

**IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION**

JOSHUA CLAY OLIVER,
Plaintiff

v.

**BOARD OF REGENTS
OF THE UNIVERSITY SYSTEM
OF GEORGIA, D/B/A/ THE
UNIVERSITY OF GEORGIA,
AND MICHAEL F. ADAMS,
IN HIS OFFICIAL CAPACITY
AS PRESIDENT OF THE
UNIVERSITY OF GEORGIA,
Defendants.**

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**CIVIL ACTION FILE NO.
3:06-CV-110 (CDL)**

**PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Plaintiff, by and through counsel, hereby files his Response Brief to Defendants' Motion for Summary Judgment, and shows there are genuine issues of material fact and Defendants are not entitled to summary judgment and Plaintiff is entitled to equitable relief and attorney fees against Defendants, and this Court should reserve the state law claims for state court. In opposition to Defendants' Motion for Summary Judgment, Plaintiff relies upon the following:

- a. Plaintiff's Response to Defendants' Statement of Undisputed Facts;
- b. Plaintiff's Brief in Opposition to Motion for Summary Judgment;
- c. Transcript of proceedings, 9/26/06 and 11/17/06;

- d. Pleadings of record;
- e. The initial disclosures, and Defendants' responses to Plaintiff's discovery filed, and Plaintiff's responses to discovery requests;
- f. Affidavits of Plaintiff Joshua Clay Oliver dated 12/19/06 and 1/29/08;
- g. Affidavit of Mark M. Wiggins dated February 2, 2008;
- h. All other evidence and admissions properly before the Court.

I. Question Presented

Is it fundamentally unfair and arbitrary for a public university to suspend a student for alleged *dishonesty* in answering a legal question on his enrollment application, when he was shown to have acted in good faith on advice of counsel, and the student tribunal found on the official record that he did not act *dishonestly* because he had no intent to deceive, and the university president's public edict tainted the post-hearing process so that it was a biased and perfunctory review that wither did not notice or ignored the glaring inconsistency? Because the answer is yes, at a minimum, equity can enjoin Defendants.

II. Factual Background

Plaintiff filled out his online application on or about May 5, 2005. At that time he was not required to register as a sex offender, and was not listed on the GBI website until July 7, 2005. Regardless of how the GBI decided when and what verbiage to use in listing Plaintiff he has never been a convicted sex offender.

On April 4, 2006, Ms. Kimberly A. Ellis, Associate Dean of Students for Judicial Programs, notified Plaintiff that he was charged with allegations of acts of dishonesty. That very night President Adams spoke at “Open Mic with Mike,” on a subject that was published the next day in the *Red & Black*, entitled “Sex offender Suspended for Lying on Application,” which was read by Dr. Patricia W. Daugherty before the case even came to her.

On April 12, 2006, the student hearing occurred. The only evidence against Plaintiff was a copy of Plaintiff’s UGA online admission application, a printout of the GBI website, and a copy of the first offender law. Plaintiff presented his own testimony, his attorney Mark Wiggins’ testimony, and a written statement from Honorable Steve C. Jones. Mr. Wiggins researched the question and the law and informed Plaintiff that the correct and proper answer was “No,” which answer was relied upon by Mr. Oliver in good faith.

The Hearing Panel issued a written decision form, and when delivering the decision on the record, found on the official record that Plaintiff was not in violation of Regulation II (3) because there “was no intent to deceive in [Plaintiff’s] actions.”

On April 18, 2006, Plaintiff filed an appeal to Dr. Daugherty, which was denied April 26th, first, by a letter incorrectly stating the student panel found a

violation on both counts, which letter was retracted and corrected without explanation of how it happened in the first place.

On or about May 4, 2006, Plaintiff filed an application for review to President Adams, which was denied on May 17, 2006. On or about June 5, 2006, Plaintiff filed a request for review with the Board of Regents.¹ The Board of Regents denied Plaintiff's application on or about September 13, 2006, without a hearing.

On September 26, 2006, the Superior Court of Clarke County, after a hearing, granted Plaintiff a TRO, and set a hearing date for interlocutory injunction for October 13, 2006. Shortly before the scheduled hearing, Defendants removed the case to federal court. On October 24, 2006, without Plaintiff's counsel having received or reviewed the audio tape, Plaintiff dismissed without prejudice his federal claims and filed an Emergency Motion to extend the TRO, which was granted on October 25, 2006.

On or about November 6, 2006, Defendants produced the audio tape.

On November 17, 2006, a second hearing took place in state court. Dr. Patricia Daugherty and President Michael Adams testified, and a stipulation was entered on the record obviating Plaintiff's need for testimony from Mr. Erroll Davis, Chancellor of the Board of Regents. After the November 17, 2006 hearing,

¹ On July 14, 2006, Ms. Kimberly Ballard-Washington's sent her summary letter to Ms. Neely incorrectly stating Plaintiff was a convicted sex offender.

Plaintiff amended his Complaint to re-allege the federal claims, and the case was removed to federal court, and Honorable Wilbur D. Owens, Jr., granted the preliminary injunction on December 22, 2006. Plaintiff has been enrolled in classes continuously, and after this semester, will have only 6 hours remaining for his degree.

III. Argument and Citation of Authority

A. Plaintiff has a liberty and property interest to continue his education without arbitrary or fundamentally unfair state interference.

1. Due Process.

Plaintiff has a substantive due process right to be free from an arbitrary and fundamentally unfair suspension from a public school. Higher public education, while not a fundamental constitutional right, receives constitutional protection.

The Eleventh Circuit Court of Appeals held:

Not only does the due process clause of the Fourteenth Amendment provide procedural protections, it provides a guaranty against arbitrary decisions that would impair appellants' constitutionally protectible interest. As we stated in Dixon, "the governmental power to expel the plaintiffs ... is not unlimited and cannot be arbitrarily exercised. Admittedly, there must be some reasonable and constitutional ground for expulsion or the courts would have a duty to require reinstatement." Nash v. Auburn University, 812 F. 2d 655 (11th Cir. 1987).

Plaintiff's continuity of education is essential to the full measure of benefit from his first offender disposition. The Fifth Circuit Court of Appeals emphasized, in

Dixon v. Alabama State Board of Education, 294 F. 2d 150 (1961), the importance of education, continuity of one's education, and the practical realities as follows:

It is not enough to say, as did the district court in the present case, "The right to attend public college or university is not in and of itself a constitutional right. . . . "One may not have a constitutional right to go to Bagdad, but the Government may not prohibit one from going there unless by means consonant with due process of law." As in that case, so here, it is necessary to consider "the nature both of the private interest which has been impaired and the governmental power which has been exercised."

The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning in which plaintiffs were students in good standing. It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens.

There was no offer to prove that other colleges are open to the plaintiffs. If so, the plaintiffs would nonetheless be injured by the interruption of their course studies in mid-term. It is most unlikely that a public college would accept a student expelled from another public college of the same state. Indeed, expulsion may well prejudice the student in completing his education at any other institution. Surely no one can question that the right to remain at the college in which the plaintiffs were students in good standing is an interest of extremely great value.

Dixon, Id. at 156 -157.

President Adams manifested and has maintained his intent that Plaintiff should not be part of the University community, so Plaintiff is clearly at risk of permanent expulsion. As such higher due process considerations are involved than that for a temporary suspension. Lamb v. Panhandle Community Unit School Dist. No. 2, 826 F. 2d 526, 529 (7th Cir. 1987). See also L.Q.A. v. Eberhart, 920 F.

Supp. 1208, 1217 (M.D. Ala. 1996). Additionally, traditional rules of deference to educators simply do not apply to this case of non-academic discipline:

The concern expressed by the appellants for their academic interest is well taken. The district court's grant of relief is based on a confusion of the court's power to review *disciplinary* actions by educational institutions on the one hand, and *academic* decisions on the other hand. This court has been in the vanguard of the legal development of due process protections for students ever since Dixon v. Alabama State Board of Education, (citation omitted). However, the due process requirements of notice and hearing developed in the Dixon line of cases have been carefully limited to disciplinary decisions. When we explained that "the student at the tax supported institution cannot be arbitrarily disciplined without the benefit of the ordinary, well recognized principles of fair play", we went on to declare that "we know of no case which holds that colleges and universities are subject to the supervision or review of the courts in the uniform application of their academic standards. Indeed, Dixon infers to the contrary." (Citations omitted). Misconduct and failure to attain a standard of scholarship cannot be equated. A hearing may be required to determine charges of misconduct, but a hearing may be useless or harmful in finding out the truth concerning scholarship. There is a clear dichotomy between a student's due process rights in disciplinary dismissals and in academic dismissals. (Citations omitted).

Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976)(See also Allahverdi v. Board of Regents, No. Civ 05-277 (N.M. April 26, 2006) (it is *disciplinary* if not involving the student's scholarship or conduct that bears upon this ability to succeed in his field of study).

Due process is not blind to just results. Process has truth as its highest end, admittedly not its sole end. Arbitrary results should not be shielded by the easily uttered mantra of minimal process. The Supreme Court revealed a concern in avoiding mistakes that significantly affect a person's life, in Goss v. Lopez, in which Justice White stated:

The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. The due process clause will not shield him from suspensions properly imposed, but it does not disserve both his interests and the interests of the state if his suspension is in fact unwarranted. The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others: and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial and it should be guarded against if that may be done without prohibitive interference with the educational process.

Goss v. Lopez, Id. at 580.

The majority opinion in Goss v. Lopez uses terminology concerned with the truth: "in order to make sure that an injustice is not done" (Id. at 580), "arriving at truth," guarding against "unfair or mistaken findings of misconduct and arbitrary exclusion from school," providing "a meaningful hedge against erroneous action" (Id. at 583), and having procedures so that the "risk of error" was substantially reduced (Id. at 584) (Ingraham v. Wright, 430 U.S. 651, 676 (1977)(concern with adequate safeguards to minimize risk of wrongful punishment). The Eleventh Circuit showed interest in results:

The *possibility that an erroneous decision* may have been made by the board was diminished by the extensive review by the faculty committee.
Nash, Id. at 665 (emphasis added).

When one orders a meal, the Chef does not serve, and customers do not eat, the recipe.

Equity is needed to correct a basic injustice: Plaintiff is being kicked out of school for dishonesty, and as such he is being publicly labeled a convicted sex offender, although he was neither dishonest nor has he ever been a convicted sex offender, and the Hearing Panel found he was not dishonest. It was well developed in the record that dishonesty, as a matter of fundamental fairness in this case, required proof of “intent to deceive.”² Kimberly Ellis and Dr. Patricia Daugherty agreed that dishonesty is a component of all six categories. (Plaintiff’s Statement of Undisputed Facts, Paragraphs 26-30, 39, 41), and Dr. Daugherty admitted a violation of fundamental fairness, when she admitted that she was knowledgeable in the constitutional concepts of substantive due process and fundamental fairness, (Transcript, November 17, 2006 hearing, Page 43, Line 9-21), and went on to state that the fact pattern (now shown to have occurred in Plaintiff’s case) would be a violation of fundamental fairness and common sense:

Q. So it would not be right to kick someone out for deception and dishonesty if there was a finding that there was no deception or dishonesty?

A. Right.

Q. And that’s a matter of common sense and fundamental fairness?

A. Right.

² See Merriam-Webster Online www.m-w.com: *Dishonesty*: 1) *lack of honesty or integrity: disposition to defraud or deceive*, 2) *a dishonest act: FRAUD*. *Dishonest* implies a willful perversion of truth in order to deceive, cheat, or defraud, a swindle usually involves two dishonest people, *Deceitful* usually implies an intent to mislead and commonly suggests a false appearance or double-dealing.

(Transcript, November 17, 2006, Page 43, Line 22 — Page 44, Line 24). There should be substantial evidence in the record that Plaintiff committed an other act of dishonesty, which by fairness and according to the testimony and documents in the record, should require proof of dishonesty. Nash, Id. at 667, 668 (using without deciding substantial evidence standard). In our case, there was no evidence of dishonesty and an official finding to that effect.

2. Equal Protection.

Plaintiffs have two equal protection arguments both developed by the evidence. First, it is fundamentally unfair and arbitrary to kick a person out of school for honestly held *false* information, because that is sanctioning honest mistakes, and honest mistakes happen all the time. (See this 2+2=5 argument in Ms. Kimberly Ellis’ testimony; Plaintiff’s Statement of Undisputed Facts Paragraph 31). Second, it is irrational and arbitrary sanction Plaintiff under the guise of *false* information within “other acts of dishonesty,” because Defendants have no idea how many other first offenders of any type are being treated this way, or how many have attended UGA, or are attending UGA, or have graduated from UGA. (See Defendant Michael Adams’ Supplemental Responses to Interrogatories 17 – 20 filed by Plaintiff with the Court on 2-2-08.). It is an irrational attempt to sanction him for his first offender disposition when there is no rational way to draw a line by for such a characterization, and the tribunal was to

hear this case, not make a policy decision or legislative decision as to how to address this issue. So the state action that is an arbitrary classification is sanctioning him in this manner, not whether UGA could develop a constitutionally rational policy for how to address this in the future. The basis for going forward on that claim lacks a rational basis:

The Equal Protection Clause of the Fourteenth Amendment prohibits a state from creating a classification which serves no rational purpose or which arbitrarily divides similarly situated citizens into different classes and treats them differently. Pace v. Smith, 248 Ga. 728 (1982)

The State cannot make a distinction that allows it to punish honest mistakes under the allegations of Other Acts of Dishonesty without providing a rational basis for how it was doing so in this case. This is not a policy case where UGA has made a policy and a student is challenging the policy. It is a student judiciary case with unique, personal and direct stigmas on this Plaintiff. The after the fact issues about Jessica Leigh Johnson's false stalking claims and the Williams case are irrelevant, as the allegations were false and dismissed, and more importantly, those issues were never part of the decisions. Are Defendants stating the tribunal relied on this or the Williams case? Did Dr. Daugherty? Did President Adams? If so, Defendants need to say so, as they have not up until now. This is not a case where some rational basis after the fact has to be offered to defend a statute in

hindsight under the lowest level scrutiny. It is whether the University Code of Conduct can be applied to this Plaintiff in this tribunal under this classification.

B. Equity can act; Defendants are persons for equity

The Board of Regents and President Michael Adams, in his official capacity, are “persons” under 42 U.S.C. § 1983 for equity:

Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because “official-capacity actions for prospective relief are not treated as actions against the State.” Kentucky v. Graham, 473 US, at 167, ... Ex parte Young, 209 US 123, 159-160 (1908). This distinction is “commonplace and sovereign immunity doctrine,” L.Tribe, American Constitutional Law § 3-27, Page 190, Note 3 (2nd Edition, 1988), and would not have been foreign to the 19th century Congress that enacted § 1983, citations omitted, on which Justice Stevens relies, see Post, at 2324 n.8, is not to the contrary. Will v. Michigan Department of State Police, 491 U.S. 58, 71, Footnote 10.

The above distinction between equity and damages relates to qualified immunity, 11th Amendment issues, sovereign immunity, and the definition of “persons” under 42 U.S.C. § 1983, which issues are entwined. Again, the Supreme Court of the United States called attention to this distinction several years before the Will decision, in Harlow v. Fitzgerald, 457 U.S. 800, at 818, Footnote 34, as follows:

We emphasize that our decision applies only to suits for civil *damages* arising from actions within the scope of an official’s duties and in “objective” good faith. We express no view as to the conditions in which injunctive or declaratory relief might be available.

Defendants enjoy no qualified immunity, 11th Amendment immunity, or sovereign immunity from the equitable claims asserted by Plaintiff.³

Plaintiff agrees that President Michael Adams is not a “person” under 42 U.S.C. § 1983 as the law now stands, but notes that the statute of limitations has not run on such claims, and specifically reserves his right to bring such claims against any individual person. Plaintiff objects to Defendants’ attempt to have their cake and eat it, too, by claiming the case has not been asserted in his individual capacity, yet then attempt to obtain issue preclusion or res judicata on the point not before the Court. If the Court deems it is properly before the Court on Plaintiff’s pleadings, Plaintiff denies summary judgment is proper for qualified immunity, and refers to all the allegations of President Adams direct action in the matters at issue, especially tainting the process by his public edict prior to the hearing.

C. The State Law Claims.

1. Equity to enforce UGA’s Code of Conduct as contract

Plaintiff should be able to enforce in equity the material terms of the contract, namely, the provisions in the Code of Conduct, to prevent Defendants

³ Plaintiff notes that the statute of limitation has not run, and to the extent Defendants maintain that the Board of Regents is not properly a person for 42 USC § 1983, Plaintiff, while disagreeing, reserves his right to move for leave of court to add each and every member of the Board of Regents solely for equitable relief. Such seems to be a waste of time and resources, as the same arguments by the same lawyers would still be before the Court.

from kicking Plaintiff out of school in any way not authorized and directed under the University Code of Conduct. All that is required for a contract is parties able to contract, consideration, assent of the parties to the terms, and a subject matter upon which the contract can operate. O.C.G.A. § 13-3-1. In Board of Regents v. Doe, 278 Ga. App. 878 (2006), the Court of Appeals, rejected the Board of Regents' argument that there "was no formal written contract," reiterated basic contract law that a "contract may be formed, however, when the parties exchange mutually interdependent promises," and "Further, a valid written contract may be formed when there are multiple signed, contemporaneous agreements between the parties which demonstrate their intent to enter into a binding contract and the individual documents, considered together, include all of the necessary terms of a contract." Specific performance and an injunction from violating the published rules would not tread on any hallowed ground of sovereign immunity.

Plaintiff does not believe sovereign immunity exists against equitable claims, and the question should simply be one of fact that the rules he is seeking to enforce are part and parcel of his agreement to enroll and pay tuition and be bound by the honor code himself. The Board of Regents delegated its admission authority to President Adams and his subordinates. The documents signed by his admission department create a contract. The Exhibit 7 admitted into evidence at the November 17, 2006 contained Plaintiff's online application in which he signed an

agreement to bind himself to the honor code. The Exhibit 9 to that hearing was the contents of the official acceptance letter envelope with instructions signed by an agent with authority to act as VP of Admissions and Enrollment. Exhibit 10 was the outside of envelope using phrase "Official Acceptance" which contained the official acceptance letter. Exhibit 11 showed reliance on those documents by the payment of tuition and attendance.

Exhibit "D" to the Original Complaint contains the few rules that Plaintiff seeks to enforce in equity. These rules are simple, clear, and definite: Rule 1 – notice of the alleged violations and the factual circumstances supporting the charges; Rule 7 – presumption of innocence and proof by preponderance of evidence; Rule 11– decisions will be made based on the evidence presented and statements made at the time of the hearing; Rule 18 – The hearing is recorded and the recording is the official record; and the rule thereafter that delivery of the decision is part of the hearing and to be recorded and is subject to all policies governing the process. Plaintiff should be allowed to enforce these basic terms so as not to be kicked out of school for lying when he did not lie or because UGA has since learned that he had a first offender disposition.

The language in the University Code of Conduct at issue in our case reveals an intent that it create binding rules:

All procedures for responding to possible violations of conduct regulations, including specifics of the judicial process, a listing of possible sanctions, and

the appeals procedures are included in the Code of Conduct. These procedures have been established to ensure due process and fundamental fairness to all involved in the University's judicial process. (See Exhibit "D" to Original verified Complaint).

The disclaimer used by Defendants in their brief proves an intent to be bound:

Any portion of this handbook in conflict with the policies of the Board of Regents shall be null and void and of no effect.
Defendants' Brief, Page 35.

Ironically, the very quoted sentence provides that to the extent the Hand Book is not in conflict with the policies of the Board of Regents it is in *full force and effect*.

The Code of Conduct does not violate any Board of Regents rule or policy, and it is clear from the record that President Adams has plenary power over admissions and the student judicial process on behalf of the Board of Regents. Because Defendants invited him to enroll and pay tuition in a signed letter, and because UGA publishes and expects its students to follow the rules, and because Plaintiff has acted in reliance on those rules, equity should at least enforce the rules so as to preclude Defendants from kicking him out of school except for grounds set forth therein. The Georgia Court of Appeals has used contractual terminology. See Life Chiropractic College v. Fuchs, 176 Ga. App. 606 (1985)(private institution was only contractually obligated to provide the those procedures specifically provided for in the bulletin itself.).

2. Administrative Review

Plaintiff is entitled to administrative review and reversal. President Adams has decided that Plaintiff will not be allowed to attend The University of Georgia, and will in effect have the primary benefit of his first offender disposition obliterated, which is a “deprivation of major proportion” that justifies the “hand of the judicial branch.” Board of Regents v. Houston, Georgia Court of Appeals, case No. A06A1165, substituted opinion decided November 16, 2006. Courts do not want to require reinstatement of a player on a football team given the factual scenario involved admitting a federal criminal offense. The Court of Appeals in Houston expressly provides that a person could have a claim for review of an incorrect administrative review if he alleged and established that a *substantial right was prejudiced*, and the opinion specifically cites the APA categories for reversing an administrative decision. See O.C.G.A. § 50-13-19(h)(1)-(6).

Defendants give too broad a reading to Woodruff v. Georgia State, 251 Ga. App. 232 (1983). Therein, the Georgia Supreme Court understandably was reluctant to decide what grade Ms. Woodruff should have been given based on allegations of plagiarism, and whether seven years later the former professors somehow interfered with her educational rights:

We have not thus far, however, entertained an individual student’s complaint seeking money damages for alleged impropriety in academic assessment of her work. Woodruff, Id. at 233.

Unlike Woodruff, that involved an academic matter, or Houston which involved playing on the football team, our case involves a non-academic issue and the use of the valuable benefits of first offender. Education and first offender go hand in hand for Plaintiff, and without either, his life would be drastically limited.

3. These state law issues should be left for State Court

Plaintiff also believes that this a unique case, and how it relates to first offender and whether it will rise to the level of the deprivation of major proportion, should be decided by State Courts on these narrow questions of state law. In the unlikely event that the federal claims are finally resolved against Plaintiff, it would be appropriate to reserve the state claims for state court. Judicial economy, fairness, convenience, and comity dictate having these state law claims decided by the state courts. Baggett v. First Nat'l Bank of Gainesville, 1187 F.3d 1342 (11th Cir. 1997). See also Palmer v. Hosp. Auth. Of Randolph County, 22 F.3d 1559 (11th Circ. 1994). (A decision to exercise or decline supplemental jurisdiction lay in considerations of judicial economy, convenience, fairness to litigants and comity). This case clearly involves a novel or complex issue of state law. 28 U.S.C. § 1367(c). Ingram v. School Board of Miami-Dade County, 167 Fed. Appx. 107, C.A. 11 (Fla.) 2006. See also United Mine Workers v. Gibbs, 383 US 715, 86 S.Ct. 1130 (1966) (Federal courts should avoid needless decisions of state law, especially when federal claims are dismissed before trial). Because a state court

case already exists, and the record is close to perfected on all of those points already, Plaintiff requests that the Court remand to the State for these issues upon final conclusion of the federal law questions, if they are not rendered moot by the final rulings on the federal claims.

IV. Conclusion

Plaintiff requests summary judgment be denied, that he be allowed to proceed on his equitable claims and attorney fees and state law claims, and that Defendants continue to be enjoined so Plaintiff can continue his education without interference.

RESPECTFULLY SUBMITTED this 4th day of February, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on February 4th, 2008, I electronically filed *Plaintiff's Response to Defendants' Motion for Summary Judgment* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Ralph W. Ellis, Esq., Assistant Attorney General, at rellis@law.ga.gov.

This 4th day of February, 2008.

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