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June 23, 2009

29044253248

Via Federal Express/Overnight Delivery
Ms. Dora Walls
Secretary of Federal Election Commission
999 E. Street
Washington, D.C. 20463

Re: MUR 5818
Fieger, Fieger, Kenney, Johnson & Giroux, P.C.,
f/k/a Fieger, Fieger, Kenney & Johnson, P.C.
Our File No.: 3959.253

Dear Ms. Walls:

In accordance with the instruction on the Federal Election Commission letter dated June 5, 2009, I have enclosed an original Brief in Response to the General Counsel's Recommendation.

For the reasons set forth in Respondent's Brief, At this time, I am also requesting an oral hearing before the Commission.

Thank you for your attention to this matter.

If you have any questions, please feel free to contact me.

Sincerely,

FIEGER, FIEGER, KENNEY, JOHNSON
& GIROUX, P.C.

Michael R. Dezsi

MRD/vgb
Enclosures
cc w/enc: Thomasenia P. Duncan, Esq.
General Counsel (enclosed 3 copies of Response Brief)

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Fieger, Fieger, Kenney, Johnson & Giroux, P.C.	)	MUR 5818
	)	
Geoffrey N. Fieger	)	
	)	
Vernon R. Johnson	)	**ORAL HEARING ON PROBABLE CAUSE REQUESTED**

RESPONDENTS' BRIEF

In September 2006, the Commission advised Respondents that it had found reason to believe that Respondents violated 2 U.S.C. §§ 441b and 441f. After its finding, the Commission took no further action in this matter and ceded its exclusive jurisdiction to the Department of Justice who had already began embarking on a multi-million dollar boondoggle.

In November 2005, former United States Attorney General Alberto Gonzales authorized an unprecedented nighttime raid on the Fieger law firm and sent nearly 100 federal agents to the homes of Fieger Firm employees and their families. The ostensible reason for the Justice Department's crusade was that the Respondents, and their employees, had violated provisions of the Federal Election Campaign Act, specifically 2 U.S.C. § 441b and 441f.

In the course of its so-called "investigation," federal agents threatened Fieger firm employees, their spouses, and even their children with criminal prosecution for contributing to the 2004 Edwards for President Campaign. Some of their tactics included coercing American citizens to reveal for whom they voted in the 2004 presidential election, and also demanding that they reveal their political affiliations and their past political activities.

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In August 2007, after an almost eighteen-month "investigation," the Justice Department indicted Respondents Geoffrey N. Fieger and Vernon R. Johnson in a ten count felony indictment charging Respondents with, *inter alia*, violations of 2 U.S.C. § 441f and 441b for allegedly reimbursing Fieger Firm employees for their voluntary contributions to the 2004 Edwards for President Campaign. Unfortunately for the prosecution, it seems they failed to ever open a book and actually read the law which they had accused Respondents of violating.

Specifically, § 441f prohibits making a contribution "in the name of another person." Nowhere in § 441f does congress prohibit or criminalize the gratuitous reimbursement of voluntary campaign contributions without a quid pro quo. Rather, § 441f prohibits an individual from making contributions using the names of the dead, the fictitious, or names randomly gathered up from a phone book. Section 441f would also prohibit an individual from making contributions (perhaps by money order) and using the names of his neighbors without their knowledge or consent. To do so would constitute making a contribution "in the name of another." A plain reading of the statute compels this conclusion. Reimbursement, after a voluntary contribution, is not prohibited. Uninterested in the plain language of the statute, the Justice Department proceeded and spent millions of taxpayer dollars pursuing Respondents for a fictitious crime. During the criminal proceedings, federal prosecutors openly acknowledged that they did not have a single case to support their self-serving re-interpretation of the law. Instead, they relied on *dicta* from cases in which certain courts considered issues tangentially related to § 441f but never directly considering the scope and reach of the statute.

The criminal case was so tainted by irregularities and specious allegations that the presiding district court found enough evidence to warrant discovery of vindictive and selective prosecution. (Exhibit A, Opinion and Order from *United States v. Fieger*, Case No. 07-20414). It should be noted also that the Federal Election Commission's involvement and coordination with the Justice Department criminal case served to raise the court's concerns as to the legitimacy of the agencies' dealings including the Commission's abandonment of its jurisdiction.

In April 2008, the Justice Department's criminal case proceeded to trial and Respondents were found not guilty of all charges. In fact, during the criminal trial, almost every single witness called by the prosecution testified *against* the government's case leaving the prosecution empty handed. In the wake of Respondents' across-the-board acquittal, many of the jurors expressed disbelief and outrage that the federal government had wasted such an inordinate amount of taxpayer money on a ruse which some jurors described as "hopeless" from the outset.

In the meantime, the Federal Election Commission sat idly on the sidelines, apparently watching as the Justice Department tested the waters, so to speak, with its criminal prosecution based on its stretched interpretation of the law. Within weeks of its high profile, multi-million dollar loss in the *Fieger* criminal case, the Justice Department decided to pursue a similar indictment brought against another trial attorney in California by the name of Pierce O'Donnell (Case No. 08-00872). Like its case against Respondents, the Justice Department's indictment of Mr. O'Donnell was also premised on violations of 2 U.S.C. § 441f and alleged that Mr. O'Donnell violated § 441f by allegedly reimbursing his employees who voluntarily

contributed to the 2004 Edwards for President Campaign.

Recently, the district court presiding over Mr. O'Donnell's case threw out most of the prosecution's case and ruled that 441f does not criminalize, at all, the reimbursement of campaign contributions (Exhibit B, Order from *United States v. O'Donnell*, Case No. 08-00872). In its opinion, the district court in *O'Donnell* held that:

> if Congress intended § 441f to apply to indirect contributions, or contributions made through a conduit or intermediary, it would have included explicit language, as it did in other sections of the same statute. [internal citations omitted]. Moreover, if § 441f covered "conduit" and "indirect" contributions, there would be no need for Congress to have explicitly included those terms in other sections of FECA. As the Court should, whenever possible, interpret a statute so as not to render any of its terms superfluous, the better reading of § 441f is that it does not cover such contributions.

In reaching its decision, the district court in *O'Donnell* rejected as dicta the government's reliance on a few stray comments and cases none of which dealt specifically with the reach and scope of § 441f. The district court also flatly rejected the Federal Election Commission's regulations and advisory opinions which squarely contradict the express language of the statute. Specifically, the *O'Donnell* court held that:

> The Government notes that the Federal Election Commission ("FEC"), which provides civil enforcement of FECA, has issued a regulation concerning § 441f which states that "examples of contributions in the name of another include giving money or anything of value, all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of the money or the thing of value to the recipient candidate or committee at the time the contribution is made." 11 C.F.R. § 110.4(b)(2)(i). In addition, an FEC advisory opinion states that "the Act and Commission regulations prohibit the making and knowing acceptance of contributions in the name of another, and also

> prohibit the use of one's name to effect such a contribution. 2 U.S.C. § 441f; 11 C.F.R. 110.4(b). This includes the reimbursement or other payment of funds by one person to another for the purpose of making a contribution." FEC Advisory Opinion No. 1996-33. While these statements may reflect the spirit of FECA, they do not accord with the plain language of § 441f read in conjunction with the sections of FECA expressly prohibiting "conduit" and "indirect" contributions, as well as FECA's legislative history. Moreover, because the plain language, structure, and legislative history of FECA demonstrate that "indirect" and "conduit" contributions are covered by other FECA sections but not by § 441f, deference to the FEC's interpretation is not warranted. *See Gen. Dynamics Land Sys.*, 540 U.S. at 600; *see also Ctr. for Biological Diversity v. Brennan*, 571 F. Supp.2d 1105 (citing *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984))[.] (Exhibit B, Order, pg. 7).

As the district court correctly held in *O'Donnell*, the federal courts owe no deference to Federal Election Commission regulations or advisory opinions where such opinions and regulations contradict the plain statutory language. Like the Justice Department, the Commission's interpretation of § 441f is wholly unsupported and contradicted by the plain language of § 441f. Accordingly, the *O'Donnell* court properly dismissed the Justice Department's indictment as premised upon a fiction. The General Counsel's recommendation in this matter similarly finds itself on hollow footing.

Contrary to the General Counsel's assertions contained in its letter to Respondents dated June 12, 2009, the district court's written opinion and order in *O'Donnell* is the ***only*** written opinion by a federal court squarely addressing whether § 441f prohibits the reimbursement of campaign contributions. Without any legal support whatsoever, the General Counsel attacks the district court's ruling in *O'Donnell* as a "misunderstanding" of the law. The law is plain and simple. Section 441f does not proscribe the reimbursements of

contributions. The General Counsel's brief and recommendation is glaringly silent as to how the Commission could (or should) proceed on a theory that has been dismissed and is unsupported by the law. Nowhere does the General Counsel attempt to answer this question for the Commission.

Neither the Justice Department nor the Commission can re-interpret the laws to contradict the statutes. In this case, the Justice Department has already traveled this hopeless journey and spent millions of dollars pursuing Respondents for a fictitious crime. After losing its criminal case, the Justice Department tried again without success in the O'Donnell case. The *O'Donnell* case ended in another embarrassing loss for the Justice Department after the district court threw out most of the indictment because it charged a fictitious crime. It is no small matter for a district court to dismiss a federal indictment as fictitious. It is also no small matter that a district court has refused to rely on the Commission's regulations and advisory opinions which, like the indictments of the Justice Department, are unsupported by the plain language of the statute. Yet, the General Counsel is advising this Commission to try again where the Justice Department has twice failed.

In making its recommendation, the General Counsel relies on the same *dicta* and other stray language from court cases none of which dealt with the interpretation of § 441f. The General Counsel cites *United States v. Fieger*, *United States v. Serafini*, *Mariani v. United States*, *Goland v. United States*, and *United States v. Sun-Diamond Growers of CA* as its authority for its interpretation of § 441f. However, as the district court in *O'Donnell* emphasized, none of those cases addressed the interpretation and/or scope of § 441f. Without any authority, the General Counsel is now asking the Commission to proceed with another

matter tainted from the outset.

There is also the question of whether agents and/or employees of the Commission illegally obtained from the Justice Department the financial records for members of the Fieger Law firm in violation of the Right to Financial Privacy Act. This issue is now being litigated in the case of *Beam v. Federal Election Commission* which is currently pending before the Honorable Rebecca R. Pallmeyer in the Northern District of Illinois. In an opinion dated October 15, 2008, the district court denied the Commission's motions and refused to dismiss Plaintiffs' claims (Exhibit C, Memorandum Opinion and Order, Case No. 07-1227).

During the ongoing discovery in the *Beam* case, agents and employees of the Federal Election Commission, including Commission investigator Roger Hearron, Staff Attorney Phillip Olaya, and Commission Counsel Thomas Andersen, testified in deposition that they saw and/or received the financial records of Fieger Firm employees which records were provided to the Commission by the Justice Department. Given such deposition testimony, the Commission may face punitive liability under the Right to Financial Privacy Act.

Notwithstanding the questions surrounding the legality of the Commission's dealings with the Justice Department, and the *O'Donnell* court's refusal to follow the Commission's regulations and opinions which are contrary to the plain statutory language, the General Counsel now believes it can achieve a result different than the Justice Department's losses in the *Fieger* and *O'Donnell* cases.

Respectfully, Respondents request that this Honorable Commission reject the recommendation of the General Counsel. The more sensible approach in this instance would be for the Commission to close this matter without further expense.

For these reasons, Respondents respectfully request an oral hearing before the Commission acts upon the recommendation of General Counsel. Respondents sincerely believe that the oral hearing would provide both the Respondents and the Commission with the opportunity to explore in further detail the facts and arguments contained herein including the manner in which General Counsel has mislead the Commission in this matter. In the event that the Commission denies Respondents' request for oral hearing, Respondents respectfully request that this Commission reject the recommendation of General Counsel and close this matter.

Respectfully submitted,

FIEGER, FIEGER, KENNEY & JOHNSON & GIROUX, P.C.

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Dated: June 23, 2009

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

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

Defendants.
_____/

CASE NO. 07-CR-20414

PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

AMENDED[1] OPINION AND ORDER:

(1) DENYING GOVERNMENT'S MOTION FOR RECONSIDERATION OF INTERIM ORDER OF NOVEMBER 16, 2005 RE GOVERNMENT'S EX PARTE SUBMISSIONS;

(2) GRANTING IN PART, DENYING IN PART DEFENDANTS' MOTION FOR RECONSIDERATION OF INTERIM ORDER:

(a) ORDERING THE GOVERNMENT TO DISCLOSE TO DEFENDANTS THE REASON FOR RECUSAL FROM THE INSTANT CASE OF THE TOP THREE PRINCIPALS OF THE DETROIT UNITED STATES ATTORNEYS' OFFICE; UNITED STATES ATTORNEY STEPHEN J. MURPHY; FIRST ASSISTANT UNITED STATES ATTORNEY TERRENCE G. BERG; SENIOR COUNSEL TO THE UNITED STATES ATTORNEY JONATHAN TUKEL. (ATT. 1). THIS DISCLOSURE SHOULD BE PROVIDED TO DEFENDANTS WITHIN SEVEN (7) DAYS OF THIS ORDER.

(b) ORDERING THE GOVERNMENT TO PROVIDE TO DEFENDANTS WITH ITS REDACTED LIST OF E.D. MI CASES INVOLVING THE USE OF SIGNIFICANT NUMBERS OF FEDERAL AGENTS IN EFFECTUATING SIMULTANEOUS SEARCHES/INVESTIGATIONS.

(c) DENYING DEFENDANT'S REQUEST FOR IDENTIFICATION OF A TRIAL LAWYER, INVESTIGATED BUT NOT PROSECUTED, FOR

[1] There are three amendments to this Opinion and Order, one on page 11, and two on page 26.

ILLEGAL FEDERAL CONTRIBUTIONS TO THE 2004 EDWARDS FOR PRESIDENT CAMPAIGN.

Before the Court is Defendant Fieger's Motion for Reconsideration regarding the Court's Interim Order on Discovery (Doc. No. 102), and the Government's Motion for Reconsideration of the same Order (Doc. No. 107). The Interim Order relates to Defendant Fieger's Motion to Dismiss for Selective and Vindictive Prosecution.[2]

This case involves a ten count indictment; nine counts charge violations of the Federal Election Campaign Act ("FECA") (Johnson is not charged in four of the first nine counts) with regard to the 2004 Edwards for President Campaign; the tenth count charges Defendant Fieger with obstruction of justice.

Count I charges that both Defendant conspired to violate the FECA by:

> (a) using corporate funds to pay for more than $25,000 in campaign contributions to the 2004 [John] Edwards for President committee.
>
> (b) making more than $25,000 in contributions to the Edwards committee in the names of other persons.
>
> (c) causing the Edwards committee to unwittingly file false campaign finance reports.
>
> (d) defrauding the United States by preventing the Federal Election Commission ("FEC") from carrying out its responsibility to enforce the Election Act and provide accurate information to the public about amounts and sources of campaign contributions.

Count I alleges that the Defendants used corporate funds to make prohibited contributions totaling $127,000 and disguised them as legitimate payments. To carry this out, Defendants allegedly solicited "straw donors" to write checks to Edwards, and agreed to provide them with

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[2] Co-Defendant Johnson has joined in this Motion. (*See* Hearing Trans. 10/16/07, at 6).

funds to make the contributions or to reimburse them. Among the straw donors recruited by Defendant were:

i. in March 2003, attorneys of the Fieger Law Firm Corporation and their spouses;
ii. in June 2003, children of attorneys, and non-attorney employees and their spouses;
iii. in September 2003, friends of Defendant Fieger;
iv. in January 2004, third party vendors of services to the Corporation as well as attorneys and support staff not-previously used as straw donors.

Count II charges Defendants with Making and Causing Conduit Campaign Contributions – causing contributions to be made in the names of others, when in fact the contributions were made by Defendants.

Count III charges Defendant Fieger only with making conduit contributions.

Count IV charges Defendants with making campaign contributions by a corporation, aggregating $25,000 or more during 2003.

Count V charges Defendant Fieger only with making corporate contributions in 2004 aggregating more than $25,000.

Counts VI and VII charge both Defendants with causing false statements to be made by the Edwards campaign to the FEC, showing that other individuals had made contributions when in fact they had been made by the corporation and the defendants. This same charge was contained in Counts VIII and IX, against Defendant Fieger only.

Finally, Count X charges Defendant Fieger only, with obstruction of justice, to wit: acting to conceal incriminating information and to provide false exculpatory information to the grand jury.[3]

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[3] On January 7, 2008, the grand jury issued a superceding indictment containing the same 10 counts.

On November 16, 2007, this Court entered an Interim Opinion and Order re Government Ex Parte [*in camera*] Submissions Related To Defendants' Motion to Dismiss Indictment For Selective/Vindictive Prosecution. (Doc. No. 99). That Order referenced three categories of documents that had been submitted to the Court voluntarily by the Government, *ex parte* and *in camera*, in response to questions raised by the Court at hearings[4]:

> 1. a list of other Eastern District of Michigan federal criminal cases where a very large complement of agents was utilized in simultaneous search warrant executions, and interviews of individuals;
>
> 2. the reason for the recusal in November 2005 from further involvement in the instant investigation/prosecution by the top three ranking personnel in the Office of the United States Attorney for the Eastern District of Michigan; and
>
> 3. identification of the named subject of a Department of Justice campaign finance criminal investigation, a tort plaintiffs attorney contributor to the 2004 John Edwards for President campaign, that did not result in a prosecution.

Thereafter, the Court held one sealed *ex parte* hearing on the record on November 27, 2007 in response to the Government's request.

Defendants have consistently objected to the *ex parte, in camera* process, contending such communication is violative of their right to due process, and arguing that the recent Sixth Circuit decision in *United States v. Barnwell*, 447 F.3d 844 (6th Cir. 2007) requires that the *in camera* information should be provided to them.

I. BACKGROUND

This indictment charges illegal campaign contributions to an individual (John Edwards) seeking election for a federal office (President), bringing it within Federal jurisdiction. *See* Federal

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[4] On October 30, 2007, the Court issued a scheduling order regarding the Government's submission of *ex parte* information, giving a deadline of November 2, 2007, and denying Defendant's opposition to the Government's providing "Secret Information" to the Court.

Prosecution of Election Offenses, 7th Ed. 2007, published by the U.S. Department of Justice, at 5-8 (hereinafter "Manual").

The Manual notes, that it is harder to obtain federal jurisdiction when there is no federal candidate on the ballot – no federal election process. Manual, 6-7. The Manual recognizes that "federal campaign financing law does not apply to violations of state campaign laws." *Id.* at 7. Nevertheless, the Manual states that while violation of state campaign financing "statutes are not by themselves, federal crimes, they may be evidence of other federal crimes," listing the "Hobbs Act, Travel Act or honest service offenses." *Id.* at 8.

The instant Government investigation in addition to the Edwards campaign, has also examined Defendant Fieger's financing regarding Michigan state election campaigns, but none of the charges relate to state campaigns.

The Court finds significant that from the initiation of the federal investigation in April 2005, the state judicial re-election campaign of former U.S. Attorney, now Michigan Supreme Court Justice, Stephen Markman was involved in this investigation. Specifically on April 13, 2005, when Eric Humphries, a former Fieger employee, walked into Detroit FBI offices and provided information that launched this investigation, he alleged campaign violations by Defendants Fieger and Johnson with regard to the 2004 Federal Edwards for President campaign, and the state re-election campaign of Michigan Supreme Court Justice Markman.

The local Assistant U.S. Attorney ("AUSA") who initiated this investigation, Lynn Helland, chief of the Special Prosecutions Unit, stated that the instant prosecution is the first such local federal election criminal case he had seen during his 25 year career. (Hearing Trans. 10/16/07, at 52). The instant case is not the usual federal criminal prosecution because it relates to activity –

political contributions – recognized by the Supreme Court as protected by the First Amendment. *See FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 440 (2001) ("[s]pending for political ends and contributing to political candidates both fall within the First Amendment's protection of speech and political association." (citation omitted)). At the same time, political contributions are not unregulated. Congress has enacted legislation, Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431, and created an entity, the Federal Election Commission ("FEC"), to regulate contributions by limits and sources. Further, Congress has enacted criminal penalties for FECA violations, and in 2002, Congress passed the Bi-Partisan Campaign Reform Act providing for enhanced criminal penalties for certain FECA violations. *See* 2 U.S.C. §§ 437g(d)(1)(A), 437g(d)(1)(D).

The Department of Justice ("DOJ") has recognized the unique nature of election offenses by publishing a comprehensive Manual – Federal Prosecution of Election Offenses – required reading for Department attorneys and all local U.S. Attorney's offices. The Manual establishes that the DOJ has concluded that election campaign investigations, in particular those involving campaign financing, require special treatment because of First Amendment issues relating to federal elections, and because of the FEC's civil enforcement responsibilities. The Manual states in pertinent part:

> Justice Department supervision over the enforcement of all criminal statutes and prosecution theories involving . . . campaign financing crimes is delegated to the Criminal Division's Public Integrity Section. Thus, Headquarters' consultation policy is set forth in the U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL (UJAM), Section 9-85.210.
>
> . . . .
>
> The Department's consultation requirements for election crime matters are designed to ensure that national standards are maintained for the federal prosecution of election crimes, that investigative resources focus on matters that have prosecutive potential, and that appropriate deference is given to the FEC's civil enforcement responsibilities over campaign financial violations. The requirements are also

> intended to help ensure that investigations are pursued in a way that respects both individual voting rights and the states' primary responsibility for administering the electoral process.
>
> . . . .
>
> 2. Consultation Requirements for Campaign Financing Crimes.
>
> Additional considerations come into play in cases involving possible campaign financing violations under FECA, notably, the concurrent jurisdiction of the FEC to conduct parallel civil proceedings in this area and the resulting need to coordinate criminal law enforcement with the commission. Therefore, consultation with the Public Integrity Section is required to:
>
> - conduct any inquiry or preliminary investigation in a matter involving a possible campaign financing offense;
> - issue a subpoena or search warrant in connection with a campaign financing matter;
> - present evidence involving a campaign financing matter to a grand jury;
> - file a criminal charge involving a campaign financing crime; or
> - present an indictment to a grand jury that charges a campaign financing crime.
>
> . . . .
>
> The Election Crimes Branch [of the Public Integrity Section] also serves as the point of contact between the Department of Justice and the FEC, which share enforcement jurisdiction over federal campaign financing violations.
>
> . . . .

Manual, at 18 (emphasis added).

The Manual lists, three categories of election crimes: Election Fraud, Patronage Crimes and Campaign Financing Crimes. The Manual first states that as to Election Fraud and Patronage Crimes (not at issue in the instant case):

> United States Attorneys' Offices and FBI field offices may conduct preliminary investigations of an alleged election fraud or patronage crime without consulting its Public Integrity Section. . . . . However, a preliminary investigation does not include interviewing voters during the pre-election or balloting periods concerning the circumstances under which they voted, as such interviews have the potential to

> interfere with the election process or inadvertently chill the exercise of an individual's voting rights.

Manual, at 17 (emphasis added). Thus, the DOJ Manual permits local federal investigations of vote fraud and patronage crimes without prior consultation with the DOJ's Integrity Section. The Manual treats campaign finance investigations differently: prior to beginning any such investigation, the local AUSA must first consult with and be cleared by the DOJ Public Integrity section. The Manual's mandated prior consultation with the DOJ Public Integrity Section by the Detroit U.S. Attorney's office did not occur in the instant case.

The Government contends that this is an ordinary prosecution by ordinary local line prosecutors. (Gov't Supp. Resp. Mot. Dismiss, at 12-13; Hearing Trans. 10/16/07, at 8, 10, 77, 79). Yet, the Government acknowledges that this is not an ordinary prosecution; it is the first such prosecution ever brought by the Detroit office. The Government also acknowledges that this investigation was initiated locally in Detroit, and that the local prosecutors did not follow the DOJ Manual by consulting with the DOJ's Public Integrity Section before beginning the investigation. The fact that the DOJ Manual required prior consultation with Washington before even beginning a local investigation establishes that the DOJ does not treat this as an ordinary prosecution.

Indeed, in addition to the admonition on page 18, the Manual sets forth the prior consultation requirement with the DOJ for campaign finance investigations a second time:

> Accordingly, the Department requires that the Public Integrity Section be consulted before beginning any criminal investigation, including a preliminary investigation, of a matter involving possible violations of the FECA USAM § 9-85.210. This consultation is also required before any investigation of campaign financing activities under one of the Title 18 felony theories discussed above, as these prosecutive theories are based on FECA violations.

Manual, at 201 (emphasis added). The Manual, recognizes that "[t]he FEC is authorized by statute to conduct a civil inquiry parallel to an active criminal investigation involving the same matter. 2 U.S.C. §§ 437d(a)(9), 437(e). Parallel proceedings present unique challenges to federal prosecutors and investigators." Manual, at 202.

The local AUSA's failure to preliminarily contact the DOJ Public Integrity Section before beginning an investigation, removed the option of the DOJ initially consulting with the FEC prior to the investigation, and coordinating enforcement from the beginning between FEC and DOJ. Indeed, there has been no coordination of efforts between the DOJ with the FEC. The prosecutors acknowledged at a hearing, that the first contact in this case with the FEC was initiated by Defendant Fieger's counsel. This matter "was brought to the Federal Election Commission by Mr. Fieger, actually, by Mr. Cranmer after we executed our search warrant.... It was not until Mr. Fieger wrote a letter to the Federal Election Commission in .... late January of 2006, that the Federal Elections Commission was involved here." (Hearing Trans. 10/16/07, at 38). The only coordination between the DOJ and the FEC in the instant case, has been an agreement subsequently secured by the DOJ, that the FEC would not proceed with a parallel investigation. (Hearing Trans. 11/7/07, at 124-25, DOJ Attorney Kendall Day). They were not brought into the case in consultation with the DOJ. (Hearing Trans. 10/16/07, at 39, Helland). The Government conceded that the FEC was "a complete non-player." (*Id.*).

Additional evidence that this is not an ordinary prosecution is the fact that in November 2005, seven months after the local prosecution was initiated, the top three principal executives in charge of the Detroit U.S. Attorney's Office, U.S. Attorney Stephen J. Murphy, First Assistant U.S.

Attorney Terrence G. Berg, and Senior Counsel to the U.S. Attorney Jonathan Tukel, were ordered recused by the DOJ in response to their request to the DOJ for consideration of recusal.

The timeline regarding the eventual recusal of the top three officials of the Detroit U.S. Attorneys' office is significant. This local investigation began in April 2005;the top three official did not immediately recuse themselves from the case. The request to the DOJ for consideration of recusal did not occur until seven months later, in November, 2005. During that seven month period, the case investigation was ongoing, including grand jury proceedings.

In response to the Court's questions as to why the three principals did not immediately recuse themselves from the case, AUSA Helland stated that he could not answer the question without getting into information which he did not believe should be disclosed. (Hearing Trans. 12/14/07, at 46-47).

In response to the Court's follow-up questions as to whether an AUSA can recuse himself without asking Washington, e.g. if the case involves an AUSA's uncle or cousin, Mr. Helland stated "I don't know the answer to that." (*Id.* at 52).

As to Mr. Helland's relationship to the top three principal U.S. Attorney during that period, in response to the Court's questions did you talk with any of them, he stated that he "talked", but did not get "any direction." (Hearing Trans. 11/7/07, at 49). At a subsequent hearing, Mr. Helland admitted that he works for Mr. Murphy: "That's that chain of command." (Hearing Trans. 12/14/07, at 49).

Further evidence that this is not an ordinary prosecution is the fact that the instant federal grand jury proceedings went beyond inquiring into Federal election campaign finance violations, but also were directed at examining Defendant Fieger's role in the funding of opposition

advertisements against the state reelection campaign of Michigan Supreme Court Justice Stephen Markman, a former U.S. Attorney.[5] The instant grand jury also investigated Defendant Fieger's contributions to a second state reelection campaign, that of Michigan Democratic Governor Jennifer Granholm.

Yet additional evidence that this is not just an ordinary prosecution is that there was, at a minimum, scheduling coordination efforts between the local U.S. Attorney's office and the Michigan Attorney General's office with regard to the investigation, of Defendant Fieger on the federal level (Edwards campaign), and on the state level (Markman and Granholm campaigns). The Federal prosecutors acknowledged that when a state special prosecutor, who had been appointed by the State Attorney General to investigate Fieger, declined to pursue a state prosecution, the Detroit U.S. Attorneys office immediately sent an FBI agent with a search warrant, identical to the previous state subpoena, to seize all of the state-seized records for use in the federal investigation. Defendants contend that there was more than merely scheduling coordination, but rather a more significant continuing relationship. (Hearing Trans. 12/14/07, at 62).

Defendants assert that this prosecution violates their constitutional rights to free speech and political association. Defendants contend that the record provides "some" –enough– facts showing vindictive prosecution to permit them to proceed with discovery. *Cf. United States v. Jones*, 159 F.3d 969, 978 (6th Cir. 1998) (finding a defendant had produced sufficient evidence to meet the "some evidence" standard applied to selective prosecution cases where he showed that eight non-

[5] Although the election ballot designates judicial races as non-partisan, candidates for the Michigan Supreme Court are nominated at party conventions. Justice Markman was nominated by the Republican Party Convention. The Court recognizes that there has been an independent Supreme Court candidate/justice nominated by petition; that, however, that did not occur in the state election at issue.

African-Americans arrested for crack cocaine were not referred for federal prosecution). The Government recognizes that *Jones* illustrates that the "some evidence" standard is not a significant hurdle, however, it argues that Defendants have not met this "some evidence" threshold. (Hearing Trans. 11/7/07, at 119-20; 126-28).

II. DISCUSSION

A. Documents Provided to the Court by the Government *Ex Parte, In Camera*

In response to the Court's questioning at hearings, the Government has voluntarily provided the Court with evidence, *ex parte, in camera*, as to three matters.

The first matter relates to the extensive amount of FBI resources devoted to this case. On the November 2005 evening when the Government simultaneously executed a search warrant at Defendant's law offices, and interviewed 30 election campaign contributors at their homes, the Government assembled a task force of over 75 agents. Eleven FBI agents went to Defendant Fieger's law offices, while 33 two agent teams (66) simultaneously appeared at homes of individual contributors, many of whom are Fieger employees. The Government elected to interview the individuals' at their homes at night, rather than at Defendant Fieger's office during daytime hours. AUSA Helland stated at a hearing "It's definitely a surprise to anybody to find out a federal agent is at the door. There's virtue in that. There's virtue in people being candid. It's – whether you agree with it or disagree with it, there is, in our opinion, a higher likelihood that witnesses are going to be candid if they are surprised, okay, not shocked, not destroyed, not distraught, but surprised." (Hearing Trans. 10/16/07, at 48, Helland). In addition, a television station was tipped off to the fact that this federal search warrant execution was occurring at Defendant Fieger's offices. (Hearing Trans. 10/16/07, at 36, Cranmer).

At a hearing, the Government sought to undercut Defendant's claim that the Government's simultaneous deployment of 75 agents in this case was unusual, and that this unusual fact supported Defendants' claim of selective and vindictive prosecution. The Government asserted that it was not unusual to utilize large numbers of agents in non-drug, non-violent crime cases in this district, and offered to supply the Court, *ex parte*, *in camera*, with examples of similar resource allocations in other Eastern District of Michigan cases. Thereafter, the Government did submit such a list, but sought *in camera* protection, to avoid revealing the names of the specific cases.

After viewing the Government's submission, the Court suggested to the Government that it could protect its interest, and at the same time, provide disclosure of this information to Defendants by redacting identifying information, i.e. deleting the names of the cases. This redaction would provide Defendants with the year of the case, the generic type of the case, and the number of agents utilized in a combined search warrant execution/interviews/arrest. Initially, the Government agreed to this resolution – "If we have to provide that discovery, we would be comfortable doing it in that format." (Hearing Trans. 12/14/07, at 32, Helland). Nevertheless, the Government concluded that to support its institutional argument that Defendants have not met the factual threshold required to justify any discovery, it will not provide any discovery information to Defendants relating to their claims of selective or vindictive prosecution.

The second matter that the Government provided to the Court *ex parte*, *in camera* related to the DOJ's recusal of the three principal Detroit U.S. Attorneys. The Government first stated that it would have to get clearance to release that information. Thereafter, the Government stated that DOJ policy prevented disclosure of the information, but that it would submit the information to the Court *ex parte*, *in camera*. It did so, and the court has been informed of the reason for the recusal.

The Government's Motion for Reconsideration now requests that the Court return the recusal information, and further, that the Court not rely upon it in evaluating the Defendants' Motion to Dismiss based on Selective and Vindictive Prosecution. The Court rejects both requests.

This Court recognizes that district judges examine matters *in camera*, and if they find the matter to be privileged, or not relevant, do not disclose the information. The matter, however, becomes part of the record – it does not revert back to the party that submitted it and disappear. The Court will not destroy that part of the record in this case. Further, the Court recognizes that if the information provided is relevant to the Court's ruling, the Court must consider the information in reaching its ruling.

The Court finds that the reason for the recusal of the three principal Detroit U.S. Attorneys relevant to Defendants' ability to muster the argument in support of their claim of selective/vindictive prosecution, and will therefore consider it in arriving at its ruling. The Court is not concluding that this evidence, by itself, establishes a constitutional violation, but rather that it is evidence which Defendants are entitled to discover to argue their claims.

The third matter provided by the Government to the Court *ex parte, in camera* relates to the Government's assertion, to undercut Defendant's selective/vindictive prosecution claims, that another Democrat trial lawyer, investigated by the DOJ for federal campaign finance violations, was not prosecuted by the Federal Government for utilizing conduit contributions to the federal 2004 Edwards for President campaign. The Government, while providing the name of the trial attorney to the Court *ex parte, in camera*, objected to public release of this individual's name because he was not prosecuted. The Court agrees that it would be improper to publicly set forth the name of a subject of a grand jury investigation who was not prosecuted.

B. Motions for Reconsideration

1. Defendant's Motion

Citing *Barnwell*, Defendants contend that *ex parte* communications between the Government and the Court can be tolerated only by a compelling government interest, such as national security, or witness or juror safety, none of which apply here. Accordingly, Defendants request access to all items submitted by the Government to the Court *ex parte, in camera.*

The Government contends it made a mistake and should never have provided the information to the Court, and that "the information we have provided *in camera* should be returned to us and not considered by the Court." (Gov't Resp. to Def. Mot. for Recon. at 1).

> Having worked hard to establish the discovery principles in *Bass* and *Thorpe*, we undercut those efforts by providing in this case the very discovery which the case law holds that we need not provide.

(*Id.* at 5). The Government asserts that Defendants have not met their burden of providing preliminary evidence of selective or vindictive prosecution necessary to entitle them to discovery. The Government concludes that it is wasting time responding "to Defendants' baseless claims." (*Id.* at 6). The Government noted that despite Defendants' lack of entitlement to such evidence, it has provided some discovery in response to Defendants' motion:

> We described the relationship between the Public Integrity Section and the United States Attorney's Office. We acknowledged the recusal of some personnel in the Eastern District of Michigan. We provided public record information to the Court concerning other campaign contribution cases, and provided certain additional information to the Court *in camera*. We did all of that in an effort to reassure the Court that defendants' failure to establish a colorable claim of improperly selective prosecution was no mere technical default – the fact is that they are being prosecuted properly.

(*Id.* at 3-4 (emphasis added)).

The Government also notes that providing materials to the Court *ex parte* for *in camera* review, e.g. grand jury materials, does not waive the government's ability to assert confidentiality. The Court concurs. The Court recognizes that this occurs, *inter alia* with regard to claims of grand jury secrecy under Federal Rule of Criminal Procedure 6(e), and in cases where the Court concludes that information submitted *ex parte*, *in camera* is privileged.

As noted before, the Court will not adopt the Government's suggestion and erase from its mind the existence of the evidence. Indeed, the Government acknowledged that the information at issue is relevant to Defendants' claim. But while the Government finds that "the particular information we have provided is only marginally relevant to Defendants' claim,"the Court concludes that the information is quite relevant and essential to that claim. (*Id.* at 9).

The Government recognizes that in certain circumstances, the Court would utilize that information: "The only reason the 'judicial bell' could not be 'unrung' would be if, once exposed to information, the Court was unable to disregard that information." (*Id.* at 10). Such is the case here.

In reaching this conclusion to provide discovery of the reason for recusal, the Court has not concluded that the information at issue establishes Defendants' claim of selective or vindictive prosecution – that consideration is for another day.

2. Government's Motion for Reconsideration

The Government's Motion for Reconsideration "asks that the Court not require the Government to provide further information" *in camera*, unless Defendant Fieger withdraws his objection to Government *in camera* presentations to the Court. Defendant Fieger has not withdrawn his objection to that concept.

The Government seeks to distinguish *Barnwell* from the instant case:

> *Barnwell* found that *ex parte* communications with a trial court occurred during a "critical stage" of a trial and, therefore, required a compelling state interest. It is an open question, however, whether evidence regarding a claim of selective and vindictive prosecution would qualify as a critical stage of trial. As the Sixth Circuit has recognized, such claims have nothing to do with the merits of the underlying criminal case. *United States v. Abboud*, 438 F.3d 554, 580 (6th Cir. 2006) . . . .

(Gov't Br. at 2, n1).

The instant case is now post-indictment, pre-trial. Defendants have made a claim of selective/vindictive prosecution, which must be decided pre-trial. The Court finds this is a critical stage for a defendant facing trial because if this claim succeeds, there will not be a trial. Indeed, the Government has filed a motion to prevent any mention of selective or vindictive prosecution at trial; Defendants' sole opportunity to address this issue is pre-trial.

The Government's Motion for Reconsideration states that absent Defendant Fieger's objections to its *ex parte, in camera* submissions, the Government would have addressed "information concerning Defendants' funding a campaign against Michigan Supreme Court Justice Stephen Markman," at the *in camera* hearing held on November 27, 2007. This did not occur because Defendant has not withdrawn his objections.

At the same time, the Court notes that information about the Government's investigation of the Markman state reelection campaign has already surfaced in these proceedings. The Government has stated, in response to Defendants' assertions that grand jury witnesses claimed they were asked about the Defendant Fieger's financing of an anti-Markman campaign, that "one can assume" that the anti-Markman state campaign financing issue was part of the federal investigation.[6]

[6] "[L]et's assume witnesses were asked about Markman campaign money and witnesses were asked how they voted for." (Hearing Trans. 12/14/07, at 29, Helland).

At the hearing held December 14, 2007 on the Motion for Reconsideration, Christopher Yates, co-counsel for Defendant Johnson stated:

> The first reference I found in the materials that we've received in discovery about questions concerning the Steve Markman campaign by Mr. Fieger was on April 13, 2005 when Mr. Humphrey met with government agents. So I believe the recusal occurred in November of 2005.
>
> This FBI 302 indicates that there was discussion of Mr. Fieger's involvement with the Markman matters as early as April 13, 2005.

(Hearing Trans. 12/14/07, at 102-03). In response, AUSA Helland stated:

> With that in the record, frankly I'd forgotten that with that in the record, that establishes an overlap of what we were looking at and what the State was looking at, I believe at least – it puts into the record that it was within our body of knowledge that there might have been involvement with Mr. Markman. It doesn't establish any connection between the state and federal investigation. And I think that's the point.

(*Id.* at 103). Thus, Defendant Fieger's alleged financing of anti-Markman campaign was front and center of the local U.S. Attorney office investigation from its inception, April 13, 2005.

The Government recognizes the possible relevance of the reason for recusal to Defendant's vindictive prosecution claim:

> It is possible to imagine that this information might become relevant to a claim of vindictive prosecution in one narrow circumstance – if defendants had offered credible evidence that we who are prosecuting them were so incensed by their finding of the anti-Markman campaign that we chose to single them out for prosecution on that basis. However, there is no such evidence.

The Government's response as to why individuals were asked for whom they voted – an invasive question that goes to the heart of an individual's right to privacy in a democracy – was if the contributor's vote went to a candidate other than Edwards, this supported evidence of an illegal campaign contribution. The Government's rationale for asking that question assumes that individuals always vote for a candidate to whom they contributed, and ignores many possible alternatives, e.g. the person contributes to multiple candidates, the contributor had a change of mind when he got into the voting booth, the contributor gave based on friendship with the solicitor, not commitment to the candidate.

(Gov't Br. at 5) (emphasis in original). The Court disagrees with the Government's conclusion as to Defendants' evidence at this stage of the proceedings. The Court must decide whether there is evidence, including the *ex parte* submissions, sufficient to proceed further on Defendant's instant discovery request – specifically whether to order the Government to provide Defendants with the reason for the recusal.

The Court notes, and the Government has recognized, that the focus of Defendants' claim has become vindictive prosecution. To establish a claim of vindictive prosecution, must show:

1. a prosecutional stake in the exercise of a protected right
2. unreasonableness of the prosecutor's conduct, and
3. an intent to punish Defendant for exercise of the protected right.

United States v. Suarez, 263 F.3d 468, 479 (6th Cir. 2001). Further,

> [t]here are two approaches to showing prosecutorial vindictiveness: a defendant can show (1) actual vindictiveness, by producing objective evidence that a prosecutor acted in order to punish the defendant for standing on his legal rights, or (2) a realistic likelihood of vindictiveness, by utilizing the framework outlined above (focusing on the prosecutor's stake in deterring the exercise of a protected right and the unreasonableness of his actions). Attempting to show actual vindictiveness has been characterized as exceedingly difficult and an onerous burden.

United States v. Dupree, 323 F.3d 480, 489 (6th Cir. 2003) (internal quotations and citations omitted) (emphasis added).

The Court having viewed the evidence submitted by the Government *in camera*, the briefing, and the oral argument, concludes that there is presently sufficient evidence to support Defendants' vindictive prosecution allegation to entitle them to the instant initial discovery matter – the reason for recusal – in pursuing their claim.

The issue before the Court today is whether Defendants are entitled to discovery of the reason for the recusal. Thereafter, Defendants can utilize that information in their argument to the Court.

The Court questioned the Government regarding the recusal:

> Q. Court: Did the U.S. Attorney, Mr. Murphy, give a reason when he recused himself on this case?
>
> A. Mr. Helland: There is a reason. At this point, I'm trying to get clearance to disclose that reason, but I'm not allowed to do it yet. It won't come from him. There's the office that does the recusing, the Executive Office of United States Attorneys and they're the ones that have to decide this. So if they did write something up and that something, they have to decide whether or not I can disclose it or its contents and they haven't authorized that.

(Hearing Trans. 10/16/07, at 90-91). On October 23, 2007, Detroit AUSA Helland sent a letter to the Court setting forth the Government's position on the recusal issue:

> I have been advised by the Executive Office for United States Attorneys that the policy of that office is not to discuss publicly the reasons for any recusal action. However, they have also advised that I am authorized to disclose those reasons to you *ex parte* and *in camera*. If that is acceptable to the Court, I am prepared to do so.

In response, the Court issued its Interim Order accepting the Government offer, and the information was provided to the Court *ex parte, in camera*. Now Defendants seek that information.

Is there a legal basis to deny Defendant's request for discovery of the reason for the recusal?

Initially, the Court finds that the DOJ policy of not revealing that issue publicly, is not a legal basis for the Court to foreclose disclosure of the reason for the recusals to Defendants.

The Government brief relies on three separate grounds to support secrecy: Fed. R. Crim. P. Rule 16, the deliberative process privilege, and the attorney client privilege, all of which are discussed, *infra*.

3. Fed. R. Crim. P. Rule 16 and Privileges

The Government filed a brief, apart from its November 26, 2007 Motion for Reconsideration, filed on December 7, 2007: "United States' Brief Concerning Privileged Nature of Recusal Information," which sets forth three separate theories in support of its argument that it need not provide Defendants with the recusal reason: (1) F.R. Crim. P. 16, (2) the Deliberative Process Privilege, and (3) the Attorney Client Privilege.

The Court concludes that none of these three grounds protects the reason for recusal from discovery by the Defendants. The Court is not requiring the Government to turn over the recusal memoranda/documents – just to explain in a single sentence the reason for the recusal, e.g., "The DOJ ordered the recusal of the three top Detroit U.S. Attorney Office principals because they (did what)."

a. Fed. Rule Crim. P. 16(a)(2): Discovery and Inspection

The Government contends that the recusal memoranda is not subject to discovery insofar as it is protected under Rule 16(a)(2), which states:

> Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspections of reports, memoranda or other internal government documents made by an attorney for the government . . . in connection with investigating or prosecuting the case."

Defendant is not basing his claim for discovery under Rule 16 which deals with trial discovery and trial preparation of the defense at trial. Instead, Defendant is seeking discovery for his pretrial constitutional due process claim which is not cabined by Rule 16.

The Supreme Court recognized in *United States v. Armstrong*, 517 U.S. 456, 462-63 (1996), that a selective prosecution claim cannot be construed as a defense:

> [I]n the context of Rule 16 "the defendant's defense" means the defendant's response to the Government's case in chief. . . . A selective prosecution claim is not a defense on the merits to a criminal charge itself, but a independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution.

Id. at 463. The Supreme Court further noted that "[o]f course, a prosecutor's discretion is 'subject to constitutional constraints'". *Id.* at 464.

A similar constitutional due process constraint applies with regard to a vindictive prosecution claim, as the Supreme Court recognized in *Blackledge v. Perry*, 94 S.Ct. 2098, 2101 (1974). Thus, Rule 16 does not control Defendant's request.

b. Deliberative Process Privilege

In *Department of the Interior v. Klamath Water Users Protective Assoc.*, 532 U.S. 1, (2001), the Supreme Court stated:

> The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance "the quality of agency decisions . . . by protected open and frank discussion among those who make them within the Government . . . .

Id. at 8-9.

The discovery ordered by the Court in the instant Order requires only that the Government provide the reason for the recusal. The Court does not require the Government to divulge any communication the three local U.S. Attorneys sent to the DOJ, or any DOJ communications in

response; just the specific reason for recusal. Thus, the instant discovery order does not reveal any candid communications between any officials or any "deliberative process." Accordingly, the deliberative process privilege does not apply.

In *Rugiero v. United States Department of Justice*, 257 F.3d 534, 550 (6th Cir. 2001), Sixth Circuit Court of Appeals Judge Alice Batchelder explained the deliberative process privilege:

> To come within this exception on the basis of the deliberative process privilege, a document must be both "predecisional", meaning it is "received by the decisionmaker on the subject of the decision prior to the time the decision is make," and "deliberative", the result of the consultative process . . . . [T]he key issue in applying this exception is whether disclosure of the materials would "expose an agency's decisionmaking process in such a way as to discourage discussion within the agency and thereby undermine the agency's ability to perform its functions.

(citations omitted). Again, in the instant case, this Court orders only the reason for the recusal – not papers relating to the process. Thus, disclosure of the reason does not expose the DOJ's decisionmaking process so as to discourage discussion within the agency and undermine its ability to perform its functions.

The Seventh Circuit noted in *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993), that even if the deliberative process privilege was applicable to the reason for the recusal, that

> privilege may be overcome when there is a sufficient showing of a particularized need outweigh the reasons for confidentiality. C.F. *Costal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) (the privilege should be applied "as narrowly as consistent with efficient government operation.")

The deliberative process is overcome – the privilege is routinely denied – "where there is reason to believe the documents sought may shed light on government misconduct. . . ." *Hinckley v. U.S.*, 140 F.3d 277, 285 (D.C. Cir. 1998), citing *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

In the instant case, the Court is not concluding that there has been governmental misconduct. However, the Court does conclude that the information at issue – the reason for the November

recusal – is essential to permit the Defendants to argue their claim, of Government misconduct. This information – the reason for the recusal – is not otherwise available to the Defendants.

The Court, in balancing the Defendants' critical need for this information in pursuing their claim of vindictive prosecution, against the effect of the disclosure on the government, concludes that this minimal disclosure is required.

The Court has had the benefit of being provided the reason for recusal by the Government *ex parte*, *in camera*, and the Court concludes that providing this information to the Defendants will not interfere with future open and frank discussion within the DOJ. This Order will not stop United States Attorneys from being open and candid, and honoring their obligations to the legal profession's Canons of Ethics or to DOJ Rules/Standards, to recuse themselves on their own, or through the DOJ process, when circumstances so require.

The Court does not accept the Government's suggestion (Government's Brief Concerning Privileged Nature of Recusal Information at 5) that the possibility of disclosure of the reason "would create a significant disincentive for Department of Justice employees to be candid concerning potential conflicts of interest, substituting an incentive to shade the facts created by the possibility of public disclosure." (emphasis added).

This Court does not for a moment believe that the thousands of outstanding attorneys within the Department of Justice would "shade the facts" when critical issues of professional responsibility arise. For the local Assistant United States Attorney, and no less than an attorney in the Public Integrity Section of the Justice Department, to suggest that the Court's ordering discovery of this limited reason for the recusal, will result in shady practices by Department of Justice attorneys, does not honor and respect the tradition and good name of the United States Department of Justice.

c. The Attorney-Client Privilege

The Government also raises the attorney-client privilege concerning the recusal information submitted to the Court *in camera*. Specifically, the Government references:

> The information that is contained in the memorandum we provided the Court which describes the events leading up to that final decision, concerns discussions between the United States Attorneys' Office for the Eastern District of Michigan and one of two entities in the Department of Justice – either the Professional Responsibility Office or the Executive Office for United States Attorneys.

(Gov't Br. at 7). Again, the Court reiterates that it is not ordering the Government to provide any discussions, or the memorandum provided to the Court, but merely the reason for the November recusal decision.

The Government recognizes that the final decision to recuse is not legal advice, but asserts that all other information in the recusal information is covered by the privilege. (Gov't Br. at 8 n. 4). Again, the Court reiterates that it is not requiring release of the memorandum, or the reasoning, just the specific conduct of the three that resulted in the recusal in November, 2005. As the Court is not requiring the Government to disclose the discussions or the memoranda, the attorney-client privilege is not applicable.

C. Vindictive Prosecution

The Sixth Circuit relied upon the discussion of vindicate prosecution *Blackledge* in *United States v. Adams*, 870 F.2d 1140, 1141 (6thCir. 1989), where it held, "[T]his is one of those rare cases where the defendants are entitled to discovery on the issue of whether the government's decision to prosecute was tainted by improper motivation."

Judge David Nelson's opinion discussed the constitutional underpinning for a claim of vindictive prosecution:

> [A] prosecution which would not have been initiated but for governmental "vindictiveness" – a prosecution that is, which has an "actual retaliatory motivation" – is constitutionally impermissible. *Blackledge v. Perry*, 94 S.Ct. 2098, 2102 (1974).

Id. at 1145 (emphasis added). Judge Nelson's opinion further discussed the defendant's claim:

> "Some evidence" of vindictive prosecution has been presented here. It is hard to see, indeed, how the defendants could have gone much farther than they did without the benefit of discovery on the process through which this prosecution was initiated. It may well be that no fire will be discovered under all the smoke, but there is enough smoke here, in our view, to warrant the unusual step of letting the defendants find out how this unusual prosecution came about. It will be time enough for the district court to consider whether an evidentiary hearing should be held after discovery has been completed – and we are confident that the district court will not let the discovery get out of hand.

Id. at 1146.

This Court recognizes the parameters set forth in Judge Nelson's opinion and finds that "some evidence" of vindictive prosecution is present here where the local U.S. Attorney's office failed to follow the DOJ Manual. Further, at the time period when the federal search warrant was executed at the Fieger law offices in late November, 2005, there was, at a minimum, scheduling coordination between the state investigation of Defendant Fieger and the federal investigation of state election contributions by Fieger. Add to this, from Defendant's point of view, the use of over 75 agents engaging in a nighttime search of Defendants' law office, and the agents' home visits of 32 Edwards contributors tied to Defendant Fieger, the threat to prosecute the contributors, and the Government's inquiry into whom the individual contributors voted. Therefore, as in *Adams*, Defendants cannot proceed further in presenting argument and evidence without the benefit of their discovering the reason for the recusal.

Also, as in *Adams*, after the reason is provided to the Defendants, the Court will not allow broad, sweeping discovery but the next proceeding will be to have argument on Defendant's Motion for Discovery.

The present case lacks the traditional hallmarks of a claim for prosecutorial vindictiveness – namely the substitution or increase in the charges brought by a prosecutor after a defendant has asserted a right. However, Defendants' claim relates to the prosecutor's initial decision to investigate, and then additional factors on the road to the indictment. The gravamen of Defendants' vindictive prosecution argument is that Defendant Fieger was targeted for prosecution because of his exercise of protected First Amendment rights. *See* LITMAN, PRETEXTUAL PROSECUTION, 92 GEORGETOWN L.J. 1135, 1142 (2004).

Defendants assert that the individual prosecutors, local and national, have a "stake' in the exercise of Defendant Fieger's protected First Amendment rights. The reason for the recusal is relevant to Defendants' ability to present that argument to the Court.

Defendants have established evidence that in initiating the investigation in this case, the Detroit U.S. Attorney's office acted in violation of DOJ policy, did not recuse the top three prosecutors instantly, but allowed seven months to elapse before asking the DOJ to determine whether they should be recused. The DOJ's answer was yes. These facts support Defendants' claim for discovery of the reason for the recusal of the top three officials in the Detroit U.S. Attorney's office.

III. CONCLUSION

This first ever campaign finance prosecution by the Detroit U.S. Attorney's office is unique both in subject matter, and its failure to follow mandatory DOJ Manual procedures that prohibit a

local U.S. Attorney from proceeding with any such campaign finance investigation without prior consultation with the DOJ's Public Integrity Section. The Public Integrity Section was not consulted by the Detroit office prior to, or apparently even early on in the investigation.[7]

The Government concedes that the overwhelming majority of election campaign finance violations proceed first to the FEC. (Hearing Trans. 10/16/07, at 102-03, Helland). The failure of the local U.S. Attorney's office to consult immediately with the DOJ Public Integrity Section prevented the DOJ from initially consulting with the FEC. Manual, at 18; Hearing Trans. 11/7/07, at 125, Day. Indeed, it was the Defendant Fieger who first consulted with the FEC. It was only after Defendant Fieger's attorney Thomas Cramner sent a letter to the FEC about the instant federal criminal investigation that the FEC opened a case. Thereafter, the prosecutors convinced the FEC

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[7] At the hearing on November 7, 2007, the following exchange occurred:

Helland:	I did not consult with Washington . . . . I assigned [AUSA Chris Varner] in my office to work on it for a period of time. . . . Roughly simultaneously, the case also went to the Public Integrity Section.
Court:	. . . . It went to Washington but you didn't consult?
Helland:	No.
. . . .	
Court:	When was your first conversation with [Public Integrity Attorneys] Mr. Day or Hillman whoever was there?
Helland:	Boy, I'm not going to be able to remember when I first spoke with Mr. Day, it was substantially after that.
. . . .	
Helland:	Mr. Varner, probably, I would hope, had contact with Public Integrity, but I did not.
Court:	But you can find out because there will be a trail list of whatever he did.

(Hearing Trans. 11/7/07, at 111-14) (emphasis added). No information of any contacts between AUSA Varner and the Public Integrity were subsequently provided to the Court.

not to proceed with a parallel civil investigation of this case: "the FEC came to us and we agreed that they would not pursue their investigation."[8] (Hearing Trans. 11/7/07, at 125, Day).

The belated recusal from this case by the DOJ of the three principal executives in the Detroit U.S. Attorney's office after the investigation had been ongoing for seven months provides additional facts, that, combined with that office's violations of the DOJ Manual's mandatory strictures, meet the "some evidence" threshold to permit Defendants to seek discovery to pursue their claim of prosecutorial vindictiveness. This supports the Court's order that the reason for the recusal be provided to the Defendants to allow them to argue their vindictive prosecution claim.[9]

The Government's refusal to provide Defendants with a redacted list of other E.D. MI cases that utilized a large complement of federal agents, is based solely on its argument that Defendants have not met the threshold necessary to entitle them to any discovery. The Court has concluded that Defendants have met that threshold. Accordingly, the Court orders that the Government provide Defendants with that redacted list within seven days.

The Court, therefore, **DENIES** the Government's Motion for Reconsideration, and **GRANTS IN PART AND DENIES IN PART** Defendant's for Reconsideration.

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[8] Three 527 Groups (two Republican, one Democrat) that raised and illegally spent millions of dollars in federal election campaigns were not criminally prosecuted. All three cases were resolved civilly by the FEC through the payment of civil fines. According to Defendant's counsel, Veterans and POWs for Truth raised and spent more than 25 million in the 2004 presidential campaign; Progress for American Voters Fund raised more than 44 million in the same election. (Hearing Trans. 10/16/07, at 23, Cranmer). None of the three 527 Groups were "referred for criminal prosecution by the FEC." (*Id.* at 53, Helland).

[9] The Court recognizes that both the local Detroit U.S. Attorney's office and the DOJ Public Integrity Section signed the indictment. The dual signatures do not eliminate the fact that the investigation was initiated, and initially carried forward by the Detroit office. Further, the Public Integrity Section and the local Detroit U.S. Attorney's office are both arms of the same entity and do not constitute two independent prosecutions.

The Court **ORDERS** that the Government provide the reason for the U.S. Attorney recusals to Defendants with seven (7) days of this Order.

Further, the Court **ORDERS** the Government provide the redacted list of other E.D. MI cases within seven (7) days of this Order. The Court is not now ruling on Defendant's claim of selective and vindictive prosecution.

SO ORDERED.

s/Paul D. Borman
PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

Dated: February 1, 2008

CERTIFICATE OF SERVICE

Copies of this Order were served on the attorneys of record by electronic means or U.S. Mail on February 1, 2008.

s/Denise Goodine
Case Manager

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. PIERCE O'DONNELL, Defendant.	NO. CR 08-00872 SJO **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS INDICTMENT** [Docket No. 20]

This matter is before the Court on Defendant Pierce O'Donnell's Motion to Dismiss Indictment, filed March 16, 2009. Plaintiff United States of America (the "Government") filed an Opposition, to which O'Donnell replied. The Court held a hearing on this matter on June 2, 2009. Because of the following reasons, O'Donnell's Motion is GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

The Government alleges that O'Donnell and an unindicted co-conspirator acting at O'Donnell's instruction solicited individuals, including employees of O'Donnell's law firm, to contribute a total of over $10,000 in one year to "EFP," an authorized political committee supporting the election of a candidate for President of the United States, and reimbursed their contributions. Based on these allegations, the Government indicted O'Donnell for: (1) conspiring

to make illegal campaign contributions in violation of 18 U.S.C. § 371 and the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 441f ("Count One"); (2) making and causing to be made illegal campaign contributions in violation of 2 U.S.C. § 441f ("Count Two"); and (3) knowingly and willfully causing ESP's treasurer to make materially false statements in violation of 18 U.S.C. § 1001 ("Count Three").

O'Donnell now moves to dismiss on the grounds that the conduct alleged in Counts One and Two is not prohibited, and Count Three fails to allege the essential elements of the crime charged.

II. DISCUSSION

A. Counts One and Two Do Not Allege Prohibited Conduct.

"In all statutory construction cases, [courts] begin with the language of the statute. The first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.' The inquiry ceases 'if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (internal citations omitted). In determining the meaning of a statute, "it is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* at 452 (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)) (explaining that "where Congress wanted to provide for successor liability in the Coal Act, it did so explicitly, as demonstrated by other sections in the Act that give the option of attaching liability to 'successors' and 'successors in interest. . . . If Congress meant to make a preenactment successor in interest like Jericol liable, it could have done so clearly and explicitly"). In such situations, the Supreme Court has explained that "we refrain from concluding that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship." *Id.* Further, "it is a 'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

Lastly, "deference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004).

1. 2 U.S.C. § 441f Is Unambiguous and Does Not Prohibit O'Donnell's Conduct.

Section 441f provides: "No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person." 2 U.S.C. § 441f. The term "contribution " includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). In contrast, § 441a, which sets forth the maximum limits on contributions to a candidate or political committee, provides that for purposes of that section only, "all contributions made by a person, *either directly or indirectly*, on behalf of a particular candidate, including contributions which are in any way earmarked or *otherwise directed through an intermediary or conduit* to such candidate, shall be treated as contributions from such person to such candidate." 2 U.S.C. § 441a(a)(8) (emphasis added). Similarly, Congress explicitly provided that for purposes of contributions or expenditures by national banks, corporations, or labor organizations, "the term 'contribution or expenditure' includes a contribution or expenditure, as those terms are defined in 2 U.S.C. § 431, *and also includes any direct or indirect payment* . . . or gift of money . . . or anything of value . . . ." 2 U.S.C. § 441b (emphasis added). Likewise, Congress specifically made it unlawful for "a foreign national, *directly or indirectly*, to make a contribution or donation of money or other thing of value." 2 U.S.C. § 441e(a)(1) (emphasis added).

The Government has charged O'Donnell with violating § 441f by soliciting and reimbursing his employees' contributions. (Indictment 4.) O'Donnell argues that § 441f prohibits only the act of making a contribution and providing a false name, not asking others to make contributions in their names and reimbursing them for it. (Def.'s Mem. P. & A. 4.) He points out that while Congress explicitly used the words "indirectly," "conduit" and "intermediary" in other parts of FECA, § 441f includes no such language. *See* 2 U.S.C. §§ 441a; b; e, f. Indeed, it appears that

if Congress intended § 441f to apply to indirect contributions, or contributions made through a conduit or intermediary, it would have included explicit language, as it did in other sections of the same statute. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. at 452. Moreover, if § 441f covered "conduit" and "indirect" contributions, there would be no need for Congress to have explicitly included those terms in other sections of FECA. As the Court should, whenever possible, interpret a statute so as not to render any of its terms superfluous, the better reading of § 441f is that it does not cover such contributions. *See TRW Inc.*, 534 U.S. at 31. Lastly, if § 441f covered indirect contributions made through a conduit, that would mean such contributions were never allowed. However, § 441a allows for indirect and conduit contributions, as long as they do not exceed designated limits. *See* § 441a. Thus, reading § 441f to prohibit such contributions is irreconcilable with § 441a's express authorization of them.

Indeed, the Government acknowledged the tension between § 441a and § 441f at oral argument, stating: "I do see the ambiguity that the Court's pointing to is that in one sense [FECA is] saying you have to report [an indirect contribution]. If you have to report it, then why is it something that 441(f) prohibits?" (June 2, 2009 Tr. 22:1-4.) The Government also stated that "I think if you disclosed [an indirect contribution] you might not run into trouble, because, again, there's no penalty–I mean there's no criminal sanction–for 441(f) until you reach over two thousand dollars. . . ." After the hearing, the Government filed a Supplement to Opposition in which it states that "[I]f a person makes a conduit contribution he has violated § 441f, regardless of the amount of the conduit contribution." (Pl.'s Supp. Opp'n 2.) In the Supplement, the Government analogizes the relationship between § 441a and § 441f to that between the tax code and Title 21. It notes that the tax code requires a drug dealer to report income earned from selling cocaine, but that such sales are illegal under Title 21, and reasons that, similarly, § 441a requires one to report conduit contributions, while § 441f makes them illegal. *Id.* However, unlike the cocaine reporting requirements in the tax code and the separate criminalizing statute, the provisions regarding conduit contributions are found in different sections of the same statute. Because a statute must be construed as a whole, the Court must read § 441a and § 441f in a way that makes them consistent with one another, and with the rest of FECA. As explained above, the

Government's proposed interpretation does not do this. Accordingly, analyzing the plain language of § 441f in the context of FECA as a whole, § 441f is unambiguous and does not prohibit soliciting and reimbursing contributions.

2. Even If § 441f's Plain Language Were Ambiguous, FECA's Legislative History and the Rule of Lenity Establish That § 441f Does Not Prohibit O'Donnell's Conduct.

a. FECA's Legislative History

Even if the language of § 441f were ambiguous, the legislative history of FECA suggests that Congress did not intend § 441f to cover indirect contributions. After § 441f was introduced, Senator Scott stated that a "loophole" existed in the campaign contribution laws because a "man of influence" could evade contribution limits by giving his friends money and having them contribute an equal amount to his campaign. 117 Cong. Rec. 29,295 (1971). If § 441f prohibited using one's friends as conduits for contributions, there would be no "loophole" to fill. In addition, § 441b's predecessor, 18 U.S.C. § 610, prohibited contributions by national banks, corporations, and labor organizations. During debate on a proposed bill and amendment to add language defining "contribution" to "include any direct or indirect payment," Senator Hansen was asked whether an employee could make a contribution and be reimbursed by his corporate employer. Hansen replied that doing so "would constitute a violation of law . . . *as an indirect payment*." 117 Cong. Rec. 43,381 (1971) (emphasis added). Senator Hayes agreed. *Id.* This discussion demonstrates that Congress used the term "indirect" to cover reimbursements.

b. The Rule of Lenity

The rule of lenity "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (internal citations omitted). "[T]he rule applies 'for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute.'" *United States v. Devorkin*, 159 F.3d 465, 469 (9th Cir. 1998) (internal citations omitted). Here, the statute is unambiguous in light of its plain

language, structure, and legislative history. However, assuming it remained ambiguous after such analyses, the rule of lenity would require the Court to interpret § 441f in O'Donnell's favor.

3. The Government's Remaining Arguments Are Unpersuasive.

The Government contends that "funneling money to another person (through either an advance or reimbursement) in order for that person to make a contribution is *basically* a contribution in the name of another person," and that O'Donnell "*essentially* made a contribution in the name of another person." (Pl.'s Opp'n 5, 11 (emphasis added).) It notes that several courts, including the Ninth Circuit, have described § 441f as the section that "prohibits the use of 'conduits' to circumvent [FECA's] restrictions." *Goland v. United States*, 903 F.2d 1247, 1251 (9th Cir. 1990); *see also Mariani v. United States*, 212 F.3d 761, 766 (3d Cir. 2000) (describing § 441f as "the conduit contribution ban or 'anti-conduit' provision"). However, while these courts have described § 441f as pertaining to conduits in passing, they did so while addressing other aspects of FECA, and have not actually considered whether § 441f covers indirect contributions or reimbursements. In *Goland*, for example, Goland solicited and reimbursed contributions, and was charged with violating 2 U.S.C. §§ 441a and 441f. *See Goland*, 903 F.2d at 1252. The first criminal suit against him resulted in a mistrial, and he was re-indicted under § 441a but not 441f. *See United States v. Goland*, 897 F.2d 405, 407-408 (9th Cir. 1990); *United States v. Goland*, 959 F.2d 1449, 1451-52 (9th Cir. 1992). Judge Fletcher's comment describing § 441f as prohibiting conduits was in the context of Goland's civil suit challenging the constitutionality of FECA under the First Amendment, and thus Judge Fletcher was not presented the opportunity to consider whether § 441f prohibited reimbursements, but rather focused solely on the constitutionality of the law. *Id.* Because Judge Fletcher's statement, like that in *Mariani*, was a passing comment made in the course of considering a separate issue, rather than a holding made after analyzing § 441f in the context of reimbursements, these generalized statements are not persuasive on the matter at issue here.

The Government also argues that because the definition of contribution applicable to § 441f includes "anything of value made by any person for the purpose of influencing any election for Federal office," O'Donnell's reimbursements to his employees qualify as "things of value," and thus

as contributions. However, if the reimbursement itself is the "contribution," O'Donnell did not "make a contribution in the name of another person," as he reimbursed the employees in his own name.

The Government notes that the Federal Election Commission ("FEC"), which provides civil enforcement of FECA, has issued a regulation concerning § 441f which states that "examples of contributions in the name of another include giving money or anything of value, all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of the money or the thing of value to the recipient candidate or committee at the time the contribution is made." 11 C.F.R. § 110.4(b)(2)(i). In addition, an FEC advisory opinion states that "the Act and Commission regulations prohibit the making and knowing acceptance of contributions in the name of another, and also prohibit the use of one's name to effect such a contribution. 2. U.S.C. § 441f; 11 C.F.R. 110.4(b). This includes the reimbursement or other payment of funds by one person to another for the purpose of making a contribution." FEC Advisory Opinion No. 1996-33, 1996 WL 549698. While these statements may reflect the spirit of FECA, they do not accord with the plain language of § 441f read in conjunction with the sections of FECA expressly prohibiting "conduit" and "indirect" contributions, as well as FECA's legislative history. Moreover, because the plain language, structure, and legislative history of FECA demonstrate that "indirect" and "conduit" contributions are covered by other FECA sections but not by § 441f, deference to the FEC's interpretation is not warranted. *See Gen. Dynamics Land Sys.*, 540 U.S.at 600; *see also Ctr. for Biological Diversity v. Brennan*, 571 F. Supp. 2d 1105 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984)) (explaining that "under *Chevron*, a court defers to an agency's reasonable interpretation of a statute, if a statute is ambiguous, and if, after examining the statute using the 'traditional tools of statutory construction,' that ambiguity remains").

For the foregoing reasons, the Court finds that O'Donnell's conduct of reimbursing his employees for contributions they made does not fall within the ambit of § 441f, and thus GRANTS O'Donnell's Motion to Dismiss with regards to Counts One and Two.

B. Count Three Sufficiently States the Essential Elements of the Crime Charged.

Count Three alleges that O'Donnell "knowingly and willfully caused the treasurer of EFP . . . to make a materially false statement" that his employees had made contributions to EFP "when, in fact, as O'Donnell well knew, O'Donnell had made those contributions by providing his money to those individuals . . . to make those contributions." (Indictment 8.) O'Donnell alleges that this Count must be dismissed because: (1) it fails to allege the essential elements of a violation of 18 U.S.C. § 1001; and (2) EFP's statement to the FEC was "indisputably true." (Def.'s Mem. P. & A. 8.)

1. The Indictment Alleges the Essential Elements of a Violation of 18 U.S.C. § 1001.

O'Donnell argues that the Indictment's statement that he "knowingly and willfully" caused the false statements fails to allege the mens rea required to convict a person for causing a false statement in the context of FEC reporting. *Id.* at 9. He cites a Third Circuit case which required a heightened mens rea to be liable under § 1001 in conjunction with 18 .U.S.C. § 2b, for causing another to make a false statement, rather than directly making the statement himself. *See United States v. Curran*, 20 F.3d 560, 570-571 (3d Cir. 1994). In *Curran*, the Third Circuit held that a defendant must: (1) know that the treasurer had a legal duty to report the actual source of contributions; (2) have acted with the specific intent to cause the treasurer to submit a report that did not accurately provide the relevant information; and (3) have known that his actions were unlawful. *Id.* The *Curran* court reached this conclusion after noting that there was no "controlling case law expounding the proper construction of willfulness required for a charge under § 2b linked with § 1001 in a [FECA] case." *Id.* at 568. It analogized to *Ratzlaf v. United States*, 114 S. Ct. 655 (1994), in which the defendant was accused of structuring cash deposits to evade the federal regulation requiring banks to report amounts deposited in excess of $10,000. The Supreme Court held that the jury instructions were incorrect because they failed to state that the prosecution must show the defendant knew the structuring was unlawful. *Curran*, 20 F.3d at 568 (citing *Ratzlaf*, 114 S. Ct. at 663). Relying on *Ratzlaf*, the *Curran* court found jury instructions incorrect that "failed

to state that the government had the burden of proving that defendant knew of the campaign treasurers' obligation to submit contribution reports to the [FEC]." *Id.* at 570.

The D.C. Circuit has expressly rejected the Third Circuit's heightened mens rea requirement and instead held that the mens rea for § 1001 requires only that "the defendant knew the statements to be made were false" and "the defendant intentionally caused such statements to be made by another." *United States v. Hsia*, 176 F.3d 517, 522 (D.C. Cir. 1999). In *Hsia*, the court explained that *Curran*'s reliance on *Ratzlaf* was flawed. It noted that *Ratzlaf* "did not universalize a broad reading of 'wilfully' and thus overturn the general rule that ignorance of the law is no excuse. *Ratzlaf* found a knowledge-of-criminality requirement in a statute that independently required the act at issue to be 'for the purpose of evading' various reporting requirements; reading 'wilfully violating' there as only requiring intention would have made it surplusage. In [cases brought under § 1001 and § 2b], no such problem exists." *Id.* (citing *Ratzlaf*, 114 S. Ct. at 658).

While the Ninth Circuit has not considered the issue of § 1001 violations in the FEC reporting context, it has held in other contexts that "the mens rea needed to violate § 1001 [requires] only that the defendant act 'deliberately and with knowledge.'" *United States v. Kim*, 95 Fed. Appx. 857, 861 (9th Cir. 2004) (citing *United States v. Heuer*, 4 F.3d 723, 732 (9th Cir. 1993) ("to willfully make a false statement under § 1001, the defendant must have the specific intent to make a false statement")); *see also United States v. Dominguez-Mestas*, 687 F. Supp. 1429, 1433 (S.D. Cal. 1988) (explaining that for conviction under § 1001, the prosecution must prove the intent element by showing "that the defendant knew the statement was untrue"). In regards to other statutes requiring willfulness, the Ninth Circuit has explained: "the Supreme Court has recognized that 'the word willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears." *United States v. Henderson*, 243 F.3d 1168, 1171-72 (9th Cir. 2001) (citing *Bryan v. United States*, 524 U.S. 184, 191 (1998). "Often, in the criminal context, 'in order to establish a 'willful' violation, the Government must prove that the defendant acted with knowledge that his conduct was unlawful. In particular, proof of knowledge of unlawfulness is required when the criminal conduct is contained in a regulation instead of in a

statute, and when the conduct punished is not obviously unlawful, creating a 'danger of ensnaring individuals engaged in apparently innocent conduct'." *Id.* at 1172 (internal citations omitted.)

Here, the conduct proscribed is contained in a statute, not a regulation. In addition, requiring a defendant to know the statements are false and intentionally cause someone to make them is a sufficient safeguard against punishing purely innocent conduct. Moreover, the Court agrees with the D.C. Circuit's analysis of § 1001 and rejection of the Third Circuit's heightened mens rea requirement. *See Hsia*, 176 F.3d at 522. Thus, the Government satisfies its burden of proving a § 1001 violation by showing that O'Donnell knew the statements to be made were false and intentionally caused such statements to be made by another. *See id.* Accordingly, the Indictment here, which alleges that O'Donnell acted "knowingly and willfully," sufficiently states the essential element of mens rea for a § 1001 and § 2b violation.

2. The Statements at Issue Are Not "Indisputably True".

O'Donnell argues that the Court must dismiss Count Three because he has a complete defense to § 1001 liability in that the EFP treasurer's statement to the FEC was "indisputably true." (Def.'s Mem. P. & A. 11.) FECA requires treasurers to report to the FEC "the identification of each person . . . who makes a contribution to the reporting committee . . . whose contribution(s) have an aggregate amount or value in excess of $200 within the calendar year." 2 U.S.C. § 434(b)(3)(A). O'Donnell argues that FECA requires reporting of the names of those who actually tender funds to a campaign committee, not the "original source" of those funds, and thus the EFP treasurer's statements were literally true. (Def.'s Mem. P. & A. 12-13.)

Once again, the Ninth Circuit has not considered this issue. However, other courts that have considered the issue have held that "§ 434(b) of FECA requires political committees to report the 'true source' of hard money contributions; thus, statements identifying conduits as the source of funds were not 'literally true.'" *United States v. Kanchanalak*, 192 F.3d 1037, 1042 (D.C. Cir. 1999) (citing *Hsia*, 176 F.3d at 523-24) (explaining that "as in *Hsia*, defendants are alleged to have acted as conduits or utilized others in making contributions to political committees in federal elections. By thus causing political committees to report conduits instead of the true sources of donations, defendants have caused false statements to be made to a government agency").

O'Donnell cites no authority holding otherwise. Accordingly, the EFP treasurer's statements were not "indisputably true," and the Court will not dismiss the Indictment on this ground.

III. RULING

For the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART Defendant's Motion to Dismiss the Indictment. Counts One and Two are hereby DISMISSED.

IT IS SO ORDERED.

Dated: June 8, 2009

S. James Otero

S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACK and RENEE BEAM,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**No. 07 C 1227**
	)	
MICHAEL B. MUKASEY, UNITED STATES ATTORNEY GENERAL, in his official capacity; FEDERAL ELECTION COMMISSION CHAIRMAN DAVID M. MASON, in his official capacity; UNKNOWN AGENTS OF THE FEDERAL BUREAU OF INVESTIGATION, in their individual and official capacities,	)	**Judge Rebecca R. Pallmeyer**
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiffs Jack and Renee Beam (the "Beams"), Illinois residents, claim that the government targeted them for an investigation in November 2005 because of their support for presidential candidate John Edwards in the 2004 election. Plaintiffs allege that the United States Attorney General ordered a raid of the Michigan law office with which Mr. Beam was affiliated, as well as raids of the homes of some of the law firm's employees and associates. Plaintiffs further claim that agents of the Justice Department and/or the FBI seized financial records of the firm's employees and associates, including the Plaintiffs. The Beams have brought a three-count complaint against the Attorney General, the Chair of the Federal Election Commission (the "FEC") and certain unknown agents of the Federal Bureau of Investigation (the "FBI") (collectively, the "Defendants"), charging them with violating certain federal statutes as well as the United States Constitution. Defendants have moved to dismiss the complaint. For the reasons given below, the motions are granted in part and denied in part.

FACTUAL BACKGROUND

For purposes of deciding a motion to dismiss, the allegations of Plaintiffs' Second Amended Complaint are accepted as true and viewed in the light most favorable to Plaintiffs. *See Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). Plaintiffs allege that in February 2003, the Beams contributed to the 2004 presidential campaign of John Edwards, a Democrat. (2d Am. Compl. ¶ 7.) A number of employees and associates of the Michigan law firm of Fieger, Fieger, Kenney & Johnson (the "Fieger law firm"), where Mr. Beam is of counsel, also made contributions to Edwards during the 2004 election cycle. (*Id.* ¶¶ 7, 10.)

On November 30, 2005, then-Attorney General Alberto Gonzales authorized a nighttime raid on the Fieger law firm's offices. (*Id.* ¶ 8.) That same evening, approximately 100 federal agents also raided the homes of certain associates and employees of the Fieger law firm. (*Id.* ¶ 9.) The Beams allege that during these raids, federal agents "harassed" the Fieger law firm employees, asking them who they voted for in the 2004 presidential election and questioning them about their contributions to the Edwards campaign. (*Id.* ¶ 11.) During these raids, federal agents also allegedly informed the Fieger employees that the agents had previously obtained the employees' financial records. (*Id.*) Plaintiffs have not alleged that their own residence was raided. They do assert, however, that at some point after the raids (Plaintiffs do not say when), the Beams learned that federal agents of the Justice Department and/or the FBI had obtained their financial records. (*Id.* ¶¶ 13, 16.) The Beams further allege that their financial records were later (again, on an unidentified date) transmitted to the FEC. (*Id.* ¶ 16.)

On March 2, 2007, Plaintiffs initiated this action by filing an Application for Writ of Mandamus and Complaint in this court, naming Attorney General Alberto Gonzales and FEC Chair Robert Lenhard as Defendants. (Docket Entry No. 1.) Pursuant to motions by both Defendants, on June 22, 2007, the court dismissed Count I of the Complaint–seeking a declaratory judgment that the Attorney General and the FEC had violated the Federal Campaign Finance Act–for failing

to allege sufficient facts that would support a right to relief. (Docket Entry No. 46.) The court reserved ruling on the other two counts of the complaint, in which Plaintiffs had alleged violations of the Administrative Procedure Act ("APA") and had sought a writ of mandamus requiring that the FEC comply with the Federal Campaign Finance Act.

A week later, on June 29, 2007, Plaintiffs filed a five-count Amended Complaint naming Gonzales, Lenhard, and certain unnamed FBI agents as Defendants, all in their official and individual capacities. (1st Am. Compl., Docket Entry No. 47.) Plaintiffs alleged violations of the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. § 3401 *et seq.*; the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq.*; and the APA, 5 U.S.C. § 701 *et seq.* (*Id.*) Plaintiffs also alleged that they were retaliated against for engaging in constitutionally protected activity, and sought a writ of mandamus compelling the FEC to comply with federal law. (*Id.*) The FEC and the Attorney General again moved to dismiss.

On March 7, 2008, this court granted their motions. *Beam v. Gonzales*, 548 F. Supp. 2d 596 (N.D. Ill. 2008). In so ruling, the court held that the Plaintiffs lacked standing to bring their claims because the Amended Complaint did not allege any injury-in-fact. *Id.* at 603. The court also held that Plaintiffs' claims were not ripe for judicial review at that time because a federal criminal investigation into the conduct of the Fleger law firm's employees was ongoing and the Attorney General and FEC had "not yet made decisions about whether or how to enforce applicable laws." *Id.* at 605-06. Finally, the court dismissed Plaintiffs' APA and mandamus claims, concluding that they failed to allege a violation of FECA because the statute does not clearly limit the Attorney General's enforcement authority and because the statute does not authorize courts to "dictate the timing and nature of an FEC investigation." *Id.* at 609-12. The court again permitted Plaintiffs to file a second amended complaint. *Id.* at 612.

Plaintiffs did so on March 28, 2008. In their three-count Second Amended Complaint, Plaintiffs renewed the RFPA (Count I) and retaliation (Count II) claims they alleged in their First

Amended Complaint, and raised for the first time a claim for selective and vindictive prosecution (Count III). (2d Am. Compl.) David Mason, who replaced Lenhard as FEC Chair, and Michael Mukasey, who replaced Gonzales as Attorney General, are sued in their official capacities; certain unknown agents of the FBI are sued in both their official and individual capacities. (*Id.*) The FEC and the Attorney General both moved to dismiss Plaintiffs' Second Amended Complaint.

While Defendants' motions have been pending in this court, on June 2, 2008, a federal jury in Detroit, Michigan acquitted Geoffrey Fieger and Ven Johnson, two partners at the Fieger law firm, of criminal violations of FECA. *See* David Ashenfelter & Joe Swickard, *Thank You, Jurors, Cleared Fieger Says*, DETROIT FREE PRESS, June 3, 2008, at 3. Fieger and Johnson had been charged with illegally reimbursing employees and associates of the Fieger law firm for more than $100,000 in campaign contributions made to the 2004 Edwards campaign. *Id.*

DISCUSSION

In their motions to dismiss, Defendants argue, first, that the court lacks subject matter jurisdiction over Plaintiffs' claims. FED. R. CIV. P. 12(b)(1). According to Defendants, some of Plaintiffs' claims are barred by sovereign immunity;[1] Plaintiffs lack standing to pursue at least some of the claims;[2] and none of the claims are ripe for judicial review. Additionally, Defendants argue that the complaint should be dismissed pursuant to Rule 12(b)(6), for failing to state a claim on which relief can be granted.

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[1] The FEC claims that sovereign immunity prevents the court from exercising subject matter jurisdiction over both Counts II and III (FEC Mem. [95] at 8-9), while the Attorney General appears to raise sovereign immunity as a defense only to Count II. (A.G. Mem. [96] at 11 n.5.)

[2] The FEC argues that Plaintiffs lack standing to bring Counts I and II (FEC Mem. at 4-8); the Attorney General argues that Plaintiffs lack standing to bring any of the three counts. (A.G. Mem. at 7-8.)

I. Standard of Review

To withstand a motion to dismiss pursuant to Rule 12(b), a plaintiff must plead facts that "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, — U.S. —, —, 127 S. Ct. 1955, 1965 (2007); *see also Jennings v. Auto Meter Prods., Inc.*, 495 F.3d 466, 472 (7th Cir. 2007). The factual allegations, however, need not be detailed, *Twombly*, 127 S. Ct. at 1964-65, and the court accepts the well-pleaded allegations of the complaint as true, drawing all reasonable inferences in favor of the plaintiff. *Vill. of DePue v. Exxon Mobil Corp.*, 537 F.3d 775, 782 (7th Cir. 2008). The 12(b)(6) test thus remains a generous one. In contrast, where Defendants challenge the court's subject matter jurisdiction, the court will presume that it "lack[s] jurisdiction unless the contrary appears affirmatively from the record." *Sprint Spectrum L.P. v. City of Carmel*, 361 F.3d 998, 1001 (7th Cir. 2004) (quoting *Renne v. Geary*, 501 U.S. 312, 316 (1991)). In responding to Defendants' arguments concerning ripeness, sovereign immunity, and standing, then, it is the Plaintiffs' "responsibility to clearly allege facts that invoke federal court jurisdiction." *Sprint Spectrum*, 361 F.3d at 1001; *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003) ("The burden of proof on a 12(b)(1) issue is on the party asserting jurisdiction." (citation omitted)).

Before applying these standards to the Second Amended Complaint, the court pauses to note the parties' apparent agreement that materials not included in the complaint, but attached to Plaintiffs' response memorandum, are properly before the court. In deciding a motion to dismiss, courts are generally limited to considering only the well-pleaded allegations of the complaint. *See* FED. R. CIV. P. 12(d); *Rosenblum v. Travelbyus.com Ltd.*, 299 F.3d 657, 661 (7th Cir. 2002). In their Second Amended Complaint, Plaintiffs have alleged that they have "obtained documentary proof that federal agents . . . obtained their financial records by engaging in acts and/or omissions that violate the [RFPA]" (2d Am. Compl. ¶ 16), but do not specifically identify the nature of the documentary proof. The Attorney General, in his memorandum in support of his motion to dismiss,

acknowledges that federal agents obtained Plaintiffs' financial records, but pount out that they did so by means of a grand jury subpoena. (A.G. Mem. at 3.) Plaintiffs apparently concede this: they have attached to their response memorandum a a copy of the grand jury subpoena, requesting records of their account from December 2002 through April 2003. (Ex. B to Pl.'s Resp. in Opp'n to Defs.' Mots. to Dismiss (hereinafter "Pl.'s Resp.").)

Despite the general reluctance of courts to consider matters outside of the pleadings in deciding a motion to dismiss pursuant to Rule 12(b), courts will nevertheless consider documents attached to a motion to dismiss if the document is referred to in the complaint itself. *Rosenblum*, 299 F.3d at 661. Although the grand jury subpoena at issue in this case is not attached to the motion to dismiss, it is attached to Plaintiffs' memorandum in response, and is referred to (albeit indirectly) in the Second Amended Complaint itself. The general principle is thus the same: Plaintiffs' complaint refers to "documentary proof" that the government obtained the Beams' financial records, and both the Defendants and the Plaintiffs appear to agree that the proof consists of the grand jury subpoena. *See Adamczyk v. Lever Bros. Co.*, 991 F. Supp. 931, 933 (N.D. Ill. 1997) ("a party may assert additional facts in response to a motion to dismiss" as long as the facts "are consistent with the allegations of the complaint" (citing *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1428 (7th Cir. 1996)) The court presumes it is this subpoena that constitutes the "documentary proof" to which Plaintiffs have referred obliquely in their complaint.[3]

I. Ripeness

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[3] Plaintiffs also attached a grand jury subpoena to their response memorandum that requests records of the Fleger law firm from the firm's bank. (Ex. A to Pl.'s Resp.) The court is not persuaded that this subpoena has any relevance to Plaintiffs' claims for relief in their Second Amended Complaint, as it does not concern any RFPA violation relating to the Beams' own financial records; does not show retaliation against the Beams; and was not used in a selective or vindictive prosecution against the Beams. Nor is this Fleger law firm subpoena obviously referenced in the complaint. The court thus declines to consider this attachment to Plaintiffs' response memorandum.

At the outset, the court addresses an objection voiced by both Defendants to the court's exercise of subject matter jurisdiction over the issues raised in Plaintiffs' Second Amended Complaint: whether the case is ripe for judicial consideration. The court dismissed Plaintiffs' First Amended Complaint partially on the ground that the issues presented were not ripe. "The question of ripeness turns on 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). Defendants contend that nothing has changed between that complaint and the present complaint, and that Plaintiffs' claims are still unripe for review. The court disagrees.

In dismissing Plaintiffs' First Amended Complaint, the court held that the issues presented in the complaint were not fit for judicial decision. The principal reason for the finding of unfitness was the court's reluctance "to intervene in an ongoing federal criminal investigation" and thereby interfere with the investigation. *Beam*, 548 F. Supp. 2d at 606. Specifically, the court noted that it did not yet know "what, if any, charges may be brought against the Beams." *Id.* That is no longer the case. The grand jury subpoena issued to the Beams' bank requested documents from December 2002 through April 2003. (Ex. B to Pl.'s Resp. at 5.) Defendants do not dispute that FECA's five-year statute of limitations for criminal sanctions has run. *See* 2 U.S.C. § 455(a) ("No person shall be prosecuted, tried, or punished for any [FECA] violation . . . unless the indictment is found or the information is instituted within 5 years after the date of the violation.") The FEC nevertheless maintains that Plaintiffs "may still face potential *civil* liability for violations of [FECA]." (FEC Reply [101] at 5.) Although FECA does not contain a statute of limitations for civil liability, courts that have considered the question have found that the five-year default statute of limitations provided by 28 U.S.C. § 2462 applies.[4] *See, e.g.*, *FEC v. Williams*, 104 F.3d 237, 239 (9th Cir.

[4] Section 2462 provides:

(continued...)

1996); *FEC v. Christian Coalition*, 965 F. Supp. 66, 69 (D.D.C. 1997) ("FECA does not contain an internal statute of limitations. The applicable statute of limitations is provided under 28 U.S.C. § 2462—a point the parties do not, nor could they, reasonably dispute."). Accordingly, the court concludes civil penalties against the Beams for the conduct at issue in the government's investigation of their financial records would also be barred by the statute of limitations.

The FEC does not explain how Plaintiffs could still be subjected to civil liability, given the five-year statute of limitations under 28 U.S.C. § 2462.[5] Perhaps the FEC believes that despite the statute of limitations, it could still seek equitable remedies against the Beams. *See Christian Coalition*, 965 F. Supp. at 72 ("[A] suit in equity may lie though a comparable cause of action at law would be barred." (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946))). Even assuming that the Beams' conduct would somehow support a claim against them for equitable relief, this court is unwilling to conclude that such a possibility requires dismissal of this action. Arguably no statute of limitations applies to equitable actions under FECA at all; thus, under the FEC's theory, the FEC's mere assertion that "investigations into the plaintiffs' activities are not complete" (FEC Mem. at 10) and that an equitable claim is under consideration could result in delaying this case as unripe indefinitely. It appears to the court that no outstanding actions yet to be taken by the FEC or other events could seriously affect the claims advanced by Plaintiffs in this complaint. *See Lucien v.*

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[4](...continued)
Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.
28 U.S.C. § 2462.

[5] The Attorney General does not address the issue of civil penalties at all. He nevertheless argues that the issues presented by the case are not ripe because the Beams were not indicted. (A.G. Reply Mem. [102] at 2-3.) The Attorney General appears to concede, however, that this argument is essentially the same as the argument that Plaintiffs lack standing because they have suffered no injury. (*Id.* at 3 ("This argument, however, merely points out Plaintiffs' lack of injury."))

Jockisch, 133 F.3d 464, 469 (7th Cir. 1998) ("Concern with the contingency of future events is at the core of the ripeness doctrine." (quoting *Alcan Alum. Ltd. v. Dept. of Rev.*, 724 F.2d 1294, 1295 n.1 (7th Cir. 1984))). The remote possibility of a future equitable action cannot preclude a finding by the court that the issues presented by Plaintiffs in their Second Amended Complaint are fit for judicial decision.

The second question in the court's ripeness inquiry is whether Plaintiffs would suffer any hardship if they were delayed in proceeding in this case. The court previously found that the Beams could identify no hardship that they would suffer if the criminal investigation into their activities were to continue. *Beam*, 548 F. Supp. at 607. Now, however, the FEC appears to have run out of time to bring either a criminal or civil enforcement action against the Beams. There is thus no benefit to any of the involved parties in delaying consideration of Plaintiffs' claims on the grounds that they are unripe. "The hardship prong under the ripeness doctrine is largely irrelevant in cases, such as this one, in which neither the agency nor the court have a significant interest in postponing review." *Elec. Power Supply Ass'n v. F.E.R.C.*, 391 F.3d 1255, 1263 (9th Cir. 2004). Defendants' arguments that Plaintiffs would suffer no hardship from continuing to delay hearing their claims fail for two reasons. First, Defendants do not acknowledge that the applicable statutes of limitations under FECA have lapsed and that no strong reasons remain for delaying consideration of their claims. Second, the "lack of hardship" arguments advanced by Defendants become, at a certain point, indistinguishable from their substantive arguments that Plaintiffs have not suffered any cognizable injury. This inquiry is better resolved by determining whether the law recognizes the injuries alleged by Plaintiffs, rather than having the court refuse to hear the claims on the grounds that the issues are not ripe for review. As the statutes of limitations have expired for both criminal and civil penalties arising out of the Beams' activities in late 2002 and early 2003, the court concludes that the claims presented in the Beams' Second Amended Complaint are now ripe for judicial decision.

II. Plaintiffs' Complaint

A. Right to Financial Privacy Act Claims

Defendants argue that Plaintiffs lack standing to bring the RFPA claims. As noted above, the party invoking federal jurisdiction–here, the Beams–bears the burden of establishing standing. *Freedom From Religion Found., Inc. v. Nicholson*, 536 F.3d 730, 737 (7th Cir. 2008). To demonstrate standing, a party must show "(1) injury-in-fact, (2) causation, and (3) redressability." *Citizens Against Ruining the Environment v. E.P.A.*, 535 F.3d 670, 675 (7th Cir. 2008) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). In the prior decision dismissing Plaintiffs' First Amended Complaint, the court found that the Beams had failed to establish that they had suffered an injury-in-fact. *Beam*, 548 F. Supp. 2d at 603.

"At the pleading stage, general factual allegations of injury resulting from defendant's conduct may suffice" to prove injury-in-fact. *Disability Rights Wis., Inc. v. Walworth County Bd. of Supervisors*, 522 F.3d 796, 800 (7th Cir. 2008) (quoting *Lujan*, 504 U.S. at 561). In their First Amended Complaint, Plaintiffs alleged that federal agents raided "the homes of the associates and employees of the Fieger law firm," but did not allege that their own home was raided or that the government actually seized their financial records. (1st Am. Compl. ¶ 9.) In the Second Amended Complaint, by contrast, Plaintiffs allege that federal agents "had, in fact, obtained [the Beams'] financial records by engaging in acts and/or omissions that violate the Right to Financial Privacy Act," and that these "illegally gathered documents" were transmitted to the FEC. (2d Am. Compl. ¶¶ 16, 18.) The question, thus, is whether these allegations suffice to demonstrate injury-in-fact caused by any of the named Defendants.

The Attorney General argues that Plaintiffs' allegations that the government accessed their financial records are not sufficient to establish an injury-in-fact because the supposed injury is not a "legally-protected interest." *See Plotkin v. Ryan*, 239 F.3d 882, 885-86 (7th Cir. 2001). Satisfying the injury requirement for standing requires a showing that the plaintiff has "suffered an invasion

of a legally-protected interest" that is real and not hypothetical. *Id.* (quoting *Lujan*, 504 U.S. at 560). The court agrees with the Attorney General that Plaintiffs have alleged no violation of a legally-protected interest, and hence no injury-in-fact, arising from the government's investigation of Geoffrey Fieger, a partner at the Fieger law firm. Plaintiffs' allegations in their Second Amended Complaint go beyond this, however, as they claim that federal agents obtained their own financial records in violation of the RFPA. (2d Am. Compl. ¶ 16.) "It is well settled that a statute itself may create a legal right, the invasion of which causes an injury sufficient to create standing." *Ramirez v. Midwest Airlines, Inc.*, 537 F. Supp. 2d 1161, 1166 (D. Kan. 2008) (citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). The RFPA creates for private citizens a right to sue and recover actual or statutory damages for violations; the statute thus by its own terms creates a legally-protected interest. See 12 U.S.C. § 3417(a). In other words, Plaintiffs have standing if they have alleged facts sufficient to support a reasonable inference that the statute was violated. The injury-in-fact inquiry, then, blends into an inquiry into the merits of Plaintiff's allegations, as the Plaintiffs have alleged a violation of a legally-protected interest only if they have alleged a violation of the RFPA. Defendants' 12(b)(1) motions to dismiss for lack of subject matter jurisdiction is thus analyzed along with the 12(b)(6) motions to dismiss for failure to state a claim. *See Peckmann v. Thompson*, 966 F.2d 295, 297 (7th Cir. 1992) ("If a defendant's Rule 12(b)(1) motion is an indirect attack on the merits of the plaintiff's claim, the court may treat the motion as if it were a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted." (citing *Malak v. Associated Physicians, Inc.*, 784 F.2d 277, 280 (7th Cir. 1986))).

Plaintiffs' conclusory statement that federal agents violated the RFPA does not by itself satisfy the pleading standards, even under the generous standards applied to a motion to dismiss under Rule 12(b). *See Twombly*, 127 S. Ct. at 1966. Instead, the court looks at the facts supporting this conclusory assertion–namely, the grand jury subpoena–to determine whether the issuance of the subpoena supports a finding that the government violated the RFPA. Defendants

insist that obtaining the information by means of a grand jury subpoena does not violate the RFPA. Section 3413(i) reads:

> Nothing in this title (except sections 1115 and 1120 [12 USCS §§ 3415 and 3420]) 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 . . . 12 U.S.C. § 3409.

12 U.S.C. § 3413(i). The Beams argue that the second exception clause ("except that a court shall . . .") requires the government to "follow the statutory procedures outlined in § 3409 to seal the *existence* of a grand jury subpoena served on a financial institution" (Pl.'s Resp. at 4), a procedure which was admittedly not followed here.[6]

Plaintiffs' reading of the statute is defeated by the plain language of the Act. The RFPA strikes a balance between customers' right to financial privacy and law enforcement's legitimate need for private financial records. *See In re Grand Jury Subpoena*, 41 F. Supp. 2d 1026, 1032 (D. Alaska 1999). In particular, grand jury subpoenas were exempted from the reporting requirements of the statute. The clause on which Plaintiffs rely grants courts the authority to order a financial institution to withhold customer notification pursuant to the RFPA despite the existence of a grand jury subpoena, but does not, as Plaintiffs suggest, *require* the government to go through this procedure. All that the second exception clause does is permit courts to institute "gag orders" pursuant to § 3409 when the disclosure is pursuant to a grand jury subpoena–a provision that might be characterized as an excess of caution, as the introductory language to the section states that

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[6] The subpoena states, in pertinent part:

> The government requests that your institution not provide any infor-mation [sic] about this grand jury subpoena to any third party–including the affected accountholder(s)–for a period of 90 days. Federal law permits but does not require you to comply with this request for nondisclosure. See 12 U.S.C. § 3413(i). However, any disclosure to third parties could impede the investigation being conducted and thereby interfere with the enforcement of federal criminal law.

Ex. B to Pl.'s Resp. at 2.

the RFPA does not apply to such subpoenas at all. Plaintiffs cite no authority to support their reading of the statute, and the court is aware of none. *See Pleasant v. Lovell*, 876 F.2d 787, 806 (10th Cir. 1989) ("Under the Act, there is no requirement that a bank notify its customer of a grand jury subpoena."); *In re Grand Jury Subpoena*, 41 F. Supp. 2d at 1032 ("[F]ederal grand jury subpoenas were specifically exempted from the provisions of the RFPA requiring notice to customers."). Indeed, Plaintiffs made this same argument in the Michigan district court that supervised the Feiger grand jury investigation, and the court rejected it. (*See* Trans. of Aug. 15, 2007, Ex. A to Def. Attorney General's Reply Mem. in Supp. of His Mot. to Dismiss [66] at 59.) Therefore, the government did not violate the RFPA by obtaining the Beams' financial records pursuant to a grand jury subpoena, which means the Plaintiffs have suffered no injury to a legally-protected interest as a result of the Attorney General's conduct and have failed to state a claim upon which relief can be granted.[7]

The Plaintiffs' claim against the FEC stands on a different footing, however. Section 3417 of the RFPA prohibits "any agency or department of the United States . . . [from] obtaining financial records or information contained therein in violation of [the RFPA]." Another section of the Act, § 3412, provides that financial records "originally obtained pursuant to this title shall not be transferred to another agency or department unless the transferring agency or department" provides a written certification that the records are needed for legitimate law enforcement needs.[8] 12 U.S.C.

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[7] Additionally, Plaintiffs cannot successfully assert this claim against the unknown FBI agents named by Plaintiffs in their Second Amended Complaint because § 3417(a), by its own terms, authorizes suits only against federal agencies and departments and financial institutions, not individuals. 12 U.S.C. § 3417(a); *see also Lifflton v. Keuker*, 850 F.2d 73, 78-79 (2d Cir. 1988).

[8] Plaintiffs have not specifically alleged a violation of § 3412 by identifying the specific provision, but their argument clearly focuses on this provision. The complaint alleges that the Attorney General and his agents transmitted the financial records to the FEC in violation of the RFPA (2d Am. Compl. ¶¶ 18-20), and they advance the same argument in their memorandum in opposition. (Pl.'s Resp. at 8.) The failure to specifically identify the precise statute is irrelevant in deciding a motion to dismiss, as the Plaintiff has only the burden of establishing a general right to (continued...)

§ 3412(a). An agency that obtained financial records from another department or agency could thus be liable under § 3417, even if the original agency obtained the documents legally. Thus, although Plaintiffs' allegations that the Attorney General obtained their financial records illegally fails, the FEC could still be liable for obtaining the documents in violation of the RFPA if they obtained the records from the Department of Justice without following the procedures outlined in § 3412. Reading these two sections together, then, Plaintiff has adequately alleged the FEC has obtained these documents in violation of the RFPA.

The FEC claims that this court's prior opinion, which dismissed the Plaintiffs' RFPA claim in the First Amended Complaint against the FEC as "unsubstantiated speculation," *Beam*, 548 F. Supp. 2d at 604, defeats this new complaint as well. Again, the court disagrees. In the Second Amended Complaint, unlike the First Amended Complaint, Plaintiffs specifically allege that the FEC received these documents. (2d Am. Compl. ¶ 18.) While it is true that Plaintiffs still do not have actual physical proof that the FEC obtained these documents in violation of the RFPA, the Plaintiffs are not required to possess definitive proof at this stage. *U.S. Gypsum Co. v. Ind. Gas Co., Inc.*, 350 F.3d 623, 628 (7th Cir. 2003) ("The right question is whether it is possible to imagine proof of the critical facts consistent with the allegations actually in the complaint."). The FEC places undue emphasis on the "unsubstantiated speculation" language of the court's prior opinion; the First Amended Complaint at issue in that case did not clearly allege that the FEC in particular (as opposed to the "government" as one singular entity) had done anything wrong, so the Plaintiffs were essentially requiring the court to speculate not just as to facts but as to what the complaint alleged. By contrast, Plaintiffs' Second Amended Complaint pleads what the First Amended

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[8](...continued)
relief rather than setting forth the precise legal theory under which he is proceeding. *See Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217, 222 (7th Cir. 1996) ("The Federal Rules of Civil Procedure do not require a plaintiff to plead legal theories."). Plaintiffs' general invocation of the RFPA, which includes § 3412, is therefore sufficient.

Complaint did not. Although not all the facts alleged by Plaintiff are proven prior to discovery, the court accepts as true well-*pleaded* allegations of the complaint for purposes of a motion to dismiss. *Tamayo*, 526 F.3d at 1081. If Plaintiffs still lack any evidence that an RFPA violation occurred after they have had the chance to engage in discovery, summary judgment in favor of the FEC may well be appropriate. But at this preliminary stage, Plaintiffs have adequately pleaded a cause of action under the RFPA against the FEC, and so the court denies the FEC's 12(b)(1) and 12(b)(6) motions as to this claim.

B. Retaliation

Defendants argue that Plaintiffs' second count, for "retaliation and deprivation of First Amendment rights to free speech," is both barred by sovereign immunity and fails to state a claim. The Second Amended Complaint alleges that the investigation of the Beams' private financial records "was carried out to instill fear and retaliation for Plaintiffs' exercise of their political activities and support for Democratic candidates and without serving any legitimate law enforcement purpose." (2d Am. Compl. ¶ 24.) The Beams have named Mukasey and Mason as defendants in their "official capacities" only, however, and sovereign immunity bars "suits brought against the United States and its officers acting in their official capacity." *Davis v. U.S. Dep't of Justice*, 204 F.3d 723, 726 (7th Cir. 2000). To proceed with this action, then, Plaintiffs must identify "federal law that waives the sovereign immunity of the United States to the cause of action." *Clark v. United States*, 326 F.3d 911, 912 (7th Cir. 2003). In their memorandum in opposition to the motions to dismiss, the Beams argue that this count is authorized as a *Bivens*-type action, which allows plaintiffs to recover money damages for certain violations of constitutional rights. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971). That theory is inapplicable here, however, because "[a] *Bivens* action may not be maintained against [] federal employees in their official capacities." *Neville v. True*, 900 F. Supp. 972, 978 (N.D. Ill. 1995) (citing *Ecclesiastical Order of the Ism of Am, Inc. v. Chasin*, 845 F.2d 113, 116 (6th Cir. 1988)). The

doctrine of sovereign immunity thus prevents this claim from being pursued against either Defendant Mukasey or Defendant Mason in their official capacities.

In any event, Count II fails to state a claim upon which relief can be granted and must be dismissed under Rule 12(b)(6), even with respect to the unknown FBI agents. At the outset, the court notes that Plaintiffs cite no case law supporting the notion that being subject to a retaliatory investigation lends itself to a *Bivens* action. *See Hartman v. Moore*, 547 U.S. 250, 262 n.9 (2006) ("No one here claims that simply conducting a retaliatory investigation with a view to promote a prosecution is a constitutional tort."). Even assuming that such a cause of action exists, however, Plaintiffs have failed to adequately plead the elements of a retaliation claim. The elements of a First Amendment retaliation claim are that (1) a plaintiff engaged in constitutionally protected speech, (2) the plaintiff "suffered a deprivation likely to deter free speech," and (3) his speech was a motivating factor in the decision to retaliate. *See Massey v. Johnson*, 457 F.3d 711, 716 (7th Cir. 2006). While making campaign contributions and vocally supporting a presidential candidate undoubtedly constitute protected speech, *see Buckley v. Valeo*, 424 U.S. 1, 15 (1976), the Beams have failed to adequately allege the second element, namely, how the deprivation that they suffered—being subjected to a political investigation–was likely to deter their speech.[9] The Plaintiffs concede—and, indeed, they rest their entire RFPA claim upon the notion–that Defendants sought to actively conceal from them that they were investigating their financial records. But a party trying to "instill fear and retaliation" (2d Am. Compl. ¶ 24) would not want its actions concealed from the party whose speech it is trying to deter; rather, the party trying to deter speech would want its actions well known. Indeed, the whole concept of deterrence rests upon the notion that the public

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[9] Defendants also argue that Plaintiffs lack standing to pursue this claim because Plaintiffs have not suffered any injury-in-fact as a result of the alleged retaliation. As with the RFPA claim, this argument is indistinguishable from whether Plaintiffs have stated a claim upon which relief can be granted, because there is no injury if the second element of the cause of action is not met. The court therefore evaluates the sufficiency of the Beams' claim for relief. *See Peckmann*, 966 F.2d at 297.

penalty for the protected speech will dissuade similar speech or activity by others. Count II thus fails to state a claim upon which relief can be granted.

C. Selective and Vindictive Prosecution

Plaintiffs' Second Amended Complaint alleges, for the first time, a deprivation of the Beams' right to be free from selective and vindictive prosecution. The Fifth Amendment protects the right of citizens to not be singled out for prosecution for improper purposes. *See Wayte v. United States*, 470 U.S. 598, 608 (1985) ("[A]lthough prosecutorial discretion is broad, it is not unfettered. Selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints." (internal quotations omitted) (citing *United States v. Batchelder*, 442 U.S. 114, 125 (1979))). Likewise, the Constitution prohibits vindictive prosecutions "undertaken in retaliation for the exercise of a legally protected statutory or constitutional right." *United States v. Cyprian*, 23 F.3d 1189, 1196 (7th Cir. 1994) (citing *United States v. Dickerson*, 975 F.2d 1245, 1250-51 (7th Cir. 1992)).

An essential element of a selective or vindictive prosecution claim is that a prosecution must take place. A "prosecution" is "a criminal action; a proceeding instituted and carried on . . . for the purpose of determining the guilt or innocence of a person charged with crime." BLACK'S LAW DICTIONARY 1221 (6th ed. 1991). Plaintiffs concede not only that no criminal action has been brought against them, but that no such action can be brought because the five-year statute of limitations for criminal actions under FECA has expired. (Pl.'s Resp. at 13.) The Beams have thus not been prosecuted, and, *a fortiori*, could not have been selectively or vindictively prosecuted. Plaintiffs' contention that dismissal of this claim means that "the government can harass, threaten, intimidate, retaliate, and conspire against American citizens" so long as they are ultimately not indicted is clearly incorrect. (*Id.* at 12.) The court's holding that these facts do not support claims for selective and vindictive prosecution does not preclude the possibility that other relief may be

available. Plaintiffs' selective and vindictive prosecution count is therefore dismissed for the simple reason that they have not been prosecuted.[10]

CONCLUSION

For the foregoing reasons, Defendant Mukasey's Motion to Dismiss [96] is granted. Defendant Mason's Motion to Dismiss [95] is denied as to Count I and granted in all other respects.

ENTER:

Dated: October 15 , 2008

REBECCA R. PALLMEYER
United States District Judge

[10] The court has no need to consider Defendants' arguments that Plaintiffs also lacked standing and were barred by sovereign immunity from bringing this count.