IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 07-cr-00462-JLK-1

UNITED STATES OF AMERICA,

Plaintiff,

vs.

1. CORY VOORHIS,

Defendant.

REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS BASED ON SELECTIVE PROSECUTION, MOTION FOR DISCOVERY AND MOTION FOR EVIDENTIARY HEARING

Defendant Cory Voorhis ("Voorhis"), through his attorneys, submits this Reply to the Government's Response to his Motion to Dismiss Based Upon Selective Prosecution, Motion for Discovery and Motion for Evidentiary Hearing. (Docket Entry # 6) ("Motion to Dismiss").

ARGUMENT

I. The Government Has Not Met Its Burden Of Establishing Nondiscrimination.

Voorhis's Motion to Dismiss, the exhibits attached thereto, and discovery recently provided by the Government establish Voorhis's *prima facie* case of selective prosecution by demonstrating the following:

- At least three individuals accessed Walter Noel Ramo's NCIC/CCIC criminal history record in September or October 2006.
- All three individuals accessed NCIC/CCIC within the context of the Colorado gubernatorial election.

- Voorhis and the Denver District Attorney's Office ("Denver DA's Office") have both asserted legitimate law enforcement purposes for accessing NCIC/CCIC.

- Voorhis provided an agent of Congressman Beauprez and the media with information about a plea bargaining practice that resulted in foreign nationals originally charged with aggravated felonies being convicted of lesser offenses, thereby impeding Immigration and Customs Enforcement's ("ICE") ability to deport them.

- When exercising its discretion to prosecute, the Government 1) knew that others were potentially similarly situated; and 2) failed to investigate or prosecute those others.

- Only Voorhis has been charged with unlawfully accessing NCIC/CCIC.

As Voorhis explained in his Motion to Dismiss, once this *prima facie* showing of selective prosecution has been put forth, "the burden of going forward with proof of nondiscrimination shifts to the government." *United States v. Haggerty*, 528 F. Supp. 1286, 1292 (D. Colo. 1981). *See* Mot. to Dismiss at 14 (quoting the same). As detailed below, the Government has failed to meet this burden.

II. Voorhis Is Being Singled Out From Others Who Engaged In Identical Or Substantially Similar Conduct.

The Government agrees that Voorhis, the Harris County Investigator and the Denver DA's Office all engaged in the same conduct by querying Walter Noel Ramo's NCIC/CCIC file. Resp. at 16. However, the Government claims that Voorhis may be singled out for prosecution because: (1) Voorhis resides in Colorado, Resp. at 17; (2) Voorhis is a federal employee, *id.*; and (3) the "nature and character" of Voorhis's actions are somehow different than those of the Denver DA's Office's, *id.* at 18. These attempts to distinguish Voorhis are disingenuous, support the conclusion that Voorhis is being singled out based on improper considerations and ought to be rejected. While the Government contends that it is entitled to a presumption that its

prosecutorial decision was "'motivated solely by proper considerations,'" Resp. at 11 (*quoting United States v. Deering*, 179 F.3d 592, 595 (8th Cir. 1999)), here, where the Government "is both employer and prosecutor . . . the usual presumption of good faith in instituting prosecutions [may be] entitled to less than its ordinary weight," *Haggerty*, 528 F.Supp. at 1292 n.4.

A. Jurisdiction And Venue To Prosecute The Harris County Individuals Exist In The District Of Colorado.

The Government concedes that the Harris County Investigator engaged in the same conduct as Voorhis and, therefore, "may have violated either federal law or the applicable Texas state statute, or both . . . ." Resp. at 16. Nonetheless, the Special Assistant United States Attorney ("Special AUSA"or "prosecutor") claims he "has absolutely no authority to prosecute an individual in the Southern District of Texas for conduct that occurred in that district." *Id*. at 17.

Whatever the prosecutor may mean when he says he has "no authority" to prosecute, it is clear that sufficient conduct occurred and evidence exists in the District of Colorado to establish both jurisdiction and venue in the District of Colorado for a prosecution of the Harris County Investigator for violating 18 U.S.C. § 1030 and the Texas Private Investigator for aiding and abetting the access under 18 U.S.C. § 2. The request for a background check on the name "Carlos Estrada Medina" originated via an email from John Marshall's Colorado email account, eventually reaching the Texas Private Investigator. *See* Exhibit 11, (Email Correspondence between Sept. 30, 2006 and Oct. 2, 2006) (excerpt also attached as Exhibit 3 to Mot. to Dismiss).[1] By accessing Walter Noel Ramo's CCIC file on October 4, 2006, at 9:32 a.m., *see*

[1] In distinction from the Exhibits to Voorhis's Motion to Dismiss, which were filed under seal, the Exhibits to this Reply are filed publicly because the persons involved have either made

Exhibit 1 to Mot. to Dismiss at 10; Exhibit 2 to Mot. to Dismiss, the Harris County Investigator accessed data physically located on servers in Lakewood, Colorado. Additionally, it appears that the Texas Private Investigator spoke with the Executive Director of the Colorado Republican Party, and was directed to (and likely did) submit his invoice to a Colorado address. Exhibit 11 at 3.

Why the Special AUSA believes that he does not have "authority" to bring cases against others similarly situated is mystifying. Did the Department of Justice prohibit him from prosecuting others? Did the United States Attorneys' Offices in the Districts of Wyoming or Colorado prohibit him from prosecuting others? Or does the Special AUSA's own view of this matter limit his charter to prosecuting Voorhis?

B. The Denver DA's Office Engaged In The Same Conduct As Voorhis.

The Denver DA's Office has provided various reasons for accessing the NCIC/CCIC database. *See* Attachment to Resp. (NCIC/CCIC file was accessed "to carry out the responsibilities of the Denver District Attorney, including providing information to the media, the campaigns, and the public that is neither confidential nor privileged"). *See also*, Exhibit 12, Interview of Chuck Lepley (Nov. 19, 2007) at 2 (citing reasons for the access: "is there anything in the California case that would allow Denver to file additional charges"; "what is the status of the Denver case"; "what were the policies and procedures").

The Government acknowledges and accepts these legitimate reasons for accessing the NCIC/CCIC file. Attachment to Resp.; Resp. at 18-19. Voorhis does not dispute the legitimacy

(cont'd.)..
public statements or have otherwise been identified publicly. In accordance with the Court's ECF Procedures and Fed.R.Crim.P. Rule 49.1, Voorhis has redacted certain personal identifying information from the Exhibits.

of the law enforcement purposes offered by the Denver DA's Office, such as answering the questions "who is this guy," "are they the same," "any other aliases," "is there anything in the California case that would allow Denver to file additional charges," "what is the status of the Denver case" and "what were the policies and procedures?" Exhibit 12 at 2. Likewise, undisputedly valid are Mr. Morrisey's stated purposes: If it was the same person it raised questions like "was this a violation of his probation," "does he owe more time on his case," or "are there additional charges that can be filed against him?" Exhibit 13, Interview of Mitchell R. Morrissey (Nov. 19, 2007) at 1-2. Further, Voorhis agrees that it was lawful for the Denver DA's Office to provide information regarding Walter Noel Ramo to the public, as unlawful foreign nationals do not enjoy Privacy Act protections. 5 U.S.C. § 552a (defining "individual" as "a citizen of the United States or an alien lawfully admitted for permanent residence").

The problem with these assertions, if credited, is only that these reasons mirror those for which Voorhis queried the database in question. They constitute a subset of the purposes Voorhis had in making the same query and other queries. Counsel for Voorhis made the prosecutor aware of Voorhis's purposes more than a year ago. If it was not a crime for the Denver DA's Office to access NCIC/CCIC for the stated purposes or to provide information regarding Walter Noel Ramo to the public and campaigns, then it was also not a crime for Voorhis to engage in the same activities.

An additional problem, however, is that the Government also assiduously avoided learning whether the information gleaned from the NCIC/CCIC query by the Denver DA's Office, or any subset of it, was passed on to the Ritter political campaign. It is that assertion - - that Voorhis passed on NCIC/CCIC information to the Beauprez campaign --that lies at the core

of the Government's case. Though Voorhis is charged with violating a computer access statute, the Governments Response leaves little doubt that it is the transmission of information that offends the prosecution the most. Yet, its timing, tactics and methods seem calculated to avoid learning whether that occurred between the Denver DA's Office and the Ritter campaign

For example, the self-avowed purpose of the Government's investigation after Voorhis filed his Motion to Dismiss was not to make an objective determination about what happened, but to establish, for purposes of litigating this motion and salvaging its prosecution of Voorhis, that the Denver DA's Office was not involved in any wrongdoing. As the FBI announced in early December: "The FBI and Colorado Bureau of Investigation agents met with DA staff Nov. 19 as part of the FBI's effort to refute Voorhis' claims, Denver FBI Special Agent Rene VonderHaar said Tuesday." Exhibit 14, P. S. Banda, *FBI Met With DA Employees for Database Probe*, The Associated Press, Dec. 5, 2007. Toward that end, the Government violated fundamental principles of investigation when it: (1) delayed its investigation of the conduct for fourteen months; (2) delayed its interviews of relevant persons for weeks after the Motion to Dismiss was filed; and (3) allowed fact witnesses to sit in on each others' interviews.

Further, unlike its scrutiny of Voorhis, the Government has not sought phone records, email messages, or even copies of documents referred to by witnesses during interviews in an attempt to verify what the witnesses were telling them.[2] Also in distinction to its scrutiny of Voorhis, the Government apparently failed to ask questions about political motives or purpose of the witnesses, and has accepted opaque language consistently offered by witnesses that "no

[2] If such documents were sought or received by the FBI or CBI, they have not been provided to Voorhis in discovery.

privileged or confidential information" was disclosed. In accepting this response, the Government systematically failed to ask obvious follow-up questions likely to answer the central question at issue: Did anyone at the Denver DA's Office disclose to the Ritter campaign or third parties its determination that the only way to connect Walter Noel Ramo and Estrada-Medina was through NCIC? The Government also failed to re-interview the named "Victim" in this case – Governor Ritter – to inquire about this critical issue.

Finally, Lynn Kimbrough, the Communications Director for the Denver DA's Office has offered diametrically opposed versions of her actions to government agents and to the public. Kimbrough told the FBI on or about November 19, 2007 that she "did not share with [Evan] Dryer, [Stephanie] Villafuerte or any other member of the Ritter Campaign that Ramo and Estrada are the same person and that fact was verified using NCIC." Exhibit 15, Interview of Lynn Kimbrough (Nov. 19, 2007) at 3. When Kimbrough went on the radio in Denver that same week, however, she said, "The information that was provided to the Ritter campaign, . . . probably the afternoon of the 12th, after I confirmed that those two defendants were the same person, would have been just that." Podcast of Nov. 27, 2007 Peter Boyles Show, available at http://www.khow.com/cc-common/podcast/single_podcast.html?podcast=fullshow_boyles.xml Notwithstanding Kimbrough's denial contained in its own agent's report, the prosecution has attached to its response Kimbrough's public statement that "[She] returned calls providing confirmation that [Ramo] and [Estrada-Medina] were in fact the same person and [she] provided additional detail about the facts of the Ramo case . . ..". *See* Attachment to Resp. Kimbrough made clear in her interview with the FBI that on October 10, 2006, one of the calls she received

related to Estrada was from Stephanie Villafuerte. Exhibit 15 at 3. Kimbrough did not call Villafuerte back and would have directed any response to Evan Dryer. *Id.*

C. Voorhis Has Been Singled Out From Similarly Situated Federal Employees.

The Government claims that Voorhis is being prosecuted because he is a federal employee. *See* Resp. at 23. But there is nothing special about Voorhis's status as a federal agent when that fact is divorced from the alleged political activity highlighted in the Government's Response. For example, in 2006, another ICE agent who allegedly misused NCIC/CCIC was not prosecuted by the federal government. Rather, she was charged in state county court with official misconduct. *See People v. McInish*, No. 07-M-01568 (Jefferson County, Colo.). Upon information and belief, that case involved the use of NCIC/CCIC to research a boyfriend's criminal history and the submission of counterfeit correspondence on agency letterhead in an effort to obscure or alter his criminal history. The Government's failure to treat Voorhis and McInish similarly demonstrates that the dominant issue driving this prosecution is the Government's disapproval of what it perceives to have been Voorhis's involvement in politics.[3]

III. The Government Has Singled Out Voorhis For Prosecution To Punish The Exercise Of His Constitutional Rights.

Nothing demonstrates the prosecution's impermissible motivation to punish Voorhis for his exercise of protected rights better than the Government's fixation on his entirely lawful interaction with Beauprez's agents, Trailhead, and a reporter. The prosecution dismisses out of hand all of the substantial evidence that establishes Voorhis's intended purpose in revealing to these people the grave problems posed to enforcement of federal immigration laws by the plea

[3] The Government was aware of McInish's case during its investigation. In recent discovery the Government provided a copy of the Summons served in that case. CBI Agent Simkins, the lead CBI Agent on this case, served the McInish Summons.

bargaining policy. The Government's Response instead confirms that Voorhis is being prosecuted because the Government believes Voorhis "bec[ame] involved in politics." *See* Gov't Resp. at 20-21 (*citing United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973)). Therefore, the Government asserts that it is proper to single Voorhis out for prosecution because he is "a federal law enforcement officer subject to the strictures of the Hatch Act . . . ." *Id*. at 21. This improper basis for prosecution appears to be based on the Government's misconstruing, misunderstanding, and misstating the law and ignoring critical facts.

A. The Hatch Act Does Not Prohibit Federal Employees From Becoming Involved In Politics.

The Hatch Act prohibits a federal employee from: (1) us[ing] his official authority or influence for the purpose of interfering with or affecting the result of an election; (2) knowingly solicit[ing], accept[ing], or receive[ing] a political contribution . . . (3) run[ning] for the nomination or as a candidate for election to a partisan political office; or (4) knowingly solicit[ing] or discourage[ing] the participation in any political activity of [certain persons]." 5 U.S.C. § 7232(a). Additionally, federal employees may not engage in "political activity" while on duty, in rooms and buildings "occupied in the discharge of official duties," wearing a uniform or insignia, or using a government vehicle. 5 U.S.C. § 7324(a).

The Hatch Act does not prohibit Government employees from "becom[ing] involved in politics" and the Supreme Court's decision in *Letter Carriers* does not support such a proposition. Rather, the Hatch Act expressly provides: "[federal] employees should be encouraged to exercise fully, freely, and without fear of penalty or reprisal, and to the extent not ***expressly*** prohibited by law, their right to participate . . . in the political processes of the Nation."

5 U.S.C. § 7321 (emphasis added). In *Letter Carriers*, a 1973 case decided prior to statutory changes that further narrowed the Hatch Act's reach, the Supreme Court noted that impartial execution of the laws rendered it essential for federal employees not to engage in specific activities that would violate the Hatch Act, such as: "tak[ing] formal positions in political parties . . . undertak[ing] to play substantial roles in partisan political campaigns, and . . . run[ning] for office on partisan political tickets." 413 U.S. at 564.

B. Voorhis Did Not Violate The Hatch Act.

None of the Hatch Act's prohibited activities are at issue here. Voorhis's interactions with the Beauprez Campaign, the Trailhead Group, and the press were not unlawful.

1. Government Property Was Not Misused.

The Government highlights Voorhis's use of a cell phone provided to him by his employer, Immigration and Customs Enforcement ("ICE"), Resp. at 5; his alleged provision of "computer generated papers" and "docket numbers of several state cases" to the Trailhead Group, *id*. at 6; and his use of an ICE computer, *id*. at 7-8. Even assuming the truth of the government's assertions for the sake of argument, none of these actions constitute unlawful behavior.

ICE policy allows "reasonable" personal cell phone use, and nothing in the Hatch Act or implementing regulations otherwise prohibits such use. Moreover, the U.S. Office of Special Counsel has made clear that the use of government messaging devices, specifically including cellular telephones, even while on duty or at a federal worksite, does not, by itself, make out a Hatch Act violation. Federal Hatch Act Advisory: U.S. Office of Special Counsel, *Use of*

Electronic Messaging Devices to Engage in Political Activity (May 30, 2002), available at http://www.osc.gov/documents/hatchact/federal/fha-29.htm (visited Dec. 27, 2007).

The Government does not put forward any evidence that the alleged "computer" papers were unlawfully obtained or provided, and case numbers are public information, not confidential Government property. Finally, as detailed below in Section III, Voorhis's ICE computer was used for a legitimate law enforcement purpose that was parallel, if not identical, to the purpose the Denver DA's Office claims (and the Government accepts) for its query of Walter Noel Ramo's NCIC/CCIC file.

2. No Meetings Occurred On Prohibited Premises.

The Government notes that Voorhis met with John Marshall "at a coffee shop located in the same building as the Defendant's [ICE] office." Resp. at 5. However, the Denver ICE office is located in a commercial building that includes non-governmental offices. Under these circumstances, Voorhis was permitted to engage in political activity in the building's public space. *See* 5 C.F.R. § 734.307, *Example 9* ("A Government agency or instrumentality leases ***all*** of the space in a commercial building; employees may not participate in political activity in the public areas of the leased building") (emphasis added). Additionally, these meetings were not clandestine in any respect as the facility is frequented by various members of the public, including other ICE agents and management personnel, on a regular basis.

3. Voorhis Was Not On Duty When He Met With The Congressman's Agent And The Trailhead Group.

The Government contends that Voorhis met with John Marshall and the Trailhead Group "during working hours." Resp. at 5, 6. However, as a criminal investigator, Voorhis regularly worked a flexible schedule that consisted of a regular eight and one half hour daily schedule,

including an uncompensated 30 minute lunch period, an additional period of regular but unscheduled overtime and availability time in addition to the eight and one half hour scheduled duty day. Furthermore, all ICE agents are entitled to additional breaks during the day and are free to attend to personal matters during such times. Voorhis attended these meetings on his own time.

4. Voorhis Did Not Use His "Official Authority Or Influence For The Purpose Of Interfering With Or Affecting The Result Of An Election."

The Government asserts that Voorhis has improperly used his "official authority or influence for the purpose of interfering with or affecting the result of an election." Resp. at 21 (*citing* 5 U.S.C. §§ 7323(a)(1), 7324(a)(1)). However, the Government offers no interpretive authority supporting its implicit claim that Voorhis violated this provision.[4] Further, neither the plain meaning of the statute nor the illustrative examples given in the regulations support such an assertion. In fact, it is clear from the illustrative examples given that this prohibition is directed towards federal officials attempting: 1) to influence voters to provide monetary support or to vote for a proposition or candidate, by using their title to bolster their endorsement; and 2) officials coercing their subordinates to provide financial support, or to attend events in support of, positions or candidates. *See* 5 C.F.R. § 734.302(b) (prohibited activities include: "(1) using his or her official title while participating in political activity; (2) using his or her authority to coerce any person to participate in political activity; and (3) soliciting, accepting, or receiving

[4] In fact, Voorhis, aware of Hatch Act restrictions, with the benefit of legal counsel prior to his meetings with Beauprez's agents, scrupulously avoided using his authority or position in the ways prohibited by the Hatch Act. He did not use his official position or authority to solicit contributions, votes, or support from other employees for any candidate or issue, and remained anonymous when speaking to the press about the plea bargaining issue.

uncompensated individual volunteer services from a subordinate for any political purpose"); *Special Counsel v. Acconcia*, 107 M.S.P.R. 60 (2007) (employees used official authority or influence for the purpose of affecting the result of an election in violation of Hatch Act by soliciting a campaign contribution from a subordinate employee); *Special Counsel v. Malone*, 84 M.S.P.R. 342 (1999) (employees used official authority or influence for the purpose of affecting the result of an election in violation of Hatch Act by soliciting agency heads to inform persons doing business with the agency of a political fundraiser, informing persons doing business with the agency of the fundraiser, soliciting agency heads to provide lists of contractors and vendors for fundraiser and providing campaign with such lists).

C. Voorhis Engaged In Protected Speech.

Ignoring the result of the Denver DA's Office's plea bargaining practices and the fact that these practices were directly relevant to Voorhis's law enforcement duties, the Government asserts that Voorhis accessed NCIC/CCIC "for non-law enforcement purposes," Resp. at 24, and that the plea bargaining practices could not be the subject of any protected disclosure, *id*. at 22-23. As discussed above, the Government's out-of-hand dismissal of Voorhis's legitimate reasons for accessing NCIC/CCIC and providing information to Congressman Beauprez's agent cannot be squared with the Government's acceptance of the Denver DA's Office's reasons for engaging in the same behavior.

Further, the Government provides no authority for its contention that "the plea bargaining practices of the [Denver DA's Office] simply did not constitute a violation of any law, rule, or regulation or qualify as gross mismanagement, a gross waste of funds, an abuse of authority, or present a 'substantial and specific' danger." Resp. at 23. As discussed in the Motion to Dismiss,

Voorhis's speech regarding this issue of public concern was protected. "[A]ny 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). *See* Resp. at 15-16.

Similarly, Voorhis's meeting with a Denver Post reporter involved protected speech regarding the plea bargaining practice – a matter of public concern that arose in the context of a political election. *See id*.; *Bass v. Richards*, 308 F.3d 1081, 1089 (10th Cir. 2002) (speech about political elections "undoubtedly" involves a matter of public concern). Voorhis met with the reporter to discuss the plea bargaining policy, he did not discuss individual cases and, aware of Hatch Act restrictions, specifically spoke on the condition of remaining anonymous. These statements were protected and within the ambit of the Whistleblower Protection Act.

Despite the Hatch Act, federal employees can be whistleblowers and have the express authority to provide information to Congress. *See* 5 U.S.C. § 7211; 5 C.F.R. § 734.203, *Example 2* (citing the same). Further, like the Denver DA's Office, Voorhis did not provide any "privileged or confidential" information regarding Walter Noel Ramo. He provided Beauprez's agent with public information that was intended to lead to additional, useful public information.

CONCLUSION

Because the Government's prosecution of Voorhis is unlawfully discriminatory and the evidence indicates that Voorhis is being singled out because he exercised his First Amendment rights, as well as related statutory rights, Voorhis respectfully requests that the Court GRANT his Motion to Dismiss Based Upon Selective Prosecution, Motion for Discovery, and Motion for an Evidentiary Hearing.

DATED: December 27, 2007

Respectfully submitted,

s/ Danielle R. Voorhees
William L. Taylor
Danielle R. Voorhees
HOLLAND & HART LLP
555 Seventeenth Street, Suite 3200
Post Office Box 8749
Denver, Colorado 80201-8749
Phone: (303) 295-8000
Fax: (303) 295-8261
wtaylor@hollandhart.com
dvoorhees@hollandhart.com

s/ Patrick L. Ridley
Patrick L. Ridley
Ridley, McGreevy & Weisz, P.C.
303 16th Street, Suite 200
Denver, CO 80202
Phone: (303) 629-9700
Fax: (303) 629-9702
ridley@rmwpc.com

ATTORNEYS FOR DEFENDANT CORY VOORHIS

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 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.

James Anderson, Assistant United States Attorney
United States Attorney's Office
P.O. Box 668
Cheyenne, WY 82003
james.anderson@usdoj.gov

s/ Danielle R. Voorhees
HOLLAND & HART LLP

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