

1 MARK J. REICHEL, State Bar #155034  
2 THE LAW OFFICES OF MARK J. REICHEL  
3 655 University Avenue, Suite 215  
4 Sacramento, California 95825  
5 Telephone: (916) 974-7033  
6 mreichel@donaldhellerlaw.com

7 Attorney for Defendant  
8 ERIC MCDAVID

9  
10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE EASTERN DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA, )  
13 Plaintiff, )

14 v. )

15 ERIC MCDAVID, )  
16 Defendant. )

Case No. CR.S-06-0035-MCE

**DEFENDANT'S MOTION TO  
DISMISS INDICTMENT FOR FIRST  
AMENDMENT VIOLATION.**

DEFENDANT'S NOTICE OF MOTION  
AND MOTION TO DISMISS THE  
INDICTMENT AS PROSECUTION IN  
THE CASE IS IN VIOLATION OF  
DEFENDANT'S **FIRST AMENDMENT  
RIGHTS TO FREE POLITICAL  
SPEECH AND FREEDOM OF  
ASSOCIATION**; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF; REQUEST FOR  
EVIDENTIARY HEARING.

Date: February 6, 2007  
Time: 8:30 A.m.  
Judge: Hon. Morrison C.  
England

17  
18  
19  
20  
21  
22  
23 **TO: MCGREGOR SCOTT, United States Attorney, and Assistant  
24 United States STEVEN R. LAPHAM:**

25 **PLEASE TAKE NOTICE THAT** at the above date and time, or  
26 as soon thereafter as the matter may be heard, defendant,  
27 through his attorney, will and hereby does move for an order

28 Mot.Dsm upon violation of First Amendment

1 dismissing the indictment with prejudice as prosecution of  
2 the defendant based upon the facts before the court establish  
3 that the criminal conspiracy statute is illegal *as applied* to  
4 this defendant under the First Amendment of the United States  
5 Constitution.

6 **MOTION**

7 Defendant Eric McDavid moves the Court for an order  
8 dismissing the indictment with prejudice on the grounds that  
9 his prosecution, under this federal statute, is illegal "as  
10 applied" under the First Amendment. McDavid's lawful  
11 exercise of his Free Speech Rights and Freedom of Association  
12 Rights, guaranteed under the U.S. Constitution, caused his  
13 investigation by law enforcement and subsequent prosecution.

14 This motion rests on the files and records of this case  
15 and the attached Memorandum of Points and Authorities.  
16 Additional evidence or argument may be offered at or before  
17 the hearing.

18 This motion is based on the United States Constitution,  
19 the Federal Rules of Criminal Procedure, the Points and  
20 Authorities submitted in support, and such argument and  
21 evidence of counsel at the hearing on the motion.

22 Respectfully submitted

23 DATED: December 19, 2006.

24  
25 MARK J. REICHEL  
26 ATTORNEY AT LAW  
Attorney for defendant

27 /S/ Mark Reichel  
28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 SUPPORTING FACTS<sup>1</sup>

3 In the present case, lawful political speech and  
4 association, the hallmarks of American liberty and the First  
5 Amendment, are so "chilled" by the application of this  
6 criminal statute that the indictment against the defendant  
7 must be dismissed.

8 This case began because of the following factors (1) in  
9 2002 and onward, the FBI and the Department of Justice  
10 illegally targeted certain people and groups who lawfully  
11 dissented with the present American governmental policies,  
12 and (2) an untrained and yet well paid informant who used the  
13 name "Anna," was set up to work for the FBI from 2003 onward  
14 to infiltrate these "targeted" people and groups who were  
15 exercising their constitutionally protected right to voice  
16 dissent at the U.S. Government and its domestic and  
17 international political policies.

18  
19  
20  
21  
22  
23  
24  

---

25 <sup>1</sup> The factual background comes from the discovery provided by the  
26 government, defense investigation conducted to date, and the  
27 anticipated testimony and evidence to be submitted at the hearing of  
28 the motion.

Familiarity with the facts is assumed and the government's version  
is succinctly stated in the Criminal Complaint, incorporated herein by  
reference.

1 **THE APPLICABLE LAW**

2 These are the rules our government must play by.  
3 Specifically, the Constitution prohibits domestic  
4 surveillance of U.S. citizens First Amendment activity in the  
5 absence of a reasonable suspicion of criminal activity.

6 Freedom of speech. The First Amendment to the United  
7 States Constitution provides

8 Congress shall make no law respecting an establishment  
9 of religion, or prohibiting the free exercise thereof;  
10 or abridging the freedom of speech, or of the press;  
11 or the right of the people peaceably to assemble, and  
12 to petition the Government for a redress of  
13 grievances.

14 No otherwise appropriate Congressional statute for the  
15 enforcement of the criminal law may violate any portion of  
16 the U.S. Constitution or the Bill of Rights *in its*  
17 *application*. United States v. Stewart, 384 F.3d 1132 (9<sup>th</sup>  
18 Cir. 2003). (The application of the otherwise lawful criminal  
19 statute 18 U.S.C. §922(o) violates the Commerce Clause in the  
20 case because the machine gun was completely home--made and  
21 had no effect on interstate commerce.) See also McIntyre v.  
22 Ohio Elections Comm'n, 514 U.S. 334, 356 (1995) and Brown v.  
23 Socialist Workers '74 Campaign Comm., 459 U.S. 87, 88  
24 (1982) (Campaign contributions as protected speech as  
25 applied). A municipal ordinance may be applied in such a way  
26 as to infringe on rights protected by the First Amendment  
27 even if such ordinance is otherwise valid under another,  
28 different, Constitutional Amendment. Felix. V. Young, 536  
F.3d 1126 (7<sup>th</sup> Cir. 1126)

If the government can act in the manner in which they

1 have in this case, the "freedom" of speech will be so  
2 substantially "chilled" that these statutes may not be used  
3 to support a prosecution. See United States v. United States  
4 Dist. Court for the Central District of California (Kantor),  
5 858 F.2d 534 (9th Cir. 1988) (Imposing criminal sanctions on  
6 the basis of strict liability in some circumstances would  
7 seriously "chill protected speech.")

#### 8 Freedom of Association

9 The "freedom to engage in association for the  
10 advancement of beliefs and ideas" is one of the most valuable  
11 rights guaranteed to us by the First Amendment. NAACP v.  
12 Alabama, 357 U.S. 449, 460 (1958). Because the disclosure of  
13 the identities of a group's members and contributors may have  
14 the practical effect of infringing upon protected  
15 associational rights, governmental efforts to compel such  
16 disclosures must be subjected to strict scrutiny. See  
17 Gibson v. Florida Legislative Comm., 372 U.S. 539 (1963);  
18 Shelton v. Tucker, 364 U.S. 479 (1960); Local 1814, Int'l  
19 Longshoremen's Ass'n. v. Waterfront Comm'n of New York  
20 Harbor, 667 F.2d 267 (2d Cir. 1981).

21 As well, in United States v. Briggs, 514 F.2d 794, 806  
22 (5<sup>th</sup> Cir. 1975), the Fifth Circuit held that the chilling of  
23 political expression and association by a grand jury "is not  
24 a governmental interest that we can accept or consider. It  
25 would circumvent the adversary process which is at the heart  
26 of our criminal justice system and of the relation between  
27 the government and citizen under our constitutional system.  
28 It would be intolerable to our society." See also Bursey v.

1 United States, 466 F.2d 1059 (9<sup>th</sup> Cir. 1972), *overruled on*  
2 *other grounds*, In re Grand Jury Proceedings, 863 F.2d 1059  
3 (9<sup>th</sup> Cir. 1988).

4 These rights do not simply protect the minority view in  
5 our country; they protect our country. Importantly, if the  
6 "tables were turned," on to those who actually *favor* the  
7 policies of the American government over the past 5 years,  
8 the law's present application would also be urged as  
9 illegal, for as our Supreme Court has taught us

10 The framers of the Constitution knew, and we should  
11 not forget today, that there is no more effective  
12 practical guaranty against arbitrary and unreasonable  
13 government than to require that the principles of law  
14 which officials would impose upon a minority be  
15 imposed generally. Conversely, nothing opens the door  
16 to arbitrary action so effectively as to allow those  
17 officials to pick and choose only a few to whom they  
18 will apply legislation and thus to escape the  
19 political retribution that might be visited upon them  
20 if larger numbers were affected.

21 Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-  
22 113, 93 L. Ed. 533, 69 S. Ct. 463 (1949) (concurring  
23 opinion).

24 Politically motivated surveillance by the FBI raises  
25 serious First Amendment concerns, including violations of  
26 associational rights. When investigations focus not on  
27 legitimate law enforcement purposes but rather on subjects'  
28 First Amendment conduct, fundamental yet fragile  
constitutional rights are abridged by this phenomenon of  
"political profiling." This form of profiling relies on guilt  
by association and is simply not a legal law enforcement  
technique.

The Supreme Court's expansive construction of the First  
Amendment-based right of association, as originally defined

1 in NAACP v. Alabama, 357 U.S. 449 (1958), and most recently  
2 in Boy Scouts v. Dale 530 U.S. 640 (2000) can protect groups  
3 engaged in First Amendment conduct from unjustified political  
4 surveillance. Because privacy in association is fundamental  
5 to the First Amendment, because political surveillance causes  
6 significant harm to expressive association, and because a  
7 group's conception of the conduct that would interfere with  
8 its expression must be taken into account, the right of  
9 association outweighs FBI's interest in investigating a crime  
10 where there has been no showing of "reasonable suspicion"  
11 criminal activity is afoot. While this "reasonable  
12 suspicion" standard comes from Fourth Amendment doctrine,  
13 political surveillance is analyzed under the stricter  
14 standards of the First Amendment, since political speech is  
15 given the highest degree of protection. Politically motivated  
16 investigations are simply not permissible as the mission of  
17 law enforcement is to enforce the criminal laws, not to  
18 monitor political. The history and purposes of the  
19 constitutional right of association corroborate this  
20 conclusion.

21 A consent decree that essentially adopts this approach  
22 was recently entered in a political surveillance lawsuit  
23 against the Denver Police Department.<sup>2</sup> In addition, the  
24

---

25  
26 <sup>2</sup> See Kevin Vaughan, Police Will Still Gather Intelligence; but  
27 "Spy Files" Settlement Places Restrictions on How It Can Be Done, Rocky  
28 Mtn. News, Apr. 18, 2003, at 12A. (discussing the consent decree  
entered in the Denver political surveillance litigation limiting Denver  
police to initiating investigations *only when a reasonable suspicion*  
*concerning a serious crime exists*).

1 reasonable suspicion standard *prior to* investigations like  
 2 the one in the case at bar is the federal *requirement* for  
 3 police departments accepting federal aid.<sup>3</sup> The famed (and now  
 4 much needed ) Church Committee Report recommended employing

5  
 6  
 7 <sup>3</sup>28 CFR 23.1; 23.20; 23.30. In relevant part, 28 C.F.R. Chapter  
 23 requires that (*italics and underline added for emphasis*)

8 23.1: "The purpose of this regulation is to assure that all  
 9 criminal intelligence systems operating through support under the  
 Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C.  
 10 3711, et seq., ..are utilized in conformance *with the privacy and*  
*constitutional rights of individuals.*

11 23.2: It is recognized that certain criminal activities including  
 12 but not limited to loan sharking, drug trafficking, trafficking in  
 stolen property, gambling, extortion, smuggling, bribery, and  
 13 corruption of public officials often involve some degree of  
 regular coordination and permanent organization involving a large  
 14 number of participants over a broad geographical area. The  
 exposure of such ongoing networks of criminal activity can be  
 15 aided by the pooling of information about such activities.  
*However, because the collection and exchange of intelligence data*  
 16 *necessary to support control of serious criminal activity may*  
 17 *represent potential threats to the privacy of individuals to whom*  
*such data relates, policy guidelines for Federally funded projects*  
*are required.*

18 23.20 (a) A project shall collect and maintain criminal  
 19 intelligence information concerning an individual *only if there is*  
*reasonable suspicion that the individual is involved in criminal*  
 20 *conduct or activity and the information is relevant to that*  
*criminal conduct or activity.*

21 (b) A project shall not collect or maintain criminal intelligence  
 22 information about the political, religious or social views,  
 associations, or activities of any individual or any group,  
 23 association, corporation, business, partnership, or other  
 organization unless such information directly relates to criminal  
 24 conduct or activity and there is reasonable suspicion that the  
 subject of the information is or may be involved in criminal  
 25 conduct or activity.

26 © Reasonable Suspicion or Criminal Predicate is established when  
 information exists which establishes sufficient facts to give a  
 27 trained law enforcement or criminal investigative agency officer,  
 investigator, or employee a basis to believe that there is a  
 28 reasonable possibility that an individual or organization is  
involved in a definable criminal activity or enterprise...

1 the standard in terrorism investigations as early as 1976.<sup>4</sup>

2 Those are the rules the FBI must live by.

3 **APPLICATION TO THE CASE AT BAR.**

4 **1.The FBI's war on ELF/ALF.**

5 On February 12, of 2002, James F. Jarboe, Domestic  
6 Terrorism Section Chief, Counterterrorism Division of the  
7 FBI, testified before the House Resources Committee,  
8 Subcommittee on Forests and Forest Health on the "The Threat  
9 of Eco-Terrorism."<sup>5</sup> His testimony centered on labeling the  
10 Earth Liberation Front and Animal Liberation Front as the  
11 emerging two most dangerous domestic terrorism groups. He  
12 acknowledged that no one had yet suffered any physical harm  
13 by these groups, however.

14 Unfortunately for federal law enforcement, these groups  
15 that the DOJ and FBI were "targeting" did not have any  
16 membership lists or associational rolls. Unlike the NAACP  
17 and/or the Teamsters Union or any of the other, former  
18 targets of the illegal federal law enforcement attacks, these  
19 "targets" they were after in 2001 onward didn't have

---

21 <sup>4</sup>See Senate Select Comm. to Study Governmental Operations with  
22 Respect to Intelligence Activities Report, S. Rep. No. 94-775, 94th  
23 Cong., 2d Sess., Book III, at 679-732 (1976), available in part at  
24 [www.cointel.org](http://www.cointel.org) [hereinafter Church Committee Report]. This  
comprehensive four-volume report exhaustively catalogues FBI abuses of  
its investigative authority from 1936-1976. Book II, pages 28-33.

25 <sup>5</sup> See the following links:  
<http://www.fbi.gov/congress/congress02/jarboe021202.htm> and/or the FBI  
link which is at <http://www.fbi.gov/congress/congress02.htm>.

26  
27 McGregor Scott, the current United States Attorney for the Eastern  
28 District of California, joined the crusade, testifying that these 2  
groups were the same as international terrorist organization-again,  
acknowledging that not one person has yet to be physically harmed by  
their actions. His testimony can be found at  
<http://www.animalrights.net/archives/year/2004/000194.html>

1 published agenda's and rented halls, auditoriums and hotels.  
2 As such, indiscriminately, agents and informants went out and  
3 did as they pleased to infiltrate persons and groups based  
4 upon "hunches", profiles and sheer luck.<sup>6</sup>

5 Surprisingly, the conduct of the "CS" "Anna" in the case  
6 at bar did not follow Domestic Terrorism Director Jarboe's  
7 instructions which he provided to Congress in 2002 that  
8 "...Law enforcement *becomes involved* when the volatile talk  
9

---

10 <sup>6</sup>And that's the problem. In Guilt by Expressive Association:  
11 Political Profiling, Surveillance and the Privacy of Groups Linda E.  
12 Fisher 46 Ariz. L. Rev. 621 (Winter 2004.), Professor Fisher aptly  
notes that

13 Historically, however, police agencies have assumed that anyone  
14 holding views such as those in the examples above must also be  
15 inclined to violence, since terrorists hold similar views. But  
16 many individuals hold beliefs in common with terrorists without  
17 any intent to engage in violence themselves. For example, millions  
18 harbor racist beliefs, but only a tiny percentage engage in racist  
19 violence. While it is undoubtedly true that individuals holding  
20 extremist beliefs are more likely than the general population to  
engage in terrorism, the proportion of those holding extremist  
beliefs who engage in terrorism is so minuscule that the mere  
existence of their beliefs, without more, cannot justify  
surveillance. Any policy to the contrary would not only violate  
First Amendment rights, it would also divert scarce law  
enforcement resources from investigating those more likely to act  
illegally.

21 In the second instance, conducting surveillance because of any  
22 association with a suspect group, agencies have assumed that  
23 individuals share a group's goals regardless of the level of  
24 association, so that the most fleeting and transitory of  
25 associations have triggered intrusive surveillance of individuals.  
26 For instance, those attending a demonstration organized by a group  
27 considered "extremist" would also be targeted, even if they were  
28 unaware of the group's sponsorship or goals. Note that I am not  
referring here to investigations of individual members of groups  
that are legitimately targeted for terrorism investigations;  
rather, I refer to investigations of individuals with only the  
most attenuated ties to a suspect group, as well as to  
investigations of individuals associated with a group that is not  
a legitimate target. The group is harmed when the costs of  
affiliation increase, distorting the group's identity and message.  
Unless additional evidence reveals further ties, or an emergency  
justifies a preliminary inquiry, investigations of people in these  
situations should be discontinued.

1 of these groups transgresses into unlawful action..."<sup>7</sup> What  
2 Anna did in the present case, according to the discovery and  
3 even the criminal complaint, was to infiltrate and  
4 investigate (i.e. "Get involved") well prior to any talk  
5 turned into unlawful action. The criminal complaint states  
6 that Anna targets "anarchists" as they share philosophies  
7 with the "ELF," although there is no mention of crimes  
8 attributed to "anarchists" based on their philosophy.

9 The illegal assault on rights continued, and on May 18 of  
10 2005 John E. Lewis, Deputy Assistant Director,  
11 Counterterrorism Division of the Federal Bureau of  
12 Investigation, testified before the Senate Committee on  
13 Environment and Public Works.<sup>8</sup> Director Lewis acknowledged

14 \_\_\_\_\_  
15 <sup>7</sup>There, he advised the committee that

16 During the past decade we have witnessed dramatic changes in the  
17 nature of the terrorist threat. In the 1990s, right-wing extremism  
18 overtook left-wing terrorism as the most dangerous domestic  
19 terrorist threat to the country. During the past several years,  
20 special interest extremism, as characterized by the Animal  
21 Liberation Front (ALF) and the Earth Liberation Front (ELF), has  
22 emerged as a serious terrorist threat. Generally, extremist groups  
23 engage in much activity that is protected by constitutional  
24 guarantees of free speech and assembly. *Law enforcement becomes  
25 involved when the volatile talk of these groups transgresses into  
26 unlawful action.* The FBI estimates that the ALF/ELF have committed  
27 more than 600 criminal acts in the United States since 1996,  
28 resulting in damages in excess of 43 million dollars." (Emphasis  
added.)

29 Testimony February 12, 2002.

30 <sup>8</sup>The testimony is reproduced at some length--where relevant-- as it  
31 is of exceeding benefit to the reader.

32 Good morning Chairman Inhofe, Ranking Member Jeffords, and members  
33 of the Committee. I am pleased to have the opportunity to appear  
34 today and to discuss the threat posed by animal rights extremists  
35 and eco-terrorists in this country, as well as the measures the  
36 FBI and its partners are taking to address this threat.

37 One of today's most serious domestic terrorism threats come from  
38 Mot.Dsm upon violation of First Amendment 11

1 that there had been no physical injuries to anyone, and that  
2 there is legitimate expressive conduct involved by members  
3 of these "groups." Unknowingly, he acknowledges that the

4  
5 \_\_\_\_\_  
6 special interest extremist movements such as the Animal Liberation  
7 Front (ALF), the Earth Liberation Front (ELF), and Stop Huntingdon  
8 Animal Cruelty (SHAC) campaign. Adherents to these movements aim  
9 to resolve specific issues by using criminal "direct action"  
10 against individuals or companies believed to be abusing or  
11 exploiting animals or the environment.

12 ...  
13 *The distinctions between constitutionally protected advocacy and*  
14 *violent, criminal activity are extremely important to recognize,*  
15 *and law enforcement officials should be solely concerned with*  
16 *those individuals who pursue animal rights or environmental*  
17 *protection through force, violence, or criminal activity. Law*  
18 *enforcement only becomes involved when volatile talk turns into*  
19 *criminal activity. Unfortunately, the FBI has seen a significant*  
20 *amount of such criminal activity. From January 1990 to June 2004,*  
21 *animal and environmental rights extremists have claimed credit for*  
22 *more than 1,200 criminal incidents, resulting in millions of*  
23 *dollars in damage and monetary loss.*

24 Preventing such criminal activity has become increasingly  
25 difficult, in large part because extremists in these movements are  
26 very knowledgeable about the letter of the law and the limits of  
27 law enforcement. Moreover, they are highly autonomous. Lists of  
28 targets and instructions on making incendiary devices are posted  
on the Internet, but criminal incidents are carried out by  
individuals or small groups acting unilaterally. Criminal activity  
by animal rights extremists and eco-terrorists in particular  
requires relatively minor amounts of equipment and minimal  
funding. Extremists of these movements adhere to strict security  
measures in both their communications and their operations.

*The FBI has developed a strong response to domestic terrorism*  
*threats. Together with our partners, we are working to detect,*  
*disrupt, and dismantle the animal rights and environmental*  
*extremist movements that are involved in criminal activity.*

...  
...

Investigating and preventing animal rights extremism and  
eco-terrorism is one of the FBI's highest domestic terrorism  
priorities. We are committed to working with our partners to  
disrupt and dismantle these movements and to bring to justice  
those who commit crime in the name of animal or environmental  
rights. Chairman Inhofe and Members of the Committee, I appreciate  
the opportunity to discuss the challenges we face and the ways we  
can overcome them.

(<http://www.fbi.gov/congress/congress05/lewis051805.htm>)

1 Constitutional line is clearly crossed by the FBI when he  
2 advises that they are involved in detecting, disrupting and  
3 dismantling the groups. He also acknowledges that it is  
4 really difficult to define them as "groups."

5 The Senate Committee was not impressed. According to a  
6 report from journalist Terry Frieden of CNN on May 18, 2005,  
7 "Senior officials from the FBI and the Bureau of Alcohol,  
8 Tobacco, Firearms (ATF) and Explosives told a Senate panel of  
9 their growing concern over these groups. Of particular  
10 concern are the Animal Liberation Front (ALF) and the Earth  
11 Liberation Front (ELF).... However, Some committee members  
12 have expressed skepticism over the high level of concern  
13 toward environmental and animal rights extremists.' The  
14 Department of Homeland Security spends over \$40 billion a  
15 year to protect the home front,' Sen. Frank Lautenberg said.  
16 After listing al Qaeda, Hamas and Hezbollah, the Democrat  
17 from New Jersey wanted to know who else the law enforcement  
18 agencies considered terrorists: 'Right to Life? Sierra Club?'  
19 Lautenberg declared himself 'a tree hugger.' And Sen. James  
20 Jeffords also issued a statement expressing doubt about the  
21 target of concern. 'Congress can't do much about individual  
22 extremists committing crimes in the name of ELF or ALF, but  
23 we can act to significantly enhance the safety of communities  
24 across the nation,' the independent from Vermont wrote.' ELF  
25 and ALF may threaten dozens of people each year, but an  
26 incident at a chemical, nuclear or wastewater facility would  
27 threaten tens of thousands.'" See

28

1 <http://www.cnn.com/2005/US/05/18/domestic.terrorism/> .<sup>9</sup>

2  
3 <sup>9</sup>The Senators on the Committee fired back at Deputy Director  
4 Lewis. Senator Lautenberg stated

5 Oversight on Eco-terrorism specifically examining the Earth  
6 Liberation Front ("ELF") and the Animal Liberation Front  
7 ("ALF")

8 In our country we are blessed to have a political system where we  
9 are free to disagree with one another - and with our government.  
10 When we want to change things, we must work for change within the  
11 law - not break the law. So I condemn any violence for political  
12 or ideological purposes. And I am concerned that people in my  
13 state have been victimized by individuals or groups that want to  
14 change policies regarding the treatment of animals, or the  
15 environment. Having said that, *we need to keep things in*  
16 *perspective.* As I mentioned, the Oklahoma City bombing killed 168  
17 people. The attacks of 9/11 killed 3,000. Since 1993, there have  
18 been at least five fatal attacks on doctors who performed legal  
19 abortions. Eric Rudolph recently pleaded guilty to placing a bomb  
20 in a public area during the Olympic Games in 1996, as well as  
21 bombing a Birmingham women's clinic and a gay nightclub. *All of*  
22 *these cases involved the loss of human life. To date, not a single*  
23 *incident of so-called environmental terrorism has killed anyone.*  
24 It's wrong to destroy property and intimidate people who are doing  
25 their jobs - and those who commit these crimes must be brought to  
26 justice. But let us not allow ourselves to be blinded to the more  
27 serious threats posed by those who have taken innocent lives. *We*  
28 *also must be careful not to proclaim guilt by association. The*  
*acts of one individual do not mean that an entire organization can*  
*be labeled a terrorist group. Timothy McVeigh was a member of the*  
*National Rifle Association. That doesn't make the NRA a terrorist*  
*group.* The National Right to Life Committee is opposed to legal  
abortion. Eric Rudolph bombed a Birmingham abortion clinic,  
and he was involved with several anti-abortion groups. That  
doesn't mean that the members of the National Right to Life  
Committee are terrorists. Terror is a tactic. We must condemn that  
tactic whenever it raises its ugly head - regardless of the  
ideology of those who would employ it. But we must take care not  
to lump legitimate groups with terrorists. To do so would only  
minimize the very real threats against our society. (Italics  
added.)

24 Statement of Senator Barack Obama

25 In America, we have the right to disagree over personal beliefs -  
26 whether they are religious, philosophical or moral - and to  
27 express those beliefs peaceably. *We have the right to assemble and*  
28 *to demonstrate.* But, we do not have the right to destroy others'  
property and to commit acts of violence in the name of free  
speech. Those who engage in such acts should be punished to the  
full extent of the law. We need to support our law enforcement  
officials in their efforts to apprehend these criminals and bring  
them to justice. However, in our quest to apprehend these

1 Despite the clear instruction to the contrary from that  
2 Senate Committee, the DOJ and FBI marched on and their policy  
3 created "Anna."

4 2. "Anna" the informant. Based upon the directives from  
5 the FBI, "Anna" performed her work. The FBI proudly announced  
6 in the criminal complaint in this case that she has  
7 successfully assisted in 12 "anarchist" investigations, as if  
8 that were co equal with criminality, like stating she helped  
9 in 12 illegal drug transactions or 12 "mafia investigations."  
10 However, that is the least of her illegal work.

11 The criminal complaint itself, as well as the discovery,  
12 boldly states - as if it were perfectly legal -- that "Anna"  
13 went to lawful demonstrations and gatherings in disguise,  
14 lying about her identity and past, and gathering information  
15 for the FBI. She was targeting young people who were  
16 dissenting from the government's political policies, who

---

17  
18 criminals, *I hope we are not headed down the path of infringing on*  
19 *the ability of legitimate advocacy organizations to express their*  
20 *opinions and to raise funds in order to do so. I do not want*  
21 *Americans to equate groups that advocate violence with mainstream*  
22 *environmental organizations. We also need to put these violent*  
23 *acts into context. The FBI has indicated a downward trend in the*  
24 *number of crimes committed by these groups - approximately 60 in*  
25 *2004. While I want these crimes stopped, I do not want people to*  
26 *think that the threat from these organizations is equivalent to*  
27 *other crimes faced by Americans every day. According to the FBI,*  
28 *there were over 7,400 hate crimes committed in 2003 - half of*  
*which racially motivated. More directly relevant to this*  
*committee, the FBI reports 450 pending environmental crimes cases*  
*involving worker endangerment or threats to public health or the*  
*environment. So, while I appreciate the Chairman's interest in*  
*these fringe groups, I urge the Committee to focus its attention*  
*on larger environmental threats, such as the dangerously high*  
*blood lead levels in hundreds of thousands of children. With all*  
*due respect, Mr. Chairman, I believe the Committee's time would be*  
*better spent learning why EPA has not promulgated regulations to*  
*deal with lead paint in remodeled homes. Such an oversight hearing*  
*could have a significant impact on improving the lives of children*  
*all over the country.*

1 gathered to associate and voice that dissent, and she felt it  
2 was strategic to specifically target those who entitled  
3 themselves "anarchists" or "green anarchists," all in the  
4 hopes of meeting people associated with "ELF" and or "ALF."<sup>10</sup>

5 As a direct result of illegally targeting people, "Anna"  
6 met and befriended this defendant. She had no "tip" about  
7 him, no "reasonable suspicion" of criminality. Rather, he was  
8 part of the catch in the broad net she spread out, woven with  
9 deception and illegality.

10 Defense investigation has learned that Anna was  
11 prominent as an informant for protest groups at both the  
12 Republican National Convention in New York in August of 2004  
13 and the Democratic Convention in Boston in 2004. Not  
14 surprisingly, the Department of Justice's Office of the  
15 Inspector General was contacted by several Congressman who  
16 requested an investigation into FBI tactics at the  
17 conventions as violative of "...First Amendment free speech  
18 and assembly rights by the Justice Department in connection  
19 with their investigations of possible protests at the

---

21 <sup>10</sup>Again, it might be that of the people who attend peace rallies  
22 and protest American government policies, there are some who share  
23 extremist views, and of those some who might take action. Again, that  
24 is most assuredly not "reasonable suspicion" and is in fact quite  
illegal as chilling of the hallowed expressive and associational rights  
to which we are all guaranteed.

25 It happened in this case. On January 13, the FBI's David Picard  
26 plainly admitted to CBS affiliate Channel 13 in Sacramento that the FBI  
27 is again investigating an entire ideology as if it constitutes a  
domestic security threat. He said, "one of our major domestic terrorism  
28 programs is the ALF, ELF, and anarchist movement, and it's a national  
program for the FBI." The Green Scare and the U.S. Government's "Case"  
Against Rod Coronado, Ben Rosenfeld, Civil Rights Attorney, published  
at CounterPunch.org, March 10, 2006

1 Democratic and Republican political conventions in Boston and  
2 New York and other venues.”<sup>11</sup>

3 Many groups have been subject to investigation and  
4 harassment from federal law enforcement while they have not  
5 themselves engaged in any criminal activity whatsoever.<sup>12</sup>  
6 The defendant in the case at bar falls in to that unfortunate  
7 category.<sup>13</sup>

8  
9 <sup>11</sup> The FBI’s overall use of informants was the subject of  
10 a very well publicized and *sharply critical* September 11,  
11 2005 Department of Justice *internal audit* entitled U.S.  
12 Department of Justice, Office of Inspector General, “FBI’s  
13 Compliance with the Attorney General’s Investigative  
14 Guidelines.” The report, (hereinafter “DOIG”), after  
15 redacting for sensitive information identified by the FBI,  
16 was released to the public and is available in pdf format at  
17 [www.usdoj.gov/oig/special/0509/final.pdf](http://www.usdoj.gov/oig/special/0509/final.pdf). That report  
18 contains the concerns about informants at political  
19 convention at page 13.

20  
21 <sup>12</sup> The horror stories abound: a quick tour of just about any  
22 website for any group even marginally vocal in their dissent from the  
23 administration’s policies since 2001 have been the victim of illegal  
24 spying and infiltration by federal law enforcement backed or supported  
25 agencies; from the Humane Society to Grandmothers For Peace in Fresno,  
26 California.

27 For an excellent, although almost dated examination, see Guilt by  
28 Expressive Association: Political Profiling, Surveillance and the  
Privacy of Groups Linda E. Fisher 46 Ariz. L. Rev. 621 (Winter 2004.)

For a more current treatment of the issue, see [www.aclu.org](http://www.aclu.org) and  
also the Center For Constitutional Rights at [ccr-ny.org](http://ccr-ny.org).

<sup>13</sup>Such federal law enforcement abuse is not entirely new, however.  
For example, earlier this century, the grand jury system was improperly  
used to frame labor organizers and union leaders and to facilitate  
witch hunts for Communist sympathizers. Michael Deutsch, *The Improper*  
*Use of the Federal Grand Jury: An Instrument for the Internment of*  
*Political Activists*, 75 J. Crim. L. & Criminology 1159 at 1171-73,  
1175-78 (1984). More recently, during the Nixon administration, over  
one thousand political activists were subpoenaed to more than one  
hundred grand juries across the nation. *Id.* at 1179. The targets of  
these grand juries included anti-Vietnam War activists, leftist

1 First Amendment conduct is expressive speech and conduct  
2 that is protected by the First Amendment, such as political  
3 speech or religious ritual. See Alliance to End Repression v.  
4 City of Chicago, 561 F. Supp. 537, 562 (N.D. Ill. 1982),  
5 modified on other grounds, 237 F.3d 799 (7th Cir. 2001).  
6 United States v. United States Dist. Court, 407 U.S. 297,  
7 314 (1972) ("Constitutional protections become the more  
8 necessary when the targets of official surveillance may be  
9 those suspected of unorthodoxy in their political beliefs.  
10 The danger to political dissent is acute where the Government  
11 attempts to act under so vague a concept as the power to  
12 protect "domestic security."").

13 Here, according to the discovery provided by the  
14 government, and pursuant to defense investigation<sup>14</sup>, it is  
15 undisputed that "Anna" spent almost all of her time going to  
16 perfectly lawful political gatherings as an undercover FBI  
17 informant. She sought out and suggested criminality to those  
18 she met. She targeted this defendant without any reasonable  
19

20 \_\_\_\_\_  
21 academics, the Catholic left, and supporters of the women's movement  
22 and the black nationalist movement. Id. at 1180. The grand juries  
23 were widely understood at the time to be domestic intelligence-  
24 gathering operations, which prompted many activists to go to jail  
25 rather than cooperate. Id. at 1182. As Senator Edward M. Kennedy  
26 astutely observed, "under the [Nixon] administration, we have witnessed  
27 the birth of a new breed of political animal--the kangaroo grand jury--  
28 spawned in a dark corner of the Department of Justice, nourished by an  
administration bent on twisting law enforcement to serve its own  
political ends, a dangerous form of Star Chamber secret inquisition  
that is trampling the rights of American citizens from coast to coast."  
Washington Post, March 14, 1972, at 2, col. 3.

27 <sup>14</sup>Anna's exploits are known around the country. See a story on  
28 Anna at  
[http://www.rawstory.com/news/2006/FBI\\_confidential\\_informant\\_also\\_said\\_to\\_be\\_provocateur.html](http://www.rawstory.com/news/2006/FBI_confidential_informant_also_said_to_be_provocateur.html)

1 suspicion of criminal activity.

2 Such conduct, at FBI direction, is illegal as  
3 established herein above.<sup>15</sup>

4 The FBI is trained on and bound by the direction from  
5 The Attorney General's Guidelines On General Crimes, issued  
6 September 2002 by former Attorney General John Ashcroft,  
7 available on line at [www.usdoj.gov/olp/generalcrimes2.pdf](http://www.usdoj.gov/olp/generalcrimes2.pdf)  
8 There, at page 7, the Guidelines state that "In its efforts  
9 to anticipate or prevent crime, the FBI must at times  
10 initiate investigations in advance of criminal conduct. It is  
11 important that such investigations not be based solely on  
12 activities protected by the First Amendment or on the lawful  
13 exercise of any other rights secured by the Constitution or  
14 laws of the United States. When, however, statements advocate  
15 criminal activity or indicate an apparent intent to engage in  
16 crime, particularly crimes of violence, an investigation  
17 under these Guidelines may be warranted unless it is  
18 apparent, from the circumstances or the context in which the  
19 statements are made, that there is no prospect of harm."

20 Interestingly, this is the Executive Branch's view of  
21 what is lawful, and comes in September 2002, from John  
22 Ashcroft.

23 \_\_\_\_\_  
24 <sup>15</sup>The days of former Attorney General Edward H. Levi are obviously  
25 over. In congressional testimony prior to release of the first Attorney  
26 General Guidelines, Attorney General Levi stated that the Guidelines  
27 "proceed from the proposition that Government monitoring of individuals  
28 or groups because they hold **unpopular or controversial political views  
is intolerable in our society.**" The Guidelines represented a  
significant shift in DOJ's approach to domestic terrorism. For the  
first time, investigations of domestic terrorism were treated as  
matters for criminal law enforcement, rather than as avenues for  
intelligence collection. Quoted in DOIG report September 2005 at page  
36.

1 Next, at page 16 of the Guidelines, General Ashcroft  
2 directed the agents that "Mere speculation that force or  
3 violence might occur during the course of an otherwise  
4 peaceable demonstration is not sufficient grounds for  
5 initiation of an investigation under this Subpart, but where  
6 facts or circumstances reasonably indicate that a group or  
7 enterprise has engaged or aims to engage in activities  
8 involving force or violence or other criminal conduct  
9 described in paragraph (1)(a) in a demonstration, an  
10 investigation may be initiated in conformity with the  
11 standards of that paragraph."

12 The informant in this case most assuredly was not aware  
13 of the rules. And the FBI directed her in that ignorance.

14 **CONCLUSION**

15 For the above reasons, the defendant respectfully  
16 requests that the court dismiss with prejudice the indictment  
17 in this case.

18 Respectfully submitted

19 DATED: December 19 2006.

20  
21 MARK J. REICHEL  
22 ATTORNEY AT LAW  
23 Attorney for defendant

24 /S/ Mark Reichel  
25  
26  
27  
28