

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

D-1 GEOFFREY FIEGER,  
D-2 VERNON JOHNSON,

Defendants.

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Case No. 2:07-cr-20414  
Honorable Paul D. Borman

**MOTION TO DISMISS FOR SELECTIVE AND VINDICTIVE PROSECUTION**

By and through counsel, Mr. Fieger brings the instant motion to dismiss the government's indictments because such indictments were selectively and vindictively filed because Mr. Fieger exercised his constitutional right to support the John Edwards 2004 presidential campaign. For the reasons stated in his brief, Mr. Fieger respectfully requests that this Honorable Court grant his motion to dismiss the government's indictment.

Respectfully submitted,

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Dated: August 28, 2007

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**BRIEF IN SUPPORT OF MOTION TO DISMISS FOR  
SELECTIVE AND VINDICTIVE PROSECUTION**

This case demonstrates the highly publicized highjacking of the Department of Justice and FBI by the White House and United States Attorney General Alberto Gonzales. For months, the news media has been reporting on what many people have known for almost two years; that is, that Attorney General Alberto Gonzales has used the Department of Justice, United States Attorneys, and the FBI to carry out politically motivated investigations and prosecutions targeting Democrats. In this case, the government has viciously attacked Mr. Fieger, his Firm, its employees and their families simply because they exercised their most sacred right of free speech under the First Amendment. They supported the John Edwards 2004 presidential campaign.

In November of 2005, Alberto Gonzales began the crusade, now before this Court, by personally authorizing nearly 100 federal agents to conduct a night time raid on the law offices of Fieger, Fieger, Kenney & Johnson in Southfield, Michigan.<sup>1</sup> Federal agents simultaneously arrived at the homes of the firm's employees demanding to know whether they contributed to the John Edwards campaign, and if so, why? Geoffrey Fieger, the principle of the firm, is a nationally known trial attorney, prominent Democrat, former Democratic Michigan gubernatorial candidate, and outspoken critic of both President George Bush and Alberto Gonzales.

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<sup>1</sup> The authorization by Mr. Gonzales to raid the Fieger law firm was in writing and serves as documentary proof that the government's frivolous prosecution of Defendants has its roots in Washington D.C.

In the presidential primary of 2000, Mr. Fieger encouraged the people of Michigan to vote for John McCain and against Bush which caused droves of Democrats to the polls and gave McCain a win in the Michigan primary. The day after the primary, George Bush gave a speech at Lawrence Technological University during which he denounced Mr. Fieger by name no less than four times (referring to him as “Kevorkian’s Attorney”).

This is important because the current investigation of Mr. Fieger and the Fieger Firm originated in Washington D.C. In order for federal agents to conduct such a grand scale raid of a law firm, they are required to obtain the express approval of the United States Attorney General, in this case Alberto Gonzales. Gonzales, in turn, sent Kendall Day, a Justice Department attorney from Washington D.C., to indict Mr. Fieger on federal campaign finance charges for contributing money to the John Edwards 2004 presidential campaign.

After obtaining the necessary approval from Washington D.C., Alberto Gonzales and his agents relentlessly pursued a two year “investigation” which reeks of political totalitarianism. Federal prosecutors Lynn Helland and Day have compelled over 40 individuals to testify before a ‘secret’ federal grand jury where they were threatened with the force of the United States Government to reveal for whom they voted in the 2004 presidential election. To force American citizens to reveal their political affiliations or preferences is completely abhorrent to the First Amendment of the United States Constitution and violates our freedoms of thought, association, and political speech. Such questioning serves no legitimate governmental purpose other than to scare, harass, intimidate, and chill the exercise of free speech.

In similar fashion, Helland and Day attempted to force American citizens to reveal their entire history of campaign contributions to the political parties of their choice. In complete and utter disregard of the United States Constitution and the protections guaranteed thereunder, federal agents and prosecutors have cloaked themselves in the secrecy of grand jury proceedings under the guise of “law enforcement” activity. While Helland and Day may have felt licensed to violate the United States Constitution in the comfort of the secret grand jury proceedings, such acts were recorded and

transcribed and will prove beyond a reasonable doubt that the Department of Justice has been turned into a weapon to silence political dissidents like Mr. Fieger and others threatening the Republican stronghold in this country.

Other evidence that the Department of Justice has been converted into a militia arm of the White House continues to surface. This is especially true in Southeast Michigan where the United States Attorney has spent millions and millions of dollars on frivolous investigations targeting prominent Democrats like Edward McNamara and Carl Marlinga. Indeed, federal prosecutions against Democrats in Detroit has been the focus of national concern:

In Eastern Michigan since 2001, at least 21 Democratic public officials have been charged or linked to corruption inquiries, including the governor, the mayor of Detroit and several local officials, including Mr. Marlinga. Officials at the United States attorney's office in Detroit identified one Republican who had been charged and said they did not have a list by party that would allow them to identify others.

Eric Lipton, *Some Ask if U.S. Attorney Dismissals Point to Pattern of Investigating Democrats*, N.Y. TIMES, May 1, 2007.

It has also become apparent that those United States Attorneys, who refused to carry out the Administration's agenda of bringing frivolous charges against Democrats, lost their jobs. United States Attorney David Iglesias of New Mexico, for instance, was added to the hit list in the fall of 2006 after refusing to bring false corruption charges against Democrats right before last November's general election. More disturbing, however, is the fact that Republican Senator Pete Domenici of New Mexico placed a wildly inappropriate phone call to Iglesias leaning on him to indict prominent Democrats right before the election (**Exhibit A**). Iglesias refused. Domenici contacted the Justice Department to share his "concern" about Iglesias's reluctance and Iglesias then lost his job.

Other United States Attorneys seem to have dodged the hit by stepping up their allegiance to Washington by targeting Democrats. United States Attorney Steven Biskupic of Wisconsin was placed on the hit list to be fired, but was later removed after bringing frivolous corruption charges aimed at swaying a tight gubernatorial election. Biskupic brought charges against Ms. Georgia Thompson, a

state employee accused of steering government contracts to companies that supported her boss, a Democratic Governor. Although U.S. Attorney Biskupic could not state a coherent crime against Ms. Thompson, he advanced a silly theory that Ms. Thompson committed a crime because state contracts were given to companies lead by Democrats who supported Ms. Thompson's boss, and that Thompson received a benefit by way of her continued employment with the state. According to Biskupic, Thompson deprived the people of Wisconsin of her "honest services" and needed to be imprisoned.

Although the charges should never have gone to a jury, Biskupic obtained a conviction based on an utterly indiscernible and fictitious crime. In an unprecedented ruling, the Seventh Circuit vacated Thompson's conviction within hours of oral argument and ordered that she be released from prison by day's end. *United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007). Although Biskupic's attempt to sway the gubernatorial election in favor of the Republican candidate failed, he managed to garner enough allegiance in Washington to keep his job.

United States Attorney Carol Lam of San Diego was not so lucky. Lam was ousted after prosecuting Republican Congressman Randy Cunningham and opening criminal investigations of other high ranking Republicans and GOP party donors. U.S. Attorney H.E. Cummins of Arkansas was also ousted in order to make room for a protégé of Karl Rove. As one editor recently remarked:

It is now clear that the United States attorneys were pressured to act in the interests of the Republican Party, and lost their job if they failed to do so. The firing offenses of the nine prosecutors who were purged last year that they would not indict Democrats, they investigated important Republicans . . .

A study by two professors, Donald Shields of the University of Missouri at St. Louis and John Cragan of Illinois State University, found that *the Bush Justice Department has investigated Democratic officeholders and office seekers about four times as often as Republican ones.*

Editorial, *Why This Scandal Matters*, N.Y. Times, May 21, 2007 (emphasis added). So who initiated the firing of those United States Attorneys who refused to carry out prosecutions of Democrats? Answer: the White House.

Late in the afternoon on December 4, 2006, an aide to White House Counsel Harriet Miers sent a two-line e-mail message to a top Justice Department Official (**Exhibit B**). "We're a go," and within

days Alberto Gonzales put into action a long-awaited plan to remove several federal prosecutors. Gonzales was aided by loyalists like Kyle Sampson and Monica Goodling who Gonzales placed into positions of authority and control over the hiring and firing federal prosecutors.<sup>2</sup> Sampson rated the prosecutors based on whether they “exhibited loyalty to the president and attorney general.” Sampson resigned amidst a congressional probe into his misconduct and after testifying to congress that Gonzales had failed to offer truthful testimony about the motives for the firings.

It is also clear that the White House played an active role in directing the Justice Department’s Public Integrity Division which department handles cases, like this, involving campaign finance investigations.

The most shocking evidence was revealed in the Justice Department’s case brought against former Alabama Democratic Governor Don Siegelman who was relentlessly pursued by the Justice Department with the aide of Karl Rove. While in office, the Justice Department tirelessly pursued Siegelman on incoherent theories of “corruption.” In November 2002, Siegelman was narrowly defeated by GOP candidate Bob Riley in a bitterly contested election riddled with voting irregularities (Riley beat Siegelman by a mere 129 votes).<sup>3</sup>

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<sup>2</sup> Goodling, a 1995 graduate of an evangelical Christian school, Messiah College, and a 1999 graduate of Pat Robertson’s Regent University School of Law, also resigned during the well publicized congressional probe into the firing of the federal prosecutors. While testifying before congress with a grant of immunity (she refused to testify otherwise), Goodling gleefully detailed how she hired federal immigration judges, among others, based on their loyalty to President Bush and the Republican party (**Exhibiti C**). Goodling was also the same person who was put in charge of interim appointments in the Department of Justice’s Public Integrity Division which division is ultimately responsible for cases, like this one, involving campaign finance disputes.

The Gonzales and Gang’s mission of hiring only political loyalists to their party trickled all the way down to the hiring of summer law interns and other positions hired from the Attorney General’s Honors Program (**Exhibit D**).

<sup>3</sup> Questions surrounding the propriety of Riley’s defeat of Siegelman in the gubernatorial election continue to mount. Mysteriously, 6,000 votes from the Republican dominated city of Bay Minette, Alabama inexplicably shifted from Siegelman’s column to Riley’s due to a “computer glitch.” The then Republican Alabama Attorney General William Pryor (later appointed by Mr. Bush to become a federal judge) intervened in opposition to Siegelman’s demand for a recount which essentially shut down the process. The Public Integrity Division of the Justice Department,

With only a razor thin margin of victory and the prospect of a recount, high ranking Republicans decided to take more decisive actions against Siegelman. According to an affidavit of Dana Jill Simpson, a lifelong Republican lawyer who practices in Alabama, Riley's top adviser Bill Canary said during a conference call "not to worry about Don Siegelman." because "his girls" would take care of Siegelman. Canary then made clear that "his girls" was a reference to his wife, Leura Canary, the United States Attorney for the Middle District of Alabama,, and Alice Martin, the United States Attorney for the Norther District of Alabama. **(Exhibit E)**.

Canary also reassured others on the call – including Riley's son Rob Riley – not to worry because "he had already gotten it worked out with Karl [Rove] and Karl had spoken with the Department of Justice and the Department of Justice was already pursuing Don Siegelman." **(Exhibit E)**. Although both U.S. Attorneys subsequently indicted Siegelman on a variety of charges, a federal judge in the Northern District of Alabama dismissed the government's case against Siegelman as politically manipulated **(Exhibit F)**.

So how did Karl Rove manage to direct the Public Integrity Division of the Department of Justice? Enter Noel Hillman, a Bush loyalist and former federal prosecutor. Hillman began working at the DOJ's criminal division in 2001 and was later appointed by Mr. Bush to lead the Public Integrity Section of the DOJ, one of the most sensitive and intrinsically political positions in the Department of Justice.

In short, Public Integrity decides who and what is corrupt in the American political landscape. With Hillman's arrival to Public Integrity, the Department of Justice began its most aggressive and current nationwide campaign of targeting Democrats with frivolous criminal prosecution. Hillman was responsible for moving forward on the incoherent charges brought against Wisconsin civil servant Georgia Thompson (which charges the Seventh Circuit described as "preposterous"), the prosecution of Siegelman, and a number of Detroit cases including the multi-million dollar investigation of

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headed by Noel Hillman refused to look into the matter any further.

McNamara and the government's frivolous charges against Carl Marlinga. More important, however, Hillman was also responsible for the nearly two-year long criminal investigation which culminated in the instant indictments against Mr. Fieger and his law firm.

The strikingly disparate targeting of Democrats under the Bush Administration and Hillman's leadership of the Public Integrity Section is also the subject of a recent study released by Donald Shields, Professor Emeritus, University of Missouri at St. Louis, and John Cragan, Professor Emeritus, Illinois State University (**Exhibit G**). In their study, Shields and Cragan examined the number of "public corruption" investigations and/or prosecutions brought by the Bush Justice Department under Hillman's leadership of Public Integrity (January 2001 through December 2006).<sup>4</sup> Based on their data and research, Shields and Cragan concluded that "the offices of the U.S. Attorneys across the nation investigate seven (7) times as many Democratic officials as they investigate Republican officials, a number that exceeds even the racial profiling of African Americans in traffic stops." (**Exhibit G**). According to Professors Shields and Cragan, "[t]he current Bush Republican Administration appears to be the first to have engaged in political profiling." (**Ex. G**). Shields and Cragan also conclude that "[t]he current Republican Administration is the first to have been 'caught' statistically as engaging in political profiling." (**Ex. G**). This study is proof positive that the Public Integrity Section of DOJ has served as the operational nucleus for the White House's politically motivated prosecutions against Democrats like Mr. Fieger and the members of his firm.

In this case, there are numerous facts which support Defendants' claim that they have been selectively and vindictively indicted by the Public Integrity Section of the Justice Department. For

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<sup>4</sup> In the spring of 2006, after his dutiful service as the leader of Public Integrity at DOJ, Hillman was rewarded by Mr. Bush with an appointment to the federal bench in New Jersey. In early 2007, Mr. Bush nominated Hillman to a coveted seat on federal Court of Appeals for the Third Circuit. In June 2007, with heightened scrutiny of Hillman's corrupt oversight and involvement in several politically motivated and frivolous prosecutions, Mr. Bush quietly pulled Hillman's nomination to the Third Circuit in a move clouded with mystery. Seemingly, the Bush Administration did not want to subject Hillman to a Senate confirmation hearing during which he would have been subject to mounting questions surrounding his (and the White House's) involvement in turning the Justice Department into a political machine.

instance, although 99% of campaign finance dispute are resolved civilly by the Federal Election Commission (“Commission”), the Justice Department has selected Mr. Fieger and his firm as the target of the largest campaign finance investigation *in the history of America*. Inexplicably, however, the United States Attorney’s Manual for Election Crimes (“Manual”) recognizes that criminal prosecution of campaign funding violations is a rare occurrence.

The Manual repeatedly states that “most FECA violations are either not crimes or do not warrant criminal prosecution” and acknowledges that the vast majority of statutory violations should be “handled noncriminally by the Federal Election Commission under the statute’s civil enforcement provision.” (Ex. L). The reason for this is simple: because campaign funding prosecutions “often tend[] to be politically sensitive, and maintaining national investigative standards helps preserve the appearance of complete enforcement impartiality.”

The Manual offers considerable guidance in defining the narrow range of cases which are amenable to criminal prosecution. Generally speaking, it acknowledges that campaign funding violations should be addressed criminally only “where they involve schemes to influence a federal candidate’s election.” There are two primary factors which go into this analysis – the amount of money involved, and the mental state of the accused at the time of the violation. These manual recognizes on several occasions that “violations of FECA are not potential crimes unless they are aggravated in both monetary amount and degree of criminal intent present.”

In this case, the Justice Department has selectively brought indictments against Defendants based on contributions which allegedly approach \$100,000 and were purportedly made through “conduits.” Even if true, however, a review of the enforcement history of FECA reveals that similar cases have never been criminally prosecuted. Quite the contrary, the Commission routinely handles “conduit” contribution cases through civil settlement including cases involving substantially higher dollar amounts than those at issue here. The following is a list of matters all of which bear close resemblance to the matter at hand and which were handled exclusively by the Commission and without the intervention or interference of the Justice Department.

1. Mattel, Inc. (MUR No. 5187)

Fernando Cuza was the Senior Vice President of Mattel, Inc. Mattel retained a company called AMS Consulting to provide consulting services. AMS was headed by Alan Schwartz. Between 1996 and 2000, AMS invoiced Mattel for approximately \$120,000 of purported consulting services, which, in fact, were designed to reimburse political contributions made by Cuza, Schwartz, and their friends and family to a host of federal campaigns. The invoices were approved on Mattel's behalf by Cuza, who was the only Mattel employee aware of the scheme. The Commission found that both Cuza and Schwartz knowingly and willfully violated Section 441f of FECA. The parties entered into a conciliation agreement on December 3, 2002 imposing a civil penalty on Cuza of \$188,000, and on Schwartz of \$195,000. The Commission found that Mattel's violation was not knowing and willful, and imposed a civil penalty of \$94,000 on the company.

2. International Buddhist Progress Society (MUR Nos. 4530 and 4531)

Between 1993 and 1996, the Buddhist Society reimbursed approximately \$120,000 in contributions made by its monks and worshipers to the Democratic National Committee. The contributions were solicited from the donors by the Society's chief financial officer, and reimbursed through checks drawn on the Society's checking account. The Commission found probable cause to believe that the Society had knowingly and willfully violated Section 441f of FECA. On November 27, 2000, the parties entered into a conciliation agreement requiring the Society to pay a civil fine of \$120,000.

3. In the Matter of Life Care Holdings, Inc. (MUR No. 5398)

The co-founder and Vice President of Government Relations of Life Care Holdings, Inc., a privately held health care company, made approximately \$105,000 in contributions to various political organizations. These payments were reimbursed through bonuses, salary increase, and expense reimbursements funded by the company. In June, 2005, the company entered into a conciliation agreement agreeing to pay a civil fine in the amount of \$50,000 for violation of the prohibition against conduit contributions.

4. International Association of Machinists and Aerospace Workers (MUR No. 5386)

The IAMAW held various conventions and conferences for its district lodges between March 2000 and October 2003. At these conventions, the delegates paid "registration fees" of between \$20 and \$50, and later voted to contribute those fees to the Machinist Non Partisan Political League, the union's segregated federal political fund. The fees were reported as unitemized federal political contributions, and the delegates were reimbursed by their local district lodges as part of a standard practice of reimbursing delegate expenses. These reimbursements totaled \$100,765. The Commission found that this practice violated Section 441f of FECA. The parties entered into a conciliation agreement on October 6, 2005 imposing a civil penalty of \$151,000.

5. In the Matter of Apex Healthcare and James Chao (MUR No. 5405)

Mr. Chao was the president and sole shareholder of Apex Healthcare, a corporation providing claims processing services to hospitals. Between February 2002 and

December 2003, he solicited donations totaling approximately \$77,000 from ten different employees and a handful of relatives. Chao promised each person from whom he solicited a contribution that he would reimburse them, and he did so using corporate funds. The Commission found that these violations were knowing and willful violations of Section 441f of FECA, the conduit contribution provision. The parties entered into a conciliation agreement on April 4, 2005 by which Chao paid a civil penalty of \$275,000.

6. Laidlaw International (MUR No. 5375)

A complaint was filed against Laidlaw International based upon a media report that, between 1995 and 2001, the company reimbursed political contributions by its employees through the payment of bonuses under a “supplemental compensation plan.” The total amount of the alleged reimbursements was \$75,000. The Commission investigated the charges and ultimately recommended that the matter be dismissed. Specifically, the Commission found that there was no correlation between the timing and amount of bonus payments and the timing and amount of political contributions made by the company employees. It noted that many employees who made contributions received no bonus payments at all, and that others received bonuses in years when they made no political contributions. With respect to those who did receive bonuses in contribution years, the Commission found that the payments “significantly exceeded the employees’ aggregate annual contributions by several thousand dollars.”

7. Centex Construction Group (MUR No. 5357)

The Chief Executive Officer of Centex Construction developed a discretionary bonus plan by which employees’ political contributions would be recognized as a “primary component” of their compensation. Employees were encouraged to send copies of all political contribution checks to management and understood that these checks would be considered in determining their year-end bonus. Between 1997 and 2002, approximately \$56,000 in contributions was reimbursed to eleven employees. The Commission found a violation of Section 441f of FECA, and the parties entered into a conciliation agreement by which the company and its employees paid a total fine of \$168,000.

8. In the Matter of James M. Rhodes (MUR No. 5305)

James Rhodes, a Nevada real estate developer, caused at least five of his employees to make a total of \$40,000 in political contributions. He reimbursed these contributions by cashing corporate checks, which he accounted for in the corporation’s general ledger as “cash for travel” and “petty cash.” The Commission found that he knowingly and willfully violated the conduit contribution provision and resolved the matter through a conciliation agreement requiring payment of a \$148,000 fine.

9. In the Matter of Future Tech International, Inc. (MUR No. 4884)

Future Tech International, Inc., a distributor of computer components, reimbursed \$39,500 in political contributions made by an unidentified number of employees. It did so through bonus checks as well as cash payments. The Commission found that the company had engaged in a knowing and willful violation of Section 441f of FECA. Nevertheless, it resolved the matter through a conciliation agreement requiring the company to pay a \$209,000 fine.

10. Beaulieu of America (MUR No. 4879)

Charles Bouckaert, the CEO and Beaulieu of America, solicited 36 of the company's employees to attend a \$1,000-a-plate fundraising dinner for Alexander for President. The employees paid the fee out of their own pockets. After the contributions were made, Beaulieu reimbursed 10 of the 36 donors, disguising these payments as bonuses or expense reimbursements. The Commission found that the company had knowingly and willfully violated Section 441f of FECA. On May 20, 1999, it entered into a conciliation agreement imposing a civil penalty of \$200,000.

11. In the Matter of AMEC Construction Management (MUR No. 5628)

AMEC Construction Management reimbursed at least \$32,000 in political contributions by at least six employees. The Chief Financial Officer for the company "instructed the selected employee to make a particular political contribution and instructed an accounting department employee to pay a 'grossed up' bonus to that employee." The grossed up bonus was such that "the employee's net bonus, after taxes, equaled the amount of the contribution at issue." The Commission found reason to believe that the company knowingly and willfully violated the prohibition against conduit contributions, but allowed the company to enter into a conciliation agreement requiring payment of an \$85,000 fine.

12. In the Matter of Wuesthoff Memorial Hospital, Inc. (MUR No. 5041)

Robert Carman, the President and Chief Executive Officer of Wuesthoff Memorial Hospital, "caused Wuesthoff to grant bonuses to certain employees which Carman treated as lines of credit against which he would ask employees to make political contributions." This bonus scheme resulted in the company reimbursing at least \$22,000 in contributions by at least thirteen different employees. The Commission found reason to believe that the company knowingly and willfully violated Section 441f of FECA, and resolved the matter through a conciliation agreement requiring payment of a \$32,000 fine.

13. In the Matter of Rust Environment (MUR No. 4901)

Bill Jameson, the Regional Vice President of Rust Environment and Infrastructure, Inc., caused the company to reimburse \$7,500 in political contributions by one of its employees through submission of "false mileage claims in Rust travel and expense reports." The Commission found a violation of the conduit contribution provision of the Act and entered into a conciliation agreement in May, 1999, calling for a civil fine of \$3,800.

14. In the Matter of Community Water System, Inc. (MUR No. 5514)

Three attorneys at Gill, Elrod, Ragon, Owen & Sherman, P.A. made a total of \$4,000 in political contributions at the instruction of their client, Community Water System, Inc. CWS directed the firm to bill it for the amount of these contributions by submitting an invoice with a line item for "miscellaneous reimbursements." That entry was later edited to further disguise the genesis of the bill as follows: "series of intraoffice conferences re: various long-term planning, finance and operational issues." The Commission found probable cause to believe that CWS reimbursed the law firm in

violation of Section 441f of FECA, but ultimately dismissed the case without imposing any sanction.

15. In the Matter of Tab Turner (MUR No. 5366)

Tab Turner, the founder and president of Turner & Associates, PA, a prominent Arkansas-based law firm, solicited four of his employees to make \$2,000 contributions each to the presidential campaign of Senator John Edwards. Mr. Turner reimbursed them the following day via checks drawn on the firm's general treasury. Mr. Turner also used a firm credit card to pay a \$2,000 contribution attributed to his brother and sister-in-law. The Commission specifically indicated that it possessed evidence "sufficient to demonstrate that these violations were knowing and willful," but nevertheless resolved the matter through a civil conciliation process by which Mr. Turner and his firm paid a civil penalty of \$50,000. No criminal prosecution was ever initiated in the case.

16. Audiovox Corporation (MUR No. 4931)

Audiovox is a supplier of aftermarket products such as cell phones and consumer electronics. Between December 1995 and July 1997, six different officers of the company (or its subsidiaries) donated a total of approximately \$18,000 to various campaigns. These officers either submitted expense reports to the company to obtain reimbursements, or used petty cash to do so. The parties entered into a conciliation agreement on April 29, 2003 imposing a civil penalty of \$620,000.

17. DeLuca Liquor and Wine, Ltd. (MUR No. 4796)

Ray Norvell, the Vice President of DeLuca, caused five company employees and their spouses to donate a total of \$10,000 to the Dole for President Committee. At the time he solicited these contributions, it was understood that the company would reimburse them for the contributions. Norvell was found to have knowingly and willfully violated Section 441f of FECA, and entered into a conciliation agreement in January, 1999, paying a \$10,000 civil fine. DeLuca paid a \$50,000 civil penalty.

18. In the Matter of Carter's Inc. (MUR No. 5643)

Four executives from Carter's Inc., a children's apparel company, purchased \$2,000 tickets to a speech by President Bush. They then caused the company to reimburse the amount of their contributions. The matter was resolved in March, 2005 by way of a conciliation agreement requiring payment of a civil fine of \$8,000.

19. In the Matter of Arthur A. Watson & Co. (MUR No. 5453)

The Senior Vice President of Arthur A. Watson & Co. devised and carried out a "reimbursement scheme" whereby the company paid back \$8,000 in political contributions by four employees. The Commission found reason to believe that there had been a knowing and willful violation of the prohibition against conduit contributions. In January, 2005, the matter was resolved by way of a conciliation agreement by which the company paid a civil penalty of \$16,000.

20. In the Matter of Cadeau Express, Inc. (MUR No. 4876)

Ramon Desage, the owner of Cadeau Express, Inc., caused his company to reimburse \$5,000 in contributions by five employees. The Commission found that the company had knowingly and willfully violated Section 441f of FECA. Nevertheless, the matter was resolved civilly through the payment of a \$10,000 fine.

21. In the Matter of Yaakov Bender (MUR No. 5101)

Yaakov Bender, the dean of a private educational academy, recruited fifteen individuals to make donations of \$1,000 each for a political fundraiser. Bender then wrote checks to these individuals drawn on the academy's account reimbursing them for the donations. The Commission found that he knowingly and willfully violated Section 441f of FECA, and entered into a conciliation agreement calling for a \$14,000 fine.

These cases demonstrate the gross disparity and vindictiveness in the Justice Department's selection of the instant case for criminal prosecution. Other more recent cases further expose the vindictiveness of the Justice Department's witch hunt against Democrats like Mr. Fieger and his firm.

In December of 2006, the Commission imposed a mere fine on the Republican 527 group Swift Boat Veterans for Truth ("SwiftVets") which spent tens of millions of dollars in illegal contributions to ensure the defeat of Democratic Presidential candidate John Kerry (**Ex. H**). In that case, SwiftVets failed to register as a political action committee, knowingly accepted individual contributions in excess of the limitations imposed by law, and knowingly accepted corporate contributions in violation of 2 U.S.C. § 441b. In total, SwiftVets raised more than \$25 million in illegal contributions from individuals and corporations. In the end, the Republican group settled with the Commission, paid a fine of \$299,500, and the Justice Department's Public Integrity Section, headed by Noel Hillman, turned their head the other way.<sup>5</sup>

Even more shocking is the recent settlement with the FEC by another mega-conglomerate Republican fund raising group called Progress for America Voter Fund ("Progress")(**Ex. I**). Like the

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<sup>5</sup> At the time of the SwiftVets settlement with the Federal Election Commission, the Commission was headed by Chairman Michael E. Toner who was appointed by Mr. Bush. Prior to his appointment to the Commission, Toner served as Chief Counsel to the Republican National Committee, and prior to that Toner served as General Counsel of the Bush-Cheney Transition Team and General Counsel of the Bush-Cheney 2000 Presidential Campaign.

SwiftVets, Progress failed to register as a political action committee, circumvented a ban on corporate money, and accepted contributions that well exceeded the caps on individual donations. Progress spent more than \$26 million in illegal campaign contributions in violation of federal campaign finance laws and got away with paying a civil fine of \$750,000. Again, the Justice Department and Noel Hillman ignored the Republican fund raising group. There were no raids with 100 federal agents, no secret grand jury proceedings, no over zealous federal prosecutors asking inappropriate and politically sensitive questions.

In its haste and spite to charge Mr. Fieger and his firm with frivolous allegations of campaign finance abuse, the Department of Justice has also run afoul of its own rules and regulations. For reasons that have never been made clear, United States Attorney Stephen Murphy of Detroit recused himself from this investigation but has allowed his agents and his assistant attorneys to continue investigating the matter.

Mr. Murphy's decision to recuse himself while allowing his office to continue an investigation is contrary to the United States Attorney Manual Section 3-2.170 which provides:

When United States Attorneys, or their offices, become aware of an issue that could require a recusal in a criminal or civil matter or case as a result of a personal interest or professional relationship with parties involved in the matter, they must contact General Counsel's Office (GCO), EOUSA. The requirement of recusal does not arise in every instance, but only where a conflict of interest exists or there is an appearance of a conflict of interest or loss of impartiality.

A United States Attorney who becomes aware of circumstances that might necessitate a recusal of himself/herself or of the entire office, should promptly notify GCO, EOUSA, at (202) 514-4024 to discuss whether a recusal is required. If recusal is appropriate, the USAO will submit a written recusal request memorandum to GCO. GCO will then coordinate the recusal action, obtain necessary approvals for the recusal, and assist the office in arranging for a transfer of responsibility to another office, including any designations of attorneys as a Special Attorney or Special Assistant to the Attorney General (see USAM 3-2.300

There is an obvious conflict of interest that arises where a United States Attorney recuses himself from a particular matter while allowing his office, agents, assistants, etc. to continue investigating the same. It appears that Mr. Murphy has ignored USAM 3-2.170.<sup>6</sup>

Even more shocking than the government's willful failure to follow its own procedures, the Department of Justice has devised new tricks to illegally spy on American citizens, like the members of the Fieger firm, in order to monitor their political activity and support of leading Democratic candidates. Specifically, the Department of Justice, by and through its United States Attorneys and FBI, secretly obtained the bank records for dozens of individuals in violation of federal law.

In November 2005, when nearly 100 federal agents simultaneously raided the Fieger Firm and the homes of its employees, federal agents had in their possession copies of everybody's checks written to John Edwards. Federal agents also had copies of the Fieger Firm's payroll records. The question, then, is how did the government secretly obtain bank records for at least 100 individuals without a trace of a warrant, subpoena, or other document.

Pursuant to federal law, the Fieger Firm and several employees asked their financial institutions whether the government had accessed their accounts. Under federal law, a financial institution must disclose to its customers whether the government has accessed their account. The only exception to this is where the government issues a grand jury subpoena and then obtains a gag-order from a federal judge

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<sup>6</sup> There are other facts which suggest that Mr. Murphy may have played a greater role in the Justice Department's agenda of targeting Michigan Democrats. During the time of Murphy's appointment, Gonzales aides Kyle Sampson and Monica Goodling were compiling a list of United States Attorneys who should be fired for their lack of loyalty to Mr. Bush. On February 17, 2005, Murphy was nominated by Mr. Bush to become U.S. Attorney for Eastern Michigan, but was not confirmed by the Senate until June 8, 2005. On March 2, 2005, before Murphy was ever confirmed, Sampson inexplicably recommended retaining Murphy and indicated that Murphy was a "strong U.S. Attorney who [had] produced, managed well, and exhibited loyalty to the President and Attorney General." (**Ex. J**). Obviously, Sampson's characterization of Mr. Murphy was based on reasons other than Murphy's performance since Murphy had not yet begun his tenure as U.S. Attorney.

As United States Attorney, Murphy handled the government's frivolous and incoherent case against notable Democrat Carl Marlinga who was acquitted of all charges. Like Noel Hillman, Murphy was later rewarded by the White House with a nomination to a coveted seat on the federal Court of Appeals for the Sixth Circuit (**Ex. K**).

to seal the existence of the subpoena. 12 U.S.C. § 3413(i) & 12 U.S.C. § 3409. In order to obtain such a gag-order, the government must prove that revealing the existence of its subpoena would endanger life or safety, flight from prosecution, or destruction of evidence. The government cannot claim, in a campaign finance case, that a subpoena for bank records in a campaign finance case was a danger to safety. Nor can the government claim that 100 people with families and children were at risk of flight from prosecution. And because the cancelled checks were in the possession of the financial institutions, the government cannot claim that there was a risk of destroying evidence. In short, there is no plausible explanation for how the government could have obtained a valid gag-order without falsifying an application for the same.

Indeed, the Fieger firm has repeatedly asked the government to produce a copy of the subpoenas used to procure the firm's bank records. To date, the government has refused to reveal how it managed to secretly obtain hundreds of bank records without any trace of a warrant or grand jury subpoena. Instead, the government has defended its actions on the basis that *all* grand jury subpoenas served on banks are secret. This is patently false.

In certain circumstances, a financial institution is precluded from revealing the existence of a grand jury subpoena. *See* 18 U.S.C. § 1510 (i.e., bank fraud, money laundering, etc.). If the government is investigating a crime other than those enumerated in § 1510, and it seeks to seal the existence of a subpoena, it must do so by meeting the requirements of 12 U.S.C. § 3409.

Given the government's assertions, and disingenuous reliance on 18 U.S.C. § 1510, it is now clear that Mr. Helland and Mr. Day unilaterally circumvented federal banking laws and expanded the 'secret' powers of the Justice Department, contrary to federal law, to monitor the political activities of American citizens.

For the forgoing reasons, Defendants respectfully request that this Honorable Court grant their motion to dismiss their indictments which were vindictively brought against them in violation of the equal protection component of the Fifth Amendment to the United States Constitution.

## II. APPLICABLE LAW

In *United States v. Armstrong*, 517 U.S. 456, 464 (1966), the Supreme Court recognized that a claim of selective prosecution “is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution.” Under the equal protection component of the due process clause of the Fifth Amendment, the decision to prosecute may not be based on “an unjustifiable standard such as race, religion, or other arbitrary classification.” *Id.* at 464-65; *see also Gardenhire v. Schubert*, 205 F.3d 303, 319 (6th Cir. 2000). “A defendant may demonstrate that the administration of a criminal law is ‘directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive’ that the system of prosecution amounts to ‘a practical denial’ of equal protection of the law.” *Id.*

In a selective prosecution claim, the moving party must demonstrate, by clear and convincing evidence, that (1) the federal prosecutorial policy had a discriminatory effect and, (2) that it was motivated by a discriminatory purpose. *Armstrong*, 517 U.S. at 465; *see also United States v. Smith*, 231 F.3d 800, 808 (11th Cir. 2000). Discriminatory effect is proven by showing that similarly situated individuals were not prosecuted, *Ah Sin v. Wittman*, 198 U.S. 500 (1906), and discriminatory impact may be demonstrated by showing a disparate impact. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)(holding that disparate impact is sufficient to show a discriminatory effect).

Discriminatory purpose examines whether the federal prosecution was carried out because of its adverse effects upon an identifiable group. *Wayte v. United States*, 470 U.S. 598 (1985). Inquiry into discriminatory purpose is “practical” and must necessarily usually rely on objective factors. *Arlington Heights v. Metro Housing Dev’l Corp.*, 429 U.S. 252, 266 (1977). If direct evidence of discriminatory purpose is unavailable, the alleged unconstitutional purpose must be examined in the context of (1) disparate impact; (2) historical background; (3) specific events leading up to the challenged decision; and (4) any associated legislative or administrative history. *Arlington*, 429 U.S. at 266-67.

The Sixth Circuit has refashioned the traditional two part test set forth in *Armstrong* into a three part test. *United States v. Anderson*, 923 F.2d 450 (6th Cir. 1991). First, an official must single out persons for prosecution because those persons belong to an identifiable group, such as those of a particular race or religion, “*or a group exercising constitutional rights.*” *Gardenshire v. Schubert*, 205 F.3d 303, 319 (6th Cir. 2000). Second, the prosecution must be based on a discriminatory purpose. *Id.* Finally, the prosecution must have a discriminatory effect on the targeted group to which defendant(s) belongs. *Id.*

In this matter, Defendants have met their burden of proving that the Department of Justice has vindictively selected them for prosecution based on their support of the John Edwards 2004 presidential campaign.

### III. Discussion and Analysis

Based on the foregoing facts, it is clear that the Department of Justice, aided by certain U.S. Attorneys, have embarked on an aggressive campaign to investigate and prosecute Democrats, like Defendants, with the hope of chilling the free exercise of their political speech, stifling Democratic candidates’ ability to raise money, tainting the reputations of Democratic candidates like John Edwards, and swaying elections in favor of GOP candidates.

#### A. **Defendants were vindictively targeted after exercising their constitutional right to provide financial support to Democratic Presidential Candidate John Edwards**

Under the first prong of the Sixth Circuit’s test for vindictive prosecution, Defendants must show that they belonged to an identifiable group *or* a group exercising constitutional rights. *Gardenshire*, 205 F.3d at 319. Defendants meet this requirements. Mr. Fieger has long been a visible voice of the Democratic party in Michigan. Mr. Fieger was the former Michigan Democratic gubernatorial candidate in 1998 and has been a staunch critic of state and national Republican leadership. Mr. Fieger become a polarizing figure in Michigan’s landscape ever since his representation of Dr. Jack Kevorkian. Since that time, he has been tirelessly attacked and pursued by the Republican leadership in Michigan.

In 2004, Mr. Fieger and his law firm privately funded political advertisements urging the Michigan electorate to vote against Stephen Markman, a GOP appointed member of the Michigan Supreme Court. Mr. Fieger's acts of criticizing Mr. Markman sparked a massively wide sweeping state investigation by Republican Attorney General Michael Cox who relentlessly pursued Mr. Fieger and his law firm under the pretext that Mr. Fieger had violated fictitious campaign finance laws. Eventually, an independent special prosecutor, appointed by Cox, found no basis for criminal charges against Mr. Fieger or his law firm and closed the investigation, but this happened only after Mr. Cox and his agents conducted raids, seized documents, served felony search warrants, and terrorized Mr. Fieger's firm and his employees.

Following Cox's failed attempts to 'get' Mr. Fieger, it is believed that Mr. Cox, who has close ties to Jonathan Tukul, second in command of the United States Attorney's office in Detroit, prompted the nearly two year long spiteful investigation that has now culminated in the Justice Department's frivolous charges against Mr. Fieger and the members of his firm. And the purpose is clear: to chill the exercise of free speech and association by threatening Democrats, like Mr. Fieger and his firm, who have supported certain Democratic candidates including John Edwards.

It is clear that the Justice Department is attempting to selectively quash political dissidents like Mr. Fieger and the members of his firm. The government's intent is to teach Mr. Fieger a lesson. Perhaps Oakland County Republican Party Chairman Saul Anuzis said it best in a statement that he released within hours of Mr. Fieger's indictment: "I also hope that this indictment will give pause to members of the trial bar about the nature of their apparently too cozy of a relationship with liberal Democrat candidates." Fieger Faces Indictment Over Campaign Funds, THE OAKLAND PRESS, August 24, 2007.

These facts amply demonstrate that the Department of Justice has embarked on a nationwide campaign to target Democrats and stifle the ability of Democratic candidates to raise funds for federal elections. As Martin Niemoeller, an opponent of Nazi racial ideology, aptly stated:

First they came for the Communists, but I was not a Communist so I did not speak out. Then they came for the Socialists and the Trade Unionists, but I was neither, so I did not speak out. Then they came for the Jews, but I was not a Jew so I did not speak out. And when they came for me, there was no one left to speak out for me.

- B. The Department of Justice has almost exclusively targeted Democrats, like Mr. Fieger, with specious charges of ‘public corruption’ in order to chill the exercise of free speech and discourage individuals like Mr. Fieger and the members of his firm from contributing money to Democratic candidates.**

Defendants also meet the requirements of demonstrating that the instant indictments have an adverse effects upon an identifiable group, that is, Democrats. Whether the government’s indictments were discriminatory in purpose is a “practical” inquiry that depends on objective factors including disparate impact, historical background, and specific events leading up to the indictments. *Arlington*, 429 U.S. 252, 266-67. By now, it is beyond peradventure that the Justice Department is selectively prosecuting individuals based on political profiling. A credible study by Professors Shields and Cragan conclusively establish that the Justice Department has been converted into a militia arm of the White House to be used for political purposes.

- 1. There is concrete empirical data revealing that the Justice Department is using political profiling to target Democrats for criminal prosecution, and statistics demonstrate that the disparity is that seven times more Democrats are being politically targeted than Republicans**

In their study, Shields and Cragan concluded, based on empirical data, that “the offices of the U.S. Attorneys across the nation investigate seven (7) times as many Democratic officials as they investigate Republican officials, a number that exceeds even the racial profiling of African Americans in traffic stops.” (Ex. G). This is concrete empirical data – not fantasy or fiction – and it squarely supports Mr. Fieger’s claims that the Justice Department is vindictively targeting Democrats at a disturbingly disparate rate.

- 2. The Historical background and specific events leading up to the instant indictments further reveal that the Justice Department’s has selectively and vindictively chose to target Democrats seven times more frequently than Republicans**

Most curiously, Professor Shield’s and Cragan’s study coincides with the Bush Administration’s Justice Department headed by Alberto Gonzales. “[T]he current Bush Republican Administration

appears to be the first to have engaged in political profiling.” (Ex. G). In fact, the White House has systematically injected itself into the day-to-day operations of the Justice Department. Harriet Miers gave the okay signal to Gonzales’s office to begin purging those United States Attorneys who failed to “exhibit loyalty” to Mr. Bush. Gonzales placed politically loyal fanatics like Kyle Sampson and Monica Goodling into positions of authority over the hiring and firing of career prosecutors. Rove was communicating with the Justice Department’s Public Integrity Section as to specific matters which resulted in the political prosecution of, at least, Don Siegelman, the former Democratic Governor of Alabama.

It is also clear that Rove was able to manipulate the Department’s Public Integrity Section through Noel Hillman, a political appointee who was responsible for numerous politically motivated investigations including the frivolous prosecution of notable Detroit Democrat Carl Marlinga and the four-year long multi-million dollar overreaching investigation of Edward McNamara. Hillman also lead the Public Integrity Section at the time that the government began the instant investigation against Mr. Fieger.

This type of involvement between the White House and the Justice Department is simply unprecedented, and for good reason. Historically, the Department of Justice is charged with evenly and impartially enforcing federal laws. Under the current regime, this is no longer happening. The White House is deciding who and what to prosecute. David Iglesias, the U.S. Attorney for New Mexico, was pressured by Republican Senator Pete Domenici to bring indictments against Democrats in close proximity to a general election. Iglesias refused, and was later fired as a consequence. In this manner, the White House has exerted its control to ensure that the Justice Department carries out politically motivated investigations.

The case of the Wisconsin civil servant who was convicted upon frivolous charges is perhaps the most concerning. In that case, U.S. Attorney Steven Biskupic filed charges against a state employee in order to taint the reputation of the Democratic Governor. With facts that would make Kafka proud, the government was able to go to a jury with charges that were utterly indiscernible. Indeed, during oral

argument, the panel indicated that it did not even understand the government's theory of the case against Ms. Thompson. In an unprecedented ruling, the Seventh Circuit vacated Thompson's conviction, but that was only Thompson was convicted of a fictitious crime and served time in prison.

Given these specific facts, the Court should carefully consider why the Justice Department has spent millions of dollars to investigate Democrats who made contributions to John Edwards worth about \$100,000. And why are federal prosecutors hauling American citizens before a grand jury and compelling them to reveal for whom they voted in a presidential election? And why is our government secretly accessing our bank records to determine who made contributions to Democratic candidates, and in what amounts. There is absolutely no justification for the government's actions as demonstrated in this case. In fact, the government's activities in this case violate the most sacred protections of our United States Constitution: our freedoms of speech and association. The Justice Department cannot simply step over the United States Constitution and federal law under the guise of law enforcement.

These facts should alarm every American citizen who should wonder if they will next fall pray to the Justice Department's campaign of political cleansing. Given Professor Shield's and Cragan's disturbing study coupled with the White House's unprecedented involvement in the affairs of the Justice Department, it is clear that the government's instant indictments against Mr. Fieger and the members of his firm are spurred solely by vindictiveness.

**C. There is an abundance of evidence revealing that the Department of Justice has hand picked Mr. Fieger and his firm for criminal prosecution while overlooking many other more serious cases involving substantially greater amounts of contributions**

Mr. Fieger can also demonstrate, by documentary evidence, that the Justice Department indictments against him have a discriminatory effect of chilling the free speech of Democrats and their political supporters. Discriminatory effect is proven by showing that similarly situated individuals were not prosecuted based on similar circumstances. In fact, Mr. Fieger has twenty-one (21) matters all of which were civilly resolved by the Federal Election Commission and without the interference or intervention of the Justice Department. It should be noted that almost 99% of campaign finance cases

are resolved civilly through the Federal Election Commission and without the intervention of the Justice Department.

The case of Tab Turner (FEC's matter under review no. 5366) is one such example. There, Tab Turner, a prominent Arkansas-based law firm, reimbursed employees who contributed to a federal campaign, and no criminal charges were brought. Interestingly, the United States Attorney who refused to indict Mr. Turner was later fired and replaced by a protégé of Karl Rove.

There are two more recent examples that demonstrate the gross disparity in Justice Department's political profiling of Democrats. The cases of SwiftVets and Progress for America Voter Fund both demonstrate that the Justice Department has selectively and vindictively targeted Democrats, like Mr. Fieger and his firm, for prosecution. Both of those cases involved tens of millions of dollars in contributions to Republican candidates, and neither of those groups were criminally prosecuted. This case involves contributions of about \$100,000, and for that amount of money, the Justice Department, aided by nearly 100 federal agents, launched the largest campaign finance investigation in the history of America. What was the difference? Mr. Fieger and his firm were contributing to Democratic candidates while the SwiftVets and Progress for America were contributing (millions of dollars to Republican candidates.

Again, these facts beg the question: why did Alberto Gonzales authorize the largest campaign finance investigation in the history of America for a matter that before has always been resolved by the FEC? And why did the government send nearly 100 federal agents in to raid the Fieger law firm and the employees' homes simply to find out who made contributions to John Edwards? The answer to these questions rests with Karl Rove, Harriet Miers, Alberto Gonzales, Kyle Sampson, and Monica Goodling. The problem, however, is that each of these individuals have now resigned in the wake of this ever expanding scandal.

#### **IV. Conclusion and Relief Requested**

From any perspective, this case appears to be the twenty-first century's version of the Salem witch trials. The Justice Department has exercised extraordinary means, stepped over the United

States Constitution, and ignored the laws of our congress for the vindictive purpose of trying to 'get' Mr. Fieger and the members of his firm. Such uneven and disparate application of federal law violates the equal protection component of the Fifth Amendment to the United States Constitution.

Accordingly, Defendants respectfully request that this Honorable Court grant their motion to dismiss the government's indictments.

Respectfully submitted,

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