In re Cliven D. Bundy, No. 17-70700

GOULD, Circuit Judge, dissenting:

I respectfully dissent from the court's denial of the Emergency Petition for Writ of Mandamus filed March 9, 2017. The reasons for my dissent are essentially the same as for my earlier dissent to the majority's published decision denying the first mandamus petition.[1] *See In re Bundy*, 840 F.3d 1034, 1049 (9th Cir. 2016) (Gould, J., dissenting). So far as I can discern, Defendant Cliven Bundy's high-profile political status and prospects for retaining a skilled and aggressive defense team have not substantially changed since my prior dissent. I do not doubt that attorney Bret Whipple is a fine lawyer who has some federal criminal case experience. But the long course of American justice shows that sometimes representation by multiple attorneys is key to a robust defense.[2] And I continue to

[1] I might have instead written a concurring opinion, accepting as circuit law the prior decision of this panel from which I previously dissented, but I think it makes my views clearer to understand when my views are framed as a dissent.

[2] It is not uncommon for a high-profile criminal defendant to have a team of skilled defense lawyers. Well-known examples include O.J. Simpson's defense to the charged 1994 murders of Nicole Brown Simpson and Ronald Goldman, and Dzhokhar Tsarnaev's defense to charges related to the 2013 bombing at the site of the Boston Marathon. Another famous case involving a defense team, this one without charges of violent crimes, was the so-called Scopes "Monkey" trial in 1925. There, Clarence Darrow and a team of several other distinguished lawyers defended a school teacher in Tennessee who had been charged with a crime for teaching evolution. *See Scopes Trial*, HistoryNet,

believe that Bundy's needs for experienced defense counsel of his choosing are more important than the articulated concerns about Larry Klayman's ethics, where he has not been disbarred or suspended by another bar association or proven to have engaged in unethical conduct that could justify disbarment. *See In re Evans*, 524 F.2d 1004, 1007 (5th Cir. 1975); *Schlumberger Techs., Inc. v. Wiley*, 113 F.3d 1553, 1561 (11th Cir. 1997). Attorney Klayman has told the district court and our appellate panel that he will in this case abide by all orders of the district court. I take him at his word on this.

This is a complex, multi-defendant proceeding, and the stakes could not be higher for Defendant Cliven Bundy. Bundy could spend the rest of his life in prison if convicted. To be sure, Klayman's aggressive tactics are likely to irritate the district court judge. But in a tough case with experienced prosecutors, forceful advocacy can be necessary to a full defense. And concerns over Klayman's aggressive style must yield to a superordinate concern: that Bundy have the counsel of his choice to receive a fair shake at this most critical trial. The government has chosen to marshal its massive resources towards convicting Bundy. We ought to let Bundy marshal the defense team he chooses. I rest my decision on the fundamental premise that Bundy has a Sixth Amendment right to

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http://www.historynet.com/scopes-trial.htm (last visited Mar. 28, 2017).

counsel of his choice and that that right is not exhausted once he has one competent criminal defense lawyer. So long as he is footing the bill, the Sixth Amendment protects Bundy's right to convene a defense team of his choosing. *See United States v. Walters*, 309 F.3d 589, 592 (9th Cir. 2002) (Sixth Amendment violation for *pro hac vice* denial where defendant was represented by other competent counsel). A system of extreme deference to a district court's decisions on *pro hac vice* admission of an experienced lawyer long-admitted to other bars is not a valid reason to deny Bundy his counsel of choice in the circumstances of this case. I respectfully dissent.