No. 09-946

In The

Supreme Court of the United States

JOSEPH JASKOLSKI, et al.,

Petitioners,

v.

RICK DANIELS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Indiana Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

JAMES R. BRANIT
LITCHFIELD CAVO LLP
303 West Madison, Suite 300
Chicago, Illinois 60606
(312) 781-6552
branit@litchfieldcavo.com
Attorneys for Petitioners
Joseph Jaskolski and
National Insurance Crime Bureau

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Blank Page

QUESTIONS PRESENTED

The United States government requested Joseph Jaskolski, a private citizen, to interrogate grand jury witnesses, review criminal grand jury matters, and manage documents and witnesses at a federal criminal trial. It was undisputed that an FBI agent or U.S. Attorney was physically present and actually directed and supervised every detail of Jaskolski's work on the federal criminal case at every moment.

1. Did the Indiana Court of Appeals rule in conflict with *Logue v. United States*, 412 U.S. 521 (1973), *United States v. Orleans*, 425 U.S. 807 (1976) and *Denton v. Yazoo & M.V.R. Co.*, 284 U.S. 305 (1932) by holding that Jaskolski was an "independent contractor" rather than an "employee of the government" and thus the United States had no authority whatsoever to supervise or control the manner in which Jaskolski interrogated federal grand jury witnesses, reviewed grand jury materials, or managed documents or witnesses at a federal criminal trial?

In *Logue* and *Orleans*, this Court held that an "employee of the government" as defined under 28 U.S.C. §2671 included "an employee of another employer" if the government was authorized to direct or supervise the detailed performance of that person's work.

2. Did the Indiana Court of Appeals rule in conflict with *Logue* and *Orleans*, including by superimposing on the definition of "employee of the government" the additional burden of proving the federal government "pressed [Jaskolski] into service" or "required" him to act?

LIST OF PARTIES

Defendants-Appellants and Petitioners: Joseph Jaskolski; National Insurance Crime Bureau (the "NICB").

Other Defendants: Liberty Mutual Insurance Company; Thomas Keer; Vehicle Investigations Nationwide, Inc.; Michael A. Evans, individually and d/b/a AIT Laboratories.

Plaintiffs-Appellees and Respondents: Rick Daniels, Anna Daniels.

Other Respondents: The United States of America. Jaskolski named the United States of America as a party to his Petition for Certification of Scope of Employment Pursuant to 28 U.S.C. §2679(d)(3) ("Petition for Westfall Certification"). The United States of America appeared and removed the case to federal district court, where it contested the Petition. After remand, the United States of America also filed in the Indiana state court a memorandum in response to Jaskolski's Motion for Ruling on his Westfall Petition. The United States of America obviously has an interest in the outcome of this Petition because if Jaskolski is certified as an "employee of the government," the United States will be substituted as a defendant. Therefore, the United States should be considered a respondent.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The NICB is a not-for-profit corporation. It has no parent corporation. No publicly held company owns any stock in the NICB.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Blank Page

OPINION BELOW

The opinion of the United States District Court for the Northern District of Indiana, Case No. 2:06-CV-213, ruling on Jaskolski's Petition for Westfall Certification and remanding the case to Indiana state court is not in the official reporters but is reported at 2006 WL 2644949 and is at page 48 of the Appendix.

The opinion of the United States Court of Appeals for the Seventh Circuit finding that it had no jurisdiction to consider the district court's remand order is at 484 F.3d 884 and at page 65 of the Appendix.

The opinion of the Indiana Lake Superior Court, Case No. 45D01-0112-CT-193, ruling after remand on Jaskolski's Petition for Westfall Certification is not in the official reporters and is at page 44 of the Appendix.

The opinion of the Indiana Court of Appeals affirming denial of Jaskolski's Petition for Westfall Certification is at 905 N.E.2d 1 and at page 1 of the Appendix.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1257.

The Indiana Court of Appeals issued its Opinion on April 24, 2009. (App. 1.) The Indiana Court of

Appeals denied Jaskolski's Petition for Rehearing on July 24, 2009. (App. 76.) The Indiana Supreme Court denied Jaskolski's Petition to Transfer on November 12, 2009. (App. 78.) Jaskolski timely filed this Petition within 90 days of November 12, 2009, pursuant to 28 U.S.C. §2101(c) and Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory provision is the definition of "employee of the government" under 28 U.S.C. §2671:

> "Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

STATEMENT OF THE CASE

The Government requested Jaskolski's help

On April 1, 1999, FBI Special Agent Timothy Campbell requested Joseph Jaskolski, an investigator for the NICB, to assist the federal government in a criminal investigation and prosecution of Kenneth Daniels for insurance fraud (the "Daniels case"). The government suspected Kenneth and his brother Rick Daniels intentionally destroyed Kenneth's recreational vehicle so that Kenneth could fraudulently recover the insurance. The government wanted to use Jaskolski's expertise in insurance fraud during its investigation and prosecution of the Daniels. (App. 142-43, 153-54.)

Jaskolski agreed that the government had the authority to control him while working on the Daniels case

After April 1, 1999, Jaskolski participated in the Daniels case subject to the direction and control of Agent Campbell and Assistant United States Attorney ("AUSA") Clarence Butler. (App. 153-54.) "After that first meeting with the F.B.I., I was under the control of the U.S. Attorney and the F.B.I. My investigation stemmed from their order and their direction." (*Id.*) Specifically, the government and Jaskolski agreed that Jaskolski would be subject to and controlled by the policies, procedures, rules and regulations and laws of the federal government. (App. 143.)

In addition, Jaskolski and the government agreed that his participation in the Daniels case was specifically subject to the terms of a certification under Federal Rule of Criminal Procedure 6(e) Jaskolski had previously signed (the "Rule 6(e) statement"). (App. 143.) (Actually, the FBI and U.S. Attorney had requested Jaskolski to assist in the investigation of numerous cases of criminal insurance fraud over many years and Jaskolski signed a Rule 6(e) statement every three years that was applicable to all of his work for the government, including the Daniels case.) The Rule 6(e) statement provided that Jaskolski was subject to government rules and directives, that he could only assist the government in the enforcement of federal criminal law, and that he would be subject to contempt if he disobeyed the government's directives. (App. 162-64.) The U.S. Attorney's office filed the necessary notice of Jaskolski's involvement with the District Court pursuant to Rule 6(e)(3)(B), thereby giving notice to the district court and the public that Jaskolski was assisting the government in performing its law enforcement duties. (App. 90.)

Pursuant to the government's request and its detailed directives, Jaskolski worked side-by-side with Agent Campbell and AUSA Butler doing things only a government employee had the authority to do: interrogating grand jury witnesses, reviewing grand jury materials, and handling witnesses and documents at the criminal trial of Kenneth and Rick Daniels in *United States v. Daniels*, No. 2:00-CR-202,

United States District Court for the Northern District of Indiana. (App. 143-44.)

Jaskolski did only what he was told to do by either Agent Campbell or AUSA Butler. (App. 143-44, 153-54.) Agent Campbell or AUSA Butler always decided what particular result to achieve and also they alone decided to achieve that result in a particular way at a particular location at a particular time with particular documents or persons. (App. 144, 153-54, 160.) Jaskolski did not and could not exercise any independent judgment of his own. (App. 144-45.)

Agent Campbell or AUSA Butler controlled and directed every detail of Jaskolski's work on the Daniels case. For example, either Agent Campbell or AUSA Butler decided which witnesses to interview, and when and where to interview the witnesses. Agent Campbell would call Jaskolski and instruct him to assist in a witness interview. (App. 154-55, 158.) Jaskolski had to adjust his schedule to meet the needs of Agent Campbell or AUSA Butler. (App. 143-44.) The idea to interview a particular witness was not a joint idea but rather Agent Campbell's alone. (App. 144-45, 155-57, 159.) Agent Campbell was always physically present and directly supervised and directed Jaskolski during the interviews. (App. 144-45, 158-59.) Jaskolski always followed Campbell's lead and direction during the interviews. (App. 144-45, 156-57.) Agent Campbell and AUSA Butler exercised the same high degree of control over every other aspect of Jaskolski's work on the Daniels case: the government always supervised and directed every

detail of how Jaskolski reviewed documents or handled witnesses at trial. (App. 145-46.)

Indeed, the United States *admitted* Jaskolski always acted under the direct supervision or control of either Agent Campbell or AUSA Butler: Jaskolski's *"actions here were at the direction of the FBI and/or the United States Attorney's Office."* (App. 166.) The United States *admitted* that the FBI and the U.S. Attorney's office treated Jaskolski as "government personnel": "The government *acknowledges its action in treating Jaskolski as 'government personnel'. . . ."* (App. 166.)

Agent Campbell and AUSA Butler had the sole right and authority to terminate Jaskolski's participation in the investigation and prosecution of the Daniels case and could have exercised that right at any time for any reason. (App. 147-48.) From April 1, 1999 to the end of the Daniels' trial, Jaskolski was bound by the terms of the Rule 6(e) certification and consequently could not and did not report to anyone at NICB any information whatsoever regarding the investigation or prosecution of the Daniels other than to inform it of the general fact that he was involved in the investigation. (App. 146-47.) No one else at the NICB was certified under Rule 6(e) and consequently the NICB could not and did not exercise directly or indirectly any influence, control or review over Jaskolski's involvement in the investigation and prosecution of the Daniels. (App. 147.)

Daniels sued Jaskolski and others for malicious prosecution

Rick Daniels was ultimately found not guilty in the criminal case and then sued Jaskolski and the NICB (among others) in Indiana state court for malicious prosecution, Case No. 45D01-0112-CT-193. (App. 82-83.)

Jaskolski asked to be certified as an "employee of the government"

Shortly after being sued, Jaskolski asked the United States Attorney General to certify that Jaskolski, when assisting the government in the Daniels case, was acting as an "employee of the government" as defined in 28 U.S.C. §2671. (App. 94.) Although the government acknowledged it controlled every aspect of Jaskolski's involvement in the Daniels case, the Attorney General declined the request for certification in April 2006. (App. 85, 94.)

Jaskolski filed a Petition for Westfall Certification

On June 13, 2006, less than two months after his request to the Attorney General had been declined, Jaskolski and the NICB then filed in the Daniels' malicious prosecution action in Indiana state court his Petition for Westfall Certification. (App. 80.)

The federal district court's decision

The United States removed the action to federal court as allowed by 28 U.S.C. §2679(d)(3). Although the United States never presented any evidence in opposition and never disputed it directed every detail of Jaskolski's involvement in the investigation and prosecution of Rick Daniels, the federal district court denied certification because it interpreted "control" as requiring proof that the government could "coerce" Jaskolski to act against his will:

> "Although Jaskolski and the Government were clearly working together, there is no evidence in the record to show that the Government had the authority to control Jaskolski's day-to-day activities. Jaskolski may have voluntarily done everything Agent Campbell and AUSA Butler asked, but that does not mean that the FBI and the AUSA had the power to coerce Jaskolski into doing things at their will." (App. 62-63.)

The Seventh Circuit's decision

The United States Court of Appeals for the Seventh Circuit in *Daniels v. Liberty Mutual Ins. Co.*, 484 F.3d 884 (7th Cir. 2007) held it did not have appellate jurisdiction over the district court's remand order. The Seventh Circuit accordingly acknowledged that on remand the Indiana state courts should resolve anew – without giving any deference to the federal District Court's opinion – the question of

whether Jaskolski was an "employee of the government" under the Westfall Act. 484 F.3d at 888.

The Indiana trial court's decision

After remand, Jaskolski then requested the Indiana Lake Superior Court to rule on his previously filed Petition for Westfall Certification and to certify him as an "employee of the government" under the Westfall Act. (App. 97-141.) On July 28, 2008, the trial court denied certification, asserting that Jaskolski "failed to present evidence sufficient enough to prove that the Attorney General abused his discretion in refusing to grant him certification under the Westfall Act." (App. 46.)

The Indiana Court of Appeals' decision

Jaskolski appealed to the Indiana Court of Appeals, No. 45A04-0810-CV-00588. The Indiana Court of Appeals quoted and then essentially adopted the conclusion of the federal district court that Jaskolski had not proved the government had the authority to coerce him to act against his will: "There is no evidence that Jaskolski was pressed into service by the government." (App. 36.) According to the Indiana Court of Appeals, there could be no employment relationship if Jaskolski merely volunteered to accept the supervision of the government; instead, Jaskolski had to prove the government could require or force him to act:

> Undoubtedly, Jaskolski participated in the federal investigation and prosecution of the Danielses. But the fact that the government allowed him to participate in those proceedings is not equivalent to saying that his participation was required by an explicit or implicit employment relationship. Nor is Jaskolski following the wishes of Agent Campbell or AUSA Butler equivalent to the federal government controlling his activities with respect to the federal investigation and prosecution of the Danielses. (*Id.*)

The Indiana Court of Appeals concluded that, "while Jaskolski participated in the federal government's investigation and prosecution of the Danielses, he did so as a volunteer and an independent contractor and not as a federal employee." (Opinion, p. 38.)

REASONS FOR ALLOWANCE OF THE WRIT

1. The Indiana Court of Appeals' holding that the government had no authority to supervise Jaskolski's activities such as interrogating grand jury witnesses is in conflict with *Logue* and *Orleans* and will disrupt the federal criminal justice system.

The Indiana Court of Appeals reached the untenable conclusion that Jaskolski acted as an independent contractor and thus the United States *had no authority whatsoever* to direct or supervise Jaskolski's work on the Daniels case. Such a

conclusion is not only in direct conflict with *Logue v. United States*, 412 U.S. 521 (1973) and *United States v. Orleans*, 425 U.S. 807 (1976) but is also so manifestly dangerous as to require this Court to exercise its supervisory power. Under the Indiana Court of Appeals' ruling, volunteers such as Jaskolski will now have license to wreak havoc and the Justice Department will only be able to express its "wishes" that the volunteers not do so.

An independent contractor is a person who contracts with another to do something for him but who is not subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. *Logue*, 412 U.S. at 527 n.5 (1973); *Orleans*, 425 U.S. at 814-15; Restatement (Second) of Agency, §2. In both *Logue* and *Orleans*, this Court found that a particular person was an "independent contractor" rather than a federal agency or an "employee of the government" precisely because the government did not have the authority to supervise the details of the work. *Logue*, 412 U.S. at 529-32; *Orleans*, 425 U.S. at 818.

Therefore, by concluding that Jaskolski was an independent contractor, the Indiana Court of Appeals also explicitly ruled that the United States *had no authority whatsoever* to supervise or control the manner and method in which Jaskolski performed his work on the Daniels case. According to the Indiana Court of Appeals, FBI Agent Campbell or AUSA Butler could only express their "wishes" but could not

control whether Jaskolski complied with their directions.

Consequently, under the Indiana Court of Appeals' ruling, Jaskolski necessarily was free, for example, to conduct the interrogation of grand jury witnesses in any manner he saw fit. Even if he began to engage in improper methods of questioning a witness, the government could only express its "wish" that he not do so but had *no authority* to direct him not to.

Indeed, one of the central claims raised by Daniels in the state court malicious prosecution action relates to Jaskolski's role in the initial interview of Rick Daniels. FBI Agent Campbell directed Jaskolski to accompany him to the interview and was physically present to supervise and direct any participation by Jaskolski in the questioning. Jaskolski testified he obeyed and followed FBI Agent Campbell's directions at that interview. Can anyone seriously suggest Jaskolski could have ignored the directions of FBI Agent Campbell and proceeded to subject Daniels to waterboarding in order to extract a confession? Can anyone seriously suggest FBI Agent Campbell was powerless to prevent Jaskolski from doing so? Under *Logue* and *Orleans*, the government obviously had the authority to control Jaskolski during the interview and had the ability to make sure Jaskolski obeyed its orders. The Indiana Court of Appeals' ruling to the contrary that Jaskolski acted as an independent contractor is an absurd result unsupported by any precedent or reason.

The Indiana Court of Appeals' holding that the government had no authority to control Jaskolski's work on the Daniel's case merely because he was not "pressed into service" but rather volunteered can only result in either mischief or severe disruption of the federal criminal justice system – as well as any other governmental program that enlists volunteers. Either volunteers such as Jaskolski will be entitled to claim under the Indiana Court of Appeals' decision that they have the freedom to do their work as they see fit without regard to any attempt by the government to supervise the manner and method of work, or the government will be forced to stop using volunteers. Neither result is acceptable.

Therefore, the Court should grant this Petition and reverse the judgment of the Indiana Court of Appeals. Indeed, the Indiana Court of Appeals' ruling that Jaskolski acted as an independent contractor is so glaringly wrong as to justify summary reversal under Supreme Court Rule 16.1.

2. The Indiana Court of Appeals holding that the government had no authority to control Jaskolski's participation in the investigation and prosecution of federal crimes is in conflict with *Denton*.

The Indiana Court of Appeals' notion that the government had no authority to direct or supervise Jaskolski's work on the Daniels case is not only absurd but also in conflict with this Court's prior

holding in *Denton v. Yazoo & M.V.R. Co.*, 284 U.S. 305 (1932). At the very least, the idea that the government has no authority to control volunteers participating in the interrogation of grand jury witnesses or reviewing grand jury materials is one of first impression and of great importance to the Justice Department and thus should be decided by this Court rather than the Indiana Court of Appeals.

In *Denton*, this Court recognized that when a government employee gives direction to another person, the right to "control" is implicit in the direction. *Id.* at 310. The government employee's direction would be practically meaningless unless it comprehended the power to supervise and control the response. This Court thus held that the direction of the government employee carried with it the duty, on the part of the people directed, to obey, and had, and was intended to have, the force of a command. *Id.* The Court concluded that the person directed by the government employee was acting under the control of the government and thus was a loaned employee of the government.

In this case, as in *Denton*, it is undisputed that beginning April 1, 1999, Jaskolski did things that only the government could do and which the government could not delegate to others unless it retained complete control: investigating and prosecuting federal crimes. The federal government has the *exclusive* authority to control all activities in the investigation and prosecution of federal crimes and therefore necessarily had the inherent and exclusive

authority to control anything Jaskolski did on the Daniels case. There is nothing in the law that would allow the United States to delegate that duty to a private citizen without retaining complete control.

Jaskolski had no authority of his own to interrogate witnesses to a federal crime. Likewise, Jaskolski had no authority of his own to handle witnesses or documents before a grand jury. Jaskolski had no authority of his own to handle witnesses or documents at a criminal trial in the District Court. Jaskolski could do all of these things only at the request of and pursuant to the authority and control of the government.

Therefore, the government necessarily had the inherent and exclusive authority to control Jaskolski's involvement in the Daniels case. Just as in *Denton,* the directions of FBI Agent Campbell and AUSA Butler to Jaskolski would have been meaningless unless they included the right to control Jaskolski's compliance with those directions. As in *Denton*, the directions were not merely a "wish" that could be ignored or disobeyed. Therefore, under *Denton*, that the government physically supervised and directed the details of all of Jaskolski's activities demonstrated it had the right to control Jaskolski's compliance with those directions.

3. The Indiana Court of Appeals ruled in conflict with *Logue* and *Orleans* by superimposing the additional and impossible burden of proving the government could require Jaskolski to act against his will.

Clearly, Jaskolski did not participate in the Daniels case as an independent contractor with full discretion to interrogate witnesses as he saw fit; instead, he acted as an "employee of the government" under the Westfall Act. The Indiana Court of Appeals' ruling that Jaskolski did not act as an "employee of the government" because he purportedly failed to prove the government "pressed [him] into service" and "required" him to act is in conflict with this Court's decisions in *Logue v. United States*, 412 U.S. 521 (1973) and *United States v. Orleans*, 425 U.S. 807 (1976). By superimposing such an unprecedented burden of proof onto the definition of "employee of the government" in 28 U.S.C. §2671, the Indiana Court of Appeals effectively amended the statute by judicial fiat to exclude volunteers.

The Westfall Act defines an "employee of the government" to include any "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. §2671. The definition of "employee of the government" thus includes an employee of a non-governmental employer who is placed under direct supervision of a federal agency pursuant to contract or other arrangement, even if the loaned employee is not on

the government's payroll. *Logue v. United States*, 412 U.S. 521, 531, 93 S.Ct. 2215, 2221 (1973); *Patterson & Wilder Constr. Co. v. United States*, 226 F.3d 1269, 1274 (11th Cir. 2000).

Moreover, the definition of the term "employee of the government" incorporates the common law definition of master-servant. *Orleans*, 425 U.S. at 814; *Logue*, 412 U.S. at 527-28, 531. Accordingly, the critical factor in determining whether one is a "person acting on behalf of a federal agency in an official capacity" is whether the government was authorized to direct or supervise the detailed performance of that person's work. *Orleans*, 425 U.S. at 814; *Logue*, 412 U.S. at 527-28.

Furthermore, under the holding in *Logue* and *Orleans* that the definition of "employee of the government" incorporates the common law, the employment relationship extends to situations in which the servant is a volunteer acting under a similar degree of control as a paid employee. See, *e.g.*, *Beul v. Asse International, Inc.*, 233 F.3d 441, 444 (7th Cir. 2000); *Southport Little League v. Vaughan*, 734 N.E.2d 261, 268 n.6 (Ind.App. 2000) (unpaid volunteer was "employee" of Little League); *Colorado Compensation Ins. Authority v. Jones*, 131 P.3d 1074, 1080-81 (Col.App. 2005) (unpaid assistant was employee); *Buisker v. Thuringer*, 648 N.W.2d 817, 820-21 (S.D. 2002) (friend assisting in removal of addition was gratuitous employee); Restatement (Second) of Agency, §225 (volunteer may be employee). (The Restatement (Second) of Agency is a particularly

valuable source in further defining "employee" as necessary. *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992).)

Therefore, under *Logue* and *Orleans* and the common law, it is sufficient to establish an employment relationship that a volunteer freely consented to obey the directives of the employer as to the details of the work. Nothing in the law requires the employee or volunteer to prove that the employer had the authority to require the employee to act or to coerce the employee to act against his will.

Under the law set forth in *Logue* and *Orleans*, there can be no question Jaskolski fell within the Westfall Act's definition of "employee of the government." It was undisputed that FBI Agent Campbell or AUSA Butler was physically present and had the authority to direct and supervise every detail of Jaskolski's work on the Daniels case at every moment. For example, either Agent Campbell or AUSA Butler decided which witnesses to interview, and when and where to interview the witnesses. Agent Campbell could call Jaskolski and instruct him to assist in a witness interview and Jaskolski had to adjust his schedule accordingly. The idea to interview a particular witness was not a joint idea but rather Agent Campbell's alone. Agent Campbell was always physically present and directly supervised and directed Jaskolski during the interviews and Jaskolski always followed those directions. Agent Campbell and AUSA Butler exercised the same high degree of control over every other detail of Jaskolski's

work on the Daniels case. In short, the government dictated the details and the manner – including the when, where, who, what and how – of every aspect of Jaskolski's work on the Daniels case.

Moreover, the United States *admitted* Jaskolski always acted under the direct supervision or control of either Agent Campbell or AUSA Butler: Jaskolski's *"actions here were at the direction of the FBI and/or the United States Attorney's Office."* (App. 166.) The United States *admitted* that the FBI and the U.S. Attorney's office treated Jaskolski as "government personnel." (*Id.*)

It is also undisputed the government and Jaskolski agreed upfront *before* the investigation even began that Jaskolski would obey the directions of Agent Campbell and AUSA Butler *and* the terms of the Rule 6(e) certification *as well as* all policies, procedures, rules, regulations and laws of the federal government. (App. 143-44.) Therefore, by their *mutual agreement*, the government had the authority to control the details of Jaskolski's work on the Daniels case. Even if the parties had not agreed beforehand, both orally and in writing, that the government would control the details of Jaskolski's work on the Daniels case, that the government actually directed the details of Jaskolski's participation in the investigation and prosecution of the Daniels *as it occurred* and Jaskolski obeyed those directions established the government had the authority to control the details of Jaskolski's work. Restatement (Second) of Agency, §7, comments a, b;

§15, comments a, b; §26, comments a, b, c. Actions manifest consent as much as words.

However, the Indiana Court of Appeals held that it was not enough for Jaskolski to satisfy the test set forth in *Logue* and *Orleans* by proving that the government gave all the orders and that Jaskolski voluntarily agreed to obey the "wishes" or orders of the government as to every detail of his work on the Daniels case. Instead, the Indiana Court of Appeals superimposed on top of §2671 and the law of *Logue* and *Orleans* the additional burden of proving the government "pressed him into service" or that the government "required" him to act. (App. 36.) The Indiana Court of Appeals thereby accepted the contention of the federal district court (after the United States removed the case and before it was remanded to state court) that Jaskolski had to prove "that the FBI and the AUSA had the power to coerce Jaskolski into doing things at their will." (App. 62-63.)

The extra burden superimposed by the Indiana Court of Appeals of proving the government had the power to coerce Jaskolski is not found in either *Logue* or *Orleans* or anywhere else in the law. No case law or authority has ever suggested an employer has the right to press anyone into service or to require, force, compel or coerce an employee to do anything against his will. To the contrary, under the common law as incorporated into the definition of "employee of the government" under *Logue* and *Orleans*, the employment relationship is based on consent, not coercion.

As the Indiana Court of Appeals' opinion demonstrates, the use of the term "control" in defining the employment relationship requires further explanation. Indeed, the use of the term "control" is unfortunate. People are neither puppets nor, since passage of the Thirteenth Amendment to the United States Constitution, slaves. American jurisprudence does not recognize the right of any human being to *control* another human being, particularly in the sense of the "master" being able to coerce or compel the "servant" to act against his will.

Rather, the law makes it clear that the employment relationship is based entirely on consent, not coercion or force. The Restatement (Second) of Agency defines agency as a "relation which results from the *manifestation of consent* by one person to another that the other shall act on his behalf and subject to his control, and *consent* by the other so to act." Restatement, §1. Comment a of Section 1 further states, "the relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other *consents* so to act." Section 32 of the Restatement further clarifies that the agency relationship is "consensual."

Section 220 of the Restatement provides that a "servant" is defined by "the extent of control which, *by the agreement*, the master may exercise over the details of the work." Section 220, comment h, further defines the right to control as "*an agreement* for close supervision or *de facto* close supervision of the

servant's work." Sections 7, 15, 26, 32, 43 and 221 of the Restatement also further illustrate how the master's authority to control, and the servant's authority to act on behalf of the master, is created by the parties' manifestation of *consent*.

Accordingly, to establish the right to "control," "[i]t is only necessary that there be submission by the one giving service to the directions and control of the one receiving it as to the manner of performance." Restatement (Second) of Agency, §221, comment c. An employee's acquiescence to the employment relationship can be established merely by showing that the employee freely accepted instruction from the employer. *Cromer v. Joseph Behr & Sons, Inc.*, 845 F.Supp. 572, 579 (N.D.Ill. 1994). Even though a volunteer need not volunteer in the first place and may refuse to do what he is directed to do and quit if he does not want to perform the services suggested, he is nonetheless an employee as long as he works under the direction and control of his employer. *Bond v. Cartwright Little League, Inc.*, 112 Ariz. 9, 536 P.2d 697, 703 (Ariz. 1975).

In summary, there is a "master-servant" or employment relationship if one party (the employer) *requests* that another party (the employee or volunteer) act on the master's behalf and subject to his direction and the volunteer or employee *agrees* to do so. It is *the agreement or consent between the parties* that both grants and defines the employer's authority to direct the details of performance.

Therefore, there is no support in the law for the Indiana Court of Appeals' assertion that Jaskolski had to prove the government "pressed him into service" or that the government could "require" him to act against his will. Indeed, the Indiana Court of Appeals' contention is directly contrary to the common law as engrafted onto the definition of "employee of the government" under *Logue* and *Orleans*.

The Indiana Court of Appeals' suggestion that "Jaskolski's arguments would require this court to conclude that anyone who cooperates with a federal prosecutor is immune from liability as if he or she is a federal prosecutor" is a *non sequitur*. The question of whether Jaskolski "cooperated" with the government is an overly broad judicial gloss that merely skims the surface of the real issue. Every employee of the government, including FBI Agent Campbell and AUSA Butler, can be said to "cooperate" with the government. The real question is much deeper and more particular: within the broad context of such cooperation, did the government have the authority to supervise and direct the details of the manner or method of Jaskolski's work on the Daniels case. Jaskolski did not merely "cooperate" with the prosecutor by, for example, providing information solely within his own knowledge such as an informant would do, or by performing tasks outside the physical supervision and direction of the prosecutor. Instead, FBI Agent Campbell and AUSA Butler physically supervised and directed every detail of the manner

and method of Jaskolski's work on the Daniels case. That is much more than cooperation.

There is no question that if either Agent Campbell or AUSA Butler had themselves done what they directed Jaskolski to do, Campbell and Butler would have been entitled to the protections of the Westfall Act as "employees of the government." The law and justice require that Jaskolski – who was only an extra hand under the complete control of Campbell and Butler – be certified as an "employee of the government" under the Westfall Act as well so that the federal government can take responsibility for what were, in essence, its own acts.

4. The Indiana Court of Appeals' decision will have an adverse impact on the United States' ability to enlist the aid of volunteers, thereby impairing the government's performance of its functions.

The Indiana Court of Appeals' decision will have an adverse impact on the United States' regular and widespread practice of enlisting the aid of volunteers in order to perform its functions. The United States regularly enlists the aid of volunteers in order to perform its functions. Jaskolski has been working under the supervision of the FBI and U.S. Attorney's office on select cases for many years. And obviously, NICB investigators other than Jaskolski work closely with the Justice Department across the country. See https://www.nicb.org/our_departments/field_operations;

http://www.chirobase.org/08Legal/Ins/CA01.html. And the NICB is not the only entity that volunteers to assist the Justice Department. Moreover, many if not all government agencies enlist the aid of volunteers in order to perform their functions. See http://volunteer.gov/gov/.

The Indiana Court of Appeals' decision jeopardizes the government's ability to enlist the aid of such volunteers. If the Indiana Court of Appeals' decision is allowed to stand, then no volunteer will be able to establish that he or she is an "employee of the government" because it is impossible to prove that the government has the authority to require or force its employees or volunteers to act against their will. Employers – including the United States – have not had the authority by virtue of the employment relationship to coerce employees or volunteers since the passage of the Thirteenth Amendment.

Consequently, under the Indiana Court of Appeals' opinion, no volunteer will ever be entitled to any of the immunities afforded under the Westfall Act, no matter how closely the government controls the volunteer's work. Rational individuals will not volunteer to work for the government if, by agreeing to obey the orders of the government as to the method or manner in which they must work, they will subject themselves to ruinous tort liability while the federal employees who gave the orders will remain immune from liability.

5. The Indiana Court of Appeals' pernicious suggestion that an employer has the right to coerce an employee or volunteer should not be allowed to stand.

The Indiana Court of Appeals' unprecedented assertion that Jaskolski had to prove the government "pressed him into service" and had the authority to "require" or force him to act – even against his will – necessarily carries with it the pernicious suggestion that the government, or any employer for that matter, can lawfully manhandle or coerce its employees. Again, at least since passage of the Thirteenth Amendment, no employer has had the right to coerce an employee or volunteer. The implication of the Indiana Court of Appeals' opinion that an employer has the right to force an employee to act against his will is so abhorrent to American law that this Court should not allow it to stand.

CONCLUSION

The Court should grant this Petition for a writ of certiorari to make clear that the federal government has the authority to supervise persons like Jaskolski who work for federal agencies such as the FBI or U.S. Attorney and who perform purely non-delegable governmental tasks such as investigating and prosecuting federal crimes or more particularly interrogating grand jury witnesses. Such tasks cannot and never should be delegated to persons outside of the government unless it is clear to everyone involved

that the government retains the authority to directly supervise and control the details of those tasks. The Indiana Court of Appeals' ruling, if allowed to stand, precludes such clarity.

Wherefore, Petitioners Joseph Jaskolski and the National Insurance Crime Bureau respectfully pray that this Honorable Court grant this Petition and issue a writ of certiorari to the Indiana Court of Appeals, and that this Court order the reversal of the April 24, 2009 decision of the Indiana Court of Appeals, and enter in lieu thereof a judgment certifying that Jaskolski was an "employee of the government" under 28 U.S.C. §2671 with regard to all of his activities related to the Daniels case beginning April 1, 1999, and ordering the substitution of the United States as a party defendant in place of Jaskolski for all allegations regarding Jaskolski's activities after April 1, 1999, and granting such other relief as this Court deems just.

Respectfully submitted,

Joseph Jaskolski and the
National Insurance Crime Bureau

JAMES R. BRANIT
LITCHFIELD CAVO LLP
303 West Madison, Suite 300
Chicago, Illinois 60606
(312) 781-6552
branit@litchfieldcavo.com
Attorneys for Petitioners
Joseph Jaskolski and
National Insurance Crime Bureau

Blank Page