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Mr. Joseph Hartunian
Staff, Judiciary Committee
of the United States
Senate
322 Hart Senate Office Building
Washington, D.C. 20510

re: *Bivens* case of Benjamin Cunningham

Dear Mr. Hartunian:

I represented Mr. Benjamin Cunningham in his efforts to appeal the award of summary judgment by the United States District Court for the Southern District of New York dismissing his case for Fourth Amendment violations against certain United States law enforcement officers on a finding of qualified immunity from liability for their warrantless invasion of his home.

My former client reports comments on the absence of his lawyer from his current attempts to bring the matter to Legislative attention. The implication may be that such non-participation reflects negatively on the substantive issues.

While avenues of appeal remained open, I never lost confidence in Mr. Cunningham's case nor respect for his serious cause. I researched, wrote, filed, and served what I believed to be a serious brief to the Second Circuit Court of Appeals. To my surprise, a panel of that Court almost immediately dismissed the appeal as "frivolous." I was taken aback, first because I am reluctant to believe that any fact-based Fourth Amendment case can be frivolous and, second, because what Mr. Cunningham sought

was to reinstate the rejected finding and decision of the S.D.N.Y. Magistrate. To be sure, a Federal Magistrate-Judge can be wrong; it seems less plausible, however, that the Magistrate would be so wide of the mark that support for his result would be frivolous.

Although I had prepared an 18-page appeal brief, the dismissal was so sudden that I was left with no assurance that the Court had examined it. And, indeed, review of the Court's docket sheet of the case seems to confirm that there was no appeal brief.

Accordingly, I drafted and filed a motion to reconsider. Again denial was all but instantaneous.

I then drafted, served, and filed a writ of certiorari to the United States Supreme Court (at my own out-of-pocket expense for printing). In light of the statistical environment and ambitious criteria of certiorari motions, I was less disconcerted when this, too, was denied.

All procedural appeal avenues known to me have been exhausted. In sum, and for what it is worth, I entertained, and entertain, then and now negative evaluation of Mr. Cunningham's *Bivens* case.

Respectfully,

Daniel A. Eigerman