

FIGER JUDGE: PROSECUTION “UNUSUAL;” GOVERNMENT MUST EXPLAIN RECUSAL

In what may be a significant victory for efforts to show that the Bush Administration has selectively targeted political opponents, the Judge in the Geoffrey Fieger case, Paul Borman, just ruled that this case is sufficiently unusual that the government must provide the evidence that Fieger’s team would need to argue Fieger was vindictively prosecuted.

A key to Borman’s thinking is the quote—and emphasis—he gives to support the threshold for a vindictive prosecution claim.

Judge David Nelson’s opinion discussed the constitutional underpinning for a claim of vindictive prosecution:

[A] prosecution which would not have been initiated but for governmental “vindictiveness” – a prosecution that is, which has an “actual retaliatory motivation” – is constitutionally impermissible. *Blackledge v. Perry*, 94 S.Ct. 2098, 2102 (1974).

Id. at 1145 (emphasis added).

Borman stresses the centrality of the way a case **is initiated**. Not surprisingly, then, several of the factors that Borman describes as making this case unusual have to do with the start of the case. In particular, he focuses on Detroit’s failure to consult with Public Integrity at DOJ before they initiated their investigation of Fieger.

Thus, the DOJ Manual permits local federal investigations of vote fraud and patronage crimes without prior consultation with the DOJ's Integrity Section. The [Federal Prosecution of Election Offenses] Manual treats campaign finance investigations differently: prior to beginning any such investigation, the local AUSA must first consult with and be cleared by the DOJ Public Integrity section. The Manual's mandated prior consultation with the DOJ Public Integrity Section by the Detroit U.S. Attorney's office did not occur in the instant case. [emphasis Borman's]

Because they didn't coordinate from the start of the investigation, Borman suggests (reflecting claims Fieger's team have made), the government prevented FEC from getting involved in the investigation, and doing what FEC normally does in such cases, imposing civil penalties in lieu of criminal prosecution.

The local AUSA's failure to preliminarily contact the DOJ Public Integrity Section before beginning an investigation, removed the option of the DOJ initially consulting with the FEC prior to the investigation, and coordinating enforcement from the beginning between FEC and DOJ.

But these aren't the only reasons Borman finds this case unusual. He gives an extensive list of other reasons.

- [I]t is the first such prosecution ever brought by the Detroit office.
- [T]he instant federal grand jury proceedings went beyond inquiring into Federal election campaign finance

violations, but also were directed at examining Defendant Fieger's role in the funding of opposition advertisements against the state reelection campaign of Michigan Supreme Court Justice Stephen Markman, a former U.S. Attorney.

- [T]here was, at a minimum, scheduling coordination efforts between the local U.S. Attorney's office and the Michigan Attorney General's office with regard to the investigation, of Defendant Fieger on the federal level (Edwards campaign), and on the state level (Markman and Granholm campaigns).
- [S]even months after the local prosecution was initiated, the top three principal executives in charge of the Detroit U.S. Attorney's Office, U.S. Attorney Stephen J. Murphy, First Assistant U.S. Attorney Terrence G. Berg, and Senior Counsel to the U.S. Attorney Jonathan Tukel, were ordered recused by the DOJ.
- On the November 2005 evening when the Government simultaneously executed a

search warrant at Defendant's law offices, and interviewed 30 election campaign contributors at their homes, the Government assembled a task force of over 75 agents.

Borman ruled that the government must give Fieger's team two things. A list of the previous times when the government has mobilized 75 agents to raid an allegedly criminal enterprise. And, more importantly, the reason why the USA and his two top deputies recused themselves seven months into the investigation.

The Importance of the Recusal Information

It's not clear what good a list of mob raids is going to do Fieger's defense team (though in the hands of Gerry Spence, who is representing Fieger, it'll make for great theater). But Borman repeatedly makes it clear that he judges the reason for the recusals to be critical to Fieger's ability to prove he was vindictively prosecuted (and that there may be some basis to Fieger's claim).

But while the Government finds that "the particular information we have provided is only marginally relevant to Defendants' claim," the Court concludes that **the information is quite relevant and essential to that claim.**

[snip]

The Court having viewed the evidence submitted by the Government in camera, the briefing, and the oral argument, concludes that there is presently sufficient evidence to support Defendants' vindictive prosecution allegation to entitle them to the instant initial discovery matter – the reason for recusal – in pursuing their claim.

[snip]

In the instant case, the Court is not concluding that there has been governmental misconduct. However, the Court does conclude that the information at issue – **the reason for the November recusal – is essential to permit the Defendants to argue their claim, of Government misconduct.**

[snip]

Defendants assert that the individual prosecutors, local and national, have a “stake” in the exercise of Defendant Fieger’s protected First Amendment rights. The reason for the recusal is relevant to Defendants’ ability to present that argument to the Court.

The Possible Reason for the Recusal and Its Impact on the Case

Of course, Borman doesn’t spell out the reason for the USA’s recusal. Here’s how Gerry Spence describes the chumminess between the recused lawyers and Michigan Republicans.

Now the first thing I would like Your Honor to know is that in 1992, when Mr. Markman now on the Supreme Court of the State of Michigan when Mr. Markman was the U.S. Attorney here, he hired Mr. Murphy as an Assistant U.S. Attorney; they are friends and that’s how far back they go.

[snip]

In the middle of November of 2005, Mr. Cox for the State of Michigan, his investigation went sour. He appointed a special prosecutor to prosecute Mr. Fieger. The special prosecutor reported that there wasn’t any crime. Not only that, but the Cox people came in with their steeds and her swords and their subpoenas and subpoenaed everything from

Mr. Fieger's office.

[snip]

Now it was at that time, in that period of time, that Mr. Murphy and Mr. Tukul and Mr. Berg, all three, all three after having been in this seven months, decided they better get out.

[snip]

[Spence reverts back in time] Then Mr. Markman's wife went to work for Mr. Cox. And then Mr. Cliff Taylor, who was the best friend to Mr. Engler, went to the Michigan Supreme Court and his wife went to work for Mr. Cox. And then Mr. Cox and Mr. Fieger got into this brou ha ha in which Cox publicly charged Mr. Fieger with trying to blackmail him for having elicited relationships with another woman. So Cox put that off to a special prosecutor.

[snip]

Cox and Tukul are friends.

In short, two of the recused lawyers have close ties to the Michigan politicians who have been trying to prosecute Fieger for some time.

Borman says one more thing—very early in his opinion—that suggests the recusal issue goes further than just the close ties between Murphy and Tukul and the top MI Republicans. He notes that the DOJ Manual (the same one the Detroit office ignored when they didn't consult with PIN at the beginning of the investigation) limits the federal jurisdiction of state-level campaign finance violations.

The Manual notes, that it is harder to obtain federal jurisdiction when there is no federal candidate on the ballot — no federal election process. Manual, 6-7. The Manual recognizes that "federal campaign financing law does not apply to

violations of state campaign laws.”

This suggests that something about the early investigation into Fieger’s campaign finance violations pertains largely (perhaps even exclusively) to the state finance charges that Mike Cox and his political allies tried, but failed, to charge Fieger with immediately before the federal lawyers were recused. After noting this passage from the DOJ Manual, Borman describes in detail that the early investigation focused closely on the Markman case.

The Court finds significant that from the initiation of the federal investigation in April 2005, the state judicial re-election campaign of former U.S. Attorney, now Michigan Supreme Court Justice, Stephen Markman was involved in this investigation. Specifically on April 13, 2005, when Eric Humphries [sic], a former Fieger employee, walked into Detroit FBI offices and provided information that launched this investigation, he alleged campaign violations by Defendants Fieger and Johnson with regard to the 2004 Federal Edwards for President campaign, and the state reelection campaign of Michigan Supreme Court Justice Markman.

[snip]

The Government has stated, in response to Defendants’ assertions that grand jury witnesses claimed they were asked about the Defendant Fieger’s financing of an anti-Markman campaign, that “one can assume” that the anti-Markman state campaign financing issue was part of the federal investigation.

Borman also mentions the investigation’s questions about whether Fieger’s associates voted for Jennifer Granholm.

Stated this way, it sure looks like the USA

office used state-level charges to initiate a federal investigation into Fieger. Which may be why they tried—successfully—to keep the FEC out of the investigation.

Borman has ordered the government to turn over the recusal information by next Thursday, with a status hearing scheduled for Friday. So we'll have some idea then why the top federal lawyers in MI suddenly bailed from this investigation seven months into it.