Description of document:	United States Marshals Service (USMS) Director Washington emails that contain the word FOIA, 2020
Requested date:	02-June-2020
Release date:	24-May- 2024
Posted date:	20-Oct-2025
Source of document:	Freedom of Information Act Request United States Marshals Service Office of the General Counsel Freedom of Information Act Unit CG-3, 15th Floor Washington, DC 20530-0001 FOIA.gov

U.S. Department of Justice

United States Marshals Service

Office of General Counsel

CG-3, 15th Floor
Washington, DC 20530-0001

May 24, 2024

Re: Interim Response to Freedom of Information Act Request No. 2022-USMS-000240
Subject: Director Washington's Emails containing the word "FOIA"

The United States Marshals Service (USMS) is responding to your Freedom of Information Act (FOIA) request received by USMS on June 02, 2020 the following with this interim response:

"Request for USMS Director Washington email that contain the word FOIA.."

Pursuant to your request, the USMS conducted a search for records responsive to your request and located 127 pages of responsive documentation within the following offices/divisions:

Information Technology Division

To withhold a responsive record in whole or part, an agency must show both that the record falls within a FOIA exemption, 5 U.S.C. § 552(b), and that the agency "reasonably foresees that disclosure would harm an interest protected by exemption." See § 552(a)(8)(A)(i)(I); Machado Amadis v. U.S. Dep't of State, 971 F.3d 364 (D.C. Cir. 2020). As described in this correspondence, the USMS reviewed responsive records to your request and asserted FOIA exemptions as appropriate. Further, the USMS has determined it is reasonably foreseeable that disclosure of the withheld information would harm an agency interest protected by the exemption. These pages are released to you with portions of 43 page(s) withheld and 0 page(s) withheld in full pursuant to the following Exemptions of the FOIA, 5 U.S.C. § 552(b):

(b)(6), FOIA Exemption (b)(6) allows an agency to withhold personnel, medical, and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Records that apply to or describe a particular individual, including investigative records, qualify as "personnel," "medical," or "similar files" under Exemption 6. A discretionary release of such records is not appropriate. See United States Department of Justice (DOJ) v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989).

(b)(7)(C), FOIA Exemption (b)(7)(C) protects records or information compiled for law enforcement purposes to the extent that the production of such records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy. A discretionary release of such records is not appropriate. See United States Department of Justice (DOJ) v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989).

Accordingly, the personally identifiable information of law enforcement officers and government employees was withheld from the responsive documentation. The disclosure of such sensitive information contained in records compiled for law enforcement purposes to the public could subject law enforcement officers and other government personnel to harassment and unwelcome contact. This could disrupt and impede official agency activity, as well as endanger the safety of law enforcement officials. Additionally, the personally identifiable information of third parties named in the records was withheld. The disclosure of third-party information could constitute an unwarranted invasion of personal privacy and subject the individuals to embarrassment, harassment, and undue public attention. Individuals have a recognized privacy interest in not being publicly associated with law enforcement investigations, not being associated unwarrantedly with alleged criminal activity, and controlling how communications about them are disseminated.

(b)(7)(E), FOIA Exemption (b)(7)(E) exempts from release information that would disclose law enforcement techniques or procedures, the disclosure of which could reasonably be expected to risk circumvention of the law. Public disclosure of law enforcement techniques and procedures could allow people seeking to violate the law to take preemptive steps to counter actions taken by USMS during investigatory operations. Information pertaining to case selection, case development, and investigatory methods are law enforcement techniques and procedures that are not commonly known. The disclosure of this information serves no public benefit and would have an adverse impact on agency operations. Furthermore, public disclosure of information such as internal URLs, codes, and internal identifying numbers could assist unauthorized parties in deciphering the meaning of the codes and numbers, aid in gaining improper access to law enforcement databases, and assist in the unauthorized party's navigation of these databases. This disclosure of techniques for navigating the databases could permit people seeking to violate the law to gain sensitive knowledge and take preemptive steps to counter actions taken by USMS during investigatory operations. The disclosure of this information serves no public benefit and would not assist the public in understanding how the agency is carrying out its statutory responsibilities.

(b)(7)(F), FOIA Exemption (b)(7)(F) protects law enforcement information that "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110175, 121 Stat. 2524. Courts have routinely upheld the use of Exemption (b)(7)(F) to protect the identities of law enforcement agents, as well as protect the names and identifying information of non-law enforcement federal employees, local law enforcement personnel, and other third persons in connection with particular law enforcement matters. See Rugiero v. DOJ, 257 F.3d 534, 552 (6th Cir. 2001); Johnston v. DOJ, No. 97-2173, 1998 WL 518529, *1 (8th Cir. Aug. 10, 1998).

Duplicate of other pages in this request, Please note that in this release you will see portions of documents labeled "Duplicate of other pages in this request." This notation was made as this release involves large amounts of duplicate documents, usually in the context of email chains. In order to expedite the release of documents to you, the USMS FOIA Office marked certain emails as "Duplicate of other pages in this request"; these documents have been fully processed in the preceding pages.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

Please be advised that because this is an interim response to your request, any appeal rights that may apply will be provided to you in our final response. Further releases of responsive records will be made to you by the USMS FOIA Office as soon as practicable.

Sincerely,

/s/ ERT for

Charlotte Luckstone
Senior Associate General Counsel
FOIA/PA Officer
Office of General Counsel

Enclosure

From: Carter, Ronald (USMS)
Sent: Tue, 28 Apr 2020 14:18:39 +0000
To: Washington, Donald (USMS); Driscoll, Derrick (USMS); Robinson, Roberto (USMS); Tyler, Jeff (USMS); Wade, Drew J. (USMS); Kilgallon, John (USMS); Auerbach, Gerald (USMS); Dickinson, Lisa (USMS)
Subject: FW: New Employee Arrest

Good morning all,

Please see the latest update below.

Respectfully,

Ron

From: (b)(6); (b)(7)(C); (b)(7)(F) (USMS)
Sent: Tuesday, April 28, 2020 10:05 AM
To: (b)(6); (b)(7)(C); (USMS) (b)(6); (b)(7)(C); @usms.doj.gov>; (b)(6); (b)(7)(C); (USMS) (b)(6); (b)(7)(C); @usms.doj.gov>
Cc: Carter, Ronald (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>; (b)(6); (b)(7)(C); (b)(7)(F) (USMS) (b)(6); (b)(7)(C); @usms.doj.gov>; Internal Affairs (USMS) (b)(7)(E) usms.doj.gov>; (b)(6); (b)(7)(C); (USMS) (b)(6); (b)(7)(C); @usms.doj.gov>
Subject: RE: New Employee Arrest

Good morning, All,

I just received an updated phone call from Sergeant (b)(6); (b)(7)(C); (b)(7)(F) and he advised that the Anne Arundel County will be conducting a search warrant on (b)(6); (b)(7)(C); resident today April 28, 2020, within the hour to search for any law enforcement gear that would lead (b)(6); (b)(7)(C); (b)(7)(F) to impersonate a law enforcement officer. (b)(6); (b)(7)(C); advised that (b)(6); (b)(7)(C); is still in custody and is scheduled to go before the Judge at 11:00am this morning for a Bail Review hearing. Additionally, (b)(6); (b)(7)(C); asked if the USMS can release (b)(6); (b)(7)(C); (b)(7)(F) job description/function to his department. I spoke with (b)(6); (b)(7)(C); (b)(7)(F) (OGC) and Ms. (b)(6); (b)(7)(C); (b)(7)(F) and Charlotte Luckstone (FOIA) both okay me to release his job function.

(b)(6); (b)(7)(C); (b)(7)(F)

United States Marshals Service | Office of Professional Responsibility | Internal Affairs
Arlington, VA 22202 (b)(6); (b)(7)(C) cell

From: (b)(6); (b)(7)(C); (b)(7)(F) (USMS)
Sent: Monday, April 27, 2020 3:00 PM
To: (b)(6); (b)(7)(C); (b)(7)(F) (USMS (b)(6); (b)(7)(C); @usms.doj.gov>; (b)(6); (b)(7)(C); (b)(7)(F) (USMS) (b)(6); (b)(7)(C); (b)(7)(F) @usms.doj.gov)' (b)(6); (b)(7)(C); (b)(7)(F) @usms.doj.gov>
Cc: Carter, Ronald (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>; (b)(6); (b)(7)(C); (b)(7)(F) (USMS) (b)(6); (b)(7)(C); (b)(7)(F) @usms.doj.gov>; Internal Affairs (USMS) (b)(7)(E); @usms.doj.gov>; (b)(6); (b)(7)(C); (b)(7)(F) (USMS) (b)(6); (b)(7)(C); (b)(7)(F) usms.doj.gov>
Subject: New Employee Arrest

Good afternoon, All,

I just received a call from Sergeant (b)(6); (b)(7)(C); (b)(7)(F) Anne Arundel County and he advised that they are currently taking (b)(6); (b)(7)(C); (b)(7)(F) into custody again as we speak for impersonation of a Deputy United States Marshal (DUSM) at Wegmans located 1413 S. Main Chapel Way, Gambrills, Maryland 21054. (b)(6); allegedly attempted to solicit a female worker at the store to be an informant by stating he's a DUSM and would like the female employee to work for him. Allegedly, (b)(6); stated that he could protect her if she worked for him and he could put her in the Witness Security Program and displayed a weapon in a backpack that was later identified as an airsoft gun. (b)(6); is currently in route to jail and he will be booked in for impersonating a police officer. Also (b)(6); displayed a parking pass that had the USMS information on it.

(b)(6); was recently taken into custody April 25, 2020 and charged with Theft over $10,000 and Impersonating a Federal Officer.

(b)(6); (b)(7)(C); (b)(7)(F)

United States Marshals Service | Office of Professional Responsibility | Internal Affairs
Arlington, VA 22202 (b)(6); (b)(7)(C) cell

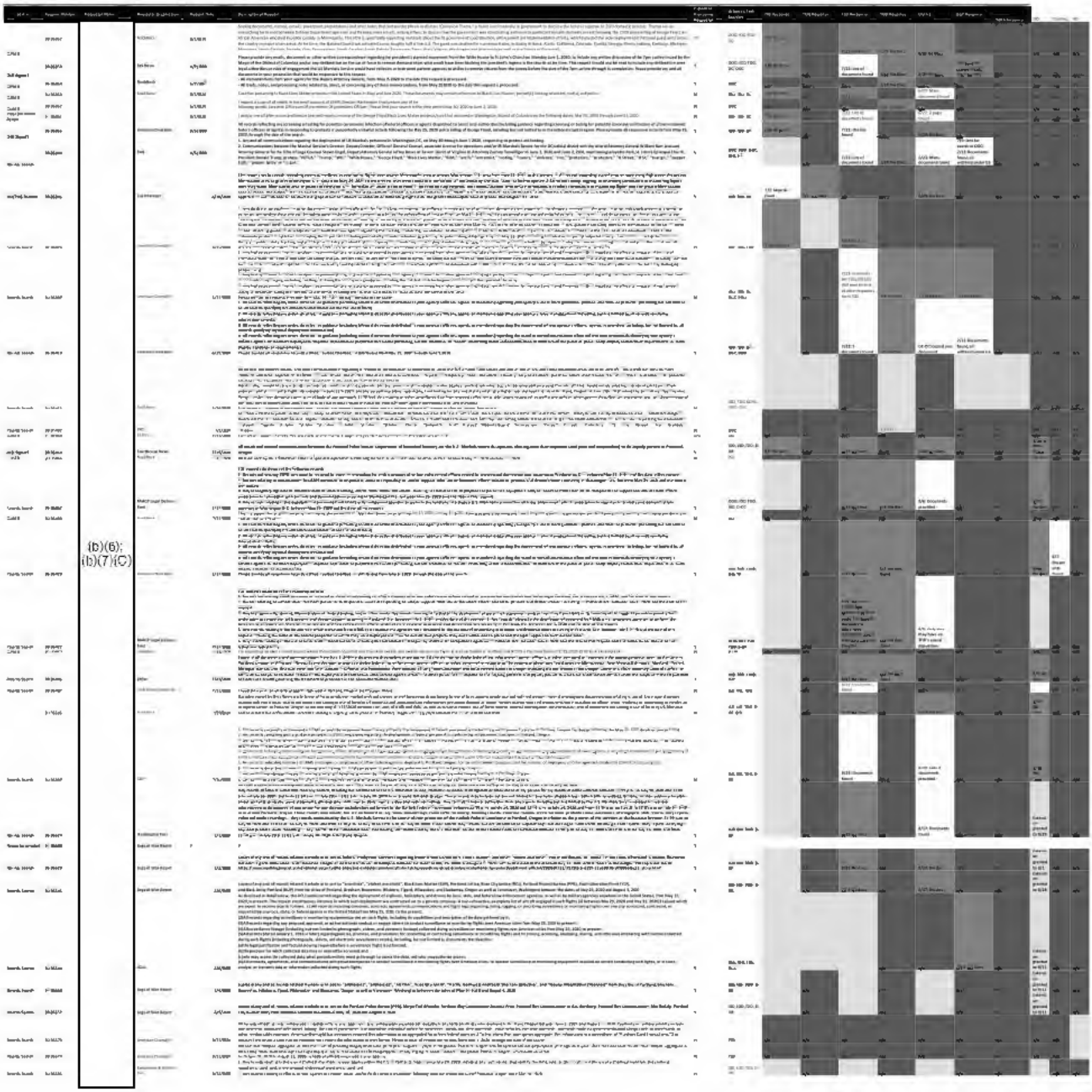
From: Driscoll, Derrick (USMS)
Sent: Mon, 31 Aug 2020 19:19:23 +0000
To: Washington, Donald (USMS); Kilgallon, John (USMS); Tyler, Jeff (USMS)
Cc: Dickinson, Lisa (USMS)
Subject: Quick Update
Attachments: BLM FOIA Requests.xlsx

All

Close hold…Lisa and her FOIA shop have put together the attached excellent spreadsheet which does a great job of summarizing our current FOIA requests related to "civil unrest". Lisa will submit to us on a monthly basis until/unless things slow down.

Thanks
Derrick

Derrick Driscoll
Deputy Director
U.S. Marshals Service
(w) (b)(6); (b)(7)(C)



(b)(6);
(b)(7)(C)

From: (b)(6); (b)(7)(C); (b)(7)(F) (USMS)
Sent: Fri, 20 Dec 2019 23:04:23 +0000
To: Driscoll, Derrick (USMS)
Cc: Washington, Donald (USMS); Hackmaster, Nelson (USMS); Delaney, William (USMS); (b)(6); (b)(7)(C); (b)(7)(F) (USMS); Wade, Drew J. (USMS); Auerbach, Gerald (USMS); Dickinson, Lisa (USMS)
Subject: RE: (b)(6); (b)(7)(C) a Marshall Projects reporter, reaches out to (b)(6); (b)(7)(C); (b)(6); (b)(7)(C); (b)(7)(F)

Sir
Will do. V/R (b)(6); (b)(7)(C); (b)(7)(F)

From: Driscoll, Derrick (USMS)
Sent: Friday, December 20, 2019 6:03 PM
To: (b)(6); (b)(7)(C); (b)(7)(F) (USMS) (b)(6); (b)(7)(C); @usms.doj.gov>
Cc: Washington, Donald (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>; Hackmaster, Nelson (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>; Delaney, William (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>; (b)(6); (b)(7)(C); (b)(7)(F) (USMS) (b)(6); (b)(7)(C); @usms.doj.gov>; Wade, Drew J. (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>; Auerbach, Gerald (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>; Dickinson, Lisa (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>
Subject: Re: (b)(6); (b)(7)(C) a Marshall Projects reporter, reaches out to (b)(6); (b)(7)(C); (b)(7)(F)

(b)(6); (b)(7)(C);

As you mentioned please work through OGC on the FOIA issue...should it come to a point that (b)(6); in an FMA capacity, is going to engage with the reporter let me know as I'll direct him that the USMS official response will come through OPA. Anything else he does is in a private capacity and he has to make clear he is not speaking for the agency and is not disclosing non-public information.

Thanks
Derrick

Deputy Director
U.S. Marshals Service
Derrick Driscoll

On Dec 20, 2019, at 5:39 PM, (b)(6); (b)(7)(C); (b)(7)(F) (USMS) (b)(6); (b)(7)(C); (b)(7)(F)@usms.doj.gov> wrote:

<image001.gif>
Gentlemen

Good evening. I wanted to inform you of the recent events associated with a media query/FOIA request (please see attached) we received about the collection of the USMS use of force data.

On Dec 10 (b)(6); (b)(7)(C) a reporter with the Marshall project, had informed OPA that she had placed a FOIA request on USMS use-of-force data reported during and outside the National Use-of-Force Data Collection's pilot program (July 1, 207 to December 31, 2017), and the current ongoing National Use-of-Force Data Collection (starting on January 1, 2019 to present day).

.

Today, Dec 20, (b)(6); (b)(7)(C); (b)(7)(F) called me and let me know that (b)(6); (b)(7)(C) reached out to him in his Federal Managers Association capacity wanting to know about our use of force activity and if he would be willing to comment about it. I informed him that we received her request and that it is currently sitting with FOIA and I would appreciate it if we could speak with a consistent voice regarding the subject. Therefore, we would need to know what the FOIA office planned to release to the reporter first as well as gather more information about the reporter's intent. He explained that as a Federal Managers Association representative, at times he has disagreed with the agency's positions on things. However, since he was uncertain of the reporter's intent he said that he would contact her right now only to gather more information about her inquiry (motive, possible questions, etc.) and let me know of her plans. He also stated that transparency was most important to him and that he hopes he and the agency can speak with a consistent voice regarding this issue. We then agreed to reconnect once he receives more information from the reporter – we plan to talk again next week. I will keep you posted as we connect with OGC regarding the request and reconnect with Jason.

Very Respectfully

(b)(6); (b)(7)(C); (b)(7)(F)
(b)(6); (b)(7)(C) Office of Public Affairs
U. S. Marshals Service
(b)(6); (b)(7)(C)

Twitter: @usmarshalshq
Instagram: @usmarshalshq
YouTube: US Marshals Service HQ
LinkedIn: US Marshals HQ

<mime-attachment>

From: Driscoll, Derrick (USMS)
Sent: Fri, 20 Dec 2019 22:59:03 +0000
To: Auerbach, Gerald (USMS)
Cc: Dickinson, Lisa (USMS); Washington, Donald (USMS); Kilgallon, John (USMS)
Subject: Re: (b)(6); (b)(7)(C) a Marshall Projects reporter, reaches out to (b)(6); (b)(7)(C); (b)(7)(F)

Perfect, thank you Gerry

Deputy Director
U.S. Marshals Service
Derrick Driscoll

On Dec 20, 2019, at 5:56 PM, Auerbach, Gerald (USMS) (b)(6); (b)(7)(C) @usms.doj.gov> wrote:

We will check on the FOIA. You can tell (b)(6); (b)(7)(C); that official response will come through OPA. Anything else he does is in a private capacity. Conflict of interest is inherent in FMA mangers representations, but he has to make clear he is not speaking for the agency and is not disclosing non-public information.
Sent from my iPhone

On Dec 20, 2019, at 5:50 PM, Driscoll, Derrick (USMS) (b)(6); (b)(7)(C) @usms.doj.gov> wrote:

Gerry and Lisa

Please see below and let me know if I'm ok directing (b)(6); (b)(7)(C); to waive off involving himself in this despite his fma position due to a conflict with his full time or any options I have hear

Thanks
Derrick

Deputy Director
U.S. Marshals Service
Derrick Driscoll

Begin forwarded message:

From: "Driscoll, Derrick (USMS)" (b)(6); (b)(7)(C) @usms.doj.gov>
Date: December 20, 2019 at 5:48:14 PM EST
To: "Coghill, Michelle (USMS)" <MCoghill@usms.doj.gov>
Cc: "Washington, Donald (USMS)" (b)(6); (b)(7)(C) @usms.doj.gov>, "Hackmaster, Nelson (USMS)" (b)(6); (b)(7)(C) @usms.doj.gov>, "Delaney, William (USMS)" (b)(6); (b)(7)(C) @usms.doj.gov>, (b)(6); (b)(7)(C); (b)(7)(F) (USMS)' (b)(6); (b)(7)(C); (b)(7)(F) @usms.doj.gov>, "Kilgallon, John (USMS)' (b)(6); (b)(7)(C) @usms.doj.gov>, "Wade, Drew J. (USMS)" (b)(6); (b)(7)(C) @usms.doj.gov>
Subject: Re: (b)(6); (b)(7)(C), a Marshall Projects reporter, reaches out to Jason

(b)(6); (b)(7)(C); (b)(7)(F)

Thanks (b)(6); (b)(7)(C); (b)(7)(F) I'm going to hit up OGC on this as there definitely seems to be a conflict in (b)(6); (b)(7)(C); (b)(7)(F) role in FMA and as district chief

Deputy Director
U.S. Marshals Service
Derrick Driscoll

On Dec 20, 2019, at 5:41 PM, (b)(6); (b)(7)(C); (b)(7)(F) (USMS) (b)(6); (b)(7)(C); (b)(7)(F) @usms.doj.gov> wrote:

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From: Driscoll, Derrick (USMS)
Sent: Thu, 2 Jul 2020 18:59:34 +0000
To: Tyler, Jeff (USMS)
Cc: Washington, Donald (USMS); Kilgallon, John (USMS)
Subject: Re: Specific Items to Track

Fantastic update and job this week, and really every week Jeff!! I can't thank you enough for pulling double duty to handle your job and my job while I've been out! I've been extra good about enjoying the time with the fam which means much more work for you. I can't imagine anyone handling all of this better than you and I totally appreciate it!!

(b)(6); (b)(7)(C)

Derrick Driscoll
U.S. Marshals Service

On Jul 2, 2020, at 1:32 PM, Tyler, Jeff (USMS) (b)(6); (b)(7)(C) @usms.doj.gov> wrote:

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From: Tyler, Jeff (USMS)
Sent: Thu, 2 Jul 2020 17:32:40 +0000
To: Driscoll, Derrick (USMS)
Cc: Washington, Donald (USMS); Kilgallon, John (USMS)
Subject: RE: Specific Items to Track
Attachments: SCOTUS Case Impact on Oklahoma Workload - After ADO meeting - Final.docx, Executive Summary Carpenter v. Murphy.fv.2.docx, Weekly Threat Summary Final 20200628.pdf

Sir,

As we close out the week and you wrap up your vacation I wanted to provide you some final updates on items I was tracking for you. My updates are below in red:

1. **Weber Case** (No additional information to indicate the report will be released prior to July 6th. However, I did receive an email from Ron Carter which indicates the DA did not provide a specific date for release, only sometime July 6 – 10. Ron will reach back out on the 6th to request an exact date.)

    a. Ron Carter is tracking this item for me…the updated date for the release of the report by the DA's office is July 6
    b. From there, Ron will send the report to DOJ for review and of course we'll need OPI to monitor related threats to the investigators and district
    c. Please ensure both W/TN and N/MS are updated should the report come out earlier

2. **SOG Operations** (AD Smith is drafting an executive summary for your review which will be completed by July 7th, upon your return to the office)

    a. When I get back I'd like to get an update on current SOG deployments since they've been operating in D/OR, D/CO and monitoring W/WA in addition to the continued protests in DC which hopefully we won't need to engage with…

3. **N/IL** (Update received from N/IL is as follows: The N/IL continues to monitor social media (# (b)(6); (b)(7)(C); (b)(7)(F) and other sites utilized by his brother (b)(6); (b)(7)(C) for potential threats to DUSM (b)(6); (b)(7)(C); (b)(7)(F) The N/IL conducted a safety and security briefing with DUSM (b)(6); (b)(7)(C); (b)(7)(F) DUSM (b)(6); (b)(7)(C); (b)(7)(F) has installed a security system and cameras at his home. To date, he has not reported any suspicious activity around his residence.

    We continue to work with the FBI and USAO here in Chicago on their investigation into this matter. DUSM (b)(6); (b)(7)(C); (b)(7)(F) filed a local police report, regarding this incident, with the Plainfield Police Department on June 18, 2020. Additionally, DUSM (b)(6); (b)(7)(C); (b)(7)(F) was interviewed by the FBI on June 26, 2020. The USAO (N/IL) has been in

contact/coordination with the USAO (D/NV) since [redacted] resides in Las Vegas, NV. The latest update from the FBI case agent is that they are continuing to monitor social media and are awaiting the return of information that has been subpoenaed in this case.)

   a. It's died down for sure but please stay in contact with OPA/OPR/N-IL on the [redacted] case

4. **OK Legislation** (POD and CoDA have done an outstanding job tracking this case. In addition, myself, CoDA, the ADA, and the CFO met to discuss drafting a supplemental resource request to mirror the FBI and US Attorneys. In preparation for the resource request, HRD conducted a workload analysis (see attached) using information from the POD executive summary (also attached). That information was shared with the CFO who agreed to take the lead on the resource request. Information received from DOJ today indicates the SCOTUS decision will not be released prior to Monday July 6th. Attached is the executive summary I sent earlier this week.)

   a. Please continue to track the SCOTUS case in OK and have our POCs update ELM on the conversations w/ DOJ

5. **Use of Force FOIA (see attached)** (I spoke with Lisa and OGC has coordinated the review of the FOIA material by IOD, Training Division, TOD (SOG), and OGC and is in the process of finalizing the information which should be ready for your final review upon your return to the office next week.)

   a. I'm tracking this FOIA w/ OGC for final review prior to anything being released…please ensure all involved divisions give it a great scrub prior to approving the packet for submission to me/16th floor

If you need anything additional please let me know.

Regards

Jeff

Jeffrey R. Tyler
Associate Director
U.S. Marshals Service
[redacted]

From: Driscoll, Derrick (USMS) [redacted]@usms.doj.gov>
Sent: Wednesday, June 24, 2020 12:24 PM
To: Tyler, Jeff (USMS) [redacted]@usms.doj.gov>
Cc: Washington, Donald (USMS) [redacted]@usms.doj.gov>; Kilgallon, John (USMS)

(b)(6); (b)(7)(C) @usms.doj.gov>

Subject: Specific Items to Track

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SCOTUS Case Impact on Oklahoma Workload

- HRD analyzed the potential impact of the Carpenter Vs. Murphy SCOTUS case by evaluating how an increase of 940 new indictments a year and 4,700 retrials will affect workload across the three Oklahoma districts.

- HRD utilized POD's estimates of the number of new indictments and retrials per year per district (as broken out below) to extrapolate workload from a variety of mission areas. In this analysis, HRD equated indictments to prisoners received. POD's white paper did not have an indictment per year estimate for W/OK, and thus it was derived from the predicted number of retrials.
  - E/OK, 300 new Indictments per year/3000 retrials
  - N/OK, 600 new Indictments per year/1500 retrials
  - W/OK, 40 New Indictments per year/200 retrials

- HRD established ratios of prisoners received to other data elements in the 2019 DSM for each of the three Oklahoma District's models in order to estimate how much workload can be expected across the wide variety of missions each district performs.
  - HRD attempted to be comprehensive in including any mission area that may potentially be impacted, including the supervisors necessary to supervise the new positions.

- Using these estimates, HRD predicts that the following (b)(7)(E) FTE will be required in order to accomplish the work associated with the impact of the potential new indictments and retrial cases. These (b)(7)(E) FTE would be spread across the three districts as follows:
  - E/OK, (b)(7)(E) DUSMs, (b)(7)(E) DUSMs
  - N/OK, (b)(7)(E) DUSMs (b)(7)(E) DUSMs
  - W/OK (b)(7)(E) DUSMs

- Utilizing the ratio of administrative personnel to operational personnel in the DSM suggests an additional need for (b)(7)(E) additional support personnel, as broken out below;
  - E/OK, (b)(7)(E) administrative position
  - N/OK, (b)(7)(E) dministrative positions
  - W/OK (b)(7)(E) one

U.S. MARSHALS SERVICE
Prisoner Operations Division

Executive Summary

Carpenter v. Murphy

June 26, 2020

Topic: The Supreme Court of the United States (SCOTUS) will soon hear the case of *Carpenter v. Murphy* re-argued in an upcoming session. This case is one of the most important Supreme Court cases on tribal sovereignty in the 21st century. If the Supreme Court Justices uphold the United States Court of Appeals' Tenth Circuit's ruling, it could lead to the most extensive land restoration in U.S. history. Furthermore, it may impact current prisoner bedspace resources in the Eastern District of Oklahoma (E/OK) and the Northern District of Oklahoma (N/OK) due to the jurisdiction transfer of ongoing state criminal cases to the federal jurisdiction.

The ruling could require the return of three million acres of eastern Oklahoma to the Muscogee Creek Nation, and 16 million acres could be returned to the other four Civilized Tribes Cherokee, Choctaw, Chickasaw, and Seminole. This could then force jurisdictions to hear cases that were once tried in state court to be tried and re-tried in federal court due to state and federal boundaries being realigned.

Background: The original basis of the case was the conviction of Patrick Murphy for the 1999 murder of George Jacobs. Murphy was convicted in Oklahoma state court and sentenced to death, but he argues he should have been tried in federal court because the crime occurred on land that was initially reservation land of the Muscogee Creek Nation. Both Murphy and Jacobs were enrolled citizens of Muscogee Creek Nation.

- A lower federal appeals court ruled in favor of Murphy after it found no evidence of Congress abolishing the reservation status of Muscogee Creek Nation.
- The law change that would prevent the state from pursuing crimes on reservation land is the Major Crimes Act of 1907. The act only applies to crimes committed *by and to* Native Americans on reservation land.

- This could require the state to transfer relevant cases to the federal jurisdiction possibly impacting current available prisoner bedspace in N/OK, Western District of Oklahoma (W/OK), and E/OK.
- The immediate impact will be prevelant in E/OK, as the Muscogee tribe will directly be impacted by the decision. It is expected that once the decision is redered in this case in support of upholding the lower courts decision, the other four tribes throughout the state will be impacted.
- E/OK and N/OK have the largest geographical Indian Territorial land mass in the state.
- On May 11, 2020, the SCOTUS reviewed the case of *McGirt v. Oklahoma*. This case is similar to the *Capenter v. Murphy* case and involves the same Indian law issues, with an appeal from an Oklahoma state court conviction. The SCOTUS is expected to render a decision as early as Thursday, June 25, 2020.
- The SCOTUS is expected to make a decision soon, in which the *McGirt v. Oklahoma* case will establish precedence in the *Capenter v. Murphy* case.

Current Status:

E/OK currently has three (3) Intergovernmental Agreements (IGA) in the following locations; Pittsburg County, Okmulgee County, and Muskogee County. They also utillize, on occasion, Creek County Criminal Justice Authority in N/OK. The district presently has potentially 100 beds avilable within its capacity.

- Currently, E/OK, has a prisoner population of 101, with a three year average prisoner population of 69.
- There is potential to increase bedspace at Pittsburg with 40 additional beds.
- Presently, Department of Corrections (DOC) local jails have no interest in housing prisoners from the Federal Government as local governments seek to maintain their sovergeinty.
- E/OK, is expecting an additionaal 300 new indictments per year.
- E/OK anticipates they will have an additional 2,137 new misdemeanor cases and 1,283 new felony cases for retrial.
- E/OK has the largest Indian Territory in the state.
- The FBI is preparing for the potential outcome of this case by bringing into the state an additional 40-50 agents due to the possibly of state case retrials under federal jurisdiction.
- The E/OK United States Attorneys Office (USAO) will be adding an additional 30 AUSA's to its district.
- The USAO is preparing contingency plans for possible federal jurisdiction transition from the state.

N/OK currently has four (4) IGAs distributed in the following locations; Tulsa Co Criminal Justice Authority, Creek Co Criminal Justice Center, and Payne Co Jail. They also use, on occasion, Okmulgee Co Criminal Justice Authority in (E/OK). The district presently has potentially 200 beds avilable within its capacity.

- Currently, N/OK has a prisoner population of 156, with a three year average prisoner population of 106.
- N/OK, will have the greatests impact due to higher populations per capita in its Native land territory.
- N/OK, is expecting an additional 600 new indictments per-year due to higher populations in the northern area of the state.
- N/OK, anticipates they will have 800-1,000 new cases for retrial.

W/OK currently has six (6) IGAs in the following locations; Comanche Co Detention Center, Grady Co Criminal Justice Authority, Logan Co Jail, Pottawatomie Co Public Safety, Tillman Co, and Payne Co Jail. The district presently has potentially 200 beds avilable within its capacity.

- Currently, W/OK has a prisoner population of 350, with a three year average prisoner population of 241.

- W/OK anticipates some impact but nothing signficant at this point.

Next Steps:
The Prisoner Operations Division (POD) continues to work with the districts to monitor developments pending the Supreme Court ruling and to forecast and mitigate any potential prisoner bedspace shortages as needed.

- POD is continuing to work with each of the districts to explore additional bedspace options at existing IGA facilities and the potential use of McCallister and Fort Smith.
- Districts will maximize facility usage of Oklahoma Transfer Center and Grady County Criminal Justice Authority for additional prisoner bedspace.
- District USMs will reach out to the State DOC to see available options in housing USMS prisoners in state facilites.
- POD provided Notification of potential available IGA Facilites in districts provided:
  - W/OK has 36 IGAs we are reviewing
  - E/OK has 54 IGAs we are reviewing
  - N/OK has 38 IGAs
- Request for Information (RFI) proposed
  - Looking for additional housing resources in-district
  - We are also looking for housing resources in surrounding districts.
- POD is working with DHS, and BOP to identify additional housing resources in-district or regionally.
- Correctional Detention Officers (CDOs) Request sent to the districts

Risks/Challenges/Concerns:
If a Supreme Court decision results in an influx of federal prisoners, it may increase the prisoner population levels throughout the state affecting multiple districts. The greatest immediate impact will be on E/OK then N/OK, as these districts have the largest footprint of Native American territory thoughout the state.

- Each of the districts have staffing concerns. The impact of court productions and prisoner receipts will be significant.
  - POD will conduct and initiate a RFI for Contract Detention Officers (CDO) to assist in supporting the district(s) mission. CDOs may assist in augmenting staffing concerns for prisoner movements, transportation, and medical matters. A challenge may be finding the workforce in the region.

Estimates

- E/OK, anticipates they will have an additional 3,000 cases to retry
- E/OK, anticipates an additional 300 new indictments per-year
- N/OK, anticipates they will have 1,500 new cases for retrial.
- N/OK, anticipates an additional 600 new indictments per-year due to higher populations in the northern area of the state.
- W/OK, does not anticipate a large impact from the decision and are anticipating an addional 200 new cases for retrial.

- *Potentially*, 4,700 new cases from all 3 districts

- The above totals do not represent projections for new cases. Based on the information provided by the districts there could be potentially 1,000 new cases annually throughout the state.

- E/OK, will be impacted first and the presendence of this case will carry over into the other tribal regions throughout the state.

- The 5 Tribes regions are primarily in the Eastern and Northern Districts of Oklahoma.

- Presently, these prisoners are in the State DOC cusody. If we are able to maintain this housing option this could have minimal impact on the USMS' bedspace in the state.

    - The districts are in the process of reengaing into discussions with the State DOC.

- Concern, there may be regulatory compliance issues relating to adherance to Department of Labor standards if the USMS assumes custody of these prisoners within state run facilities housing other state/local prisoners.

    - POD is prepared to negotiage IGAs with the State DOC. This would be in line with how the agency manages its prisoner operations in the District of Alaska.

- Challenge, projections are difficult at this stage due to the ambiguity of the law change and its impact. The United States Attorneys in each of the districts are working with the state and FBI to determine solid numbers.

- There is no indication as to when this will take effect or whether a grace period will be provided when the decision from the SCOTUS is redered.

Projections (New Cases)

- New Prosecutions: Based on about 1,000 new prosecutions per year, the increased caseload will increase the USMS ADP by approximately 550 prisoners.

- Current average per diem rate paid in the OK districts is approximately $60.00.

- If the USMS has to secure additional space, a premium above the current average per diem rate might be paid; assuming a 15% premium above the current average rate, we could expect to pay approximately $70 per day.

- The annual increase in housing expenditures is estimated at approximately $14 million;

- The additional cost of detention-related services such as medical and transportation is estimated at approximately $1.5 million. Total: $15.5 million annually.

Projections (Re-Trial)

- Estimating that 4,500 prisoners are currently serving a sentence in a State correctional facility once transferred into USMS custody for retrial the total projected cost is approximately $70 million ($65 million for housing expenditures and $5 million for detention-related services).

- This $70 million total expenditure might be incurred across multiple fiscal years.

From: Driscoll, Derrick (USMS)
Sent: Wed, 24 Jun 2020 16:40:42 +0000
To: Tyler, Jeff (USMS)
Cc: Washington, Donald (USMS); Kilgallon, John (USMS)
Subject: RE: Specific Items to Track

Whoever wrote that for me deserves a medal

Derrick Driscoll
Deputy Director
U.S. Marshals Service
(w) (b)(6); (b)(7)(C)

From: Tyler, Jeff (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>
Sent: Wednesday, June 24, 2020 12:29 PM
To: Driscoll, Derrick (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>
Cc: Washington, Donald (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>; Kilgallon, John (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>
Subject: RE: Specific Items to Track

Sir,

Not a problem. Thanks for the info and I hope you manage to enjoy the time away. After reading 10 questions with the DD earlier today, I know how important your family time is.

Regards

Jeff

Jeffrey R. Tyler
Associate Director
U.S. Marshals Service
(b)(6); (b)(7)(C)

From: Driscoll, Derrick (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>
Sent: Wednesday, June 24, 2020 12:24 PM
To: Tyler, Jeff (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>
Cc: Washington, Donald (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>; Kilgallon, John (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>
Subject: Specific Items to Track

Duplicate of other pages in this request

Duplicate of other pages in this request

From:	Driscoll, Derrick (USMS)
Sent:	Wed, 24 Jun 2020 16:24:26 +0000
To:	Tyler, Jeff (USMS)
Cc:	Washington, Donald (USMS); Kilgallon, John (USMS)
Subject:	Specific Items to Track
Attachments:	FW: FOIA Case 19-00087 (Rebecca Lindstrom)

JT

Thanks again for agreeing to act for me, I really do appreciate it as I know that means double duty for you! Just a few items to track while I'm gone, most of which I'm sure you're already aware of/tracking:

1. **Weber Case**
    a. Ron Carter is tracking this item for me…the updated date for the release of the report by the DA's office is July 6
    b. From there, Ron will send the report to DOJ for review and of course we'll need OPI to monitor related threats to the investigators and district
    c. Please ensure both W/TN and N/MS are updated should the report come out earlier

2. **SOG Operations**
    a. When I get back I'd like to get an update on current SOG deployments since they've been operating in D/OR, D/CO and monitoring W/WA in addition to the continued protests in DC which hopefully we won't need to engage with…

3. **N/IL**
    a. It's died down for sure but please stay in contact with OPA/OPR/N-IL on the (b)(6); (b)(7)(C) case

4. **OK Legislation**
    a. Please continue to track the SCOTUS case in OK and have our POCs update ELM on the conversations w/ DOJ

5. **Use of Force FOIA (see attached)**
    a. I'm tracking this FOIA w/ OGC for final review prior to anything being released…please ensure all involved divisions give it a great scrub prior to approving the packet for submission to me/16th floor

I'll stop by to discuss/review, thanks!
Derrick

Derrick Driscoll
Deputy Director
U.S. Marshals Service

(w) (b)(6); (b)(7)(C)

From: Wade, Drew J. (USMS)
Sent: Tue, 23 Jun 2020 12:59:27 +0000
To: Driscoll, Derrick (USMS)
Subject: FW: FOIA Case 19-00087 (b)(6); (b)(7)(C)
Attachments: 2019_04_04_15_40_10.pdf, 19-00087 Final Documents.pdf

Drew J. Wade
Chief
U.S. Marshals Service
Office of Public Affairs
(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C); (b)(7)(F) USMS) (b)(6); (b)(7)(C); (b)(7)(F) @usms.doj.gov>
Sent: Monday, June 22, 2020 10:26 AM
To: Wade, Drew J. (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>
Subject: FOIA Case 19-00087 (b)(6); (b)(7)(C)

Good morning Drew;
Attached, please find the final redacted copy of the responsive file for the (also) attached request. Please advise upon review if you have any concerns.

(b)(6); (b)(7)(C); (b)(7)(F)
Government Information Specialist
United States Marshals Service
Office of General Counsel
Bldg. CG-3, 15TH Floor
Washington, D.C. 20530-0001
(b)(6); (b)(7)(C) main)
direct)

REQUEST NO: 2019USMS 00087

NEW FOI/PA REQUESTS (LOGGED)

(b)(6); (b)(7)(C) RE: Training Guides 2/21/19

(Name) (Date)

Assigned to:

(b)(6); (b)(7)(C); (b)(7)(F)

Action Needed:

File ____ PA ____ PA Cited ____ FOIA ✓
A20 ____ Other ____

Search Areas **Search Form** _____
Search Areas

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_____ _____

Special Areas: _____

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_____
_____
_____

(b)(6); (b)(7)(C); (b)(7)(F) **(USMS)**

From: (b)(6); (b)(7)(C) @11alive.com>
Sent: Thursday, November 8, 2018 11:23 AM
To: USMS FOIA
Subject: FOIA - training policy

I am writing to make an open records request under the Freedom of Information Act, for a copy of all guidelines, directives, training policies and videos used by the USMS related to the arrest of a fugitive with a potential mental health illness.

If you are not the custodian of these records, please identify the correct custodian and also please forward this FOIA to that entity or individual. We request these records in electronic form if available, and if not in their original form.

By this letter, I agree to pay search, retrieval, redaction, and copying costs, and whatever other reasonable charges as are authorized under FOIA, up to and including $200.00. In the event the costs associated with responding to this request are anticipated to exceed this amount, please contact us at the telephone number or e-mail address below to obtain further assurances of payment or a reduction in the scope of this request.

Thank you,

(b)(6); (b)(7)(C)
11Alive
(b)(6); (b)(7)(C)
(b)(6); (b)(7)(C) 11alive.com

INSTRUCTIONS: Use Form USM-433 to provide an outline lesson plan for a course taught within the USMS. Submit the completed lesson plan, along with Form USM-433A, *Risk Assessment for Lesson Plan*, and all course materials, to the Chief of the Training Management Branch, Training Division, Glynco, GA. Click here for more detailed instructions.

Course Title: Use of Force

TO BE COMPLETED BY THE TRAINING MANAGEMENT BRANCH:

Course #: TD-1300.01

Date Approved:

LearnUSMS Item #:

This lesson plan may contain sensitive law enforcement information that is exempt from release under Exemption 7 of the Freedom of Information Act. The USMS Office of General Counsel's FOIA/PA Officer must be consulted before any of the information contained in this lesson plan is released.

LESSON PLAN SUMMARY	
COURSE TITLE	Use of Force
TERMINAL PERFORMANCE OBJECTIVE	Given lecture and discussion on the USMS Use of Force Policy and pertinent case law, the students will develop a detailed, functional knowledge of both legal and agency approved use of force which will be demonstrated through written exam and practical exercises.
INSTRUCTIONAL METHOD *(Check all that apply.)*	☒ Lecture w/questions ☒ Practical exercise ☐ Small group activities ☒ Laboratory ☐ Discussion ☐ Other - *Specify*:
INSTRUCTIONAL ENVIRONMENT *(Check all that apply.)*	☒ Classroom ☒ Matroom ☐ Range ☐ Raid House ☒ Other - *Specify*: FLETC Use of Force facility
INSTRUCTIONAL AIDS *(Check all that apply.)*	☒ PowerPoint (must include TPO & EPOs) ☐ Handouts ☒ Manuals ☐ Assistant Instructors - List number: ____ ** Attach a copy of all instructional aids to the lesson plan. **
INSTRUCTOR REFERENCES *(List all references and copyright approvals.)*	USMS Policy 2.1 (Use of Force). USMS Policy 2.1 (Less than Lethal Devices). USMS Policy 2.1 (Shooting Incidents). Federal Law Enforcement Training Center, Legal Division, "Use of Force-Legal Aspects" Lesson Plan (1212), May 09. Dave Grossman and Bruce K. Siddle, "Psychological Effects of Combat" in Encyclopedia of Violence, Peace and Conflict, Academic Press, 2000. SSA Thomas D. Petrowski, "Fourth Amendment Issues Related to the Use of Force by Agents of the Government", Office of General Counsel, FBI Academy, Quantico, VA. Dave Grossman "On Combat: The Psychology of Deadly conflict in War and Peace", Warrior Science Publications, 3rd Ed., October 2008 Bruce K. Siddle "Sharpening the Warriors Edge: The Psychology and Science of Training" PPCT Publications, 1995 Dr. Alexis Artwohl "Deadly Force Encounters: What Cops Need to Know to Mentally and Physically Prepare for and Survive a Gunfight" Paladin Press, 1997
STUDENT ASSIGNMENT *(Participation, demonstration, written exam, etc.)*	Participation in classroom lecture and discussion, written exam for applicable classes, participation in Use of Force Simulations Lab and Transitional Drills for applicable classes, meet performance expectations in Use of Force Practical Exercise for applicable classes.
STUDENT MATERIALS	USMS Policy 2.1 (Use of Force). USMS Policy 2.1 (Less than Lethal Devices). USMS Policy 2.1 (Shooting Incidents). Student manual (BDUSM only)
EQUIPMENT *(Projector, computers, Red Rocks, batons, etc.)*	Computer, projector or other means to display powerpoint presentation to class, white boards/ blackboards, dry erase markers/ chalk, erasers for all lectures. Equipment requirements for Use of Force Simulations Lab and Transitional Drills are listed in the attachments.
RISK ASSESSMENT - *Complete Form USM-____A and submit along with this form.*	☒ Low ☐ Moderate ☐ High

LESSON PLAN DETAILS		
1. # of Lecture Hours:	**2. # of Practical Exercise Hours:**	**3. TOTAL # of Hours:**
4	14	18

4. Description:
This course provides the student with a functional knowledge of the legal and practical parameters for using force as established by the U.S. Constitution, the U.S. Supreme Court, and U.S. Marshals Service Policies. It discusses concepts in use of force, case law, mental preparation, documenting use of force incidents, and USMS policy. During the Basic Deputy United States Marshal (BDUSM) training program the lecture material covers all six EPOs, and is presented over the course of two instructional periods. During the Advanced Deputy United States Marshal (ADUSM) training program the lecture material covers EPOs 1, 2, 5, and 6 in one instructional period. During the Less-Than-Lethal Instructor training program (LLITP) the lecture material covers EPOs 1, 2, 3, and 6 in one instructional period.

5. Terminal Performance Objective (TPO):
Given pertinent case laws and agency policy, students will identify when force is reasonable to include effective methods of documenting according to USMS and Department of Justice (DOJ) policies.
Given Use of Force simulation labs and various equipment, students will demonstrate effective and reasonable force options by passing all critical and a majority of secondary elements.

6. Enabling Performance Objectives (EPO):
EPO #1 Identify the constitutional standard in the use of force.
EPO #2 Identify the key elements of USMS Policy 14.15 (Use of Force).
EPO #3 Identify the key elements of USMS Policy 14.16 (Less than Lethal Devices).
EPO #4 Identify the key elements of USMS Policy 2.1 (Shooting Incidents).
EPO #5 Discuss effective use of force.
EPO #6 Identify steps to be taken after force is used.
EPO #7 Review the fundamentals of documenting use of force incidents.
EPO #8 Demonstrate reasonable force options when presented with a UOF scenario.

7. Method of Evaluation ***(Select all that apply)*****:**

☒ Student participation ☒ Practical exercise ☐ None
☐ Multiple choice question class exam* ☒ Multiple choice questions on comprehensive exam*

* *See question 7a.*

7a. If a written test will be used to evaluate students, provide a minimum of three multiple choice questions for each Enabling Performance Objective (EPO). True / False questions are not to be used.

Click here to add multiple choice questions.

8. Introduction:
1. The use of force by law enforcement personnel is a matter of critical concern to both the public and the law enforcement community. Officers have numerous and varied encounters with the public on a daily basis, and when reasonable may use force to carry out their duties.

2. Officers must have an understanding of both the extent and limitations of their authority. This is especially true with respect to officers overcoming resistance while engaged in the performance of their duties.

3. The overall purpose of this course is to provide the student with a functional knowledge of the legal and practical parameters for using force as established by the U.S. Constitution, the U.S. Supreme Court, and U.S. Marshals Service Policies.

9. Presentation ***(Insert the TPO & EPOs from Questions 5 & 6 above and provide supporting teaching point explanations.)*****:**

A. EPO #1 Identify the constitutional standard in the use of force.

1. Graham v. Connor (1989) - Law enforcement officers have a Constitutional right to use force. In the U.S. Supreme Court decision Graham v. Connor (1989), the court stated "our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical

coercion or threat thereof to effect it."

a. The Court also stated that the use of force by an officer "in the course of an arrest, investigatory stop, or other `seizure' of a free citizen [is] properly analyzed under the Fourth Amendment's `objective reasonableness' standard, rather than under a substantive due process standard."

b. The Court stated that based on the totality of the circumstances, "the reasonableness of a particular use of force must be judged from the perspective of the reasonable officer on the scene, rather than with the 20/20 vision of hindsight." The Court further noted that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split second judgments -- in circumstances that are tense, uncertain, and rapidly evolving[.]"Totality of the circumstances

c. In every use of force situation, officers must look at the totality of the circumstances that affect the reasonable use of force. There can be many aspects and or considerations within the totality of the circumstances that affect the appropriate and reasonable use of force.

d. Among the circumstances that may govern the reasonableness of using a particular level of force, the Supreme Court emphasized four key factors in Graham v. Connor:

   1) Severity of the Crime

   2) Whether the suspect is an immediate threat to the safety of the officer or others

   3) Whether the suspect is actively resisting arrest, or

   4) Attempting to evade arrest by flight

e. Additional factors used by courts when applying the standard of Graham v. Connor that may also govern the reasonableness of using a particular level of force are:

   1) The number of suspects and officers involved

   2) The size, age, and condition of the officer and suspect

   3) The duration of the action

   4) Whether the force applied resulted in injury

   5) Previous violent history of the suspect, known to the officer at the time

   6) The use of alcohol or drugs by the suspect

   7) The suspect's mental or psychiatric history, known to officer at the time

   8) The presence of innocent bystanders who could be harmed if force is used or not

   9) The availability of officer weapons, such as pepper spray, batons, or electronic control devices.

f. In addition to the facts and circumstances identified by the courts, each officer should also address any other applicable considerations such as those listed below specific to each incident:

   1) Can the subject, who is resistant, physically comply with the issued commands or directions?

   2) Does the officer(s) have the ability to disengage or engage a contact?

3) Will the officer(s) actions or tactics precipitate a higher use of force level?

4) Will the use of force that is presently appropriate have the desired results?

5) Is the officer(s) placing himself or herself in a position of disadvantage by using a tactic that, while lawful, is not strategically appropriate for the threat presented?

6) What is the law enforcement experience level of the officer?

7) What is the environment (night, day, rain, snow, ice, heat, water, terrain, confinement) of the contact?

8) What available weapons are in the immediate vicinity to the subject?

9) What is the distance from the officer to the subject?

10) What is the intended result from escalating force?

11) Is your action(s) worth the risk of injury to yourself?

12) Am I injured? How bad? Am I exhausted? Can I continue?

g. Law enforcement officers may use reasonable force to complete a variety of different objectives. These objectives may include:

1) Detentions

2) Frisks

3) Arrests

4) Self defense

5) Defense of others

6) Defense of property

7) Preventing a person from self-injury

8) Preventing a person(s) from destroying evidence

9) Stopping a riot

10) Preventing prisoner escapes

h. All searches and seizures of persons by agents of the government must be reasonable. The test of reasonableness is a common sense evaluation of what another "objectively reasonable" officer could have done in the same circumstances.

i. While "objective reasonableness is not capable of precise definition or mechanical application," (Graham v. Connor) objective reasonableness will be determined based on the facts and circumstances known to the officer at the instant the force was used.

j. It will be determined by examining a number of factors that are involved in the officer's decision to use force.

k. What was determined or discovered after force was used cannot be used to justify or condemn the use of force and

would normally not be admissible evidence in a criminal proceeding.

l. The standard of objective reasonableness set forth in the Fourth Amendment does not require that officers choose the least intrusive level of force, only a reasonable one.

2. The Use of Deadly Force - Objective Reasonableness. As stated above, all claims of excessive force by law enforcement officers - deadly or not - are analyzed under the Fourth Amendment's "objective reasonableness" standard. Graham. "Whether or not an officer's actions constitute `deadly force,' all that matters is whether the [officer's] actions were [objectively] reasonable." Scott v. Harris, 2007 U.S. Lexis 4748 at *19 (2007). This determination depends upon the underlying facts and circumstances of each particular case. See Scott at *19 (Courts must slosh their way through the fact bound morass of "reasonableness.")

   a. Tennessee v. Garner (1985) - As stated in Scott v. Harris (2007), when a law enforcement officer uses deadly force, the standard of review is still objective reasonableness. But in Tennessee v. Garner, 471 U.S.1 (1985), the Supreme Court provided some examples of situations in which the use of deadly force might be constitutionally reasonable.

   b. The five key elements of Tennessee v. Garner are:

      1) Probable Cause

         a) Not certainty. An officer need not be 100% sure the suspect is going to cause death or serious bodily harm.

      2) Threat of

         a) An officer is not obligated to wait until death or serious bodily harm is occurring.

         b) If based upon the totality of circumstances the officer perceives there is a threat of such action, deadly force may be used.

      3) Serious Physical Harm

      4) To officers or others

      5) Warning if feasible

         a) A number of factors may determine whether a warning is feasible:

         b) Time

         c) Distance

         d) Available cover/concealment

         e) Known history of violence

         f) Whether such a warning may cause the offender to act before an officer could respond (i.e. a case involving a sniper)

3. General guidelines for deadly force

   a. If the use of deadly force is reasonable, the implement used to apply that force is of no consequence.

b. If the use of deadly force is reasonable, the degree of injury sustained by the assailant is of no consequence.

c. If the use of deadly force is reasonable, the relative positioning of the assailant to the officer is of no consequence.

d. If the use of deadly force is reasonable, the assailant is responsible for the injuries incurred not the officer who delivered the force.

e. A subject need not be armed with a weapon to justify the use of deadly force. An officer may use deadly force if he or she has a reasonable belief that a subject presents a threat of imminent danger of death or serious physical injury to the officer or others.

f. If feasible, a warning should be given prior to the use of deadly force. A subject need not be armed to pose a threat of serious bodily harm to the officer or others.

g. There is a perception of a very hard line rule that the police are forbidden to shoot an assailant in areas other than the front of the assailant's body or when the assailant is doing anything but directly attacking the officer. The Constitution does not restrict nor imply any limitation of employment of force based on the assailant's body position.

4. Pre-assault indicators

a. When using force, officers routinely observe behaviors before the force becomes necessary that indicate an attack or an assault is likely to occur.

b. These indicators are often referred to as pre-assault indicators, and can be used to justify an officer's response to a particular use of force.

c. It is also important that an officer recognize that when these indicators are present, they need not wait for the assault to occur to be justified in using reasonable force.

(b) (7)(E)

[redacted]

B. EPO #2 IDENTIFY THE KEY ELEMENTS OF USMS POLICY 14.15 (USE OF FORCE).

1. Objectively reasonable
   a. All of the circumstances
   b. Known at the time force is used
2. All incidents involving the use of firearms or nonlethal devices will be reported
3. Less-than-lethal force
   a. Defined as "force that is neither likely nor intended to cause death or serious physical injury
   b. DUSMs are authorized to use only those less-than-lethal devices that are approved for use by the USMS and that they are trained to use.
   c. Used only where reasonable force is necessary to:
      1) Protect themselves or others from physical harm
      2) Restrain or subdue a resistant prisoner or suspect
      3) Make an arrest
      4) Prevent a prisoner from escaping
      5) Otherwise obtain lawful compliance from a subject.
   d. Not used to harass, taunt, or abuse a suspect
   e. Prohibited acts (Unless deadly force is reasonable)

      (b) (7)(E) [redacted]

      [redacted]

      [redacted]
4. Deadly force
   a. Defined as "any force that is likely to cause death or serious physical injury
   b. Used only when necessary
      1) Reasonable belief
      2) Imminent threat of death or serious physical injury
   c. (b) (7)(E) [redacted]
   d. (b) (7)(E) [redacted]
   e. (b) (7)(E) [redacted]
5. Medical attention
   a. In all use-of-force incidents

b. Provided as soon as practicable to:

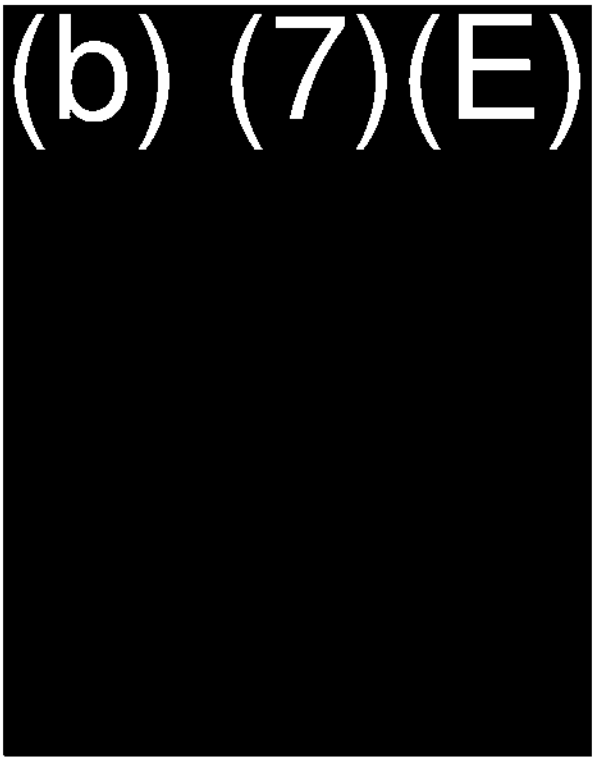
1) Injured persons

2) Persons alleging injury

3) Persons requesting medical care

C. EPO #3 Identify the key elements of USMS policy 14.16 (less than lethal devices).

1. Authorized devices



2. Use of Force Statement

a. Less than lethal devices will not be used to harass, taunt or abuse a subject

b. Less than lethal devices will be used in compliance with respective policies and in a manner consistent with current training procedures as established by TD.

3. Training

a. Must complete the Training Division approved course of instruction during Basic Training

b. Must be certified and trained annually (b) (7)(E)

4. Requirements after use of Less Than Lethal Device

a. After the subject and scene have been secured

b. Provide medical attention as soon as possible when:

1) Obviously injured

2) Alleges any injury

3) Requests medical attention

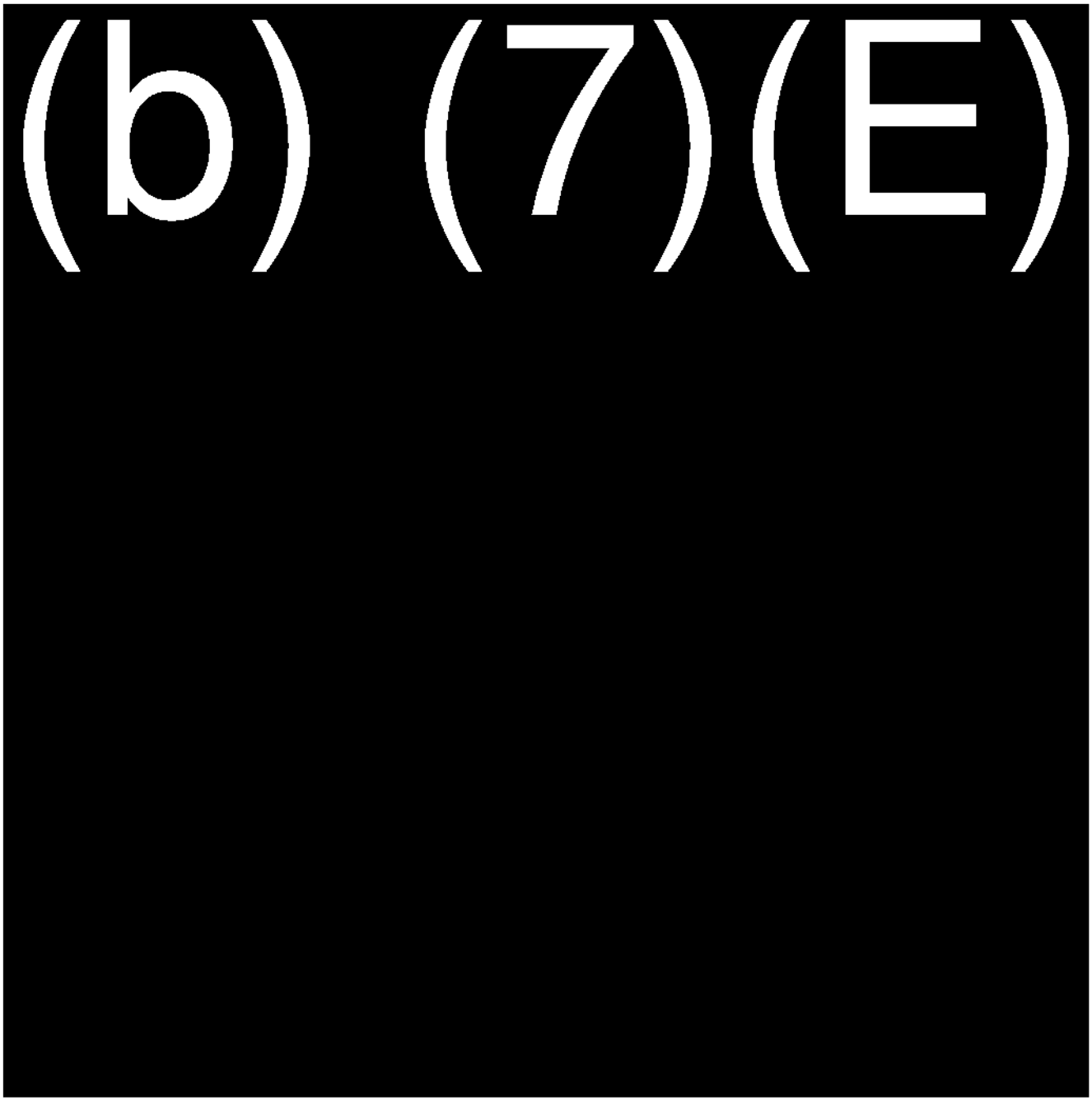
c. Report incident to supervisor as soon as possible

d. Photograph and/or videotape marks or injuries

e. Complete (b) (7)(E) and submit to OI (b) (7)(E)

f. Complete (b) (7)(E) and send to appropriate detention facility if subject was injured and/or received medical attention

5. Device Specific Deployment Protocols



(b) (7)(E)

C. EPO #4 Identify the key elements of USMS Policy 2.1 (Shooting Incidents).

1. All shooting incidents will be reported and investigated

   a. Immediately report incident to supervisor

   b. Supervisor completes (b) (7)(E)

   c. (b) (7)(E) provided to Office of Inspection (OI) (b) (7)(E)

(b) (7)(E)

(b) (7)(E)

[redacted]

D. EPO #5 Discuss effective use of force.

1. Speed: When and how the decision to act is made

   a. Force decision is made during the OODA LOOP

      1) Observe- all decisions are based on observations of the evolving situation.

         a) Pre-assault indicators

         b) Subject actions

      2) Orient- putting the observations into context with information rooted in your long-term memory, including training-both good and bad- life experiences, and your genetic heritage.

         a) Causes of Hesitation

            I. Learned behavior

            II. Lack of understanding of law or policies

               i. Qualified Immunity- Officers are entitled to qualified immunity where their actions do not violate a clearly established statutory or constitutional right that a reasonable person would have known existed.

            III. Physiological changes

               i. Fight, flight, or freeze

      3) Decide- decision to act or react

      4) Act- the physical action

         a) When to act

            I. Failure to act, or failure to act quickly and appropriately can lead to failure

2. Appropriateness

   a. Reasonableness of the force choice

1) Selection of the reasonably appropriate level of force to: control the incident, effect the arrest, or protect self or others from harm or death.

a) Facts make force reasonable

b) Graham Factors (SCITAREF)

c) Contributing factors

2) No need to exhaust less intrusive options

3. Efficiency

a. Proper delivery of the force

1) The use of force is an offensive act

2) Development and maintenance of proficiency

E. EPO #6 Identify steps to be taken after force is used.

(b) (7)(E)

(b) (7)(E)

[redacted]

E. EPO #7 Review the fundamentals of documenting use of force incidents.

1. (b) (7)(E)

   a. The report should be thorough.

      1) Elements of the offense

      2) Provide a time line of activity (before, during, and after-action procedures

      3) Give the reader a visual "motion" picture of the incident

      4) List training and experience

   b. The report should be precise.

      1) Facts not conclusions

      2) Objective not subjective

         a) "Officer safety"

         b) "In fear of my life"

      3) Basis for the seizure

         a) Reasonable suspicion

         b) Probable cause

         c) Matched the description

            I. Detail what the description was

10. Summary ***(Insert the TPO & EPOs from Questions 5 & 6 above and provide a brief summary of this course of instruction.)*****:**
Given lecture and discussion on the USMS Use of Force Policy and pertinent case law, the students will develop a detailed, functional knowledge of both legal and agency approved use of force which will be demonstrated through written exam and practical exercises.
EPO #1 Identify the constitutional standard in the use of force.
EPO #2 Identify the key elements of USMS Policy 2.1 (Use of Force).

EPO #3 Identify the key elements of USMS Policy 2.1 (Less than Lethal Devices).
EPO #4 Identify the key elements of USMS Policy 2.1 (Shooting Incidents).
EPO #5 Discuss effective use of force.
EPO #6 Review the fundamentals of documenting use of force incidents.

11. Application:

☒ Laboratory ☒ Practical exercise ☐ N/A

REVIEW AND APPROVALS

Developed By *(List all team members' names)*:

Lesson Plan Prepared By: (b) (6), (b) (7)(C), (b) (7)(F)	**Title:** Senior Inspector	
Signature: (b) (6), (b) (7)(C), (b) (7)(F)	(b) (6), (b) (7)(C), (b) (7)(F)	**Date:** 5/14/2014
Reviewed By: (b) (6), (b) (7)(C), (b) (7)(F)	**Title:** Lead Instructor	
Signature: (b) (6), (b) (7)(C), (b) (7)(F)	(b) (6), (b) (7)(C), (b) (7)(F)	**Date:** 4/7/2015
Reviewed By *(Supervisor/Manager)*: (b) (6), (b) (7)(C), (b) (7)(F)	**Title:** Chief Inspector	
Signature: (b) (6), (b) (7)(C), (b) (7)(F)	(b) (6), (b) (7)(C), (b) (7)(F)	**Date:** 9/27/2016

Submit the completed lesson plan along with course materials (student text or manual, PowerPoint file showing instructors notes) to the Chief of the Training Management Branch, Training Division.

- TD USE ONLY -

Accreditation Review By: (b) (6), (b) (7)(C), (b) (7)(F)	**Title:** Accreditation Manager	
Signature: (b) (6), (b) (7)(C), (b) (7)(F)	(b) (6), (b) (7)(C), (b) (7)(F)	**Date:** 10/3/2016
Approved By:	**Title:**	
Signature:		**Date:**

U.S. Department of Justice

United States Marshals Service

Office of General Counsel

Washington, D.C. 20530-1000

February 19, 2016

MEMORANDUM TO: United States Marshals
Chief Deputy United States Marshals
Assistant Directors
Regional Fugitive Task Force Commanders
Administrative Officers

FROM: Gerald Auerbach
(b) (6), (b) (7)(C)

SUBJECT: Use of Tasers on Mentally Disabled Persons

A recent Fourth Circuit Court of Appeals decision about the use of tasers, addresses the use of tasers on mentally disabled persons. The decision has resulted in numerous inquiries to the Office of General Counsel, Investigative Operations Division, and Training Division. This memorandum addresses that decision, Armstrong v. Village of Pinehurst, which is attached. The decision establishes law only in the Fourth Circuit, which includes the States of Maryland, West Virginia, Virginia, North Carolina, and South Carolina, but it should be considered by all Deputy U.S. Marshals (DUSM) if they confront a situation similar to the one in the Armstrong case.

Ronald Armstrong, who suffered from paranoid schizophrenia, had not taken his medication for 5 days. Because of unusual behavior, his sister asked him to accompany her to a hospital, and he willingly went with her, but during the course of the evaluation, he left the area where he was being examined. The examining doctor judged Armstrong to be a danger to himself, but did not conclude that Armstrong was a danger to others. The doctor issued involuntary commitment papers to compel Armstrong's return. Three local police officers arrived and found Armstrong. Once the commitment papers were final, the officers advanced toward Armstrong. Armstrong sat down and wrapped himself around a four by four post that was supporting a stop sign. The officers tried to pry him loose from the post "but he was wrapped too tightly and would not budge." After approximately 30 seconds, Armstrong was told that if he did not let go of the post, he would be tased. Armstrong did not let go, and he was tased in drive stun mode five times for over 2 minutes. He was still wrapped around the pole. Shortly after the tasing stopped, two hospital security guards joined the police officers and successfully removed Armstrong from the post and restrained him. Armstrong soon became

unresponsive and did not respond to CPR from the officers or resuscitation efforts by emergency medical services (EMS) or hospital personnel. Armstrong was pronounced dead at the hospital.

The Court determined that the police officers' seizure of Armstrong and use of the taser violated Armstrong's Fourth Amendment rights.

The Court ruled that:

> A "taser, like 'a gun, a baton, . . . or other weapon,' . . . . is expected to inflict pain or injury when deployed. It, therefore, may only be deployed when an officer is confronted with an exigency that creates an immediate safety risk and that is reasonably likely to be cured by using the taser."

In discussing the basis for its decision, the Court set out its view of the facts: Armstrong was not thought to be a danger to others; he was only believed to be a danger to himself. The purpose of the commitment order was to keep him from harming himself. His non-violent resistance made the use of some force reasonable, but the level of force an individual's resistance will support is dependent on the factual circumstances underlying that resistance. Here, the factual circumstances demonstrate little risk – Armstrong was stationary, non-violent, and surrounded by people willing to help return him to the hospital. That Armstrong was not allowing his arms to be pulled from the post and was refusing to comply with shouted orders to let go, while cause for some concern, did not import much danger or urgency. Deploying a taser is a serious use of force. The weapon is designed "to cause excruciating pain." Taser International, the manufacturer of the taser warned, "Drive-stun use may not be effective on emotionally disturbed persons or others who may not respond to pain due to a mind-body disconnect." In this situation, "the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis." And even when this ideal course is not feasible, officers who encounter an unarmed and minimally threatening individual who is exhibiting conspicuous signs that he is mentally unstable must "de-escalate the situation and adjust the application of force downward." A reasonable officer would have perceived a static stalemate with few, if any, exigencies.

Summing up its decision, the Court stated, "Where, during the course of seizing an out-numbered mentally ill individual who is a danger only to himself, police officers choose to deploy a taser in the face of stationary and non-violent resistance to being handcuffed, those officers use unreasonably excessive force. . . Law enforcement officers should now be on notice that such taser use violates the Fourth Amendment."

This case, unlike most USMS encounters, did not involve a person who was known to be armed and dangerous or a person who was charged with a violent offense. Armstrong did not attempt to strike a law enforcement officer, to use a weapon or to take an officer's weapon. The subject of the officers' actions was a person who was not perceived to be a danger to others; he was thought to be a danger only to himself. His resistance to law enforcement action was non-violent – he clung to a post and refused to be moved.

USMS policy 14.15, Use of Force, at D. 2. b., states that "DUSMs may use less-than-lethal force only in situations where reasonable force, based on the totality of the circumstances at the time of the incident is necessary to 1) protect themselves or others from physical harm; 2) restrain or subdue a resistant prisoner or suspect; 3) make an arrest; 4) prevent a prisoner from escaping; or 5) otherwise obtain lawful compliance." The Armstrong case provides that when law enforcement officers must seize an outnumbered mentally ill individual who is a danger only to himself and that person is stationary and resisting only non-violently, the use of a taser against that individual is not considered reasonable.

As with all cases that establish new borderlines in the law, this case creates some uncertainties that will hopefully be clarified sooner rather than later. Most of all, this case reinforces principles that all law enforcement officers should keep constantly at the front of their minds. You must train so that you are prepared to use reasonable force in fast-moving, dangerous, uncertain situation, and you must be prepared to explain to a judge, jury or investigator, without personal experience in use of force situations, why your actions were reasonable.

If you have any questions on this topic, please call the Office of General Counsel at (b) (6), (b) (7)(C)

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1191

THE ESTATE OF RONALD H. ARMSTRONG, by and through his Administratrix, Jinia Armstrong Lopez,

Plaintiff - Appellant,

v.

THE VILLAGE OF PINEHURST; OFFICER JERRY MCDONALD, In his official and individual capacity; OFFICER TINA S. SHEPPARD, In her official and individual capacity; OFFICER ARTHUR LEE GATLING, JR., In his official and individual capacity,

Defendants - Appellees,

and

TASER INTERNATIONAL, INC.,

Defendant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Catherine C. Eagles, District Judge. (1:13-cv-00407-CCE-JLW)

Argued: October 28, 2015 Decided: January 11, 2016

Before WILKINSON, KEENAN, and THACKER, Circuit Judges.

Affirmed by published opinion. Judge Thacker wrote the opinion, in which Judge Keenan joined. Judge Wilkinson wrote a separate opinion concurring in part.

ARGUED: Karonnie R. Truzy, CRUMLEY ROBERTS, LLP, Greensboro, North Carolina, for Appellant. Dan McCord Hartzog, CRANFILL SUMNER & HARTZOG LLP, Raleigh, North Carolina, for Appellees. **ON BRIEF**: David J. Ventura, CRUMLEY ROBERTS, LLP, Charlotte, North Carolina, for Appellant. Dan M. Hartzog, Jr., CRANFILL SUMNER & HARTZOG LLP, Raleigh, North Carolina; Michael J. Newman, VAN CAMP, MEACHAM & NEWMAN PLLC, Pinehurst, North Carolina, for Appellees.

THACKER, Circuit Judge:

The Estate of Ronald H. Armstrong ("Appellant" when referring to the estate, or "Armstrong" when referring to the decedent) appeals an order granting summary judgment to the Village of Pinehurst, North Carolina, and Lieutenant Jerry McDonald, Sergeant Tina Sheppard, and Officer Arthur Gatling, Jr., of the Pinehurst Police Department ("Appellees"). The district court determined that qualified immunity bars Appellant's claim that Appellees used excessive force when executing an involuntary commitment order, which required Armstrong's immediate hospitalization.

On review, we hold that Appellees used unconstitutionally excessive force when seizing Armstrong, but we, nevertheless, agree with the district court that Appellees are entitled to qualified immunity. We, therefore, affirm the grant of summary judgment in Appellees' favor on the grounds explained below.

I.

We review the district court's grant of summary judgment de novo. See Henry v. Purnell, 652 F.3d 524, 531 (4th Cir. 2011) (en banc). We "determine de novo whether the facts . . . establish the deprivation of an actual constitutional right," Leverette v. Bell, 247 F.3d 160, 166 (4th Cir. 2001), and "[w]e review de novo an award of summary

judgment on the basis of qualified immunity," Durham v. Horner, 690 F.3d 183, 188 (4th Cir. 2012). "Summary judgment is appropriate only if taking the evidence and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party, 'no material facts are disputed and the moving party is entitled to judgment as a matter of law.'" Henry, 652 F.3d at 531 (quoting Ausherman v. Bank of Am. Corp., 352 F.3d 896, 899 (4th Cir. 2003)).

II.

A.

Ronald Armstrong suffered from bipolar disorder and paranoid schizophrenia. On April 23, 2011, he had been off his prescribed medication for five days and was poking holes through the skin on his leg "to let the air out." J.A. 675.[1] His sister, Jinia Armstrong Lopez ("Lopez"), worried by his behavior, convinced Armstrong to accompany her to Moore Regional Hospital ("Hospital") in Pinehurst, North Carolina. He willingly went to the Hospital and checked in, but "[d]uring the course of the evaluation he apparently became frightened and eloped from the [emergency department]." Id. Based on that flight and Lopez's report about his odd behavior over the

[1] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

previous week, the examining doctor judged Armstrong a danger to himself and issued involuntary commitment papers to compel his return. Armstrong's doctor could have, but did not, designate him a danger to others, checking only the box that reads "[m]entally ill and dangerous to self" on the commitment form. Id.

The Pinehurst police were called as soon as Armstrong left the Hospital, and three members of the department -- all Appellees in this case -- responded in short order. Officer Gatling appeared on the scene first, followed a minute or two later by Sergeant Sheppard. Lieutenant McDonald arrived about ten minutes after Sheppard. Armstrong had not traveled far when Gatling arrived. He was located near an intersection near the Hospital's main entrance.

When the police arrived, Armstrong's commitment order had not yet been finalized.[2] Therefore, Gatling and Sheppard engaged Armstrong in conversation. By all accounts, the parties were calm and cooperative at this point in time.

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[2] North Carolina law required that Armstrong's involuntary commitment order be certified in writing and notarized before it took effect. See N.C. Gen. Stat. § 122C-262(b). Police officers are sometimes authorized to seize individuals to prevent them from harming themselves without a commitment order in place, see id. § 122C-262(a), but Appellees did not go that route. Rather, they rely solely on the involuntary commitment order as authorization for their seizure of Armstrong.

Armstrong was acting strangely, however. When Officer Gatling first initiated conversation, Armstrong was wandering across an active roadway that intersects with the Hospital's driveway. Gatling successfully convinced him to withdraw to the relative safety of the roadside, but Armstrong then proceeded to eat grass and dandelions, chew on a gauze-like substance, and put cigarettes out on his tongue while the police officers waited for the commitment order.

As soon as they learned that the commitment papers were complete, the three police officers surrounded and advanced toward Armstrong -- who reacted by sitting down and wrapping himself around a four-by-four post that was supporting a nearby stop sign. The officers tried to pry Armstrong's arms and legs off of the post, but he was wrapped too tightly and would not budge.

Immediately following finalization of the involuntary commitment order, in other words, Armstrong was seated on the ground, anchored to the base of a stop sign post, in defiance of the order. The three police officers at the scene were surrounding him, struggling to remove him from the post. Lopez was in the immediate vicinity as well, along with Jack Blankenship and Johnny Verbal, two Hospital security officers. So Armstrong was encircled by six people -- three Pinehurst police officers tasked with returning him to the Hospital, two

Hospital security guards tasked with returning him to the Hospital, and his sister, who was pleading with him to return to the Hospital.

Appellees did not prolong this stalemate. Nor did they attempt to engage in further conversation with Armstrong. Instead, just thirty seconds or so after the officers told Armstrong his commitment order was final, Lieutenant McDonald instructed Officer Gatling to prepare to tase Armstrong. Officer Gatling drew his taser, set it to "drive stun mode,"[3] and announced that, if Armstrong did not let go of the post, he would be tased. That warning had no effect, so Gatling deployed the taser -- five separate times over a period of approximately two minutes.[4] Rather than have its desired effect, the tasing actually increased Armstrong's resistance.

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[3] Tasers generally have two modes. "In dart mode, a taser shoots probes into a subject and overrides the central nervous system." Estate of Booker v. Gomez, 745 F.3d 405, 414 n.10 (10th Cir. 2014). Drive stun mode, on the other hand, "does not cause an override of the victim's central nervous system"; that mode "is used as a pain compliance tool with limited threat reduction." Id. (internal quotation marks omitted). Appellees' expert confirmed that the drive stun mode on the TASER X26 ECD that Officer Gatling was carrying is intended to be used for pain compliance rather than incapacitation.

[4] The number of times Armstrong was tased is a disputed fact. But Lopez testified that she saw it happen five times, and because summary judgment was granted in favor of Appellees, this court must accept her version of the facts. See Henry v. Purnell, 652 F.3d 524, 527 (4th Cir. 2011) (en banc).

But shortly after the tasing ceased, Blankenship and Verbal jumped in to assist the three police officers trying to pull Armstrong off of his post. That group of five successfully removed Armstrong and laid him facedown on the ground.

During the struggle, Armstrong complained that he was being choked. While no witness saw the police apply any chokeholds, Lopez did see officers "pull[] his collar like they were choking him" during the struggle. J.A. 192.

With Armstrong separated from the post, Appellees restrained him. Lieutenant McDonald and Sergeant Sheppard pinned Armstrong down by placing a knee on his back and standing on his back, respectively, while handcuffs were applied. But even after being cuffed, Armstrong continued to kick at Sergeant Sheppard, so the police shackled his legs too.

The officers then stood up to collect themselves. They left Armstrong facedown in the grass with his hands cuffed behind his back and his legs shackled. At this point, he was no longer moving -- at all. Lopez was the first to notice that her brother was unresponsive, so she asked the officers to check on him. Appellees did so immediately,[5] but Armstrong's condition

[5] It is not clear exactly how long Armstrong was left facedown on the ground after he had been secured. But Lopez conceded that it "happen[ed] pretty quickly really" and that the officers responded "immediately" when asked to check on (Continued)

had already become dire. When the officers flipped him over, his skin had turned a bluish color and he did not appear to be breathing.

Sergeant Sheppard and Lieutenant McDonald administered CPR, and Lieutenant McDonald radioed dispatch to send Emergency Medical Services ("EMS"). EMS responders transported Armstrong to the Hospital's emergency department where resuscitation attempts continued but were unsuccessful. He was pronounced dead shortly after admission. According to the Pinehurst Police Department's summary of communications during the incident, just six and one-half minutes elapsed between dispatch advising Appellees that Armstrong's commitment papers were final and Appellees radioing for EMS.

B.

Based on the foregoing, Appellant filed a complaint in the Superior Court of Moore County, North Carolina, on April 16, 2013. Appellant sued each police officer involved in Armstrong's seizure, pursuant to 42 U.S.C. § 1983, alleging that the officers used excessive force, in violation of Armstrong's

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Armstrong. J.A. 241. Other witnesses estimated the time as "a couple of seconds" and "15 to 20 seconds." Id. at 346, 446.

Fourth and Fourteenth Amendment rights, when seizing him.[6] Appellees removed the case to the United States District Court for the Middle District of North Carolina on May 20, 2013.

The district court granted summary judgment to Appellees on January 27, 2015, reasoning, "[i]t is highly doubtful that the evidence establishes a constitutional violation at all, but assuming it does, the defendants are entitled to qualified immunity." Estate of Ronald H. Armstrong v. Village of Pinehurst, No. 1:13-cv-407, slip op. at 4 (M.D.N.C. Jan. 27, 2015) (citation omitted). Appellant filed a timely notice of appeal on February 24, 2015.

III.

A.

"Qualified immunity protects officers who commit constitutional violations but who, in light of clearly established law, could reasonably believe that their actions were lawful." Henry v. Purnell, 652 F.3d 524, 531 (4th Cir.

[6] Appellant's complaint alleges additional causes of action and names additional defendants. But Appellant's brief on appeal presses only one claim: The officers attempting to execute the involuntary commitment order used unconstitutionally excessive force. "Failure to present or argue assignments of error in opening appellate briefs constitutes a waiver of those issues," IGEN Int'l, Inc. v. Roche Diagnostics GmbH, 335 F.3d 303, 308 (4th Cir. 2003), so the excessive force claim is the only matter that remains pending in this appeal. See Fed. R. App. P. 28(a)(8)(A).

2011) (en banc). A "qualified immunity analysis," therefore, "typically involves two inquiries: (1) whether the plaintiff has established the violation of a constitutional right, and (2) whether that right was clearly established at the time of the alleged violation." Raub v. Campbell, 785 F.3d 876, 881 (4th Cir. 2015). The court "may address these two questions in 'the order . . . that will best facilitate the fair and efficient disposition of each case.'" Id. (alteration in original) (quoting Pearson v. Callahan, 555 U.S. 223, 242 (2009)). Appellant's case survives summary judgment, however, only if we answer both questions in the affirmative. See Pearson, 555 U.S. at 232.

In this case, we adhere to "the better approach to resolving cases in which the defense of qualified immunity is raised," that is, we "determine first whether the plaintiff has alleged a deprivation of a constitutional right at all." Pearson, 555 U.S. at 232 (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998)). Though this sequence is "no longer . . . regarded as mandatory," it is "often beneficial," and "is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." Id. at 236. Because excessive force claims raise such questions, see Nancy Leong, Improving Rights, 100 Va. L. Rev. 377, 393 (2014) ("[E]xcessive force claims are

litigated over 98% of the time in the civil context . . . ."), we exercise our discretion to address the constitutional question presented by this appeal first.

B.

Our initial inquiry, then, is this: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Brosseau v. Haugen, 543 U.S. 194, 197 (2004) (per curiam) (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)). In this case, the answer is yes. Viewed in the light most favorable to Appellant, the record before us establishes that, when seizing Armstrong, Appellees used unreasonably excessive force in violation of the Fourth Amendment.

A "claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of [a] person" is "properly analyzed under the Fourth Amendment's 'objective reasonableness' standard." Graham v. Connor, 490 U.S. 386, 388 (1989); see also Scott v. Harris, 550 U.S. 372, 381 (2007). "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." Bell v. Wolfish, 441 U.S. 520, 559 (1979). But the Court has counseled that the test "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the

countervailing governmental interests at stake." Smith v. Ray, 781 F.3d 95, 101 (4th Cir. 2015) (quoting Graham, 490 U.S. at 396). There are, moreover, three factors the Court enumerated to guide this balancing. First, we look to "the severity of the crime at issue"; second, we examine the extent to which "the suspect poses an immediate threat to the safety of the officers or others"; and third, we consider "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." Id. (alteration supplied) (quoting Graham, 490 U.S. at 396). "To properly consider the reasonableness of the force employed we must 'view it in full context, with an eye toward the proportionality of the force in light of all the circumstances.'" Id. (quoting Waterman v. Batton, 393 F.3d 471, 481 (4th Cir. 2005)).

1.

Here, the first Graham factor favors Appellant. Appellees have never suggested that Armstrong committed a crime or that they had probable cause to effect a criminal arrest. When the subject of a seizure "ha[s] not committed any crime, this factor weighs heavily in [the subject's] favor." Bailey v. Kennedy, 349 F.3d 731, 743-44 (4th Cir. 2003); see also Turmon v. Jordan, 405 F.3d 202, 207 (4th Cir. 2005) ("[T]he severity of the crime cannot be taken into account because there was no crime." (internal quotation marks omitted)). And this factor

would still favor Appellant if Appellees had argued that their seizure was converted to a criminal arrest when Armstrong failed to obey the officers' lawful orders. "Even in a case in which the plaintiff ha[s] committed a crime, when the offense [i]s a minor one, we have found that the first Graham factor weigh[s] in plaintiff's favor . . . ." Jones v. Buchanan, 325 F.3d 520, 528 (4th Cir. 2003) (internal quotation marks omitted).

But we have also recognized that this first Graham factor is intended as a proxy for determining whether "an officer [had] any reason to believe that [the subject of a seizure] was a potentially dangerous individual." Smith, 781 F.3d at 102. And while Armstrong committed no crime, the legal basis of his seizure did put Appellees on notice of two facts that bear on the question of whether Appellees had reason to believe Armstrong was dangerous.

First, as the subject of an involuntary commitment order, executed pursuant to N.C. Gen. Stat. § 122C-262, Armstrong was necessarily considered "mentally ill." See also N.C. Gen. Stat. § 122C-261(a). Armstrong's mental health was thus one of the "facts and circumstances" that "a reasonable officer on the scene" would ascertain. Graham, 490 U.S. at 396. And it is a fact that officers must account for when deciding when and how to use force. See Champion v. Outlook Nashville, Inc., 380 F.3d 893, 904 (6th Cir. 2004) ("It cannot be forgotten

that the police were confronting an individual whom they knew to be mentally ill . . . . The diminished capacity of an unarmed detainee must be taken into account when assessing the amount of force exerted."). "The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense." Bryan v. MacPherson, 630 F.3d 805, 829 (9th Cir. 2010) (alteration omitted) (quoting Deorle v. Rutherford, 272 F.3d 1272, 1282-83 (9th Cir. 2001)). "[T]he use of force that may be justified by" the government's interest in seizing a mentally ill person, therefore, "differs both in degree and in kind from the use of force that would be justified against a person who has committed a crime or who poses a threat to the community." Id.

Mental illness, of course, describes a broad spectrum of conditions and does not dictate the same police response in all situations. But "in some circumstances at least," it means that "increasing the use of force may . . . exacerbate the situation." Deorle, 272 F.3d at 1283. Accordingly, "the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis." Id. And even when this ideal course

is not feasible, officers who encounter an unarmed and minimally threatening individual who is "exhibit[ing] conspicuous signs that he [i]s mentally unstable" must "de-escalate the situation and adjust the application of force downward." Martin v. City of Broadview Heights, 712 F.3d 951, 962 (6th Cir. 2013).

The second relevant fact that Appellees could glean from Armstrong's commitment order is that a doctor determined him to be a danger to himself.[7] Where a seizure's sole justification is preventing harm to the subject of the seizure, the government has little interest in using force to effect that seizure. Rather, using force likely to harm the subject is manifestly contrary to the government's interest in initiating that seizure. See Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d 1052, 1059 (9th Cir. 2003) (When "a mentally disturbed

[7] Armstrong's involuntary commitment order could have issued in order "to prevent harm to self or others," N.C. Gen. Stat. § 122C-262(a) (emphasis supplied), and it is not entirely clear from the record whether reasonable officers at the scene would have known that Armstrong had only been judged a danger to himself or would have thought that a doctor may consider him a danger to others. The officers did, however, speak to Wayne Morton, the behavioral assessment nurse who assisted with preparation of Armstrong's commitment papers, prior to seizing Armstrong. In addition, the officers observed Armstrong for over 20 minutes before the involuntary commitment order was issued. During this period, Armstrong engaged in behavior mildly harmful to himself, but he exhibited no risk of flight or risk of harm to others. Taking these facts in the light most favorable to Appellant, objectively reasonable officers would be aware of the basis underlying Armstrong's commitment order.

individual not wanted for any crime . . . [i]s being taken into custody to prevent injury to himself[,] [d]irectly causing [that individual] grievous injury does not serve th[e officers'] objective in any respect.").

The first Graham factor thus weighs against imposition of force. The government's interest in seizing Armstrong was to prevent a mentally ill man from harming himself. The justification for the seizure, therefore, does not vindicate any degree of force that risks substantial harm to the subject.

2.

The second and third Graham factors, whether Armstrong threatened the safety of others and resisted seizure, do justify some -- limited -- use of force, though. Appellees had observed Armstrong wandering into traffic with little regard for avoiding the passing cars, and the seizure took place only a few feet from an active roadway. Armstrong, moreover, fled from the Hospital earlier that day, although he did not go far. Under such circumstances, Appellees concerns that Armstrong may try to flee into the street to avoid being returned to the Hospital, thereby endangering himself and individuals in passing cars, were objectively reasonable. A degree of force was, consequently, justified.

But that justified degree of force is the degree reasonably calculated to prevent Armstrong's flight. When

Appellees decided to begin using force, Armstrong, who stood 5'11" tall and weighed 262 pounds, was stationary, seated, clinging to a post, and refusing to move. He was also outnumbered and surrounded by police officers and security guards. The degree of force necessary to prevent an individual who is affirmatively refusing to move from fleeing is obviously quite limited.

Armstrong was also resisting the seizure. There is no question that, prior to being tased, Armstrong was refusing to let go of the post he had wrapped himself around despite verbal instruction to desist and a brief -- **30-second** -- attempt to physically pull him off. Noncompliance with lawful orders justifies some use of force, but the level of justified force varies based on the risks posed by the resistance. See Bryan, 630 F.3d at 830 ("'Resistance,' however, should not be understood as a binary state, with resistance being either completely passive or active. . . . Even purely passive resistance can support the use of some force, but the level of force an individual's resistance will support is dependent on the factual circumstances underlying that resistance.") And, here, the factual circumstances demonstrate little risk -- Armstrong was stationary, non-violent, and surrounded by people willing to help return him to the Hospital. That Armstrong was not allowing his arms to be pulled from the post and was

refusing to comply with shouted orders to let go, while cause for some concern, do not import much danger or urgency into a situation that was, in effect, a static impasse.

3.

When we turn "an eye toward the proportionality of the force in light of all the[se] circumstances,'" Smith, 781 F.3d at 101 (alteration and emphasis supplied) (quoting Waterman, 393 F.3d at 481), it becomes evident that the level of force Appellees chose to use was not objectively reasonable. Appellees were confronted with a situation involving few exigencies where the Graham factors justify only a limited degree of force. Immediately tasing a non-criminal, mentally ill individual, who seconds before had been conversational, was not a proportional response.

Deploying a taser is a serious use of force. The weapon is designed to "caus[e] . . . excruciating pain," Cavanaugh v. Woods Cross City, 625 F.3d 661, 665 (10th Cir. 2010), and application can burn a subject's flesh, see Orem v. Rephann, 523 F.3d 442, 447-48 (4th Cir. 2008) abrogated on other grounds by Wilkins v. Gaddy, 559 U.S. 34, 37 (2010); cf. Commonwealth v. Caetano, 26 N.E.3d 688, 692 (Mass. 2015) ("[W]e consider the stun gun a per se dangerous weapon at common law."). We have observed that a taser "inflicts a painful and frightening blow." Orem, 523 F.3d at 448 (quoting Hickey v.

Reeder, 12 F.3d 754, 757 (8th Cir. 1993)). Other circuits have made similar observations.[8] See, e.g., Estate of Booker v. Gomez, 745 F.3d 405, 414 n.9 (10th Cir. 2014) ("A taser delivers electricity into a person's body, causing severe pain."); Abbott v. Sangamon Cnty., 705 F.3d 706, 726 (7th Cir. 2013) ("This court has acknowledged that one need not have personally endured a taser jolt to know the pain that must accompany it, and several of our sister circuits have likewise recognized the intense pain inflicted by a taser." (internal citations and quotation marks omitted)); Bryan, 630 F.3d at 825 ("The physiological effects, the high levels of pain, and foreseeable risk of physical injury lead us to conclude that the X26 and similar devices are a greater intrusion than other non-lethal methods of force we have confronted.").

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[8] Officer Gatling deployed his taser in drive stun mode, which is intended to cause pain but is not intended to cause paralysis. See supra n.3. Our conclusions about the severity of taser use, however, would be the same had he used dart mode. Dart mode, no less than drive stun mode, inflicts extreme pain. See David A. Harris, Taser Use by Law Enforcement: Report of the Use of Force Working Group of Allegheny County, Pennsylvania, 71 U. Pitt. L. Rev. 719, 726-27 (2010) ("I remember only one coherent thought in my head while this was occurring: STOP! STOP! GET THIS OFF ME! Despite my strong desire to do something, all through the Taser exposure I was completely paralyzed. I could not move at all." (emphasis in original)). And the risk of injury is increased because a paralyzed subject may be injured by the impact from falling to the ground. See Bryan, 630 F.3d at 824. Taser use is severe and injurious regardless of the mode to which the taser is set.

These observations about the severe pain inflicted by tasers apply when police officers utilize best practices. The taser use at issue in this case, however, contravenes current industry and manufacturer recommendations. Since at least 2011, the Police Executive Research Forum ("PERF") and the Department of Justice's Office of Community Oriented Policing Services ("COPS") have cautioned that using drive stun mode "to achieve pain compliance may have limited effectiveness and, when used repeatedly, may even exacerbate the situation." PERF & COPS, 2011 Electronic Control Weapon Guidelines, at 14 (March 2011) (emphasis omitted). The organizations, therefore, recommend that police departments "carefully consider policy and training regarding when and how personnel use the drive stun mode[] and . . . discourage its use as a pain compliance tactic." Id. In 2013, moreover, Taser International, the manufacturer of the taser Appellees used in this case, warned, "Drive-stun use may not be effective on emotionally disturbed persons or others who may not respond to pain due to a mind-body disconnect." Cheryl W. Thompson & Mark Berman, Stun guns: 'There was just too much use,' Wash. Post, Nov. 27, 2015, at A1. Taser users, the warning goes on, should "[a]void using repeated drive-stuns on such individuals if compliance is not achieved." Id. Even the company that manufactures tasers, in other words, now warns against the precise type of taser use inflicted on Armstrong.

Force that imposes serious consequences requires significant circumscription. Our precedent, consequently, makes clear that tasers are proportional force only when deployed in response to a situation in which a reasonable officer would perceive some immediate danger that could be mitigated by using the taser. In Meyers v. Baltimore County, we parsed a defendant-officer's taser deployments based on the level of resistance the arrestee was offering -- and the danger that resistance posed to the officers -- when each shock was administered. See 713 F.3d 723, 733-34 (4th Cir. 2013). The "first three deployments of [the] taser did not amount to an unreasonable or excessive use of force[] [because the arrestee] was acting erratically, was holding a baseball bat that he did not relinquish until after he received the second shock, and was advancing toward the officers . . . ." Id. at 733. But seven later deployments of the taser did amount to excessive force:

> It is an excessive and unreasonable use of force for a police officer repeatedly to administer electrical shocks with a taser on an individual who no longer is armed, has been brought to the ground, has been restrained physically by several other officers, and no longer is actively resisting arrest.

Id. at 734. Immediate danger was thus key to our distinction -- tasing the arrestee ceased being proportional force when the

officer "continued to use his taser" after the arrestee "did not pose a continuing threat to the officers' safety." Id. at 733.

In Orem v. Rephann, though we were applying a Fourteenth Amendment test rather than the Fourth Amendment's objective reasonableness test, we rejected an officer's argument that the taser deployment in question was intended to prevent an arrestee from endangering herself because the facts belied any immediate danger. See 523 F.3d at 447-49. Rather, those facts -- that "Orem was handcuffed, weighed about 100 pounds, had her ankles loosened in the hobbling device which Deputy Boyles was tightening, and was locked in the back seat cage of Deputy Boyles's car until Deputy Rephann opened the door" -- indicated that "the taser gun was not used for a legitimate purpose[,] such as protecting the officers, protecting Orem, or preventing Orem's escape." Id. As in Meyers, then, we tied permissible taser use to situations that present some exigency that is sufficiently dangerous to justify the force.

Appellees understand these cases to proscribe tasing when a subject has already been restrained but to sanction the practice when deployed against active resistance. Since Armstrong was unrestrained and actively resisting, they contend, their taser use must be permissible.

We disagree. While the questions whether an arrestee has been restrained and is complying with police directives are,

of course, relevant to any inquiry into the extent to which the arrestee "pose[s] a continuing threat to the officers' safety," Meyers, 713 F.3d at 733, they are not dispositive. A rule limiting taser use to situations involving a proportional safety threat does not countenance use in situations where an unrestrained arrestee, though resistant, presents no serious safety threat.

Indeed, application of physical restraints cannot be the only way to ensure that an arrestee does not pose a sufficient safety threat to justify a tasing. If it were, use of a taser would be justified at the outset of every lawful seizure, before an arrestee has been restrained. This, of course, is not the law. Courts recognize that different seizures present different risks of danger. See, e.g., Parker v. Gerrish, 547 F.3d 1, 9 (1st Cir. 2008) ("Though driving while intoxicated is a serious offense, it does not present a risk of danger to the arresting officer that is presented when an officer confronts a suspect engaged in an offense like robbery or assault."). Firing a taser "almost immediately upon arrival" at the scene of an altercation, before an officer "could . . . have known what was going on," is, consequently, constitutionally proscribed. Casey v. City of Fed. Heights, 509 F.3d 1278, 1285 (10th Cir. 2007); see also id. at 1286 ("[I]t is excessive to use a Taser to control a target without having any

reason to believe that a lesser amount of force -- or a verbal command -- could not exact compliance."). Painful, injurious, serious inflictions of force, like the use of a taser, do not become reasonable simply because officers have authorization to arrest a subject who is unrestrained.

Even noncompliance with police directives and non-violent physical resistance do not necessarily create "a continuing threat to the officers' safety." Meyers, 713 F.3d at 733. Examples of minimally risky physical resistance are prevalent. Refusing to enter an out-of-state officer's police car until a local officer is summoned is not a sufficient threat to the arresting officer to justify physically striking the arrestee. See Rambo v. Daley, 68 F.3d 203, 207 (7th Cir. 1995). Nor is an arrestee pulling her arm away when a police officer attempts to grab her without explanation. See Smith, 781 F.3d at 103. An arrestee "yank[ing] his arm away" from a police officer, similarly, does not justify "being tackled." Goodson v. City of Corpus Christi, 202 F.3d 730, 733, 740 (5th Cir. 2000).

Unsurprisingly, then, other circuits have held that taser use can constitute excessive force when used in response to non-violent resistance. The subject of a seizure "refus[ing] to release his arms for handcuffing," for example, "is no[t] evidence suggesting that [he] violently resisted the officers'

attempts to handcuff him." Cyrus v. Town of Mukwonago, 624 F.3d 856, 863 (7th Cir. 2010) (emphasis supplied). Such a refusal, therefore, does not justify deploying a taser when the subject "[i]s unarmed and there [i]s little risk [he] could access a weapon," according to the Seventh Circuit. Id. The en banc Ninth Circuit has drawn a similar conclusion: A suspect "actively resist[s] arrest [when] she refuse[s] to get out of her car when instructed to do so and stiffen[s] her body and clutche[s] her steering wheel to frustrate the officers' efforts to remove her from her car," but when she also "d[oes] not evade arrest by flight, and no other exigent circumstances exist[] at the time[,] . . . [a] reasonable fact-finder could conclude . . . that the officers' use of [a taser] was unreasonable and therefore constitutionally excessive." Mattos v. Agarano, 661 F.3d 433, 446 (9th Cir. 2011) (en banc). The Eighth Circuit agrees as well. See Brown v. City of Golden Valley, 574 F.3d 491, 497 (8th Cir. 2009) (refusal to terminate a telephone call after police ordered an arrestee to do so does not justify tasing even though the police officer was concerned that the arrestee could use glass tumblers near her feet as weapons or could kick the officer).

And this conclusion, that taser use is unreasonable force in response to resistance that does not raise a risk of immediate danger, is consistent with our treatment of police

officers' more traditional tools of compliance. We have denied summary judgment on excessive force claims to an officer, who "punched [an arrestee][,] threw him to the ground," and, subsequently, "used a wrestling maneuver" on him, because there was no "real evidence that [a] relatively passive, [mentally delayed] man was a danger to the larger, trained police officer." Rowland v. Perry, 41 F.3d 167, 172, 174 (4th Cir. 1994). In doing so, we rejected the argument that such force was a reasonable response to "the resistance offered by [the arrestee] during the struggle," reasoning that, despite this resistance, the arrestee "posed no threat to the officer or anyone else." Id. at 173-74.

We have similarly held that punching and throwing an arrestee to the ground because she "took only a single step back off of the small stoop in front of the door" and "pulled her arm away" during an attempted handcuffing was excessive force. Smith, 781 F.3d at 102-03. This nominal resistance did not justify the officer's use of force where a reasonable officer at the scene would not have "any reason to believe that [the arrestee] was a potentially dangerous individual" or "was at all inclined to cause [the officer] any harm." Id. at 102.

And we have treated pepper spray, a use of force that causes "closing of the eyes through swelling of the eyelids, . . . immediate respiratory inflammation, . . .

and . . . immediate burning sensations," similarly, having held it excessive when used on an arrestee's wife, who was sprinting toward police officers to assist her husband upon seeing him placed in handcuffs. Park v. Shiflett, 250 F.3d 843, 848-49, 852 (4th Cir. 2001). Though the officers at the scene thought running full-bore toward their detainee was basis to arrest the wife for "disorderly conduct[] [and] obstruction of a law enforcement officer in the performance of his duties," id. at 854 n.* (Traxler, J., concurring in part and dissenting in part), we rejected any notion that such behavior justified the application of pepper spray, see id. at 852-83 (maj. op.). Rather, because "[i]t [wa]s difficult to imagine the unarmed [wife] as a threat to the officers or the public," the officers' "irresponsible use of pepper spray twice from close range . . . was indeed excessive." Id.

In all of these cases, we declined to equate conduct that a police officer characterized as resistance with an objective threat to safety entitling the officer to escalate force. Our precedent, then, leads to the conclusion that a police officer may only use serious injurious force, like a taser, when an objectively reasonable officer would conclude that the circumstances present a risk of immediate danger that

could be mitigated by the use of force. At bottom, "physical resistance" is not synonymous with "risk of immediate danger."[9]

Therefore, in the case before us, Appellees' use of force is only "proportional[] . . . in light of all the circumstances," Smith, 781 F.3d at 101 (quoting Waterman, 393 F.3d at 481), if Armstrong's resistance raised a risk of immediate danger that outweighs the Graham factors militating against harming Armstrong. But when the facts are viewed in the light most favorable to Appellant, they simply do not support that conclusion.

Under these facts, when Officer Gatling deployed his taser, Armstrong was a mentally ill man being seized for his own protection, was seated on the ground, was hugging a post to ensure his immobility, was surrounded by three police officers

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[9] Graham's test "requires careful attention to the facts and circumstances of each particular case." Graham, 490 U.S. at 396. Our holding, therefore, does not rule out the possibility that taser use could be justified in some cases where an arrestee's non-compliance could be described as non-violent. Such a situation would require the existence of facts from which an officer could reasonably conclude that the resistance presents some immediate danger despite its non-violent character. See Casey v. City of Fed. Heights, 509 F.3d 1278, 1285 (10th Cir. 2007) ("While we do not rule out the possibility that there might be circumstances in which the use of a Taser against a nonviolent offender is appropriate, we think a reasonable jury could decide that [a police officer] was not entitled under these circumstances to shoot first and ask questions later.").

and two Hospital security guards,[10] and had failed to submit to a lawful seizure for only 30 seconds. A reasonable officer would have perceived a static stalemate with few, if any, exigencies -- not an immediate danger so severe that the officer must beget the exact harm the seizure was intended to avoid.

That Armstrong had already left the Hospital and was acting strangely while the officers waited for the commitment order to be finalized do not change this calculus. If merely acting strangely in such a circumstance served as a green light to taser deployment, it would then be the rule rather than the exception when law enforcement officials encounter the mentally ill. That cannot be. By the time Appellees chose to inflict force, any threat had sunk to its nadir -- Armstrong had immobilized himself, ceased chewing on inedible substances, and ceased burning himself. Use of force designed to "caus[e] . . . excruciating pain," Cavanaugh, 625 F.3d at 665, in these circumstances is an unreasonably disproportionate response.

We are cognizant that courts ought not "undercut the necessary element of judgment inherent in a constable's attempts to control a volatile chain of events." Brown v. Gilmore, 278

[10] Indeed, it was not the deployment of the taser that ultimately resulted in Armstrong's removal from the post, but rather, the additional aid of the two security guards, who jumped in to assist the three police officers prying him off the post.

F.3d 362, 369 (4th Cir. 2002). And we certainly do not suggest that Appellees had a constitutional duty to stand idly by and hope that Armstrong would change his mind and return to the Hospital on his own accord. But the facts of this case make clear that our ruling does not hamper police officers' ability to do their jobs: Tasing Armstrong did not force him to succumb to Appellees' seizure -- he actually increased his resistance in response. When Appellees stopped tasing and enlisted the Hospital's security guards to help pull Armstrong off of the post, however, the group removed Armstrong and placed him in restraints. Had Appellees limited themselves to permissible uses of force when seizing Armstrong, they would have had every tool needed to control and resolve the situation at their disposal.

Appellees, therefore, are not entitled to summary judgment on the question whether they violated the Constitution. Viewing the record in the light most favorable to Appellant, Appellees used excessive force, in violation of the Fourth Amendment.[11]

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[11] We have reviewed Appellant's additional theories of excessive force but have determined that they lack merit. Those theories are based on Appellees' conduct while handcuffing and shackling Armstrong. Applying "just enough weight" to immobilize an individual "continu[ing] to struggle" during handcuffing is not excessive force. Estate of Phillips v. City of Milwaukee, 123 F.3d 586, 593 (7th Cir. 1997). Appellant (Continued)

C.

We, nevertheless, affirm the district court's grant of summary judgment in Appellees' favor because we conclude that Appellees are entitled to qualified immunity.

Qualified immunity "shields government officials from liability for civil damages, provided that their conduct does not violate clearly established statutory or constitutional rights within the knowledge of a reasonable person." Meyers, 713 F.3d at 731. Not all constitutional violations are "violat[ions of] clearly established . . . constitutional rights," id., so "a plaintiff may prove that an official has violated his rights, but an official [may still be] entitled to qualified immunity." Torchinsky v. Siwinski, 942 F.2d 257, 261 (4th Cir. 1991).

The inquiry into whether a constitutional right is clearly established requires first that we define the precise right into which we are inquiring. Because "[t]he dispositive

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concedes that Armstrong was resisting Appellees' efforts to restrain him, that Appellees stopped applying force to Armstrong's back when their restraints were secure, and that Armstrong was left in the prone position for a very short period of time after being restrained. Lopez, herself, even placed her foot on Armstrong's leg to assist Appellees' efforts to immobilize Armstrong and apply restraints. In those circumstances, an officer at the scene could conclude that the force used to hold Armstrong down and the length of time Armstrong was left on the ground were objectively reasonable.

question is 'whether the violative nature of particular conduct is clearly established,'" Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (per curiam) (emphasis in original) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)), courts must "not . . . define clearly established law at a high level of generality," al-Kidd, 563 U.S. at 742.

After defining the right, we ask whether it was clearly established at the time Appellees acted. A right satisfies this standard when it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." Mullenix, 136 S. Ct. at 308 (quoting Reichle v. Howards, 132 S. Ct. 2088, 2093 (2012)).

"This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Wilson v. Layne, 526 U.S. 603, 615 (1999) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). "[O]fficials can . . . be on notice that their conduct violates established law even in novel factual circumstances." Hope v. Pelzer, 536 U.S. 730, 741 (2002). But they must, in fact, have notice in order to be held liable.

The constitutional right in question in the present case, defined with regard for Appellees' particular violative

conduct, is Armstrong's right not to be subjected to tasing while offering stationary and non-violent resistance to a lawful seizure. Cf. Hagans v. Franklin Cnty. Sheriff's Office, 695 F.3d 505, 509 (6th Cir. 2012) ("Defined at the appropriate level of generality -- a reasonably particularized one -- the question at hand is whether it was clearly established in May 2007 that using a taser repeatedly on a suspect actively resisting arrest and refusing to be handcuffed amounted to excessive force."). While our precedent supports our conclusion that Appellees violated that right when seizing Armstrong, we acknowledge that this conclusion was not so settled at the time they acted such that "every reasonable official would have understood that" tasing Armstrong was unconstitutional. Mullenix, 136 S. Ct. at 308 (quoting Reichle, 132 S. Ct. at 2093).

To be sure, substantial case law indicated that Appellees were treading close to the constitutional line. As discussed, we have previously held that tasing suspects after they have been secured, see Meyers, 713 F.3d at 734;[12] Bailey,

[12] Meyers v. Baltimore County was decided after Appellees' conduct in the instant case, but Meyers did not clearly establish any right for the first time. Rather in Meyers, we found that the officer in question violated a right that had been clearly established since, at least, Bailey v. Kennedy, which was decided in 2003. See Meyers, 713 F.3d at 734-35 (citing Bailey, 349 F.3d at 744-45). Appellees in the instant case, therefore, were on notice that tasing an individual who (Continued)

349 F.3d at 744-45, and that punching or pepper spraying suspects in response to minimal, non-violent resistance, see Park, 250 F.3d at 849-53; Rowland, 41 F.3d at 172-74, constitute excessive force.

These cases, however, are susceptible to readings which would not extend to the situation Appellees faced when seizing Armstrong. Unlike in Meyers and Bailey, Appellees did not continue using force after Armstrong was secured. See Meyers, 713 F.3d at 734; Bailey, 349 F.3d at 744. And unlike in Park and Rowland, Appellant does not contend the officers in question initiated the excessive force without warning or opportunity to cease any noncompliance. See Park, 250 F.3d at 848; Rowland, 41 F.3d at 171-72. It would not necessarily have been clear to every reasonable officer that those cases applied to force inflicted after warning an individual exhibiting non-violent resistance to desist and discontinued before that individual was secured.

A survey of other circuits' case law confirms that Appellees did not have sufficiently clear guidance to forfeit qualified immunity. Again, there were many decisions that ought to have given Appellees pause. See Bryan, 630 F.3d at 826-27

"was unarmed and effectively was secured" is clearly unconstitutional. Id. at 735.

(taser use against individual exhibiting "unusual behavior" and "shouting gibberish[] and . . . expletives" who was "unarmed, stationary . . ., [and] facing away from an officer at a distance of fifteen to twenty-five feet" constitutes excessive force); Cyrus, 624 F.3d at 863 (taser use when misdemeanant was not violent and did not try to flee but resisted being handcuffed constitutes excessive force); Brown, 574 F.3d at 499 ("[I]t was unlawful to Taser a nonviolent, suspected misdemeanant who was not fleeing or resisting arrest, who posed little to no threat to anyone's safety, and whose only noncompliance with the officer's commands was to disobey two orders to end her phone call to a 911 operator.")

But other cases could be construed to sanction Appellees' decision to use a taser. In 2004, the Eleventh Circuit held, "use of [a] taser gun to effectuate [an] arrest . . . was reasonably proportionate to the difficult, tense and uncertain situation" faced by a police officer when an arrestee "used profanity, moved around and paced in agitation, . . . yelled at [the officer]," and "repeatedly refused to comply with . . . verbal commands." Draper v. Reynolds, 369 F.3d 1270, 1278 (11th Cir. 2004)). When reviewing the law as of 2007, moreover, the Sixth Circuit found, "[c]ases from this circuit and others, before and after May 2007, adhere to this line: If a suspect actively resists arrest and refuses

to be handcuffed, officers do not violate the Fourth Amendment by using a taser to subdue him." Hagans, 695 F.3d at 509. The Hagans court proceeded to provide examples in which the Sixth Circuit had held tasing reasonable simply because "[t]he suspect refused to be handcuffed" or "the suspect . . . refused to move his arms from under his body." Id. Other circuits, in short, have sometimes distinguished permissible and impermissible tasing based on facts establishing bare noncompliance rather than facts establishing a risk of danger. Because Armstrong was not complying with Appellees' commands, these cases negate the existence of any "consensus of cases of persuasive authority" across our sister circuits "such that a reasonable officer could not have believed that his actions were lawful." Wilson, 526 U.S. at 617.

We conclude, therefore, that Armstrong's right not to be tased while offering stationary and non-violent resistance to a lawful seizure was not clearly established on April 23, 2011. Indeed, two months after Appellees' conduct in this case, one of our colleagues wrote, "the objective reasonableness of the use of Tasers continues to pose difficult challenges to law enforcement agencies and courts alike. . . . 'That the law is still evolving is illustrated in cases granting qualified immunity for that very reason.'" Henry, 652 F.3d at 539-40

(Davis, J., concurring) (quoting McKenney v. Harrison, 635 F.3d 354, 362 (8th Cir. 2011) (Murphy, J., concurring)).

D.

This ought not remain an evolving field of law indefinitely though. "Without merits adjudication, the legal rule[s]" governing evolving fields of constitutional law "remain unclear." John C. Jeffries, Jr., Reversing the Order of Battle in Constitutional Torts, 2009 Sup. Ct. Rev. 115, 120. "What may not be quite so obvious, but is in fact far more important, is the degradation of constitutional rights that may result when . . . constitutional tort claims are resolved solely on grounds of qualified immunity." Id. This degradation is most pernicious to rights that are rarely litigated outside the context of § 1983 actions subject to qualified immunity -- rights like the Fourth Amendment protection against excessive force at issue here. See id. at 135-36. "For [such rights], the repeated invocation of qualified immunity will reduce the meaning of the Constitution to the lowest plausible conception of its content." Id. at 120.

Rather than accept this deteriorative creep, we intend this opinion to clarify when taser use amounts to excessive force in, at least, some circumstances. A taser, like "a gun, a baton, . . . or other weapon," Meyers, 713 F.3d at 735, is expected to inflict pain or injury when deployed. It,

therefore, may only be deployed when a police officer is confronted with an exigency that creates an immediate safety risk and that is reasonably likely to be cured by using the taser. The subject of a seizure does not create such a risk simply because he is doing something that can be characterized as resistance -- even when that resistance includes physically preventing an officer's manipulations of his body. Erratic behavior and mental illness do not necessarily create a safety risk either. To the contrary, when a seizure is intended solely to prevent a mentally ill individual from harming himself, the officer effecting the seizure has a lessened interest in deploying potentially harmful force.

Where, during the course of seizing an out-numbered mentally ill individual who is a danger only to himself, police officers choose to deploy a taser in the face of stationary and non-violent resistance to being handcuffed, those officers use unreasonably excessive force. While qualified immunity shields the officers in this case from liability, law enforcement officers should now be on notice that such taser use violates the Fourth Amendment.

IV.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

WILKINSON, Circuit Judge, concurring in part:

I am happy to concur in the judgment of affirmance and in Part III.C of the majority opinion. Having resolved the case by properly awarding judgment to defendants on qualified immunity grounds, the majority had no need to opine on the merits of the excessive force claim. In fact, it runs serious risks in doing so.

This was a close case, the very kind of dispute in which judicial hindsight should not displace the officers' judgmental calls. I do not contend that the officers' behavior was impeccable here, but I do believe, with the district court, that it was not the kind of action that merited an award of monetary damages.

I.

These are difficult situations. It is undisputed that on April 23, 2011, Armstrong had been off his medications for days and was in an unpredictable and erratic state. J.A. 210–19. It is undisputed that by the time Officer Sheppard arrived at the scene, Armstrong was engaged in self-destructive behavior -- eating grass, dandelions, and gauze, and burning his arms and tongue with cigarettes. Id. at 507-08. It is undisputed that the police obtained an involuntary commitment order to bring Armstrong back to the hospital. Id. at 534. It is undisputed that Armstrong did not want to return to the hospital despite

his sister's pleas to stop resisting authorities. Id. at 231. It is undisputed that Armstrong was a strong man, and weighed about 260 pounds. Id. at 297-98, 411. It is undisputed that before the officers ultimately detained Armstrong they did not have an opportunity to frisk him for weapons. Id. at 464. It is undisputed that the sign post Armstrong gripped was near a trafficked intersection. Id. at 461. It is undisputed that the officers "had observed Armstrong wandering into traffic with little regard for avoiding the passing cars and the seizure took place only a few feet from an active roadway." Maj. Op. at 17. It is undisputed that the officers applied graduated levels of force -- first verbal commands and then a "soft hands" approach -- prior to Officer Gatling's use of his Taser. J.A. 514. It is undisputed that Armstrong tried to kick the officers as they put handcuffs on his legs. Id. at 573. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation" Graham v. Connor, 490 U.S. 386, 396-97 (1989). That pretty much describes the situation here.

II.

Having thoughtfully resolved the appeal on qualified immunity grounds,* the majority launches into an extended discussion on the merits of the excessive force claim. This is so unnecessary. Sometimes it is best for courts not to write large upon the world but to discharge our simple rustic duty to decide the case.

The Supreme Court in Pearson v. Callahan, 555 U.S. 223 (2009), gave us the discretion to do just that. Pearson is admittedly a decision with a bit of back and forth, but its salient contribution was to liberate the lower federal courts from the onerous shackles of the Saucier v. Katz regime and allow them to proceed directly to a qualified immunity analysis without addressing the merits first. In this regard, Pearson recognized the foremost duty of courts to resolve cases and controversies. Id. at 242. That, at least, is what Article III established us to do.

In fact, proceeding in such a manner is often the preferable course. The majority says it must go further in order

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* Normally, "clearly established" law is found by looking to Supreme Court cases and the cases in the circuit in which the officers are located. See Marshall v. Rodgers, __ U.S. __, 133 S.Ct. 1446, 1450 (2013). My good colleagues range somewhat further afield here, but I think doing so in this case in no way affected the outcome.

to provide clarity in future cases, Maj. Op. at 38–39, but that clarity is often illusory. Today's prescription may not fit tomorrow's facts and circumstances. Our rather abstract pronouncements in one case may be of little assistance with the realities and particulars of another.

As the Supreme Court noted, "the rigid Saucier procedure comes with a price. The procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case. There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right." Pearson, 555 U.S. at 236–37. So I would respectfully prefer not to get into the first prong of the Saucier analysis here. It is "far from obvious," to use the Court's term, that the trial court's conclusion that "[a]dditional reasonable force was appropriate under these circumstances" was unsound. J.A. 767.

Clarity is arguably most difficult to achieve in Fourth Amendment cases because bright-line rules at most imperfectly take account of the slight shifts in real-life situations that can alter what are inescapably close judgment calls. As the Supreme Court noted,

> Although the first prong of the Saucier procedure is intended to further the development of constitutional precedent, opinions following that procedure often

> fail to make a meaningful contribution to such development. For one thing, there are cases in which the constitutional question is so factbound that the decision provides little guidance for future cases. See Scott v. Harris, 550 U.S. 372, 388 (2007) (BREYER, J., concurring) (counseling against the Saucier two-step protocol where the question is "so fact dependent that the result will be confusion rather than clarity"); Buchanan v. Maine, 469 F.3d 158, 168 (C.A.1 2006) ("We do not think the law elaboration purpose will be well served here, where the Fourth Amendment inquiry involves a reasonableness question which is highly idiosyncratic and heavily dependent on the facts").

Pearson, 555 U.S. at 237.

My fine colleagues in the majority have done as good a job as can be expected given the circumstances. But the very exemplary quality of the effort serves to illustrate the perils of the enterprise. The majority notes "that different seizures present different risks of danger," Maj. Op. at 24, but fails to recognize that the spectrum of risk presented cannot be easily sketched by an appellate court. It is hard to disagree with the majority's highly generalized assertion that Taser use is unwarranted "where an unrestrained arrestee, though resistant, presents no serious safety threat." Id. But of course, what conduct qualifies as "resistant," and what rises to the level of a "serious safety threat" is once again dependent on the actual and infinitely variable facts and circumstances that confront officers on their beat.

Tasers came into widespread use for a reason. They were thought preferable to far cruder forms of force such as canines, sprays, batons, and choke-holds, and it was hoped that their use would make the deployment of lethal force unnecessary or at least a very last resort. None of this of course justifies their promiscuous use. The majority "tie[s] permissible taser use to situations that present some exigency that is sufficiently dangerous to justify the force." Maj. Op. at 23. But with all due respect, that abstract formulation will be of less than limited help to officers wondering what exactly they may and may not do.

We are told further that the officers, though armed with a civil commitment order, do not possess the same degree of latitude with regard to a mentally ill person as with someone whom there is reason to believe has committed a crime. Id. at 14-15. All well and good, but the majority then notes that "[m]ental illness, of course, describes a broad spectrum of conditions and does not dictate the same police response in all situations." Id. at 15. Again, what may seem a comforting appellate nostrum is of limited utility to those faced with volatile situations far removed from the peaceful confines of appellate chambers. The majority goes on to note that "in some circumstances . . . increasing the use of force may . . . exacerbate the situation." Id. (internal quotation marks

omitted). But what those circumstances are neither my colleagues nor I can really say.

I finally cannot agree that the plaintiff here posed no real danger. He certainly posed a danger to himself having been off medication and engaging in self-destructive behaviors to the point that his sister was pleading for her brother's prompt return to the hospital where he might receive some help. As for the danger to others, it was hardly unlikely that the plaintiff, a sizeable and unrestrained individual, would bolt into the street and cause a traumatic accident for motorists who, if not themselves injured, would regret the harm inflicted on this pedestrian for years to come. I say this not to contend that the case was easy, but that it was hard. The district court rightly recognized that its intrinsic difficulty afforded no reason to deliver these officers an unnecessary rebuke.

III.

The majority has left it all up in the air. And its approach to this case is not without consequence. The great majority of mentally ill persons pose no serious danger to themselves or others and the challenge of society is to help these good people lead more satisfying lives. A smaller subset of the mentally ill do pose the greatest sort of danger, not only to themselves but to large numbers of people as the string of mass shootings in this country will attest.

It is difficult sometimes for even seasoned professionals to predict which is which, not to mention officers and others with more limited training. And yet it is important in this area that law not lose its preventive aspect. It can be heartbreaking to wait until the damage is done. Delivering vague proclamations about do's and don'ts runs the risk of incentivizing officers to take no action, and in doing so to leave individuals and their prospective victims to their unhappy fates. Law enforcement will learn soon enough that sins of omission are generally not actionable. See Deshaney v. Winnebago Cty. Dep't of Social Services, 489 U.S. 189 (1989). And in the face of nebulae from the courts, the natural human reaction will be to desist. Perhaps this is what we mean to achieve, but over-deterrence carries its own risks, namely that those who badly need help will receive no help, and we shall be the poorer for it.

From: Kilgallon, John (USMS)
Sent: Fri, 21 Feb 2020 21:06:47 +0000
To: Driscoll, Derrick (USMS)
Cc: Washington, Donald (USMS)
Subject: Re: USMS Notification - DSNet Breach

Thanks sir.

John Kilgallon
Chief of Staff
Office of the Director
United States Marshals Service
(b)(6); (b)(7)(C) office
mobile

On Feb 21, 2020, at 3:29 PM, Driscoll, Derrick (USMS) (b)(6); (b)(7)(C) @usms.doj.gov> wrote:

Gentlemen

Just fyi below…The DSNet packet was forwarded to (b)(6); (b)(7)(C) /OCPL by USMS OGC.

Thanks
Derrick

Derrick Driscoll
Deputy Director
U.S. Marshals Service
(w) (b)(6); (b)(7)(C)

From: Luckstone, Charlotte (USMS)
Sent: Friday, February 21, 2020 2:36 PM
To: Driscoll, Derrick (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>
Cc: Mathias, Karl (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>; Miller, Gwen S. (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>; Sawyer, Aaron (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>; Sheehan, John (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>; (b)(6); (b)(7)(C); (b)(7)(F) (USMS) (b)(6); (b)(7)(C); (b)(7)(F) @usms.doj.gov>; Delaney, William (USMS) < (b)(6); (b)(7)(C) @usms.doj.gov>; Dickinson, Lisa (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>; Hackmaster, Nelson (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>
Subject: FW: USMS Notification - DSNet Breach

Good afternoon Deputy Director Driscoll,

I wanted to let you (and the rest of the USMS team handling the DSNet breach) know that I forwarded the attached memorandum to (b)(6); (b)(7)(C) at OPCL this afternoon. Please see below. I will keep the group apprised as to what I/OGC receives in response.

Thank you,

Charlotte M. Luckstone
Associate General Counsel
FOIA/PA Officer
Office of General Counsel
U.S. Marshals Service
Office: (b)(6); (b)(7)(C)
Cell: (b)(6); (b)(7)(C)
Email: (b)(6); (b)(7)(C) @usdoj.gov<mailto: (b)(6); (b)(7)(C) @usdoj.gov>

From: Luckstone, Charlotte (USMS)
Sent: Friday, February 21, 2020 2:30 PM
To: (b)(6); (b)(7)(C) (OPCL) (b)(6); (b)(7)(C) @jmd.usdoj.gov>
Cc: Dickinson, Lisa (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>; Auerbach, Gerald (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>
Subject: USMS Notification - DSNet Breach

Good afternoon (b)(6); (b)(7)(C)

I am writing regarding the DSNet breach and corresponding USMS notification requirements. USMS prepared the attached memorandum, signed by Deputy Director Driscoll and forwarded to you at his direction, setting forth the Agency position regarding notification procedures for those whose personally identifiable information was affected by the breach.

As the USMS is well aware of its responsibility to notify affected persons in a timely manner, the USMS respectfully requests your review of the attached memorandum as soon as practicable.

Please let me know if you have any questions. I have CC'd my management (Lisa Dickinson, Deputy General Counsel, and Gerry Auerbach, General Counsel) to this email; you can reach out to them as well, if needed.

Thanks and have a good weekend,

Charlotte M. Luckstone
Associate General Counsel
FOIA/PA Officer
Office of General Counsel

U.S. Marshals Service
Office: (b)(6); (b)(7)(C)
Cell: (b)(6); (b)(7)(C)
Email: (b)(6); (b)(7)(C) @usdoj.gov<mailto: (b)(6); (b)(7)(C) @usdoj.gov>

<DSNet Memo.pdf>

U.S. Department of Justice

United States Marshals Service

Office of the Director

Washington, DC 20530-0001

February 21, 2020

MEMORANDUM TO: Peter Winn
Acting Chief Privacy and Civil Liberties Officer
Office of Privacy and Civil Liberties

FROM: Derrick Driscoll
Deputy Director
(b)(6); (b)(7)(C)

SUBJECT: Notification for DSNet Breach

This memorandum is to provide you with the United States Marshals Service's (USMS) position regarding notification requirements for the breach of personally identifiable information (PII) from DSNet that occurred in December 2019. As the USMS desires to move forward with the timely notification of those who were affected by the data compromise, please advise us of any concerns you may have so that we can work together to prepare an appropriate proposal for consideration by the Attorney General.

Factual Background:

On Decemher 30, 2019, at 8:52 AM, the Department of Justice (DOJ) Security Operations Center (JSOC) alerted the USMS Information Technology Division (ITD) cybersecurity team of an attack against one of the public facing DSNet web servers (ows.usdoj.gov). Further investigation and analysis indicated 10 applications containing PII housed in the DSNet suite were potentially affected, with 8 out of 10 of those applications being reinstated as fully operational as of the date of this memorandum. Archived user tables within DSNet (gathering PII to include names, social security numbers (SSNs), birth dates, and addresses to include city, state, and zip codes) were compromised during the Structured Query Language (SQL) injection attack. The USMS Prisoner Operations Division (POD) estimated potentially 387,000 persons had their PII exfiltrated from DSNet as part of the SQL attack in December 2019. The individuals whose PII may have been compromised include current and former USMS prisoners whose information was indexed by USMS between 2005-2016. United States Citizens (USCs), Legal Permanent Residents (LPRs) and illegal aliens comprise the nationalities of current and former prisoners whose information was exfiltrated from the DSNet archival table.

A Core Management Team (CMT) was convened shortly after the breach was discovered and, in a meeting on January 6, 2020, labeled the breach a "Major Incident" as defined in OMB-17-12 (January 3, 2017). A USMS Tiger Team was assembled to ensure the requirements of OMB-17-12, *Preparing for and Responding to a Breach of PII*, and DOJ Instruction 0900.00.01 (February 16, 2018) were met, including mandatory Congressional notification within the initial 30 days post breach and notification to the individuals whose PII was compromised.

Legal Considerations:

As per OMB-17-12, in order to properly tailor breach response activities, a breach response team shall conduct and document an assessment of the risk of harm to individuals potentially affected by the breach. Factors that should be contemplated in making this assessment include the nature and the sensitivity of the PII exposed in the breach, the likelihood of the access and use of the PII, and the type of breach, to include any evidence of the specific actors of the breach and intent. Additionally, whether potentially affected individuals are from a particularly vulnerable population must be identified and considered.

In accordance with the requirements of OMB-17-12 and DOJ Instruction 0900.00.01, the USMS conducted a thorough analysis of the potential risk of harm to current and former prisoners whose information was compromised in the breach. As an initial matter, the USMS recognizes that prisoners (both current and former) are a vulnerable population. Additionally, the USMS acknowledges the sensitivity and permanence of the data points that were exfiltrated, such as dates of birth and SSNs. USMS notes information such as address information is transitory and subject to change. When evaluating the suspected perpetrator of the breach, the JSOC determined that the DSNet web applications were attacked by 87 distinct IP addresses from 30 unique countries; attackers ran approximately 640,000 queries focused on the archive table. However, the specific actor behind the SQL attacks is still unknown and there is no evidence to indicate exfiltrated PII was utilized in a nefarious manner (such as, posted on the dark web).

The USMS has an obligation to notify affected persons and to mitigate the risk of harm to individuals potentially affected by the breach. The USMS believes the individuals whose PII was exfiltrated from the archival table constitute the universe of individuals who were potentially affected by the breach. There exists no evidence to support the theory that all data housed in the DSNet system was compromised (and thus, that the pool of individuals potentially affected is larger than the estimate of 387,000 individuals). The breach response team within USMS has considered countermeasures, guidance, and services when evaluating how to mitigate the harm to individuals who were potentially affected by the breach.[1] Countermeasures are defined in OMB-17-12 as those steps that may not always prevent harm to potentially affected individuals, but may limit or reduce the risk of harm.

[1] This memorandum does not discuss mitigation efforts for law enforcement users whose login information to the DSNet suite of applications may have been compromised. The active users have already been contacted to recertify their DSNet account is valid and have been instructed to reset their password information to the application. In addition, USMS recommended all current and former authorized users change their credentials for other secure systems for which they use the same access credential as Detention Service Network.

For evaluating the risk of harm to an individual, the USMS also considered risks to DOJ and USMS programs, including the risk of agency liability (*see* OMB-17-12 at p. 21), should an affected individual bring suit against the USMS for damages incurred as a result of the data breach. Relevant to this analysis is the Privacy Act of 1974, as amended, 5 U.S.C. § 552a, which provides for judicial penalties for agency violations of the Act. The Act specifically provides civil remedies, 5 U.S.C. §552a(g), including damages, and criminal penalties, 5 U.S.C. § 552a(i), for violations. The civil action provisions are premised on agency violations of the Act or agency regulations promulgated thereunder.

An individual claiming a violation of the Privacy Act by a federal agency may bring a civil action in a federal district court. Actual damages may be awarded to the plaintiff for intentional or willful refusal by the agency to comply with the Act. In the case of "criminal violations" of the Act (Section 3 of the Act, 5 U.S.C. §. 552a(i) limits these so-called penalties to misdemeanors), an officer or employee of an agency may be fined up to $5,000 for:

A. Knowingly and willfully disclosing individually identifiable information which is prohibited from such disclosure by the Act or by agency regulations; or
B. Willfully maintaining a system of records without having published a notice in the Federal Register of the existence of that system of records.

While the Act does not establish a time limit for prosecutions for violation of the criminal penalties provision it does limit the bringing of civil action to 2 years from the date on which the cause of action arose. See 5 U.S.C. § 552a(g)(5). The breach which occurred on December 30, 2019, was not the result of any intentional or willful action by the agency or agency personnel.

Another threshold matter is the question of the application of the protections of the Privacy Act and the right of persons to bring suit under the Privacy Act. The Privacy Act provides protections and redress only for USCs and LPRs. Although prior Administrations have extended the protections of the Privacy Act to illegal aliens, this Administration expressly rescinded those protections in Executive Order (EO) 13678, dated January 25, 2017, entitled *Executive Order: Enhancing Public Safety in the Interior of the United States*, located at https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/. In pertinent part, the EO states:

> Sec. 14. Privacy Act. Agencies shall, to the extent consistent with applicable law, ensure that their privacy policies exclude persons who are not United States citizens or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information.

As the EO indicates, since the Privacy Act does not apply to those without lawful status in this country, further protections to non-citizens are not to be accorded. Even if the agency's action was found to be knowing and intentional (which in this matter, it was not), those individuals without legal status in the United States may not bring a private cause of action against a federal agency for a failure to adhere to the provisions of the Privacy Act. The Privacy Act does not provide redress to individuals who are not USCs or LPRs; and remediation for privacy breaches for non-citizens would not appear to be contemplated by EO 13768.

Although the Judicial Redress Act (JRA), P.L. 114-126 (Feb. 24, 2016), extends the rights of the Privacy Act to citizens of certain countries, in specific circumstances, it is inapplicable here. It enables a "covered person" to bring the same type of suit an "individual" (i.e., a USC or LPR) may bring and obtain with respect to the: 1) intentional or willful unlawful disclosure of a covered record under 5 U.S.C. § 552a(g)(1)(D); and 2) improper refusal to grant access to or amendment of a covered record under 5 U.S.C. § 552a(g)(1)(A) & (B). Under the JRA, the access/amendment action may only be brought against a designated federal agency or component. Further, under the JRA, a "covered person" means a natural person who is a citizen of a covered country. "Covered countries" are defined in the JRA and notably do not include nations in South and Central America.[2] However, the JRA is limited to information shared between covered countries for the purpose of "preventing, investigating, or prosecuting criminal offenses." Thus, the JRA is inapplicable here.[3]

Proposed Notification:

Based on the analysis contained in the preceding section of this memorandum, the USMS believes the agency is only legally required to notify those USCs and LPRs whose information was exfiltrated from DSNet in the December 30, 2019, breach.

The USMS will provide written notice to the last known mailing address of the individual affected by the breach. The written notice will inform an individual of the breach and the remedial steps the individual can take to ensure their identities are not compromised. The USMS will explain to individuals how to file an identity theft affidavit with the Federal Trade Commission (FTC); request a credit freeze and/or fraud alert; request a copy of one's credit report; and, provide template letters for an individual to notify a credit reporting bureau, should he or she notice suspicious activity. These are the same guidance and instructions publicly available on the FTC website and the format of the proposed notification letter is in line with those proposed letters provided in DOJ Instruction 0900.00.01, *Reporting and Response Procedures for a Breach of Personally Identifiable Information.*

Attachments

[2] Covered countries are: 1. European Union; 2. Austria; 3. Belgium; 4. Bulgaria; 5. Croatia; 6. Republic of Cyprus; 7. The Czech Republic; 8. Estonia; 9. Finland; 10. France; 11. Germany; 12. Greece; 13. Hungary; 14. Ireland; 15. Italy; 16. Latvia; 17. Lithuania; 18. Luxembourg; 19. Malta; 20. Netherlands; 21. Poland; 22. Portugal; 23. Romania; 24. Slovakia; 25. Slovenia; 26. Spain; 27. Sweden; and 28. United Kingdom.

[3] Nor would the Federal Information Security Modernization Act (FISMA), 44 U.S.C. § 3551, et seq., provide a cause of action to an affected individual. FISMA requires federal agencies to provide information security for agency information systems, but does not provide a private cause of action. *See* In re U.S. Office of Personnel Management Data Security Breach Litigation, 266 F. Supp.3d 1, 26 (D.D.C. 2017), *rev'd on other grounds*, 928 F.3d 42 (D.C. Cir. 2019). The Privacy Act is the only viable cause of action, and that is barred for non-citizens.

Attachment 1

USMS Prisoner Operations Division Notification Plan

Objective:

The United States Marshals Service (USMS) Prisoner Operations Division (POD) is tasked with providing the best known address of individuals whose Personally Identifiable Information (PII) was exfiltrated as part of the Detention Services Network (DSNet) system data breach. As part of this directive, individuals will be broken out into different notification groups based upon their custody status.

Background:

The DSNet system is utilized by USMS, Federal Bureau of Prisons (BOP), U.S. Probation and Pretrial Services (USPO) and state and local law enforcement authorities to enter into interagency agreements and logistical arrangements related to prisoner designation, transport and detention; share information with each other and the courts related to the prisoners being detained, such as names, addresses, dates of birth, Social Security numbers, nationality, and similar personal information, documentation related to the need for restricted housing (e.g., special housing when appropriate, and restricted housing for juveniles), and medical and mental health information for accommodation requests. A breach of the DSNet system was confirmed to have occurred during the month of December 2019.

During the breach in December 2019, based on information currently available, the attacker(s) electronically exfiltrated a subset of the total records in the system. Out of the 938,577 unique prisoners with records in the system, we have reason to believe records of an estimated 387,413 unique prisoners were electronically exfiltrated.

Below is the process POD is proposing to obtain the best known address of individuals whose PII was exfiltrated as part of the DSNet data breach:

Notification Group Data Strategy:

1) **Federal Bureau of Prisons Custody**

   Objective: Determine how many of the individuals whose PII was exfiltrated are currently in custody (incarcerated) in a BOP facility.

   Action: A dataset of the exfiltrated records was provided to BOP for analysis.

   Result: BOP has provided data on approximately 580,000 individuals who are currently, or were previously, in BOP custody.

   - The dataset provided by BOP will be reviewed by POD in an effort to extract the specific set of prisoner data available relating to the 387,413 records exfiltrated.

- Once the subset of data relating to exfiltrated records is produced, an analysis will be conducted for the individuals identified as having their data exfiltrated who are still in BOP custody.
- Once POD and BOP verify the custody status of the individuals identified as being in BOP custody, either the USMS will initiate notification to these individuals through the US Mail or the BOP will assume notification responsibilities through established internal prisoner notification procedures.
- POD will also obtain the last known address for all former prisoners of the BOP whose data has been identified as having been exfiltrated. This data will be kept and utilized as a backup for any remaining individuals with exfiltrated records whose most current address could not be obtained and verified through the remaining steps. In the event that no other address can be obtained, the last known address provided to BOP for individuals with exfiltrated data will be utilized for notification through the established and approved methodology identified by USMS leadership.

Note: BOP may notify the impacted individuals, in lieu of the USMS, due to internal data dissemination restrictions.

2) U.S. Probation and Pretrial Services Office

Objective: Determine the last (best) known address of individuals who are on *supervised release* or have *completed supervised release*.

Action: A dataset of exfiltrated records for individuals not in BOP custody will be provided by POD to the USPO for analysis upon completion of Phase I.

Result: The USPO will review the records provided by the USMS to determine which individuals with exfiltrated records are current probationers and either the USMS or the USPO will initiate notifications to those impacted probationers.

- POD has scheduled a meeting for February 20, 2020 with the USPO to provide additional information and context to USMS' request for the release of probationer information. The USMS and USPO will utilize this meeting to also address any outlying data release issues given previous indications by the USPO that they were prohibited from providing this information to outside agencies.
- Upon agreement between agencies, either the USMS will be given notice that current and previous probationer data will be released upon analysis by USPO, or the USPO will notify the USMS that it intends to make notification, utilizing language provided by the USMS, to its current and former probationers.
- The USMS intends to provide the USPO with its dataset of individuals with exfiltrated data not currently incarcerated in federal or state custody during the February 20, 2020 meeting. The USMS will receive notification of which individuals highlighted within its dataset are currently, or were previously, under USPO supervision along with their most recent address. Should the USPO indicate an inability to provide this information but a willingness to make notification to these individuals, the USMS will request confirmation of which current/former probationers it will be notifying and the date that this notification was made.

Note: USPO may notify the individuals effected, in lieu of the USMS, due to restrictions on release of information.

3) **Court Service and Offender Supervision Agency (CSOSA)**

Objective: Determine the last (best) known address of individuals who are on *Supervised Probation, Supervised Release, Parole* or have *completed supervision* with CSOSA.

Action: A dataset of exfiltrated records for individuals assigned to CSOSA from DSNet will be provided to CSOSA by POD for analysis.

Result: Upon analysis, CSOSA will provide the USMS with the last known address of any individual with exfiltrated data under current or previous supervision by the agency. The USMS will commence notification procedures in alignment with all other impacted individuals who are not currently incarcerated.

4) **Detainers**

Objective: Determine how many of the individuals whose PII was exfiltrated are currently being held on USMS detainers in state facilities.

Action: Upon reviewing records of all individuals with exfiltrated data, the USMS will cross-reference its current list of lodged detainers within Justice Detainee Information System (JDIS) and Capture to determine which prisoners remain in state custody awaiting return to federal custody for service of a federal prison sentence.

- Upon compiling a listing of individuals with exfiltrated data who are currently incarcerated within a state facility awaiting return to federal custody, POD will contact the respective state department of corrections to verify the individual's location.
- POD will request information from each state department of corrections on their approved methodologies for dissemination of information/mail through their facilities. This information will be noted to ensure compliance and successful notification to the prisoner.

Result: Upon compiling a listing of individuals with exfiltrated data who are currently in state custody and determining their current location through the respective state department of corrections, the USMS will commence notification procedures either through US Mail or the dissemination method authorized by the state.

Notification Group Categories

1) US Citizens
2) US lawfully admitted Permanent Residents
3) In US Federal Prisons
4) In State/Local/Tribal prisons
5) Released from prison and in a Supervised Release Program
6) Released from prison and Completed Supervised Release

Attachment 2

U.S. Department of Justice

United States Marshals Service

Prisoner Operations Division

Washington, DC 20530-0001

Date

Name
Address

Dear Mr./Ms:

On December 30, 2019, the United States Marshals Service (USMS), Information Technology Division (ITD) received notification from the Department of Justice, Security Operations Center (JSOC) of a security breach effecting a public-facing USMS server that houses information pertaining to current and former USMS prisoners. You have been identified as an individual whose personally identifiable information (PII) may have been compromised as a result of this breach. Accordingly, you are being notified by the USMS at this time so that you can take steps to protect yourself against potential identity theft.

The USMS recommends that you complete a Federal Trade Commission ID Threat Affidavit. This affidavit can be found at https://www.identitytheft.gov/. This will allow you to legally notify your creditors that your identity may have been compromised. Depending on the specific circumstances, any debt related to identify theft incurred after the notification date may not be assigned to you.

You may also wish to place a free credit freeze or a fraud alert on your credit files. A credit freeze lets you restrict access to your credit report, which in turn makes it more difficult for identity thieves to open new accounts in your name. A fraud alert advises creditors to contact you before opening any new accounts.

By calling or writing any one of the three credit reporting agencies at the numbers and/or addresses below, you will be able to place a credit freeze or fraud alerts with all of the agencies. You will then receive letters from each of them with instructions on how to obtain a copy of your credit reports at no cost. Sample written notifications are provided for you, attached to this correspondence. Also provided for you are the relevant sections of the Fair Credit Reporting Act. You may want to reference the appropriate Sections of the Act in your correspondence to the credit reporting agency.

Equifax
P.O. Box 105069
Atlanta, GA 30348-5069

800-525-6285

Experian
P.O. Box 9554
Allen, TX 75013
888-397-3742

TransUnion
Fraud Victim Assistance Department
P.O. Box 2000
Chester, PA 19016
800-680-7289

After you receive your credit reports, review them carefully. Look for accounts you did not open and inquiries from creditors that you did not initiate. Also note any inaccuracies in your personally identifiable information, such as home address or Social Security number, as this may be an indicator of someone attempting to impersonate you. If there is anything in the report that you do not understand, call or write the credit reporting agency at the telephone number and/or address on the report. Additionally, enclosed with this correspondence is a dispute letter that you may send to the credit reporting agency, if you see any accounts open or inquiries you did not initiate.

If you find suspicious activity on your credit reports, you may also wish to contact your local police or sheriff's office and file a formal report of identity theft. Be sure to obtain a copy of the police report as you will likely need to provide it to any affected creditors to resolve the disputed activity or debt.

For additional information on protecting yourself from identity theft, we suggest that you visit the website of the Federal Trade Commission at www.consumer.gov/idtheft.

Sincerely,

John Sheehan
Assistant Director

Enclosures

Notifying a Credit Reporting Agency about Identity Theft

- This sample letter will help you notify a credit reporting agency about a breach of your personally identifiable information and request a credit freeze and/or fraud alert.
- The text in [brackets] indicates where you must customize the letter.

[Date]

[Your Name]
[Your Address]
[Your City, State, Zip Code]

Equifax
P.O. Box 105069
Atlanta, GA 30348-5069

-or-

Experian
P.O. Box 9554
Allen, TX 75013

-or-

TransUnion
Fraud Victim Assistance Department
P.O. Box 2000
Chester, PA 19016

[RE: Your Account Number (if known)]

Dear Sir or Madam:

I am a victim of potential identity theft and I write to notify you about the compromise of my personally identifiable information. I was notified by the United States Marshals Service (USMS), a component of the United States Department of Justice (USDOJ) that my personally identifiable information might have been exposed as a result of a security breach on or about December 30, 2019.

Accordingly, I write to ask that you [place a freeze on my credit account, which will prevent any creditor from accessing a copy of my credit report **or** place a fraud alert on my credit account and contact me prior to the opening of any new account in my name.]

Please let me know by written correspondence to the address above what, if anything, you may need me to do to effectuate the [credit freeze or fraud alert] on my credit account.

Sincerely,
[Your Name]
[Your Date of Birth]
[Your Social Security Number]

Dispute Letter to a Credit Bureau

- This sample letter will help you dispute inaccurate information on your credit report.
- The text in [brackets] indicates where you must customize the letter.

[Date]

[Your Name]
[Your Address]
[Your City, State, Zip Code]

Equifax
P.O. Box 105069
Atlanta, GA 30348-5069

-or-

Experian
P.O. Box 9554
Allen, TX 75013

-or-

TransUnion
Fraud Victim Assistance Department
P.O. Box 2000
Chester, PA 19016

[RE: Your Account Number (if known)]

Dear Sir or Madam:

I am a victim of identity theft and I write to dispute certain information in my file resulting from the crime. I have circled the items I dispute on the attached copy of the report I received. The items I am disputing do not relate to any transactions that I have made or authorized. Please remove/correct this information at the earliest possible time.

[This/These] item(s) [identify item(s) disputed by name of the source, such as creditors or tax court, and identify type of item, such as credit account, judgment, etc.] [is/are] [inaccurate or incomplete] because [describe what is inaccurate or incomplete about each item, and why]. As required by section 611 of the Fair Credit Reporting Act, 15 U.S.C. § 1681i, a copy of which is enclosed, I am requesting that the item(s) be removed [or request another specific change] to correct the information.

Please reinvestigate [this/these matter(s)] and [delete or correct] the disputed item(s) as soon as possible. Please let me know by written correspondence to the address above what, if anything, need from me to complete your reinvestigation.

Sincerely,
[Your Name]
[Your Date of Birth]
[Your Social Security Number]

§ 611. Procedure in case of disputed accuracy [15 U.S.C. § 1681i]

(a) Reinvestigations of Disputed Information

(1) Reinvestigation Required§ 611 - 15 U.S.C. § 1681i 59

(A) *In general.* Subject to subsection (f), and except as provided in subsection (g) if the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly, or indirectly through a reseller, of such dispute, the agency shall, free of charge, conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate and record the current status of the disputed information, or delete the item from the file in accordance with paragraph (5), before the end of the 30-day period beginning on the date on which the agency receives the notice of the dispute from the consumer or reseller.

(B) *Extension of period to reinvestigate.* Except as provided in subparagraph (c), the 30-day period described in subparagraph (A) may be extended for not more than 15 additional days if the consumer reporting agency receives information from the consumer during that 30-day period that is relevant to the reinvestigation.

(C) *Limitations on extension of period to reinvestigate.* Subparagraph (B) shall not apply to any reinvestigation in which, during the 30-day period described in subparagraph (A), the information that is the subject of the reinvestigation is found to be inaccurate or incomplete or the consumer reporting agency determines that the information cannot be verified.

(2) Prompt Notice of Dispute to Furnisher of Information

(A) *In general.* Before the expiration of the 5-business-day period beginning on the date on which a consumer reporting agency receives notice of a dispute from any consumer or a reseller in accordance with paragraph (1), the agency shall provide notification of the dispute to any person who provided any item of information in dispute, at the address and in the manner established with the person. The notice shall include all relevant information regarding the dispute that the agency has received from the consumer or reseller.

(B) *Provision of other information.* The consumer reporting agency shall promptly provide to the person who provided the information in dispute all relevant information regarding the dispute that is received by the agency from the consumer or the reseller after the period referred to in subparagraph (A) and before the end of the period referred to in paragraph (1)(A).60 § 611 - 15 U.S.C. § 1681i

(3) Determination That Dispute Is Frivolous or Irrelevant

(A) *In general.* Notwithstanding paragraph (1), a consumer reporting agency may terminate a reinvestigation of information disputed by a consumer under that paragraph if the agency reasonably determines that the dispute by the consumer is frivolous or irrelevant, including by reason of a failure by a consumer to provide sufficient information to investigate the disputed information.

(B) *Notice of determination.* Upon making any determination in accordance with subparagraph (A) that a dispute is frivolous or irrelevant, a consumer reporting agency shall notify the consumer of such determination not later than 5 business days after making such determination, by mail or, if authorized by the consumer for that purpose, by any other means available to the agency.

(C) *Contents of notice.* A notice under subparagraph (B) shall include

(i) the reasons for the determination under subparagraph (A); and

(ii) identification of any information required to investigate the disputed information, which may consist of a standardized form describing the general nature of such information.

(4) *Consideration of consumer information.* In conducting any reinvestigation under paragraph (1) with respect to disputed information in the file of any consumer, the consumer reporting agency shall review and consider all relevant information submitted by the consumer in the period described in paragraph (1)(A) with respect to such disputed information.

(5) Treatment of Inaccurate or Unverifiable Information

(A) *In general.* If, after any reinvestigation under paragraph (1) of any information disputed by a consumer, an item of the information is found to be inaccurate or incomplete or cannot be verified, the consumer reporting agency shall –

(i) promptly delete that item of information from the file of the consumer, or modify that item of information, as appropriate, based on the results of the reinvestigation; and

(ii) promptly notify the furnisher of that information that the information has been modified or deleted from the file of the consumer.§ 611 - 15 U.S.C. § 1681i 61

(B) Requirements Relating to Reinsertion of Previously Deleted Material

(i) *Certification of accuracy of information.* If any information is deleted from a consumer's file pursuant to subparagraph (A), the information may not be reinserted in the file by the consumer reporting agency unless the person who furnishes the information certifies that the information is complete and accurate.

(ii) *Notice to consumer.* If any information that has been deleted from a consumer's file pursuant to subparagraph (A) is reinserted in the file, the consumer reporting agency shall notify the consumer of the reinsertion in writing not later than 5 business days after the reinsertion or, if authorized by the consumer for that purpose, by any other means available to the agency.

(iii) *Additional information.* As part of, or in addition to, the notice under clause (ii), a consumer reporting agency shall provide to a consumer in writing not later than 5 business days after the date of the reinsertion

(I) a statement that the disputed information has been reinserted;

(II) the business name and address of any furnisher of information contacted and the telephone number of such furnisher, if reasonably available, or of any furnisher of information that contacted the consumer reporting agency, in connection with the reinsertion of such information; and

(III) a notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the disputed information.

(C) *Procedures to prevent reappearance.* A consumer reporting agency shall maintain reasonable procedures designed to prevent the reappearance in a consumer's file, and in consumer reports on the consumer, of information that is deleted pursuant to this paragraph (other than information that is reinserted in accordance with subparagraph (B)(i)).

(D) *Automated reinvestigation system.* Any consumer reporting agency that compiles and maintains files on consumers on a nationwide basis shall implement an automated system through 62 § 611 - 15 U.S.C. § 1681i which furnishers of

information to that consumer reporting agency may report the results of a reinvestigation that finds incomplete or inaccurate information in a consumer's file to other such consumer reporting agencies.

(6) Notice of Results of Reinvestigation

(A) *In general.* A consumer reporting agency shall provide written notice to a consumer of the results of a reinvestigation under this subsection not later than 5 business days after the completion of the reinvestigation, by mail or, if authorized by the consumer for that purpose, by other means available to the agency.

(B) *Contents.* As part of, or in addition to, the notice under subparagraph (A), a consumer reporting agency shall provide to a consumer in writing before the expiration of the 5-day period referred to in subparagraph (A)

(i) a statement that the reinvestigation is completed;

(ii) a consumer report that is based upon the consumer's file as that file is revised as a result of the reinvestigation;

(iii) a notice that, if requested by the consumer, a description of the procedure used to determine the accuracy and completeness of the information shall be provided to the consumer by the agency, including the business name and address of any furnisher of information contacted in connection with such information and the telephone number of such furnisher, if reasonably available;

(iv) a notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the information; and

(v) a notice that the consumer has the right to request under subsection (d) that the consumer reporting agency furnish notifications under that subsection.

(7) *Description of reinvestigation procedure.* A consumer reporting agency shall provide to a consumer a description referred to in paragraph (6)(B)(iii) by not later than 15 days after receiving a request from the consumer for that description.

(8) *Expedited dispute resolution.* If a dispute regarding an item of information in a consumer's file at a consumer reporting agency is resolved in accordance with paragraph (5)(A) by the deletion of the disputed information by not later than 3 business days after the date § 611 - 15 U.S.C. § 1681i 63 on which the agency receives notice of the dispute from the consumer in accordance with paragraph (1)(A), then the agency shall not be required to comply with paragraphs (2), (6), and (7) with respect to that dispute if the agency

(A) provides prompt notice of the deletion to the consumer by telephone;

(B) includes in that notice, or in a written notice that accompanies a confirmation and consumer report provided in accordance with subparagraph (C), a statement of the consumer's right to request under subsection (d) that the agency furnish notifications under that subsection; and

(C) provides written confirmation of the deletion and a copy of a consumer report on the consumer that is based on the consumer's file after the deletion, not later than 5 business days after making the deletion.

(b) *Statement of dispute.* If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. The consumer reporting agency may limit such statements to not more than one hundred words if it provides the consumer with assistance in writing a clear summary of the dispute.

(c) *Notification of consumer dispute in subsequent consumer reports.* Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrelevant, the consumer reporting agency shall, in any subsequent report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.

(d) *Notification of deletion of disputed information.* Following any deletion of information which is found to be inaccurate or whose accuracy can no longer be verified or any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish notification that the item has been deleted or the statement, codification or summary pursuant to subsection (b) or (c) of this section to any person specifically designated by the consumer who has within two years prior thereto received a consumer report for employment purposes, or within six months prior thereto received a consumer report for any other purpose, which contained the deleted or disputed information.

(e) Treatment of Complaints and Report to Congress

(1) *In general.* The Bureau shall –64 § 611 - 15 U.S.C. § 1681i

(A) compile all complaints that it receives that a file of a consumer that is maintained by a consumer reporting agency described in section 603(p) contains incomplete or inaccurate information, with respect to which, the consumer appears to have disputed the completeness or accuracy with the consumer reporting agency or otherwise utilized the procedures provided by subsection (a); and

(B) transmit each such complaint to each consumer reporting agency involved.

(2) *Exclusion.* Complaints received or obtained by the Bureau pursuant to its investigative authority under the Consumer Financial Protection Act of 2010 shall not be subject to paragraph (1).

(3) *Agency responsibilities.* Each consumer reporting agency described in section 603(p) that receives a complaint transmitted by the Bureau pursuant to paragraph (1) shall –

(A) review each such complaint to determine whether all legal obligations imposed on the consumer reporting agency under this title (including any obligation imposed by an applicable court or administrative order) have been met with respect to the subject matter of the complaint;

(B) provide reports on a regular basis to the Bureau regarding the determinations of and actions taken by the consumer reporting agency, if any, in connection with its review of such complaints; and

(C) maintain, for a reasonable time period, records regarding the disposition of each such complaint that is sufficient to demonstrate compliance with this subsection.

(4) *Rulemaking authority.* The Bureau may prescribe regulations, as appropriate to implement this subsection.

(5) *Annual report.* The Bureau shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives an annual report regarding information gathered by the Bureau under this subsection.

(f) Reinvestigation Requirement Applicable to Resellers

(1) *Exemption from general reinvestigation requirement.* Except as provided in paragraph (2), a reseller shall be exempt from the requirements of this section.

(2) *Action required upon receiving notice of a dispute.* If a reseller receives a notice from a consumer of a dispute concerning the § 611 - 15 U.S.C. § 1681i 65 completeness or accuracy of any item of information contained in a consumer report on such consumer

produced by the reseller, the reseller shall, within 5 business days of receiving the notice, and free of charge –

(A) determine whether the item of information is incomplete or inaccurate as a result of an act or omission of the reseller; and

(B) (i) if the reseller determines that the item of information is incomplete or inaccurate as a result of an act or omission of the reseller, not later than 20 days after receiving the notice, correct the information in the consumer report or delete it; or

(ii) if the reseller determines that the item of information is not incomplete or inaccurate as a result of an act or omission of the reseller, convey the notice of the dispute, together with all relevant information provided by the consumer, to each consumer reporting agency that provided the reseller with the information that is the subject of the dispute, using an address or a notification mechanism specified by the consumer reporting agency for such notices.

(3) *Responsibility of consumer reporting agency to notify consumer through reseller.* Upon the completion of a reinvestigation under this section of a dispute concerning the completeness or accuracy of any information in the file of a consumer by a consumer reporting agency that received notice of the dispute from a reseller under paragraph (2) –

(A) the notice by the consumer reporting agency under paragraph (6), (7), or (8) of subsection (a) shall be provided to the reseller in lieu of the consumer; and

(B) the reseller shall immediately reconvey such notice to the consumer, including any notice of a deletion by telephone in the manner required under paragraph (8)(A).

(4) *Reseller reinvestigations.* No provision of this subsection shall be construed as prohibiting a reseller from conducting a reinvestigation of a consumer dispute directly.

(g) Dispute Process for Veteran's Medical Debt

(1) *In general.* With respect to a veteran's medical debt, the veteran may submit a notice described in paragraph (2), proof of liability of the Department of Veterans Affairs for payment of that debt, or documentation that the Department of Veterans Affairs is in the 66 § 612 - 15 U.S.C. § 1681j process of making payment for authorized hospital care, medical services, or extended care services rendered to a consumer reporting agency or a reseller to dispute the inclusion of that debt on a consumer report of the veteran.

(2) *Notification to veteran.* The Department of Veterans Affairs shall submit to a veteran a notice that the Department of Veterans Affairs has assumed liability for part or all of a veteran's medical debt.

(3) *Deletion of information from file.* If a consumer reporting agency receives notice, proof of liability, or documentation under paragraph (1), the consumer reporting agency shall delete all information relating to the veteran's medical debt from the file of the veteran and notify the furnisher and the veteran of that deletion.

From: Driscoll, Derrick (USMS)
Sent: Fri, 18 Sep 2020 11:43:51 +0000
To: Wade, Drew J. (USMS); Washington, Donald (USMS); Kilgallon, John (USMS); (b)(6); (b)(7)(C); (b)(7)(F) (USMS); Delaney, William (USMS); White, Darrell (USMS)
Cc: Coghill, Michelle (USMS)
Subject: RE: WaPo article: Judges in D.C. threatened, harassed after high-profile, political legal battles

Thanks Drew! I was a little worried after seeing the title, but good/fair article. I'm all for diving in more, I feel like this is our time and need to make the most of it.

Derrick Driscoll
Deputy Director
U.S. Marshals Service
(w) (b)(6); (b)(7)(C)

From: Wade, Drew J. (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>
Sent: Friday, September 18, 2020 7:36 AM
To: Washington, Donald (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>; Driscoll, Derrick (USMS) (b)(6); (b)(7)(C); (b)(7)(F) @usms.doj.gov>; Kilgallon, John (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>; (b)(6); (b)(7)(C); (b)(7)(F) (USMS) @usms.doj.gov>; Delaney, William (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>; White, Darrell (USMS) @usms.doj.gov>
Cc: Coghill, Michelle (USMS) <MCoghill@usms.doj.gov>
Subject: WaPo article: Judges in D.C. threatened, harassed after high-profile, political legal battles

The WaPo article is below. Straight forward. No curve balls.
Might be worth going after some other outlets on the subject, instead of waiting for them to come to us.

- Drew

https://www.washingtonpost.com/local/legal-issues/judges-in-dc-threatened-harassed-after-high-profile-political-legal-battles/2020/09/18/acece6e2-f8e9-11ea-be57-d00bb9bc632d_story.html

Legal Issues

Judges in D.C. threatened, harassed after high-profile, political legal battles

By **Ann E. Marimow**
September 18, 2020 at 6:00 a.m. EDT

After a recent court hearing in a high-profile, politically charged case, judges on the powerful federal appeals court in Washington received an onslaught of harassing, profane phone calls to their chambers. The angry calls from citizens unhappy with the views judges expressed during oral argument prompted some on the U.S. Court of Appeals for the D.C. Circuit to remove their direct office phone numbers from the court's website, two officials said.

The threats also hit home.

One judge's personal phone number and street address circulated on Twitter with a message encouraging people to protest in front of the judge's home. A picture of the house was also posted online.

The judge raced home to hunker down with family and soon after paid hundreds of dollars to personally install a new, more sophisticated video alarm system, according to one of the government officials who spoke on condition of anonymity because of security concerns.

The heightened security steps reflect the rising number of threats against federal judges throughout the country. They also come as leaders of the federal judiciary askCongress for help ramping up court protection after the attack this summer on the family of New Jersey District Judge Esther Salas. Her 20-year-old son was killed and her husband was critically wounded at their home by an embittered self-proclaimed "anti-feminist" who had filed a case before the judge.

"Criticism is part of the job; we're used to it, and it doesn't impact how we decide cases," said Judge David McKeague, who leads the Judicial Conference's Committee on Judicial Security and serves on the U.S. Court of Appeals for the 6th Circuit. But, he said, the concern is when the criticism "veers from being unhappy about a decision a judge makes to all of a sudden becoming, 'You're evil, biased or incompetent.'"

In the last three years, the number of threats tracked by the U.S. Marshals Service has dramatically increased as attacks targeting judges and their rulings have proliferated on social media.

"The concern is real," McKeague said, "as evidenced by the rapid increase in threats and violent actions directed toward the judiciary."

The animosity directed at judges is particularly persistent in Washington with legal battles over President Trump's financial records and access to secret material from Robert S. Mueller III's Russia investigation.

District Court Judge Emmet G. Sullivan began receiving hundreds of calls, emails and letters in May after he refused to go along with the Justice Department's unusual request to immediately drop the prosecution of Trump's former national security adviser, Michael Flynn. The vast majority of the messages, according to another official who also spoke on the condition of anonymity to discuss the threats, were hostile. Many were laced with race-based profanity toward the judge, who is Black.

The Marshals Service, the official said, has since increased protection for the judge, who declined to comment for this story.

In August, a New York man was arrested after threatening to assault and murder a district court judge in Washington on or about May 14, when Sullivan put Flynn's case on hold, according to a grand jury indictment unsealed this week in Washington.

The indictment of Frank J. Caporusso does not name Sullivan. But the dates align with Sullivan's actions in court. The threat came in a voice-mail message left on the targeted judge's office line, according to a detention memo filed in court.

"We are professionals. We are trained military people. We will be on rooftops. You will not be safe," the message said. "Back out of this bullshit before it's too late, or we'll start cutting down your staff."

Attorney William D. Wexler, who briefly represented Caporusso in New York, said "he denies the allegations."

The Marshals Service is responsible for protecting about 2,700 federal judges nationwide, in addition to 30,300 prosecutors and court officials at more than 800 locations. Supreme Court justices have a separate police department in Washington.

In fiscal 2019, investigators reviewed more than a million derogatory social media posts. Deputies recorded about 4,500 "inappropriate" communications or threats directed a judges and other court officials, an increase of 40 percent from fiscal 2016.

It is a crime to threaten a federal judge, but not every nasty message or social media post is considered a threat and deputies must balance free speech considerations.

During the trial of Roger Stone, President Trump's friend, a photo of the presiding judge was posted on Stone's Instagram account. The image of U.S. District Judge Amy Berman Jackson appeared next to what looked like a gun sight's crosshairs. Stone deleted the post and apologized, saying he did not mean to threaten the judge.

In that case, Trump piled on, targeting Jackson in a tweet in which he also criticized the judge's treatment of his former campaign chairman, Paul Manafort.

Troubling messages are more closely examined when there are multiple missives that use harsh language or an outright threat to physically harm the judge. Of the 4,500 potential threats tracked in fiscal 2019, 373 rose to a level that required deeper investigation, according to data from the Marshals Service.

Marshals Service Deputy Director Derrick Driscoll said personal information about judges, their families and other court officials is easier than ever to access online. Because of social media, "it's easier to make threats or perceived threats," he said. "The thing that's not easier is the investigative side."

Tracking down the people behind the phone calls, emails and tweets, and then showing up to knock on doors takes time.

The Administrative Office of the U.S. Courts is asking Congress for funds to hire 1,000 deputies; $7.2 million to install upgraded security systems in judges' homes; and $267 million to replace and improve security cameras at 650 courthouses and related federal buildings.

Judiciary leaders are also recommending legislative fixes that would give judges permanent authority to redact certain information from financial disclosure forms and restrict online posting of personal information by government and private organizations. The list of proposed protected information includes personal data related to property tax records; car registration information; the employers of family members; and religious, organization, club or association memberships.

Gabe Roth, executive director of Fix the Court, which advocates for greater court transparency, supports the physical security measures and hiring of additional deputies. But he's concerned about access to public records and believes citizens should know more, for instance, about reimbursements for travel by judges.

"Unfortunately, being a public figure means some details of your life that you might wish weren't public are made public," Roth said in an email. "If the proposed legislation becomes law, and a federal judge is gifted a fancy house or car from a litigant, the public

might never know about it. That'd be wrong and make it almost impossible to hold bad judges accountable."

John F. Clark took over as director of the Marshals Service soon after the last deadly shooting of relatives of a federal judge iu 2005. The killing of Judge Joan Lefkow's husband and elderly mother at her Chicago home was the driving force behind the last package of security measures, including funds to install alarm systems in the homes of every judge.

"Judges are in a position that requires high security, but there is a balance because people have the right to know, hear and see" the court at work, said Clark, now head of the National Center for Missing and Exploited Children.

"It's an extremely difficult assignment to provide a 24/7 package that some judges may want or expect. I'm hopeful that more resources can be provided for security, especially in a world that's technology driven and increasingly open."

) , l/a e
Chief, Office of Public Affairs
U.S. Marshals Service
Direct) (b)(6); (b)(7)(C)
Main) (b)(6); (b)(7)(C)
Mobile) (b)(6); (b)(7)(C)

From: Driscoll, Derrick (USMS)
Sent: Mon, 31 Aug 2020 15:52:15 +0000
To: Washington, Donald (USMS)
Subject: FOIA

Sir

Just a quick fyi that I've asked Lisa/GC to have her shop develop a spreadsheet of all the "civil unrest" related FOIA requests we've received to date…just to have eyes on what's being requested of us etc…

Thanks
Derrick

Derrick Driscoll
Deputy Director
U.S. Marshals Service
(w) (b)(6); (b)(7)(C)

From: Driscoll, Derrick (USMS)
Sent: Sun, 30 Aug 2020 23:29:13 +0000
To: Dickinson, Lisa (USMS)
Cc: Washington, Donald (USMS); Kilgallon, John (USMS)
Subject: Re: FOIA -Second and Final

Thanks Lisa! I've got the ADA working on the dates Brandt was actually the #1 at dcsc

Derrick Driscoll
U.S. Marshals Service

On Aug 30, 2020, at 6:56 PM, Dickinson, Lisa (USMS) (b)(6); (b)(7)(C) @usms.doj.gov> wrote:

I am checking to see whether we have in fact received a FOIA request from this individual and, if so, what the status is. I will brief you on Tuesday unless you wish to discuss sooner.

Thanks, Lisa

Lisa M. Dickinson
General Counsel
U.S. Marshals Service
CG-3 15th floor
Washington, D.C. 20530-0001
Office: (b)(6); (b)(7)(C)
Fax: (b)(6); (b)(7)(C)

From: Washington, Donald (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>
Sent: Sunday, August 30, 2020 9:41 AM
To: Dickinson, Lisa (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>
Cc: Driscoll, Derrick (USMS) usms.doj.gov>; Kilgallon, John (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>
Subject: Fwd: FOIA -Second and Final

GC- here's the other email I mentioned in the email I just sent to you.

Best regards,

Donald W. Washington
Director

United States Marshals Service
Office (b)(6); (b)(7)(C)

Begin forwarded message:

From: (b)(6); (b)(7)(C) @protonmail.com>
Date: August 29, 2020 at 10:18:31 PM EDT
To: (b)(6); (b)(7)(C)
"FOIA, Civil.routing" (b)(7)(E) , "Washington, Donald (USMS)"
(b)(6); (b)(7)(C) @usms.doj.gov>, (b)(6); (b)(7)(C) @usdoj.gov" (b)(6); (b)(7)(C) @usdoj.gov>
Subject: Fw: FOIA -Second and Final

don't receive the information sought by September 4,2020 , we will formally seek a Congressional criminal investigation Investigation for a cover-up., obstruction of justice,aiding, abetting criminals employed by the Justice Dept.

We are seeking a Grand Jury Indictment under
18 U.S. Code § 2261A.Stalking U.S. Code Seeking Criminal Indictment of Christopher Dammons; Steven Linden; Maureen Marin, Thomas Bruton; Jason Wojdylo ; John Does 1 and 2 of (1)travels in interstate within the territorial jurisdiction of the United States, with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person,

Hon. Jerry Nadler , Chairman, House Judiciary Committee, Via E mail
Michael Horowitz , Inspector General Dept.of Justice via E mail (b)(6); (b)(7)(C) @usdoj.gov
Christopher Wray, FBI Director via E mail
Donald W. Washington, Director, United States Marshal office , Washington, D.C, Via E mail

------- Original Message -------
On Friday, June 26, 2020 1:27 PM, (b)(6); (b)(7)(C) @protonmail.com> wrote:

bcc: E mail : Michael Horowitz , Inspector General Dept.of Justice
Hon. Jerry Nadler , Chairman, House Judiciary Committee

SECOND AND FINAL FOIA REQUEST
We are giving the benefit of doubt that you did not receive or read the First FOIA sent on February 13,2020 , due to COVID Pandemic situation and sent by US mail .
The FOIA information should include **unredacted complete file** from AUSA in Chicago named Maureen Merin who has created a "profiling file" as a favor and harassment and retaliation for our client sued some thugs in a pending Civil law suit.and thus Merin committed Federal crime of Hazing, profiling, abusing her authority as AUSA in threatening a citizen for personal favors for some thugs in judiciary in anticipation to get appointed as a Magistrate Judge etc. . This is now a Federal crime by an AUSA by Merin, to Inspector General of DOJ. There is also a petition pending in Illinois Supreme court to disbar and revoke Maureen Merin law license for Felony crimes under State laws..

That attached complaint filed with Inspector General is self exploratory. We are seeking all information under FOIA unredacted as to he complaint field with Inspector General, complete file on (b)(6); (b)(7)(C) **unredacted** including the Grand Jury indictment of (b)(6); (b)(7)(C) criminal case information on (b)(6); (b)(7)(C) etc.

We are **asking all the information unredacted ,** related to the **murderous aggravated stalking trip of January 21,2020** by few thugs from US marshal office . The FOIA information must be complete with all Phone logs, E mails, E mail server logs, internal memos, all E mail communication with (b)(6); (b)(7)(C) from anyone including all communications, E mail from felon and thug named (b)(6); (b)(7)(C) from E mail address (b)(6); (b)(7)(C) akerman.com; all information as to an alleged threat "nexus" ,which is addressed as a Federal crime of profiling referred in the attached IG complaiunt . **The FOIA information must be recieved no later than June 30, 2020 to the following address;**

(b)(6); (b)(7)(C)

Below is what we discovered as to the felon who attempted to murder me with a motorized vehicle and who lied his identity as (b)(6); (b)(7)(C) , and the felon real name is (b)(6); (b)(7)(C) He sued United States and his case was miserably dismissed with prejudice. This felon (b)(6); still in US Marshal payroll and that is something outrageous. We will be addressing this abuse to House Committee to summon Director Washington for a hearing to answer how a felon ,indicted by Federal Grand Jury still employed by US Marshall office,which seems some sort political clout, favors ,to get "get out jail" freepass and how this violent felon (b)(6); still not fired.

RAP SHEET OF (b)(6); (b)(7)(C)

" (b)(6); (b)(7)(C) was indicted by a federal grand jury for punching and choking a handcuffed man in July 2010. (b)(6); is also accused of obstructing justice in the case by trying to persuade another official to withhold evidence of the assault. In addition, (b)(6); was indicted for allegedly head-butting a handcuffed man in May 2008 and with obstructing justice by allegedly persuading another officer to withbold evidence of the assault. The indictments follow an investigation by the Justice Department's inspector general's office.

Justice Department civil rights lawyers will prosecute the case, according to the Justice Department. (b)(6); faces up to 10 years in prison for the alleged assaults and up to 20 years for the obstruction-of-justice counts. Each count also carries a fine of up to $250,000

By Registered Mail and E mail to:

Hon. Jerry Nadler , Chairman, House Judiciary Committee
bcc: E mail : Michael Horowitz , Inspector General Dept.of Justice
Christopher Wray, FBI Director
Donald W. Washington, Director, United States Marshal office , Washington, D.C, Via E mail

From: Driscoll, Derrick (USMS)
Sent: Fri, 3 Jul 2020 18:02:05 +0000
To: Washington, Donald (USMS)
Cc: Kilgallon, John (USMS); Tyler, Jeff (USMS)
Subject: Re: Ghislaine Arrest

Yes sir! Didn't know how to phrase it

Derrick Driscoll
U.S. Marshals Service

On Jul 3, 2020, at 1:58 PM, Washington, Donald (USMS) (b)(6); (b)(7)(C) @usms.doj.gov> wrote:

DD - I think that we are on the same sheet of music. However, "on watch" means both preventing her from harming herself, and keeping others from causing harm to her. She probably has a lot of information about a lot of rich/powerful people.

Welcome back!

Best regards,

Donald W. Washington
Director
United States Marshals Service
Office (b)(6); (b)(7)(C)

On Jul 3, 2020, at 12:06 PM, Washington, Donald (USMS) (b)(6); (b)(7)(C) @usms.doj.gov> wrote:

Thanks.

Best regards,

Donald W. Washington
Director
United States Marshals Service
Office (b)(6); (b)(7)(C)

On Jul 3, 2020, at 11:37 AM, Driscoll, Derrick (USMS) (b)(6); (b)(7)(C) @usms.doj.gov> wrote:

Just got home and have been tracking Sir. ADO and I just spoke and he's getting an update from (b)(6); (b)(7)(C); (b)(7)(F) which we'll have shortly and will pass along. We're tracking the following:

1. Tracking her exact location
2. Tracking her status and ensuring the current facility has her on watch
3. Tracking her timeline/travel to S/NY and eventual handoff to BOP

Thanks
Derrick

Derrick Driscoll
Deputy Director
U.S. Marshals Service
(w) (b)(6); (b)(7)(C)

From: Washington, Donald (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>
Sent: Friday, July 3, 2020 11:43 AM
To: Driscoll, Derrick (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>
Subject: Re: Ghislaine Arrest

Thanks DD.

I just got a call from Rachel B relaying the AG's message that I am personally responsible for Gislaine Maxwell's safety until she is turned over to BOP. Where is she now?

Best regards,

Donald W. Washington
Director
United States Marshals Service
Office (b)(6); (b)(7)(C)

On Jul 3, 2020, at 8:12 AM, Driscoll, Derrick (USMS) (b)(6); (b)(7)(C) @usms.doj.gov> wrote:

Sir just FYI below

Derrick Driscoll
U.S. Marshals Service

Begin forwarded message:

From: "Driscoll, Derrick (USMS)" (b)(6); (b)(7)(C) @usms.doj.gov>
Date: July 3, 2020 at 9:11:54 AM EDT

To: "O'Hearn, Donald (USMS)" (b)(6); (b)(7)(C) @usms.doj.gov>
Cc: "Tyler, Jeff (USMS)" (b)(6); (b)(7)(C) @usms.doj.gov>, "Robinson, Roberto (USMS)" (b)(6); (b)(7)(C) @usms.doj.gov>, "O'Brien, Holley (USMS)" (b)(6); (b)(7)(C) @usms.doj.gov>, "Farrell, Doug (USMS)" (b)(6); (b)(7)(C) @usms.doj.gov>, "Kilgallon, John (USMS)" (b)(6); (b)(7)(C) @usms.doj.gov>, "Wade, Drew J. (USMS)" (b)(6); (b)(7)(C) @usms.doj.gov>, "Delaney, William (USMS)" (b)(6); (b)(7)(C) @usms.doj.gov>, "Auerbach, Gerald (USMS)" (b)(6); (b)(7)(C) @usms.doj.gov>, "Dickinson, Lisa (USMS)" (b)(6); (b)(7)(C) @usms.doj.gov>
Subject: Ghislaine Arrest

Hey Don

Hope you're having a good start to you holiday weekend! Sorry to bother you but could you please check with POD to get a status of our custody of Ghislaine (apparently arrayed by fbi last night) and respond back to this email group.

Gerry/Lisa, let's be mindful of any related foia requests as this is an ongoing investigation and we should not release anything related etc...

Thanks
Derrick

https://www.google.com/amp/s/www.cnbc.com/amp/2020/07/02/fbi-arrests-jeffrey-epstein-friend-ghislaine-maxwell-sex-case.html

Derrick Driscoll
U.S. Marshals Service

From: Dickinson, Lisa (USMS)
Sent: Thu, 27 Feb 2020 20:23:46 +0000
To: Washington, Donald (USMS); Auerbach, Gerald (USMS); Kilgallon, John (USMS); (b)(6); (b)(7)(C); (b)(7)(F) (USMS)
Subject: RE: Information for your review regarding my FOIA request

Director,

A response is going out today regarding (b)(6); (b)(7)(C) 's request for a copy of the findings in complaints made by him against two current and two former USMS N/GA employees. That response will inform him that the two OPR case files which have been located (there are no files related to the retired employees (b)(6); (b)(7)(C); (b)(7)(F) cannot be released as those complaint files are currently open and pending investigation. Such records are subject to FOIA Exemption (b)(7)(A) which allows the withholding from public release "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." See 5 U.S.C. § 552(b)(7)(A) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110175, 121 Stat. 2524. Records compiled in connection with the investigation of potential disciplinary matters may be withheld pursuant to FOIA Exemption (b)(7)(A), as certain administrative proceedings qualify as law enforcement proceedings. See Gray v. U.S. Army Criminal Investigation Command, 742 F. Supp. 2d 68, 73 (D.D.C. 2010).

Lisa Dickinson
Deputy General Counsel
U.S. Marshals Service
(b)(6); (b)(7)(C) (Direct)
703-740-3943 (Main)
(b)(6); (b)(7)(C) (Fax)

From: Washington, Donald (USMS)
Sent: Thursday, February 27, 2020 11:08 AM
To: Auerbach, Gerald (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>; Kilgallon, John (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>; Dickinson, Lisa (USMS) (b)(6); (b)(7)(C) @usms.doj.gov>; (b)(6); (b)(7)(C); (b)(7)(F) (USMS) (b)(6); (b)(7)(C); (b)(7)(E) @usms.doj.gov>
Subject: Fwd: Information for your review regarding my FOIA request

Gerry/Lisa - what's the status of the USMS response to (b)(6); (b)(7)(C) s FOIA request?

Best regards,

Donald W. Washington

Director
United States Marshals Service
Office (b)(6); (b)(7)(C)

Begin forwarded message:

From: (b)(6); (b)(7)(C) @yahoo.com>
Date: February 27, 2020 at 11:02:42 AM EST
To: "Auerbach, Gerald (USMS)" (b)(6); (b)(7)(C) @usms.doj.gov>
Cc: "Washington, Donald (USMS)" (b)(6); (b)(7)(C) @usms.doj.gov>, "Luckstone, Charlotte (USMS)" (b)(6); (b)(7)(C) @usms.doj.gov>, "Dickinson, Lisa (USMS)" (b)(6); (b)(7)(C) @usms.doj.gov>, "Driscoll, Derrick (USMS)" (b)(6); (b)(7)(C) @usms.doj.gov>, (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) (USAGAN)" (b)(6); (b)(7)(C) @usa.doj.gov>, (b)(6); (b)(7)(C) (USAGAN)" (b)(6); (b)(7)(C) @usa.doj.gov>, (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) (USAGAN)" (b)(6); (b)(7)(C) @usa.doj.gov>, (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) (USAGAN)" (b)(6); (b)(7)(C) @usa.doj.gov>
Subject: Information for your review regarding my FOIA request

Good morning General Counsel Auerbach,

I hope all is well. As the leader of the USMS Office of General Counsel who oversees the USMS FOIA office, I am emailing you to inquire about the status of my overdue FOIA request. Today is the 81st business day since I first filed my FOIA request on November 7, 2019, which is labeled as Exhibit 190, and in accordance with a letter from the USMS's Associate General Counsel of the USMS FOIA office Ms. Luckstone, dated December 11, 2019, labeled as Exhibit 189 where she requested an additional 30 days for production of the documents, I should have had my requested documentation by approximately January 28, 2020. However, the documents still have not been produced.

Pursuant to 5 U.S.C. § 552(a)(4)(B) (2009) and 5 U.S.C. § 552(a)(6)(C)(i) (2009) the USMS is in violation of the Freedom of Information Act and their own policies. As I informed the USMS through numerous prior emails, my request is time-sensitive, because the documents are critical to my federal lawsuit against the USMS and Akal Security. Attached to this email are Exhibits 189-190.

I respectfully ask for an update as to when I will receive my FOIA request. No one has responded and given me an update on my overdue FOIA request, and it appears that the USMS is attempting to stonewall. Please advise that I am documenting all of the USMS's non- responses to my emails, with legitimate questions regarding my FOIA request.

On April 16, 1963, Dr. Martin Luther King Jr. while sitting in Birmingham City Jail in Birmingham, Alabama said the following:

> **"History will have to record that the greatest tragedy of this period of social transition was not the strident clamor of the bad people, but the appalling silence of the good people"**

Whether anyone on this email likes me or not is irrelevant, what is taking place here is an injustice. However, as we honor Black History month, Dr. King's words are something we all must keep in my mind. The silence of the "good people" is what's so disheartening. But, as Dr. King believed in brighter days, I do as well, and the "melody's from heaven will rain down on this situation and justice will be served".

For transparency, several USMS and USAO decision markers are copied on this email.

Respectfully,

(b)(6); (b)(7)(C)