

# United States Court of Appeals For the First Circuit

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No. 03-1383

UNITED STATES OF AMERICA,

Appellant,

v.

BRADFORD C. COUNCILMAN,

Defendant, Appellee.

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**Before**  
**Boudin, Chief Judge,**  
**Cyr, Senior Circuit Judge,**  
**Torruella, Selya, Lynch, Lipez and Howard Circuit Judges.**

**Order of Court**  
**Entered: October 5, 2004**

A majority of the judges of this court in active service have voted to rehear this matter en banc. Thus, the petition for rehearing en banc is granted, and the petition for panel rehearing is denied as moot. In accordance with customary practice, the panel opinion and dissent released on June 29, 2004 are withdrawn, and the judgment entered June 29, 2004 is vacated.

The parties shall simultaneously submit within 30 days of the date of this order supplemental briefs not exceeding 30 pages per side. In preparing these briefs, counsel should be aware that the en banc court will have copies of all prior briefs and copies of the petition for rehearing en banc. Although the parties can address other issues in their supplemental submissions, and the en banc court is free to consider all of the issues presented, the court specifically requests that the parties address the following questions:

1. Whether the conduct at issue in this case could have been additionally, or alternatively, prosecuted under the Stored Communications Act?

2. Whether the rule of lenity precludes prosecution in this case?

Oral argument is scheduled for 3:00 p.m. on December 8, 2004 in the en banc courtroom in the John Joseph Moakley United States Courthouse.

The court welcomes timely motions to file amicus briefs concerning any of the issues in this appeal.

By the Court:

/s/  
Richard Cushing Donovan,  
Clerk of Court

[Certified copy to Hon. Michael A. Ponsor and Mr. Tony Anastas, Clerk, United States District Court for Massachusetts. Copies to Mr. Katzmann, Ms. Chaitowitz, Mr. Levenson, Mr. Salgado, Mr. Kerr, Mr. Swire and Mr. Good.]