05-35023

United States Court of Appeals

For the Ninth Circuit

Bill Walker, pro se

Appellant

v.

Members of Congress, et al.

Appellees

Response by Appellant to Appellees' Opposition to Appellant's Motion to Deny Appearance of Counsel

Admittedly, appellant in this suit is a pro-se, which means he is not familiar with every nuisance of federal law. However, he is familiar enough with court rules to read what they say and understand they must be obeyed. When a court rule says a paper must be turned in to the court, it means a paper must be turned in to the court. When a statute says before the Department of Justice can represent a party, that party must request such representation then that is what is what the statute means. All parties in this suit were sued *individually* and no federal agency was named. Hence, this fact of request if required by statute cannot be ignored.

The response of the Department of Justice in this issue of appearance at appellate level is to say the least, strange. Instead of simply stating that all individuals named in the district court suit have requested representation by the Department of Justice as permitted by 2 U.S.C. 118[1] and providing proof of such request, or even simpler yet, merely returning the Waivers of Summons as required by FRCP 4[2] and

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[1] "In any action brought against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty…the United States Attorney for the district within which the action is brought *on being thereto requested by the officer sued*, shall enter an appearance in behalf of such officer…" (Emphasis added).

[2] FRCP 4(2): An individual…that is subject to service under subdivision (e) and that receives notice of an action… has a duty to avoid unnecessary costs of serving the summons." FRCP 4(5): The costs to be imposed on a defendant under para-

FRCP 12[3] to the district court and be done with the matter, the Department of Justice instead is content to label the entire court process of service and due process as "patently frivolous" and refuse to answer any questions or issues raised as a result of their own actions even those this "frivolous" rules make it clear they are to make an appearance and do not give any exception or reprieve whatsoever if they fail to do so.

The appellant carefully followed the service procedures given in FRCP 4 and its associated subsections in district court. He expects the Department of Justice to do the same, which it obviously is not willing to do. The Department, based on its opposition statement, apparently expects the rules of due process in regards

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graph (2) *for failure to comply with a request to waive service of a summons*…" (Emphasis added).

[3] FRCP 12 (a) (1) (B): "When presented. Unless a different time is prescribed in a statute of the United States, defendant shall serve an answer if service of the summons has been timely waived on request under Rule 4(d), within 60 days after the date when the request for waiver *was sent*…" (Emphasis added). Further FRCP 12 (3) (A) specifies: The United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity, *shall serve an answer* to the complaint… *within 60 days after the United States attorney is served with the pleading asserting the claim*." FCRP 12 (3) (B) states: "An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States *shall serve an answer to the complaint*… within 60 days after service on the officer or employee, *or service on the United States attorney*, whichever is later." (Emphasis added).

to service to be ignored by the appeals court. Court rules regarding service exist for a specific and obvious purpose: to inform the parties of all actions taken in court in which they, as a party to a suit, are involved and to permit them time to respond or take other actions as they deem appropriate in that suit. The court is obligated to jealously guard the rights of due process and service in order to protect the rights of both plaintiffs and defendants at all states of a court suit. The Department of Justice would have the rules for them be otherwise.

For whatever reason, the Department of Justice chose not to make an appearance at district court. They ignored clear, distinct and unambiguous court rules and now ask the appeals court to ignore these rules. Had they made appearance by the usual introductory form letter this entire issue would be mute and not even raised by appellant. It is their actions entirely, and not the appellant's, which caused this predicament for them. Their lack of legal professionalism is what is "patiently frivolous" not that the appellant who merely asks the appeals court to protect the rules of due process.

Appellant asserted in his original motion that Ms. Utiger can not represent appellees because she does not conduct business nor reside in the district in question which is required by language of 2 U.S.C 118. The Department of Justice termed appellant's assertion "patently frivolous" yet simultaneously files a re-

sponse to his motion listing U.S Attorney, John McKay Jr. who does reside in the district and conduct business in that district as an attorney. Apparently the Department assumes simply by listing an attorney in the district this will satisfy the statute. The fact is another U.S. Attorney who still is outside of the district wrote the response. This residency requirement, as stated before, is based on the statutory language of 2 U.S.C. 118. If the statute asserted by appellant is so "patently frivolous" why suddenly does the Department of Justice attempt to comply with the terms of 2 U.S.C. 118 by including an attorney who resides in the district in question? Why not simply have Ms. Utiger make the response and ignore the statute entirely as it is "patently frivolous" according to the Department of Justice?

It is not frivolous for the appellate court to determine by what means the Department was "notified" as to the appeal of this suit. The record is clear and was presented in appellant's original motion: the district court did not notify anyone but appellant, who was the only party who made appearance at district court level. Hence, the Department has never been legally notified of this appeal by the district court as required by court rules. There is no evidentiary proof provided by the Department that this "notification" came by legal means or as a function of its official business. For all the appeals court knows the "notification" was two clerks, one from the district court and one from the U.S. Attorney shooting the breeze in a bar

after work, hardly an act of official business. According to the Department such notification procedures by the district court are simply "patently frivolous" and deserve no explanation or answer to the appeals court as to how, under what circumstances or by what means this so-called "notification" came about or whether this "notification" satisfies court procedural rules of due process. As the Department of Justice refuses to provide any evidentiary proof of the manner of "notification" it must be assumed it does not meet these court procedural rules or the Department would simply present this evidence and be done with the matter.

There is another issue appellant raised in his motion. Who exactly is the Department representing? Is the appeals court to assume with no evidentiary proof by the Department that all of the appellees have made request for legal representation as required by statute? Has the Department even attempted to contact all the parties involved before asserting itself in this suit and informed them of all facts such as their failure to make appearance at district court? Does it make sense to assume that if all appellees were informed of such a legal faux pas as failure to appear at district level that they would all eagerly jump on board to have the same legal team defend them in appeal? Obviously, according to the Department, answers to such fundamental questions of due process and other constitutional guarantees are "patently frivolous." If the appeals court allows entry of the Department of Justice un-

der these circumstances, the court won't even know which appellees, if any, are represented. The Department has failed to provide any evidentiary proof they are in fact assigned or have been granted permission by any appellee named in this suit to represent them. In short, some of the most fundamental rights of appellees such as the right to choose counsel and the right to due process are all brushed aside by the Department of Justice as "patently frivolous." How can the appeals court permit representation by the Department when it can't even be proved the Department is even representing the interests of the appellees? According to the Department's response, the appeals court does not even deserve an answer to these basic constitutional questions. Again, a single sentence stating that all defendants/appellees were contacted and requested representation under statute would solve the matter. The Department provides no evidentiary proof of any such requests. Therefore it must be presumed no appellee has asked the Department to represent them in this suit. If no such request is made, under statute, the Department cannot represent the appellees and thus has no right to appear at appellate level.

Appellant reasserts any entrance by the Department of Justice at appellate level must be considered as presenting "new evidence" which court rules forbid unless such evidence is first presented at district court. This point is obvious. There was nothing entered at district court by the Department so clearly if the Depart-

ment now presents any material, as it was never presented at district court, it must be viewed as “new evidence” not previously presented at district court. Again, the issue of due process is violated because the appeals court considers appeals from matters presented in district court, not original evidence that was not first presented in district court either by direct evidence or reasonable implication. To consider new evidence would transform the appeals court to a court of original jurisdiction. Hence, the due process of the appellate procedure would be violated. The right of appellant to an appeal would be denied, as he would be presenting his suit before a court of original jurisdiction not an appeals court. The original jurisdiction process of this suit is at an end and the matter is now in appeal. To alter this fact of due process by the entrance of new evidence not adjudged at district court deprives the appellant of his right of due process and right of appeal.

The Department of Justice ignores an obvious conflict of interest terming this fact “patently frivolous.” Appellant asserts appellees have committed several criminal acts in violation of federal criminal law and requested the district court to refer them for prosecution to the Department of Justice. Some violations are tax related, others are not. When substantiated, all violations must be prosecuted by the same Department of Justice which now proposes defend appellees. The conflict of interest is obvious and certainly not “patently frivolous.” Issues of due process,

rights of the accused, protection against self- incrimination and other obvious constitutional issues arise for the appellees if the appellate court grants the Department's opposition motion.

Appellant attempted on his own at district court to correct the service and representation issues now before this court when he had no real obligation to do so. The district court refused to act on the matter even though FRCP 4 made the matter obligatory. Appellant feels under these circumstances that the appeals court should disapprove any issue of service or other matter related to failure to appear raised by the Department of Justice. As the attached record shows, the Department of Justice was properly, and in a timely fashion, notified of this suit at the beginning of the district court process. The Department had ample time to make an appearance by doing nothing more than sending in a form letter to district court. For whatever reasons it chose not to. The appeals court should not now permit itself to become a court of original jurisdiction in order to accommodate the mistake by the Department of Justice for failing to follow court procedures of service and due process all of which the Department terms "patently frivolous."

The Department of Justice asserts in its response several statutes, 28 U.S.C. 516, 28 U.S.C. 517 and 28 U.S.C. 515(a) plus a Supreme Court ruling the Depart-

ment lost, U.S. Dept. of Justice v. Tax Analysts, 492 U.S. 136 (1989) as the legal basis to permit appearance.

Appellant will address Tax Analysts first. In an attempt to persuade the appeals court regarding appearance, the Department misquotes the Supreme Court's ruling. The Department stated in its response "It is well-recognized that the Tax Division of the Department of Justice represents the Federal government in civil tax cases in the district courts and the courts of appeals." What the Supreme Court actually said was, "The Tax Division of the Department of Justice (Department) represents the Federal Government *in nearly all* civil tax cases in the district courts, the courts of appeals, and the Claims Court…" (Emphasis added). Hence, given appropriate circumstances, such as failure to appear, the Department *does not* always appear.

The case did not address the issue before this court; the failure of the Department to make appearance at district court level and the assumption by the Department that such failure automatically entitles them representation at appellate level. Tax Analysts is in no way a precedent. Instead the case addressed the withholding of records by the Department, which is what the Department is doing here. It refuses to answer questions related to due process, client representation and court service terming these processes "patently frivolous." As noted, the Department lost

the case meaning it does not have the right to withhold such records. The language of the Court makes it clear that representation by the Department is neither automatic nor axiomatic. Further the case makes it clear that "materials [must] have come into the agency's [department's] possession in the legitimate conduct of its official duties." Therefore according to the Department's own Supreme Court citation, the Department has no basis on which it may refuse to answer appellant's questions regarding notification and other issues of service and due process raised in his motion.

The Department has refused to explain how it was "notified" regarding this suit as it failed to appear at district court level. This raises the question of whether this "notification" to the Department came as a result of legitimate conduct in its official duties. Had the "notification" been through the legitimate conduct of its official duties, the Department obviously would have simply stated this. Instead it terms the inquiry "patently frivolous." It did not state the obvious answer that would satisfy appellant's objection leading to the conclusion this "notification" was not by means of legitimate conduct of official duties. If the notification was not obtained as a matter of legitimate conduct of its official duties, then the Department cannot claim the right to appear based on such notification.

As to the statutes cited by the Department in its response. It is clear that 28 U.S.C. 516 does "reserve the "conduct of litigation… to officers of the Department of Justice, *under the direction of the Attorney General*" (Emphasis added). All the statute means is that lawyers hired by the government deal with legal matters. Appellant is certain somewhere in federal law other job functions are assigned to other departments such as the conduct of military matters to the armed forces, transportation issues to the Department of Transportation and so forth. By itself the statute means nothing given the circumstances of this suit. As to 28 U.S.C. 517, the statute states:

"The Solicitor General, or any officer of the Department of Justice, *may be sent by the Attorney General* to any State or District in the United States to attend to the interest of the United States in a suit pending in a court of the United States…" (Emphasis added).

Again, this statute does not address the failure of the Department to appear at district level nor grant it automatic appearance at appellate level after such failure.

As to 28 U.S.C. 515(a) the language of the statute states:

"The Attorney General or any other officer of the department of Justice, or any attorney specially appointed by the Attorney General under law, may, *when specifically directed by the Attorney General*, conduct any kind of legal proceeding…which United States attorneys *are authorized by law to conduct*…" (Emphasis added).

In these three statutes cited by the Department none apply to the current situation, which is failure to appear at district level. The statutes do allow appear-

ance of the Department where its representatives are not "authorized by law to conduct" nor do they in any way nullify or set aside the other statutes cited by appellant in this response and his original motion. The question is, based on their failure to appear, whether the Department is authorized by law to conduct an appearance. The Department has provided no evidentiary proof based on statute or by Supreme Court ruling showing their appearance is automatically permitted or authorized by law given the circumstances of this suit. They have not produced evidentiary proof of the Waivers of Summons served on appellees which when signed by them allow them appearance. They have not asserted the terms of 2 U.S.C. 118 with evidentiary proof of requests of representation by the appellees, which produced, would allow appearance. They have not even employed 28 U.S.C. 2679[4], which allows appearance upon the certification by the Attorney General that appellees actions are a duty of office and therefore allow appearance. Instead in a sworn statement, absent any evidentiary proof, Ms. Utiger states she is to "handle" the

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[4] 28 U.S.C. 2679 (d) (1) "*Upon certification by the Attorney General* that the defendant employee was acting with the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defended." (Emphasis added).

cases on “behalf” of the appellees but fails to prove she or the Department has been requested to do so by the appellees, as required by statute.

Ms. Utiger is not the Attorney General of the United States. She has not provided evidentiary proof in her declaration that her action of appearance have been “specifically directed by the Attorney General” as required by statute. She merely states she is “assigned” the “primary responsibility” of handling the cases on behalf of the appellees. She does not state who assigned her this position and has not proven the Attorney General has “specifically directed” her in this matter. As this has not been proven, it must be assumed the actions of Ms. Utiger were done without the *specific* direction of the Attorney General as required by statute. The response of the Department of Justice is signed by Eileen J. O’Conner, Assistant Attorney General who, it must be assumed wrote the response as it bears her signature. Ms. O’Conner cites federal statutes that *specifically require* an action by the Attorney General to allow Ms. Utiger or any other Department of Justice attorney to make an appearance. No other person is authorized by statute to make such a decision. Ms. O’Connor provides no proof or even assertion of any Attorney General authorization even though it is she who presents the statutes that require such action. The Department, having provided no evidentiary proof of specific Attorney General authorization, then requests the Appeals Court to simply ignore the lan-

guage of these statutes it presents and allow appearance anyway. The Department provides a Supreme Court ruling that it deliberately misquotes in an attempt to persuade the court to its assertion. When properly quoted, the Supreme Court case does not support their position. In short, the Department of Justice has provided no evidentiary or legal proof on any description supporting its assertion that at this point, after failure to appear at district court level, the Department is entitled to make appearance at appellate level. Terming the entire service process "patently frivolous" does not provide evidence. As there is no evidentiary proof provided by the opposition brief filed by Ms. O'Connor, it must stricken and appellant's motion affirmed.

Finally, appellant refers to the attached order filed February 11, 2005 by the Court of Appeals. The order clearly states, "Appellees are informed that in view of the non-appearance in the district court, *<u>any</u> brief submitted to this court must be accompanied by a motion requesting leave to participate at the appellate level*." (Emphasis added). The Department of Justice has submitted a brief in opposition to appellant's motion to deny the Department appearance at appellate level which appellant is now responding to. Certainly, the Department is familiar with appeal court rules including the most obvious that if the court issues an order, it is obeyed. The Department has ignored the order. Their brief in response does not contain a

motion to participate at the appellate level and therefore the response should be stricken by the appeals court as it does not satisfy the court's order as to a submittal of a brief and motion requesting leave to participate at the appellate level.

The Department cannot correct this error by submission of a new brief. To allow the Department to submit a brief again just to correct yet another mistake of due process which the Department considers "patently frivolous" violates appellate rules regarding submittal of motions, responses and counter-responses and hence compromises appellant's rights in his appeal. It appears to appellant the Department of Justice also considers orders from the appeals court as "patently frivolous."

For the above reasons, as well as those cited in his original motion, appellant again moves the appeals court deny the Department of Justice appearance as counsel of record for appellees or in any other capacity in Walker v Members of Congress, et al., 05-35023.

Respectfully Presented,

_____

Dated: February 18, 2005

S/ Bill Walker, pro se
Appellant
PO Box 698
Auburn, WA 98071

CERTIFICATE OF SERVICE

Case Name: Walker v. Members of Congress et al.

Case No: 05-35023

I certify that a copy of the Response by Appellant to Appellees' Opposition to Appellant's Motion to Deny Appearance of Counsel and any attachments thereof were served by First Class Mail on the person listed below per her written instructions to direct all such correspondence exclusively to her.

_____

Bill Walker, appellant, pro-se
PO Box 698
Auburn, WA 98071

Karen D. Utiger
Attorney
Tax Division/ Appellate Section
Department of Justice
PO Box 502
Washington D.C. 20044

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

Case No: C04-1977RSM
Date: Oct. 11, 2004

CERTIFICATE OF RETURN OF SERVICE

I hereby certify that on October 11, 2004 I received via United States Postal Service the below certified mail receipt showing the U.S. Attorney John McKay had received copies of the complaint together with other papers described in Certificate of Service submitted to this court on October 5, 2004.

S/ Bill Walker, pro se
PO Box 698
Auburn, WA 98071-0698
253 735-8860
Concon@Isomedia.com

SENDER: *COMPLETE THIS SECTION*

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

U.S. Attorney John McKay
U.S. Attorney's Office
601 Union Street, Suite 5100
Seattle, WA 98101-3903

COMPLETE THIS SECTION ON DELIVERY

A. Received by *(Please Print Clearly)* B. Date of Delivery OCT 0 6 2004

C. Signature
X [signature] ☐ Agent ☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

2. Article Number *(Copy fro* 7001 0360 0004 7066 9629

PS Form 3811, July 1999 Domestic Return Receipt 102595-00-M-0952

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. 04-1977RSM
DATE: OCT. 25, 2004

CERTIFICATE OF RETURN OF SERVICE

I hereby certify that on October 25, 2004, I received via United States Postal Service the below certified mail receipt showing the Attorney General of the United States had received copies of the complaint together with other papers described in Certificate of Service submitted to this court on October 5, 2004.

S/Bill Walker, pro se
PO Box 698
Auburn, WA 98071-0698
253 735-8512

SENDER: *COMPLETE THIS SECTION*

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1. Article Addressed to:

Attorney General John Ashcroft
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

COMPLETE THIS SECTION ON DELIVERY

A. Received by *(Please Print Clearly)* | B. Date of Delivery

C. Signature
X OCT 12 2004
☐ Agent
☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
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4. Restricted Delivery? *(Extra Fee)* ☐ Yes

2. Article Number *(Copy from service lat* 7001 0360 0004 7048 9142

PS Form 3811, July 1999 Domestic Return Receipt 102595-00-M-0952

Judge: Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BILL WALKER, Plaintiff, vs. MEMBERS OF CONGRESS OF THE UNITED STATES et al., Defendants	CASE NO. C04-1977RSM MOTION P: MOTION FOR DEFAULT FOR FAILURE TO APPEAR NOTE ON MOTION CALENDAR: DECEMBER 3, 2004

For the purpose of record in appeal, Plaintiff hereby moves for the court to declare all defendants in default for failure to appear and failure to respond to the summons and waivers of summons sent by Plaintiff. Proposed remedies are prescribed below. Plaintiff does not move to vacate, reconsider or otherwise effect the order of dismissal made by this court on November 12, 2004 as this issue will be addressed in appeal.

The rules of the court are plain and unambiguous regarding service and the "duty" of those served to respond to a summons issued by the court or a waiver of summons.

As noted in Plaintiff's complaint under FRCP 4(i)(2)(A).defendants Snow and Everson who were served a summons an official summons issued by the clerk of the court together with copies of the complaint. Under FRCP 12 (3)(A)(B), defendants were required to present some response to Plaintiff's complaint within 60 days of the complaint having been filed with the U.S.

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Attorney. This time period has expired and there has been no response either from Mr. Snow or Mr. Everson, their legal representatives, the United States Attorney or the Attorney General of the United States.

As to the other defendants who were served as noted in the complaint under FRCP 4(d), none have responded, returned a waiver of summons, or made any action to this court as to appearance. As noted in Plaintiff's complaint, service under FRCP 4(d) is permitted under FRCP 4(i)(2)(B) and FRCP 4(e). However these rules require that should no waivers of service be returned, that a formal copy of the summons and complaint shall be delivered either "personally" or by "delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process."

Plaintiff asserts that under the terms of 2 U.S.C. 118 which permits the United States Attorney to represent the defendants, he has already delivered such a copy of the summons and complaint "to an agent authorized by law to receive service of process" and that this agent authorized by law has failed to appear before the court.

The facts are plain: no defendant to this suit, nor any legal representative of those defendants have responded to any summons or waiver or summons as required by court rules and therefore have failed to appear. Despite any ruling the court may have made in their favor, the defendants do not have the right to ignore the court and its legal processes of service and are still duty bound to respond to the summons and waivers of summons. They have not done so in a timely and required fashion.

Under FCRP 4(5), "The cost to be imposed on a defendants under paragraph [FCRP 4](2) for failure to comply with a request to waive service of a summons shall include the cost subsequently incurred in effecting service under subdivision (e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service."

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Plaintiff therefore moves (Proposed Order A) under this rule that the court immediately order the defendants to comply with the waivers of summons and summons issued to Mr. Snow and Mr. Everson and order that all costs incurred in filing the over 500 summons and copies of the complaint shall be borne entirely by the defendants who shall also be ordered to present for the record their legal representatives in this matter. Plaintiff moves the court order the United States Marshall service deliver the complaints and summons to the defendants. Further Plaintiff moves that the clerk of the court be permitted a reasonable time to process such a large volume of complaints and summons and that sufficient time of service and response be granted by the court. Finally, Plaintiff moves that the court order the time for Plaintiff to file his notice of appeal be extended so as to permit this service upon the defendants to be completed.

Alternatively, if the court is not disposed to grant this motion, Plaintiff then moves (Proposed Order B) the court rule Plaintiff has properly satisfied all service in this suit and defendants are in default by reason of failure to appear. However the order of dismissal reached by the court on November 12, 2004 shall not be effected by this ruling and the time of serving notice of appeal by the Plaintiff as set by court rules shall remain unchanged.

Proposed orders (A) and (B) attached.

Dated this 2nd day of December, 2004

S/Bill Walker, pro se
PO Box 698
Auburn, WA 98071-0698

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BILL WALKER,

Plaintiff - Appellant,

v.

MEMBERS OF CONGRESS OF THE UNITED STATES, as Individuals and in their Official Capacities; et al.,

Defendants - Appellees.

No. 05-35023

D.C. No. CV-04-01977-RSM
Western District of Washington, Seattle

ORDER

Appellant's motion to deny appellees appearance of counsel of record and any related filing shall be referred to the panel that shall decide the merits of the appeal. Appellees are informed that in view of the non-appearance in the district court, any brief submitted to this court must be accompanied by a motion requesting leave to participate at the appellate level. Any such motion and related filings will also be referred to the merits panel for resolution. The opening brief remains due February 16, 2005.

For the Court:

CATHY A. CATTERSON
Clerk of the Court

Linda K. King
Deputy Clerk
Ninth Cir. R. 27-7/Advisory Note to Rule 27
and Ninth Circuit Rule 27-10

pro 2.7