brubaker shared his memoranda with

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Victor Rostow and James Hinds, Mr. Barlow's second- and third-line supervisors, and both men signed off on the termination. See, e.g., Plaintiff's Trial Exhibits 5, 6, and 8 (copies of Rostow and Hinds).

In addition, Mr. Rostow testified at trial that Mr. Barlow's termination was also based in part on his August 2<sup>nd</sup> or 3<sup>rd</sup> disclosure to Mr. Brubaker and Mr. Rostow that Deputy Assistant Secretary of Defense Hughes had falsely testified that day (or the day before) on Pakistan's ability to modify F-16s for nuclear delivery. Mr. Brubaker and Mr. Rostow were "concerned" about Mr. Barlow's charge, but they decided not to investigate it or report it to higher-ups. Trial Transcript, at 861-62. Instead, Mr. Rostow approved the termination that day and the next day, August 4<sup>th</sup>, Mr. Brubaker handed Mr. Barlow his termination notice. Joint Trial Exhibit 7.

II. MR. BARLOW TOLD HIS DOD SUPERVISORS ABOUT SEVERAL POTENTIAL VIOLATIONS OF LAW.

The Hearing Officer found, and the record contains additional evidence, that Mr. Barlow told his DOD supervisors about a number of potential illegalities by Executive Branch officials on several occasions shortly before the DOD suspended his security clearance and terminated him in August 1989. In or around February 1989, after CIA [redacted] and NIO officers blocked Mr. Barlow's access [redacted] concerning Pakistan's nuclear program. [redacted] he told his DOD supervisors his concern that these officers were punishing him because he had previously blown the whistle on false testimony provided to Congress on Pakistan's illegal nuclear procurement activities and on efforts to conceal from Congress [redacted] violation of the Pressler Amendment. He told his DOD supervisors his concern that the NIO and [redacted] officers were engaged in an effort to perpetuate a cover-up of the intelligence from Congress:

- Facts [redacted] the Pressler Amendment certification in 1988 were being withheld from Congress: "I briefed him [REDACTED]"

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and my conclusions relating to the activities of people in the community regarding cooking the intelligence on Pakistan." Trial Transcript, at 203.

- Facts [redacted] the Solari Amendment were being withheld from Congress: "My views on the Einsel testimony. And once again, linking it back into the prior false testimony and cover-up." See, e.g., Trial Transcript, at 193. In July 1987, Mr. Barlow had been sent to a House Foreign Affairs subcommittee briefing on the Solari Amendment by the National Intelligence Officer, Retired General Einsel. During the briefing, Mr. Barlow concluded that Mr. Einsel was lying about the extent of Pakistan's illegal nuclear procurement efforts in the U.S. Mr. Barlow corrected Gen. Einsel on the record.
- State Department officials had obstructed an investigation into Pakistan's illegal nuclear procurement efforts in the U.S. by tipping off the target of a sting operation. "I told them about the incidents involving the criminal activity, what appeared to be criminal activity, by senior State Department employees." Trial Transcript, at 200.

In March 1989, the Hearing Officer found that Mr. Barlow told his supervisors that Ret. Gen. Einsel had again testified falsely during a recent House Foreign Affairs subcommittee briefing on Pakistan's nuclear program. "During this discussion, Mr. Barlow told them that the testimony provided was misleading and inaccurate." August 19, 2002 Opinion, at 9-10.

In mid-April 1989, Mr. Barlow drafted a classified report for the incoming Secretary of Defense analyzing Pakistan's nuclear program. Mr. Barlow's analysis concluded that Presler certification was not possible [redacted] "noted the Solari Amendment was continuing to be violated," Trial Transcript, at 212, and "discussed Pakistan's ability to deliver nuclear weapons weapons using F-16s that the U.S. had earlier sold to Pakistan." December 21, 2001 Opinion, at 5. A DOD employee pressured Mr. Barlow to change his conclusions on the Presler Amendment: he "pressured me very, very very heavily to soften that language." Trial Transcript, at 211. Mr. Barlow refused to soften his conclusions: "I changed it to -- under pressure from him -- to 'extremely difficult or impossible.'" Id. at 211. His report was subsequently rewritten without his knowledge and

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incoming Secretary of Defense Cheney received only the re-written report. *December 21, 2001 Opinion*, at 5.<sup>1</sup>

In mid-July 1989, Mr. Barlow told his DOD supervisor, Gerald Brubaker, that a CIA witness had provided potentially misleading testimony to the Solarz subcommittee of the House Foreign Affairs Committee during a July 12, 1989 briefing on Pakistan's illegal nuclear procurement efforts. According to Mr. Brubaker, Mr. Barlow told him that the briefing "created a misleading picture of Pakistan's activities" and that the subcommittee "had been given a misleading and incomplete picture regarding Pakistan's illicit procurement activities in the U.S." Joint Trial Exhibits 6 and 8. Mr. Brubaker testified:

Q. Essentially what he told you, and correct me if I am wrong, is that he had information that certain government officials had misled Congress?

A. That's approximately what he said.

*August 19, 2001 Opinion*, at 19.

In early August, Mr. Barlow told his DOD supervisors that testimony by a Deputy Assistant Secretary of Defense provided to Congress falsely stated that modifying F-16s to deliver nuclear weapons "far exceeded the state of the art in Pakistan and could only be accomplished with a major release of data and industrial equipment from the U.S." See Trial Transcript, at 262-63, and Plaintiff's Trial Exhibit 51. "Mr. Barlow believed this was false, and on August 2 or 3, told Mr. Brubaker, Mr. Rostow, and the individual who had prepared the testimony, Mr. MacDermoy, his concerns about the truthfulness of the Hughes testimony."

*August 19, 2002 Opinion*, at 25. The next day, August 4, Mr. Brubaker told him he was being terminated. Joint Trial Exhibit 7. His security clearances were immediately stripped. Plaintiff's Trial Exhibits 13-17.

<sup>1</sup> Mr. Brubaker reviewed Mr. Barlow's draft and was aware of its content. See Plaintiff's Trial Exhibit 39.

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**II CIRCUMSTANTIAL EVIDENCE CORROBORATED MR. BARLOW'S CHARGES**

Evidence at trial corroborated Mr. Barlow's charge that Executive Branch officials may have withheld facts from Congress . . . the Pressler Amendment in the late 1980s. Gordon Oehler, a high-ranking CIA official at the time, stated under oath his concern that intelligence on the Pressler Amendment was being politicized: "as a result of such shaping [of the intelligence], there were times when the picture most consistent with the intelligence community's positions as a whole was not presented"). Plaintiff's Trial Exhibit 52, at Oehler Decl. ¶ 14.

CIA official Charles Burke testified that the Pressler certification

Trial Transcript, at 702-09. Indeed, Mr. Burke testified that his concerns about the inaccuracy of the Pressler certification were so strong that he formally requested an Inspector General investigation, but was rebuffed. *Id.* at 708-09. He also went to the Senate and briefed staffers, including George Tenet, on his concerns. Another CIA witness with responsibility for Pakistan's nuclear program testified that

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Trial Transcript, at 624-25. The State Department Inspector General testified that after investigating Mr. Barlow's charges he concluded that officials were "[p]hrase this diplomatically -- trying not to see what was happening." Plaintiff's Trial Exhibit 52, Funk Deposition, at 32. Undersecretary of Defense Paul Wolfowitz subsequently testified that he "specifically sensed that people thought we could somehow construct a policy on a house of cards that the Congress wouldn't know what the Pakistanis were doing." Plaintiff's Trial Exhibit 52, Wolfowitz February 27, 2001 Confirmation Testimony.

The record also contains evidence corroborating Mr. Barlow's charge that Executive Branch officials withheld facts from Congress the Solari Amendment. Indeed, the Hearing Officer concluded that "the Government made no attempt to defend the accuracy of General Einsel's [July 1987] statement. Mr. Charles Burke ... agreed with Mr. Barlow and indeed believed that the error was not accidental." August 19, 2002 Opinion, at 7. Mr. Burke testified, like Mr. Barlow, that the full extent of Pakistan's illegal nuclear procurement efforts was concealed from Congress:

my belief is that, based on a briefing that was given in July 1987, that General Einsel gave to the Congress, that Einsel had not been fully informing the Congress on procurement issues that related primarily to the Solari Amendment.

Id. at 697-98.

State Department Obstruction Of Justice. The State Department Inspector General investigated Mr. Barlow's allegations and concluded that two high-ranking officials were "eminently convictable" for obstructing justice: "It was proven beyond a doubt." Plaintiff's Trial Exhibit 52, Funk Deposition Transcript, at 28-29.

The July CIA Briefing on Pakistan's Illegal Procurement Efforts. The July 12, 1989 CIA briefing, like the earlier briefings by General Einsel, primarily concerned Solari Amendment issues, i.e., the extent of Pakistan's illegal procurement efforts -- a topic Mr. Barlow correctly believed officials were not fully disclosing to Congress. Marvin C[], a CIA analyst who attended the July briefing, testified that the CIA witness, Mr. S[], provided a briefing

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that "probably wasn't as accurate as it could be because of leaving a few additional points out that Mr. S[] may not have thought he could answer." Trial Transcript, at 661. As a result, Congressman Solax "indicated during the briefing that he was concerned that Mr. S[] was being evasive." *August 19, 2002 Opinion*, at 16.

The Hearing Officer agreed, after viewing Mr. S[]'s trial testimony, that he could understand why his July 1989 briefing bore earmarks of wrongdoing:

It is easy to visualize why his manner might prompt someone, particularly given the setting at the subcommittee hearing to suspect he was not disclosing all the facts.

He may well have left an impression that he was trying to hide something[.]

*Id.* at 16-17. The Hearing Officer concluded, however, that there was no actual violation of law ~~during the briefing— even though the transcript of the briefing was entirely off-limits during this proceeding and the Court (and the plaintiff) were unable to review it.~~ *August 19, 2002 Opinion*, at 17.

The F-16 Testimony. Finally, proof at trial corroborated Mr. Barlow's concerns that the August 1989 testimony of Deputy Assistant Secretary of Defense Hughes falsely downplayed Pakistan's ability to use F-16s for nuclear delivery by stating that it could only occur with a major release of technical data and equipment from the U.S.

Mr. Barlow testified at trial that all of the facts contained in Trial Exhibit 26 and more were known to Executive Branch officials long before the Hughes testimony. Trial Transcript, at 554-59.

Gordon Oehler, a high-ranking CIA official, testified that within the intelligence community there was "general agreement at the time that Pakistan's F-16 jets, which had been delivered in the early 1980s had the technical ability to deliver nuclear weapons[.]" Plaintiff's

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Exhibit 52, Oehler Decl. ¶12. The author of the Hughes testimony, Michael MacMuray, testified, however, that he did not include intelligence in the assessment because he was tasked with supporting the administration's stated policy of securing Congressional approval of the proposed F-16 sale. See, e.g., Trial Transcript, at 964. CIA Director Robert Gates later testified before Congress that the "F-16s don't require those changes, I don't think, to deliver a weapon." See also Plaintiff's Trial Exhibit 50 (declassified NSC report to Congress stating that "Currently, Pakistan probably would rely on its F-16 fighters . . . for such a mission").

The Hearing Officer's pre-trial rulings blocked Mr. Barlow from presenting additional evidence to support his claims. During discovery in this matter, the Government asserted the state secrets privilege over [redacted] evidence Mr. Barlow contended would corroborate his charges that Executive Branch officials misled Congress for a number of years [redacted] the extent of its illegal efforts to

~~export nuclear technology and components from the U.S., and its ability and efforts to justify~~ U.S.-supplied F-16 jets to deliver nuclear weapons. The Hearing Officer upheld the invocation of the privilege in its entirety, and not a single word [redacted] was released to plaintiff. See *Barlow v. United States*, No. 98-877X, 2000 U.S. Claims LEXIS 156 (July 12, 2000).

Because he was denied the [redacted] evidence necessary to corroborate his claims, Mr. Barlow sought at trial to present testimony by knowledgeable officials. The proposed testimony was very generalized, in an effort to avoid implicating sources and methods of intelligence gathering, and was already in the public realm (or had been released to plaintiff by the Government in unclassified form). Two days before trial, the Government asserted the state secrets privilege over that testimony, as well. The Government argued that the state secrets privilege covered [redacted] all testimony on any fact based upon classified intelligence of any level - - despite the fact that the in camera trial was conducted at the SECRET level. The Government argued that "virtually all of the classified information that could be relevant in this case is information over which the state

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secrets privilege has been invoked." *Defendant's May 29, 2000 Motion For Clarification Regarding The Protective Order Concerning State Secrets*, at 9 n. 1.

Richard Kerr, the Deputy Director of the CIA for Central Intelligence, submitted a signed declaration containing a single sentence that affirmed, under oath, his conclusion

Not only was Mr. Kerr's conclusion generic, it was already in the public realm: he was widely quoted in a 1973 *New Yorker* magazine article making the same point. Nonetheless, the substance of his declaration was entirely redacted. See Plaintiff's Trial Exhibit 52, at Kerr Decl. ¶ 6. Gordon Oehler, a high level CIA official at the time, similarly provided his general conclusion on Pakistan's ability to modify the F-16s for nuclear delivery, but portions of his declaration were likewise redacted. See Plaintiff's Trial Exhibit 52, at Oehler Decl. ¶ 12.<sup>2</sup>

Even though evidence corroborated Mr. Barlow's charges that potential illegalities occurred, the Hearing Officer upheld the Government's broad assertion of the state secrets privilege, preventing Mr. Barlow from introducing not only [redacted], but testimonial evidence to further corroborate his charges that Executive Branch officials misled Congress. For example:

- Mr. Barlow told his supervisor Mr. Embaker that a July 12, 1989 CIA briefing to the Hill "created a misleading picture of Pakistan's activities," but the transcript of that July 12, 1989 briefing was withheld from plaintiff in its entirety. Defendant was permitted to make use of it, however.<sup>3</sup>

<sup>2</sup> The trial record also contains numerous examples where Mr. Barlow and other witnesses were unable, in this SECRET level proceeding, to answer questions because of the Government's invocation of the state secrets privilege over all classified information. See, e.g., Trial Transcript, at 142-44 ("I'm constrained from explaining this"), 146, 154, 167-69, 171-72, 192, 211 ("The conclusions were that -- basically, the initial conclusion on Predator [redacted]. Mr. Mackinnon pressed me very, very very heavily to soften that language. I changed it to -- under pressure from him -- to 'extremely difficult or impossible.' [Redacted]"), 214.

<sup>3</sup> The Hearing Officer allowed the Government's witness on this briefing to testify at trial after he had reviewed an unredacted version of the transcript. See generally Plaintiff's May 2, 2002 Motion in Limine Regarding The Government's State Secrets Privilege.

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- Mr. Barlow told his DOD supervisors that the Presler certification in 1988 and 1989 was false, but even the most generic testimony supporting Mr. Barlow's charge were withheld from plaintiff in their entirety.
- Mr. Barlow told his DOD supervisors that CIA witnesses were grossly mistating Pakistan's illegal efforts to export nuclear components from the U.S. Again, that Mr. Barlow contended would corroborate his charges were withheld from him in their entirety.
- Mr. Barlow told his DOD supervisors that August 3, 1989 testimony by a Deputy Assistant Secretary of Defense falsely stated that modifying F-16s to deliver nuclear weapons "far exceeded the state of the art in Pakistan and could only be accomplished with a major release of data and industrial equipment from the U.S." With one exception, Mr. Barlow was blocked from all testimonial evidence on this issue.

The Hearing Officer recognized that his state secrets rulings severely hampered Mr. Barlow's ability to prove his case:

The Government is hypersensitive [redacted]. Unfortunately, that unavoidably conflicts with the level of detail that you can go into on the reasonableness issue.

Trial Transcript, at 185. Nonetheless, he concluded that Mr. Barlow did not reasonably believe that potential illegalities had occurred. *August 19, 2001 Opinion*, at 34.

**IV. THE HEARING OFFICER'S LEGAL RECOMMENDATIONS WERE FLAWED**

Mr. Barlow also takes exception to several of the Hearing Officer's legal recommendations. The Hearing Officer held that Mr. Barlow could not recover on equitable grounds in this Congressional Reference because there were no legal grounds for recovering for the loss of his security clearance and his termination. The Court recommended that Mr. Barlow's disclosures of potential illegality were not covered by the Whistleblower Protection Act or common law retaliatory discharge because:

1. His supervisor believed it possible that Mr. Barlow might discuss classified information with cleared Congressional staffers. *August 19, 2002 Opinion*, at 34-35 ("the

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potential that Mr. Barlow would contact Hill staffers [] would not be an improper ground for the discharge"), 36 ("Mr. Barlow had no right to make the threatened disclosure, even if the staffers were cleared"). The basis for this potential discussion with Congress was Mr. Brubaker's unsworn assertion in his August termination memorandum that Mr. Barlow had threatened to "straighten out" the Hill on facts pertinent to the Solarz Amendment. Joint Exhibit 8. When cross-examined under oath, however, Mr. Brubaker later recanted his story:

Q. Just so we're clear, then, I take it that your recommendation that Barlow be terminated had nothing to do with a perceived risk that he would go to Congress?

A. That's absolutely correct.

Brubaker December 21, 2000 Deposition Transcript, at 217.

Mr. Barlow denied making any such threat and Mr. Rostow testified at trial that he did not consider Mr. Brubaker's allegation to be credible. See Trial Transcript, at 256 ("I would say I probably had contrary evidence from Mr. Barlow that he would not do it"). A several month long Department of Defense investigation into Mr. Brubaker's allegations cleared Mr. Barlow, finding "no information" to support Mr. Brubaker's allegations and a "significant amount of detail in the investigative reports which refutes the allegations made against him." Plaintiff's Trial Exhibit 22.

2. An effort to correct the testimony was underway. *August 19, 2002 Opinion*, at 17 ("Moreover, subcommittee members were also assured, before the briefing ended, that the CIA would furnish the subcommittee with additional information responsive to the oral questions").

3. Although Mr. Barlow had received an objective evaluation of "Exceeds Fully Successful" and a promotion shortly before his termination, his supervisor claimed that he had long intended to terminate him. The Hearing Officer's recommendation relied heavily on Mr. Brubaker's April 1989 notes criticizing Mr. Barlow's performance. Mr. Brubaker was Mr. Barlow's co-worker at the time, not his supervisor. His notes, which recommend postponing Mr. Barlow's promotion, were written after Mr. Brubaker heard a number of Mr. Barlow's

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disclosures. Thus, they are consistent with Mr. Barlow's whistleblower contention because they show that shortly after Mr. Barlow told Mr. Brubaker about potential illegalities in early 1989, Mr. Brubaker began to contemplate taking adverse actions against him.<sup>4</sup> Moreover, Mr. Barlow's actual supervisors at the time disregarded Mr. Brubaker's complaints as trivial and, instead, gave Mr. Barlow high marks and promoted him. See, e.g., *Hampson v. DOJ*, No. 93-3282, 1994 U.S. App. LEXIS 429, at \*5-\*6 (Fed. Cir. Jan. 7, 1994) (employer's receipt of "fully successful" evaluation meant Government failed to prove alleged performance problems by clear and convincing evidence: "[T]he objective evidence of Hampson's past performance in the form of satisfactory or better written evaluations . . . belie the conclusion that Fuller had sufficient cause to question Hampson's supervisory abilities").

4. Mr. Brubaker had a legitimate reason for terminating him: Mr. Brubaker claimed that he discovered in late July 1989 that Mr. Barlow had not been reading certain classified documents. *August 19, 2002 Opinion*, at 24. In his summary judgment opinion, however, the Hearing Officer found that:

It is undisputed, however, that Mr. Barlow's job description did not contain any specific requirement for review of those documents, and in his deposition testimony in this case, Mr. Brubaker stated that Mr. Barlow's failure to review the documents had not affected his performance one way or the other. It is also undisputed that Mr. Barlow visited the NRIB document room at various times from April through July.

*December 21, 2001 Opinion*, at 12.

5. The Hearing Officer also found that the loss of a security clearance cannot constitute an equitable wrong for purposes of a Congressional Reference because it gives rise to no legal claim. See *December 21, 2001 Opinion*, at 24-25 (citing *Dept. of the Navy v. Egan*, 484 U.S. 518 (1988)).

<sup>4</sup> Indeed, he contacted DOD security during this time and questioned whether an employee could be trusted with classified information if he was obtaining psychiatric treatment -- although Mr. Barlow was not receiving psychiatric treatment. It later came to light that Mr. Brubaker was referring to Mr. Barlow.

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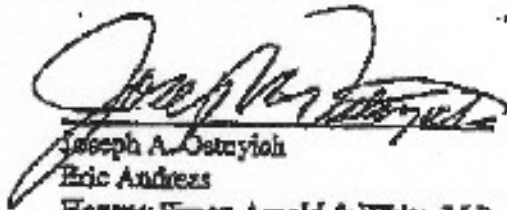
6. The Hearing Officer also found that the DOJ's actions did not constitute equitable claims based on intentional infliction of emotional and blackmailing. *Id.*

For these and other reasons, Mr. Barlow takes exception to the Hearing Officer's report, but will not formally press his appellate rights because he believes that Congress is the appropriate forum to resolve his claims.

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Respectfully submitted,



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Date: October 16, 2002

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Plaintiff's Appendix D Notice of Exceptions was served by

mail on October 17, 2002 on:

*Overseas Office*

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Assistant Director  
Commercial Litigation Branch, Civil Division  
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