

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

JAN - 8 2002

Alexandria Division

\_\_\_\_\_  
UNITED STATES OF AMERICA )  
 )  
v. )  
 )  
ZACARIAS MOUSSAOUI, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Criminal No. 01-455-A

GOVERNMENT'S RESPONSE TO AMICUS CURIAE MEMORANDUM  
FILED BY NATIONAL NARROWCAST NETWORK, L.P.

On January 7, 2002, National Narrowcast Network, L.P. ("NNN") moved for leave to file an Amicus Curiae memorandum in response to the motion of Intervenor Courtroom Television Network LLC (Court TV) to record and telecast pretrial and trial proceedings in this case. This court granted this motion on January 8, 2002. Although time constraints preclude a full reply to NNN's memorandum, we offer the following responses to the key arguments made in this brief.

1) NNN proposes to provide "audio-only coverage" of the proceedings in this case live by telephone. The rules that preclude a televised broadcast, however, equally preclude the broadcast NNN proposes. In particular, Fed. R. Crim. P. 53 prohibits "[t]he \* \* \* radio broadcasting of judicial proceedings from the court room." Likewise, Local Rule 83.3 bans the "[t]he \* \* \* operation of tape recorders in the Courtroom or its environs, and radio and television broadcasting from the Courtrooms and its environs during the progress of or in connection with judicial proceedings \* \* \*."

NNN suggests, but does not seriously argue, that the term "radio broadcasting" does not apply to the type of transmission it contemplates because its transmission will use telephone

wires, not radio waves. Amicus Curiae Memorandum of National Narrowcast Network, L.P. (“Amicus Memo.”) at 5. This suggestion lacks all merit. Should NNN be permitted to broadcast these proceedings by telephone wires, its broadcast would be immediately rebroadcast by radio. Accordingly, the effect of its broadcast would be identical to a radio broadcast and is therefore covered by the rules quoted above.

2) NNN also suggests that there are no risks to the integrity of the trial process when the broadcast is audio only. Amicus Memo. 1, 6-7. Significantly, however, amicus does not argue that there is a constitutional distinction between audio and television broadcasts. Amicus Memo. 7 (“This Court need not reach the Constitutional questions raised by Court TV.”). This decision is a wise one. While some of the negative effects associated with televised broadcasts may be improved somewhat when the visual portion of the broadcast is eliminated, these negative effects do not simply disappear. To the contrary, a live audio broadcast of criminal proceedings still poses many of the same problems as a televised broadcast, including the potential intimidation and distraction of witnesses, the distraction of the court and counsel, and the creation of a target for terrorism. See generally Government’s Opposition to Motion of Courtroom Television Network LLC for Leave to Record and Telecast Pretrial and Trial Proceedings.

3) Next, NNN finds precedent for an audio broadcast of these proceedings in the Supreme Court’s decision to permit a delayed audio broadcast of the arguments in Bush v. Gore, (S. Ct. 00-949), and the D.C. Circuit’s decision to permit an audio broadcast of the oral arguments in U.S. v. Microsoft Corporation, (D.C. Cir. No. 99-5212). Amicus Memo. 3. Those proceedings are not comparable to this one because they involved appellate arguments in civil cases. As NNN acknowledges, the Judicial Conference specifically permits the broadcasting of

such arguments, at the discretion of the relevant court. Accordingly, the broadcasts in those cases did not take place in spite of a valid court rule prohibiting them.<sup>1</sup>

4) At the heart of NNN's filing is its suggestion that this Court should revise Local Rule 83.3 to permit the broadcasting of this particular proceeding. Amicus Memo. 4-6. At the outset, we note that this is not a legal argument for this Court to decide. Instead, it is a policy proposal that would need to be considered by the entire Eastern District of Virginia District Court. Moreover, the proposal is unsound. 28 U.S.C. § 2071(a), Fed. R. Crim. P. 57(a)(1) and Local Rule 1 all require that local rules be consistent with federal rules, including the Federal Rules of Criminal Procedure. A local rule that permitted the broadcasting of these proceedings would conflict with Fed. R. Crim. P. 53, and thus could not be adopted by this Court.

5) NNN appears to argue that the Guide to Judiciary Policies and Procedures somehow authorizes this Court to adopt a local rule permitting the broadcasting of a criminal trial, notwithstanding Fed. R. Crim. P. 53. Amicus Memo 5-6. In fact, the relevant portion of this Guide (Exhibit A) indicates that judges should not authorize broadcasting in the courtroom, subject only to exceptions inapplicable here.<sup>2</sup> Accordingly, this Guide provides an independent

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<sup>1</sup> Katzman v. Victoria's Secret Catalogue, 923 F. Supp. 580 (S.D.N.Y. 1996), also involved civil proceedings, and, in the court's view, the broadcasting of those proceedings did not violate any applicable local rule. The Katzman court recognized, however, that such a broadcast could not take place in a criminal case given Fed. R. Crim. P. 53. Id. at 583 n.1.

<sup>2</sup> NNN may intend to suggest that these proceedings fall within the exception permitted for broadcasts that are "for other purposes of judicial administration." This is incorrect. No purpose of "judicial administration" would be served by broadcasting these proceedings.

basis for concluding that the proceedings in this case should not be televised.<sup>3</sup>

6) NNN also suggests that a local rule permitting the broadcasting of these proceedings could somehow be adopted notwithstanding Fed. R. Crim. P. 53 as long as the Circuit Council chose not to abrogate such a rule. Amicus Memo. 5-6. In support of this claim, Amicus notes that in March 1996, the Judicial Conference voted to urge each Circuit Judicial Council to adopt an order reflecting the Conference's decision not to permit the broadcasting of proceedings in U.S. district courts. Amicus infers from this action that the failure of a Circuit Judicial Council to adopt such an order would leave the district courts within that circuit free to adopt local rules that permit such broadcasts.<sup>4</sup> This inference is misguided. Regardless of whether the relevant Circuit Council chooses to act on the Judicial Conference's recommendation, the district courts within that circuit are still obligated to adopt local rules that do not conflict with the Federal Rules of Criminal Procedure. Indeed, the Circuit Judicial Councils have an independent obligation to ensure that local rules within the Circuit and general federal rules do not conflict. 28 U.S.C. § 332(d)(4). Accordingly, there is no basis to believe that the Eastern District of Virginia may ignore Fed. R. Crim. P. 53, unless the Fourth Circuit Judicial Council instructs it not to.<sup>5</sup>

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<sup>3</sup> We note that the district court in Katzman did not refer to this prohibition in concluding that it had discretion to televise civil proceedings. 923 F. Supp. at 583-84.

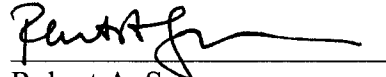
<sup>4</sup> The Fourth Circuit does not appear to have entered an order pursuant to 28 U.S.C. § 332(d)(1) addressing the broadcasting of proceedings in district courts.

<sup>5</sup> Nor can the Fourth Circuit Judicial Council adopt a rule that conflicts with Fed. R. Crim. P. 53. While each council may "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit," 28 U.S.C. § 332(d)(1), an order that conflicts with the federal rules would be neither necessary nor appropriate.

Respectfully submitted,

PAUL J. McNULTY  
UNITED STATES ATTORNEY

By:



Robert A. Spencer  
Kenneth M. Karas  
David J. Novak  
Assistant United States Attorneys



Elizabeth D. Collery  
Attorney  
Appellate Section  
Criminal Division  
U.S. Department of Justice

Date: January 8, 2002

Certificate of Service

I certify that a true and correct copy of the foregoing Government's Opposition to Motion of Courtroom Television Network LLC for Leave to Record and Telecast Pretrial and Trial Proceedings was served by fax on January 8, 2002, on the counsel listed below:

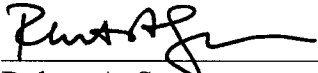
Lee Levine  
Jay Ward Brown  
Cameron A. Stracher  
Levine Sullivan & Koch  
1050 Seventh Street, N.W.  
Suite 800  
Washington, DC 20036  
(fax number 202-861-9888)

Derek A. Dyson  
Duncan, Weinberg, et al.  
1615 M Street, N.W.  
Washington, DC 20036  
(Fax number 202-467-6379)

Frank W. Dunham, Jr.  
Federal Public Defender  
Eastern District of Virginia  
401 Courthouse Sq., Ste. 300  
Alexandria, VA 22314  
(fax number 703-299-3323)

Gerald T. Zerkin  
Assistant Federal Public Defender  
830 Main Street  
Richmond, VA 23219  
( fax number 804-648-5033)

Edward B. MacMahon, Jr.  
107 East Washington Street  
P.O. Box 903  
Middleburg, VA 20118  
(fax number 540-687-6366)

  
\_\_\_\_\_  
Robert A. Spencer  
Assistant U.S. Attorney