IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JACQUELINE STEVENS, Plaintiff, vs. ERIC HOLDER, JR., Attorney General of the United States, et al., Defendants.	)	CIVIL ACTION NO.: 1:12-CV-1352-ODE

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Bruce Perrin Brown
Georgia Bar Number 064460
BRUCE P. BROWN LAW, LLC
1123 Zonolite Road, N.E.
Suite 6
Atlanta, Georgia 30306
Telephone: 404-881-0700
bbrown@brucepbrownlaw.com

R. Keegan Federal, Jr.
Georgia Bar No. 257200
R. O. Lerer
Georgia Bar No. 446962
THE FEDERAL FIRM, LLC
750 Hammond Drive
Building 12, Suite 200
Atlanta, Georgia 30328
Telephone: (678) 434-4044
keegan@fedfirm.com
ray@fedfirm.com

Attorneys for Plaintiff

I. INTRODUCTION

This case presents an assault on core Constitutional values by senior administrators who are charged with managing the deportation procedures of our immigration system. It is fundamental equal protection doctrine that Government may not create a "class of one" to inflict punishment for speech that the Government finds offensive. Yet these administrators, the Defendants, have undertaken to bar a citizen, the Plaintiff, from the Executive Office of Immigration Review ("EOIR") "courtrooms" in which they seek to do the public's business. For some actions they acted absent any pretense of legality. For others, their administrative weapons of choice are regulations that are, at least ostensibly, facially neutral. But for over a century, the Supreme Court has made clear that such superficially neutral rules may not be used to hide Constitutionally impermissible conduct. As the Supreme Court stated in *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886): "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the

Constitution."[1]

The Government here contends that Professor Stevens has no constitutional right to attend deportation proceedings. Professor Stevens emphatically disagrees, but the Government's argument misses the point. Though a person may have no "right" to a particular governmental benefit, a benefit may not be denied on a basis that infringes upon protected interests – particularly, the freedom of speech. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (Stewart, J). Even if access to hearings is not a right, a point which Professor Stevens does not concede, excluding an individual on the basis of the individual's speech is patently unconstitutional because it allows the Government to use its power to produce indirectly a result which it could not command indirectly. *Id.*

This case is directly in line with *Yick Wo* and *Sinderman.* Defendants, EOIR employees, singled out Professor Stevens because of her sustained criticism of EOIR's deportation review process, and in particular the conduct of Defendant Cassidy. In response to her criticisms, many of which reverberated in the national media, the Government targeted Stevens and did what they have never done with any

[1]In *Yick Wo,* an ordinance required Governmental consent before a person could operate a laundry in a building constructed of materials other than brick or stone. Permits were granted to all but one of the non-Chinese applicants for laundries in wooden buildings, and to none of 200 Chinese applicants. The Supreme Court reversed Yick Wo's conviction under the ordinance because, though facially neutral, the law had been applied so as to deny Chinese citizens equal protection of the laws. *Id.* at 362-63.

other person: in an act of outrageous administrative caprice, they expelled her from a Government building for no reason at all, and then lied about it.

This motion, however, is addressed not at the underlying merits of the case, which will be tried to a jury, but narrowly to the defense of judicial immunity that Defendants have interposed. As will be shown below, based on facts with respect to which there is no genuine issue to be tried, Defendants Smith and Keller have no judicial immunity because they are administrators and the action complained of is administrative, not judicial. *Forrester v. White,* 484 U.S. 219, 227-229 (1988). Defendant Cassidy may have judicial immunity with respect to his decision to exclude Professor Stevens from his courtroom, as the Court has already held. But Defendant Cassidy went further. After Professor Stevens had left Defendant Cassidy's courtroom, and was sitting quietly in the EOIR waiting room, Defendant Cassidy directed federal security officers (over whom he has no jurisdiction) to expel Professor Stevens from the federal building. Defendant Cassidy's actions were totally unrelated to any adjudication and were not remotely judicial; accordingly, under scores of cases and direct authority from the Eleventh Circuit and the United States Supreme Court, Defendant Cassidy is not entitled to judicial immunity.

II. FACTUAL BACKGROUND

A. Professor Stevens

Plaintiff Stevens is a Professor of Political Science and Legal Studies at Northwestern University in Evanston, Illinois. She is the author of scores of articles and two major books in her field, STATES WITHOUT NATIONS: CITIZENSHIP FOR MORTALS, published by the Columbia University Press in 2009, and REPRODUCING THE STATE, published by Princeton University Press in 1999. Stevens was awarded a Guggenheim Fellowship[2] for 2013 – 2014. (Plaintiffs' Responses to Federal Defendant Mooney First Set of Interrogatories, Ex. 1).

B. Stevens' Writing Attracts Intense EOIR Attention

Since 2008, Professor Stevens' work has focused on deportation, including U.S. immigration courts' adjudications and the alarming number of U.S. citizens who have been wrongly deported. The evidence developed in discovery shows in remarkable detail how EOIR reacted to Stevens' writings, which attracted an unusual amount of attention in Atlanta, because they focused on Defendant Cassidy, and in Falls Church, Virginia, where EOIR's headquarters and public relations team mobilized to counter the negative publicity.

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[2] Guggenheim Fellowships are grants that have been awarded annually since 1925 by the John Simon Guggenheim Memorial Foundation to those "who have demonstrated exceptional capacity for productive scholarship or exceptional creative ability in the arts." (www.gf.org).

In depositions, EOIR witnesses admitted that they singled out Stevens for special attention because of her writings, attention that included tracking Stevens' visits to EOIR courtrooms throughout the country and blocking Stevens' access to court proceedings. For example, on June 13, 2008, Stevens published a post on her blog, "States Without Nations," with the headline, "U.S. Citizen Falsely Imprisoned by ICE since August 31, 2006, Immigration Court Malfeasance." [Doc. 157, p. 7]. In the blog, Stevens explained that Defendant Cassidy had terminated a U.S. citizen's deportation proceeding in 2006 (because he was a U.S. citizen) but ICE appealed and the citizen remained in custody. EOIR failed to insure service of the appeal on the indigent citizen's pro bono attorney. Two years later, in 2008, the citizen's attorney learned that his client was still in custody and that EOIR's oversight denied his client the opportunity to be released on bond pending appeal. Defendant Cassidy two years later, per the remand, issued a written opinion again terminating the deportation order, but in the order Defendant Cassidy altered the timeline, changing the date of his first order from August 31, 2006 to May 13, 2008, thus erasing from the official record the two years of hardship created by this egregious mistake. (*Id.*).

Stevens' post attracted EOIR's immediate attention.[3] On June 17, 2008, an

[3] There is no indication that EOIR was concerned about the underlying case and the injustice of incarcerating someone by mistake for two years. Instead, this was a public relations issue.

EOIR official forwarded Stevens' post to Cassidy. The same day, Cassidy sent an email reply, stating "[REDACTED].[4] Further resent the implication that I LIE or would risk my career to cover-up for anybody!"

In March and April, 2009, Stevens published posts on EOIR's practice of excluding members of the public from immigration proceedings in detention facilities, work that appeared as well in a June 6, 2009 article in *Nation* entitled "Secret Court Exploit Immigrants." Again Stevens' publications attracted an unusual amount of attention at EOIR, and were circulated to a number of EOIR officials. [Doc. 157, pp. 11 – 16].

In April, 2009, Stevens published on her blog an account of Defendant Cassidy's deportation of Mark Lyttle, a U.S. citizen. In December, 2008, Defendant Cassidy ignored Lyttle's sworn statement of U.S. citizenship and ordered him deported to Mexico, even though Lyttle was born in North Carolina, speaks no Spanish, has no relatives in Mexico, and has two brothers serving in the United States Army. Stevens' post was highly critical of Cassidy running roughshod over the rights

[4] According to Defendants' Privilege Log, the remainder of the email is protected under the "deliberative process privilege" because it reflects discussions between Defendant Cassidy and Public Affairs about "proposed responses to Jackie Stevens' question." *But see Burka v. New York City Transit Authority*, 110 F.R.D. 660, 667 (S.D.N.Y. 1986) (deliberative process privilege unavailable where deliberative process is the subject of the litigation). Whether there is any legal or factual basis for asserting this privilege will be addressed at trial.

of pro se Lyttle, especially in light of Lyttle's written claim of U.S. citizenship and his documented mental disabilities.

What is striking about EOIR's reaction to the Lyttle story was the preoccupation with how Cassidy's feelings might have been injured by the negative publicity, rather than concern over what EOIR had done to Mark Lyttle. On April 27, 2009, EOIR's Elaine Komis sent an email to Fatimah Mateen, then with EOIR's Office of Legal and Public Affairs, with a link to Steven's blog post, stating "Two Jackie Stevens stories that unfairly portray Judge Cassidy's adjudication of this case. He is concerned because the blogs are on Benders." [Doc. 157, p. 18]. ("Benders" refers to *Benders Immigration Bulletin*, published by LexisNexis.) The same day, on April 27, 2009, Ms. Mateen told Ms. Mooney: "Also, I just received a call from IJ Cassidy. He said that he had received calls and emails from AILA[5] and other attorneys concerning this." [Doc. 157, p. 19].

Significantly for this case and this motion, the attention that EOIR directed at Professor Stevens was not limited to EOIR's public relations staff, but extended to EOIR administrators like Defendant Smith. Smith -- a good friend of Cassidy who would later be appointed to review Plaintiffs' formal complaint against Cassidy -- in 2009 was an active participant in EOIR's response to the media attention that Cassidy

[5] "AILA" refers to the American Immigration Lawyers Association."

was attracting. On April 28, 2009, Ms. Mateen wrote: "I have spoken [with] ACIJ [Defendant] Smith, . . . [who] said that Cassidy is very sensitive and concerned about his public reputation." [Doc. 157, p. 20]. Several weeks later, after more negative publicity surfaced, Defendant Smith emailed his colleagues: "I talked with him [Cassidy] Friday and told him not to take it personally." [Doc. 157, p. 21].

C. EOIR Admits Singling out Stevens for Special Attention

EOIR witnesses have confirmed under oath that EOIR singled out Professor Stevens for special treatment and attention "because she had been critical of the agency." (Mooney Dep. at 37). After Stevens' critical articles were published, but before any of the events leading to this litigation, EOIR's public relations office took the unprecedented step of notifying Defendant Smith in EOIR's Falls Church Virginia headquarters each time they learned that Professor Stevens would be attending immigration proceedings anywhere in the country. (Smith Dep. at 32, 37).

Similarly, on the eve of Professor Stevens' first visit to the Atlanta Immigration Center in June of 2009, Atlanta Court Administrator Cynthia Long distributed an email to 11 EOIR court staff in Atlanta, four immigration judges, and four EOIR officials in Falls Church, Virginia notifying them of Stevens' and Lyttle's upcoming visit to Atlanta to obtain some of Lyttle's records. (Smith Dep., Ex. 26). Long admitted this was attention was unique:

> Q. Do you recall writing an e-mail to this type of collection of officials about someone seeking access to their own records, other than Mr. Lyttle and Ms. Stevens, ever in the history of the world?
>
> A. No.

(Long Dep. at 53-54). *See also* Long Dep. at 51-52 (agreeing that there was an "enormous amount of attention" given to Professor Stevens).

EOIR's tracking of Professor Stevens' whereabouts was creepy, but not as bad as the active measures that EOIR took to inhibit Stevens' access to court proceedings. For example, EOIR has no general requirement that visitors to Immigration Courts "check in" with EOIR prior to attending court proceedings (any more than there is such a requirement to attend a U.S. Supreme Court oral argument). "Ordinarily the public can come in and attend hearings." (Smith Dep. at 84). When Stevens came to the Atlanta Immigration Center, court personnel told Stevens that she needed special permission to attend court proceedings. (*Id*.). Atlanta Court Administrator Cynthia Long acknowledged that Stevens had been singled out:

> Q: Apart from the professor who was highly critical of Judge Cassidy's work, do you know of any person who was told by Ms. Crosby or any other person under your charge that they needed permission to go to Judge Cassidy's courtroom?
>
> A: [Ms. Long] No….

(Long Dep. at 65).

D. Professor Stevens' October 2009 Expulsion from Atlanta Immigration Courtroom

On October 7, 2009, Professor Stevens and Mr. Lyttle sat in Defendant Cassidy's courtroom to observe three cases listed on his 1:00 p.m. docket. (Cassidy Affidavit, p. 3). Defendant Cassidy entered the courtroom and asked each person attending the proceeding to identify themselves. Cassidy then left the courtroom out the back door without explanation. Cassidy then called Court Administrator Long and told her that Stevens and Lyttle, who Cassidy identified to Long by name, had to leave the courtroom. (Smith Dep. at 29 – 30, 32). Several minutes later, Defendant Long entered the courtroom and told Stevens and Lyttle that they had to leave because asylum hearings were scheduled. (Long Dep. at 29). Stevens and Lyttle complied. (Long Dep. at 30).

Long testified that Stevens "wasn't happy about it," but did not recall Stevens or Lyttle being disrespectful or acting inappropriately in any way. (Long Dep. at 33). After a lengthy conversation during which Long would leave the lobby on occasion and return, Long said they could return to the courtroom. Stevens and Lyttle sat down in the empty room and waited. A few minutes later, Long entered the courtroom again and informed them that there were no more hearings scheduled for the day.

Defendant Cassidy's account of the day has now been proven to be false. In an email, Cassidy told other federal officials that the first hearing had been closed and

that, "in Jackie's presence, he advised the respondents and their attorneys that a member of the media was present and asked if they wanted an open or closed hearing. Both respondents advised they wanted a closed hearing (sexual abuse case)." [*See* Order, January 16, 2013, Doc. 55, p. 4; Plaintiff's Ex. 37, page 4 - 5]. The transcript of the entire hearing is now in the record, however, and it shows that no attorney requested a closed hearing and that Cassidy never ordered a closed hearing. [Doc. 96-6, *passim*].

E. January 2010 -- Stewart Immigration Center

In January, 2010, Professor Stevens and Mr. Lyttle visited the Stewart Immigration Center, a facility in Lumpkin, Georgia. Because immigration judges typically sat in Atlanta, Stewart detainees would have hearings via teleconference. On the morning of January 14 2010, for no known reason, Defendant Cassidy (in Atlanta) sent Defendant Smith (in Falls Church) an email stating, "Ms. Jackie Stevens and Mark Lyttle are at Stewart today." [Doc. 157, p. 22]. That morning, no dockets were posted in Stewart, making it impossible for Stevens to ascertain Cassidy's docket that day. Dr. Stevens asked Court Administrator Bethune if she could view the dockets. Mr. Bethune said that he was having a problem printing them. Later in the day, Bethune reported to EOIR's headquarters that Stevens had asked "why no calendar was posted" and that Bethune "informed her that we had computer problems

that prohibited us from printing at that time," but provided in his email to his supervisor no further detail on the alleged computer problem or its planned remedy. [Doc. 157, p. 23].

That Mr. Bethune might have been under instructions from Cassidy and Smith to block Stevens' access to court proceedings at Stewart is reflected by his reaction to the next visit of Stevens and Lyttle, in April, 2010. Upon their arrival, Bethune immediately emailed EOIR's public relations officials in Falls Church and Defendant Smith, stating that Stevens and Lyttle "want access to view the court hearing today . . . Please advise!" (Plaintiff's Ex. 37, p. 36). Given that the public by regulation presumptively has access to court proceedings, there was no reason for Bethune's inquiry unless Professor Stevens had been singled out for special treatment.

F. April 19, 2010 Hearing in Atlanta

Discovery has confirmed every detail of Stevens' account of her expulsion from the federal building on the April 19, 2010:

1. Dr. Stevens visited the EOIR's Atlanta offices by herself on the morning of April 19, 2010. Her appearance triggered a number of email notifications and telephone calls throughout the EOIR bureaucracy. Defendant Cassidy immediately called EOIR public relations official Susan Eastwood in Falls Church, and told her that Stevens was in his courtroom observing. (Ex. 37, page 37). Eastwood then

circulated the news to four other EOIR officials. (*Id.*). Why did Stevens' attract this much attention? In her deposition, EOIR Assistant Director Frances Mooney answered this question with admirable candor: Dr. Stevens attracted this scrutiny "***because she had been critical of the Agency***." (Mooney Dep. at 37) (Emphasis added).

2. Security guard notes obtained in discovery corroborate Stevens' account that, upon her arrival, EOIR official Marion Crosby told Stevens that "she needed permission to sit in on court." [Doc. 157, p. 24]. In depositions, EOIR officials acknowledged that this was incorrect and a violation of federal regulations: court proceedings are presumptively open; no one is required to obtain permission to sit in on court proceedings. (Smith Dep. at 84). Again, in depositions EOIR officials acknowledged that Stevens was singled out for this unlawful treatment. (Long Dep. at 65).

3. After some delay, Stevens was allowed into Defendant Cassidy's courtroom, where Cassidy was conducting hearings with Stewart detainees via videoconference. At some point, Cassidy surreptitiously got word to Assistant Atlanta Court Administrator Marion Crosby to tell Stewart Court Administrator Bethune that Stevens was in the Atlanta courtroom. (Plaintiff's Ex. 15). In his deposition, Defendant Smith (to whom Bethune and Crosby reported) could not

identify any legitimate reason why Bethune would need to know that Stevens was in the Atlanta courtroom. (Smith Dep. at 95-96).

4. After several brief afternoon hearings, Cassidy left the dais and, standing in front of Stevens and a courtroom empty except for his assistant, told Stevens that he was asking her to leave the courtroom. [Doc. 69, Paragraph 47]. Stevens asked Cassidy if the respondent had asked for a closed hearing. Cassidy responded: "No – the respondent is pro se." *Id*. Cassidy told Stevens that he could order guards to remove her from the courtroom. Cassidy then left the courtroom by the door behind the bench. Oddly, Cassidy then again called Susan Eastwood at EOIR headquarters, and Eastwood reported to her colleagues at headquarters that Cassidy "had to ask Jackie to leave the courtroom while he conferred with counsel." (Plaintiff Ex. 37, page 38).

5. Before Cassidy returned, Professor Stevens left Cassidy's courtroom and walked down the hall to the EOIR waiting room (Stevens Dep. at 84), where she was observed by EOIR personnel sitting quietly and writing in her notebook. (Plaintiff's Ex. 37, p. 83).

6. About fifteen minutes after leaving the courtroom, three Federal Protective Service (hereinafter "FPS") guards came to the waiting area. One of them reached for his handcuffs and told Stevens "It's time to leave." [Doc. 69, ¶53].

7. Professor Stevens asked the guards why they were telling her to leave the building, but she received no response. She then rose and walked toward the exit and out the building, accompanied and surrounded by the armed, uniformed security personnel. Stevens heard one of the guards tell another guard: "Judge Cassidy wants her out of here! He wanted her out of the building!" [Doc. 69, ¶ 54]. *See also* Stevens Dep. at 89 ("I heard the guard tell another guard, he wants her out of here. He wants her out of the building. I heard that myself, personally.").

8. Cassidy then called Eastwood at EOIR headquarters for a third time that day. According to Eastwood: "Judge Cassidy just called to advise that Jackie had to be escorted out of the building." (Plaintiff's Ex. 37, p. 38).

9. In a subsequent email to Defendant Smith, Cassidy stated "at no time did I ask anyone to remove her." (Plaintiff's Ex. 9). Evidence obtained in discovery confirms that Cassidy's account is simply not true:

- Officer Hayes has confirmed through counsel that Cassidy gave him the order to evict Stevens from the building. [Doc. 84-3, p. 2 ("On April 19, 2010, Judge Cassidy directed Paragon's security guard, Nathanial Hayes, to escort Plaintiff from the Atlanta Immigration Court.")].

- Hayes' account is further confirmed by a transcript of his telephone conversation with the FPS dispatcher just moments after the incident occurred. (Plaintiff Ex. 37, pp. 74-75 (Dispatcher: "Who asked you to escort her off? The judge?" Hayes: "The judge, yes, ma'am.")).

- EOIR Assistant Director Frances Mooney testified in her deposition that she had heard that Defendant Cassidy directed the guards to escort Stevens out of the building. (Mooney Dep. at 39).

- FPS official Summers told Stevens the same thing the day after the incident. (Plaintiff's Ex. 47, p. 21).

- That Cassidy gave the order to the guards is further confirmed by the total absence of any other plausible explanation for the guards' conduct. The best Atlanta Court Administrator Long could offer was that the guards evicted Steven because they "wanted her to leave the building." (Smith Dep. at 74).

10. Significantly, the email in which Cassidy denies ordering the guards to evict Stevens was written *before* the release of the transcript of the conversation between the dispatcher and guard Hayes.[6] In an affidavit submitted *after* the release of the transcript, Defendant Cassidy does not deny that he gave the instruction and, indeed, avoids the topic entirely. [Doc. 96-3]. Cassidy has refused to give live deposition testimony; he or his lawyers are unwilling to subject Cassidy to cross-examination. Thus, the only admissible evidence establishes, without contradiction, that Cassidy directed the FPS guards to evict Dr. Stevens from the building.

11. It is undisputed that Cassidy has and had no jurisdiction or authority over the guards. "Federal Protective Service guards, the building guards, do not work for the Executive Office of Immigration Review or the Department of Justice." (Reid

[6] By contrast, Plaintiff's published account of the incident, which is true to the transcript, appeared long before the transcript was released. (Plaintiff's Ex. 37, page 41).

Dep. at 82). Lauren Alder Reid, a lawyer in EOIR headquarters, agreed that EOIR "would not have jurisdiction over whether [Stevens] stayed in the building." (Reid Dep. at 82). *See also* Summers Dep., *passim* (explaining that FPS does not report to EOIR and that EOIR officials have no jurisdiction or authority over FPS guards).

G. The "Investigation" of Plaintiff Stevens' Administrative Complaint

On April 27, 2010, Stevens submitted a formal complaint against Cassidy to EOIR Assistant Chief Immigration Judge Mary Beth Keller in accordance with EOIR's procedures. (Plaintiff's Exs. 37, p. 41 (Stevens' Complaint), 42 (EOIR Procedures), 43 (EOIR Procedure flowchart). Keller is not a "judge," but an administrator, and is responsible for handling complaints against immigration judges. However, there was no investigation.

1. Though Keller's job was to ensure the fair and objective assessment of complaints against immigration judges, within hours of receiving Stevens' complaint, Keller sought to coordinate this investigation with agency officials trying to ban Stevens from immigration proceedings. (Plaintiff's Ex. 45). Keller was fully aware that EOIR's Public Relations team had been tracking Stevens for almost two years by this time, attempting to ban her, and protecting Defendant Cassidy's body of work. One might expect Keller to insulate the investigation of Stevens' misconduct complaint against Cassidy from those in the organization who were responsible for

"spin control." But Keller, instead, aspired to coordinate her investigation with them – in her words – "to avoid a right hand/left hand scenario." *Id*.

2. The second action that EOIR and Keller took upon receiving Stevens' complaint was to go on the offensive. In an email dated April 28, 2010 (the day after Stevens filed her complaint), Charles Miller of the Department of Justice's Public Affairs Office emailed DOJ colleagues Matthew Miller and Tracy Schmaler:

> The Executive Office for Immigration Review has asked our opinion concerning the potential banning of a blogger from an immigration court in Atlanta.
>
> Jacqueline Stevens, a professor at U.C. Berkeley and editor of an immigration blog, has been disruptive in the court and was removed recently during a hearing. She has been quite vociferous over the past few years in regard to immigration matters. She has also written for the Nation.
>
> All that said, her blog does not appear to have much of a following. I have not seen any pickup or mention of her pieces by more mainstream media immigration reporters.
>
> What do you think? EOIR would like our opinion by noon today so they can make their decision.

(Plaintiff's Ex. 37, page 56). The Federal Defendants have withheld production of, or severely redacted, documentation relating to the government's consideration of banning Dr. Stevens. For present purposes, however, it is undisputed that, before initiating an investigation into the merits of Dr. Stevens' complaint against Defendant Cassidy, EOIR approached the Justice Department in consideration of "banning" Dr.

Stevens from EOIR court proceedings.

3. With this background, it will come as no surprise that EOIR's "investigation" was a sham. Keller delegated the responsibility of disposing of the complaint against Cassidy to none other than Defendant Smith, the person at EOIR least capable of providing an objective assessment of Cassidy's actions. As recounted above, Smith had been actively involved in EOIR's efforts to shield Cassidy from the negative publicity arising from, among other problems, his controversial deportation of U.S. citizen Mark Lyttle. Smith also coordinated the efforts of EOIR's public relations team in tracking Dr. Stevens' movements in and out of EOIR courtrooms. Smith and Cassidy also were long-time friends. Smith testified: "I believed him to be truthful." (Smith Dep. at 79).

4. Smith, who had spoken with Cassidy on April 19, 2010, chose not to interview Guard Hayes, and did not review the transcript of the call between Guard Hayes and the dispatcher before reaching his decision exonerating Cassidy and dismissing Dr. Stevens' complaint. About the transcript, Smith testified: "I did not know it existed, so I did not ask for it." (Smith Dep. at 78). When presented with the telephone transcript that directly contradicted Cassidy's account, Smith remained loyal to his friend:

> Q: Given that the officer there [in the transcript] says that he was instructed by the judge to remove Ms. Stevens from the building, had

> you had that prior to issuing your opinion, would you have changed your opinion in any way?
>
> A: No.
>
> Q: Why is that?
>
> A: Because I had considered the information that I had been provided. I believed the witnesses who I talked with and who provided me statements. I knew these people. I had known them for, at that point in time, five years for most of them . . . .

(Smith Dep. at 79). Smith testified as to the transcript: "I did not find that to be accurate." (Smith Dep. at 53). Smith's belief was that the security guards on their own "made that determination that she had to leave the building." (*Id*.).

5. Smith avoided speaking with the key witnesses or making any effort to reconcile conflicting accounts contained in written statements. Smith did not interview Professor Stevens or Guard Hayes, who received the order from Cassidy and evicted Stevens from the building, or Betsy Schuster (Smith Dep. at 54), the only other person in the courtroom with Stevens.

6. Keller, who delegated the matter to Smith, confirmed that she never undertook on her own, "at any point, to evaluate the quality of Judge Smith's investigation into Judge Cassidy's misconduct relating to Ms. Stevens." (Keller Dep. at 42). (EOIR regulations, however, required Keller to monitor complaints "to ensure proper and expeditious handling and resolution. (Plaintiff Ex. 42)). Keller testified

that she was unaware of Smith's friendship with Cassidy, but had she known of this it "probably" would not have had an impact on her decision to assign Stevens' complaint to Smith. (Keller Dep. at 27). As to the transcript of the telephone conversation that confirmed Stevens' account and contradicted Cassidy's account, the most Keller would say is that it "might" have been germane to the investigation of Cassidy's conduct. (Keller Dep. at 36).

7. When she was reminded that Cassidy's account was contained in a report to Smith, Cassidy's superior, Keller testified as follows:

> Mr. Brown: If Judge Cassidy lied to Judge Smith, would that concern you?
>
> Ms. Keller: If a Judge lied to a supervisor, it would concern me.
>
> By Mr. Brown: Particularly in the context of responding to a citizen who was lodging a misconduct complaint against that Judge, correct?
>
> A: Sure.

(Keller Dep. at 82). The likelihood that Defendant Cassidy lied and obstructed an investigation, however, has not concerned anyone associated with the Federal Defendants enough to do anything about it:

> Mr. Brown. . . . Since this lawsuit was filed, are you aware of any investigation by the United States into whether Judge Cassidy was lying to Judge Smith in connection with Ms. Stevens' complaint about Judge Cassidy's conduct.
>
> Ms. Keller: No, I am not aware.

(Keller Dep. at 83). Keller testified that she had no plans of her own to further investigate Cassidy's conduct. In her view, such an investigation would be "inappropriate" because "we're in litigation." *Id*.

III. DISCUSSION

Under controlling precedent of the United States Supreme Court, Defendants Keller, Smith and Cassidy are not entitled to judicial or quasi-judicial immunity. In Part A, Plaintiff will provide an overview of judicial immunity. In Part B, Plaintiff will show that Defendants Keller and Smith are not entitled to judicial immunity because their actions were entirely administrative. In Part C, Plaintiff will show that Defendant Cassidy, with respect to the second action of expelling Plaintiff from the federal building, also is not immune.

A. The Limits of Judicial Immunity

The common law doctrine of judicial immunity has been recognized for over four centuries, and its outer limits delineated in a large body of Supreme Court opinions. *See, e.g.,* Shaman, *Judicial Immunity from Civil and Criminal Liability*, 27 SAN DIEGO L. REV. 1 (1990); Block, *Stump v. Sparkman and the History of Judicial Immunity,* 1980 DUKE L.J. 879; Feinman & Cohen, *Suing Judges: History and Theory,* 31 S.C. L. REV. 201 (1980); Note, *Liability of Judicial Officers Under Section 1983,* 79 YALE L.J. 322 (1969).

In Tenth Century England, at the dawn of the common law, no right of appeal existed. Litigants who successfully challenged an unfavorable judgment were entitled to nullification of the judgment *and* a fine against the trial judge.[7] As appellate rights became available over centuries of development, judicial fines were replaced by the doctrine of judicial immunity. Lord Coke authored the foundational opinion, *Floyd v. Barker,* 77 Eng. Rep. 1305 (Star Chamber 1607). Coke, at the birth of the doctrine, limited judicial immunity to actions the judge "did openly in Court as Judge or Justice of Peace," but not to "extrajudicial" conduct. I SELECTED WRITINGS OF SIR EDWARD COKE.

Thus – of critical importance to this case – the doctrine of judicial immunity has always included a functional limitation (actions taken "as a judge') and, necessarily, a jurisdictional dimension. Perhaps most importantly, Coke explicitly discussed what are now recognized as the public policies that underlie the doctrine – the finality of judgments and judicial independence – and made clear that when those policies are not implicated, the reason for the rule disappears. Shaman, *supra* at 3.

The first complete statement of the doctrine of judicial immunity by the Supreme Court came in *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335 *(*1872), which arose from one of the Lincoln assassination prosecutions. Attorney Bradley brought

[7] Feinman & Cohen, supra, citing 1 W. Holdsworth, A HISTORY OF ENGLISH LAW 214, 337-42 (3d ed. 1922); 2 F. Pollack & F. Maitland, THE HISTORY OF ENGLISH LAW 665 (2d ed. 1898).

suit against Judge Fisher after the judge disbarred him for contemptuous courtroom behavior. *Id*. at 344-45, 357. After reviewing Coke's decision and other English precedents, the Supreme Court held that Judge Fisher was immune to the claim. But while granting immunity, the Court was careful to instruct that when the purpose of judicial independence is not served, the immunity shield is not appropriate. Thus, when the "judge" acts administratively or without jurisdiction, the reason for the rule disappears and "no excuse is permissible." *Id*. at 351-52.

It is now established that a judge or judicial officer is immune from liability when (1) she or he has jurisdiction over the subject matter before him; and (2) she or he is performing a "judicial" act. *E.g., Forrester v. White,* 484 U.S. 219, 227-229 (1988); *Mireles v. Waco,* 502 U.S. 9 (1991). A judge is not immune for actions taken in the complete absence of all jurisdiction. *Stump v. Sparkman,* 435 U.S. 349 (1978). Whether an act is "judicial" and not "administrative" depends upon: (a) whether the act is a ***function*** normally performed by a judge; and (b) whether the parties dealt with the judge in a judicial capacity. *Id.* at 360.

Woven throughout the copious fabric of the Supreme Court's and the Eleventh Circuit's immunity doctrine is the ancient mandate that judicial immunity is "absolute" only when the actor functions as an adjudicator. *E.g., Antoine v. Byers & Anderson, Inc.,* 508 U.S. 429 (1993) ("the 'touchstone' for the doctrine's applicability

has been 'performance of the *function of resolving disputes between parties, or of authoritatively adjudicating private rights*'") (emphasis added); *Roland v. Phillips*, 19 F.3d 552 (11th Cir. 1994) (Birch, J.) ("we determine … absolute quasi-judicial immunity … through a *functional* analysis of the action taken by the official in relation to the judicial process") (emphasis in original).[8]

The functional test is, in turn, derived from the doctrine's purpose, which is "not to make life easy for officials of any branch of government," but "to protect officials from being seriously deflected from the effective performance of their duties." *Forrester v. White,* 712 F.2d 647, 660 (7th Cir. 1985) (Posner, J., dissenting).[9] Because granting immunity is, according to Judge Posner, "strong medicine," *id.,* these factors are always to be construed in light of the public policies underlying immunity. Immunity is only granted when "essential to protect the integrity of the judicial process." *Briscoe v. LaHue*, 460 U.S. 325, 334-335 (1983).

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[8] In *Jenkins v. Clerk of Court*, 150 Fed. Appx. 988; 2005 U.S. App. LEXIS 23195 (11th Cir. 2005), and *Lomax v. Ruvin*, 387 Fed. Appx. 930; 2010 U.S. App. LEXIS 15018 (11th Cir. 2010), the Eleventh Circuit gave special attention to the "functional" test, drawn from decades of Supreme Court jurisprudence. In *Jenkins*, the court observed: "Absolute quasi-judicial immunity … is determined by a *functional analysis* of their actions in relation to the judicial process." In *Lomax,* the court stated: "whether non-judicial officials can claim absolute quasi-judicial immunity depends on *'functional analysis*' of the official's action in relation to the judicial process." *Accord Cuyler v. Ley*, 2013 U.S. Dist. LEXIS 126563 (N.D. Ga. 2013) (Carnes, C.J.) (quoting the "functional analysis" test of *Roland*).

[9] Judge Posner's dissent was quoted and cited with approval by the Supreme Court in its unanimous reversal, *Forrester v. White,* 484 U.S. 219 (1988).

B. Smith and Keller Are Not Immune for Administrative Acts

1. Undisputed Facts

There is nothing about the roles of Defendants Keller or Smith, or the functional character of their actions, that would give either of them quasi-judicial immunity. Though the Government gives both Keller and Smith the title "judge," neither is a judge in any sense of the word. The American Heritage Dictionary defines "judge" as "An appointed or elected official responsible for conducting a court in which he or she resolve legal controveries." Keller has *never* conducted court hearings (Keller Dep. at 24),[10] and, since his promotion five years ago, Smith has never presided over any case in any kind of adjudicative capacity. Keller and

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[10] The following is from Defendant Keller's deposition:

> MR. BROWN: Judge Keller, do you today have responsibility actually adjudicating immigration cases?
>
> MS. KELLER:··I do not.
>
> BY MR. BROWN: Did you in the time period from 2008 until today actually conduct immigration trials?
>
> A· No.
>
> Q· Or hearings?··When is the last time that you actually conducted an immigration trial or presided over an immigration hearing?
>
> A· I have not.

(Keller Dep. at 67-68).

Smith also had no judicial responsibilities that would potentially give them absolute quasi-judicial immunity. As the Court described in its January 31, 2014 Order [Doc. 97, at 16-17], their positions are entirely administrative. "Ms. Keller . . . is 'responsible for managing investigations of misconduct complaints against immigration judges.'" Defendant Smith "'oversaw the operation of the Atlanta Immigration Court and was responsible for investigating judges in Georgia.'"

2. Law

The controlling case is *Forrester v. Smith,* 484 U.S. 219 (1988). Justice O'Conner's scholarly opinion for a unanimous Supreme Court warrants extended discussion. The defendant, Judge White, was a Illinois state trial court judge. Under Illinois law, Judge White had authority to hire adult probation officers, who were removable in his discretion. Judge White hired plaintiff Forrester as an adult probation officer. "Forrester prepared presentence reports for Judge White in adult offender cases, and recommendations for disposition and placement in juvenile cases. She also supervised persons on probation and recommended revocation when necessary." After two years, Judge White demoted Forrester and then, after a few more months, discharged her. Forrester brought a Section 1983 action against Judge White, alleging discrimination. The trial court granted summary judgment, ruling that Judge White was entitled to "judicial immunity." The Seventh Circuit, over

Judge Posner's dissent, affirmed.

The Supreme Court reversed, holding that Judge White was not entitled to immunity because the act of hiring and firing probation officers was administrative, not judicial, even though it came within Judge White's responsibilities as a judge. The Supreme Court stated that the "Court has generally been quite sparing in its recognition of claims to absolute immunity," and then explained:

> When applied to the paradigmatic judicial acts involved in resolving disputes between parties who have invoked the jurisdiction of a court, the doctrine of absolute judicial immunity has not been particularly controversial. Difficulties have arisen primarily in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges. Here, as in other contexts, immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attached.

The Court cited numerous prior cases in which administrative actions have not been accorded immunity because they are not "judicial" in character. *Id., citing Ex parte Virginia,* 100 U.S. 339 (1880) (judge not granted immunity from criminal prosecution for selecting jurors on the basis of race); *Supreme Court of Virginia v. Consumers Union of United States, Inc.,* 446 U.S. 719 (1980) (judicial immunity did not extend to judges acting to promulgate attorneys' conduct code). "Administrative decisions, even though essential to the very functioning of courts, have not similarly

been regarded as judicial acts." 484 U.S. at 228.[11]

The *Forrester* Court concluded:

> In the case before us, we think it clear that Judge White was acting in an administrative capacity when he demoted and discharged Forrester. These acts – like so many others involved in supervising court employees and overseeing the efficient operation of a court may have been quite important to providing the necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative.

484 U.S. at 229.

Judge White had a far better claim to immunity than either Defendant Keller or Smith. The person whom Judge White fired, Ms. Forrester, worked as his probation officer and thus had a direct impact on Judge White's performance of his adjudicative responsibilities, but that was not nearly enough. Here, the connection between the actions of Keller and Smith to any actual adjudication is many steps further removed than the connection in *Forrester.* Under *Forrester,* Defendants Keller and Smith, as a matter of law, are not entitled to absolute quasi-judicial immunity.

C. **Defendant Cassidy is Not Immune**

1. Procedural Context

[11] Justice O'Connor held, in this regard, that "[t]o argue that, because a judge acts within the scope of his authority, such routine employment decisions are within the court's "jurisdiction," or converted into "judicial acts," would, according to the Court, "lift form above substance." For example, under Virginia law, only that State's judges could promulgate and enforce a Code for attorneys, but the Court nevertheless concluded that neither function was "judicial" in nature. See *Supreme Court of Virginia* v. *Consumers Union, supra*.

As to Defendant Cassidy, it is Plaintiff's position, respectfully, that if this Court's prior Order is to be read as holding that Defendant Cassidy is entitled to judicial immunity for *all* of his actions, then it constitutes a clear error of law and should be reconsidered and reversed. The key to understanding this issue is that Defendant Cassidy was sued for two separate actions that he took on April 19, 2010. The first action was the closing of the *courtroom*. This Court's January 16, 2013 Order speaks to this action, and holds that Defendant Cassidy was entitled to immunity because "the decision to close courtroom proceedings is a 'function normally performed by a judge.'" [Doc. 55, p. 16.]

The second action, however, occurred after Plaintiff left Defendant Cassidy's courtroom and while she was sitting peacefully by herself in the EIOR waiting room down the hall from the EOIR courtrooms. It was at this point that Defendant Cassidy ordered security guards from the Federal Protective Service to expel Plaintiff from the building-– a federal facility that houses agencies other than EOIR. This Court's prior Order does not address this action and does not hold that Defendant Cassidy has immunity with respect to this second act.[12]

[12] The claim that Defendant Cassidy wrongfully expelled Plaintiff from the building was set forth in the original pro se complaint, [Doc. 1, paragraph 61], and set forth in some detail in the First Amended and Restated Complaint, which was filed with leave of Court after this Court's Order. [Doc. 69, paragraph 21 and *passim*]. The Court's holding concerns the allegations of paragraphs 41 through 52 of the First Amended Complaint – the subsection of the complaint entitled "Exclusion

Plaintiff in this motion is seeking summary judgment that Defendant Cassidy, as a matter of law, does not have immunity for his decision to order FPS guards to expel Plaintiff from the federal office building. To the extent that this Court's prior Orders can be read to dismiss *all* of the claims against Defendant Cassidy on the grounds of immunity, then this motion should be read as a request for reconsideration of an interlocutory order under Rule 54(b) on the basis that the prior Order constitutes a clear error of law.[13]

2. Discussion

As explained above, after Plaintiff left Defendant Cassidy's courtroom and was sitting quietly in the EOIR waiting area, Defendant Cassidy ordered Federal Protective Service guards to expel Professor Stevens from the building that houses EOIR and other federal agencies. There is no dispute that Defendant Cassidy has no authority over FPS or over building security. There also is no allegation that

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from Deportation/Removal Hearings-April 2010." [Doc. 69, p. 19 – 23]. However, in the next section subtitled "Attempted 'Banning' and Forcible Removal from the Atlanta Immigration Court-April 2010," Plaintiff goes on to allege that, after Plaintiff exited Defendant Cassidy's courtroom and was sitting by herself in the EOIR waiting room down the hall, Defendant Cassidy ordered Federal Protective Service security guards to expel Plaintiff from the building.

[13] Since the order dismissing the claims against Defendant Cassidy is not a final judgment, this Court has the inherent authority to revise its rulings and the express authority under Rule 54(b). *See Solutia, Inc. v. McWane, Inc.,* 726 F. Supp. 2d 1316, 1328 (N.D. Ala. 2010) ("a district court retains discretionary authority to revisit such interlocutory orders at any time prior to final judgment") *aff'd,* 672 F.3d 1230 (11th Cir. 2012). *See also Harper v. Lawrence County, Ala.,* 592 F.3d 1227, 1231 (11th Cir.2010); *Aldana v. Del Monte Fresh Produce, N.A., Inc.,* 578 F.3d 1283,1289 (11th Cir.2009).

expelling Plaintiff had any remote connection to any adjudicative process.

Under the relevant authorities, Defendant Cassidy had no "jurisdiction" to take this second act and accordingly has no immunity with respect thereto. *E.g., Dykes*, 776 F.2d at 948-49; *Green v. Maraio*, 722 F.2d 1013, 1017 (2d Cir. 1983). Generally, where a court has some subject matter jurisdiction, there is sufficient jurisdiction for immunity purposes. *Adams v. McIlhany,* 764 F.2d 294, 298 (5th Cir. 1985). But there are limits, and Defendant Cassidy exceeded them. *E.g., King v. Love*, 766 F.2d 962, 966, 968 (6th Cir. 1985) (although setting bond is a judicial act, deliberately misleading the officer who was to execute the warrant about the identity of the person sought was non-judicial).

The Supreme Court, over a century ago, offered this helpful "jurisdictional" analysis: "if a probate court, invested only with authority over wills and the settlement of estates … should proceed to try parties for [criminal] offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority." *Bradley v. Fisher*, *supra* at 352.

On the other hand, if a judge in a criminal court convicts a defendant of even a non-existent crime, he maintains his immunity, because "where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the

manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case." *Id.*

There are a number of close and difficult cases in which the limits of judicial immunity have been tested by outrageous conduct taken by judges with some colorable claim to immunity. *See Stump v. Sparkman*, *supra* (state court judge immunized for a sterilization order after no hearings, no evidence, and no counsel for the minor; judge had plenary statutory jurisdiction over "all cases at law and in equity"). In contrast, Cassidy had no colorable authority over the premises at issue here, and the expulsion order was ***not*** a function normally performed by a judge. In *Mireles v. Waco*, *supra*, another state judge avoided liability for ordering that a public defender be physically dragged from a nearby courtroom, when the lawyer was late for the judge's morning calendar call. "The action, even if mishandled, was within the judge's jurisdiction." *Id.* There is not even a hint of similar authority for Cassidy over a non-party, the FPS or the federal building's waiting room. In *Harris v. Harvey*, 605 F.2d 330 (7th Cir.1979), an African-American police lieutenant had been attacked in a variety of ways by a state court judge. The officer sued because of (a) comments by the judge made to the news media, (b) threatening letters from the judge to city and county officials, and (c) social events hosted by the judge for state officials during which the judge attempted to get the officer removed. At trial, the

jury concluded that the judge was not eligible for judicial immunity, because his acts were not part of the judge's normal duties (i.e., were "outside his jurisdiction"). The Seventh Circuit affirmed.

In this case, Defendant Cassidy's removal of a peaceable member of the public and member of the media was an action that was not within his authority or jurisdiction or a part of this judge's "normal duties." Defendant Cassidy is accordingly not entitled to judicial immunity.

IV. CONCLUSION

The judicial development of the issue of the limits of judicial immunity has been rich and deep. But it has been clear for centuries that it offers no protection from wrongful acts when judicial officers function as administrators or act without any jurisdiction. Plaintiff's motion should be granted.

Respectfully submitted this 14th day of October, 2014.

/s/Bruce Perrin Brown
Bruce Perrin Brown
Georgia Bar No. 064460
BRUCE P. BROWN LAW LLC
1123 Zonolite Road, N.E.
Suite 6
Atlanta, Georgia 30306
(404) 881-0700
bbrown@brucepbrownlaw.com

/s/R. Keegan Federal, Jr.
R. Keegan Federal, Jr.
Georgia Bar No. 257200
R. O. Lerer
Georgia Bar No. 446962
THE FEDERAL FIRM, LLC
750 Hammond Drive
Building 12, Suite 200
Atlanta, Georgia 30328
(678) 443-4044
keegan@fedfirm.com
ray@fedfirm.com

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JACQUELINE STEVENS, Plaintiff, vs. ERIC HOLDER, JR., Attorney General of the United States, et al., Defendants.	)	CIVIL ACTION NO.: 1:12-CV-1352-ODE

CERTIFICATION OF FONT

Counsel for Plaintiff certifies that this document has been prepared in a Times New Roman, 14 point font and otherwise complies with Local Rule 5.1C.

This 14th day of October, 2014.

Respectfully submitted,

/s/Bruce P. Brown_
Bruce Perrin Brown

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CERTIFICATE OF SERVICE

I hereby certify that I have, this date, filed electronically the foregoing Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification to the attorneys of record.

This 14th day of October, 2014.

/s/Bruce Perrin Brown
Bruce Perrin Brown