

David Jacquot
Pro Se Defendant
Telephone: (208) 415-0777
Facsimile: (208) 263-6274
Email: dave@jacquotlaw.com

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,)	Case # 08CR1171-W
)	
Plaintiff)	Supplemental Brief
)	1) Motion for Reconsideration
v.)	Selective / Vindictive Prosecution
)	2) Motion for Change of Venue
DAVID C. JACQUOT,)	
)	Judge: Hon. Thomas J. Whelan
Defendant)	Courtroom: 7
)	Date: 1 June 2009
)	Time: 2:00 p.m.

1 Now comes the Defendant, David Jacquot (“Jacquot”) and provides supplemental information to
2 support his Motion for Selective/Vindictive Prosecution and to grant a change of venue.

3
4 **Section I**
5 **Procedural History**

6
7 Jacquot filed a Selective / Vindictive Prosecution Motion on 5 March 2009 (Document 66). In
8 this Motion, Jacquot alleges that elected and politically appointed individuals (“Political
9 Insiders”), to include Secretary of the Treasury Timothy Geithner, House Ways and Means
10 Chairman Charles Rangel, Justice Stephen Breyer, and former Senate Majority Leader Tom

1 Daschle receive favorable treatment over “ordinary citizens” regarding tax problems.
2 Specifically, that the Political Insiders were not being prosecuted even though similarly situated
3 with Jacquot. The Government filed its Response and Opposition on 23 March 2009 as
4 (Document 75).

5
6 After the Government filed its Response and Opposition, the Defendant issued subpoenas to
7 several of the Political Insiders. The Government filed an Emergency Motion to have the
8 Political Insiders excused from appearing. The Court granted the Government’s request without
9 hearing. At the Status Conference on 30 March 2009, the Court indicated that it quashed the
10 subpoenas because they were scheduled for a status conference and not a scheduled motion
11 hearing. The Court also stated that Jacquot could subpoena witnesses to the motion hearing it set
12 on the matter for 27 April 2009. Pleadings relating to the Government Motion to excuse
13 attendance and the Defendant’s response are Documents 76 and 81 & 82, respectively. At this
14 hearing on 30 March 2009, AUSA Faith Devine asserted that the Government was proper
15 counsel for the Political Insiders. Jacquot objected and stated that the testimony sought related
16 solely to their personal tax returns and not to their official duties. The Court appropriately
17 declined to rule on the issue.

18
19 Jacquot served new subpoenas on the Political Insiders for the motion hearing set for 27 April
20 2009. The Government, on behalf of the Political Insiders, filed a Motion to Quash the
21 Subpoenas on Monday, 13 April 2009 (Document 86). On Wednesday, 15 April 2009, the Court
22 on its own initiative set a hearing on the Government’s Motion for 20 April 2009 (Docket Entry
23 87). On Friday 17 April 2009, Jacquot received a fax from counsel for Tom Daschle containing
24 a Motion to Quash. No other Political Insider that was subpoenaed contacted Jacquot, nor did
25 they file an appearance or a Motion to Quash. Jacquot filed a Response to both the Government
26 and Mr. Daschle’s Motions to Quash on Friday 17 April 2009. (Documents 88 & 89).

27
28 At the hearing on 20 April 2009, the Court granted the Government’s Motion to Quash and
29 denied Jacquot’s request to disqualify government counsel for conflict of interest. (Docket Entry
30 91.) Hereinafter this ruling will be referred to as the “April 20 Order”. The hearing on the

1 Selective / Vindictive Motion was continued until 1 June 2009 to allow the Defendant to attempt
2 to obtain evidence via FOIA requests.

3
4 **Section II**
5 **Evidentiary Issues**
6

7 **Reconsideration of Motion to Quash.**
8

9 At the 20 April Hearing, the District Court found that the Armstrong decision requires that there
10 be a traditional protected class for a selective prosecution claim to be valid. See United States v.
11 Armstrong, 517 U.S.456, 464 (1996). The Court then reasoned that with no showing of a
12 traditional protected class, that the selective prosecution claim lacked merit, and therefore the
13 testimony of the subpoenaed witnesses was unnecessary. The Defendant respectfully asserts that
14 the Court was wrong in its ruling.

15
16 As described below in **Section III**, there is no requirement of a traditional protected class for
17 selective prosecution claims. Since the decision to grant the Government’s Motion to Quash was
18 premised on an erroneous interpretation of the law, the Defendant respectfully requests the Court
19 to reconsider its decision and grant the Defendant’s request that the Government’s Motion to
20 Quash be denied. Trial courts have “*inherent authority*” to decide motions for reconsideration
21 and rehearing in criminal proceedings. See, e.g., United States v. Barragan-Mendoza, 174 F.3d
22 1024, 1028 (9th Cir.1999). The grounds justifying reconsideration usually involve a change of
23 law, the availability of new evidence, or **the need to correct an error or prevent injustice**. In
24 this case, the Defendant requests reconsideration to correct an error and to prevent injustice. The
25 injustice is that the Government’s Motion to Quash interferes with the Defendant’s 6th
26 Amendment right to Compulsory Process.

27
28 The Supreme Court has held that all the Defendant must show in order to be entitled to
29 compulsory process is that the testimony sought is **material and favorable**. See U.S. v.
30 Valenzuela-Bernal, 458 22 U.S. 858 (1982). The evidence that the Defendant seeks to present is

1 material and favorable to his Selective Prosecution claim. The Political Insiders testimony will
2 provide **material and favorable** evidence that **individuals, though similarly situated, were not**
3 **prosecuted**. This evidence is required for the prong #1 of the two prong test for Selective
4 Prosecution found in Wayte v. United States, 470 U.S. 598 (1985).

5
6 Information Requests.

7
8 The Defendant has requested information from various government entities regarding evidence
9 about the Political Insiders tax problems and treatment. As of 15 May 2009, the Defendant has
10 received no response to his requests.

11
12 If responses are received before the hearing on 1 June 2009, the Defendant will provide them to
13 the Government and the Court. If such material is not received by the hearing date, the
14 Defendant makes the following alternative arguments to support his claim.

15
16 The Government has Conceded the Issue.

17
18 In AUSA Devine's response to the Selective Prosecution Motion she states that the Defendant's
19 averments regarding the Political Insiders are without merit, stating:

20
21 *"Defendant chooses to attack the prosecutor, the Secretary of the Treasury,*
22 *Congressman Rangel and others, with **baseless, self-serving hearsay and***
23 ***patently false allegations.**"*

24
25 *"Defendant has put forward nothing but "mere allegations." and hearsay*
26 *from news articles. Defendant's argument that he was treated differently from*
27 *select "political insiders" is **ridiculous on its face.**"*

28
29 *"Defendant offers nothing but **wild accusations and allegations that have***
30 ***nothing to do with reality.**"*

1 However, in her Motion to Quash, AUSA Devine’s story **changes drastically** and she states:

2
3 *“Defendant has selectively chosen high level government officials who have*
4 ***publicly admitted** that their tax returns were subject to scrutiny by the*
5 *Internal Revenue Service.”*

6
7 *“with respect to Timothy Geithner, it is **well known** that his tax situation was*
8 *discussed at length in his Senate confirmation hearings. Thus, Defendant can*
9 *simply introduce the relevant portions of these congressional hearings and*
10 *does not need to disrupt the official business of the U.S. Department of the*
11 *Treasury by requiring Secretary Geithner to appear at the motion hearing in*
12 *this case.”*

13
14 In response to the Selective Prosecution Motion, the Political Insider’s tax situation was:

- 15
16
 - *“baseless, self-serving hearsay and patently false”*
 - 17 • *“ridiculous on its face”*
 - 18 • *“wild accusations”*
 - 19 • *“hearsay from news articles”*
 - 20 • *“allegations that have nothing to do with reality”*

21
22 Now the information regarding the Political Insiders has been “**publically admitted,**” Mr.
23 Geithner’s tax situation is “**well known**” and can be “**simply introduced**” via the congressional
24 record.

25
26 The Defendant argues that AUSA Devine’s drastic change of opinion constitutes a concession on
27 the part of the government that statements regarding the Political Insider’s tax problems found in
28 the Defendant’s Motion are true. The Defendant requests the Court to find that the Government
29 has conceded that the statements regarding the Political Insider’s tax problems found in the
30 Defendant’s Motion are true

1 The Court Should Take Judicial Notice.

2
3 Even if the Court does not find that the Government has conceded that the statements regarding
4 the Political Insiders tax problems are true, the drastic switch in the Government’s position is
5 relevant to Judicial Notice. Federal Rule of Evidence 201(b) states:

6
7 *“A judicially noticed fact must be one not subject to reasonable dispute in that it*
8 *is either:*

9 *(1) **generally known** within the territorial jurisdiction of the trial court*

10 *or*

11 *(2) capable of accurate and ready determination by resort to sources whose*
12 *accuracy cannot reasonably be questioned.” [emphasis added]*

13
14 The Government has taken the position that the tax problems of the Political Insiders has been
15 “*publically admitted*” and is “*well known.*” and can be proven via the Congressional Record, a
16 writing “*whose accuracy cannot be reasonably questioned.*” AUSA Devine argues that the
17 **common knowledge** and **availability** of the information is a basis to quash the subpoenas in her
18 Motion to Quash. (**Document 86**). If this information is commonly known and available, then it
19 should be subject to Judicial Notice pursuant to FRE 201(b)(1).

20
21 Courts **may take judicial notice of newspaper articles** demonstrating that certain facts are
22 generally known. See, e.g., Washington Post v. Robinson, 935 F.2d 282, 291-292 (D.C. Cir.
23 1991)(holding that under Rule 201, facts were generally known as a result of news articles);
24 Ritter v. Hughes Aircraft Co., 58 F.3d 454, 458-459 (9th Cir. 1995) (district court did not abuse
25 its discretion by taking judicial notice of facts generally known and reported in newspaper
26 articles); Plevy v. Haggerty, 38 F. Supp. 2d 816, 820-821 (C.D. Cal. 1998) (taking judicial notice
27 of press releases and news articles where the contents of the press releases and news articles
28 were “*capable of accurate and ready determination*”). As is shown by the above cases,
29 newspaper articles can be Judicially Noticed under FRE 201 under either or both of the tests set
30 out in FRE 201 (i.e., (1) general knowledge, or 2) capable of accurate determination.)

1 Attached as **Exhibit 1** are search extracts from the search engine results pages (SERP) showing
2 the following number of web pages and videos related to the following terms:
3

Search Term	Search Engine	Web Pages	Videos
Nominee Tax Problems	Yahoo	9,200,000	5
“	Google	1,200,000	732
Geithner Tax Problems	Yahoo	3,410,000	8
“	Google	343,000	656
Rangel Tax Problems	Yahoo	1,020,000	0
“	Google	123,000	157
Daschle Tax Problems	Yahoo	1,940,000	9
“	Google	178,000	374

4
5 This clearly shows that these matters have been the subject of widespread news articles, videos
6 and internet publications and therefore should be considered to be “**generally known.**”
7

8 Attached as **Exhibit 2** are extracts from the Congressional Record regarding Mr. Geithner and
9 Mr. Rangel’s tax problems. Also attached at Exhibit 2 are documents from the Senate Finance
10 Committee that Mr. Geithner submitted to them for his confirmation hearing; a report related to
11 Mr. Daschle’s tax problems; and HR 735, The Rangel Rule Act of 2009. These documents show
12 that the information is “**generally known,**” and are from a source that is “**capable of accurate
13 and ready determination.**”
14

15 Video of Mr. Rangel and Mr. Geithner that was recorded by C-SPAN discussing their tax issues
16 in Congressional hearings can be found at:
17

18 Geithner: <http://www.youtube.com/watch?v=YWBVqoa-ORs>

19
20 Rangel: <http://www.c-spanarchives.org/congress/?q=node/77531&id=8887631>
21
22

1 Video of President Obama stating that he “screwed up” regarding the Daschle nomination and
2 his administration needs to send the message that “there aren’t two sets of rules—you know, one
3 for prominent people and one for ordinary folks who have to pay their taxes” can be found at:

4
5 <http://www.youtube.com/watch?v=QmY-opYOItQ>

6
7 Where information is incorporated by reference in pleadings, but is not physically attached, the
8 information may be considered by the court if it is central to the claim and no party questions its
9 authenticity. See Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006); In re Silicon Graphics Inc.
10 Securities Litigation, 183 F.3d 970, 986 (9th Cir. 1999) (“[the incorporation by reference
11 doctrine] permits a district court to consider documents ‘whose contents are alleged in a
12 complaint and whose authenticity no party questions, but which are not physically attached to
13 the [plaintiff’s] pleading,’” quoting Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)); In re
14 CNET Networks, Inc., 483 F.Supp. 2d 947, 953-954 (N.D. Cal. 2007) (“documents referenced in
15 [] complaint ... are the proper subjects of judicial notice”); In re Cornerstone Propane Partners,
16 L.P., 355 F. Supp. 2d 1069, 1076- 1077 (N.D. Cal. 2005).

17
18 These videos are evidence that the information is “**generally known**,” and is also a source that is
19 “**capable of accurate and ready determination**” because they contain the actual images and
20 audio of the individual to which the statements are attributed.

21
22 Attached hereto as **Exhibit 3** are news articles relating to the Political Insiders tax problems.

23 The articles come from reputable news sources such as:

- 24
- The Associated Press
 - The New York Times
 - The Wall Street Journal
 - The Washington Times
 - USA Today
 - CBS News
 - L.A. Times
 - MSNBC News
 - Washington Business Journal
 - The Boston Globe
 - US News and World Report
 - The Washington Post
 - ABC News
 - Fox News
 - CNN News
 - Seattle Times
 - National Public Radio
 - C-SPAN

1 The articles in Exhibit 3 are divided into three (3) categories:
2

3 Political Insiders in General. This category has articles about multiple Political Insiders
4 and then has two or three articles about select Political Insiders.
5

6 Select Political Insiders. This category has information about four Political Insiders that
7 the Defendant believes are representative of the class. These four are, Timothy Geithner,
8 Charles Rangel, Tom Daschle and Stephen Breyer. There are a dozen or so articles
9 relating to each of these Political Insiders.
10

11 Civil Case. The newspaper article that contains Commissioner Everson's quote and
12 information regarding the dismissal of the civil action.
13

14 These articles were printed from the internet, but the Defendant hereby incorporates by reference
15 the actual internet sites and the articles printed. These news articles are an indication that the
16 information is "**generally known,**" and are also a source of information that is "**capable of**
17 **accurate and ready determination.**"
18

19 Section III

20 Selective Prosecution.

21
22

23 At the 20 April hearing on the subpoenas, the Court stated that the Armstrong case holds that
24 Selective Prosecution requires a constitutionally protected class. See United States v.
25 Armstrong, 517 U.S. 456, 464 (1996). The Defendant respectfully argues that the Court is
26 wrong.
27

28 The Armstrong Court describes the standard for selective prosecution as:
29

30 *" the decision whether to prosecute may not be based on "an unjustifiable*

1 *standard such as race, religion, or **other arbitrary classification**,*" Oyler v. Boles,
2 368 U.S. 448, 456 (1962).

3
4 *"The claimant must demonstrate that the federal prosecutorial policy 'had a*
5 ***discriminatory effect and that it was motivated by a discriminatory purpose.**'"*

6 Wayte v. United States, 470 U.S. 598, (1985) accord, Oyler, supra, at 456.

7
8 The only place that the Armstrong Court mentions "protected classes" is in dicta relating to what
9 other Circuits have ruled regarding the standard for discovery:

10
11 *"The Court of Appeals also expressed concern about the "evidentiary obstacles*
12 *defendants face." 48 F. 3d, at 1514. But all of its sister Circuits that have*
13 *confronted the issue have required that defendants produce some evidence of*
14 *differential treatment of similarly situated members of other races or **protected***
15 ***classes.**"* [emphasis added]

16
17 The Armstrong Court does not impose a requirement for "protected classes" to prevail on a
18 selective prosecution claim. The language of the Armstrong Court clearly shows that the two
19 prong test described in Wayte governs selective prosecution claims. Wayte v. U.S., 470 U. S.
20 598 (1985). The Wayte decision lays out a two prong test as described in the Defendant's
21 Motion. In short the test requires a showing of:

- 22
23 1) Prong #1 - Discriminatory Effect. Specifically that others similarly
24 situated generally have not been prosecuted for similar conduct, and
25
26 2) Prong #2 - Discriminatory Purpose. Specifically the decision to prosecute
27 was deliberately based upon an unjustifiable standard such as race,
28 religion, or other arbitrary classification including the exercise of
29 protected statutory and constitutional rights.

1 The Ninth Circuit has described this test as:

2
3 (1) other similarly situated individuals have not been prosecuted and

4
5 (2) the prosecution was based on an impermissible motive

6
7 United States v. Culliton, 328 F.3d 1074, 1081 (9th Cir.2003) (per
8 curium).

9
10 Other cases have held that no traditional protected class (such as race or religion) is required to
11 meet the first prong of the Wayte test that similarly situated individuals are not prosecuted.

12
13 In United States v. Hoover, 727 F.2d 387, 389 (5th Cir.1984), the court found the
14 first prong of the selective prosecution test satisfied because only three from
15 among over 300 persons failing to report for work as air traffic controllers were
16 ultimately prosecuted.

17
18 In United States v. Hazel, 696 F.2d 473 (6th Cir.1983), two members of a
19 Michigan tax revolt group who failed to file tax withholding certificates in 1979
20 and 1980 were prosecuted for tax violations, while 34 others who engaged in the
21 same "protest" were not. The Court held that the Defendants met the first prong
22 of the selective prosecution test that others similarly situated were not being
23 prosecuted.

24
25 These cases show that the similarly situated group does not need to be a traditional
26 constitutionally protected class such as race or religion.

27
28 Additionally, the Armstrong decision describes how Selective Prosecution law is derived from
29 ordinary equal protection analysis:

1 “The requirements for a selective prosecution claim draw on “ordinary equal
2 protection standards.” Armstrong at 608 citing Wayte v. United States, 470
3 U.S. 598, 607 (1985).

4
5 “imposed by the equal protection component of the Due Process Clause of
6 the Fifth Amendment.” Armstrong at 607 citing Bolling v. Sharpe, 347 U.S.
7 497, 500 (1954.).

8
9 See also Cornwell v. Bradshaw, No. 06-4322 (6th Cir. 3/11/2009) (6th Cir.,
10 2009)“It is appropriate to judge selective prosecution claims according to
11 ordinary equal protection standards.” citing Wayte v. United States, 470 U.S.
12 598, 608 (1985).

13
14 Equal Protection analysis “prohibits selective enforcement based upon an unjustifiable standard
15 such as race, religion, or other arbitrary classification” United States v. Batchelder, 442 U.S.
16 114, 125 n. 9 (1979). No traditionally protected class is required, in fact, the Supreme Court has
17 held that equal protection allows there to be a “**class of one**”:

18
19 In Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000), the United
20 States Supreme Court held that a plaintiff need not be a member of a
21 traditionally “protected class” in order to allege an equal protection violation.
22 Instead, a “class of one” may maintain an equal protection claim, as long as
23 the plaintiff alleges that he or she was **treated differently than similarly**
24 **situated persons**. The Court stated:

25
26 “Our cases have recognized successful equal protection claims brought by a
27 “class of one,” where the plaintiff alleges that she has been intentionally
28 treated differently from others similarly situated and that there is no rational
29 basis for the difference in treatment. See Sioux City Bridge Co. v. Dakota
30 County, 260 U. S. 441 (1923); Allegheny Pittsburgh Coal Co. v. Commission

1 *of Webster Cty., 488 U. S. 336 (1989). In so doing, we have explained that*
2 *'[t]he purpose of the equal protection clause of the Fourteenth Amendment is*
3 *to secure every person within the State's jurisdiction against intentional and*
4 *arbitrary discrimination, whether occasioned by express terms of a statute or*
5 *by its improper execution through duly constituted agents.'" Sioux City Bridge*
6 *Co., supra, at 445 (quoting Sunday Lake Iron Co. v. Township of Wakefield,*
7 *247 U. S. 350, 352 (1918))."*

8
9 *"Whether the complaint alleges a class of one or of five is of no consequence*
10 *because we conclude that the number of individuals in a class is immaterial*
11 *for equal protection analysis"*

12
13 The appropriate standard to be used for determination of the merits of the Defendant's claim is as
14 stated in his Selective Prosecution Motion, namely that:

15
16 *"others similarly situated generally have not been prosecuted for conduct*
17 *similar to petitioner's."*

18
19 As described in the next section, the Defendant has shown that others similarly situated have not
20 been prosecuted. These individuals are the Political Insiders.

21
22 Lastly, even if there is a requirement that a "protected class" exist, the Court erred in determining
23 that "ordinary citizens" are not a protected class. The Defendant contends that not only are
24 "ordinary citizens" a protected class, that they may indeed be the **most protected class**. The
25 founding documents of this Country such as the Declaration of Independence, the Constitution,
26 the Bill of Rights, and thousands of statutes and Court decisions declare ordinary citizens to be
27 protected. These documents declare that **all citizens are created equal**, and **all citizens are**
28 **entitled to equal treatment under the law**. A citizen does not need to be a minority in order to
29 be protected. Ordinary citizens are a protected class.

1 **Prong 1 – Discriminatory Effect.**

2
3 As described above, in order for there to be discriminatory effect, Jacquot must show that:

4
5 *“others similarly situated generally have not been prosecuted for conduct similar*
6 *to petitioner’s.”* Wayte.

7
8 In most selective prosecution cases (such as race cases), there are a small group of individuals
9 that are being prosecuted, while a larger group is not. In this case, there are a large group of
10 individuals (“Ordinary Citizens”) that are being prosecuted, while a smaller group (“Political
11 Insiders”) is not. For the purposes of Equal Protection analysis (which is the basis for Selective
12 Prosecution analysis), this distinction is irrelevant. In both situations, the law is being
13 unconstitutionally selectively applied. As described above, such action by the Government is
14 unconstitutional even in a “*class of one.*” Village of Willowbrook at 564.

15
16 The Government argues that the Defendant is required to prove why the Political Insiders were
17 not prosecuted. The Government is wrong. They provide no authority for this argument and the
18 Defendant likewise has found no cases supporting the Government’s argument. The Defendant
19 only has to meet the elements of the Wayte and Culliton test. Thus in regards to Prong #1 of the
20 test, Jacquot is only required to show that:

21
22 **There are others similarly situated that were not prosecuted.**

23
24 Jacquot meets this burden.

25
26 There are many similarities between Jacquot and the Political Insiders. For the purpose of
27 analysis of the similarities, the Defendant has selected four (4) Political Insiders. These four
28 were selected based on the fact that they cover all branches of the government, cover a long
29 period of time, and the information relating to their tax matters is more readily available. These
30 four are:

	Name	Tax Years with Problems
Executive Branch	Timothy Geithner	2001 to 2004
Legislative Branch	Charles Rangel	1987 to 2008
Judicial Branch	Stephen Breyer	1980 to 1992
Failed Nominee	Tom Daschle	2005 to 2008

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The similarities all show that there are reasons “*as strong or stronger*” to prosecute the Political Insider as compared to Jacquot. See McDonald v. Village of Winnetka, 371 F.3d 992, 1003 (7th Cir., 2004). These similarities are summarized in the table below:

Issue	Political Insiders	Jacquot
Citizens	Yes	Yes
No Prior Criminal Record	No Record	No Record
Alleged Errors on Tax Returns	Yes	Yes
Alleged Errors Cover More than 1 Year	Geithner: 4 years Rangel: 20 years Breyer: 13 years Daschle: 3 years	2 Years
Alleged Unreported Income	Geithner: Yes Rangel: Yes Daschle: Yes Breyer: No	Yes
Alleged Tax Loss	Geithner: \$43,000 Rangel: \$26,000 Daschle: \$128,000 Breyer: \$4,120	The Government alleges tax loss of approximately \$89,000 in two years, however their four-year investigation shows that income was over declared.
Educated	Geithner: Masters Degree Rangel: Law Degree Daschle: Law Degree Breyer: Law Degree	Law Degrees

Tax Expertise	<p>Geithner: Worked at the Treasury for many years, now supervises the IRS.</p> <p>Rangel: Chairman of the Committee that writes virtually all the tax legislation for over 3 decades.</p> <p>Breyer: Considered one the most significant tax scholars at the Supreme Court on tax issues.</p>	Tax attorney
Public Service	Public servants.	Retired Army Officer

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The major difference between Jacquot and the Political Insiders is:

Issue	Political Insiders	Jacquot
Elected or Appointed Government Official	YES	NO.

The treatment regarding alleged tax errors differs greatly between the Political Insiders and Jacquot:

Issue	Political Insiders	Jacquot
Audited	Many of the Political Insiders were audited and/or reviewed during the vetting process.	NO Audit. The government never contacted anyone at the law firm for any explanation.
Given Opportunity to Correct	All the Political Insiders were given an opportunity to correct their mistakes.	NO opportunity to correct errors
No Penalties or Interest	Some did not pay penalties or interest	NO opportunity to correct, so not applicable.
Deterrent Effect of the Prosecution	The potential deterrent effect of prosecution of the Political Insiders is huge – DOJ policy is to seek such cases (See Selective Prosecution Motion for details of the Government not following its own policy)	Virtually none, especially since the prosecution, contrary to DOJ policy was initiated out of the District where Jacquot lives and works. (See Change of Venue Motion for details regarding violation of DOJ Policy.)
PROSECUTED	No	YES

1 The favoritism provided the Political Insiders **regarding tax problems** is real and has been
2 recognized by the Congress and the President. HR 735, the Rangel Rule Act of 2009 was
3 introduced to level the playing field between Ordinary Citizens and the treatment that Political
4 Insiders receive on their tax returns. President Obama has stated that it is important that his
5 administration does not favor politically prominent over ordinary citizens in tax treatment. This
6 is clear evidence that a class of citizens, i.e. the Political Insiders, receive favorable tax treatment
7 for no reason other than being politically prominent.

8
9 Congressman Charles Rangel has stated that he believes that Political Insiders should be held to
10 a higher standard than Ordinary Citizens. See the C-SPAN video described on page 7 above,
11 where he states:

12
13 *“As a Member of Congress, as a public servant, I should have a higher standard*
14 *than most people.”*

15
16 Although the Defendant believes this is an admirable position taken by Congressman Rangel, the
17 Defendant does not advocate that the Political Insiders be held to a higher standard. Rather the
18 Defendant only argues that Ordinary Citizens get treated as well as the Political Elite. Based on
19 this statement by Congressman Rangel, it is clear that he believes, as does President Obama, that
20 the Political Elite should not receive favorable treatment.

21
22 Favoritism towards Political Insiders **regarding their tax problems** has been shown by the
23 Department of Justice in this very case. AUSA Devine and other Justice Department attorneys
24 provided personal representation to the Political Insiders regarding their personal tax matters by
25 intervening and illegally interfering with the Defendant’s subpoenas. The Justice Department
26 does not provide representation to “Ordinary Citizens” that get subpoenaed to testify, and in fact,
27 such representation violated both federal regulations and attorney ethics rules. The only reason
28 that this illegal representation occurred is because the subpoena recipients are politically
29 connected.

1
2 The Defendant has clearly shown that there is **a group of similarly situated individuals that**
3 **were not prosecuted.** This group is the Political Insiders. The problem of Political Insiders
4 receiving favorable treatment regarding their tax problems has been recognized by Congressional
5 legislation and by President Obama. Jacquot has shown that he meets Prong #1 of the Wayte
6 test.

7
8 **Prong 2 – Discriminatory Purpose.**

9
10 In order for there to be discriminatory purpose, Jacquot must show that the decision to prosecute
11 was “*deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary*
12 *classification including the exercise of protected statutory and constitutional rights.*” Wayte at
13 608. Citing Bordenkircher v. Hayes, 442 U. S. 434,364; Oyler v. Boles, 368 U. S. 448, 456
14 (1962); and United States v. Goodwin, 457 U. S. 368,372. Jacquot contends that the decision to
15 prosecute was for a discriminatory purpose for two reasons: 1) arbitrary classification, and 2)
16 retaliation for exercise of constitutional and statutory rights. A showing of **either** one of these
17 reasons is sufficient to pass Prong #2 of the Wayte test.

18
19 **Arbitrary Classification.**

20
21 Mr. Jacquot is being arbitrarily classified by the government. Contrary to the very fundamentals
22 of our nation, the government has created two classes relating to tax problems, 1) the ruling elite
23 and 2) ordinary citizens. Although this type of discrimination may not be as obvious as racial
24 profiling, it is far more dangerous and damaging. This insidious form of discrimination
25 undermines the foundations of our Constitution and the reasons that this country was formed.
26 Nowhere in the Constitution can you find support for preferential treatment of a ruling elite class
27 of citizens. In fact, the Constitution and other the founding documents are packed with
28 provisions that declare just the opposite, that **all citizens are created equal and all are entitled**
29 **to equal treatment under the law.**

1
2 This arbitrary classification is sanctioned by the Justice Department. For example, the Justice
3 Department ignores its own published guidelines regarding selection of cases with high deterrent
4 value. Moreover, there is concrete evidence in this very case that the Justice Department gives
5 preferential treatment to Political Insiders, even when such treatment is in violation of law and
6 attorney ethics rules. The Justice Department’s behavior regarding the subpoenas issued to the
7 Political Insiders in this case is proof that there is an arbitrary classification being made. If the
8 Defendant had subpoenaed an “*Ordinary Citizen*” rather than the “*Political Insiders*” there is no
9 chance that the Justice Department would have filed the Motion to Quash. It is clear from the
10 content of the Government’s Motion that the Government was contacted by subpoena recipients.
11 With the exception of Tom Dashle, the Political Insiders did not contact the Defendant, make an
12 appearance, or file their own motion to quash. Why wouldn’t they? Because they were getting
13 illegal and unethical pro bono services from the Department of Justice. It is only because of
14 these individuals status as “Political Insiders,” that the Government intervened on their behalf.
15 Again, no such intervention would occur for “Ordinary Citizens.” The Government’s actions are
16 **proof** that there is a serious problem at the Department of Justice regarding preferential
17 treatment of the Political Insiders. Favorable treatment of the Political Elite over Ordinary
18 Citizens is the **most serious and destructive type of discrimination possible** and the
19 Government’s actions regarding these subpoenas further proves that such arbitrary
20 discrimination exists and is sanctioned by the Department of Justice.

21
22 Contrary to the Justice Department’s position, there is nothing “*ridiculous*” about the ruling elite
23 being treated favorably over ordinary citizens. It is counter to the very fundamentals of our
24 Constitution and freedoms, and the Department of Justice stating that it is “*ridiculous*” is
25 offensive. Obviously, members of Congress that drafted and support HR 735, “The Rangel Rule
26 Act of 2009” don’t think that favoritism of Political Insiders is appropriate. President Obama did
27 not think that the politically prominent should receive favorable treatment when he stated that it
28 was import that his administration send a message that “*there aren’t two sets of rules—you know,*
29 *one for prominent people and one for ordinary folks who have to pay their taxes.*” The Justice
30 Department’s claim that the problem being addressed by the pending legislation and the

1 statement of the President is “*ridiculous on its face*” is further evidence that a severe problem
2 exists in the Department of Justice’s attitude toward favorable treatment of the politically
3 prominent. This Court should not dismiss this claim as “*ridiculous on its face*” as the Justice
4 Department would like. The Defendant’s Motion describes the applicable law and tests. This
5 Court should apply that law and tests and determine, as have members of Congress and President
6 Obama, that the political elite get unconstitutionally favorable treatment over ordinary citizens.
7 The Court should send a message to the Department of Justice that favorable treatment of
8 Political Insiders is not “*wild accusations and allegations that have **nothing to do with reality.***”
9 The **reality** is that this problem is real and needs to be addressed. This Court should send a
10 strong message to the Department of Justice that such a double standard violates Due Process
11 and will not be tolerated by the Courts. This Court should find that the two classes are Political
12 Insiders and the Ordinary Citizens (which includes Mr. Jacquot), and further find that such
13 classification is arbitrary and contrary to the rule of law in this country. The Court should apply
14 the tests in applicable law to the facts as set forth in the Defendant’s Motion, grant the Selective
15 Prosecution Motion, and dismiss this case with prejudice.

16
17 Political affiliation has been held to be an arbitrary classification for selective prosecution
18 purposes. See U.S. v. Hastings, 126 F.3d 310 (C.A.4 (N.C.), 1997); See United States v.
19 Marcum, 16 F.3d 599, 602 (4th Cir.1994); United States v. Berrios, 501 F.2d 1207, 1211 (2d
20 Cir.1974).

21
22 The arbitrary classification as described above to prove Prong #2 (Discriminatory Purpose) is
23 essentially the same criteria used for Prong #1 (Discriminatory Effect, i.e., “similarly situated
24 individuals are not prosecuted”). This similarity is irrelevant. “*A discriminatory effect which is*
25 *severe enough can provide sufficient evidence of discriminatory purpose.*” See United States v.
26 Tuitt, 68 F.Supp.2d 4, 10 (D.Mass.1999). See also U.S. v. Green, 108 F.Supp.2d 1169 (D. Kan.,
27 2000)(“*We also acknowledge that one may argue that “a credible showing of different treatment*
28 *of similarly situated persons” constitutes proof of both discriminatory effect and intent*”, citing
29 U.S. v. Tuitt, 68 F.Supp.2d 4, 15 (D.Mass.1999)). The invidious discrimination in favor of the
30 Political Insiders is so severe that it has been addressed in pending Congressional Legislation and

1 condemned by President Obama in his first thirty days in office. Since the problem is recognized
2 as widespread and is so damaging to the rights of Ordinary Citizens it should be considered a
3 sufficient basis for both discriminatory effect and discriminatory purpose.
4

5 Exercise of Constitutional and Statutory Rights.
6

7 Much of the applicable case history has already been presented to the Court. To present the full
8 picture of vindictive behavior, it is necessary to cover this case history. The Defendant
9 apologizes to the Court for the any duplication that has occurred, but feels it was more
10 appropriate to describe the allegations rather than make numerous cross references to other filed
11 documents. The prosecution against Jacquot was also initiated for the discriminatory purpose of
12 retaliation against him for his zealous representation of his clients, and as a result of the
13 embarrassing defeat the government (including prosecutor AUSA Faith Devine) suffered in the
14 prior TRO and civil action against Jacquot.
15

16 The standard to establish discriminatory purpose in retaliation for the exercise of constitutional
17 rights is an **objective standard**. There is no requirement to produce any evidence of bad faith to
18 establish the element of discriminatory purpose. Blackledge v. Perry 417 U.S. 21 (1974). The
19 reason that the Supreme Court held that **no** proof of bad faith is required is that “*fear of*
20 *vindictiveness may unconstitutionally deter the exercise*” of these constitutional, statutory or
21 procedural rights. *Id.* To prevent such a chilling effect, **there must only be a showing that the**
22 **prosecution was initiated in response to the exercise of constitutional, statutory or**
23 **procedural rights**. Jacquot’s exercise of his 1st and 5th Amendment rights, combined with the
24 zealous exercise of constitutional, statutory and procedural rights and legal defense of his clients’
25 interests are the reason that the government initiated this prosecution, and such vindictive
26 behavior meets this objective standard.
27

28 In this case, the prosecution was in response to Jacquot’s exercise of constitutional, statutory and
29 procedural rights on his own behalf and on behalf of his clients. The most telling piece of
30 evidence is how the prosecution was initiated.

1 Vindictive Initiation of Prosecution

2
3 This case does not result from a legitimate exercise of prosecutorial discretion, but from a bad-
4 faith desire to punish the one person the government most blames for its humiliating defeat in the
5 xelan case and to chill and deter zealous representation by making an example of Jacquot.

6
7 (1) The Defendant and his law firm represented the xelan family of companies from
8 2000 to 2004. During this time, extensive and contentious litigation occurred. (See
9 Documents 28, 29 and 32 for more details about the xelan litigation).

10
11 (2) During the summer of 2004, Mr. Jacquot was interviewed by two IRS criminal
12 investigators at his home in Idaho. The agents asked many questions about his
13 representation of xelan, but **asked no questions regarding Mr. Jacquot's taxes or**
14 **the law firm tax returns, even though the returns related to the indictment had**
15 **been filed years earlier.**

16
17 (3) In late 2004, in retaliation for the exercise of the Defendant's constitution rights and
18 his defense of the constitutional rights of the xelan Family of Companies, AUSA
19 Devine and other government officials instituted a meritless lawsuit that **seized all of**
20 **the Defendant's assets** and destroyed his reputation and law practice. This case was
21 filed in the Southern District of California, designated Case No. 04CV2184-W.
22 AUSA Devine submitted false declarations to the Court in this matter. This
23 vindictive action **falsely alleged** the following criminal charges against the
24 Defendant:

- 25
26 • Mail Fraud
27 • Wire Fraud
28 • Money Laundering
29 • Conspiracy to Defraud the United States
30 • Unlawful Welfare Fund Payments

1
2 The **motivations** for bringing this meritless lawsuit are clear from the pleadings and
3 declarations. The Government was frustrated with the Defendant’s lawful exercise of
4 constitutional, statutory, and procedural rights. Some of the false allegations the
5 Government made include:
6

7 *“In 2001, when the IRS began looking into ... Jacquot...took affirmative*
8 *steps to prevent the IRS from obtaining complete and accurate*
9 *information. Specifically...*

10
11 *Filed obstructionist lawsuits and pursued frivolous claims...*

12
13 *“...interfering with the lawful function of the IRS...”*

14
15 (TRO Pleadings P.20)

16
17 *“by attempting to prevent...law enforcement officials from learning all the*
18 *underlying facts...”*

19
20 *“to commit perjury in connection with IRS summons enforcement actions”*

21
22 (France Declaration P.31)

23
24 *“The evidence ... demonstrates how xelan controls the flow of information*
25 *to the IRS and engages in delaying and obstructionist tactics, all designed*
26 *to prevent the IRS from learning all the information that would enable it to*
27 *detect and document xelan’s ongoing schemes to defraud the doctors and*
28 *the IRS, and impede the lawful functions of the IRS.”*

29 (France Declaration P.67)

- 1 • “The government produced **no evidence** that any agency, court or other
- 2 authority has definitively ruled that any xelan program in fact runs afoul of
- 3 the Internal Revenue Code.”
- 4 • the government’s allegations of a “ponzi scheme” are “**without merit,**”
- 5 • “**no evidence**” that the defendant’s are dissipating their assets,
- 6 • “**no evidence**” that assets are traceable to criminal activity,
- 7 • “**the government conceded**” that it can produce “**no evidence**” that the
- 8 xelan program violated internal revenue statutes or regulations,
- 9 • the government’s evidence that the xelan programs were not legitimate
- 10 was “**speculative,**” and
- 11 • the government did **not** show that “**the tax implications of any**
- 12 **particular xelan product were mischaracterized.**”

13
14 Judge Burns also found that the TRO improperly “*profoundly intruded on the*

15 *personal and professional interests of the individual defendants.*”

- 16
17 (5) The Court also ordered the Government to pay hundreds of thousands of dollars in
- 18 attorney fees to the defendants in the case and the government voluntarily dismissed
- 19 their case. (The Exhibit to Document 47 contains Judge Burn’s final order). AUSA
- 20 Devine **falsely informed this Court** that the case was settled two years later:

21
22 “...the case was settled in October 2005. Contrary to Defendant’s

23 *allegations, a settlement is not a ‘humiliating defeat.’*”

24
25 The **truth** is that the case was voluntarily dismissed by the Government **only several**

26 **weeks** later. A copy of the Government’s Dismissal is attached as **Exhibit 4**. It is

27 dated 17 December 2004, which is approximately two weeks after the hearing and

28 approximately 3 days after Judge Burns’ written ruling. AUSA Devine’s statement

29 that the case was settled in 2005 is **knowingly false**.

1 It is important to note that **nowhere in the Complaint or in the Ex Parte TRO /**
2 **Receivership application or the supporting Declarations is there a single**
3 **mention of any problem or issues with individual tax returns for Jacquot,**
4 **Jacquot’s law firm or any other person. No criminal charges related to the**
5 **allegations in the TRO/ civil case were ever brought against anyone.**
6

7 (6) Shortly after the government dismissed its case, and even though the government’s
8 claims were unsupported by the false declarations that AUSA Faith Devine presented
9 to the Court, Ms. Devine indicated to Jacquot’s attorney Jim Frush that she was
10 going to continue to pursue criminal charges on the same allegations that Judge
11 Burns had just dismissed. The standard for criminal charges is much higher than for
12 a TRO and **this action by AUSA Devine alone should raise a presumption of**
13 **vindictiveness.** This is especially true since no charges related to these allegations
14 were ever brought and since this laundry list of charges is not even considered by the
15 Government to be 404(b) evidence. AUSA Devine recently provided notice of
16 404(b) evidence. (Document 72). This 404(b) evidence is very telling regarding
17 AUSA Devine’s vindictive behavior in regards to this humiliating defeat. In the
18 government Response to this Motion, AUSA Devine states that the Defendant:

19
20 *“argues that any further investigation of xelan after Judge Burns’ ruling*
21 *was unjustified.”*
22

23 The government’s 404(b) notice does not include any of the laundry list of crimes
24 alleged against the Defendant in the TRO application, which stated that:

25
26 *“Jacquot...through the xelan affiliated entities have and are now*
27 *violating federal law, including: Mail Fraud... Wire Fraud... Money*
28 *Laundering... Conspiracy to Defraud the United States... Unlawful*
29 *Welfare Fund Payments...”* (Page 30, Line 25)
30

1 The fact that these crimes are omitted from the 404(b) evidence is proof the
2 Defendant was correct that “*further investigation of xelan after Judge Burns’ ruling*
3 *was unjustified*” and supports the Defendant’s argument that AUSA Devine’s pursuit
4 of criminal charges on the exact same allegations that Judge Burns dismissed was
5 vindictive. Moreover, these alleged criminal acts that required seizure of all the
6 Defendant’s assets, adverse publicity that destroyed his law practice and finances,
7 and seizure of his passport are not even considered by the government to be 404(b)
8 evidence. This is because, as Judge Burns found, the allegations have **no merit**.
9

10 (7) In January 2005, just several weeks after the allegations in the TRO/receivership and
11 supporting declarations were shown to be false, one of the major false affiants in the
12 case, Postal Inspector Timothy France sent out a letter to virtually all xelan clients
13 informing them that they were **victims of violations of federal criminal laws** and
14 soliciting them to provide information. Not only does this letter leap to conclusions
15 of violations of federal criminal law without a trial, it is packed with leading
16 questions and factual inaccuracies. A copy of this letter can be found in Document
17 29, Exhibit 2. Apparently no victims stepped forward as **no charges were ever**
18 **brought relating to any of the laws described as violated in this letter, let alone**
19 **any convictions**.
20

21 (8) Ultimately, the various xelan programs entered into global administrative closing
22 agreements with the IRS **upholding the deductibility** of the alleged fraudulent
23 programs. In other words, **no fraud was found** and the alleged improper deductions
24 were allowed to stand.
25

26 (9) **Only after all these embarrassing defeats** did the government seek to attack
27 Jacquot’s law firm’s tax returns. Around mid-2006, AUSA Devine retaliated, **falsely**
28 **alleging** that the Defendant did not file a 2000 and 2004 Corporate Tax Return. The
29 Defendant provided the government a copy of the filed 2004 Corporate Return and
30 AUSA Devine told the Defendant’s Attorney Jim Frush that the Government had

1 discovered that the 2004 Corporate Tax Return was timely filed and that she believed
2 that the 2000 return had been filed. Following this attack, Mr. Frush, in a letter dated
3 July 20, 2006 requested that if charges were to be sought, that he be given a
4 conference with the National Tax Division pursuant to U.S Attorney Manual section
5 6-4.214. He received a response that such a conference would be granted. This letter
6 was also provided to AUSA Devine. A copy of that letter is attached as **Exhibit 5**.

7
8 (10) AUSA Devine then sought charges before the Grand Jury that 2001 and 2002
9 gross income was understated **knowing** that the conference that the Defendant was
10 promised via the letter in Exhibit 5 had not occurred. The National Tax Division
11 acknowledged that the conference should have been granted. AUSA Devine knew
12 that the conference should have been granted but vindictively sought the indictment
13 anyway.

14
15 (11) At the Grand Jury, AUSA Devine **intentionally excluded known exculpatory**
16 **evidence** that that 2003 and 2004 were overstated and that over the period of the
17 entire investigation, that the Defendant had, according to the Government, over-
18 declared his income. (See the Declaration of Jim Frush, attached as **Exhibit 6** which
19 describes the information provided to him by the government that shows that income
20 in 2003 and 2004 was overstated.) This intentional exclusion of known exculpatory
21 evidence violates the Department Of Justice's written policy that requires such
22 evidence to be presented. Only through the exclusion of known exculpatory
23 evidence was AUSA Devine able to manipulate venue to allow her to seek her
24 revenge. Moreover, only through exclusion of this exculpatory evidence was AUSA
25 Devine able to manipulate the Grand Jury into returning an indictment.

26
27 (12) **Only after six years of successful defense of himself and his clients did AUSA**
28 **Devine attack the Defendant's corporate law firm tax returns. There was no**
29 **audit of these returns, no one at the law firm was ever contacted for an**
30 **explanation, IRS audit procedures were not followed, in fact, there were no IRS**
31 **administrative procedures whatsoever. Simply a retaliatory indictment. The**

1 **Government contends that the current charges are unrelated to the previous**
2 **action, however, there never would have been the current tax return charges**
3 **had it not been for the xelan investigation. The only reason that the Defendant’s**
4 **tax returns were ever reviewed were his due to his successful defense against the**
5 **Government’s prior failed attacks on his clients and himself, plain and simple.**
6

7 Vindictive Behavior During the Case. The vindictive behavior did not stop with the vindictive
8 charges. Not only was the initiation of charges retaliatory, AUSA Devine’s actions during the
9 case have been vindictive. (**Exhibit 7**).

10
11 (13) Publicity is a telling factor in the Government’s motivations. When the
12 TRO/Receivership and raid occurred, the government launched a massive publicity
13 campaign and the story was carried in local and national newspapers, televisions
14 shows, and internet sites. This publicity even included a prepared statement by the
15 IRS Commissioner Mark W. Everson who said *“This is one of the biggest cases we*
16 *have seen in years...”* A copy of the Washington Post article containing this quote
17 is attached to Exhibit 3. Obviously the agents involved and AUSA Faith Devine
18 must have really “sold” the xelan case to their superiors as a huge deal if the IRS
19 Commissioner himself had a prepared statement waiting to be released in conjunction
20 with the raid. After it was disclosed that the declaration was full of lies and the case
21 was thrown out by Judge Burns, AUSA Devine and the agents involved were
22 publically humiliated and Jacquot alleges that AUSA Devine sought payback by
23 indicting Jacquot. AUSA Devine and the agents involved had their personal
24 reputations tarnished and are attempting to salvage their careers from their
25 unwarranted, expensive and fruitless investigation by bringing this unjustified case.
26 **No press release was made by the AUSA Devine and the Government that the**
27 **allegations they made against the Defendant were false, even though Judge**
28 **Burns found that they were false and made the Government pay hundreds of**
29 **thousands of dollars in attorney fees.** The New York Times reported the dismissal
30 stating:

1 *“We have no intention to take any action regarding the Memorandum **or***
2 *your clients acknowledgement that he has reviewed it and waives any*
3 *conflicts. The waiver is simply for our files in the event that your client*
4 *raises at a later date that his Sixth Amendment right to counsel was*
5 *violated due to a conflict of which he was not aware but which was known*
6 *to the government.”*

7
8 Mr. Jenkins notified AUSA Devine that the waiver would be forthcoming. However,
9 on January 16, 2009, just one (1) day after Mr. Jenkins embarrassed AUSA Devine
10 by pointing out in his Reply Brief (Document 51) that she was misleading the Court
11 by arguing a legal theory with supporting cases that had been abolished by the
12 Supreme Court fifteen (15) years ago, **she retaliated**. Rather than simply send an
13 email and stating that she had not received the waiver, she filed the Memorandum
14 with the Court in a clear effort to retaliate and embarrass or discredit Mr. Jenkins in
15 the eyes of the Judge. (Document 54.)

16
17 (16) AUSA Devine has submitted false evidence to the Court in her continuing
18 retaliation against Jacquot. The search warrant that the government obtained used
19 affidavits that are virtually identical to the TRO declarations that Judge Burns found
20 to be false. When Jacquot challenged the legitimacy of the search, based on these
21 false affidavits and improper use of attorney-client privileged materials, **AUSA**
22 **Devine knowingly submitted another false declaration to the Court.** (Document
23 36). The falsity of this declaration is clearly proved by the Government’s own
24 conflicting documents. When the falsity of the declaration was pointed out, AUSA
25 Devine had a legal duty to correct the error, which she did not do. See (**Documents**
26 **48, 50, 52**) for more details on this unconscionable behavior.

27
28 (17) AUSA Devine has submitted misleading authority to the Court on more than one
29 occasion. As described in Paragraph 15 above, she submitted a theory of law and
30 line of cases that had been abolished by the Supreme Court 15 years ago in her effort

1 to oppose the Defendant’s Motion to Suppress. (Document 35.) Recently, she
2 submitted significant **misleading law** to the Court in her attempt to quash the
3 Defendants subpoenas to the Political Insiders. (Document 86.) AUSA Devine
4 submitted significant cases and arguments relating to Rule 17(c). However, she
5 failed to apprise the Court that Rule 17(c) applies **only to the production of**
6 **documents and objects**. No documents were requested by the Defendant and
7 therefore Rule 17(c), all of AUSA Devine’s arguments, and all the cases that AUSA
8 Devine cites were **irrelevant and misleading**. AUSA Devine knows that no
9 documents or objects were requested, **as the subpoenas are blank in this regard**.
10 AUSA Devine also knows the purpose of Rule 17(c), as her Motion states that the
11 rule was meant “*to expedite the trial by providing a time and place before trial for*
12 *the inspection of subpoenaed materials.*” But in her unfettered quest for retaliation,
13 AUSA Devine did not want the facts to get in the way of some “good cases” that she
14 found, so she **intentionally submitted misleading pleadings** to the Court. Unethical
15 conduct is a sign of vindictive behavior.

16
17 (18) AUSA Devine falsely represented to the Court in her Response to the Selective
18 Prosecution Motion (Document 75) that she was not government counsel in the
19 TRO/Civil Case, stating:

20
21 *“The pleadings submitted in the case as well as the transcript clearly*
22 *show that the prosecutor on this case **was not government counsel** in the*
23 *civil case.”*

24
25 Attached as Exhibit 1 to the Defendant’s Reply are two declarations of AUSA
26 Devine in the TRO/Civil case. (Document 80.) Additionally, AUSA Devine was
27 present during the entire hearing before Judge Burns. Her statement that she was not
28 government counsel in these matters **is a lie**. She submitted the cover sheet of the
29 transcript (Exhibit to Document 75) to try and **mislead the Court**. She may not have

1 been lead counsel, but **she clearly was government counsel** in the TRO/ civil case.
2 Lying to the Court is a sign of vindictive behavior.

3
4 (19) In a knowing conflict of interest AUSA Devine provided pro bono personal legal
5 services to the Political Insiders in violation of federal regulations and attorney ethics
6 rules by representing them in a Motion to Quash Subpoenas (Document 86). This
7 violation was **knowing and intentional** because the Defendant raised the issue in
8 open Court on 30 March 2009, well **before** AUSA Devine filed her Motion to Quash
9 on their behalf on 13 April 2009. Details of this illegal conduct are found in the
10 Defendant's Response and Opposition to the Government's Motion to Quash.
11 (Documents 88 and 89). Undertaking illegal and unethical representation of third
12 parties against the Defendant is a sign of vindictive behavior.

13
14 (20) AUSA Devine corruptly prevented the Defendant from subpoenaing witnesses
15 which constitutes obstruction of justice under 18 U.S.C. 1503. AUSA Devine's
16 actions are corrupt because she:

- 17
18 • had no standing to interfere,
19 • presented false arguments,
20 • illegally provided representation to Political Insiders regarding personal
21 matters,
22 • engaged in a conflict of interest,
23 • violated attorney ethics rules, and
24 • intentionally submitting false authority to the Court.

25
26 Engaging in criminal conduct to interfere with the Defendant's constitutional right to
27 compulsory process is a sign of vindictive motive.

28
29 (21) After the Defendant filed a complaint with the Office of Professional
30 responsibility regarding alleged unethical behavior of AUSA Devine, AUSA Devine

1 **falsely alleged** that the Defendant failed to file 2005-2007 tax returns. (Document
2 72.) These allegations are false and the filed tax returns were submitted to the Court
3 two days after AUSA Devine made such false allegations. As described in Paragraph
4 #10 above, this was not the first time that AUSA Devine has falsely alleged that the
5 Defendant did not file tax returns. Alleging false criminal charges against a
6 Defendant is a sign of a vindictive motive.

7
8 (22) The false allegations provided in the 404(b) notice also prove that AUSA
9 Devine’s proffer to the Court regarding the Government’s case in chief was
10 **fraudulent**. On 29 August 2008, AUSA Devine provided a proffer to the Court of
11 the Government’s case (Document 35). AUSA Devine stated the purpose of the
12 proffer was:

13
14 *“To illustrate the simplicity of its case and to show that it is **not hiding the***
15 ***ball**, the Government provides a proffer of the evidence it will introduce in*
16 *trial in its case in chief.”*

17
18 The proffer contained no allegations of 404(b) evidence. Due to all of AUSA
19 Devine’s unethical behavior, the Defendant suspected that she may be trying to “*hide*
20 *the ball*” and filed a Motion to produce 404(b) evidence. (Document 70.) Only then
21 did AUSA Devine make her false allegations, even though such allegations were
22 known to AUSA Devine **at the time she made her proffer** to the Court (with the
23 exception of the 2007 returns). False statements in an attempt to prosecute the
24 Defendant are signs of vindictive behavior.

25
26 (23) In response to the Defendant’s Motion to Change Venue (Document 66) to the
27 District in which he lives, AUSA Devine states:

28
29 *“even if the case was transferred, the prosecutor would not*
30 *change.”* (Document 75.)

1
2 This statement is evidence that AUSA Devine is determine to extract her revenge no
3 matter where the case is tried and completely disregards the fact that if transferred,
4 the case comes under the jurisdiction of a different U.S. Attorney and a different
5 District Court that may not allow her to continue. AUSA Devine’s relentless desire
6 to prosecute the Defendant is indicative of vindictive motive.
7

8 (24) On or about 13 April 2009, after the Defendant exercises his 1st Amendment
9 Rights by posting documents related to this case on his website and by making a
10 press release, AUSA Devine **improperly threatened more criminal charges** for
11 violation of 26 U.S.C. § 7212 in her Motion to Quash the Subpoenas. (Document 86.)
12 Official reprisal for protected speech "*offends the Constitution [because] it threatens*
13 *to inhibit exercise of the protected right,*" Hartman v. Moore, 547 U.S. 250 citing
14 Crawford-El v. Britton, 523 U.S. 574, 588, n. 10, 118 S. Ct. 1584, 140 L. Ed. 2d 759
15 (1998), *and the law is settled that as a general matter the First Amendment prohibits*
16 *government officials from subjecting an individual to retaliatory actions, including*
17 *criminal prosecutions, for speaking out” Id.* Threatening criminal charges in
18 response to lawful exercise of 1st Amendment rights is classic vindictive behavior.
19

20 Burden of Proof

21
22 The Courts have held that upon a showing of vindictive circumstances, a presumption sufficient
23 for dismissal arises which the government may “*overcome only by objective information in the*
24 *record.*” Goodwin at 374. The 9th Circuit law is that all that is required to raise this
25 presumption and obtain a dismissal is a “*mere appearance of vindictiveness*” See United States
26 v. Rusega-Martinez, 534 F.2d 1367 (9th Cir. 1976); See also, United States v. Burt, 619 F.2d 831
27 (9th Cir. 1980); United States v. Griffin, 617 F.2d 1342.
28

29 The facts alleged in **Paragraphs 1 to 24 above** easily meet the test of a “*mere appearance of*
30 *vindictiveness.*” Therefore, the government has the burden to refute these facts with objective

1 evidence. Even if the burden is not shifted, the facts in **Paragraphs 1 to 24 above** clearly
2 establish that the prosecution was initiated vindictively in response to Jacquot’s exercise of
3 constitutional, statutory and procedural rights on behalf of himself and his clients.
4

5 Summary Prong #2.
6

7 Jacquot has established two separate and adequate grounds to find discriminatory effect. First,
8 an arbitrary and unjustifiable classification has occurred that puts Ordinary Citizens and Jacquot
9 in a different class than the Political Insiders. Second, Jacquot has been vindictively attacked for
10 the exercise of his Constitutional rights and zealous representation of the Constitutional and
11 statutory rights of his clients. **Either or both** of these grounds are sufficient to meet the second
12 prong of the test for Selective Prosecution, that the decision to prosecute was “*deliberately based*
13 *upon an unjustifiable standard such as race, religion, or other arbitrary classification including*
14 *the exercise of protected statutory and constitutional rights.*” Wayte at 608.
15

16 Summation – Selective Prosecution Claim.
17

18 Jacquot has shown that the initiation of charges was for a discriminatory purpose and had a
19 discriminatory effect. Although similarly situated, Jacquot has been treated markedly differently
20 than the Political Insiders and the reason for such disparate treatment is the arbitrary
21 classification of Jacquot as a **not** being a member of the ruling elite and/or retaliation by the
22 government for Jacquot’s zealous representation of his client’s rights which resulted in
23 humiliating losses to the government. Since the elements of a Selective Prosecution claim are
24 met, the Court should therefore dismiss the indictment with prejudice.
25
26
27

1 **Section IV**

2 **Vindictive Prosecution**

3
4 Vindictive behavior in this case is one of the two grounds alleged to satisfy the 2nd prong of the
5 Selective Prosecution test above. **It is also an independent basis for dismissal of the case.**

6
7 Vindictive behavior of a prosecutor is grounds for dismissal. See U.S. v. Goodwin, 457 U.S. 368
8 (1982). The vindictive prosecution doctrine is "*a limit on prosecutorial discretion, and goes to*
9 *the very authority of the prosecutor to hale the defendant into court in the first place.*" United
10 States v. Griffin, 617 F.2d 1342, 1346 (9th Cir. 1980).

11
12 The Defendant alleges that the behavior described in **Section III, Paragraphs 1 to 24**, above,
13 constitutes improper vindictive acts and incorporates them by reference into his claim of
14 Vindictive Prosecution.

15
16 It is clear law that actual proof of vindictiveness will result in reversal. "*To punish a person*
17 *because he has done what the law plainly allows him to do is a due process violation 'of the most*
18 *basic sort.'*" Goodwin at 372 quoting Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978).

19
20 Additionally, the Courts have held that upon a showing of vindictive circumstances, **a**
21 **presumption** sufficient for dismissal arises. In the 9th Circuit, all that is required to raise this
22 presumption and obtain a dismissal is a "*mere appearance of vindictiveness*" See United States
23 v. Rusega-Martinez, 534 F.2d 1367 (9th Cir. 1976); United States v. Groves, 571 F.2d 450, 453
24 (9th Cir.1978) ("*it is the appearance of vindictiveness rather than vindictiveness, in fact, which*
25 *controls*"); See also, United States v. Burt, 619 F.2d 831 (9th Cir. 1980);and United States v.
26 Griffin, 617 F.2d 1342 (1980). To establish a presumption of vindictiveness, Jacquot need **not**
27 show "*that the prosecutor acted in bad faith*" or that AUSA Devine "*maliciously sought*" the
28 indictment. Groves at 453 (9th Cir.1978); *see also* United States v. Ruesga-Martinez, 534 F.2d
29 1367, 1369 (9th Cir.1976). In Griffin, the Ninth Circuit held that a presumption of
30 vindictiveness may even be inferred in the **absence of evidence** that the prosecution acted with a

1 retaliatory motive in obtaining the challenged indictment. The presumption arises when the
2 "*totality of circumstances surrounding the prosecutorial decision at issue suggest the*
3 *appearance of vindictiveness.*" Griffin at 1347. In this case there is ample evidence to "*suggest*
4 *the appearance of vindictiveness.*" As described in **Section III, Paragraphs 1 to 24**, above, the
5 Government and AUSA Devine have engaged in vindictive prosecutorial misconduct numerous
6 times in this case.

7
8 Once a "*mere appearance of vindictiveness*" has been shown, the burden of proof shifts to the
9 Government and a dismissal must be granted unless the Government meets the "*heavy burden of*
10 *proving that... the alleged charges were not motivated by a vindictive motive.*" Ruesga-
11 Martinez at 1369. This presumption sufficient for dismissal may be "*overcome only by*
12 *objective information in the record.*" Goodwin at 374. "*Once a presumption of vindictiveness*
13 *has arisen, the burden shifts to the prosecution to show that "independent reasons or intervening*
14 *circumstances dispel the appearance of vindictiveness and justify its decisions."* U.S. v.
15 Montoya, 45 F.3d 1286 (9th Cir.) 1995) citing United States v. Hooton, 662 F.2d 628, 634 (9th
16 Cir.1981), cert. denied, 455 U.S. 1004 (1982); see also Garza-Juarez, 992 F.2d at 906.

17
18 The fact that the charges brought against a criminal defendant are **unrelated** to the original
19 charge is "*is neither dispositive nor essential to prove vindictiveness.*" United States v. Robison,
20 644F.2d 1270, 1272 (9th Cir.1981)

21
22 In fact, the **initial imposition of charges** without prior proceedings can be considered vindictive.

23
24 "*This court holds that the mere filing of an indictment can support a charge of*
25 *vindictive prosecution.*" U.S. v. Hooton, 662 F.2d 628 (9th Cir 1981) cert. denied,
26 455 U.S. 1004. [emphasis added]

27
28 "... the filing of **the initial indictment** can provide the basis for a charge of
29 *vindictive prosecution...*" U.S. v. McWilliams, 730 F.2d 1218 (C.A.9 (Cal.),
30 1984) citing Hooten at 634. [emphasis added]

1
2 *“While most vindictive prosecution cases involve re-indictment of a defendant, the*
3 *mere filing of an indictment can support a charge of vindictive prosecution.”* U.S.
4 v. Montoya, 45 F.3d 1286 (9th Cir. 1995) citing Hooten at 634.

5
6 There does **not** have to be an increase or change in charges. There simply must be improper
7 vindictive action. See also Town of Newton v. Rumery, 480 U.S. 386, (1987) fn 14 citing,
8 Dixon v. District of Columbia 129 U.S.App.D.C. 341, 394 F.2d 966 (D.C. Cir 1968) MacDonald
9 v. Musick, 425 F.2d 373 (9th Cir 1970) cert. denied, 400 U.S. 852, (1970).

10
11 The appearance of vindictiveness is enhanced when the charges are related to a nucleus of facts.
12 *“A key factor in determining whether vindictive prosecution exists is whether the second charge*
13 *arose out of **the same nucleus of facts** as the original charge.”* U.S. v. Zamora-Sanchez, 959
14 F.2d 243 (9th Cir. 1992) citing Robinson at 1272-73. In Groves, the Court held that the:

15
16 *“two statutory violations were so interrelated that there never would have been a*
17 *cocaine charge in the first instance were it not for the marijuana investigation.”*
18 Groves at 454.

19
20 The Groves situation is exactly the same in this case. The civil proceeding was punitive in
21 nature. It alleged a laundry list of false **criminal allegations** as the sole reason for the case. The
22 action seized **all of the Defendant’s assets** (not just those alleged to be related to the false
23 criminal accusations). The Government contends that the current charges are unrelated to this
24 previous action, however, just as in Groves, the charges are *“so interrelated,”* that there never
25 would have been the current tax return charges had it not been for the TRO/ civil case
26 investigation. As described above in **Section III, Paragraphs 12**, the Government did not
27 follow any normal IRS examination or audit procedures, never contacted anyone at the law firm
28 for an explanation. The Government simply indicted the Defendant, based on a retaliatory
29 motive, and **based on information they had discovered during their meritless criminal**
30 **investigation and TRO / Civil case.** Additionally, just like in Groves, the same prosecutor here

1 (AUSA Devine) was involved in both actions. The appearance of vindictiveness is enhanced
2 when the Government **knows all the facts relating to second charge when the first charge is**
3 **made**. See Groves at 453-4. In this case, the tax returns in question (2001 and 2002) were filed
4 1 to 2 years before the TRO/ Civil case. As part of this TRO/ Civil case, the Government had
5 been looking at the Defendant's bank records, financial records and tax returns and knew this
6 information when they filed the Civil action.

7
8 The facts before us also do not support a finding that the Government's charging decision
9 resulted from "*the prosecutor's normal assessment of the societal interest in prosecution.*"
10 Goodwin, 457 U.S. at 380 n. 11. The facts alleged in **Section III, Paragraphs 1 to 24** are actual
11 proof of vindictive behavior and warrant a dismissal. Moreover, the facts alleged in **Section III,**
12 **Paragraphs 1 to 24** easily meet the test of a "*mere appearance of vindictiveness.*" Therefore,
13 unless the government meets its burden to refute these facts with objective evidence, and further
14 shows by objective evidence a basis justifying its action, the indictment must be dismissed with
15 prejudice.

16
17 **Section V**
18 **Change of Venue**
19

20 The recent disclosure of alleged 404(b) evidence shows additional information that was withheld
21 from the Grand Jury, namely alleged tax crimes in 2005 to 2007. The Defendant asserts that this
22 evidence was withheld to manipulate venue in the same manner as the intentional withholding of
23 the 2003 and 2004 exculpatory evidence (described in detail in the main Selective / Vindictive
24 Prosecution Motion). The Government was well aware of the alleged 404(b) information at the
25 time they sought the indictment. If they believed that such crimes occurred they should have
26 sought to have them included in the indictment. However, if they did seek such inclusion, it
27 would have deprived AUSA Devine of venue in the Southern District of California. This
28 manipulation of venue should not be sanctioned by the Court and for the reasons stated in the
29 Defendant's Motion and Reply, the Court should grant a change of venue.

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PRAYER FOR RELIEF

The Defendant urges the Court to:

- Reconsider and Deny the Government Motion to Quash
- Find the Government has conceded the allegations regarding the Political Insiders tax problems.
- Take Judicial Notice of the Political Insiders tax problems, HR 735, President Obama’s statement, and Commissioner Everson’s quote.
- Dismiss the indictment with prejudice for Selective Prosecution.
- Dismiss the indictment with prejudice for Vindictive Prosecution.
- Order the case to be transferred to the Federal District Court of Idaho
- Impose other such relief that the Court feels is appropriate.

Respectfully Submitted,

/s/ David Jacquot

David Jacquot, Defendant

Certificate of Service

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IT IS HEREBY CERTIFIED THAT:

I, David Jacquot, am a citizen of the United States and am at least eighteen years of age. My business address is 2041 Bandy Road, Priest River, ID 83856. I am the pro se Defendant in the above entitled action.

I have caused service of:

- **SUPPLEMENTAL BRIEF: Motion for Reconsideration Selective / Vindictive Prosecution; Change of Venue**

by filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies the Government.

I declare under penalty of perjury that the foregoing is true and correct on this 15 May 2009.

/s/ David Jacquot
DAVID JACQUOT