AFJ NOMINEE REPORT

# KURT ENGELHARDT

*U.S. Court of Appeals for the Fifth Circuit*

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# INTRODUCTION

On September 28, 2017, President Trump nominated Judge Kurt D. Engelhardt of the Federal District Court of Eastern Louisiana to fill a seat on the U.S. Court of Appeals for the Fifth Circuit.[1] Engelhardt was nominated to replace Judge Edith Clement Brown, who in September 2017 notified the President of her intent to take senior status.[2]

Like the vast majority of Trump's nominees, Engelhardt is a member of the Federalist Society, an outside group to which Trump has indicated he has delegated the judicial nomination process.[3] Engelhardt has long-standing connections with the Republican Party, including serving as congressional campaign finance chairman for former Senator David Vitter.[4] Engelhardt was formerly a member of Louisiana Lawyers for Life.[5]

This report highlights aspects of Engelhardt's record which we believe are relevant to the Senate Judiciary Committee during the confirmation process (a confirmation process Engelhardt himself described, to the Loyola University Chapter of the Federalist Society, as "trench warfare which occurs every time a high profile judicial nomination is made").[6]

1 Press Release, President Donald J. Trump Announces Eighth Wave of Judicial Candidates, The White House (Sept. 28, 2017), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-eighth-wave-judicial-candidates/.

2 Future Judicial Vacancies, Administrative Office of the U.S. Courts (last checked Dec. 26, 2017), http://www.uscourts.gov/judges-judgeships/judicial-vacancies/future-judicial-vacancies; *see also* Geoff Pender, Trump judicial pick will take Louisiana seat, not Mississippi's, THE CLARION-LEDGER (Oct. 5, 2017), http://www.clarionledger.com/story/news/politics/2017/10/05/trump-judicial-pick-take-louisiana-seat-not-mississippis/737114001/.

3 Sen. Comm. On the Judiciary, 115th Cong., Kurt Damian Engelhardt: Questionnaire for Judicial Nominees, 3; *see* Lawrence Baum & Neal Devins, *Federalist Court: How the Federalist Society became the de facto selector of Republican Supreme court justices*, SLATE (Jan. 31, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/01/how_the_federalist_society_became_the_de_facto_selector_of_republican_supreme.html.

4 Jenny Hurwitz, Federal Judge takes big role in fight over Jefferson Parish schools, TIMES-PICAYUNE (Jan. 24, 2009), http://www.nola.com/news/index.ssf/2009/01/federal_judge_takes_big_role_i.html.

5 Sen. Comm. On the Judiciary, 115th Cong., Kurt Damian Engelhardt: Questionnaire for Judicial Nominees, 4.

6 Speaker, Federalist Society Chapter at Loyola University School of Law, New Orleans, Louisiana (Mar. 2, 2010), at 15-16, https://www.afj.org/wp-content/uploads/2018/01/Engelhardt-QA-63.pdf.

Engelhardt's most prominent case involves his decision to overturn the convictions of five New Orleans police officers who had been convicted of shooting unarmed civilians on the Danziger Bridge in New Orleans, days after Hurricane Katrina, because Justice Department officials had anonymously posted online comments about the case.

This report also discusses *Truvia v. Julian*, 2012 LEXIS 127991 (E.D. La., Sept. 10, 2012). There, Engelhardt dismissed a civil rights lawsuit brought against the Orleans Parish District Attorney despite the DA's Office's repeated failure, over decades, to turn over possibly exculpatory evidence to those accused of a crime as required by the Supreme Court in *United States v. Brady*, 397 U.S. 742 (1970).

Contrasting Engelhardt's treatment of misconduct by law enforcement in the two cases is illuminating. In short, Engelhardt appeared less troubled by the misconduct of New Orleans prosecutors who withheld potentially exculpatory evidence in the case of two men who had been wrongfully incarcerated for 27 years, than he was by the fact that Justice Department officials anonymously posted comments on a newspaper website. Although the latter was highly inappropriate behavior, Engelhardt's remedy – to throw out the convictions of five people – was extreme, especially since Engelhardt himself conceded that the online comments had not actually prejudiced the case.

In addition to those cases, this report highlights several cases involving allegations of sexual harassment.

Particularly at a time when harassment and discrimination against women are in the news, it is notable that Engelhardt appears to have very narrowly applied Title VII, preventing sexual harassment cases from even being heard by a jury.

# BIOGRAPHY

Engelhardt was born in New Orleans, Louisiana in 1960. He earned his B.A. and J.D. from Louisiana State University. After law school, Engelhardt clerked for Judge Charles Grisbaum Jr., on the Fifth Circuit Court of Appeals. Engelhardt then practiced commercial litigation at Little & Metzger and later at Hailey, McNamara, Hall, Larmann & Papale LLP.

In 2001, President George W. Bush nominated Engelhardt to the U.S. District Court for the Eastern District of Louisiana, and he was confirmed in December 2001.

# LEGAL AND OTHER VIEWS

Referring to Engelhardt, former U.S. Attorney Harry Rosenberg observed that, "the [F]ederalist [Society] viewpoint certainly guides the judge's political philosophy."[7]

Indeed, in a speech to the Loyola University Chapter of the Federalist Society in 2010, Engelhardt discussed Justice Thomas's dissent in *Lawrence v. Texas*, 539 U.S. 558 (2003), as an example of "one man's submission of personal preference in favor of adherence to Constitutional principle."[8] In the same Federalist Society speech, Engelhardt quoted Justice Felix Frankfurter's dissent in *Baker v. Carr*, 369 U.S. 186 (1962), as follows: "there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethought refused so to enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate."[9]

It is troubling that two dissents he cites are in two of the most consequential cases for our democracy and for equality for LGBTQ Americans.

Elsewhere, he described part of his philosophy: "As a judge, I have also learned that fairness is giving all people the treatment they earn and deserve and are entitled. It doesn't mean treating everyone alike. Everyone doesn't earn the same treatment."[10]

## I. PROSECUTORIAL MISCONDUCT

***Danziger Bridge Shooting***

In *United States v. Bowen*, 2012 U.S.

7 Jenny Hurwitz, *Federal Judge takes big role in fight over Jefferson Parish schools*, Times-Picayune (Jan. 24, 2009), http://www.nola.com/news/index.ssf/2009/01/federal_judge_takes_big_role_i.html.

8 Speaker, Federalist Society Chapter at Loyola University School of Law, New Orleans, Louisiana (Mar. 2, 2010), at 19, https://www.afj.org/wp-content/uploads/2018/01/Engelhardt-QA-63.pdf.

9 *Id.* at 17-18.

10 Speaker, LSU College of Arts and Sciences Graduation, Baton Rouge, Louisiana (May 20, 2005), at 4, https://www.afj.org/wp-content/uploads/2018/01/Engelhardt-QA-88.pdf.

Dist. LEXIS 50670 (E.D. La. Apr. 11, 2012), Engelhardt presided over the trial of five New Orleans police officers convicted of shooting six unarmed civilians, two of whom died, on the Danziger Bridge in New Orleans, and the subsequent police cover-up. The events took place in the aftermath of Hurricane Katrina.[11]

On September 4, 2005, four New Orleans police officers arrived at Danziger Bridge in response to a distress call.[12] According to witnesses, the officers opened fire on unarmed civilians, killing 17-year old James Brisette and seriously wounding four others.[13] Then the police chased Lance Madison and his brother Ronald, a 40-year old mentally disabled man. Ronald was shot in the back, fatally, and then was stomped on by one of the officers.[14]

After the shootings, the New Orleans Police Department orchestrated an elaborate cover-up scheme, which even included made-up witnesses and a planted handgun.[15] Retired sergeant Arthur Kaufman, who was supposed to have been investigating the shooting, was charged with administering most of the cover-up.[16]

The Civil Rights Division of the U.S. Justice Department investigated and brought federal charges against the officers.[17] Thomas E. Perez, then Assistant Attorney General for Civil Rights, said the case was "the most significant police misconduct prosecution since the Rodney King beating case in Los Angeles in the early 1990s."[18]

In August 2011, a jury found five officers guilty in the shootings as well as the subsequent cover-up.[19] For the victims' families, the verdict provided closure and "having the officers finally held accountable for their actions is a bit of comfort [the families] can hold on to for the loved ones they will never get back."[20] According to New Orleans Mayor Mitch Landrieu, the "verdicts will provide closure for a 'dark chapter of the city's history.'"[21]

In April 2012, Engelhardt sentenced the five officers to prison. The four officers directly involved in the shooting were sentenced to terms ranging from 38 to 65 years, while the officer who was convicted for his role in the cover-up was sentenced to six years in prison.[22]

After sentencing, the defendants filed a motion for a new trial on grounds that "the government allegedly 'engaged in a secret public relations campaign' designed to make the NOPD 'the household name for corruption,' inflame public opinion against the defendants and others involved with NOPD, establish community acceptance of the government's version of the facts 'before anyone set foot in a courtroom,' urge defendants and others to plead 'guilty' as a result, and prejudice the defendants during trial through online activities designed to secure their convictions." *See* *United States v. Bowen*, 969 F. Supp. 2d 546, 551 (E.D. La. 2013).

Defendants based this argument on the

11 Campbell Robertson, 5 Ex-Officers Sentenced in Post-Katrina Shootings, N.Y. TIMES (Apr. 4, 2012), http://www.nytimes.com/2012/04/05/us/5-ex-officers-sentenced-in-post-katrina-shootings.html.
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*
19 *Jury Convicts 5 On Multiple Counts in Danziger Trial*, WDSU TV (Apr. 11, 2011), https://web.archive.org/web/20120405194143/http://www.wdsu.com/news/28778410/detail.html.
20 *Id.*
21 *Id.*
22 Campbell Robertson, *5 Ex-Officers Sentenced in Post-Katrina Shootings*, N.Y. TIMES (Apr. 4, 2012), http://www.nytimes.com/2012/04/05/us/5-ex-officers-sentenced-in-post-katrina-shootings.html.

"persistent online posting of 'comments' by a former U.S. Attorney Senior Litigation Counsel, who was exposed on March 12, 2012, as the NOLA.com poster 'Henry L. Mencken1951.'" *Id.*at 552. In November 2012, it was also revealed that another Assistant United States Attorney had also been posting inappropriate comments on NOLA.com from November 2011 to March 2012, under a pseudonym. *Id.* at 553.

Engelhardt granted the motions. He determined that there was "grotesque prosecutorial misconduct," vacated the convictions, and ordered a new trial. *Id.* at 551. Relying on *Brecht v. Abrahamson*, 507 U.S. 619 (1993), in which the Supreme Court said that "in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict," *Id.* at 575 (citing Brecht, 507 U.S. at 638 n.9), Engelhardt determined this was such a case, that a showing of prejudice was not necessary, and the verdict was overturned. *Id.* at 619.

Engelhardt's observations about the case are notable for the strong sentiments and equally strong language that characterize them. He wrote, "[u]nder circumstances as extraordinary and offensive as these, jurisprudence indicates that a showing of prejudice is not necessary." *Id.* at 619. The online comments left Engelhardt "with the distinct impression that an online 'carnival atmosphere' existed," and created "a prejudicial, poisonous atmosphere . . . sufficient to impair the fundamental constitutional right to a fair trial." *Id.* at 625, 621. The judge concluded his opinion: "The government's actions, and initial lack of candor and credibility thereafter, is like scar tissue that will long evidence infidelity to the principles of ethics, professionalism, and basic fairness and common sense necessary to every criminal prosecution, whatever it should occur in this country." *Id.* at 627.

Engelhardt's decision, and the heated rhetoric employed in it, did garner significant criticism. Illustrative of the criticism of Engelhardt's decision, The Washington Post called his opinion "unconvincing in the extreme[,]" and added that the ruling "gives the impression that [Engelhardt] is so exasperated and infuriated with prosecutors, for a host of reasons not confined to the online postings that he has thrown out the officers' convictions in a fit of pique."[23] Moreover, Engelhardt's "conclusion that the online postings created a 'prejudicial, poisonous atmosphere' that justified throwing out the convictions is a huge stretch[,]" especially given the fact that even Engelhardt "himself acknowledged, there is no evidence that members of the jury saw the online postings in question or any online postings about the case."[24]

After Engelhardt's ruling, the Justice Department appealed. *See United States v. Bowen*, 2014 U.S. 5th Cir. Briefs LEXIS 297* (Aug. 4, 2014). In a nearly 200-page brief,[25] the Justice Department questioned Engelhardt's impartiality, claiming his role as a neutral arbiter of law and fact was forfeited based on his decision to "independently investigate government misconduct unrelated to the

23 Editorial, *No justice in New Orleans Danziger Bridge case*, WASH. POST. (Sept. 21, 2013), https://www.washingtonpost.com/opinions/no-justice-in-new-orleans-danziger-bridge-case/2013/09/21/e8977754-2239-11e3-b73c-aab60bf735d0_story.html?utm_term=.4ff74de81039.
24 *Id.*
25 Jim Mustian, *Justice Department blasts Kurt Engelhardt in Danziger appeal, requests new judge in the event of retrial*, THE ADVOCATE (Nov. 30, 2014), http://www.theadvocate.com/new_orleans/news/article_5b480a2e-7073-5dfb-ac99-5a2e-99934ae0.html.

fairness of the trial." *Id.* at *108. Additionally, the Justice Department argued that Engelhardt disregarded an "impressive body of established Supreme Court and appellate court caselaw" by tossing out the verdicts, when there was no evidence the case had actually been affected by the online comments. *Id.* at *124. The prosecutors conceded that the online postings were indeed "offensive and inappropriate." *Id.* at *112. However, they argued, Engelhardt focused too much of his decision on "the offensiveness of this conduct rather than its potential for harm." *Id.* at *110.

A Fifth Circuit panel affirmed Engelhardt's ruling in a 2-1 decision, with George W. Bush appointee Judge Edward Prado dissenting. *See United States v. Bowen*, 799 F.3d 336 (5th Cir. 2015). Prado emphasized that "[i]n order to warrant a new trial on the basis of newly discovered evidence . . . *the evidence introduced at a new trial would probably produce an acquittal*." *Id.* at 362 (quoting *United States v. Bowler*, 252 F.3d 741, 747 (5th Cir. 2004) (per curiam) (emphasis added) and that "defendants advance[d] no credible argument that the newly discovered evidence in this case—the identity of the commentators on NOLA.com—would likely produce an acquittal." *Id.* at 362. Prado, citing a recent 5th Circuit decision, noted that "[the court] knew of no case 'in which an appellate court affirmed the grant of a Rule 33 motion on grounds of prosecutorial misconduct unrelated to confidence in the jury verdict, merely as a way to punish contemptuous prosecutors.'" *Id.* at 362 (quoting *United States v. Poole*, 735 F.3d 269, 279 (5th Cir. 2013).

Subsequently, all five defendants pled guilty. However, the guilty pleas were in exchange for significantly lesser time than the original sentences: Robert Faulcon was originally sentenced to a 65-year prison term, and accepted a 12-year term; Kenneth Bowen and Robert Gisevius were originally sentenced to 40 years, and accepted 10-year terms, and Anthony Villavaso, who was originally sentenced to 38 years in prison, accepted a 7-year term.[26] Finally, Kaufman, who pled guilty to conspiracy to obstruct justice and falsifying evidence in order to obstruct justice, had his sentenced reduced from 6 years to only 3 years.[27]

***Truvia v. Julian***

The contrast with Engelhardt's approach in *Truvia v. Julian*, where the plaintiffs were two African-Americans who had served 27 years in prison before it was discovered that the prosecution failed to turn over potentially exculpatory evidence, as required by the Constitution, is illuminating.

In *Truvia v. Julian*, 2012 LEXIS 127991 (E.D. La., Sept. 10, 2012), after serving 27 years in prison, Earl Truvia and Gregory Bright's convictions were vacated by a state court upon a finding that the state had withheld material information from the defense. Their convictions had rested solely upon the testimony of a single eye witness, a schizophrenic heroin addict, who testified under a false name to conceal her criminal history. This information was not turned over by prosecutors to the defendants, nor was other key evidence, at the time of trial.[28] Truvia and Bright filed a civil lawsuit.[29]

26 John Simerman & Matt Sledge, *Ending decade-long Danziger Bridge case, federal judge accepts guilty pleas from 5 ex-NOPD officers*, THE ADVOCATE (Apr. 21, 2016), http://www.theadvocate.com/new_orleans/news/article_cf74e331-8cd1-5c66-98ee-d36bae131601.html.
27 *Id.*
28 Editorial, *How to Force Prosecutors to Play Fair*, N.Y. TIMES (Feb. 16, 2015), https://www.nytimes.com/2015/02/16/opinion/how-to-force-prosecutors-to-play-fair.html?_r=0.
29 John Simerman, *Prosecutors' tactics amounted to civil rights violations, exonerated*

This was not the first time the Orleans Parish District Attorney's office had been accused of violating constitutional rights. In fact, since 1990, at least 12 people had been exonerated because of the DA's failure to disclose exculpatory evidence.[30] As one former assistant prosecutor to that office explained, "the office's unwritten policy [was] 'when in doubt, don't give it up.'"[31] The district attorney himself "misunderstood the *Brady* rule so profoundly that he was once indicted himself for suppressing evidence, and he never disciplined a prosecutor for violating the *Brady* rule."[32]

In fact, in 1995, the Supreme Court said that the office had "blatant and repeated violations" of the *Brady* rule, and a culture that had "descend[ed] to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth."[33] In 2011, in *Connick v. Thompson*, 131 S.Ct. 1350 (2011), while the Supreme Court split 5-4 on whether a single *Brady* violation could support a §1983 suit based on a "failure to train" theory with regard to inadequacy of prosecutors' training, all nine justices agreed that the Orleans DA's Office had committed a *Brady* violation in the case of John Thompson, a former death row inmate. Four justices wrote that the "misperception and disregard of *Brady*'s disclosure requirements" in the Orleans DA's Office, "were pervasive." In that case, it was not until one month before Thompson's scheduled execution date that a private investigator discovered that several prosecutors had lied about a crime-lab report. *Id.* at 1370, 1355. Both of Thompson's convictions were vacated. *Id.* at 1355.

One year later, in *Smith v. Cain*, 132 S.Ct. 627 (2012), the Court reversed another conviction arising out of Orleans Parish for failure to turn over *Brady* material.

As one author noted, "[g]iven that the courts have turned over at least 36 convictions for prosecutor misconduct, including the convictions of nine death row inmates (four of whom were later exonerated)," there certainly seemed to be "a pattern and practice of unconstitutional policies, training and behavior."[34] "Press accounts of the office dating to the 1990s (see a summary of them in this brief) describe judges in Louisiana growing increasingly frustrated with the office for failing to turn over exculpatory evidence, on occasion even ordering prosecutors to take classes to better learn the law."[35] As the New York Times noted, describing the pervasive level of constitutional violations in the Orleans DA's Office, "How many constitutional violations will it take before the New Orleans district attorney's office is held to account for the culture of negligence and outright dishonesty that has pervaded it for decades?".[36]

The Supreme Court, in *Connick*, while holding a single violation was insufficient, did not indicate what would in fact be sufficient to establish a "policy" or "custom" with respect to failure to turn over evidence to defendants, as required by *Brady*. In the case of Truvia and Bright, Engelhardt, narrowly applying *Connick*, determined, that even if there had been a *Brady* violation in connection with Truvia

*convicts maintain*, TIMES-PICAYUNE (July 18, 2012), http://www.nola.com/crime/index.ssf/2012/07/prosecutors_tactics_amounted_t.html.

30 Editorial, How to Force Prosecutors to Play Fair, N.Y. TIMES (Feb. 16, 2015), https://www.nytimes.com/2015/02/16/opinion/how-to-force-prosecutors-to-play-fair.html?_r=0.

31 *Id.*

32 *Id.*

33 Radley Balko, *New Orleans's persistent prosecutor problem*, WASH. POST (Oct. 27, 2015), https://www.washingtonpost.com/news/the-watch/wp/2015/10/27/new-orleanss-persistent-prosecutor-problem/?utm_term=.6f66f0e9305b.

34 *Id.*

35 *Id.*

36 Editorial Board, *Justice Gone Wrong in New Orleans*, N.Y. TIMES (Oct. 20, 2015), https://www.nytimes.com/2015/10/20/opinion/justice-gone-wrong-in-new-orleans.html?_r=0.

and Bright's convictions, the civil rights suit should be dismissed because the men had failed to show that the district attorney's office had a policy or practice of violating criminal defendants' *Brady* rights, and had failed to establish a "failure to train" theory against the city. *See* *Truvia v. Connick*, 577 Fed. Appx. 317 (5th Cir. 2014), *cert denied*, Truvia v. *Connick*, 135 S. Ct. 1550 (2015). The Fifth Circuit affirmed the decision in August 2014. *Id.* at 16.

Dean Erwin Chemerinsky authored a cert petition on behalf of the plaintiffs, who sought to appeal to the U.S. Supreme Court. *See* Petition for Writ of Certiorari, *Truvia v. Connick*, 2014 U.S. S. Ct. Briefs LEXIS 4389(2014) (No. 14-708). As the cert petition noted, Truvia and Bright presented evidence showing "it literally was the policy and custom of the Orleans Parish District Attorney's office to not disclose exculpatory and impeachment material as required by the Constitution." *Id.* at *15. The petition outlined the evidence the plaintiffs submitted to the district court that demonstrated that the district attorney's office had a policy and custom of withholding exculpatory evidence in violation of *Brady*, including:

- Discovery responses from 49 Orleans Parish assistant district attorneys in 90 cases, in which the assistant district attorneys told the criminal defendants that they were not entitled to materials they were in fact entitled to under *Brady*;
- The prosecutor's admission that he withheld *Brady* evidence in Truvia's and Bright's case.
- The affidavit of a former assistant district attorney showing that the Orleans Parish District Attorney's office did not train him on *Brady* violations, and actually instructed him to provide "not entitled" responses to *Brady* requests;
- *Connick*'s stipulations in *Connick v. Thompson* that his assistant district attorneys could not recall any *Brady* training before 1985, and that the Orleans Parish District Attorney's office had no written policy regarding *Brady* violations;
- Admissions by the Orleans Parish DA's office in Smith v. Cain that it had an unconstitutional *Brady* policy for two decades.

*Id.* at *8-9.

In both *United States v. Bowen* and *Truvia v. Julien*, Engelhardt addressed prosecutorial misconduct. However, he came to wildly different conclusions. In the Danziger Bridge case Engelhardt threw out the convictions. In *Truvia v. Julien*, in which wrongfully convicted individuals sought civil remedies based on the Orleans Parish District Attorney's *Brady* violations, which are considered "among the most pervasive and recurring types of prosecutorial violations,"[37] Engelhardt expressed little concern about prosecutorial conduct, and instead adopted a very narrow reading of the Supreme Court's *Connick v. Thompson* decision, thereby barring civil remedies.

## II. SEXUAL HARASSMENT

Engelhardt has a troubling record with

37 Bennet L. Gershman, *Reflections on Brady v. Maryland,* 47 S. Tex. L. Rev. 685, 688 (2006).

regards to sexual harassment claims, often going out of his way to rule that allegations do not rise to the level of objectively hostile conduct and keep cases from even being heard by a jury.

Relevant is *EEOC v. Rite Aid Corp.*, 2004 U.S. Dist. LEXIS 12356 (E.D. La., June 30, 2004). There, Tiffany Blackmon alleged that she was the victim of sexual harassment and inappropriate conduct when she worked for Rite Aid as a security officer. She testified that a security detective would "make remarks under his breath, stuff like that, like mm-hmm, how fine [Blackmon] was." *Id.* at *5. The detective would "rub [his hand or body] across [Blackmon's behind]," "unsuccessfully tried to kiss her," "make remarks about how pretty [she] was, how pretty [her] chest was." *Id.* The detective also asked Blackmon what she slept in at night; and another detective cornered her in the store and "cupped her breast." *Id.* at *8. Other employees testified that they viewed the detectives zooming the security cameras "on the chests and buttocks of women." *Id.* at *6–7. Blackmon further alleged that Rite Aid retaliated against her after she reported two incidents of sexual harassment to her supervisor. *Id.* at *2.

Engelhardt granted summary judgment to Rite Aid in part, finding that while "the comments made to Blackmon were offensive and sophomoric; however, they were not sufficiently severe or pervasive[.]" *Id.* at *18. Moreover, Engelhardt noted how "the six to seven alleged instances where [the detective] brushed up against Blackmon in the aisles, the three times that [the other detective] allegedly cornered Blackmon in the store, and any other unwelcomes physical touching—allegations of which are relatively few in number over several months—were neither severe nor physically threatening, though quite unwelcome" *Id.* at *19. He said that each comment made was the "equivalent of a mere utterance of an epithet that engender [sic] offensive feelings." *Id.* at 18* (citing *Shepard v. Comptroller of Pub. Accounts*, 168 F.3d 871 (5th Cir. 1999)).

Engelhardt did deny summary judgment on the retaliation claim, holding that there were genuine issues of material fact "regarding the circumstances under which Tiffany Blackmon left the employ of Rite Aid and as to Rite Aid's nondiscriminatory reasons." *Id.* at *35.

Other cases further illustrate Engelhardt's narrow definition of sexual harassment:

» In *Ellzey v. Catholic Charities Archdiocese*, 833 F.Supp. 2d 595 (E.D. La. 2011), Sharon Ellzey sued her employer Catholic Charities Archdiocese of New Orleans; she alleged sexual harassment by her immediate supervisor, consisting of "'hugs with sensual back rubs' allegedly occurring once every 1-2 weeks and 'observations about her clothes, buttocks, weight (she was losing weight), and hairstyles in relation to her looking sexy allegedly occurring once every week.'" *Id.* at 603(quoting Rec. Doc. 1, ¶5 and ¶6).

While Engelhardt dismissed the complaint on procedural grounds (she failed to exhaust her administrative remedies), in dicta, language not necessary for the holding, he evaluated the merits of Ellzey's claims, concluding that

"these alleged instances and any other unwelcomed physical touching-allegations were neither severe nor physically threatening, though quite unwelcome and indeed inappropriate." *Id.* at 603.

» In *Matherne v. Cytec Corp.*, 2002 U.S. Dist. LEXIS 6304 (E.D. La. Mar. 28, 2002), Cynthia Matherne alleged that while she was working at Cytec Corp. a male coworker "commented on her buttocks and then pressed her against a wall, kissed or pecked her on the lips, and said, 'now you ain't never going to get married.'" *Id.* at 2. Afterwards, she asked a supervisor to take her to the infirmary, where she locked herself in a room for two hours and then was taken to a medical center, where she voluntarily admitted herself to the psychiatric ward for two days. Matherne also alleged that male co-workers had "requested sexual favors and had used pornographic movies and websites in the break room and work area." *Id.* Engelhardt dismissed the claims, finding that the conduct "does not rise to the level of an objectively abusive environment, as required under Title VII." *Id.* at *13.

» In *Fleming v. Napolitano*, 2012 U.S. Dist. LEXIS 47499 (E.D. La., Apr. 4, 2012), Jackie Fleming worked as a Transportation Security Officer at the New Orleans airport. From June 2008 to 2010, Fleming was subjected to sexual harassment by her supervisor, including "unwelcome touching connected with sexual advances" as well as "defaming her character by spreading rumors that she had engaged in sexual activity with him." *Id.* at *1-2. Fleming alleged that her supervisor threatened to fire her after she complained about his unwelcome sexual advances. *Id.* at *2.

Defendants argued that under the Federal Tort Claims Act, Fleming's claims should have been dismissed because the allegations "arise[s] out of an intentional tort for which the government has not waived sovereign immunity under the FCTA." *Id.* at *2. Judge Engelhardt agreed with the defendants, stating that "[w]hile sexual harassment and intentional infliction of emotional distress" are not listed in the statute, "such claims are barred when based on conduct that would establish a tort listed therein." *Id.* at *8.

» In *Kreamer v. Henry's Marine*, 2004 U.S. Dist. LEXIS 20677 (E.D. La., Oct. 7, 2004), Thomas Kreamer alleged that one of his coworkers, Carroll Carrere, had grabbed Kreamer in the crotch area several times, burned Kreamer with a lighter while trying to place it between his legs, entered Kreamer's sleeping quarters, and directed offensive gestures and whistles at Kreamer. *Id.* at *5-9. According to Kreamer, during one grabbing incident, Carrere told Kreamer that "he would like to compare packages." *Id.* at 5. During another incident, when Kreamer was bent over, Carrerre grabbed his sides and said he "would like to f**k that piece of ass." *Id.* at *10.

Kreamer sued under Title VII,

alleging that he had been subjected to sexual harassment. Engelhardt granted summary judgment in favor of the company. *Id.* at 32. Narrowly applying *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), Engelhardt concluded that in order to sustain a claim of same-sex sexual harassment under Title VII, Kreamer had to "provide credible evidence that the harasser was homosexual." *Kreamer*, at *17 (quoting *La Day v. Catalyst Tech., Inc.*, 302 F.3d 474, 478 (5th Cir. 2002) (quoting *Oncale*, 523 U.S. at 80)).

Engelhardt, on summary judgment, determined that Carrere's grabbing plaintiffs' crotch or side on eight separate occasions, sexually suggestive statements, offensive gestures, and the lighter incident, revealed Carrere's intent was "to humiliate the plaintiff for reasons unrelated to a sexual interest, rather than actual intent to have sexual contact." *Kreamer*, at *19. Moreover, Engelhardt concluded that no reasonable juror could infer that Carrere entering plaintiff's sleeping quarters at night was credible proof that Carrere intended to have sexual contact with him, because Carrere "did not say anything, did not touch the plaintiff and did not attempt to get into plaintiff's bed or remove plaintiff's clothing." *Id.* at *22. Thus, Engelhardt determined that "the instant case does not involve 'conduct [that] goes beyond the casual obscenity.'" *Id.* at *24-25 (quoting *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1010 (7th Cir. 1999)).

Engelhardt's rejection of same-sex sexual harassment claims is counter to other courts. *See, e.g., Shepherd v. Slater Steels Corp.*, 168 F.3d 998 (7th Cir. 1999. In *Shepherd*, the Seventh Circuit concluded that in the absence of any evidence that the harasser was gay, "the connotations of sexual interest in [the plaintiff] certainly suggest that [the harasser] might be sexually oriented toward members of the same sex," which "leaves ample room for the inference" that the harasser engaged in the harassment because of the plaintiff's sex. 168 F.3d at 1010.

## III. PREGNANCY DISCRIMINATION

In *Taylor v. Jotun Paints, Inc.*, 2010 U.S. Dist. LEXIS 96510 (E.D. La., Sept. 15, 2010), Brandi Taylor sued Jotun Paints, alleging pregnancy discrimination. After working at the company for four years, Taylor was promoted, and shortly thereafter she told her co-workers she was pregnant. Taylor's supervisors, Robin Colton and Dawn Adams "became rude and confrontational with her." *Id.* at *1. On April 25, 2007, Taylor was out of work for a few days due to a pregnancy related condition. When she returned on May 3, 2007, Taylor "sensed tension at work." *Id.* at *2. On May 7, 2007, Taylor's obstetrician placed her on bedrest for the remainder of her pregnancy due to gestational hypertension. *Id.* at *2. After Taylor applied for short term disability benefits, her doctor submitted a form stating that Taylor had a high-risk pregnancy and was unable to work from May 11, 2007 to December 22, 2007 (which was approximately eight weeks after her due date). *Id.* at *2.

On July 18, 2007, Colton sent Taylor an email threatening to fire Taylor if she did not return to work by August 23, 2007. *Id.* at *3. On August 16, 2007, Taylor had an emergency C-section, thus giving birth three months early. On August 30, 2007, Jotun fired Taylor "due to her inability to return to work." *Id.* at *3. Taylor claims that she was fired two weeks after giving birth, in violation of the Pregnancy Discrimination Act (PDA). *Id.* at *5.

Jotun argued that Taylor failed to make a prima facie case of pregnancy discrimination, because Taylor "was not qualified for the position from which she was terminated (because she was unable to come to work)," and that Taylor "cannot prove that others similarly situated outside of the protected class (i.e. similarly-situated non-pregnant employees) were more favorably treated." *Id.* at *10-11.

Engelhardt agreed with Jotun, holding that Taylor was "unable and, thus not qualified to perform the functions of the job due to her inability to work." *Id.* at *12. Engelhardt noted that "[t]he fact that Plaintiff's absences were caused by pregnancy does not dispense with the general requirement that employees must show up for work . . . it is well-established that a pregnant employee is only entitled to be treated as well as other non-pregnant employees, not better." *Id.* at *12-13. Next, Engelhardt found that Taylor failed to show that Jotun treated non-pregnant employees more favorably. *Id.* at *13. Taylor provided three examples of Jotun employees to satisfy this requirement. Taylor was given sixteen weeks of medical leave. *Id.* at *13. Taylor presented evidence that another Jotun employee was given over sixteen weeks of leave, related to two problematic pregnancies. Engelhardt dismissed this distinction, because this was "not a 'non-pregnant' employee who was treated better than Plaintiff." *Id.* at *14. Engelhardt dismissed the other two examples as well. *Id.* at *16.

## IV. DISCRIMINATION BASED ON RELIGION

In *Sarsour v. Oakwood Shopping Ctr. Ltd. P'ship*, 2012 U.S. Dist. LEXIS 72543 (E.D. La., May 24, 2012), Engelhardt granted defendants motion to dismiss. There, plaintiffs Muntaha Sarsour and Sajedeh Judett went to Oakwood Shopping Center. They purchased food at the food court and were walking to a table to sit and eat when defendant Weatherstrand, a security guard, approached them and told Sarsour to remove her hijab, or leave the shopping center. *Id.* at *2. After Sarsour refused, the security guard told plaintiffs to leave and followed them to the exit. After a verbal exchange over radio with other security personnel, the plaintiffs left the mall. *Id.* Plaintiffs sued for discrimination under 42 U.S.C. § 1981 and 1985 based on race, including ancestry or ethnicity.

Engelhardt noted how "the parties' written submissions reflect the existence of a factual dispute regarding whether Plaintiffs actually were required to leave the shopping center when Sarsour refused to take off or push back her hijab[.]" *Id.* at *6. Nevertheless, Engelhardt granted summary judgement for the defendants, holding that the "Defendants simply sought to enforce the shopping center's non-discriminatory policies of prohibiting patrons' wearing of any face-obscuring garments on the

premises . . . Plaintiffs offer nothing more than mere speculation and supposition that Defendants' proffered non-discriminatory reason is untrue." *Id.* at *6-7.

## V. DENIAL OF BENEFITS

In *Romain v. Sonnier*, 2016 U.S. Dist. LEXIS 93026 (E.D. La., July 18, 2016), plaintiffs were residents of Louisiana who qualified for benefits under the Supplemental Nutritional Assistance Program ("SNAP") and who relied on a state-wide waiver to satisfy the "work requirement" to qualify for SNAP benefits. *See* *Romain v. Walters*, 856 F.3d 402, 404 (5th Cir. 2017). In September 2015, the waiver expired. Those individuals who were previously covered by the waiver were informed by letter that their SNAP benefits would expire in three months unless they satisfied the work requirement. Plaintiffs filed a lawsuit, arguing that "the September letters discussing the waiver, the December notices reducing or terminating SNAP benefits, and the decision of Defendant to terminate SNAP benefits without individual investigations or fair hearings violated [] Plaintiffs' due process rights[.]" *Id.* at 404.

In January 2016, the parties filed a settlement order, which was signed by the district court. The settlement order quoted a letter from then-Governor-elect John Bel Edwards to the U.S. Department of Agriculture (USDA), which stated his intention to extend the work requirement waiver in 2016, as well as a request that the USDA "ensure that there is no gap in benefits until the waiver can be formally extended after [the Governor-elect] take[s] office [on January 11, 2016][.]" *Id.* at 405. Specifically, the settlement order required the Defendant to "(1) have SNAP benefits for January 2016 issued no later than January 22, 2016; (2) take necessary steps to ensure that no individual loses his or her SNAP benefits due to the timing of the waiver application by Defendant; and (3) issue a new notice to individuals covered by the old waiver informing them of the order and the new waiver." *Id.* at 406.

Subsequently, plaintiffs moved for attorneys' fees and costs. Engelhardt denied plaintiffs' motion, determining that "Plaintiffs were not the prevailing party under § 1988" because "no relief provided to Plaintiffs . . . is fairly attributable, to any extent, to the instant lawsuit and the efforts of Plaintiffs' counsel, rather than merely the voluntary action of Defendant based on the announced policy of Louisiana's (then) Governor-Elect John Bel Edwards." *Id.* at 406 (internal citations omitted).

The Fifth Circuit reversed Engelhardt's decision, finding that the plaintiffs were in fact the prevailing party. *Id.* at 408. The Fifth Circuit held that the plaintiffs were the prevailing party because they "obtained judicially-sanctioned relief in the form of the Settlement Order," the settlement order "materially altered the legal relationship of the parties," and finally, the settlement order "modified Defendant's behavior in a way that directly benefited Plaintiffs at the time relief was entered[.]" *Id.* at 406-07.

In *Sun v. Colvin*, 2014 U.S. Dist. LEXIS 111364 (E.D. La., Aug. 11, 2014), Leslie Sun filed claims for disability insurance benefits and supplemental income benefits under the Social Security Act (SSA), after fracturing her ankle in May 2011. *See* *Sun v. Colvin*, 793 F.3d 502 (5th Cir. 2015). In June and July 2011, Sun had applied for SSA benefits, which the commissioner denied. *Id.* at 505.

Sun requested a hearing by an Administrative Law Judge (ALJ). The ALJ had none of Sun's medical records after August 2011—thus, none of the records regarding Sun's second ankle surgery and subsequent visits to the Louisiana State University (LSU) clinic in 2012. *Id.* at 505. Ultimately, the ALJ issued a decision, finding that Sun was not disabled under the SSA. *Id.* at 506. Sun argued that the ALJ failed to fully and fairly develop the record "by not obtaining all of her medical records before denying her claim" *Id.* at 504. Sun sought judicial review of the administrative decision, which was denied by both the magistrate judge and Engelhardt. *Id.* at 507.

The Fifth Circuit reversed Engelhardt's decision, holding that the court could not conclusively say whether substantial evidence supports the ALJ's denial of benefits because "the LSU medical records and Sun's second surgery create considerable uncertainty that has not been addressed or resolved by a fact finder below." *Id.* at 512.

Similarly, in *Morgan v. Colvin*, 2015 U.S. Dist. LEXIS 43936 (E.D. La., Apr. 2, 2015), Engelhardt affirmed a magistrate decision dismissing challenges to SSA's denial of a disability benefits claim. Once again, the Fifth Circuit reversed. *See Morgan v. Colvin*, 803 F.3d 773 (5th Cir. 2015). There, Kenneth Morgan applied for disability insurance and supplemental income benefits after sustaining injuries when he fell off an 18-wheeler while working as an auto-glass technician. The Commissioner of Social Security denied Kenneth Morgan's claim for disability and requested an administrative hearing and testified before an ALJ. *Id.* at 775. However, the ALJ who held a hearing on Morgan's claim was not the same ALJ who ultimately issued the decision in Morgan's case. *Id.* at 775.

Morgan challenged the ALJ's credibility assessment on the basis that the ALJ who made the assessment was not the same ALJ who heard Morgan testify at the hearing. *Id.* at 777. While Engelhardt dismissed this argument, the Fifth Circuit held that "Morgan's credibility was not only a significant factor in deciding his case, it was essential to the decision." *Id.* at 777. As a result, a rehearing before an ALJ was proper. *Id.* at 778.

## VI. SAME-SEX MARRIAGE

Prior to the Supreme Court's decision in *Obergefell v. Hodges*, in *Maradiago v. Castle*, 2008 U.S. Dist. LEXIS 84849 (E.D. La., Oct. 21, 2008), Engelhardt made clear his opposition to same-sex marriage.

In *Maradiago*, after the death of Eddie Gomez Naranjo, who Dolores Naranjo claimed was her common law spouse, Ms. Naranjo brought a wrongful death suit against insurance companies. *Id.* at *2. The companies filed a motion for partial summary judgement, arguing that the plaintiff could not bring a wrongful death claim because she did not have a valid marriage under Louisiana law. *Id.* at *2.

At issue was whether Louisiana was required to recognize the common law marriage between Naranjo and the decedent, which was a valid common law marriage in Texas. *Id.* at *3. Engelhardt explained that Louisiana need not recognize all common law marriages, for instance, "[w]hen the relationship offends

some strongly established public policy of the state, Louisiana does not have to give full faith and credit to those common law marriages." *Id.* *7.

Engelhardt then added, unnecessarily for the case, in dicta, that "the Louisiana Legislature has clearly stated the 'strong public policy' of this state against recognition of same-sex marriages. According to Louisiana Civil Code article 3520, '[a] purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage.'" *Id.* at *7 n.1. Engelhardt made this point, despite the fact that the common law marriage at issue in this case was between a man and a woman.

## VII. EDUCATION

In 1993, before he was a judge, Engelhardt wrote a letter to the editor of The Times-Picayune, entitled "Making School Choice an Option for Everyone." The letter was a follow up to a letter to the editor from David Vitter advocating for school choice. Engelhardt argued that it was hypocritical for then-President Clinton and First Lady Hillary Clinton to send their daughter to a private school, and that, "other, less financially fortunate families should have the same choice."

In the *Dandridge v. Jefferson Parish Sch. Bd.*, No. 64-cv-14801 litigation, Engelhardt supervised, and eventually ended, the desegregation process in the Jefferson Parish school system overseen by the federal courts.[38] In 1964, Rev. Arthur Dandridge, along with several other African-American parents, sued the school board in order to begin the integration process following *Brown v. Board*.[39] Since that time, the federal district courts were responsible for monitoring integration in Jefferson Parish Schools. But, in 2011, Engelhardt declared the school system sufficiently integrated and no longer in need of court supervision. However, the plaintiffs were still worried about the districts integration policies, and the school board entered into a consent decree maintaining reforms established by court orders.[40]

Engelhardt took a notably active role in the litigation before his decision to end federal oversight of the integration process. According to one journalist, "Engelhardt's tendency to side with parents and promote their right to school choice—at all costs—has emerged as a common threat in the case."[41]

Jefferson Parish schools remain highly segregated. In October 2015, well after Engelhardt deemed Jefferson Parish adequately desegregated, only 58 of the 82 district schools were considered sufficiently desegregated.[42]

## VIII. OTHER NOTEWORTHY CIVIL CASES

» In *United States v. Rainey*, No 12-cr-291 (E.D. La.), Engelhardt

38 See Sen. Comm. on the Jud., 114th Cong., Kurt Damian Engelhardt: Questionnaire for Judiciary Nominees, 25.

39 Danielle Dreilinger, *Jefferson schools close desegregation case, 51 years later*, TIMES-PICAYUNE (Dec. 9 2015, updated May 17, 2017), http://www.nola.com/education/index.ssf/2015/12/jefferson_school_desegregation.html.

40 Mark Waller, *Jefferson Parish schools are sufficiently integrated and free from federal oversight, judge rules*, TIMES-PICAYUNE (Aug. 3, 2011), http://www.nola.com/education/index.ssf/2011/08/after_looming_long_and_large_o.html.

41 Jenny Hurwitz, *Judge takes big role in fight over schools; But mystery shrouds U.S. judge in Jefferson case*, TIMES-PICAYUNE (Jan. 25, 2009).

42 Ramon Antonio Vargas, *Jefferson school officials agree to take further steps to integrate the system*, (Jan. 18, 2016), http://www.theadvocate.com/new_orleans/news/communities/east_jefferson/article_1ab25af6-c947-59e2-9013-77a865d47575.html.

dismissed obstruction of Congress charges against British Petroleum (BP) executive, David Rainey, in connection with congressional subcommittee investigation of the Deepwater Horizon oil spill. The Department of Justice Deep Water Horizon Task Force had brought three criminal charges against Rainey, then vice-president of BP. Engelhardt dismissed the charge of obstructing a congressional investigation, due in part because members of Congress could not be subpoenaed to testify.[43] A federal jury found Rainey not guilty on the other criminal charges.

» In *Ciccarone v. City of New Orleans*, No. 13-133 (E.D. La., Jan. 24, 2013), the ACLU filed a First Amendment suit against the City of New Orleans over its "clean zone" ordinance restricting signs and banners in various areas of the city during Super Bowl week. Engelhardt granted a temporary restraining order prohibiting the city from enforcing the ordinance except in the immediate area outside the Superdome.[44] The ACLU and the city subsequently settled the lawsuit.

» In *FEMA Trailer Formaldehyde Products Liability (2012)* litigation, Engelhardt presided over a class action filed by Hurricane Katrina and Hurricane Rita victims who claimed they were injured after being housed in trailers containing formaldehyde. Engelhardt dismissed all claims against FEMA on various grounds, including that a state law "shield[ed] the federal government from negligence liability for providing free shelter in response to a disaster."[45] In 2012, Engelhardt approved of $42.6 million class-action settlement between the companies that made and installed the FEMA-issued trailers and the victims who were exposed to the hazardous fumes while living in those shelters.[46] FEMA was not a party to the settlement.[47]

» In *Blanco v. Burton*, 2006 U.S. Dist. LEXIS 56533 (E.D. La., Aug. 14, 2006), Engelhardt declined the state's request for a preliminary injunction to enjoin the opening of bids on offshore leases. After Hurricanes Katrina and Rita, Louisiana Governor Kathleen Blanco sought to have the Minerals Management Service (MMS) exercise greater caution and diligence prior to permitting oil and gas activities off of the Louisiana coast line.[48] After MMS had done a "less-than-complete" job of measuring and mitigating mineral impacts on the coast line, Louisiana decided to challenge MMS's future actions.[49] In 2006, Governor Blanco sued to enjoin MMS's Lease Sale 200, which would have permitted the opening of bids on offshore leases. Engelhardt declined to enter injunctive relief, despite admitting that the claims of the State of Louisiana potentially had merit. To

43 *Ex-BP exec David Rainey not guilty of lying about Gulf oil spill*, CHICAGO TRIBUNE (June 5, 2015), http://www.chicagotribune.com/news/nationworld/ct-bp-david-rainey-not-guilty-gulf-oil-spill-20150605-story.html.
44 Order on Motion for Temporary Restraining Order, Ciccarone, Et Al. v. City of New Orleans, No. 13-133 (E.D. La., Jan. 24, 2013), https://www.aclu.org/legal-document/ciccarone-et-al-v-city-new-orleans-order-motion-temporary-restraining-order?redirect=free-speech/ciccarone-et-al-v-city-new-orleans-order-motion-temporary-restraining-order.
45 Michael Kunzelman, *Judge tosses Miss. Claims over trailer fumes*, ASSOCIATED PRESS (July 29, 2010).
46 *Katrina, Rita victims get $42.6M in toxic FEMA trailer suit*, CBS NEWS (Sept. 28, 2012), https://www.cbsnews.com/news/katrina-rita-victims-get-426m-in-toxic-fema-trailer-suit/.
47 *Id.*
48 Ryan M. Seidmann & James G. Wilkins, *Blanco v. Burton: What Did We Learn from Louisiana's Recent OCS Challenge?*, 25 Pace Envtl. L. Rev. 393, 395 (2008),
49 *Id.*

justify his decision, Engelhardt noted that any actions taken by MMS under the actual lease sale would not actually cause immediate irreparable harm; rather, it was the subsequent activity resulting from the sale of the leases that would have environmental impacts. Notably, Engelhardt criticized MMS's practices, stating that "rather than a well-researched analytical approach to post Katrina/Rita Louisiana, MMS and DOI [Department of the Interior] have instead hastily provided expedient language designed to facilitate its preexisting decision." *Id.* at *38. Nevertheless, Engelhardt denied the preliminary injunction.

## IX. OTHER NOTEWORTHY CRIMINAL CASES

» In *Parra-Sanchez v. Gusman*, 2008 U.S. Dist. LEXIS 116890 (E.D. La., Oct. 15, 2008), Pedro Parra-Sanchez was arrested for aggravated battery and disturbing the peace. *Id.* at *4. He remained in custody for more than 400 days before he was released, without his case ever going to trial. *Id.* at *5. While in custody, Parra-Sanchez repeatedly requested to speak with an attorney and be brought to trial. However, "due to alleged administrative errors and oversights" he was never brought before a judge. *Id.* at *4-5.

Parra-Sanchez filed suit, arguing a § 1983 claim for false imprisonment, as well as a violation of his Sixth Amendment right to a speedy trial. *Id.* at *5. Engelhardt described the procedural history of this case as "a comedy of errors" noting that Parra-Sanchez failed to file an amended complaint, despite having two opportunities to do so. *Id.* at *7. For claims under §1983, there is a "heightened" pleading requirement, and under Fifth Circuit precedent, a district court "may, at its discretion, insist that a plaintiff file a reply tailored to an answer pleading the defense of qualified immunity." *Id.* at *11 (quoting *Schultea v. Wood*, 47 F.3d 1427, 1434 (5th Cir. 1995)). Parra-Sanchez argued that the district court "cannot grant Defendants' motion [to dismiss] at this point, since the Court has not yet 'Ordered Plaintiffs to 'file a reply tailored to an answer pleading the defense of qualified immunity.'" *Id.* at *13. Engelhardt rejects this claim, stating that "[t]his Court is no longer willing to provide [Parra-Sanchez] opportunities to plead and re-plead until such time as he 'stumble[s] upon a formula that carries [him] over the threshold . . . At some point a court must decide that a plaintiff had a fair opportunity to make his case." *Id.* at *14 (quoting *Jacquez v. Procunier*, 801 F.2d 789, 792 (5th Cir. 1986)). Thus, Engelhard granted the defendants motion to dismiss. *Id.* at *18.

According to a Los Angeles Times article, "Parra-Sanchez's case is not unique in post-Katrina New Orleans. An untold number of people got 'lost' in the prison system in the weeks immediately after the storm . . . [m] any are still among the 3,000 active criminal court cases. At least 85% of them qualify for representation by a public defendant from the Orleans Parish Indigent Defender program[.]"[50]

50 Ann M. Simmons, *Justice on Katrina Time*, L.A. TIMES (Dec. 12, 2006), http://articles.

» In *United States v. Tapp*, No. 002-253, 2005 WL 8145560 (E.D. La. Jan. 11, 2005), in connection with a guilty plea, a defendant waived his right to appeal his sentence either directly or collaterally. Defendant's counsel subsequently filed an untimely notice of appeal. Defendant later filed a § 2255 petition arguing that his counsel was ineffective in failing to timely file a notice of appeal. Judge Engelhardt ruled that the defendant waived that argument by waiving his right to appeal his sentence. *Id.* at * 7.

The Fifth Circuit vacated the judgment and remanded the case for a hearing on whether the defendant had asked his attorney to file a notice of appeal. *See United States v. Tapp*, 491 F.3d 263 (5th Cir. 2007). In an issue of first impression for the Fifth Circuit, the Court held that the Supreme Court's decision in *Flores-Ortega*–that the failure to file a requested notice of appeal is *per se* ineffective assistance of counsel– applies even where a defendant has waived his right to direct appeal and collateral review.

» In *United States v. Pando Franco*, 503 F.3d 389 (5th Cir. 2007), Engelhardt sat on the Fifth Circuit by designation. The trial court had allowed prosecutors to ask juries to draw negative inferences from a defendant's "selective silence" after receiving a *Miranda* warning. "Selective silence" generally refers to situations in which a defendant, after being read his Miranda rights, answers some questions but not others. *Pando Franco* involved a twist on this situation, in which the defendant's "silence" consisted of his failure to ask why he had been arrested. The Fifth Circuit permitted the use of a defendant's selective silence, contrary to the holding of other circuits. *See McBride v. Houtzdale*, 687 F.3d 92 (3d Cir. 2012); *Hurd v. Terhune*, 619 F.3d 1080 (9th Cir. 2010); *United States v. May*, 52 F.3d 885 (10th Cir. 1995).

» In *United States v. Chavez-Hernandez*, 671 F.3d 494 (5th Cir. 2012), the Fifth Circuit affirmed a sentence for being in the U.S. illegally, enhanced based on a conviction for sexual activity with a minor, "five times greater than the low end of the properly calculated range and over two-and-a-half times greater than the upper end of that range." Engelhardt, sitting by designation, joined the majority opinion, authored by Judge Edith Jones. Judge Catharina Haynes, dissenting, wrote that "I have been unable to locate a decision from our court where we failed to find that such a wide variance between the correct range and the incorrect range" was not plain error. *Id.* at 502.

# CONCLUSION

Judge Kurt Engelhardt must explain his record of troubling rulings, particularly with respect to his contrasting treatment of prosecutorial misconduct in the Danziger Bridge and *Truvia v. Julien* cases, as well as

latimes.com/print/2006/dec/12/nation/na-defenders12.

his troubling decisions in cases involving sexual harassment allegations. Alliance for Justice requests that the Senate Judiciary Committee carefully scrutinize Engelhardt's record and urges senators and the nominee to address these issues at his confirmation hearing.