

LESSONS LEARNED: ACTING AS GUARDIAN/SPECIAL MASTER IN THE BAD NEWZ KENNELS CASE

By  
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*The United States District Court for the Eastern District of Virginia appointed Rebecca Huss as the guardian/special master of the pit bulls that were the subject of the case against Michael Vick relating to dog fighting. In April of 2007, the Surry County Sheriff's Department seized fifty-three pit bulls from Vick's home in Virginia. According to the facts set forth in the plea agreement, dogs on the property were killed and subjected to violent dog fights. Similar to human victims of abuse, the dogs needed someone to represent their best interests during litigation. Huss was in charge of determining whether each dog should be euthanized due to its inability to interact safely with humans or other animals or given a second chance at life in a new home. Huss explains her role as guardian/special master and how she made her determinations about each dog's destiny.*

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\* © Rebecca J. Huss 2008. Professor Huss is a law professor at Valparaiso University School of Law. This essay is dedicated to all the people who worked together to give these dogs a second chance including, but not limited to, the ones with whom she worked the most—the assistant U.S. attorneys at the U.S. Attorney's Office of the Eastern District of Virginia, the United States Department of Agriculture-Office of Inspector General agents, the Virginia shelters, and all of the rescue organizations where the dogs were permanently placed. It was a privilege for the author to work with them. Copies of many of the court documents relating to this case are available at <http://www.valpo.edu/law/faculty/rhuss> (last accessed Nov. 8, 2008) (select "Vick Court Documents").

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## I. INTRODUCTION

One phone call dramatically changed my plans for the fall of 2007. I arrived from teaching my Business Associations class at Valparaiso University School of Law to find a telephone message taped to my office door. It read: "Vick case prosecutor. Help take care of dogs—guardian ad litem."<sup>1</sup> I returned the call, and my involvement with the country's most notorious dog fighting case began.

On September 25, 2007, I was approached about becoming the guardian/special master for the American Pit Bull Terriers that were at the center of the case against National Football League star Michael Vick. Vick was accused of running a dog fighting ring out of his Bad Newz Kennels in Surry County, Virginia. This essay details aspects of my involvement as the guardian/special master in *U.S. v. Approximately 53 Pit Bulldogs* [hereinafter *Civil Case*],<sup>2</sup> as I took on a role that had never before been attempted in such a case. It begins with an overview of the civil and criminal cases. It then focuses on the questions I am frequently asked since my appointment. Finally, it discusses issues to be considered if the role of guardian/special master is appointed in future cases.

## II. DISTINGUISHING BETWEEN THE CRIMINAL AND CIVIL CASES: WHO PROTECTS THE VICTIM?

In the summer of 2007, Vick, then an Atlanta Falcons quarterback, faced federal charges of operating a dog fighting ring—he was accused of participating in the fights, procuring and training the pit bulls, and brutally executing the dogs.<sup>3</sup> Civil and criminal actions followed.

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<sup>1</sup> I later spoke with the Melissa Mundt, associate director for Academic Services, who took the message, and she told me that when she started writing down the message her first thought was that I could not possibly bring all those dogs to Valparaiso and take care of them. E-mail from Melissa Mundt, associate director of Academic Services, Valparaiso U. Sch. of Law to Rebecca Huss, Prof. of Law, Valparaiso U. Sch. of Law, *Quote* (Aug. 27, 2008) (on file with Prof. Huss).

<sup>2</sup> *U.S. v. Approximately 53 Pit Bulldogs*, No. 3:07CV397 (E.D. Va. July 2, 2007) [hereinafter *Civil Case*].

<sup>3</sup> ESPN.com, *Falcons' Vick Indicted by Grand Jury in Dogfighting Probe*, <http://sports.espn.go.com/nfl/news/story?id=2940065> (last updated July 18, 2007) (last accessed Nov. 8, 2008).

### A. Civil Action

The civil case of *U.S. v. Approximately 53 Pit Bulldogs* began on July 2, 2007, with the filing of a Verified Complaint in Rem.<sup>4</sup> “In rem” refers to involving or determining the “status of a thing.”<sup>5</sup> The “things” in this federal civil action were approximately fifty-three pit bulldogs that were seized by the Surry County’s Sheriff’s Department of Virginia in April 2007 from Bad Newz Kennels.<sup>6</sup> The seizure of the dogs was pursuant to the Animal Welfare Act Amendments of 1976 (“AWA”), which prohibit animal fighting ventures.<sup>7</sup> A subsection of the AWA provides that a warrant can be issued to seize any animal for “which there is probable cause to believe was involved in the violation of the section.”<sup>8</sup>

The civil case followed the procedures set forth in the statute requiring notice to individuals who the government believed may have an interest in the dogs.<sup>9</sup> Throughout August 2007, the civil action continued by executing an Arrest in Rem on the property<sup>10</sup> and a Request for Entry of Default.<sup>11</sup> On August 30, 2007, the court produced an order granting the United States’ request for a default judgment, and the dogs were forfeited to the government.<sup>12</sup>

### B. Criminal Action

The eighteen-page criminal indictment against Vick and his three co-defendants was filed on July 17, 2007.<sup>13</sup> The sole count was “Conspiracy to Travel in Interstate Commerce in Aid of Unlawful Activities and to Sponsor a Dog in an Animal Fighting Venture.”<sup>14</sup> This count was supported by the federal provision against conspiracy<sup>15</sup> citing to violations of the AWA and a general provision prohibiting the use of interstate commerce to further any unlawful activity.<sup>16</sup>

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<sup>4</sup> *Civil Case*, Verified Compl. in Rem 1 (July 2, 2007) (identifying the property as the pit bulldogs seized by the Surry County Sheriff’s Department “on or about April 25, 2007 from 1915 Moonlight Road, Smithfield, Virginia”).

<sup>5</sup> *Blacks Law Dictionary* 809 (Bryan A. Garner ed. 8th ed., West 2004).

<sup>6</sup> *Civil Case*, Verified Compl. in Rem 1 (July 2, 2007).

<sup>7</sup> 7 U.S.C. § 2156 (2006).

<sup>8</sup> 7 U.S.C.S. § 2156(f) (Lexis 2008).

<sup>9</sup> *Civil Case*, Ord. 1 (Aug. 30, 2007).

<sup>10</sup> *Civil Case*, Arrest in Rem (Aug. 22, 2007).

<sup>11</sup> *Civil Case*, Req. for Entry of Default (Aug. 24, 2007).

<sup>12</sup> *Civil Case*, Order 2 (Aug. 30, 2007) (The dogs were to remain in the custody of the U.S. Department of Agriculture pending a final order of disposition.).

<sup>13</sup> *U.S. v. Purnell A. Peace, Quanis L. Phillips, Tony Taylor & Michael Vick*, No. 3:07CR274 (E.D. Va.) [hereinafter *Criminal Case*], Indictment 1 (July 17, 2007).

<sup>14</sup> *Criminal Case*, Indictment 1.

<sup>15</sup> 18 U.S.C. § 371 (2000) (Conspiracy to Commit Offense or To Defraud United States providing of a penalty of no more than five years).

<sup>16</sup> 18 U.S.C. § 1952 (2006) (interstate and foreign travel or transportation in aid of racketeering enterprise); 7 U.S.C. § 2156.

At the time of the criminal indictment filing, the AWA dog fighting penalty was only one year in prison.<sup>17</sup> The penalty for violating the general conspiracy provision used in the criminal case was a maximum imprisonment of five years.<sup>18</sup>

This case dramatically raised the profile of the problem of dog fighting, primarily through the media's significant coverage. The day Vick entered his initial plea of not guilty, there was a "phalanx of news cameras across the street" from the federal courthouse along with protestors holding signs advocating the prosecution of dog fighters.<sup>19</sup> On the same day, at the Falcons training camp opening day, there was triple the number of media representatives in attendance compared with previous years even though Vick was not present.<sup>20</sup>

The *Vick* case also influenced law by changing dog fighting penalties. Following the case, the maximum imprisonment time for violations of the AWA animal fighting prohibition increased from one to three years, pursuant to the Animal Fighting Prohibition Enforcement Act.<sup>21</sup> In 2008, the passage of the Food Conservation and Energy Act increased the maximum time for imprisonment for dog fighting ventures to five years.<sup>22</sup> Furthermore, dog fighting became a felony in all fifty states in 2008, with Idaho and Wyoming being the last states to pass laws making it a felony.<sup>23</sup>

### C. Intertwining of the Civil and Criminal Actions—Restitution

On August 24, 2007, Vick pled guilty to conspiring to travel in interstate commerce in aid of unlawful activities and sponsoring a dog in an animal fighting venture.<sup>24</sup> He also admitted to helping kill six to eight of the dogs by methods such as hanging or drowning.<sup>25</sup> Vick agreed to pay for the costs associated with the disposition of the dogs in the civil action.<sup>26</sup> The costs of the restitution included, but were not limited to, "all costs associated with the care of the dogs involved in that cases, including if necessary, the long-term care and/or the humane euthanasia of some or all of those animals."<sup>27</sup> In addition, the plea agreement provided that Vick would forfeit all interests in the pit

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<sup>17</sup> 7 U.S.C. § 2156.

<sup>18</sup> 18 U.S.C. § 371.

<sup>19</sup> D. Orlando Ledbetter & Jeremy Redmon, *Cheers, Jeers, Media Circus Surround Vick*, Atlanta Journal-Const. A10 (July 27, 2007).

<sup>20</sup> Rodney Ho, *NFL: Falcons Training Camp Media Crush Meets Opening*, Atlanta Journal-Const. H8 (July 27, 2008).

<sup>21</sup> Pub. L. No. 110-22, § 2(a), 121 Stat. 88 (2007).

<sup>22</sup> 18 U.S.C.A. § 49 Enforcement of Animal Fighting Prohibitions (West 2008).

<sup>23</sup> Sandra Eckstein, *Downtime*, Atlanta Journal-Const. M4 (Apr. 20, 2008).

<sup>24</sup> *Criminal Case*, Plea Agreement § 1 (Aug. 24, 2007). *Criminal Case*, Plea Agreement, Summary of the Facts 2, 3, 9 (Aug. 24, 2007).

<sup>25</sup> *Criminal Case*, Plea Agreement, Summary of the Facts § 32 (Aug. 24, 2007).

<sup>26</sup> *Criminal Case*, Plea Agreement § 1, 1 (Aug. 24, 2007).

<sup>27</sup> *Id.*

bulldogs recovered from his residence in Virginia in April 2007.<sup>28</sup> The plea agreement acknowledged that the AWA would hold the owner of the forfeited animals liable for the costs incurred by the United States used to care for the animals.<sup>29</sup> Vick agreed to reimburse the United States for the costs of caring for the dogs that were the subject of the civil action.<sup>30</sup>

The U.S. Attorney's Office for the Eastern District of Virginia used Vick's restitution money to evaluate the dogs and find proper rescue organizations for them. The actual Restitution Judgment required Vick to pay \$928,073.04 for the costs of caring for the dogs.<sup>31</sup> A significant portion of this judgment was allocated to the federal government to care for the dogs while in federal custody.<sup>32</sup>

However, there was concern that Vick would not fulfill his obligation to pay the restitution.<sup>33</sup> As a result, the U.S. Attorney's Office filed a motion shortly before Vick's sentencing to restrict him from dissipating his assets.<sup>34</sup> Vick paid the restitution, and the rescue organizations received five thousand dollars for each dog that was likely to be rehabilitated and adopted by members of the public.<sup>35</sup> The rescue organizations also received \$18,275 for each dog that was likely to spend a significant amount of time, if not the dog's remaining lifetime, in a more restrictive environment such as a foster home or a sanctuary environment.<sup>36</sup>

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<sup>28</sup> The property was further identified as 1915 Moonlight Road, Smithfield, Virginia. *Criminal Case*, Plea Agreement § 15, 8 (Aug. 24, 2007). The number of dogs stated in the plea agreement was approximately fifty-four although the number used in the civil case always was "approximately fifty-three." *Civil Case*, Verified Compl. in Rem 1 (July 2, 2007).

<sup>29</sup> *Criminal Case*, Plea Agreement § 15, 9 (Aug. 24, 2007).

<sup>30</sup> *Id.*

<sup>31</sup> *Criminal Case*, Restitution Judm., 1 (Dec. 10, 2007).

<sup>32</sup> *Id.* at 5. Essentially, the Federal Government Asset Forfeiture Fund was used to pay the ongoing expenses for the care of the dogs, and the fund was reimbursed after the judgment was paid. *Id.* This also included the cost of the evaluation of the dogs by the ASPCA team in September, expenses incurred for the dogs placed in foster care prior to placement and the expenses of the guardian/special master. *Id.*

<sup>33</sup> The Government cited to multiple legal proceedings against Vick to recover money. *Id.* at 4. Vick has since filed for Chapter 11 bankruptcy. D. Orlando Ledbetter & Steve Wyche, *Vick Files for Chapter 11 Bankruptcy*, Atlanta Journal-Const. 1D (July 9, 2008).

<sup>34</sup> *Criminal Case*, Gov't's Mot. for Restraining Ord., 1 (Nov. 20, 2007).

<sup>35</sup> *Civil Case*, Ord., Summary Rpt. Guardian/Special Master 4 (Dec. 4, 2007) and *Criminal Case*, Restitution Judm. 3-4 (Dec. 10, 2007).

<sup>36</sup> *Civil Case*, Ord., Summary Rpt. Guardian/Special Master 4 (Dec. 4, 2007) and *Criminal Case*, Restitution Judm. 3-4 (Dec. 10, 2007). The stipend amount for the long term care dogs was listed at twenty thousand dollars per dog in the Summary Report of the Guardian/Special Master but the amount allocated by the court was \$18,275 per dog due to an estimate for the total cost of the restitution provided to Vick during plea agreement discussions. The estimate provided to Vick did not provide for any reimbursement of the cost of the care of a dog that could immediately be placed in a foster home environment. The rescue organizations that applied to take the dogs were informed that although the Plea Agreement contained a restitution provision, there was a possibility that there would be no funds available for the care of the dogs. Rescue Or-

### D. Sentencing

Vick was sentenced to twenty-three months in prison on December 10, 2007.<sup>37</sup> After his imprisonment, he will be under supervised release for three years,<sup>38</sup> and during that time he will not be allowed to purchase, possess, or sell any canines.<sup>39</sup> While Vick is now in prison, his legal troubles relating to dog fighting are not over. State charges of dog fighting and animal cruelty are outstanding.<sup>40</sup> The Commonwealth Attorney responsible for the case requested that the trials be postponed until after the defendants are released from federal prison.<sup>41</sup>

## III. HOW MANY DOGS WERE INVOLVED IN THE CASE?

### A. Dogs Transferred to the Federal Government

At the time of the initial seizure, all of the dogs on the property were dispersed to several animal shelters in Virginia.<sup>42</sup> Although the title of the civil action denotes approximately fifty-three pit bulldogs,<sup>43</sup> the United States Department of Agriculture Office of Inspector General's (USDA-OIG) records indicated only fifty-two pit bulldogs were involved in the case.<sup>44</sup> Of these fifty-two dogs, two dogs died prior to the dogs' transfer to the federal government, and one dog was transferred to her owner.<sup>45</sup> The team of certified animal behavior experts

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ganization Application (made available to the public on Oct. 26, 2007) § V(D) (available at <http://www.valpo.edu/law/faculty/rhuss/>) (last accessed Nov. 8, 2008).

<sup>37</sup> *Criminal Case*, Senten. Minutes 1, 3 (Dec. 10, 2007).

<sup>38</sup> *Criminal Case*, Senten. Minutes 1, 2 (Dec. 10, 2007).

<sup>39</sup> *Id.*

<sup>40</sup> Bill Geroux, *Surry Prosecutor Wants Vick; Official: Athlete Will Face Va. Case When Federal Term is Over*, Richmond Times Dispatch B10 (June 25, 2008). The possible penalty for the state charges is up to ten years in prison. *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Civil Case*, Arrest Warrant in Rem, Attachment A 1 (Aug. 23, 2007) (listing the location of the dogs) (on file with *Animal L.*).

<sup>43</sup> Generally with civil asset forfeiture proceedings, the title of the case includes "approximately" to provide some flexibility once the exact status of the property is known. See e.g. *U.S. v. Approximately 1,170 Carats of Rough Diamonds Seized at John F. Kennedy Intl. Airport on Jan. 13, 2004*, 2008 U.S. Dist. LEXIS 56734 (E.D.N.Y. July 22, 2008); *U.S. v. Approximately \$5,023.00 in U.S. Currency*, 2008 U.S. Dist. LEXIS 40748 (E.D. Cal. May 14, 2008); *U.S. v. 2004 Yukon Denali*, 2008 U.S. Dist. LEXIS 5585 (E.D. Cal. Jan. 23, 2008).

<sup>44</sup> *Civil Case*, Arrest Warrant in Rem, Attachment A (Aug. 23, 2007).

<sup>45</sup> *Id.* (The dog transferred to her owner was a Presa Canario.) E-mail from Clare Neuchterlein, asst. prof. of law, Valparaiso U. Sch. of Law to Rebecca Huss, prof. of law, Valparaiso U. Sch. Of Law, *Thinking of You -And . . .* (Aug. 18, 2008, 10:41 p.m. CDT). (Clare Neuchterlein, worked as an assistant U.S. attorney from 1989-2000 working on civil asset forfeiture matters along with other issues. During her tenure as an employee with the federal government, she was told that the seizure of live animals was complicated. The general rule was to try to avoid seizing "anything that eats or excretes" due to the difficulty housing and caring for the animals. Although all seized property has to be stored, there are obviously more challenges with "storing" live animals through the asset forfeiture process.)

assembled by the American Society for Prevention of Cruelty to Animals (ASCPA) evaluated the remaining forty-nine dogs between September 4 and 6, 2007.<sup>46</sup> After the evaluations, the team recommended that one of the dogs be euthanized due to her intense aggression toward humans.<sup>47</sup> This dog was euthanized early in October 2007.<sup>48</sup> Another dog was also euthanized due to medical reasons on November 10, 2007.<sup>49</sup> The remaining forty-seven dogs were placed with eight rescue organizations at the end of the process in December 2007.<sup>50</sup> One of these dogs placed with the Georgia SPCA died on June 27, 2008, due to injuries incurred during an automobile accident.<sup>51</sup> Forty-six dogs remained in federal custody.

### B. Dogs in Custody of the Commonwealth of Virginia

The Commonwealth of Virginia retained custody of nine beagles, two Rottweilers, and one Cane Corso.<sup>52</sup> These dogs were held at Surry County Animal Control. In mid-November 2007, these dogs were transferred to the Virginia Beach SPCA for evaluation and possible adoption.<sup>53</sup> By the end of the December 2007, six beagles and one Rottweiler had been adopted by members of the public.<sup>54</sup>

## IV. HOW DID YOU OBTAIN THE APPOINTMENT AS GUARDIAN/SPECIAL MASTER?

When I returned the call from the U.S. Attorneys Office I expressed some reservations I had about taking on the role of guardian/special master because my practice background was limited to transac-

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<sup>46</sup> *Civil Case*, Mot. for First Ord. as to Disposition 1, 2 (Oct. 1, 2007) (also found in *Civil Case*, Ord. Summary Rpt. Guardian/Special Master 1 (Dec. 4, 2007)) (on file with *Animal L.*).

<sup>47</sup> *Civil Case*, Mot. for First Ord. as to Disposition 1–2 (Oct. 1, 2007). This dog had a history of biting humans and the evaluation of the dog could not be completed. *Id.*

<sup>48</sup> *Civil Case*, First Ord. as to Disposition 1 (Oct. 1, 2007).

<sup>49</sup> *Infra* nn. 74–79 and accompanying text. (Discussing the medical condition of this dog and the decision to euthanize her).

<sup>50</sup> *Civil Case*, Ord. Summary Rpt. Guardian/Special Master 7–8 (Dec. 4, 2008).

<sup>51</sup> E-mail from Brandon Bond, Atlanta Pitbull Rescue, to Rebecca Huss, prof. of law, Valparaiso U. Sch. of Law, *One of Michael Vick's Former Pit Bulls Passed Away* (July 3, 2008); All or Nothing Pitbull Rescue, [http://atlantapitbullrescue.com/index.php?sub=press\\_release](http://atlantapitbullrescue.com/index.php?sub=press_release) (last accessed Nov. 8, 2008). This dog was named Aretha during my first trip to see the dogs in October. She was renamed “7” after the number on Vick’s jersey by her foster father in Georgia. I was told “7” also stood for “Lucky 7” because it is so rare for American Pit Bull Terriers to survive forfeiture. My memory of Aretha is of a scarred up “old” girl who was quite food motivated—she would sit nicely for a treat. The reports from her foster father prior to her death indicated that her training was going well and she had a strong bond with him.

<sup>52</sup> Dave Forster, *Beach SPCA Puts 9 Beagles Up for Adoption*, *The Virginian-Pilot* (Norfolk, VA) B3 (Nov. 14, 2007).

<sup>53</sup> *Id.*

<sup>54</sup> Susan E. White, *For Some Dogs, Finding a Home Isn't So Easy*, *The Virginian-Pilot* (Norfolk, VA) B1 (Dec. 25, 2007). The remaining Rottweiler was moved to a rescue group due to aggression issues. *Id.*

tional work. Mike Gill, the assistant U.S. attorney working on the criminal case, assured me that the U.S. Attorney's Office would be responsible for all the court filings, and my job was to concentrate on the dogs' welfare, work with the rescue organizations, and make recommendations about the disposition of the dogs.

After my conversation with Gill, I spoke with several colleagues (including one who regularly acts as a guardian ad litem to children) and the Dean of Valparaiso University College of Law. I also spoke with Assistant U.S. Attorney Wingate Grant, who was responsible for the civil forfeiture action. We discussed my general attitude about the project, as well as Grant's discussion about me with one of my former professors from University of Richmond School of Law.<sup>55</sup>

After these conversations, I was ready to fulfill my role. My colleagues and the Dean overwhelmingly supported my acceptance of the position even though my actions would be criticized regardless of the outcome. I believed that, because there are many myths circulating in the media about the behavior of American Pit Bull Terriers<sup>56</sup> that some people would criticize any decision that would allow for any of the dogs to eventually be placed into adoptive homes in the community. On the other hand, because there was the possibility that I would recommend the euthanization of one or more dogs, some people would say that I did not give the dog or dogs a fair opportunity, find alternative placement, or locate appropriate training that could have saved the dog or dogs.

I was curious about why Gill and Grant approached me, and I learned that Ledy VanKavage, an American Society for Prevention of Cruelty to Animals (ASPCA) employee recommended me when discussing the issue with the people at the ASPCA who were in communication with the U.S. Attorney's Office.<sup>57</sup> The U.S. Attorney's Office then researched my background<sup>58</sup> and read some of my recent publica-

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<sup>55</sup> I was actually quite impressed that this professor remembered who I was from my graduation more than fifteen years before. It probably helped that when I began teaching, the faculty at the University of Richmond School of Law had noted my entrance into the legal academy and had sent me a note of congratulations. It certainly is a good reminder that the legal world really is small.

<sup>56</sup> See generally Karen Delise, *The Pit Bull Placebo: The Media, Myths and Politics of Canine Aggression* (Anubis 2007) (detailing the history of the mischaracterization of pit bulls); see also e.g. Emily Stranger, *Pit Bull Problems Blamed on Owners*, *The Brunswick News* (July 2, 2008) (repeating the myth that pit bulls have a unique locking jaw mechanism).

<sup>57</sup> VanKavage later told me that she also told her colleagues at the ASPCA that she thought I would be organized and keep on top of any paperwork. VanKavage is a Senior Director of Legal Training and Legislation with the ASPCA. I had known VanKavage for a few years, and she was familiar with my work in the area of animal law. Telephone Interview with Ledy VanKavage, Sr. Director of Legal Training and Legislation, ASPCA (Aug. 27, 2008).

<sup>58</sup> As with most academics, quite a bit of my professional background is publicly available on my school's website. See <http://www.valpo.edu/law/faculty/rhuss/> (last accessed Nov. 8, 2008).

tions in the area of animal law.<sup>59</sup> Ultimately, I believe that I was asked to act as guardian/special master because I had experience with canine rescue organizations,<sup>60</sup> but I was independent of any specific organization.

Prior to my appointment, I spoke with the U.S. Attorney's Office to detail the process that I had envisioned to determine appropriate placements for each dog. There were several issues, such as indemnification and insurance requirements that the federal government (there were multiple agencies involved in the case) wanted to make certain were met by any of the organizations that were allowed to take the dogs. These issues would be included in any order appointing me as guardian/special master. On October 15, 2007, the United States District Court for the Eastern District of Virginia appointed me as guardian/special master to recommend the final disposition of the forfeited dogs.<sup>61</sup>

## V. WHY DID YOU NEED TO SEE THE DOGS IN VIRGINIA?

At the time of my appointment in October, the dogs were in six different municipal and county shelters in Virginia.<sup>62</sup> The team of experts assembled by the ASPCA had classified each dog into categories<sup>63</sup> that would lead to five possible disposition recommendations.<sup>64</sup> One of the reasons to visit the shelters was to see whether the dogs' behavior had changed since the September evaluation and to determine their current condition. Because I am not an expert on dog behavior, Tim Racer of Bay Area Doglovers Responsible About Pitbulls

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<sup>59</sup> My most recent publication was an article titled *Rescue Me: Legislating Cooperation Between Animal Control Authorities and Rescue Organizations*, 39 Conn. L. Rev. 2059 (2007).

<sup>60</sup> As part of my research for *Rescue Me: Legislating Cooperation Between Animal Control Authorities and Rescue Organizations*, I had interviewed persons in various types of rescue organizations, including Michael Mountain from Best Friends Animal Society.

<sup>61</sup> *Civil Case*, Second Ord. as to Disposition and Appointing Guardian/Special Master 2 (Oct. 16, 2007).

<sup>62</sup> *Civil Case*, Arrest Warrant in Rem Attachment A (Aug. 23, 2007).

<sup>63</sup> The first category was "Foster Care/Observation," dogs that showed no signs of aggression and were to be eventually placed in screened homes. The second category was "Law Dog," dogs that exhibited suitability for a specialized program because they were highly energetic and motivated. With proper training, these dogs could be placed with law enforcement agencies. The third category was "Sanctuary 1," dogs exhibiting fear or lack of socialization with people or other dogs. After controlled experiences with people, these dogs could be placed in foster homes. The fourth category was "Sanctuary 2," dogs exhibiting a threat to stimulus and arousal to people. These dogs were to be placed in a sanctuary with extensive breed experience. The final category was "Euthanization," dogs exhibiting intense aggression toward people or a medical condition requiring euthanasia. *Civil Case*, Mot. for First Ord. as to Disposition, 2 (Oct. 1, 2007).

<sup>64</sup> *Civil Case*, Mot. for First Ord. as to Disposition 2 (Oct. 1, 2007). In addition to written comments, each of the evaluations was recorded and I was able to view them as part of the process I used to determine my recommendations to the court.

("BAD RAP") accompanied me on my visit to the Virginia shelters.<sup>65</sup> We interacted with each dog and talked with caretakers at each shelter.

It was important to me that each dog be considered as an individual. During the trip to Virginia, Racer and I named each dog that had not already been given a name by the ASPCA evaluation team or the shelter workers.<sup>66</sup> From a practical perspective, the naming of the dogs made it much easier to reference them during the process. For all official documentation, the original kennel numbers, instead of the names, continued to be used.

The other reason to visit the Virginia shelters was to determine appropriate interim care and to begin the process of determining which dog would be best suited to the various rescue organizations.<sup>67</sup>

## VI. WHAT HAPPENED TO THE DOGS AFTER YOU WERE APPOINTED BUT BEFORE THE FINAL ORDER?

One of the provisions in the order appointing me as the guardian/special master was that I had the power to provide interim care for the dogs.<sup>68</sup> BAD RAP had previously communicated with the federal government about the possibility of foster care, instead of shelter care, for some of the dogs prior to the final court order.<sup>69</sup> By the end of the first week of my appointment, the federal government provided clearance for sixteen dogs to be transferred from their shelters to foster homes during the interim period.<sup>70</sup> This interim transfer to foster care benefited all those involved for two reasons. First, it was extremely positive for the dogs to be out of the shelter environment and in homes. Second,

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<sup>65</sup> *Civil Case*, Ord., Summary Rpt. of Guardian/Special Master 1 (Dec. 4, 2007). Racer had accompanied the team of experts that saw the dogs in September.

<sup>66</sup> For example, we named a dog Oliver (after *Oliver Twist*) because when I first saw him he looked quite forlorn in his kennel. Since the transfer of the dogs to the rescue organizations, most of the names have been changed as the unique personalities of each of the dogs became more evident.

<sup>67</sup> The rescue organizations had not yet had the opportunity to apply to take the dogs, but I knew that different rescue organizations had experience with various challenges that might be faced by the dogs.

<sup>68</sup> The interim period was the time from my appointment to the final disposition of the dogs. When I first spoke with the U.S. Attorney's Office, it was unclear how much time there would be to complete the application process with the rescue organizations and make my recommendations to the court. Ultimately it was decided that, if at all possible, the recommendations should be made early in December prior to Vick's scheduled sentencing on December 10, 2007, to be able to complete the restitution judgment at the same time. Of course, it was better for the dogs to be out of the shelter environment as soon as practicable.

<sup>69</sup> All the dogs that were in foster care during the interim period had been categorized as "Foster Care/Observation" dogs during the ASPCA assessment.

<sup>70</sup> Thirteen of the dogs were taken to the West Coast, while three stayed on the East Coast. Although BAD RAP made the arrangements, other rescue organizations also provided foster homes. It was made clear to each of the rescue organizations that placement of a dog or dogs during the interim period did not ensure that a dog would be placed with the organization permanently.

this transfer reduced the burden on the Virginia shelters that had been taking care of the dogs since April 2007.

For the dogs remaining in the shelters, because foster care was not available or appropriate, it was useful to have continuing feedback to assist in making my recommendations. The shelters and BAD RAP provided these services. Nicole Rattay, an experienced volunteer at BAD RAP, traveled to Virginia to begin interacting with the dogs early in November 2007. She provided me with daily reports about the dogs, detailing behavior and veterinary issues.<sup>71</sup> To facilitate her visits, some dogs were relocated and consolidated into two Virginia shelters.<sup>72</sup> Then, due to an unexpected staffing shortage at one of the Virginia shelters, eleven dogs were moved to the Washington Animal Rescue League (WARL) in Washington, D.C.<sup>73</sup> The caretakers at WARL provided regular medical and behavioral reports. The reports from the foster homes, Rattay (Virginia shelters), and WARL (Washington, D.C. shelter) made it easier to match up individual dogs with the appropriate rescue organizations.<sup>74</sup>

I returned to Virginia in November to interact with the dogs again and to facilitate the visits between the dogs and rescue organizations likely to be recommended. Rattay accompanied me on this visit. I also had the opportunity to observe evaluations of the dogs by a team from Best Friends Animal Sanctuary, which specializes in caring for animals with special needs.<sup>75</sup> By that point in time it appeared very likely that I would recommend that several dogs be placed with Best Friends. There are relatively few places in the United States that are true

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<sup>71</sup> Each evening, Rattay would e-mail her report to me. We also spoke frequently during this period of time.

<sup>72</sup> One dog stayed at Hopewell Animal Services throughout the entire period. Chesapeake Animal Control continued to provide care for several dogs. Virginia Beach Animal Control was very generous in agreeing to take on the responsibility of several additional dogs during the interim period.

<sup>73</sup> The Washington Animal Rescue League, <http://www.warl.org> (last accessed Nov. 8, 2008). The Washington Animal Rescue League has a newly renovated shelter with glass block kennels and other amenities that are generally not available at municipal and county shelters. One of the advantages of having the dogs at WARL was the on-site veterinary clinic enabling each of these dogs to be spayed or neutered prior to being transferred to the rescue organizations. All the remaining dogs were spayed or neutered within a short period after their transfer to rescue organizations.

<sup>74</sup> For example, according to Racer and Rattay, the dog that was being held at Hopewell Animal Services exhibited behavior that might indicate that he would be good for therapy work. The dog, who is now named Leo (the caretakers at the shelter called him "Bouncer" because he would dance in his kennel when you would approach him), was eager to interact with people and was receptive to training. The founder of Our Pack, Inc., Marthina McClay, is a professional trainer who is a strong proponent of American Pit Bull Terriers performing therapy work. Through a series of phone calls and video recordings (a site visit to Virginia was not feasible), McClay agreed that Leo would be a good fit with Our Pack. After training, Leo has turned out to be a natural at therapy work. Our Pack, Inc., *Leo's Story*, <http://www.ourpack.org/leo.html> (last accessed Nov. 8, 2008).

<sup>75</sup> Best Friends Animal Society. *About Best Friends Animal Society*, <http://www.bestfriends.org/aboutus/> (last accessed Nov. 8, 2008).

“sanctuaries” set up for long term care of animals, and Best Friends had the capacity and commitment to provide each dog the ability to thrive in that environment if a dog had to stay there for life.<sup>76</sup>

Each rescue organization had the opportunity to meet the dogs that I thought worked best with their organization. I based this determination on the organizations’ applications and my research on the organizations.<sup>77</sup> Within just a few days of that visit, I made my recommendations to the court as to the final placement of the dogs.<sup>78</sup>

## VII. LESSONS LEARNED

### A. *Meeting the Dogs and Their Caretakers*

I cannot imagine fulfilling my obligations without interacting with the dogs and their caretakers.<sup>79</sup> Interacting with the dogs, even briefly, along with reviewing the reports I received, made it feasible to match the individual dog’s needs with the strengths of each rescue organization.

During my visits I obtained information that was unavailable through regular reporting. For example, one dog, Oliver, appeared quite withdrawn and stressed during the first evaluation in September. He was not responsive to the various stimuli used during the evaluation. Although Oliver did not show aggression toward humans, he appeared extremely fearful of people. When Racer and I approached Oliver, he crouched down against the wall of his upper tier kennel and watched us closely. I began to wonder whether it was fair to keep Oliver alive when he was so clearly miserable. The September evaluation results were very discouraging, and it was unclear how many more months Oliver would be required to stay at the shelter. One of the animal control officers was assisting us in taking out each dog, and Racer and I told her that we did not want to stress Oliver by trying to remove him from the kennel. She then told us that when she cleaned his cage, he would place himself against her body. This showed that

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<sup>76</sup> All but one of the twenty-two dogs placed with Best Friends was placed in the Sanctuary 1 or Sanctuary 2 categories developed by the ASPCA team.

<sup>77</sup> It was important for the dogs’ interaction with people during this time to be as positive as possible, so I did not want the dogs to be evaluated multiple times by various organizations. In addition, it was important to respect the regular functioning of the shelters.

<sup>78</sup> I recommended that the dogs be placed with eight rescue organizations. Twenty-two dogs were placed with Best Friends Animal Society. Ten dogs were placed with BAD RAP. Four dogs were placed with the Richmond Animal League. Three dogs each were placed with the Georgia Society for Prevention of Cruelty to Animals, the SPCA of Monterey County, and Recycled Love, Inc. One dog was placed with Animal Rescue of Tidewater, and one dog was placed with Our Pack, Inc. *Civil Case*, Ord. Summary Rpt./Guardian Special Master 7–8 (Dec. 4, 2008).

<sup>79</sup> In my initial discussions with the U.S. Attorney’s Office, we considered whether I would be required to personally visit the dogs. Because no precedent existed for my position, the U.S. Attorney’s Office allowed me to determine whether I thought visiting the dogs was necessary.

Oliver may have had a chance of appropriately living and interacting with humans. Racer removed Oliver out of his kennel, and Racer and I sat with him for quite some time.

Specifically, there were two aspects of Oliver's behavior that Racer noted that might indicate Oliver's ability to bond with people given the right circumstances. The first is that when Oliver was allowed to roam on his own in a large enclosed area he would periodically "check back in with us"—circling back towards us and trotting over our legs even though at that point he was free to stay away from us. The second indication was that when Racer or I would hold Oliver closely, Oliver's body would relax against ours.

Oliver's case is a clear example of why my visiting the dogs was so important. If the animal control officer did not mention her interaction with Oliver, I may have decided it would be more humane to recommend he be euthanized. Because I looked beyond the reports, Oliver was placed with Best Friends Animal Society and is making progress in his recovery.<sup>80</sup> It has taken time, but Oliver's caretakers have reported that he now loves walks and sits before leashing and other activities such as being fed.<sup>81</sup>

### B. Importance of Interim Care and Veterinary Care

By the time I was appointed, the dogs had been in the Virginia shelters for more than five months. Many of the dogs had not had any

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<sup>80</sup> Best Friends Network, *One Step at a Time*, <http://network.bestfriends.org/news/postdetail.aspx?np=26215> (last accessed Nov. 8, 2008). Oliver also showed improvement with Rattay during the interim period, eventually becoming comfortable enough with her to take food out of her hand. Although this does not sound significant, given where Oliver started, it is major progress. Another example is Sweet Jasmine, a very withdrawn dog that had been moved to WARL. The official reports from WARL indicated that although her caretakers had made many efforts to make Sweet Jasmine more comfortable, she was not making any real progress. During my November visit to WARL, Rattay brought her out to the exercise area. (Like several dogs in similar condition, Sweet Jasmine had to be carried outside.) She remained very withdrawn and placed herself closely next to a brick wall. The September evaluation indicated that she had responded well to another dog, so I asked that a second dog (also a withdrawn female) be brought out to the yard. Sweet Jasmine reacted positively to the second dog. That of course, did not address the fear and withdrawal issues Sweet Jasmine had with people. On our way out of the building, one of the dogs' caretakers (a man who cleaned the kennels, not one of the trainers), stopped us and told us that Sweet Jasmine wagged her tail when he went into her kennel—and he demonstrated that for us. This behavior was not in any written report and did not occur with any other caretaker. Clearly it was due to the bond that Sweet Jasmine was able to develop with this man. Sweet Jasmine was placed with Recycled Love, Inc. and is being cared for in a foster home that has extensive experience with withdrawn dogs. She has made significant progress in learning how to trust humans, but it would have been difficult to make the decision to place Sweet Jasmine with Recycled Love without the conversation Rattay and I had with the caretaker.

<sup>81</sup> Kelli Ohrtmann, *Rehabilitating the Vick Dogs: Phase Two*, [http://www.startribune.com/pet\\_central/25573894.html?elr=karks8Da\\_3D:ayE7UeDa0D:ayE7UiD3aPc:\\_Yyc:aUU](http://www.startribune.com/pet_central/25573894.html?elr=karks8Da_3D:ayE7UeDa0D:ayE7UiD3aPc:_Yyc:aUU) (last updated July 17, 2008) (last accessed Nov. 8, 2008) (stating that "Oliver has learned to trust people and has now entered phase two of rehabilitation: training").

enrichment activities during that time.<sup>82</sup> I believe that many animal control officers would agree that a shelter environment is not ideal for long term care.<sup>83</sup> It is well researched that animals in shelters are subject to physical and psychological stress.<sup>84</sup> All of the dogs were amazingly resilient, but some appeared to be handling the shelter environment better than others. Allowing some of the dogs to enter into foster care along with Rattay's interaction with each of the shelter dogs in Virginia provided multiple benefits. First, the dogs clearly benefited from the attention. Second, the Virginia shelters (which had stepped forward to help the federal government) benefited from having some of the dogs leave before the final disposition.<sup>85</sup>

The importance of veterinary care is illustrated by the dog, Rose.<sup>86</sup> At the September evaluation, the ASPCA team noted that Rose exhibited signs of having a mammary tumor or other tumors.<sup>87</sup> Although the Virginia shelters were allowed to provide basic veterinary and emergency care, it would take additional government authorization to complete the tests necessary to treat this possible condition. Another problem was attempting to determine whether it would be beneficial to put Rose through this type of veterinary treatment if the ultimate decision was to euthanize her.<sup>88</sup> The evening after my visit with Rose in October, I requested the authorization to provide her with additional care. The government granted this authorization within twenty-four hours. As a result, Rose moved to a different shelter that had a better

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<sup>82</sup> For example, no toys or regular outside exercise were provided to most of these dogs. This was not the case in all of the shelters, but due to the dogs' status as custody dogs and a lack of resources, most of the dogs did not benefit from any enrichment activities prior to the interim period.

<sup>83</sup> This is a common problem for custody dogs. There are rarely formalized programs to deal with the issues with long term care. One example of these formalized programs is the Give a Dog a Bone program supporting San Francisco's Animal Care and Control. Give a Dog a Bone, <http://www.gadab.org/> (last accessed Nov. 8, 2008).

<sup>84</sup> See e.g., David S. Tuber et al., *Dogs in Animal Shelters: Problems, Suggestions and Needed Expertise*, 10 *Psychol. Sci.* 379, 380 (1999) (finding that the plasma levels of the stress related adrenal hormone cortisol were elevated in dogs in modern public shelters); Elly F. Hiby et. al., *Behavioural and Physiological Responses of Dogs Entering Re-Homing Kennels*, 89 *Physiol. & Behav.* 385, 388 (2006) (comparing cortisol levels in dogs that had not previously been in a shelter environment with dogs that had been returned to a shelter or that were strays).

<sup>85</sup> Rattay was willing to do whatever was necessary for the dogs' care, but the shelters continued to provide basic services (such as kennel cleaning and feeding) for the dogs. Rattay took care of providing exercise, toys to alleviate boredom and positive human interaction.

<sup>86</sup> *Civil Case, Ord.*, Summary Rpt. of Guardian/Special Master 3 (Dec. 4, 2007). Rose was named by the ASPCA team.

<sup>87</sup> It was quite obvious that there was something physically wrong with Rose. With just a visual inspection, it was apparent that her abdominal area was not normal.

<sup>88</sup> Rose had been categorized as a Foster Care/Observation Dog during the ASPCA team's evaluation. It is important to note that until the order granting custody of the dogs to the Federal Government in August, there were limitations with providing veterinary care to the dogs. In addition, it was not clear until the September evaluation that any of the dogs would be placed with a rescue organization.

physical environment for her. The veterinarian diagnosed a large growth in Rose's abdominal cavity and did not believe she would be a good candidate for surgery. Rose was transferred to a rescue organization for foster home care and was euthanized shortly thereafter.<sup>89</sup> It is unclear whether Rose's story would have ended differently if she had received veterinary care earlier.

It was difficult to provide veterinary care before the dogs became property of the federal government and the title to the dogs did not pass to the federal government until the end of August.<sup>90</sup> Fortunately, during my tenure as guardian/special master, it was easy to obtain federal government authorization for veterinary care for any dog, even when that care was extensive.<sup>91</sup>

### *C. Defining Your Role as Guardian/Special Master*

Because there had never been a guardian/special master appointed in a case like this, it was unclear what obligations or powers the court would provide me. Discussions with the U.S. Attorney's Office prior to the appointment allowed the opportunity to develop some of the parameters of the role. It was imperative for me to have the authority to consult with other individuals and organizations, to have access to the dogs, to allow others to have access to the dogs, and to provide for interim care.

One area of authority that was not mentioned in the court order was the power to provide for the euthanization of a dog for medical reasons. After one of the dogs had a post-surgical complication (from which he recovered fully), the U.S. Attorney's Office and I discussed a procedure for authorizing euthanization in these circumstances.<sup>92</sup> Certainly this is an issue that could have been better defined in the court order for the appointment.

The biggest issue in defining the role of guardian/special master is whether the role is even necessary. In this case, I believe it was useful to have a guardian/special master because it was useful to have an independent party to act as an intermediary between the federal government and the rescue organizations. As an attorney, I had the ability to assist with language that was needed for the documentation

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<sup>89</sup> Rose began having difficulty breathing, and a veterinarian recommended that she be euthanized. A later necropsy showed that there was extensive damage in Rose's abdominal cavity.

<sup>90</sup> *Civil Case*, Ord. 2 (Aug. 30, 2007). It is possible to provide veterinary care to maintain the dogs, but it would have been inappropriate to provide veterinary care that would change the dogs (such as spaying or neutering the dogs) prior to the time the dogs were forfeited to the federal government.

<sup>91</sup> For example, several of the dogs in one of the Virginia shelters developed kennel cough, and two of the dogs developed pneumonia. One of the dogs required extensive emergency care during the weekend prior to the submission of my report to the Court and the USDA-OIG approved the provision of that care.

<sup>92</sup> The euthanization could occur with my concurrence and that of the Assistant Special Agent-in-Charge of the case at the USDA-OIG.

required in the case.<sup>93</sup> In other situations, I think that there will likely be sufficient protection for the dogs by virtue of granting of the custody of the animals to a local humane society or rescue organization.<sup>94</sup> If the organization that has been granted custody of the dogs has the ability and willingness to find appropriate placements for any dog involved in a dog fighting or abuse case, it would not be necessary to have someone assisting in that position. An example of a situation where a guardian or special master would be useful is if an organization has a policy of never adopting out the particular breed of dog at issue, or if the organization is located in an area with a breed ban for the type of dog involved in the case. In that situation, a guardian or special master may be able to provide a court with recommendations for alternative placements for the dogs.

#### *D. Response of the Public and Media Coverage*

Nothing prepared me for the response from the media and the public when I was appointed as guardian/special master. I received numerous e-mails and telephone calls from concerned citizens expressing their ideas about the case.<sup>95</sup> Although many people contacted me, I know that even more contacted the U.S. Attorney's Office and the judge to say that these dogs deserved a chance. I believe the public's attitude about these dogs made a significant difference in the outcome of this case.

Members of the media began trying to contact me immediately after the order of appointment was filed.<sup>96</sup> All media requests were routed to the outside consultant my law school retains to assist with media issues. This was important not only because of the ongoing criminal matter (thus it was inappropriate to comment on the "evidence" in the case), but also to enable me to focus on the dogs.

Even my limited exposure to the media during the press release associated with the application process for the rescue organizations was quite frustrating and time consuming.<sup>97</sup> I was also frustrated by

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<sup>93</sup> One example was the ability to explain to non-lawyers the basis for the language in the documents required by the federal government.

<sup>94</sup> This presumes that the local organization desires the custody of the animals and is willing to treat each of the animals as an individual.

<sup>95</sup> The vast majority of concerned citizens asked me to try to save the dogs, although a few advocated the immediate euthanization of all the dogs. The judge in this case, U.S. District Judge Henry E. Hudson, reported that he received more than three thousand letters from people, and his secretary was getting two hundred phone calls a day. *Fox on the Record with Greta Van Susteren*, "Interview with Judge Henry Hudson" (Fox News Network, LLC Jan. 20, 2008) (TV broad., transcr. available in Lexis, News library).

<sup>96</sup> One of the first calls was from an Atlanta newspaper at my home number late in the evening just hours after the order for my appointment had been signed. The order had been signed after 5 p.m.

<sup>97</sup> The process for sending out the press releases was time consuming in part because there were several people involved. I would provide information to the outside consultant to the law school. He would draft up a press release, and then I would review

the fact that even though it was made quite clear in the press releases that all inquiries were to go to the outside consultant, reporters still contacted me directly—at my work, home and cell phone numbers, and via e-mail. Each time this occurred, I would have to refer them to the outside consultant.

There was another surge of media interest once all the defendants in the case were sentenced.<sup>98</sup> Although I am happy to speak of my role and the importance of treating animals individually, responding to the media was challenging. One particular challenge is that myths and misstatements appear to regularly go uncorrected in the media. For example, one misstatement I have seen repeatedly is that there was a “court order” or “gag order” on the rescue organizations’ ability to talk with the media about the dogs.<sup>99</sup> In actuality, the rescue organizations, pursuant to the agreements between each of them and the USDA-OIG, agreed they would refrain from talking about the dogs until after the last defendant in the case was sentenced. This was done because the dogs were considered evidence in the case, and it would be inappropriate for there to be public comments on the status of the dogs until after the last defendant in the case was sentenced.

### VIII. THE REWARD

The most significant reward for me in this case was the opportunity to interact with the dogs. Just like with other animals that I have dealt with in my life, these dogs taught me a lesson. In this case, the dogs demonstrated how to survive in difficult circumstances. I also feel fortunate that I was able to meet and work with so many quality people throughout the process. I was impressed with the responsiveness and efficiency of the people I worked with at the federal government, and I continue to be awed by the work that rescue organizations do every day to help animals. It really was an honor to be asked to participate in this case.

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and edit the material. There was frequently more than one draft of each release. Before any press release was issued, the Public Information Officer for the U.S. Attorney’s Office would clear the issuance of the document.

<sup>98</sup> The last defendant was sentenced January 25, 2008. Frank Green, *Man Gets Three Years Probation in Vick Case*, Richmond Times-Dispatch (Jan. 26, 2008).

<sup>99</sup> See e.g. Matthew Dolan, *Vick’s Pit Bulls Skittish, Scared No Longer*, Journal-Gazette 3D (Feb. 4, 2008) (stating that until “Jan. 25, groups . . . had been unable to provide details about the 47 dogs taken from Vick and placed in their care because of a gag order”); Tim Eberly, *Smyrna Man to Foster 3 of Vick’s Pit Bulls*, Atlanta Journal-Constitution, B3 (Jan. 24, 2008) (stating that some of the restrictions, regarding disclosing information about the dogs “will be lifted Friday when a federal gag order in the Vick dog fighting case is set to be lifted”); John Simerman, *As Scars Fade, Homes Await “Vick Dogs” After Rescue, Recovery, Former Fighting Pit Bulls Meet Media, Wag and Play*, Contra Costa Times A1 (Jan. 26, 2008) (stating that the “final defendant’s sentencing Friday lifted a gag order”).

