

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

SENATOR VINCENT D. FORT)
and GEORGE ANDERSON,)
)
Plaintiffs,)

Civil Action File No.:

v.)
)
RENEE S. UNTERMAN,)
in her individual and)
official capacity as)
Chairman of the Georgia)
Senate Ethics Committee,)
)
Defendant.)
)

**PLAINTIFFS' BRIEF IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

This suit raises a single constitutional question: Do the confidentiality provisions of Georgia State Senate Rule 1-4.11(c) violate Plaintiffs' constitutional rights to free speech and to petition? A long line of decisions have answered "yes," relying in significant part on the Supreme Court's seminal decision in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). By this motion, Plaintiffs seek a preliminary injunction against enforcement of Rule 1-4.11

pending a final ruling declaring that Rule 1-4.11 is unconstitutional and enjoining its enforcement.

I. FACTUAL BACKGROUND

Consistent with the discreet legal issue presented, the pertinent facts are few. Plaintiff Vincent D. Fort is a four-term Georgia State Senator who previously has filed ethics complaints with the Georgia Judicial Qualifications Commission and with other governmental entities. *See Verified Complaint ("Compl.")* ¶ 3. Plaintiff Georgia Anderson regularly monitors the activities of Georgia legislators, and has filed ethics complaints with the Georgia State Ethics Commission and other entities challenging certain activities of Georgia legislators. *Id.* ¶ 4. Both Plaintiffs expect, in the normal course of conducting their affairs, to file complaints with the Georgia Senate Ethics Commission and to speak publicly regarding such complaints. *See id.*

Defendant Renee S. Unterman is the chairman of the Georgia Senate Ethics Committee and the person with responsibility for enforcing the ethics rules for the Georgia State Senate, including rules governing confidentiality. *Id.* ¶ 5.

At the beginning of the 2006 session, the Georgia Senate re-enacted Georgia Senate Rule 1-4.11, a provision from the 2005 session rules that governs "Ethics Complaints." Compl. ¶¶ 6-7 & Ex. A. Subsection (a) of Rule 1-4.11

authorizes the filing of an ethics complaint "by any Senator or staff or others who are directly involved in legislative activity or business." *Id.* ¶ 8. The complaint must "specifically describe the nature of the alleged violation" and must be signed and "verified under oath." *Id.* (citing Rule 1-4.11(a)).

Once an ethics complaint is filed, it is investigated by the Committee (although there is no time limit for the investigation). Compl. ¶¶ 8-9. During this investigation, the complaint must be kept confidential. *Id.* ¶ 10. A written report regarding the investigation is presented to the Committee, which must determine if "substantial cause" exists that a violation occurred. *Id.* ¶ 11. If the Committee does not find "substantial cause to determine that a violation has occurred," the complaint is dismissed and must remain confidential. *Id.* ¶¶ 10-12.

The critical language mandating confidentiality provides as follows:

Any complaint brought by or before the Committee shall remain confidential until the Committee has determined that substantial cause exists that a violation occurred. If the Committee determines that substantial cause does not exist that a violation occurred, the complaint shall remain confidential.

Rule 1-4.11(c) (emphasis added).

Thus, pursuant to subsection (c), all complaints must be kept confidential pending the completion of the Committee's investigation, and any complaints

found by the Committee to lack substantial cause must be kept confidential forever. A later subsection of Rule 1-4.11 confirms that "the confidentiality provisions contained herein" must not be "abridged." Rule 1-4.11(i).

The effect of Rule 1-4.11 is to prohibit a complaining party from ever disclosing the contents of an ethics complaint ultimately rejected by the Committee; from ever criticizing the rejection of an ethics complaint by the Committee or the rules and procedures leading to the rejection; and from disclosing the contents of any ethics complaint, regardless of merit, pending the completion of the Committee's initial investigation.

II. ARGUMENT AND CITATIONS OF AUTHORITY

A preliminary injunction is appropriate when the movant establishes: "(1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered unless the injunction is issued; (3) the threatened injury to the moving party outweighs whatever damage the proposed injunction might cause the non-moving party; and (4) if issued, the injunction would not be adverse to the public interest." *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Seros., LLC*, 425 F.3d 964, 968 (11th Cir. 2005); *This That and the Other*

Gift and Tobacco, Inc. v. Cobb County, Ga., 285 F.3d 1319, 1321-1322 (11th Cir. 2002).

Plaintiffs¹ satisfy each of these requirements.

A. Plaintiffs are Likely to Succeed on the Merits of their Claim

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech, or the press; or the right of the people ... to petition the Government for a redress of grievances." U.S. Const. amend. I. The Georgia Constitution similarly provides, "No law shall be passed to curtail or restrain the freedom of speech or of the press.." Ga. Const. Art. I, § I, ¶ V. The type of speech regulated by Rule 1-4.11, concerning alleged governmental misconduct, "traditionally been recognized as lying at the core of the First Amendment." *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (statute which proscribes witness from disclosing grand jury testimony unconstitutional); *see*

¹ Both Plaintiffs are expressly authorized to file ethics complaints by Rule 1-4.11 (and therefore subject to its confidentiality provisions) and both Plaintiffs regularly file ethics complaints in the normal course of their affairs. Accordingly, both have standing to challenge Rule 1-4.11. *See, e.g., Jacobs v. The Florida Bar*, 50 F.3d 901, 904-905 (11th Cir. 1995) (standing proper where plaintiff intended "to engage in a specific course of conduct 'arguably affected with a constitutional interest'" (quoting *ACLU v. The Florida Bar*, 999 F.2d 1486, 1492 (11th Cir. 1993)); *International Society for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 817-819 (5th Cir. 1979) (standing proper where "allegedly unconstitutional statute interferes with the way the plaintiff would normally conduct his affairs"); *see also Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1309 (11th Cir. 2000) (standing to bring facial challenge where parties sought to engage in constitutional speech that ordinance would restrict).

also *Providence Journal Co. v. Newton*, 723 F. Supp. 846, 852 (D.R.I. 1989) (similarly describing "speech about the conduct of officials" as "core" free speech in invalidating provision mandating confidentiality of ethics complaints).

In this case, it cannot be disputed that Rule 1-4.11 expressly limits speech on a specific subject, i.e., ethics complaints filed against a legislative official. Accordingly, Rule 1-4.11 indisputably is a content-based prior restraint subject to strict scrutiny. See *Cooper v. Dillon*, 403 F.3d 1208, 1214-1216 (11th Cir. 2005). "Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *United States v. Playboy Entertainment Group*, 529 U.S. 803, 812, 818 (2000) ("The Government's content based burdens must satisfy the same rigorous scrutiny as its content-based bans It is rare that [such] a regulation ... will ever be permissible.").

1. The Supreme Court's *Landmark* Decision

In the seminal case analyzing confidentiality requirements for governmental proceedings, the Supreme Court held unconstitutional, as applied to the news media, a state law that criminally punished anyone who disclosed information about judicial ethics proceedings. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). In *Landmark*, a Virginia newspaper published an accurate article reporting that a state judge was the subject of a pending

disciplinary investigation. *Id.* at 831. The newspaper was subsequently convicted under a Virginia statute making it unlawful to identify any judge who was the subject of an investigation by the state commission. *Id.*

When the newspaper challenged the law on First Amendment grounds, the state argued that maintaining the confidentiality of the judicial disciplinary system was a compelling interest because investigations of misconduct would be impeded, and the reputation of judges unjustly discredited, if accusations of wrongdoing were permitted to circulate among the public. *Id.* at 840. The Supreme Court disagreed, finding that dissemination of information regarding the proceedings "clearly served th[e] interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect," such that any punishment of such speech raises concerns that rest "near the core of the First Amendment." *Id.* at 838-839.

When set against the right to publish information about judicial review proceedings, Virginia's concerns about the "pernicious effects of public discussion" were insufficient:

[N]either the Commonwealth's interest in protecting the reputation of its judges, nor its interest in maintaining the institutional integrity of its courts is sufficient to justify the subsequent punishment of speech at issue here, even on the assumption that criminal sanctions do in fact enhance the guarantee of confidentiality. Admittedly, the Commonwealth

has an interest in protecting the good repute of its judges, like that of all other public officials. Our prior cases have firmly established, however, that injury to official reputation is an insufficient reason "for repressing speech that would otherwise be free."

Id. at 841-842 (citations omitted).

After looking "behind the legislative determination[s] and examin[ing] for itself" the rationales advanced by Virginia, the Court concluded that Virginia's evidence of a "direct and substantial threat" to the administration of justice "falls far short" and found Virginia's punishment of speech about confidential judicial review proceedings unconstitutional. *Id.* at 845.

2. *Landmark's Progeny*

In the wake of *Landmark*, numerous courts have struck down confidentiality provisions applicable to governmental proceedings. One of the leading cases is the decision of the United States District Court for the Southern District of Florida in *Doe v. State of Florida Judicial Qualifications Commission*, 748 F. Supp. 1520 (S.D. Fla. 1990). The plaintiff in *Florida JQC* filed a complaint against a county judge who allegedly discriminated against a person with AIDS by both threatening contempt and removing the person from the judge's courtroom upon discovering his HIV status. As with Rule 1-4.11, the confidential provisions in *Florida JQC* provided that "all proceedings by and before the commission shall be

confidential" and "permanently barred" disclosure of the filing or disposition of a complaint unless the Florida JQC found probable cause. *Id.* at 1521-23.

The plaintiff sought declaratory and injunctive relief against the Florida confidentiality provision on its face and as applied, arguing that the provision violated the First Amendment and was overbroad under the Fourteenth Amendment.² The Florida JQC argued both that the regulation was a valid "time, place and manner" restriction and that the provision was justified by numerous interests in supporting secrecy. Then-District Judge Stanley Marcus first rejected the time, place and manner argument:

In the instant case, the JQC has not presented any non-content related justifications for the confidentiality rule. Rather, each of the stated justifications for the rule - avoidance of the complaint mechanism being used as a sounding device for unfounded complaints; protection of the privacy of state judges; facilitation of investigations; and the state interest in upholding the reputations of and public confidence in individual judges as well as the judiciary as an institution - are all directly related to the content of the prohibited speech

² The confidentiality provisions of Rule 1-4.11 are also overbroad, and therefore facially unconstitutional. In the First Amendment context, the overbreadth doctrine applies to invalidate statutes even where some applications of the statute are valid. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). The rule is "based on an appreciation that the very existence of some broadly written laws has the potential to chill the expression of [persons] not before the court." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129 (1992); *see also Secretary of State of Maryland v. Munson*, 467 U.S. 947 (1984); *Broadrick v. Oklahoma*, 413 U.S. 602, 612 (1973). For the reasons stated herein, Rule 1-4.11 sweeps "a substantial amount of protected speech" within its unnecessarily overbroad confidentiality provisions. *See City of Houston v. Hill*, 482 U.S. 451, 466 (1987).

rather than any secondary effects emanating from the speech. Accordingly, the provision may not be justified simply as a content-neutral time, place and manner restriction

Moreover, the confidentiality provision as applied to the facts of this case also fails to pass muster as a time, place and manner restriction since the Plaintiff is left with no alternative means of communicating the fact that he has filed a complaint against a judge with the JQC. In instances such as these where formal charges will not be filed with the Florida Supreme Court, the complainant is forever barred from comment on the fact that a complaint has been filed. Therefore, the rule is manifestly not justifiable as a mere time, place and manner restriction.

Id. at 1523-1525. *Accord Baugh v. Judicial Inquiry and Review Comm'n*, 907 F.2d 440, 443-45 (4th Cir. 1990) (Virginia Judicial Review and Inquiry Commission's secrecy provision was "inescapabl[y]" related to the content of speech" because it "silences all speech related to the actual filing of a complaint").

Next, Judge Marcus comprehensively addressed each of the numerous interests advanced by the Florida JQC,³ placing them in four categories before rejecting them as insufficient:

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- ³ The interests asserted by the Florida JQC were:
- a. To prevent a complainant who might have self-serving motives from publicly discussing the fact of filing of a complaint that may prove to be unfounded until a preliminary investigation has been completed;
 - b. To minimize the risk of injury to the reputation of a judicial constitutional officer caused by any adverse publicity from unfounded complaints;
 - c. To maintain the public's confidence in its judicial officers by preventing the premature disclosure of the fact of filing of a complaint that may

Reputational Considerations. Based upon Landmark, the court concluded that any threat to the judges' reputational interests was (1) "insufficient" because complaining persons nevertheless remained free to disclose the gravamen of their complaints; (2) "unconvincing" because "forced silence ... is more likely to engender resentment and suspicion than promote confidence or integrity"; and (3) "overbroad" because the confidentiality also covered true complaints and those not addressed on the merits. *Id.* at 1526-1527.

Bully Pulpit. The Florida JQC's claim that disclosure of the filing of a complaint would unfairly add legitimacy to charges was (1) not "persuasive" because the danger that persons would "overvalue" a JQC complaint was "illusory" in light of people's general "familiar[ity] with the fact that frivolous complaints are frequently filed" and (2) "overbroad" because the scope of confidentiality was not limited to frivolous complaints. *Id.* at 1527-28.

ultimately prove to be unfounded;

d. To protect the complainant and witnesses from possible pressure and recrimination;

e. To facilitate the investigation of a complaint;

f. To prevent the potential use of a constitutional agency to help injure the reputation of a judge;

g. To protect the constitutional right of privacy of a member of the Florida Bar who is also a constitutional officer--a judge;

h. To assure that the public policy behind the subject constitutional provision as adopted by the citizens of the State of Florida is protected consistent with the will of the people.

Facilitation of Investigations. The court found that the confidentiality rule did not facilitate investigations because even without compelled secrecy "the complainant remains equally free not to reveal the fact that a complaint has been filed." But more importantly, disclosure "may well have the effect of furthering the investigation" by prompting witnesses to come forward. *Id.* at 1528.

Protection of Privacy Interests. The court found that "no privacy interests which are even colorably implicated [by] revelation of a complaint concerning a public act by a sitting judge in open court." *Id.* at 1528-29.

Having found that the Florida JQC "failed to set forth any compelling interests alone or in concert to justify" the perpetual bar on disclosure of the fact of filing a complaint, Judge Marcus enjoined the Florida constitutional provision and any contempt proceedings thereunder. *Id.*

Numerous other courts, addressing similar confidentiality provisions for judicial review commissions and other similar bodies, have routinely found that broad confidentiality rules violate the First and Fourteenth Amendments:

- *Doe v. Gonzalez*, 723 F. Supp. 690, 693-694 (S.D. Fla. 1988), *aff'd w/o opinion*, 886 F.2d 1323 (11th Cir. 1989) (finding unconstitutional state law preventing disclosure of complaints to Florida Ethics Commission because

"the interests asserted by defendants herein are no more compelling than those asserted in Landmark");

- *First Amendment Coalition v. Judicial Inquiry and Review Board*, 784 F.2d 467, 477-479 (3d Cir. 1986) (en banc) (contempt sanction for disclosure of proceedings before Pennsylvania Judicial Inquiry and Review Board "runs afoul of the First Amendment as [an] impermissibly broad prior restraint" because a "person having knowledge about the conduct of a judge, favorable or otherwise, might be forever barred from speaking, writing, or publishing");
- *Lind v. Grimmer*, 30 F.3d 115, 118 (9th Cir. 1994) (Hawaii Campaign Spending Commission rule "forever" prohibiting disclosure of information concerning investigations found to lack probable cause is a "content based" and "overbroad" regulation of speech "antithetical" to the First Amendment);
- *Doe v. Supreme Court of Florida*, 734 F. Supp. 981, 987 (S.D. Fla. 1990) (Florida Bar rule "forever" barring disclosure regarding bar disciplinary proceedings and punishing disclosure with contempt is a "content based" and "overbroad" restriction on speech "that engender[s] resentment, suspicion and contempt for Florida's Bar");

- *Providence Journal Co. v. Newton*, 723 F. Supp. 846, 850-859 (D.R.I. 1989) (Rhode Island Ethics Commission confidentiality rule which "serve[s] to black out, prior to final adjudication of the merits, all public discussion of the existence and contents of a complaint" and punishing disclosure by contempt is a "prototypical content based regulation of speech" that "attempt[s] to apply the test of truth to the public airing of grievances" – "the essence of unconstitutional censorship");
- *Petition of Brooks*, 678 A.2d 140, 141-145 (N.H. 1996) (New Hampshire Professional Conduct Committee confidentiality rule "forever" barring disclosure of fact that complaint filed and punishing disclosure by contempt is overbroad and an unconstitutional content-based restriction of speech regarding the "workings of the attorney disciplinary process");
- *Doe v. Doe*, 127 S.W.3d 728, 732-736 (Tenn. 2004) (invalidating as unconstitutional provision prohibiting disclosure of complaints against attorneys "until and unless" Board of Professional Responsibility files a recommendation for the imposition of public discipline with Supreme Court; even assuming state might have a compelling interest in maintaining the integrity of pending investigation, provision at issue was not "sufficiently narrowly drawn" to further that interest because it

"prohibits disclosure of such information even after a determination of probably cause for the filing of formal charges");

- *R.M. v. Supreme Court*, 883 A.2d 369, 377-381 (N.J. 2005) (holding that provision prohibiting disclosure of all complaints against attorneys pending investigation and permanently barring disclosure of non-meritorious complaints "violates the First Amendment because it is not narrowly tailored to advance a compelling interest"; "Fostering an environmental where individuals are free to criticize government is precisely what the First Amendment is designed to do.");
- *Kamasinski v. Judicial Review Comm'n*, 44 F.3d 106, 108-112 (2d Cir. 1992) (disagreeing with other authorities regarding constitutionality of confidentiality provision during investigation, but nevertheless rejecting permanent ban following investigation: "Once the JRC has determined whether or not there is probable cause that judicial misconduct has occurred, even Connecticut's most compelling interests cannot justify a ban on the public disclosure of allegations of judicial misconduct.").

Thus, following *Landmark*, the federal courts unanimously have invalidated permanent bans on the disclosure of ethical complaints, and virtually

all decisions similarly have rejected even limited confidentiality bans pending investigation.

3. Georgia's Constitution Prohibits Prior Restraints on Speech

On the issue of content-based prior restraints, Georgia law is, if anything, even more protective of free speech than federal law. *Cf. Statesboro Publ'g Co. v. City of Sylvania*, 271 Ga. 92, 95, 516 S.E.2d 296, 299 (1999) ("Our state constitution provides even broader protection of speech than the first amendment.")

The Georgia Supreme Court has recognized that the Georgia Constitution's prohibition against laws that "curtail or restrain the freedom of speech" means what it says and therefore precludes the enactment of any law "that does curtail or restrain" speech. *K. Gordon Murray Prod., Inc. v. Floyd*, 217 Ga. 784, 793, 125 S.E.2d 207, 214 (1962). In accordance with this broad protection, the Georgia courts have implemented a nearly categorical prohibition against preliminary injunctions restraining allegedly libelous statements:

Consistent with this Court's firm policy to protect the right of free speech, we apply the general rule that equity will not enjoin libel and slander, and therefore reverse the grant of the interlocutory injunction on the ground that it constitutes an impermissible prior restraint.

Cohen v. Advanced Medical Group of Ga., Inc., 269 Ga. 184, 185, 496 S.E.2d 710, 711 (1998) (citing, *inter alia*, *High Country Fashions, Inc. v. Marlenna Fashions, Inc.*, 257

Ga. 267, 268, 357 S.E.2d 576, 577 (1987), and *Georgia Society of Plastic Surgeons, Inc. v. Anderson*, 257 Ga. 710, 715, 363 S.E.2d 140, 144 (1987)).

4. Application to Rule 1-4.11

An unbroken line of federal decisions mandate the finding that Rule 1-4.11, by forever barring disclosure of an ethics complaint deemed to lack "substantial cause," violates the First and Fourteenth Amendments. As the *Providence Journal* court explained, the constitutional interests underlying *Landmark* and its progeny are at their zenith where, as here, the confidentiality provision prohibits speech regarding the conduct of elected governmental officials such as state senators:

Surely if public discussion of the courts and of the conduct of judges "are matters of utmost public concern," discussion of which "the First Amendment was adopted to protect," how much closer to the First Amendment's core must lie speech about the conduct of officials in the legislative and executive branches of government, which conduct our electoral system of government routinely and deliberately subjects to intensive public scrutiny and criticism as the principle means of ensuring the accountability of the governors to the governed.

723 F. Supp. at 852 (emphasis added).

Viewing Rule 1-4.11 through the prism of Georgia's heightened protection of speech confirms that even the temporary limitation on disclosure pending investigation cannot stand. The express function of Rule 1-4.11 is to "curtail [and] restrain" speech regarding alleged ethical violations by Georgia State

Senators, in violation of Ga. Const. Art. I, § I, ¶ V. By categorically prohibiting disclosure of alleged ethical violations pending completion of the Committee's investigation, Rule 1-4.11 functions as an automatic preliminary injunction of presumptively "libelous" accusations against Georgia's legislators. Thus, the Georgia Senate provides for itself precisely what it could not receive from a Georgia court: an injunction against alleged "libel and slander."

In sum, Senate Ethics Rule 1-4.11 silences exactly the type of criticism of elected governmental officials repeatedly characterized as lying at the core of the First Amendment. Accordingly, Plaintiffs are likely to succeed on the merits of their claim that the confidentiality provisions of Rule 1-4.11 are unconstitutional. A preliminary injunction should issue prohibiting enforcement of Rule 1-4.11 pending the resolution of this action.

B. A Substantial Threat Of Irreparable Injury Exists If The Injunction Is Not Granted

Plaintiffs have no adequate remedy at law for the deprivation of their free speech and due process rights. Plaintiffs' compelled silence about the operations of government is an irreparable harm of the highest order. *See ACLU v. The Florida Bar*, 999 F.2d 1486, 1492 (11th Cir. 1993). As the Supreme Court has stated, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347,

373-376 (1976) (affirming order directing district court to enter preliminary injunctive relief). *See also Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983).

C. The Balance of Hardships Weighs in Plaintiffs' Favor

Balanced against Plaintiffs' right to free speech are interests already rejected as insufficient under *Landmark* and its progeny.

D. A Preliminary Injunction Would Promote The Public Interest

Finally, and for all the reasons set forth above, the entry of a preliminary injunction would promote, not disserve, the public interest. As Judge Sloviter observed, "[n]o long string of citations is necessary to find that the public interest weighs in favor of having access to a free flow of constitutionally protected speech." *ACLU v. Reno*, 929 F. Supp. 824, 851 (E.D. Pa. 1996) (three-judge panel) (Sloviter, Chief Circuit Judge), *aff'd*, 521 U.S. 844 (1997); *see also Turner Broadcasting System v. FCC*, 512 U.S. 622, 641 (1994).⁴

⁴ Counsel certifies that this Brief is Bookman Antiqua 13 point.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court issue a preliminary injunction barring enforcement of the confidentiality provisions of Rule 1-4.11 pending the resolution of this litigation.

Respectfully submitted this 13th of February, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I served the foregoing upon Defendant by depositing a true and correct copy of same into the United States mail, first-class postage prepaid, addressed to:

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This 13th day of February, 2006.

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