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4  
5 Attorney for Defendant  
ERIC MCDAVID

6  
7 IN THE UNITED STATES DISTRICT COURT  
8 FOR THE EASTERN DISTRICT OF CALIFORNIA  
9

10 UNITED STATES OF AMERICA, )  
11 Plaintiff, )

12 v. )

13 ERIC MCDAVID, )  
14 Defendant. )

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

**DEFENDANT'S MOTION TO  
DISMISS INDICTMENT FOR  
PROSECUTORIAL MISCONDUCT IN  
MAKING PREJUDICIAL PUBLIC  
STATEMENTS**

15 DEFENDANT'S NOTICE OF MOTION  
16 AND MOTION TO DISMISS THE  
INDICTMENT AS PROSECUTION IN  
17 THE CASE IS IN VIOLATION OF  
DEFENDANT'S **DUE PROCESS**  
18 **RIGHTS AND THE FIFTH**  
**AMENDMENT RIGHT TO AN**  
19 **UNBIASED GRAND JURY**  
**INDICTMENT; REQUEST FOR GAG**  
20 **ORDER OF ALL EXECUTIVE**  
**BRANCH AGENTS AND REQUEST**  
21 **FOR GRAND JURY TRANSCRIPTS;**  
MEMORANDUM OF POINTS AND  
22 AUTHORITIES IN SUPPORT  
THEREOF; REQUEST FOR  
23 EVIDENTIARY HEARING.

24 Date: February 6, 2007  
25 Time: 8:30 A.m.  
26 Judge: Hon. Morrison C.  
England  
27  
28

1 **TO: MCGREGOR SCOTT, United States Attorney, and Assistant**  
2 **United States STEVEN R. LAPHAM:**

3 **PLEASE TAKE NOTICE THAT** at the above date and time, or  
4 as soon thereafter as the matter may be heard, defendant,  
5 through his attorney, will and hereby does move for an order  
6 dismissing the indictment with prejudice as the prosecution  
7 improperly made highly inflammatory pretrial statements in  
8 violation of the law, substantially prejudicing the defendant  
9 and violating his right to an unbiased grand jury indictment.

10 **MOTION**

11 Defendant Eric McDavid moves the Court for an order  
12 dismissing the indictment with prejudice on the grounds that  
13 the prosecution has unfairly prejudiced him through public  
14 statements about both his guilt and his character, when  
15 they are fully aware that such conduct is illegal.

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

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

24 Respectfully submitted

25 DATED: December 19, 2006. MARK J. REICHEL  
26 ATTORNEY AT LAW  
Attorney for defendant

27 /S/ Mark Reichel

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 SUPPORTING FACTS<sup>1</sup>

3 In a separate motion on file with this court, the  
4 defendant has detailed the Department of Justice and the  
5 FBI's assault on environmental and animal rights activists,  
6 as well as essentially all voices of political dissent since  
7 2001. Specifically, the FBI has appeared before Congress and  
8 publicly proclaimed, despite their own clear evidence that  
9 there has never been any physical violence which has been  
10 directed toward or harmed anyone, that the "domestic  
11 terrorism" of the "Earth Liberation Front" and "Animal  
12 Liberation Front" is the greatest threat to safety in  
13 America, above that of the Al Qaeda terrorists who actually  
14 attacked our country.<sup>2</sup> "ELF" and "ALF" became, in essence,  
15 more worthy of our fear than Osama Bin Laden, Iran, North  
16 Korea, and the Taliban.

17 Indeed, the United States Attorney for the Eastern  
18 District testified before Congress on this issue, along with  
19 a host of other federal law enforcement "higher ups."<sup>3</sup>

20 Once this defendant was arrested on January 13,  
21 2006—charged by criminal complaint—press conferences were  
22 held around the nation by these same higher ups who, as will  
23

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24 <sup>1</sup> The factual background comes from the discovery provided by the government, defense  
25 investigation conducted to date, and the anticipated testimony and evidence to be submitted at the hearing  
26 of the motion. Some familiarity with the facts is assumed and reference is also made to the Criminal  
Complaint, incorporated herein by reference.

27 <sup>2</sup> See the defendant's Motion To Dismiss Indictment For Violation of First Amendment, on file.

28 <sup>3</sup>Id.

1 be explained below, should have known better.

2 The press releases, public statements and press  
3 conferences are catalogued in Exhibit A, attached hereto. In  
4 summary:

5 A 1. January 13, 2006, Sacramento Bee. "Terrorists" and  
6 "tied to ELF."

7 A 2. January 13, 2006, Los Angeles Times. "Earth  
8 Liberation Front," "eco-terrorists" and "The arrests in  
9 ...capped a terrorism investigation that began nearly a year  
10 ago" and "We did prevent some violent acts, I am sure of  
11 that," said Dave Picard, assistant special agent in charge of  
12 the FBI's Sacramento office. "These people could have done a  
13 lot of harm to people and property."

14 A 3. January 20, 2006 KCRA Television Channel 3  
15 Sacramento. "'ELF is a group that doesn't really have a  
16 leader; however, we know that Eric McDavid has strong ties to  
17 Ryan Lewis and that the group met with Eva Holland while they  
18 were in San Francisco just a few days ago,' Endrizzi said.  
19 Authorities said they have connected Lewis and Holland to  
20 ELF."

21 A 4. January 20, 2006: Attorney General and FBI Press  
22 release regarding Oregon defendants on un related yet similar  
23 charges. "...indictment proves that we will not tolerate any  
24 group that terrorizes the American people, no matter its  
25 intentions or objectives." "Investigating and preventing  
26 animal rights and environmental extremism is one of the FBI's  
27 highest domestic terrorism priorities," said FBI Director

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1 Robert Mueller. "We are committed to working with our  
2 partners to disrupt and dismantle these movements, to protect  
3 our fellow citizens, and to bring to justice those who commit  
4 crime and terrorism in the name of animal rights or  
5 environmental issues."

6 A 5. January 25, 2006 Sacramento U.S. Attorneys office  
7 press release. "Eco terrorists indicted" United States  
8 Attorney McGregor W. Scott: "Eric McDavid and his  
9 co-defendants pose a grave risk to the safety of our  
10 communities. They would not hesitate to commit dangerous and  
11 life-threatening acts in the name of their extremist views,"  
12 said United States Attorney Scott...

13 A 6. January 26, 2006 press conference: "U.S. Attorney  
14 McGregor W. Scott said during a Wednesday press conference  
15 that Eric McDavid, one of three suspected eco-terrorists,  
16 threatened to kill a confidential source working for the  
17 FBI...' (McDavid) also advocated violent protest and expressed  
18 his desire to kill a police officer,' Scott said. He went on  
19 to say that it was McDavid who recruited co-defendants Weiner  
20 and Jenson to assist with his plans ...Additionally, Scott  
21 said that McDavid was a 'friend' of Ryan Lewis, 23, of  
22 Newcastle, who pleaded guilty to Oct. 14 to two counts of  
23 attempted arson and one count of arson in relation to 'a  
24 string of ELF-related arsons in Placer County.'"

25 "David Picard, assistant special agent in charge for the  
26 Sacramento division of the FBI, said although the three  
27 suspects did not actually carry out any of their plans,  
28 plotting to do so is still a crime. "They conspired and  
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1 plotted," Picard said. "They were definitely going forward  
2 with their plan."

3 On September 11, 2001, this country endured the worst  
4 loss of civilian life ever inflicted on it by a hostile  
5 foreign force. The people of this country are furious and  
6 demand retribution. The unacceptable comments from the  
7 Executive Branch leaders has stated -not suggested--that  
8 McDavid and the other defendants were in the same league with  
9 the terrorists who crashed four airplanes into the World  
10 Trade Centers, the Pentagon, and the ground at Shanksville,  
11 Pennsylvania. The FBI and Justice Department's claim is that  
12 the **arrest** of these defendants would prevent future terrorist  
13 attacks on American citizens.

#### 14 LEGAL AUTHORITY

15 The right to a fair and impartial fact-finder is  
16 paramount in our criminal justice system. To protect this  
17 right, "a trial judge has an affirmative duty to minimize the  
18 effects of prejudicial pretrial publicity." Gannett Co. v.  
19 DePasquale, 443 U.S. 368, 378 (1978). The protections may  
20 include issuance of a gag order against lawyers and litigants  
21 where there is a "substantial likelihood of material  
22 prejudice" from extrajudicial statements. United States v.  
23 Scarfo, 263 F.3d 80, 90 (3rd Cir. 2001) (quoting Gentile v.  
24 State Bar of Nevada, 501 U.S. 1030, 1075 (1990). Gag orders  
25 may be issued more freely against lawyers both because the  
26 disciplinary rules notify lawyers that of similar  
27 restrictions on attorney speech, and because of the risk that  
28 the public and potential jurors will place confidence in the  
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1 accuracy of statements from lawyers familiar with the case.  
2 Scarfo, 263 F.2d at 90.

3 The Attorney General's remarks regarding the Oregon  
4 charges, the FBI director's remarks in that regard, the local  
5 United States Attorney's remarks on these charges, the local  
6 Assistant United States Attorney's remarks, and the F.B.I.  
7 agent's remarks, violated Rule 5-120 of the California Rules  
8 of Professional Conduct<sup>4</sup> for those who are attorneys; it may  
9

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10 <sup>4</sup>Rule 5-120. Trial Publicity

11 (A) A member who is participating or has participated in the investigation or litigation of a matter  
12 shall not make an extrajudicial statement that a reasonable person would expect to be disseminated  
13 by means of public communication if the member knows or *reasonably should know that it will*  
*have a substantial likelihood of materially prejudicing* an adjudicative proceeding in the matter.

14 (B) Notwithstanding paragraph (A), a member may state:

15 (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the  
16 persons involved;

17 (2) the information contained in a public record;

18 (3) that an investigation of the matter is in progress;

19 (4) the scheduling or result of any step in litigation;

20 (5) a request for assistance in obtaining evidence and information necessary thereto;

21 (6) a warning of danger concerning the behavior of a person involved, when there is reason to  
22 believe that there exists the likelihood of substantial harm to an individual or the public interest;  
23 and

24 (7) in a criminal case, in addition to subparagraphs (1) through (6):

25 (a) the identity, residence, occupation, and family status of the accused;

26 (b) if the accused has not been apprehended, the information necessary to aid in apprehension of  
27 that person;

28 (c) the fact, time, and place of arrest; and

(d) the identity of investigating and arresting officers or agencies and the length of the  
investigation.

©) Notwithstanding paragraph (A), a member may make a statement that a reasonable member  
would believe is required to protect a client from the substantial undue prejudicial effect of recent  
publicity not initiated by the member or the member's client. A statement made pursuant to this  
paragraph shall be limited to such information as is necessary to mitigate the recent adverse  
publicity.

Discussion:

Rule 5-120 is intended to apply equally to prosecutors and criminal defense counsel.

Whether an extrajudicial statement violates rule 5-120 depends on many factors, including: (1)  
whether the extrajudicial *statement presents information clearly inadmissible as evidence* in the  
matter for the purpose of proving or disproving a material fact in issue; (2) whether the

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1 be that the FBI agents are not attorneys. Nevertheless, all  
2 of the above agents are DOJ employees, subject to discipline  
3 for violating 28 C.F.R. §50.2, which forbids even *accurate*  
4 pretrial comments (the defendant does not concede these  
5 comments are accurate) when they "materially prejudice" a  
6 proceeding, or "may reasonably be expected to influence the  
7 outcome of a pending or future trial," 28 C.F.R. §50.2.<sup>5</sup>

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8  
9 extrajudicial statement presents information the member knows is false, deceptive, or the use of  
10 which would violate Business and Professions Code section 6068(d); (3) whether the extrajudicial  
11 statement *violates a lawful "gag" order, or protective order, statute, rule of court, or special rule*  
of confidentiality (for example, in juvenile, domestic, mental disability, and certain criminal  
proceedings); and (4) the timing of the statement.

12 Paragraph (A) is intended to apply to statements made by or on behalf of the member.

13 Subparagraph (B)(6) is not intended to create, augment, diminish, or eliminate any application of  
14 the lawyer-client privilege or of Business and Professions Code section 6068(e) regarding the  
member's duty to maintain client confidence and secrets.

15 (Effective October 1, 1995) (Italics added for emphasis.)

16 <sup>5</sup>28 CFR 50.2

17 § 50.2 Release of information by personnel of the Department of Justice relating to criminal and  
18 civil proceedings.

19 (a) General. (1) The availability to news media of information in criminal and civil cases is a  
20 matter which has become increasingly a subject of concern in the administration of justice. The  
purpose of this statement is to formulate specific guidelines for the release of such information by  
personnel of the Department of Justice.

21 (2) While the release of information for the purpose of influencing a trial is, of course, always  
22 improper, there are valid reasons for making available to the public information about the  
administration of the law. The task of striking a fair balance between the protection of individuals  
23 accused of crime or involved in civil proceedings with the Government and public understandings  
of the problems of controlling crime and administering government depends largely on the exercise  
of sound judgment by those responsible for administering the law and by representatives of the  
press and other media.

24 ....  
25 (b) Guidelines to criminal actions. (1) These guidelines shall apply to the release of information to  
news media from the time a person is the subject of a criminal investigation until any proceeding  
resulting from such an investigation has been terminated by trial or otherwise.

26 (2) At no time shall personnel of the Department of Justice furnish any statement or information  
27 for the purpose of influencing the outcome of a defendant's trial, nor shall personnel of the  
Department furnish any statement or information, which could reasonably be expected to be  
disseminated by means of public communication, if such a statement or information may  
28 ***reasonably be expected to influence the outcome of a pending or future trial.***

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1 There is hardly a section of 28 C.F.R. §50.2. that wasn't  
 2 violated in this instance. Using the word "terrorism"  
 3 repeatedly, linking the defendant to "ELF," to a convicted  
 4 group of other defendants, asserting he is a "grave risk to  
 5 safety," who wanted to "kill a source" and "kill the  
 6 informant," clearly might reasonably influence the outcome.

7 Among the remarks that both the rule and regulation  
 8 absolutely prohibit are those which describe the character of  
 9 the defendant. A statement that the defendant engaged in  
 10 serious criminal activity such as "terrorism" and all of the

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11 (3) Personnel of the Department of Justice, subject to specific limitations imposed by law or court  
 12 rule or order, may make public the following information:

- 13 (i) The defendant's name, age, residence, employment, marital status, and similar background  
 14 information.  
 15 (ii) The substance or text of the charge, such as a complaint, indictment, or information.  
 16 (iii) The identity of the investigating and/or arresting agency and the length or scope of an  
 17 investigation.  
 18 (iv) The circumstances immediately surrounding an arrest, including the time and place of arrest,  
 19 resistance, pursuit, possession and use of weapons, and a description of physical items seized at the  
 20 time of arrest.

21 Disclosures should include *only incontrovertible, factual matters*, and should not include  
 22 subjective observations. In addition, where background information or information relating to the  
 23 circumstances of an arrest or investigation would be highly prejudicial or *where the release*  
 24 *thereof would serve no law enforcement function, such information should not be made public.*

25 (5) Because of the particular danger of prejudice resulting from statements in the period  
 26 approaching and during trial, they ought strenuously to be avoided during that period. Any such  
 27 statement or release *shall be made only on the infrequent occasion when circumstances*  
 28 *absolutely demand a disclosure of information and shall include only information which is*  
*clearly not prejudicial.*

(6) The release of certain types of information generally tends to create dangers of prejudice  
 without serving a significant law enforcement function. Therefore, personnel of the Department  
 should refrain from making available the following:

- (i) Observations about a *defendant's character*.  
 (ii) Statements, admissions, confessions, or alibis attributable to a defendant, or the refusal or  
 failure of the accused to make a statement.  
 (iii) Reference to investigative procedures such as fingerprints, polygraph examinations, ballistic  
 tests, or laboratory tests, or to the refusal by the defendant to submit to such tests or examinations.  
 (iv) Statements concerning the identity, testimony, or credibility of prospective witnesses.  
 (v) Statements concerning evidence or argument in the case, whether or not it is anticipated that  
 such evidence or argument will be used at trial.  
 (vi) *Any opinion as to the accused's guilt*, or the possibility of a plea of guilty to the offense  
 charged, or the possibility of a plea to a lesser offense.

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1 other statements directed toward the defendant is a statement  
2 about character. See FRE 405(b).

3 The FBI agents's and the United States Attorney's  
4 remarks violated the further requirement of 28 C.F.R. §50.2  
5 that any public remarks "should include only  
6 incontrovertible, factual matters, and should not include  
7 subjective observations. In addition, where background  
8 information or information relating to the circumstances of  
9 an arrest or investigation would be highly prejudicial . . .  
10 such information should not be made public." Section  
11 50.2(b)(3). Their remarks linking the defendant to the "ELF"  
12 or ALF" or as a terrorist were not only controvertible, they  
13 were false. As well, the defendant did not have a meeting  
14 with convicted ELF member Ms. Holland, nor did the defendant  
15 threaten to kill the informant or desire to kill a police  
16 officer.

17 What is incontrovertible is that the remarks were  
18 "highly prejudicial."

19 1. Gag order. To prevent the Executive Branch from doing  
20 more harm, defendant asks that the Court enter an order  
21 identical to that entered in the Oklahoma bombing case, see  
22 United States v. McVeigh, 931 F.Supp. 756, 760-61  
23 (D.Colorado 1996).

24 2. Dismissal of the indictment. The Executive Branch  
25 statements should be met with dismissal of the Indictment,  
26 both as a remedy for violation of the defendant's right to a  
27 fair and impartial grand jury and as an exercise of the  
28 Court's supervisory power to enforce violations of 28 U.S.C.  
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1 §530B.

2 Many of the Executive Branch comments about this case  
3 were made before the grand jury voted on the indictment on  
4 January 25, 2005. These comments violated Mr. McDavid's right  
5 to an impartial grand jury. The Court should dismiss the  
6 indictment, or in the alternative, stay that ruling and order  
7 disclosure of the transcript of the grand jury instructions,  
8 colloquys, and testimony. This is discussed more fully,  
9 *infra*.

10 The Fifth Amendment demands that the grand jury that  
11 votes on an indictment be unbiased. United States v. Serubo,  
12 604 F.2d 807, 816 (3d Cir. 1979). "[A]ssociat[ing] the  
13 defendants with a disfavored criminal class" offends the  
14 Fifth Amendment's mandate, Serubo, 604 F.2d at 818 (La Cosa  
15 Nostra), as does the dissemination to the news media of  
16 information considered likely to generate public animus  
17 against the potential defendants, United States v. Sweig, 314  
18 F.Supp. 1148, 1153-54 (S.D.N.Y. 1970) (Frankel, J.). To the  
19 extent that these prejudicial statements reached the grand  
20 jury, they violated Mr. McDavid's right to an unbiased grand  
21 jury.

22 The Executive Branch remarks violated not only the  
23 Constitution, but both federal regulations and statutes.  
24 Congress has elevated state ethics rules into federal law.  
25 Section 530B of Title 28, the McDade Amendments, requires  
26 that federal prosecutors obey state ethical rules. 28 U.S.C.  
27 §530B. Section 530B applies to the Attorney General himself.  
28 28 C.F.R. §77.2. DOJ's regulations apply the ethical rules  
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1 of the state containing the district in which a case is  
2 pending, or if no case is pending, the rules of the state of  
3 the attorney's licensure. 28 C.F.R. §77.4. The California  
4 Rules are appropriate here. Additionally, as was described  
5 above, the remarks violated the Department of Justice's  
6 longstanding regulations on the public release of  
7 information, 28 C.F.R. §50.2.

8 Dismissal is an appropriate remedy for prosecutorial  
9 misconduct where it "substantially influenced the grand  
10 jury's decision to indict" or "if there is a grave doubt that  
11 the decision to indict was free from substantial influence of  
12 such violations." Bank of Nova Scotia v. United States, 487  
13 U.S. 250, 256 (1988). See also United States v. Sigma  
14 Intern., Inc., 244 F.3d 841, 856-58, 870-73 (11th Cir.  
15 2001) (dismissing indictment for improper comments to the  
16 grand jury, including statements implying that defendants had  
17 engaged in other criminal conduct.); United States v. Lopez,  
18 4 F.3d 1455 (9th Cir. 1991) (an ethical violation could result  
19 in dismissal of an indictment if the government's conduct  
20 "caused substantial prejudice to the defendant and had been  
21 flagrant in its disregard for the limits of appropriate  
22 professional conduct.") Courts may exercise their  
23 supervisory power to dismiss indictments when prosecutors  
24 violate specific statutory or regulatory prohibitions.  
25 United States v. Williams, 504 U.S. 36, 46 & n.6 (1992).

26 This case presents an extraordinarily strong one for  
27 dismissal for three reasons. (1) First, improper statements  
28 came from the top and locally: the Attorney General himself,  
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1 the FBI Director, as well as the local Assistant United  
2 States Attorney and the United States Attorney and the FBI.  
3 Statements from the nation's highest law enforcement officer,  
4 as well as the local United States Attorney, are likely to be  
5 especially influential with grand jurors and prospective  
6 jurors. Further, the government can hardly complain that it  
7 is unfair to impute these individual's comments to the  
8 government itself. (2) Second, after September 11, there can  
9 be no more inflammatory remark than linking a person with or  
10 comparing them with the September 11 "terrorists," and the  
11 attorney's involved know that. Associating a defendant with  
12 La Cosa Nostra pales in comparison. (3) Third, the  
13 statements were false. Often, prejudicial pretrial publicity  
14 arises from statements that though improper, are true, such  
15 as a description of the defendant's confession or his  
16 criminal history. In this case, they are mostly false.  
17 Defendant never threatened to kill anyone; he never desired  
18 to kill a police officer. There never has been any evidence  
19 linking any of the defendants to terrorism; indeed, as soon  
20 as two of the defendants agreed to plead guilty they were  
21 *released on bond back in to the community*. That is not how  
22 the Justice Department normally treats terrorists.

23 The combined statements of the Executive Branch create  
24 "a grave doubt that the decision to indict was free from  
25 substantial influence of such violations," Bank of Nova  
26 Scotia, 487 U.S. at 256. Given the extraordinary nature of  
27 the statements, dismissal is the appropriate remedy.

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1        3. Disclosure of grand jury transcripts.

2        Rule 6(E)(3)(C)(ii) , specifically permits disclosure of  
3 grand jury transcripts "when permitted by a court at the  
4 request of the defendant, upon a showing that grounds may  
5 exist for a motion to dismiss the indictment because of  
6 matters occurring before the grand jury." As has been  
7 described, the Executive Branch statements are grounds for a  
8 motion to dismiss. To decide this motion, the court and the  
9 defense should have the opportunity to review the grand jury  
10 transcripts and determine if the grand jurors discussed the  
11 publicity with the AUSA or whether they were voir dired  
12 regarding their ability to be impartial. See United States  
13 v. Serubo, 604 F.2d 807.

14        In Serubo, the Court of Appeals ruled that the  
15 prosecutor's conduct before the grand jury, including remarks  
16 suggesting an association between the target and organized  
17 crime, would justify dismissal of the indictment. However,  
18 the remarks were made to the first panel to hear evidence in  
19 the matter, and it was unclear whether the AUSA read those  
20 portions to the second panel, the one that returned the  
21 indictment. The Court remanded the case for production of  
22 the complete transcripts to the defense to determine this  
23 issue as well as whether the prosecutor made other improper  
24 remarks or asked other improper questions. Id. at 818-19.

25        Here, as in Serubo, there already is evidence of  
26 improper conduct that may have influenced the grand jury: the  
27 Executive Branch remarks. See United States v. Fischback &  
28 Moore, Inc., 576 F.Supp. 1384, 1394 (W.D.Pa. 1983). If the  
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1 Court does not believe that these remarks alone justify  
2 dismissal, the court should permit inspection of the grand  
3 jury transcripts.

4 In commenting on the disclosure of materials and  
5 testimony acquired by the grand jury, the Supreme Court  
6 stated that "the proper functioning of our grand jury system  
7 depends upon the secrecy of the grand jury proceedings."  
8 Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218,  
9 99 S. Ct. 1667 (1979). With certain limitations, Rule 6(e)  
10 recognizes the importance of this notion and imposes a  
11 general rule against disclosure of "matters occurring before  
12 the grand jury." Specifically, Rule 6(e) provides that:  
13 [a] grand juror, an interpreter, a stenographer, an operator  
14 of a recording device, a typist who transcribes recorded  
15 testimony, an attorney for the government, or any person to  
16 whom disclosure is made . . . shall not disclose matters  
17 occurring before the grand jury except as otherwise provided  
18 for in these rules. Fed. R. Crim. P. 6(e).

19 In accordance with the language of Rule 6(e), grand jury  
20 secrecy attempts to: (1) insure the safety of witnesses  
21 testifying before the grand jury; (2) encourage disclosure of  
22 information to the grand jury; (3) prevent perjury or  
23 tampering with witnesses; (4) prevent suspects from fleeing  
24 jurisdictions; and (5) protect the reputations of innocent  
25 individuals who are exonerated by grand jury investigations.  
26 See United States v. Sells Eng'g, Inc., 463 U.S. 418, 424,  
27 103 S. Ct. 3133, (1983); Douglas Oil Co., 441 U.S. at 219.

28 The reasons set forth therein do not apply to the  
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1 present request.

2 **CONCLUSION**

3 For the above reasons, the defendant respectfully  
4 requests that the court dismiss with prejudice the indictment  
5 in this case; or in the alternative, order immediate  
6 production of the grand jury transcripts. In any event, the  
7 court must order a gag order on the United States to remedy  
8 the previous improprieties.

9 Respectfully submitted

10 DATED: December 19, 2006.

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MARK J. REICHEL  
ATTORNEY AT LAW  
Attorney for defendant

/S/ Mark Reichel

EXHIBIT "A"

A 1 . Three people with eco-terrorism group ties arrested in Auburn

By Art Campos -- Bee Staff Writer  
Published 3:23 pm PST Friday, January 13, 2006

FBI agents said they arrested three people Friday who were plotting to blow up unspecified power generation plants, cell phone towers and U.S. Forest Service facilities. The three, who were taken into custody in a shopping center parking lot in north Auburn, planned the attacks on behalf of the Earth Liberation Front, an eco-terrorist group that commits acts of vandalism, the federal agency said. FBI Special Agent John Cauthen said agents believe the suspects had "a loose association" with four Newcastle residents who had ties to the ELF and who were arrested last year in connection with bombing incidents in Placer and Amador counties. "But there is no information to indicate they were connected to the events that resulted in the arrests of (the Newcastle residents)," Cauthen said. Arrested Friday were Eric Taylor McDavid, 28, of Foresthill; Zachary O. Jenson, 20, of Monroe, Wash.; and Lauren Weiner, 20, of Philadelphia. The three were taken from Auburn to the Sacramento County jail, Cauthen said. Karen Ernst, a spokeswoman for the FBI, said formal charges against the three will be filed next week. No bail amounts have been assigned, she added. Cauthen said the three had been living temporarily in the greater Sacramento area and their arrests are part of a continuing investigation. Cauthen declined to say whether other arrests will be made, but said the public is in no immediate danger in connection with the planned attacks. The FBI would not disclose details of those attacks or how information leading to the arrests was obtained. Cauthen said, however, that agents moved in on McDavid, Jenson and Weiner at 11 a.m. in front of a Kmart store in a shopping center at Bell Road and Highway 49 in north Auburn. The three offered no resistance, FBI agents said. "The shopping center had nothing to do with the threats or the plot," Cauthen said. "It was not a target in the plot. We were following the suspects. We had had them under surveillance and we took them down in the parking lot. "Weighing all the circumstances, the parking lot seemed to be the best place to make the arrests. The public's safety was first and foremost on our minds," he said. No explosives were recovered when the arrests were made, Cauthen said.

Bee staff writer Elizabeth Hume contributed to this report.

1 A 2. FBI arrests three suspected eco-terrorists  
2 By Greg Krikorian  
3 Los Angeles Times

4 FBI agents in Sacramento, Calif., arrested three suspected Earth Liberation Front members Friday  
5 in an alleged plot to blow up U.S. Forest Service facilities, cellular phone towers and power-generating  
6 facilities at various locations in Northern California. The arrests in the foothill community of Auburn, 30  
7 miles east of Sacramento, capped a terrorism investigation that began nearly a year ago, authorities said.  
8 Taken into custody were Eric Taylor McDavid, 28, of Foresthill, just outside Auburn; Zachary Jensen, 20,  
9 of Monroe, Wash., and Lauren Weiner, of Philadelphia, also 20. All three were being held in federal  
10 custody pending a court appearance on Tuesday, authorities said. They could not be reached for comment  
11 and it was not immediately clear who would be legally representing them in the case.  
12 While the FBI and U.S. Attorney's Office declined to provide details about the alleged evidence against  
13 the trio, FBI officials said they believe their investigation foiled a possible attack on a number of sites they  
14 would not specify.

15 "We did prevent some violent acts, I am sure of that," said Dave Picard, assistant special agent in  
16 charge of the FBI's Sacramento office. "These people could have done a lot of harm to people and  
17 property." At the same time, Picard and officials emphasized that they had nothing to indicate that there  
18 was any imminent danger to the public. The three purported members of the eco-terrorist group were  
19 arrested without incident about 11 a.m. as they exited a store in a shopping center in Auburn. There, an  
20 FBI Special Weapons and Tactics team and at least another dozen other state and local police were waiting  
21 for the suspects after a surveillance, authorities said.

22 The long-term investigation, which was coordinated by the FBI's Joint Terrorism Task Force and  
23 included the U.S. Forest Service and California Department of Fire and Forestry, began not long after  
24 other Sacramento-area attacks blamed on environmental extremists.  
25 Just days after Christmas 2004, construction workers found explosive devices at three new houses in the  
26 Sacramento suburb of Lincoln. Two weeks later, authorities were investigating an attempted arson, with  
27 five incendiary devices, at a commercial building being built in Auburn. Then last February, seven devices  
28 were discovered after a brief fire at a 100-unit apartment complex in Sutter Creek, just southwest of  
Sacramento, and a firebomb also was found outside the Placer County Courthouse in Auburn.  
The FBI later arrested four people in connection with the incidents, and three of the four have pleaded  
guilty.

While last year's incidents and the recent case have been blamed on the ELF, authorities said their  
investigation was continuing and that they had not yet found any links between the latest alleged plot and  
the arsons a year ago.

29 Motion to dismiss based upon prejudicial  
30 pretrial statements

1 A 3. January 20, 2006 Suspects In Court

2 The three suspects appeared in federal court in Sacramento Tuesday  
3 for their arraignment. In court, Assistant U.S. District Attorney  
4 described the suspects Ellen Endrizzi as misguided and dangerous. "ELF  
5 is a group that doesn't really have a leader; however, we know that Eric  
6 McDavid has strong ties to Ryan Lewis and that the group met with Eva  
7 Holland while they were in San Francisco just a few days ago," Endrizzi  
8 said. Authorities said they have connected Lewis and Holland to ELF.

9 KCRA.com

10 A4 . FOR IMMEDIATE RELEASE

11 FRIDAY, JANUARY 20, 2006  
12 WWW.USDOJ.GOVCRM  
13 (202) 514-2007  
14 TDD (202) 514-1888

15 Eleven Defendants Indicted on Domestic Terrorism Charges  
16 Group Allegedly Responsible for Series of Arsons in Western States,  
17 Acting on Behalf of Extremist Movements

18 WASHINGTON, D.C. - Eleven defendants have been indicted on charges  
19 including arson and destruction of an energy facility for allegedly  
20 participating in a campaign of domestic terrorism in five western  
21 states on behalf of the extremist Earth Liberation Front (ELF) and  
22 the Animal Liberation Front (ALF) movements, the Justice Department  
23 announced today.

24 The 65-count indictment, returned by a federal grand jury in  
25 Eugene, Ore., Thursday, alleges that the defendants committed acts  
26 of domestic terrorism in Oregon, Wyoming, Washington, California,  
27 and Colorado from 1996 through 2001. Specifically, the indictment  
28 includes the charges of conspiracy to commit arson; conspiracy;  
arson; attempted arson; use and possession of a destructive device;  
and destruction of an energy facility.

Eight defendants were arrested prior to the indictment and three  
are believed to be outside the United States.

The indictment alleges that the group committed arsons with  
improvised incendiary devices made from milk jugs, petroleum  
products and homemade timers in a series of attacks in the five  
states. The targets of these attacks included U.S. Forest Service  
ranger stations, Bureau of Land Management wild horse facilities,  
meat processing companies, lumber companies, a high-tension power  
line, and a ski facility in Colorado. The indictment alleges that  
the group claimed to be acting on behalf of ALF and ELF.

"The trail of destruction left by these defendants across the  
western United States caused millions of dollars in damage to  
public and private facilities," said Attorney General Alberto R.

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1 Gonzales. "Today's indictment proves that we will not tolerate any  
2 group that terrorizes the American people, no matter its intentions  
or objectives."

3 "Investigating and preventing animal rights and environmental  
4 extremism is one of the FBI's highest domestic terrorism  
5 priorities," said FBI Director Robert Mueller. "We are committed to  
6 working with our partners to disrupt and dismantle these movements,  
to protect our fellow citizens, and to bring to justice those who  
commit crime and terrorism in the name of animal rights or  
environmental issues."

7 "To those who use arson and explosives to threaten lives and  
8 destroy property, ATF will continue to dedicate all of our  
9 expertise to solve these crimes," said ATF Director Carl J.  
Truscott. "We will work relentlessly with our law enforcement  
partners to find you and bring you to justice."

10 According to the indictment, Joseph Dibee, Chelsea Dawn Gerlach,  
11 Sarah Kendall Harvey, Daniel Gerard McGowan, Stanislas Gregory  
12 Meyerhoff, Josephine Sunshine Overaker, Jonathan Mark Christopher  
13 Paul, Rebecca Rubin, Suzanne Savoie, Darren Todd Thurston, and  
14 Kevin M. Tubbs conspired to commit numerous acts of domestic  
15 terrorism as part of a group they called "the Family," an alleged  
16 group of the extremist movements ALF and ELF. The indictment  
17 follows a series of arrests on Dec. 7, 2005, in Oregon, Arizona,  
New York, and Virginia. Gerlach, Harvey, Meyerhoff, McGowan,  
Thurston, and Tubbs were arrested at that time for various charges,  
including the destruction of an energy facility. Paul was arrested  
on Jan. 17, 2006, on a criminal complaint charging him with one of  
the arsons mentioned in the indictment. Savoie was arrested on Jan.  
19, 2006, on a criminal complaint. Dibee, Overaker and Rubin are  
believed to be outside of the United States.

18 The indictment refers to attacks on 17 sites:

19 Oct. 28, 1996, at the U.S. Forest Service Detroit Ranger Station in  
20 Marion County, Ore.;

21 Oct. 30, 1998, at the U.S. Forest Service Oakridge Ranger Station  
in Lane County, Ore.;

22 July 21, 1997, at the Cavel West, Inc. meat packing company in  
23 Deschutes County, Ore.;

24 Nov. 30, 1997, at the U.S. Bureau of Land Management Wild Horse and  
Burro Facility in Harney County, Ore.;

25 June 21, 1997, at the U.S. Department of Agriculture National  
26 Wildlife Facility in Olympia, Wash.;

27 Oct. 11, 1998, at the U.S. Bureau of Land Management Wild Horse  
Holding Facility in Rock Springs, Wyo.;

28 Oct. 19, 1998, at the Vail Ski Facility in Vail, Colo.;

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1 Dec. 27, 1998, at U.S. Forest Industries in Jackson County, Ore.;

2 May 9, 1999, at Childers Meat Company in Lane County, Ore.;

3 Dec. 25, 1999, at the Boise Cascade office in Polk County, Ore.;

4 Dec. 30, 1999, at a Bonneville Power Administration high-tension  
5 power line tower near Bend, Ore.;

6 Sept. 6, 2000, at the Eugene Police Department West University  
7 Public Safety Station in Eugene, Ore.;

8 Jan. 2, 2001, at the Superior Lumber Company in Douglas County,  
9 Ore.;

10 March 30, 2001, at Joe Romania Chevrolet Truck Center in Eugene,  
11 Ore.;

12 May 21, 2001, at Jefferson Poplar Farms in Columbia County, Ore.;

13 May 21, 2001, at the University of Washington Horticultural Center  
14 in Seattle; and

15 Oct. 15, 2001, at the U.S. Bureau of Land Management Wild Horse  
16 Facility in Litchfield, Calif.

17 An indictment is not evidence of guilt. The defendants named in  
18 this indictment are presumed innocent unless and until proven  
19 guilty.

20 The cases are being prosecuted by the office of the U.S. Attorney  
21 for the District of Oregon. The cases are being investigated by the  
22 FBI and ATF, along with the Eugene Police Department, Bureau of  
23 Land Management, U.S. Forest Service, Oregon State Police, Portland  
24 Police Bureau, Oregon Department of Justice, and the Lane County  
25 Sheriff's Office.

26 [www.usdoj.gov/opa/pr/2006/January/06\\_crm\\_030.html](http://www.usdoj.gov/opa/pr/2006/January/06_crm_030.html)

27 A.5. FOR IMMEDIATE RELEASE

28 Patty Pontello,  
Wednesday, January 25, 2006  
Phone: 916-554-2706

Fax: (916) 554 2874  
<http://www.usdoj.gov/usao/cae>  
McGregor W. Scott  
United States Attorney  
Eastern District of California

ECO-TERRORISTS INDICTED  
Trio Foiled in Their Plot to Attack Government and Private Property

Motion to dismiss based upon prejudicial  
pretrial statements

1 SACRAMENTO, CA-United States Attorney McGregor W. Scott and FBI  
2 Special Agent in Charge Drew S. Parenti announced today that a  
3 federal grand jury returned a one-count indictment charging Eric  
4 McDavid, 28, of Foresthill, California, Zachary Jenson, 20 of  
5 Monroe, Washington, and Lauren Weiner, 20, of Philadelphia,  
6 Pennsylvania, with conspiracy to damage and destroy property by  
7 fire and an explosive.

8 This case is the product of an extensive investigation by various  
9 federal, state, and local law enforcement agencies comprising the  
10 FBI Joint Terrorism Task Force (JTTF), as well as assistance from  
11 the United States Forest Service and the California Department of  
12 Fire and Forestry.

13 According to Assistant United States Attorneys R. Steven Lapham and  
14 Ellen V. Endrizzi, who are prosecuting the case, the indictment  
15 alleges that McDavid, Jenson, and Weiner conspired between June  
16 2005 through January 13, 2006, to maliciously damage or destroy, or  
17 attempt to do so, by fire and an explosive, government- and  
18 privately-owned and funded property. Targets included the United  
19 States Forest Service Institute of Forest Genetics, the Nimbus Dam  
20 and Fish Hatchery, cellular telephone towers, and electric power  
21 stations.

22 In furtherance of the conspiracy, McDavid, Jenson, and Weiner  
23 performed a number of acts. During the weekend of November 18-20,  
24 2005, McDavid, Jenson, and Weiner met, in the presence of a  
25 confidential source, at a residence in Foresthill, California and  
26 conducted a planning meeting at which they identified potential  
27 targets of destruction. Following that meeting, Weiner ordered the  
28 book Poor Man's James Bond, which contains instructions for  
creating explosive devices. That book was later seized from the  
defendants' rented residence in Dutch Flat, California. As part of  
their plan, on January 10, 2006, McDavid, Jenson, and Weiner, in  
the presence of a confidential source, visited the Nimbus Dam and  
Nimbus Fish Hatchery, and later that day visited the United States  
Forest Service Institute of Forest Genetics, to perform  
reconnaissance on those prospective targets for destruction. On  
January 11, 2006, all of the defendants, in the presence of a  
confidential source, traveled to a store in Sacramento to purchase  
ingredients necessary for the creation of an explosive device,  
including three bottles of bleach, a hot-plate, glassware, a  
gasoline can, a car battery, and three jars of petroleum jelly.  
Finally, on January 12, 2006, Weiner and McDavid measured and  
heated bleach on a hot-plate at a rented residence in Dutch Flat,  
California, in order to create crystals necessary for an explosive  
device.

McDavid, Jenson, and Weiner were arrested on January 13, 2006  
outside a retail store in Auburn, California.

"Eric McDavid and his co-defendants pose a grave risk to the safety  
of our communities. They would not hesitate to commit dangerous and  
life-threatening acts in the name of their extremist views," said  
United States Attorney Scott.

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1 "The FBI, along with member agencies of the JTTF, will continue to  
2 investigate individuals who cross the line between free speech and  
criminal activity in the name of their beliefs," said SAC Parenti.

3 If convicted, the maximum penalty under federal law for each  
4 offense is imprisonment for at least 5 but no more than 20 years, a  
fine of \$250,000, and a three-year term of supervised release.

5 The defendants are currently in custody at the Sacramento County  
6 Jail. Magistrate Judge Gregory H. Hollows has taken the bail issue  
for all three defendants under submission.

7 McDavid, Jenson, and Weiner will be in court again on January 26,  
8 2006, at 2:00 p.m. before Magistrate Judge Hollows for arraignment  
on the indictment.

9 The charges are only allegations and the defendant is presumed  
10 innocent until and unless proven guilty beyond a reasonable doubt.

11 [sacramento.fbi.gov/dojpressrel/pressrel106/sc01252006.htm](http://sacramento.fbi.gov/dojpressrel/pressrel106/sc01252006.htm)  
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1 A.6. Federal grand jury indicts eco-terror suspects  
2 Prosecutor says Foresthill suspect was the ringleader

3 By: Penne Usher, Journal Staff Writer  
4 Thursday, January 26, 2006 12:43 AM PST

5 U.S. Attorney McGregor W. Scott said during a Wednesday press  
6 conference that Eric McDavid, one of three suspected  
7 eco-terrorists, threatened to kill a confidential source working  
8 for the FBI. Photo by Ben Furtado/Auburn JournalSACRAMENTO - Three  
9 suspects involved in an alleged eco-terrorist plot to destroy  
10 government buildings, banks and a dam were indicted by a federal  
11 grand jury, the U.S. Attorney announced Wednesday.

12 U.S. Attorney McGregor W. Scott said at an afternoon press  
13 conference that the grand jury returned an indictment charging Eric  
14 McDavid, 28, of Foresthill, Zachary Jenson, 20, of Monroe, Wash.  
15 and Lauren Weiner, 20, of Philadelphia, Pa., with one count of  
16 conspiracy to damage and destroy property by fire or explosives.

17 The indictment states that the three, who were arrested Jan. 13 in  
18 the parking lot of the Bell Road Kmart in Auburn, intentionally  
19 conspired with "others known and unknown" to "maliciously damage  
20 and destroy" buildings, cellular telephone towers and electric  
21 power stations.

22 Scott said the three met at an anarchist convergence where McDavid  
23 provided training to other anarchists.

24 "(McDavid) also advocated violent protest and expressed his desire  
25 to kill a police officer," Scott said.

26 He went on to say that it was McDavid who recruited co-defendants  
27 Weiner and Jenson to assist with his plans.

28 On Jan. 10 all three visited the Nimbus Dam and Nimbus Fish  
Hatchery and the U.S. Forest Services Institute of Forest Genetics  
to perform "reconnaissance" on prospective targets, the indictment  
reads.

The following day McDavid, Jenson and Weiner reportedly purchased  
ingredients to create an explosive device, including bleach, a  
hotplate and a car battery. On Jan. 12 the three suspects allegedly  
heated the bleach at a rented home in Dutch Flat to make crystals  
necessary for an explosive device.

A female informant working for the FBI infiltrated the  
eco-terrorist groups local "cell," according Nason Walker, FBI  
special agent. The foursome was video and audiotaped at a Dutch  
Flat cabin pre-wired with surveillance equipment by the FBI.

Additionally, Scott said that McDavid was a "friend" of Ryan Lewis,  
23, of Newcastle, who pleaded guilty to Oct. 14 to two county of  
attempted arson and one count of arson in relation to "a string of

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1 ELF-related arsons in Placer County."  
2 Though friends, they were apparently not co-conspirators.  
3 "Mr. McDavid was not involved in Mr. Lewis' crime spree, nor was  
4 Mr. Lewis involved in Mr. McDavid's plans," Scott said.  
5 Lewis is free on \$500,000 bail and scheduled to be formally  
6 sentenced March 17.  
7 David Picard, assistant special agent in charge for the Sacramento  
8 division of the FBI, said although the three suspects did not  
9 actually carry out any of their plans, plotting to do so is still a  
10 crime.  
11 "They conspired and plotted," Picard said. "They were definitely  
12 going forward with their plan."  
13 The grand jury indictment comes in the midst of detention hearings  
14 for the three in which the attorneys for the defendants have argued  
15 for their release on bail. Magistrate Judge Gregory Hollows is  
16 expected to make a decision on bail by the end of the week.  
17 The indictment takes the place of a preliminary hearing allowing  
18 the prosecution to continue toward a jury trial that must commence  
19 70 days after arraignment. McDavid, Jenson and Weiner are scheduled  
20 to appear in federal court at 2 p.m. today to be arraigned on the  
21 indictment charge.  
22 The three remain in Sacramento County Jail without bail. If  
23 convicted they each face from five to 20 years in prison.  
24 The Journal's Penne Usher can be reached at [penneu@goldcountrymedia.com](mailto:penneu@goldcountrymedia.com).