UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACK and RENEE BEAM,

Plaintiffs,

Civil Action No. 07-cv-1227
Honorable Rebecca R. Pallmeyer

vs.

ALBERTO R. GONZALES, UNITED STATES ATTORNEY GENERAL, AND ROBERT LENHARD, FEDERAL ELECTION COMMISSION CHAIRMAN,
In their official capacities,

Defendants.
_____/

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

In their First Amended Complaint, Plaintiffs assert that Defendants Gonzales, the FEC, and an unknown agent(s) of the FBI ("Justice Department, or DOJ") violated the Right to Financial Privacy Act, and conspired to retaliate against them for exercising their First Amendment Right of free speech, and conspired with the FEC to circumvent federal campaign finance laws.[1] Both Defendants Gonzales and the FEC now seek dismissal under Fed. R. Civ. P. 12(b)(1) & (6). For the following reasons, Defendants' motion should be denied.

[1] Counts IV and V of Plaintiffs' First Amended Complaint are based on mandamus and the Administrative Procedures Act. Defendant FEC contends that the Court already ruled on these claims (in a June 22, 2007 Minute Order) when it granted Defendants' motions to dismiss. It was the undersigned counsel's understanding that during the hearing on June 22, 2007, the Court did not expressly rule on Plaintiffs' mandamus and APA claims and indicated that it would likely rule on those claims in the near future. Given the Court's verbal order and that fact that the Court had not expressly ruled on the mandamus and APA claims, Plaintiffs included those counts in their First Amended Complaint.

In the first twelve pages of its motion to dismiss, DOJ asserts that Plaintiffs' claims are not ripe and Plaintiffs have no standing to challenge the DOJ "unless and until an indictment is returned against [them]." (DOJ Motion to Dismiss, pg. 4). DOJ also begs the Court to stay out of this matter because there is an ongoing criminal investigation and, apparently, any sort of questioning of DOJ's improper conduct would impede the DOJ's ability to investigate serious and important matters (the most important of which is investigating the political activities and preferences of American citizens). On August 24, 2007, the DOJ indicted Mr. Geoffrey Fieger and his law partner Ven Johnson (**Exhibit A)**. With these indictments now in hand, there is no reason for the Court to abstain from hearing Plaintiffs' claims. *See Steffel v. Thompson*, 415 U.S. 452, 462 (1974)(pointing out that a federal court should not abstain from hearing a claimant's constitutional claims where there is no pending criminal action against the claimant).

While the government attempts to place this case into a procedural morass, the crux of Plaintiffs' claims are very simple. The DOJ began the largest campaign finance investigation in the history of America with a small militia of nearly 100 federal agents who raided the Fieger law firm and the homes of all the Fieger firm employees and associates. The pretext for this unprecedented type of raid was alleged campaign finance disputes that involve approximately $100,000 of contributions made to the John Edwards 2004 presidential campaign. Plaintiff Jack Beam serves as *of counsel* to the Fieger law firm.

During the course of its crusade, the DOJ revealed that they had secretly obtained the bank records for dozens of individuals without a trace of a warrant or subpoena or other document. Shortly thereafter, FEC Chairman Michael Toner (former General Counsel of the Bush-Cheney team) sent a threat letter to Plaintiffs Jack and Renee Beam accusing them of violating federal

campaign finance laws. So how did the FEC obtain information about political contributions made by Jack and Renee Beam? How did the FEC obtain financial records about monies paid either to or from the Beams from the Fieger law firm. The most likely answer is that the DOJ illegally gathered such private financial records in violation of federal law and then sent their illegal fruits to the FEC.

The Beams have attempted unsuccessfully to find out how the government obtained their bank records. The financial institutions have refused to disclose how the government accessed their accounts. The government has also refused to explain how it secretly collected the records without a trace of a subpoena or warrant. Now, the government is asking the Court to dismiss this case without any further questions. The Court should deny the government's motions to dismiss.

Generally, a grand jury subpoena served on a financial institute is not secret, and a financial institution is not precluded from acknowledging the existence of a grand jury subpoena. Under the Right to Financial Privacy Act (RFPA), the government may seal the *existence* of a grand jury subpoena by obtaining a court issued gag-order which would effectively gag a financial institution from revealing to its customers whether the government had accessed the account. 12 U.S.C. §§ 3413(i) and 3409.

In complete contradiction of §§ 3413(i) and 3409, the government contends that the RFPA does not apply to grand jury subpoenas. This is not exactly true.

Section 3413(i) provides that:

> Nothing in this title [] shall apply to any subpoena or court order issued in connection with proceedings before a grand jury, *except* that a court shall have authority to order a financial institution, on which a grand jury subpoena for customer records has been served, not to notify the customer of the existence of the subpoena or information

> that has been furnished to the grand jury, under the circumstances and for the period specified and pursuant to the procedures established in section 1109 of the Right to Financial Privacy Act of 1978 (12 U.S.C. § 3409).

So, while it is true that most of the substantive provisions of the RFPA do not apply to grand jury subpoenas, the government must still follow the statutory procedures outlines in § 3409 if it wishes to seal the *existence* of a grand jury subpoena served on a financial institution.

The following example best illustrates the operation of §§ 3413(i) and 3409. The government is investigating a bank robbery of a prominent Chicago bank. There is an ongoing grand jury investigation and the government wishes to obtain surveillance video from the bank. The government serves on the financial institution a grand jury subpoena. The mere existence of that subpoena is not a secret. The financial institution is free to disclose the *existence* of the grand jury subpoena. If the government wishes to seal the existence of the subpoena, it may do so by obtaining a gag order under § 3409. If the government does not obtain the gag order, the bank is not precluded from disclosing the existence of the subpoena.

In this case, the government is arguing that *all* grand jury subpoenas are secret. This is simply untrue.[2] If the government wishes to secretly obtain bank records through use of a grand jury subpoena, it must obtain a gag order under § 3409. In order for the government to obtain a gag order under § 3409, it must prove, *inter alia*, that disclosure of such actions will "endanger life or physical safety of any person; flight from prosecution, destruction of or tampering with evidence; intimidation of potential witnesses; or otherwise seriously jeopardizing an investigation or official proceeding .

[2] If the government's theory were correct that *all* grand jury subpoenas served on financial institutions were secret, why would congress have passed § 3413(i) and § 3409 which expressly provides for a gag order?

. .” 12 U.S.C. § 3409(a)(3)(A)-(E). Such a court issued gag order remains in effect for only 90 days unless the government renews its request to suppress notice of disclosure by meeting the requirements of § 3409(a)(3)(A)-(E).

In this case, the financial institutions, upon proper request made pursuant to 12 U.S.C. § 3404(c), have refused to reveal whether the government has accessed their customers' accounts. None of the statutory requirements to obtain a gag order of a grand jury subpoena remotely apply to a campaign finance case. Alleged violations of campaign finance do not involve endangering life or the physical safety of any person. Nor can the government credibly claim that more than 100 people (employees of the Fieger firm, their spouses and children) are at risk of “flight from prosecution.” And because the banking records are in the possession of the financial institutions, such records are not subject to “destruction.” Given the statutory language of § 3409, it is difficult, if not impossible, to imagine how the government could obtain gag orders for dozens of subpoenas in a case involving campaign contributions to John Edwards.

As another red herring, the government also claims that “provisions in other statutes make it a crime for financial institutions to disclose grand jury subpoenas to customers in certain circumstances.” (Gonzales's motion to dismiss, pg. 14-15). Specifically, the government cites 18 U.S.C. § 1510(b)(2) for the proposition that grand jury subpoenas served on financial institutions are secret. Again, the government is incorrect. Section 1510 provides that the secrecy requirements apply *only* to a grand jury subpoena for records relating to the following categories of criminal investigations:

- receipt of commissions or gifts for procuring loans
- theft, embezzlement, or misapplication by bank officer or employee
- banking crimes committed by lending, credit and insurance institutions employees

- influencing FDIC transactions with false entries, etc.
- making false loan and credit applications
- bank fraud
- laundering of monetary instruments
- engaging in monetary transactions in property derived from specified unlawful activity

18 U.S.C. § 1510(b)(3)(B)(i),(ii). The FEC's claims against Plaintiffs have nothing to do with any of the crimes enumerated in § 1510; therefore, the government's vague claims to secrecy should be flatly rejected.

If the government's investigation does not involve suspected violations of the aforementioned crimes, then its grand jury subpoena for records is not secret unless the government obtains a gag order under 12 U.S.C. §§ 3413(i) & 3409. Indeed, the fact that 12 U.S.C. §§ 3413(i) & 3409 specifically address the manner in which the government may seal a grand jury subpoena served on a financial institution further demonstrates that the government's interpretation of 18 U.S.C. § 1510 is flawed. For instance, if the government's assertion were true that *all* grand jury subpoenas served on financial institutions were secret under § 1510, then 12 U.S.C. § 3413(i) would be rendered superfluous because there would never be a need to seal such a subpoena. *See, e.g., Arkansas Best Corp. v. Comm'r Internal Revenue Serv.*, 485 U.S. 212, 218 (an interpretation of statutory provision that renders another superfluous cannot be correct).

In short, it is a virtual certainty that the government violated *at least* the RFPA by secretly obtaining Plaintiffs' bank records (and the bank records for dozens of employees and other associates of the Fieger law firm). It is also a virtual certainty that the DOJ illegally gathered these bank records and then transmitted the same to the FEC. And why did the government do all of this?

Because the DOJ, aided by other political operatives like former FEC Chairman Michael Toner,[3] have aggressively engaged in a nationwide campaign to harass and prosecute Democrats with the purpose of chilling their First Amendment rights.

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 after being narrowly defeated by GOP candidate Bob Riley.[4]

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 B)**.

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

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[3] Toner, who recently resigned as Chairman of the Federal Election Commission, was appointed by Mr. Bush. Prior to his appointment to the FEC, 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.

[4] Although the election was riddled with irregularities, the Public Integrity Division of the Justice Department, headed by Noel Hillman refused to look into the matter.

Department of Justice and the Department of Justice was already pursuing Don Siegelman." (**Ex. B**). 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 (**Ex. C**). *See also* **Exhibit D,** Adam Nossiter, *Democrats See Politics in a Governor's Jailing*, N.Y. TIMES, September 11, 2007.

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"),[5] the prosecution of Siegelman, and a number of other cases including the

[5] *United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007). There, United States Attorney Steven Biskupic of Wisconsin brought frivolous corruption charges against Ms. Georgia Thompson, a state employee accused of steering government contracts to companies that supported her boss, a Democratic Governor. Although Biskupic could not state a coherent crime against Ms. Thompson, he advanced a silly theory that Thompson committed a crime because state contracts were given to companies lead by Democrats who supported the Governor, 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

government's frivolous charges against prominent Detroit Democrat Carl Marlinga who was acquitted on all charges. More important, however, Hillman was also responsible for the nearly two-year long criminal investigation which culminated in the instant indictments against members of the Fieger 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 E)**. 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).[6]

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." **(Ex. E).** According to Professors Shields and Cragan, "[t]he current

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vacated Thompson's conviction within hours of oral argument and ordered that she be released from prison by day's end. The case was so frivolous that Seventh Circuit Judge Diane Wood (a former Deputy Assistant General of the Justice Department) told the government during argument that she did not even understand the government's theory of its case.

[6] 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.

Bush Republican Administration appears to be the first to have engaged in political profiling." **(Ex. E)**. 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. E)**. 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 and investigations of Democrats like Jack and Renee Beam.

So while the government may attempt to discredit Jack and Renee Beam as fantastic story tellers, this case is far from fiction. Indeed, Plaintiffs have identified an alarming pattern of what appears to be political prosecutions under the current administration. And the evidence of the government's witch hunt against Democrats continues to grow. Just a few days ago, two sources, including a member of the Justice Department, revealed that the Bush Administration developed a plan to stifle the ability of Democratic candidates to raise money by targeting their financial supporters with frivolous allegations of campaign finance violations. *See* Scott Horton, *Tracking Political Prosecutions*, Harper's Magazine, Sept. 22, 2007, at 1 (**Ex. F**). The scheme contemplated raids on law offices in order to "flyspeck" campaign contribution records and directed that "offenses not be treated as an administrative matters but rather as serious criminal offenses." *Id.* "It was essential to pull it off that each case be viewed as something standing all on its own, and that the fact that there was a politically motivated prosecution be obscured." *Id.*

While the strategy may have gone unnoticed in its early stages, the frequency with which the politically-based prosecutions have been carried out now proves that there is a stink in the pantry. Now, even in the face of what appears to be the twenty-first century version of the Salem witch trials, the government is attempting to 'make this lawsuit go away.' The FEC simply claims it did nothing

wrong and the DOJ raises specious jurisdictional challenges to this lawsuit. The Court should reject the government's arguments and proceed on the merits of Plaintiffs' statutory and constitutional claims.

A. The RFPA provides for a statutory cause of action against any "agency or department of the United States" and thus constitutes a waiver of sovereign immunity.

In its motions to dismiss, both Defendants DOJ and the FEC assert that Plaintiffs claims are barred by sovereign immunity. The Right to Financial Privacy Act (RFPA) provides a statutory cause of action for violation of the Act and expressly provides for actual and punitive damages against "[a]ny ***agency or department*** of the United States . . ." 12 U.S.C. § 3417(a)(emphasis added).[7] Thus, § 3417 constitutes a waiver of sovereign immunity as to Plaintiffs' claims against both the DOJ and FEC arising under the RFPA.

To the extent that Plaintiffs claim that federal agents violated their constitutional rights to engage in free speech, Defendants' reliance on sovereign immunity also fails. A suit in which a plaintiff alleges that a federal officer has acted in violation of the Constitution or statutory authority generally is not deemed to be a suit against the sovereign. *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963); *Ogden v. United States*, 758 F.2d 1168, 1177 n.5 (7th Cir. 1985). As the Seventh Circuit has aptly pointed out, an action seeking monetary relief from individual federal officials for a constitutional violation may be brought as a *Bivens* action "to avoid the sovereign immunity that

[7] In its motion to dismiss, DOJ erroneously concludes that Plaintiffs' cause of action, if any, is against the financial institutions and not the government. Again, this is incorrect. Section 3417(a) expressly provides a statutory cause of action against *any agency or department of the United States*.

would block an action against the United States." *Sterling v. United States*, 85 F.3d 1225, 1228-29 (7th Cir. 1996).[8]

For these reasons, the Court should reject Defendants' arguments that Plaintiffs' claims are barred by sovereign immunity.

B. Plaintiffs have standing to challenge the government's act of secretly obtaining their private financial records where the government violated, among other laws, the Right to Financial Privacy Act.

Also without merit is the government's claim that Plaintiffs lack standing. In an attempt to obfuscate the issue, the government repeatedly claims that Plaintiffs are attempting to disrupt a grand jury investigation. This is no longer at issue. The DOJ recently indicted the principals of the Fieger law firm such that there is no longer a prospect of disrupting a grand jury investigation. Furthermore, the Beams have a congressional-created statutory cause of action against a government agency and its employees who violated federal law in secretly obtaining their bank records.

It is a fact that the government obtained bank records for scores of individuals without a trace of a warrant or subpoena. Mysteriously, after the DOJ obtained these records in violation of federal law, the illegally gathered bank records found their way into the hands of the FEC. The FEC, in turn, sent letters to Plaintiffs Jack and Renee Beam accusing them of violating federal campaign laws based on their financial support to the John Edwards presidential campaign. It is not difficult to connect these dots. Contrary to the government's assertion, Plaintiffs have suffered an invasion of a legally protected interest (albeit Plaintiffs cannot yet identify the hand that held the pen). It is

[8] In *Bivens,* the Supreme Court held that a plaintiff could recover money damages for violations of the Fourth Amendment committed by federal agents. 403 U.S. at 397; *see also Bagola v. Kindt*, 131 F.3d 632, 637 (7th Cir. 1997). Courts have also recognized that a *Bivens* remedy extends beyond Fourth Amendment violations and encompasses other constitutional rights. *Butz v. Economou*, 438 U.S. 478 (1978).

incredible for the government to now stand in a circle refusing to reveal how it secretly obtained Plaintiffs' financial records while at the same time argue that Plaintiffs cannot ask any questions.[9]

The RFPA provides Plaintiffs with a statutory cause of action for violations of such Act. The Act sets forth the manner and circumstances under which the government may gag a financial institution from disclosing the existence of a grand jury subpoena. Plaintiffs claim that the DOJ violated and/or circumvented these provisions in order to spy on their political activities, and the DOJ transmitted its illegally gathered records to the FEC. The FEC also seeks dismissal of this case and claims ignorance as to the manner in which the DOJ illegally gathered Plaintiffs' bank records. Seemingly, the FEC is proffering a new type of immunity; that is, the don't ask don't tell immunity.

In September 2006, Commission Chairman Michael Toner sent Plaintiffs Jack and Renee Beam a threat letter accusing of them violating campaign finance laws. Toner also provided a factual basis of his claims against Plaintiffs, which made clear that the FEC had in its possession Plaintiffs' bank records. To this day, however, the FEC has neither conducted an investigation nor has it never issued a subpoena for any records. So where did the FEC get the records. Answer: from the DOJ, and the FEC asserts that it did not ask where the records came from and DOJ apparently did not tell. At a minimum, Plaintiffs are entitled to discovery as to these disputed factual questions.

In their complaint, Plaintiffs allege that members of the DOJ and FEC conspired to retaliate against them for exercising their free speech. In the FEC's motion to dismiss, it claims that Plaintiffs failed to sufficiently plead a conspiracy claim against it. Plaintiffs disagree.

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[9] The circular type of argument made here has become all too common under the Bush Justice Department. For years now, the Bush Justice Department has attempted to expand the power of the executive branch and provide greater secrecy to DOJ activity. Apparently, their strategy is that the less we know, the less we can complain.

The standard which determines the sufficiency of factual allegations of the existence of a civil conspiracy are governed by the "short and plain statement" rule set forth in Fed. R. Civ. P. 8(a). *See, e.g., In re, Crazie Eddie Securities Litigation*, 747 F. Supp. 850, 863 (E.D. N.Y. 1990); *see also Quinones v. Szorc*, 771 F.2d 289, 291 (7th Cir. 1985). When pleading a civil conspiracy – just as every other civil action – the "plaintiff need not 'plead his evidence' in stating a claim in conspiracy or otherwise go into unnecessary detail (internal citations omitted)." *Williams v. AMF, Inc.*, 512 F. Supp. 1048 (S.D. Ohio 1981). Indeed, pleading and proving the existence of a conspiracy is one of the more difficult of all possible undertakings in litigation because a conspiracy, by its very nature, is a secret and clandestine enterprise.

As the Supreme Court has admonished: "in . . . cases, where the proof is largely in the hands of the alleged conspirators . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly (internal quotation marks omitted)." *Hospital Building Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976). The allegations of Plaintiffs' complaint falls well within the guidelines for pleading a civil conspiracy. Accordingly, this Court should reject Defendant FEC's argument that Plaintiffs have failed to sufficiently state a conspiracy claim.

Plaintiffs' complaint further alleges that the government's acts were carried out in retaliation for their support of the John Edwards campaign with the intent to chill the exercise of their constitutional rights. And contrary to the government's assertion, Plaintiffs have stated a federally cognizable claim for retaliation.

In *Chicago Reader v. Sheahan*, 141 F. Supp.2d 1142 (N.D. Ill. 2001), Judge Moran aptly set forth the elements of a retaliation claim as follows:

> (1) that the plaintiff was engaged in a constitutionally protected activity; (2) that the defendant's adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to the exercise of the plaintiff's constitutional rights.

(citing *Block v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998)). Here, Plaintiffs Jack and Renee Beam exercised their most sacred right of political speech by providing financial support to the John Edwards 2004 Presidential campaign. Shortly thereafter, the DOJ embarked on the largest campaign finance investigation in the history of America. Gonzales personally authorized a small army of nearly 100 federal agents to raid a law office and simultaneously raid the homes of its employees and their families. Indeed, one agent commented about how he had been flown in from Iraq to help find out why American citizens had made contributions to the John Edwards campaign.

During the course of a nearly two-year-long grand jury investigation, federal agents have compelled individuals to reveal the identity of whom they voted for in the 2004 presidential election. These facts amply demonstrate that the government's purpose was to harass, intimidate, threaten, and chill the exercise of free speech by stifling Democratic candidates' ability to raise money, taint the reputations of Democratic candidates like John Edwards, and sway elections in favor of GOP candidates. In this respect, the White House and the politicized Justice Department have already succeeded in their mission by retaliating against people like Jack and Renee Beam for their participation in the political process.

The government has also moved to dismiss Plaintiffs' claims against "unknown agents of the Federal Bureau of Investigation" for failure to serve. The problem, however, is that without discovery Plaintiffs cannot identify the specific person(s) who violated their rights by secretly

accessing their bank accounts. The government sent a small army of nearly 100 federal agents (apparently from all over the country and world) to investigate claims of campaign finance violations. Since the raid upon the Fieger law firm, the government has harassed the employees, family members, children, friends, associates, and acquaintances (all over the nation) of Mr. Fieger and his firm. Given that the government has secretly accessed Plaintiffs' bank records, Plaintiffs cannot be faulted for failing to identify those responsible for the misconduct.

Indeed, in *Billman v. Indiana Dep't of Corrections*, 56 F.3d 785, 789 (7th Cir. 1995)(Posner, C.J.), the Seven Circuit held that a plaintiff's "initial inability to identify the injurers is not by itself a proper ground for the dismissal of the suit," because this would "gratuitously prevent [a plaintiff] from using the tools of pretrial discovery to discover the defendants' identity." *See also Maclin v. Paulson*, 627 F.2d 83, 87 (7th Cir. 1980)(finding that when "a party is ignorant of defendants' true identity, it is unnecessary to name them until their identity can be learned through discovery or through the aid of the trial court").

The Eight and Ninth Circuits also follow this rule. *See Munz v. Parr*, 758 F.2d 1254, 1257 (8th Cir. 1985)("Rather than dismissing the claim, the court should have ordered disclosure of Officer Doe's identity by other defendants named and served or permitted the plaintiff to identify the officer through discovery."); *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980)("the plaintiff should be given an opportunity through discovery to identify the unknown defendants, unless it is clear that discovery would not uncover the identities . . .").

Consistent with the law of this circuit, and other circuits across the country, the government motion to dismiss Plaintiffs' claim for failure to serve "unknown agents" of the FBI should be denied. The mere production by the government of the subpoena (or national security letter, etc.)

used to secretly access the bank accounts in question will reveal the identity of the culprits who now face liability.

C. Plaintiffs have suffered a violation of their constitutional rights and their claims are ripe for this Court's review.

The DOJ also raises a specious argument that Plaintiffs' claims are not ripe for review "unless and until an indictment is returned." (Gonzales's Motion to Dismiss, pg. 5). The government's ripeness argument misses the mark. Plaintiffs' claims are grounded in conspiracy and retaliation for exercising their free speech. The FEC ripened Plaintiffs' claims by sending them a threat letter accusing Plaintiffs' of frivolous campaign finance violations. There is an abundance of evidence that has surfaced in the last six months which confirms Plaintiffs' claims; that is, that the DOJ is engaging in political profiling by targeting Democrats with frivolous investigations. It is also clear that other agencies, headed by political appointees like former FEC Chairman Toner, are assisting the DOJ in their mission.

The government's assertion that Jack and Renee Beam cannot present their federal claims unless and until they are indicted is simply absurd. So the government can harass, threaten, intimidate, retaliate, and conspire against American citizens for exercising their free speech and those victimized by such acts cannot complain about it unless and until they are indicted? Such an assertion violates the core protections of the United States Constitution and should not be circumvented by resorting to such disingenuous formalities.

Given the disclosure by Columbia Law Lecturer Scott Horton in his article *Tracking Political Prosecutions*, Plaintiffs' claims are far from imaginary or speculative (**Ex. F**). Given that Mr. Fieger and his law partner were recently indicted for alleged campaign finance violations, there is no reason

that Jack and Renee Beam cannot proceed with their constitutional and statutory claims against the government.

For these reasons, Plaintiffs respectfully request that this Honorable Court deny the government's motions to dismiss and allow Plaintiffs to proceed immediately on their claims.

Respectfully submitted,

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Dated: September 28, 2007

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 28, 2007 she electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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