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 UNITED STATES OF AMERICA  
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10 UNITED STATES DISTRICT COURT

11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 CHARLES LYNCH,

16 Defendant.

No. CR 07-689-GW

GOVERNMENT'S UNOPPOSED EX PARTE  
 REQUEST FOR CONTINUANCE OF HEARING  
 ON MOTION FOR DENIAL OF MOTION FOR  
 FAILURE TO COMPLY WITH LOCAL  
 RULES; DECLARATION OF DAVID KOWAL

**Current Hearing Date:**  
 January 9, 2017

**Proposed Date:**  
 January 30, 2017

19 The United States of America, by and through its counsel of  
 20 record, the United States Attorney for the Central District of  
 21 California, hereby moves *ex parte* for a continuance of the hearing  
 22 date on the motion filed by on December 12, 2016 as the clerk's  
 23 docket number ("CR") 453 defendant Charles Lynch ("defendant")  
 24 seeking "McIntosh Relief". The government seeks a hearing date of  
 25 January 30, 2017, or a date thereafter convenient to the Court, and  
 26 until January 19, 2017 to file its opposition. This request is based  
 27 on the Attached Declaration of AUSA David Kowal, the files and  
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1 records in this case, and such further evidence and argument as the  
2 Court may permit.

3 Defendant does not oppose this request.

4 Dated: December 23, 2016

Respectfully submitted,

5 EILEEN M. DECKER  
6 United States Attorney

7 PATRICK R. FITZGERALD  
8 Assistant United States Attorney  
Chief, National Security Division

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10           /s/            
DAVID KOWAL  
Assistant United States Attorney

11 Attorneys for Plaintiff  
12 UNITED STATES OF AMERICA

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DECLARATION OF DAVID KOWAL

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2 1. I am an Assistant United States Attorney in the Central  
3 District of California. I make this declaration in support of the  
4 government's motion for a continuance of the hearing on defendant's  
5 Motion "For Written Indication That the Court Would Grant or  
6 Entertain A Motion For *McIntosh* Relief", filed on December 12, 2016.  
7 (CR 453, the "Motion").

8 2. I am a counsel of record in the above-entitled case, United  
9 States v. Lynch, et.al., 07-0689-GW, which resulted in defendant's  
10 conviction. I am one of the government's counsel of record in  
11 defendant Lynch's pending appeal and the government's cross-appeal  
12 before the Ninth Circuit, 9th Circuit Docket Nos. 10-50219 and 10-  
13 50264. I know the following information from my review of the files  
14 and records in this matter and my personal knowledge.

15 3. Defendant's final brief on appeal, the third brief on  
16 cross-appeal, was initially due May 11, 2014. Defendant subsequently  
17 filed requests for extensions of time to file his final brief, and  
18 defendant's final brief is currently due on February 13, 2017.

19 4. During this period, on February 24, 2015, defendant filed  
20 in the Ninth Circuit an "urgent" motion for an order directing the  
21 Department of Justice to cease spending funds prosecuting this case  
22 based on language in a Congressional appropriations act. On April  
23 13, 2015, the Ninth Circuit denied defendant's urgent motion without  
24 prejudice to defendant renewing his arguments in his final brief on  
25 appeal. The Ninth Circuit also denied defendant's alternative  
26 request that his appeal be remanded to the district court to consider  
27 the issue without prejudice to defendant seeking an indicative ruling  
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1 in the district court and presenting the results to the Ninth Circuit  
2 pursuant to Fed. R. App. P. 12.1. (See Def.'s Mot., Ex. A); see also  
3 Fed. R. Crim. P 37. On June 22, 2015, the Ninth Circuit denied  
4 defendant's subsequent requests for reconsideration or rehearing of  
5 the Court's April 13, 2015 denial of defendant's urgent motion.

6 5. On December 12, 2016, twenty months after the Ninth Circuit  
7 had referenced the option of seeking an indicative ruling in district  
8 court on the Congressional appropriations language pursuant to Fed.  
9 R. App. P. 12.1, defendant filed his current Motion in this Court  
10 seeking such a ruling. Defendant noticed the hearing on the present  
11 Motion for January 9, 2017.

12 6. The government requests a continuance so that it can  
13 adequately respond to the Motion. Specifically, the government  
14 requests that it be given until at least January 19, 2017 to file its  
15 opposition, and that the hearing on the matter be set for January 30,  
16 2017, or a day thereafter convenient to the Court. Any optional  
17 reply may be filed by January 26, 2017, or a day convenient to the  
18 Court. The continuance is justified for the following reasons.

19 a. Government counsel has several pending matters, both  
20 in district court and on appeal. Although the Ninth Circuit's April  
21 15, 2015 order referenced the filing of an indicative motion in  
22 district court regarding language in the Congressional appropriations  
23 language, defendant did not file the motion until twenty months  
24 later, two weeks before Christmas, without any prior notice to the  
25 government or attempt to meet and confer under the local rules. See  
26 Local Civil Rule 7-3; Local Criminal Rule 57-1. Thus, government  
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1 counsel has had no opportunity, as it would in the normal course, to  
2 arrange its schedule to adequately respond to the motion.

3           b. The Motion was filed without advance notice less than  
4 two weeks before the Christmas holiday season. The undersigned has  
5 scheduled leave for 11 days starting on December 24, 2016. The  
6 requested continuance reflects the minimum time government counsel  
7 needs to properly respond to the motion. My co-counsel in this  
8 matter is no long with this office. Other government counsel who are  
9 likely to assist me in responding to the Motion have lengthy pre-  
10 planned leave similar to or more lengthy than mine.

11           c. Responding to the Motion will be burdensome. The  
12 motion is 17 pages with five exhibits totaling over 200 pages. The  
13 motion references a number of factual matters, hearings, and prior  
14 proceedings from a lengthy district court record. Defendant's motion  
15 is uncommon procedurally, for it is based on a request during the  
16 pendency of an appeal from district court proceedings that ended over  
17 five years ago. The government will thus need to research procedural  
18 aspects of the Motion, for which there may not be extensive direct  
19 precedent.

20           d. The motion is potentially consequential in that it  
21 seeks, among other things, to enjoin an agency of the United States  
22 from performing its duties.

23           e. The proposed continuance would not prejudice  
24 defendant. Defendant is on bond pending appeal, and has had ample  
25 time since the Ninth Circuit referenced the indicative proceeding in  
26 April, 2015 to prepare its Motion.

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