

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Action No. 07-mj-01221-MEH-1

UNITED STATES OF AMERICA,

Plaintiff,

vs.

1. CORY VOORHIS,

Defendant.

**DEFENDANT'S MOTION TO DISMISS BASED UPON SELECTIVE
PROSECUTION, MOTION FOR DISCOVERY, AND MOTION FOR AN
EVIDENTIARY HEARING**

Defendant Cory Voorhis (“Voorhis”), through his attorneys, William L. Taylor and Danielle R. Voorhees of Holland & Hart LLP, and Patrick L. Ridley of Ridley, McGreevy & Weisz, P.C., respectfully requests that the Court dismiss the Information in its entirety due to selective prosecution. Voorhis further requests that the Court require the United States to provide discovery on this matter and hold an evidentiary hearing on this Motion. As grounds therefor, Voorhis states as follows:

INTRODUCTION

On October 26, 2007, Voorhis was charged by Information filed in this Court by the United States Attorney’s Office for the District of Colorado with three misdemeanor counts of violating 18 U.S.C. § 1030(a)(2)(B), intentionally exceeding authorized access to a computer and obtaining information from an agency of the United States. The Information specifically alleges

that on two separate dates, September 27 and 28, 2006, Voorhis, while acting outside his official capacity as an Immigration and Customs Enforcement (“ICE”) agent, retrieved criminal histories of various individuals by using an ICE computer to access a database maintained in the National Crime Information Center (“NCIC”). In fact, Voorhis accessed the NCIC database to check the immigration status of foreign nationals whom he reasonably suspected to be unlawfully present in the United States and for other legitimate law enforcement purposes. His access was well within his assigned duties as an ICE agent and concomitant authorization granted to him by the Government. Even assuming for the sake of argument, however, that the Government could prove the truth of the allegations it has filed against him, the Information should be dismissed in its entirety because the Government has singled Voorhis out for investigation and prosecution from similarly situated persons it has chosen not to investigate or charge, in order to prevent or punish Voorhis’s exercise of his First Amendment rights, and derivative statutory and political rights.

STATEMENT OF FACTS

These facts are drawn from investigative materials provided by the Government, defense investigation, and public source materials.¹ Voorhis is a 15-year federal law enforcement veteran currently employed in Denver, Colorado as a Senior Special Agent, assigned to the

¹ ___/ The Government has provided 480 pages of investigative reports and exhibits, which the Government has characterized as substantially all of the investigative reports. The Government has stated it will require the defense to file motions for certain additional materials gathered during its investigation. The defense will file a specific motion for discovery in connection with this Motion.

Denver office of ICE.² Voorhis has years of experience working on sensitive public safety and national security matters, including complex immigration cases and criminal investigations.

I. The NCIC Databases

At all times relevant to the charges in this case, within the scope of his employment and assigned duties as a federal law enforcement agent, Voorhis was required to utilize various government and law enforcement computer databases, including the NCIC and the Colorado Crime Information Center (“CCIC”) databases.

The NCIC is a computerized index of criminal justice information maintained by the Federal Bureau of Investigation (“FBI”). The NCIC maintains information regarding wanted persons, individuals identified as having committed crimes, fingerprint information, gang information, members of terrorist organizations, and missing persons.³ It is available to federal, state, and local law enforcement, as well as other criminal justice agencies.

Maintained and administered by the Colorado Bureau of Investigation (“CBI”), the CCIC is a computerized information system that provides and maintains criminal justice information to assist law enforcement. Law enforcement uses the CCIC to maintain indices of wanted and missing persons and property and to identify people and property involved in crime, members of criminal gangs, stolen property, criminal suspects, criminal methods of operation, reported

² ___/ Voorhis is now on administrative leave from ICE, with pay.

³ ___/ See Federal Bureau of Investigation, NCIC website at http://www.fbi.gov/hq/cjisd/ncic_brochure.htm (visited October 25, 2007).

crime, reported arrests, and to share crime bulletins about major crimes in other states from which suspects may flee to Colorado.⁴

II. Voorhis's Conferences With Congressman Beauprez's Office and Agent

In the summer of 2006, Bob Beauprez ("Beauprez"), then a Member of the United States House of Representatives from Colorado, and A. William Ritter, Jr. ("Ritter"), formerly the elected District Attorney of Denver, Colorado, were involved in a heated political race for the office of Colorado Governor. In August 2006, a newspaper article appeared in which Ritter touted his record as District Attorney in prosecuting illegal immigrants. Ritter also stated that Congressman Beauprez and others in Washington, D.C. should do more to enact substantive immigration reform. The article identified John Marshall as a spokesman for Beauprez.

Ritter's statements were inconsistent with Voorhis's experience as an agent assigned to the Criminal Alien Apprehension Program in the Denver ICE office. In Voorhis's experience, plea bargaining policies and practices in Ritter's office, and other metro-area District Attorneys' offices, significantly impeded ICE's ability to deport criminal aliens. Under these policies and practices, District Attorneys' offices offered plea bargains that allowed aliens to plead guilty to charges that did not constitute: 1) aggravated felonies, 2) drug trafficking offenses; or 3) other serious crimes involving moral turpitude under the Immigration and Nationality Act, even though they had originally been arrested and charged with such offenses. This choice of charge for the plea bargains had the practical and legal effect of removing these criminal aliens from ICE's list of deportation priorities (driven by (1) offense of conviction and (2) scarcity of ICE resources) and/or, with respect to legal resident criminal aliens, made them statutorily non-

⁴ ___/ See Colorado Bureau of Investigation website at <http://cbi.state.co.us/ccic/default.asp> (visited October 25, 2007).

deportable. In a typical plea bargain, a district attorney would permit the alien to plead guilty to a fictitious charge of criminal trespass on agricultural lands, waiving the factual basis or stipulating to a fictitious factual basis for the charge. As a result, aliens who received the benefit of this plea bargain were not required to allocute to a bona fide factual basis when making their guilty pleas. In addition to Voorhis, many ICE agents, managers and attorneys viewed this practice as obstructing and impeding ICE's functions, causing waste of taxpayer funds, and posing a significant threat to public safety.

Shortly after reading the newspaper article, Voorhis contacted Congressman Beauprez's office, and asked to speak with John Marshall, whom the newspaper article had identified as the Congressman's spokesman. Voorhis later spoke with and met Marshall. Voorhis informed Marshall that information available in public files in the District Courts of Denver and other front range counties would evidence a policy and practice of plea bargaining potentially dangerous illegal immigrants to lesser charges to reduce collateral immigration consequences.⁵

Approximately one month after their initial meeting, Marshall provided Voorhis a list of names and dates of birth of suspected foreign nationals who, based on his search of publicly available court files, Marshall had determined received the benefit of a lenient plea bargain. Voorhis understood that some of these names might be released in the media by the Beauprez campaign. On receipt of the list, Voorhis did not know the immigration status of these individuals. From their receipt of the plea bargains, however, it was reasonable to infer that they

⁵ ___/ Copies of investigative reports provided to Voorhis by the Government demonstrate that FBI and CBI investigators determined that John Marshall met with Voorhis with the express permission and knowledge of Congressman Beauprez. (CBI Initial Report, Apr. 12, 2007, at 19, lines 37-38, excerpts provided at Exhibit 1.)

potentially were in the United States unlawfully, subject to deportation, and likely to flee if named in a media campaign. Included on the list was the name “Walter Noel Ramo,” also known as “Carlos Estrada-Medina.”

Voorhis’s intent at this juncture is important. Contrary to the apparent theory underlying the Government’s case, and its evident motivation in bringing this case, Voorhis was indifferent to the outcome of this gubernatorial election. He was not indifferent, however, to statements made during the course of that campaign about practices that impeded the mission of ICE and the Department of Homeland Security.

Voorhis’s previous attempts to bring this matter before a Member of Congress and other executive branch officials had little practical effect. Voorhis’s disclosures were intended to bring to light the threat to public safety and attendant problems posed by these plea bargains in the context of the policy debate that had become part of the gubernatorial campaign. Voorhis sought to underscore that public safety was and continued to be compromised by lenient plea bargaining practices for criminal immigrants.

III. Voorhis’s Law Enforcement Database Queries

With Marshall’s list in hand and concerned that individuals on the list might flee to evade arrest or deportation, Voorhis investigated the immigration status of various individuals on the list. As part of his investigation, he conducted queries through NCIC/CCIC to identify persons who might not be known to ICE by the name provided on the list. (These queries are the focus of the Information.) Voorhis determined that ICE did not need to take immediate formal action on any of the cases likely to be the subject of media scrutiny because the individuals were either

permanent resident aliens - - whose status as such was not threatened by the plea bargain they had received - - or because the persons had already been deported for other reasons.

Following this research, Voorhis provided Marshall certain information about individuals on the list. This provision of information was consistent with agency guidance Voorhis had received from his supervisor and others, including written guidance reciting that unlawful foreign nationals do not enjoy Privacy Act protections and that a foreign national's immigration status, nationality and entry/departure information are exempt from Privacy Act protections and available for release to the general public and media.⁶

IV. Media Related To The Foreign Nationals

Marshall and his associates subsequently released the identities of several foreign nationals on the list to the media, including the name "Walter Noel Ramo," contributing to a public debate regarding favorable criminal case dispositions for legal and illegal aliens. For example, starting on the evening of October 10, 2006, a television commercial aired in the Denver-area identifying "Walter Noel Ramo," as an illegal alien who had originally been arrested in Denver for an offense of Distribution of Heroin, subsequently pled guilty to an offense of Criminal Trespassing on Agriculture Land, avoided deportation, and went on to commit a sexual assault offense against a minor in San Francisco, California under the name of

⁶ ___/ The Privacy Act does not apply to foreign nationals who do not hold lawful permanent residence status. *See* 5 U.S.C. § 552a (defining "individual" as "a citizen of the United States or an alien lawfully admitted for permanent residence"); S. Rep. No. 93-1183, 93rd Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 6916, 6993 (1974) (term "individual" used instead of "person" "to exempt [from] the coverage of the bill intelligence files and data banks devoted solely to foreign nationals or maintained by the State Department, the Central Intelligence Agency and other agencies for the purpose of dealing with nonresident aliens and people in other countries."); *Raven v. Panama Canal Co.*, 583 F.2d 169 (5th Cir. 1978) (Panamanian citizen not an "individual" within the meaning of the Privacy Act).

“Carlos Estrada-Medina.” No one seriously disputed the accuracy of the information in the advertisement.

V. Other Law Enforcement Database Queries Not Selected for Prosecution

FBI, CBI, and ICE investigators’ reports indicate that, apparently in connection with the policy debate involving the Denver District Attorney’s Office plea bargaining policy, other individuals ran queries in law enforcement databases for “Walter Noel Ramo.” On October 16, 2006, CBI Chief Investigator Simkins reviewed the audit trail for all queries made on the NCIC/CCIC file for Ramo. (*See* CCH Dissemination Log, Oct. 16, 2006, Ex. 2.) That audit trail identified Voorhis’s query, as well as several other queries of the Ramo file made in September or October 2006, among them:

A. Harris County, Texas Investigator Query

On October 4, 2006, at 9:32 a.m., an investigator with the Harris County, Texas District Attorneys’ Office (“Harris County Investigator”) made an inquiry through NCIC into the criminal history files relating to “Walter Noel Ramo.” (CBI Initial Report, Apr. 12, 2007, at 10, lines 35-39, excerpts provided at Exhibit 1.)⁷ Law enforcement agents subsequently determined that the Texas Investigator was affiliated with a private investigator (“Texas Private Investigator”) who was under contract or otherwise employed by the Colorado Republican Party with respect to this matter. (Email Correspondence to Texas Private Investigator, Exhibit 3.)

⁷ ___/ The names of several actors are redacted from quoted materials and withheld in this Motion. Additionally, Exhibits 1 – 4 and 7-8, which would identify these individuals, are being filed under seal, pursuant to Voorhis’s concurrently filed Motion to Seal Exhibits.

B. Denver District Attorney's Office Employee Queries

On October 12, 2006, at 3:46 p.m., an employee of the Denver District Attorneys' Office ("Denver DA Employee") accessed NCIC/CCIC and inquired into the criminal file for Ramo. (Ex. 1 at 11, lines 3-4.) This access reportedly was done at the request of a lawyer in that office. *Id.* at 11, lines 4-12.

VI. Ritter Campaign Complaints

The same day as the Denver DA Employee's access, October 12, 2006, counsel for the Bill Ritter for Governor Campaign ("Ritter Campaign Counsel") contacted the CBI telephonically and requested an investigation into an alleged misuse of NCIC/CCIC by the Bob Beauprez for Governor Campaign. (Letter from Ritter Campaign Counsel to Robert C. Cantwell, CBI Director, Oct. 13, 2006, at 1, Exhibit 4.) The time of that call is not recited in investigative reports; but the Denver DA Employee's access was toward the end of the workday, 3:46 p.m.

The next day, October 13, 2006, Ritter Campaign Counsel issued a letter to CBI, formally requesting an investigation be conducted into alleged misuse of NCIC/CCIC by the Beauprez for Governor Campaign. *Id.* In his/her letter, Ritter Campaign Counsel referenced unsuccessful efforts of two local media reporters who tried to verify the information contained in the television ad regarding Ramo through public information sources. *Id.* at 2.

Also on October 13, 2006, Ritter publicly called for a CBI investigation into an alleged misuse of NCIC/CCIC by the Beauprez Campaign.⁸ Shortly thereafter, CBI Director Robert Cantwell ("Cantwell") announced an investigation and promised to quickly conclude the

⁸ ___/ Although it was Walter Noel Ramo's NCIC/CCIC file that was allegedly misused or accessed without authorization, CBI Chief Investigator Simkins' April 25, 2007 report identifies "Bill Ritter, Gubernatorial Candidate for Colorado, Democratic Party," as the "Victim" of the alleged offense. (Ex. 1 at 1.)

investigation. (See Beth Porter, *CBI Speeds Campaign Probe*, THE DENVER POST, Oct. 15, 2006, available at http://www.denverpost.com/news/ci_4495082, Exhibit 5.)

VII. Voorhis's Conversations With ICE Regarding Queries

Following CBI's audit of the queries, on October 16, 2006, Cantwell contacted ICE Special Agent in Charge Jeffrey Copp and requested that Agent Copp contact Voorhis to determine the purpose of Voorhis's CCIC inquiry into the criminal history record for Walter Noel Ramo. Agent Copp directed Assistant Special Agent in Charge ("ASAC") Paul Maldonado to contact Voorhis. ASAC Maldonado summoned Voorhis to his office and asked Voorhis if he recognized the name Ramo. Voorhis stated that he did recognize that name and that he had received the name from a Source of Information as a suspected criminal foreign national. Voorhis advised ASAC Maldonado that he had queried the name Ramo in the CCIC system for law enforcement purposes. Voorhis also explained that he was aware that access of CCIC for Ramo's file was the subject of a CBI criminal investigation.

On October 19 and 20, 2006, Voorhis was publicly identified in the media as a suspect in the investigation of unauthorized access of the CCIC. A media report cited "a government source . . . briefed on the investigation. (See *Beauprez Calls Source "Courageous Whistleblower,"* KMGH CHANNEL 7, available at <http://www.thedenverpostchannel.com/politics/10120859/detail.html>, Exhibit 6.)

VIII. The CBI and FBI Investigation of Others Who Queried the Ramo File

On October 20, 2006, Ritter Campaign Counsel issued a second letter to CBI outlining concerns about television commercials linked to the Beauprez Campaign entitled "Didn't Stand Up," which first aired on television on September 29, 2006. (Letter from Ritter Campaign

Counsel to CBI, Oct. 20, 2006, Exhibit 7.) The letter explained that a Ritter Campaign Staff Member (“Ritter Staff Member”) made “inquiries” related to the Beauprez ads. *Id.* at 3.

On October 24, 2006, FBI and CBI investigators conducted an interview of Ritter. (FBI Report of Ritter Interview, Oct. 24, 2006, Exhibit 8.) The FBI and CBI investigators allowed the Ritter Staff Member to be present during this interview. *Id.* at 1.

During the interview, “Ritter reported [the Ritter Staff Member] from his office determined that the only way to tie Estrada-Medina and Ramo together is through the information available in the NCIC computer system.” (Ex. 1, at 19, lines 5-7.) Neither the FBI report nor the CBI report documenting this interview make mention of any follow up question indicating an effort to determine how the Ritter Staff Member arrived at this conclusion after the Ramo ad ran. Further, the interview of Ritter was conducted by agents of CBI and FBI eight days after CBI Chief Investigator Simkins reviewed the audit trail for the Ramo file. This audit trail reflected the query on October 12, 2006 by the Denver DA Employee. There is no indication in the FBI or CBI reports that the agents asked Ritter or the Ritter Staff Member whether he/she received specific information from an NCIC query of the Ramo file, despite the fact the Denver District Attorney’s Office conducted the identical query on the day the Ritter Campaign Counsel had contacted the CBI to demand an investigation. (*See generally*, Ex. 1 at 18-19; Ex. 8.)

Six months later, CBI agents “spoke to” the Denver DA Employee, to inquire about his/her use of NCIC/CCIC to query the Ramo file. CBI Chief Investigator Simkins’ report states:

When I spoke to [Denver DA Employee] on April 16, 2007,
[he/she] explained that when the advertisement aired regarding the

Denver District Attorney's Office plea bargains; [a long-time, senior Deputy District Attorney] requested [him/her] to run Walter Noel Ramo on CCIC/NCIC to review the record. [Denver DA Employee] reported it was confirmed by [the long-time, senior Deputy District Attorney] the criminal history record for Carlos Estrada-Medina was not available on the CCIC criminal history record, the NCIC system had to have been accessed in order to have this information. [Denver DA Employee] reported that this criminal history printed for [long-term, senior Deputy District Attorney] only for "informational purposes" for the current District Attorney.

(Ex. 1 at 11, lines 4-12.) At the time that the Denver DA Employee was asked to query the Ramo NCIC/CCIC file, the Denver District Attorney's Office was not otherwise investigating Ramo. Similarly, there is no indication in the investigative reports that a complaint had been filed with the District Attorney's Office that would have caused them to query Ramo's NCIC/CCIC file.

Further, there is nothing in the investigative report to indicate what "informational purposes" means. The only purpose reflected in the conversation with the Denver DA Employee is that he/she determined that Walter Noel Ramo could not be tied to Carlos Estrada-Medina without access to NCIC - - the same determination that the CBI was later informed the Ritter Campaign Staff Member made. The investigative reports do not reflect that any questions were asked or explanations offered as to why the Denver District Attorney's Office would be attempting to make this determination.

Exhibit 1, the report of CBI Chief Investigator Simkins, generated by the CBI on April 25, 2007, makes no mention of any attempt to contact and interview the long-time, senior Deputy District Attorney, the elected Denver District Attorney, the Ritter Staff Member, or Ritter

Campaign Counsel regarding the NCIC/CCIC query of the Ramo file by the Denver District Attorney's Office.

Additionally, the CBI Report only indicates "possible" interviews with the Texas Private Investigator and the Harris County Investigator were "pending" as of the date of the report. (Ex. 1 at 11, lines 2-3.)

A defense investigator, Anthony DiVirgilio, recently contacted the Texas Private Investigator who had been hired by the Colorado Republican Party to check the background of Ramo. The Texas Private Investigator informed DiVirgilio that in 2006, he asked his friend, the Harris County Investigator, to query the NCIC criminal history of Ramo for the Colorado Republican Party.

The Texas Private Investigator reported that approximately two months after learning of an investigation into access of the Ramo file, he was contacted and interviewed by a federal agent regarding this matter and had agreed to provide his file regarding this search to the Government. Despite having twice made arrangements with the federal agent, the agent never picked up the investigative file, and the Texas Private Investigator had not heard from the Government again as of the date of DiVirgilio's interview - - October 26, 2007.

DiVirgilio recently attempted to interview the Denver DA Employee who CBI identified as having queried the Ramo file on NCIC/CCIC on October 12, 2006 - - the same date that the Ritter campaign requested a CBI investigation into misuse of NCIC/CCIC. The Denver DA Employee declined to be interviewed at that time, stating he/she wished to speak first with the long-time, senior Deputy District Attorney, the District Attorney, or counsel for the District Attorney's Office. DiVirgilio asked counsel for the District Attorney's Office for permission to

interview the Denver DA Employee, the long-term, senior Deputy District Attorney, and the District Attorney about this matter. He was denied this request and told that anything these individuals did was official business, and it would be inappropriate for the defense to interview them.

DiVirgilio also attempted to interview the Ritter Staff Member and a subordinate to him/her. These attempts were met with direction from Counsel for Governor Ritter for the defense not to attempt to contact these individuals during business hours. Counsel for the Governor also stated that he/she had spoken with both individuals and neither of them wanted to speak with DiVirgilio at any other time.

LEGAL STANDARD

The Fifth Amendment's Due Process clause provides a federal defendant with a guarantee against discriminatory federal prosecution. *United States v. Haggerty*, 528 F. Supp. 1286, 1291 (D. Colo. 1981) (Kane, J.). A defendant asserting selective prosecution has the initial burden to establish *prima facie* that:

- 1) While others similarly situated have not generally been proceeded against because of the conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and
- 2) The government's discriminatory selection of him has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion or the desire to prevent his exercise of constitutional rights.

Id. at 1292. Once this *prima facie* showing is made, "the burden of going forward with proof of nondiscrimination shifts to the government." *Id.* (internal quotations and citations omitted).

A defendant is entitled to discovery on selective prosecution “if he presents ‘**some evidence**’ tending to show the essential elements of his selective prosecution claim.” *United States v. Folkers*, 2007 WL 677703, at * 4, Cr. Act. No. 04-20124-KHV (D. Kan. Feb. 28, 2007), quoting *United States v. James*, 257 F.3d 1173, 1178 (10th Cir. 2001) (Exhibit 9) (emphasis added). For discovery to be obtained, therefore, the defendant need not establish the *prima facie* case. *Id.* Similarly, an evidentiary hearing on selective prosecution should be allowed if the defendant makes a threshold showing of selective prosecution. *See Haggerty*, 528 F. Supp. at 1292.

ARGUMENT

I. The Government’s Prosecution Of Voorhis Is To Prevent And Punish The Exercise Of Voorhis’s Constitutional Rights

A. Voorhis Is Being Prosecuted For Exercising His Constitutional And Statutory Right To Petition A Member Of Congress

“[T]he government infringes upon protected activity whenever it punishes or threatens to punish protected speech.” *Bass v. Richards*, 308 F.3d 1081, 1088 (10th Cir. 2002). Speech about political elections “undoubtedly” involves a matter of public concern. *Id.* at 1089 (speech relating to the assessment of the viability of a potential candidate’s campaign and belief about merits of two candidates for public office is “**at the core of protected speech**”) (emphasis added). Similarly, speech that discloses “any evidence of corruption, impropriety, or other malfeasance on the part of [] officials . . . clearly concerns matters of public import.” *Dill v. City of Edmond*, 155 F.3d 1193, 1202 (10th Cir. 1998) (police detective’s statements regarding belief that exculpatory evidence was being withheld in murder investigation were protected speech) (internal quotations and citations omitted). As do private citizens, Government employees have

a First Amendment right to speak about political elections and other matters of public concern without being punished. *See, e.g., id.* at 1201 (“government employer cannot ‘condition public employment on basis that infringes the employee’s constitutionally protected interest in freedom of expression’”).

Government employees also have been guaranteed their First Amendment right to petition the government – including members of Congress. In fact, 5 U.S.C. § 7211 specifically provides: “The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, **may not be interfered with or denied.**” (emphasis added). Section 7211 “contains no limitation.” *Steck v. Connally*, 199 F. Supp. 104, 105 (D.D.C. 1961).

Additionally, Congress has enacted the Whistleblower Protection Act to protect government employees from adverse employment action resulting from “any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement . . . or a substantial and specific danger to public health or safety” or for exercising “any appeal, complaint, or grievance right granted by any law, rule, or regulation.” 5 U.S.C. §§ 2302(b)(8)(A) and (9)(A).

As detailed below, of the multiple parties who accessed the database, Voorhis alone has been singled out for prosecution. The Government’s investigation established that two other individuals accessed Ramo’s NCIC/CCIC file. The Harris County Investigator accessed the file for political purposes, and the Denver DA Employee’s access at least raises the inference that it was also requested for political purposes. The inferences that arise from this evidence are very

similar to the inferences that form the basis, at least in part, for some or all of the charges against Voorhis. Yet, the Government has declined to prosecute, and discontinued or declined to further investigate, these others. This supports the deduction that the United States is prosecuting Voorhis because he exercised his First Amendment rights, and derivative and related statutory rights. The fact that an individual exercising his First Amendment rights was charged, while others who have or may have committed the same act have not been charged or investigated, strongly suggests a discriminatory purpose. “[A]n enforcement procedure that focuses upon the vocal offender is inherently suspect, since it is vulnerable to the charge that those chosen for prosecution are being punished for their expression of ideas, a constitutionally protected right.” *United States v. Steele*, 461 F.2d 1148, 1152 (9th Cir. 1972).

Voorhis has been charged due to his exercise of his First Amendment rights to petition a U.S. Congressman and his right to speak about issues of public concern. Voorhis’s speech to Congressman Beauprez’s aide, Marshall, on these issues of public concern was protected under both the First Amendment and 5 U.S.C. § 7211; and he cannot be singled out for prosecution on the basis of such speech. *See Haggerty*, 528 F. Supp. at 1292 (prosecution cannot be based on a desire to prevent exercise of constitutional rights); *Steele*, 461 F.2d at 1151 (“Steele is entitled to an acquittal if his evidence proved that the authorities purposefully discriminated against those who chose to exercise their First Amendment rights”) Nor can he face adverse employment action based on his disclosure of the plea bargaining practice, which he reasonably believed to be a threat to public safety, a violation of law, and a waste of taxpayer funds. *See* 5 U.S.C. § 2302(b)(8) and (9).

The facts detailed above establish a *prima facie* showing that Voorhis was singled out for prosecution because he exercised his right to petition a member of Congress and because he spoke out during a political campaign about a law enforcement policy he believed violated the law, wasted taxpayers' money, and endangered the public. Such discriminatory intent cannot form a legitimate basis for prosecution; therefore, the Information against Voorhis must be dismissed.

II. Similarly Situated Individuals Have Not Been Prosecuted

A. Two Individuals Who Ran The Exact Same Query Within The Same Time Frame As Voorhis Have Not Been Prosecuted And Have Barely Been Investigated

From the CBI and FBI investigation, it appears that, in the same time frame, Voorhis, the Harris County Investigator and the Denver DA Employee engaged in *precisely* the same conduct by accessing the NCIC/CCIC database files relating to Ramo, yet only Voorhis has been charged. Indeed, it appears that the investigation failed to follow up at all on the Harris County Investigator's access of the databases. (Ex. 1 at 11, lines 2-3.) The only apparent difference between Voorhis's access of the databases and the Harris County Investigator's is that Voorhis, as an ICE officer charged with enforcement of this nation's immigration laws, had a legitimate law enforcement purpose in accessing the databases when presented with a list of individuals that were potentially unlawful foreign national criminals. With no apparent need to access the databases for a law enforcement purpose, the Harris County Investigator's access should be inherently more suspect than Voorhis's; however, Voorhis has been criminally charged and the Harris County Investigator apparently has not even been interviewed.

Similarly, while, six months after the query, CBI “spoke” to the Denver DA Employee regarding his/her access of NCIC/CCIC, there appears to have been no action taken to follow up on the explanation that the elected Denver District Attorney and a long-time, senior Deputy District Attorney requested the query on the same day that the Ritter Campaign Counsel called CBI. (Ex. 1 at 11, lines 3-12; Ex. 4.) In fact, neither of those individuals appear to have been interviewed. This despite the lack of any evidence of a complaint to the Denver District Attorney’s Office that would justify such a query, and CBI’s jurisdiction over offenses involving NCIC/CCIC as the agency responsible for the database.

During the FBI and CBI interview of Ritter, which the Ritter Staff Member was allowed to attend, the investigators were told that the Ritter Staff Member “determined that the only way to tie Estrada-Medina and Ramo together was through an NCIC check.” Even with this admission, the investigators failed to ask the obvious question of how the Ritter Staff Member came to this conclusion. (*See* Ex. 8 at 2, lines 31-32.)

The Denver District Attorneys’ Office and the Ritter Campaign made near simultaneous determinations that Walter Noel Ramo and Carlos Estrada-Medina could not be connected except by accessing NCIC. If this coincidence is in fact explained by the Ritter Campaign receiving information from Ritter’s former office as a result of the Denver DA Employee’s query, then this case should be dismissed. If the Government has engaged in the conduct that underlies the charges against Voorhis, then this prosecution is selective and offends Voorhis’s right to Equal Protection and Due Process. *See United States v. Robinson*, 311 F. Supp. 1063, 1064 (D. Mo. 1962) (prosecution of individual for illegal wire tapping dismissed when evidence showed the government engaged in the same illegal activity).

B. Others Who Have Engaged In Systemic NCIC Misuse Have Not Been Prosecuted

In addition to being singled out from the others who ran an identical NCIC/CCIC criminal history file query in the same time period, as to the same individual, Voorhis has also been singled out for prosecution from others accused of misusing NCIC. For example, in 2005, the CBI publicly disclosed that police officials with the University of Colorado were illegally and improperly accessing the NCIC database to determine whether prospective employees had prior criminal histories. (Chuck Plunker, *CBI: CU Can't Use National Database*, THE DENVER POST, Dec. 14, 2005, at 28A, Exhibit 10.) The University police explained that they believed they had a right to run the queries; but the CBI found that the University's searches were illegal. *Id.* CBI has not, however, prosecuted these violators, despite the fact that the University was apparently improperly using NCIC for several years.

The Government cannot prosecute Voorhis for actions that others have repeatedly engaged in without consequence. *See Robinson*, 311 F. Supp. at 1064-65 (government cannot prosecute individual when government itself is engaged in unlawful practice); *United States v. Crowthers*, 456 F.2d 1074 (4th Cir. 1972) (demonstrators could not be prosecuted for use of concourse when Pentagon allowed other events on same property).

Through this prosecution, Voorhis has been isolated and singled out, in stark contrast to the Harris County Investigator and the Denver DA Employee, who both appear to have run the same query in the same databases, as well as others accused of NCIC misuse. The prosecution of Voorhis is clearly discriminatory and, therefore, meets the first prong of the selective prosecution test. *See Haggerty*, 528 F. Supp. at 1291-92.

III. Voorhis Requests Discovery And An Evidentiary Hearing On This Motion

If a defendant presents “some evidence tending to show the essential elements of his selective prosecution claim,” he is entitled to discovery. *Folkers*, 2007 WL 677703, at * 4 (internal quotations and citations omitted). Additionally, an evidentiary hearing on selective prosecution should be allowed if the defendant makes a threshold showing of selective prosecution. *See Haggerty*, 528 F. Supp. at 1292. Voorhis has presented evidence that he has been singled out for prosecution, while others who are similarly situated have not been charged with a crime. Further, the evidence indicates that Voorhis has been singled out for prosecution because he exercised rights protected by the First Amendment, and derivative statutory rights. As such, Voorhis is entitled to discovery and an evidentiary hearing .

CONCLUSION

The Government’s prosecution of Voorhis is unlawfully discriminatory. Others similarly situated to Voorhis have not been prosecuted for accessing the NCIC/CCIC databases and the evidence indicates that Voorhis is being singled out because he exercised his First Amendment rights and related statutory rights. Voorhis has presented evidence of selective prosecution; therefore he is entitled to discovery and an evidentiary hearing on this Motion. Voorhis therefore respectfully requests that the Court GRANT his Motion to Dismiss for Selective Prosecution, Motion for Discovery, and Motion for an Evidentiary Hearing. More specifically, Voorhis requests that the Court set a hearing to rule on that portion of this Motion that requests discovery, and at that hearing, to set an evidentiary hearing on this Motion’s request to dismiss the Information.

Dated November 6, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2007, I have caused to be electronically filed the foregoing with the Clerk of Court using CM/ECF system which will send notification of such filing to the following via e-mail:

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