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

UNITED STATES OF AMERICA	)	
	)	
v.	)	Crim. No. 01-455-A
	)	Hon. Leonie M. Brinkema
ZACARIAS MOUSSAOUI	)	

GOVERNMENT'S RESPONSE TO DEFENDANT'S
MOTIONS REGARDING GOVERNMENT SURVEILLANCE

Defendant has filed a number of motions (docket numbers 231, 232, 235, 237) demanding that the Government assert in various ways that it did not conduct surveillance of him before he was arrested on August 16, 2001. Even though the issue is of dubious relevance and the defendant is not entitled to such a statement, and even though we have already stated on the record that we know of no such surveillance, we here seek to reiterate that the defendant was not under surveillance by the Government before his arrest on August 16, 2001.

First, the U.S. Government did not conduct electronic or physical surveillance of the defendant before his arrest on August 16, 2001.[1] Second, the U.S. Government knows of no surveillance of the defendant by a foreign government before August 16, 2001. Third, the U.S. Government knows of no searches of the defendant or any of his U.S. residences before August 16, 2001.[2]

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[1] The defendant was not the target of U.S. Government surveillance before August 16, 2001, and, as far as we know, he was not under any surveillance. Given his admitted international telephone calls (e.g., his calls from Kandahar to Azerbaijan and to Chechnya, *see* docket numbers 241, 243), however, it may be possible that the defendant was intercepted. We know of no such interceptions, however.

[2] What the U.S. Government knew about the defendant *after* August 16, 2001, and before September 11, 2001, has been produced to defense counsel largely, though not exclusively, as classified discovery.

These statements are more than sufficient. The defendant is not entitled to the "certification" he repeatedly demands.

As a threshold matter, the defendant fails to set forth how the alleged surveillance is exculpatory or material to his defense. Even assuming that the U.S. was surveilling him before August 16, 2001, such surveillance would not exculpate him as he implies. Accordingly, the defendant's repeated demands for varying certifications and assurances should be denied, as should his requests for a hearing on whether he was under surveillance.

Moreover, as a matter of law, the defendant is not entitled to such certifications. Even if defendant's claim can be read as a demand under 18 U.S.C. § 3504,[3] it is too speculative to satisfy the required *prima facie* showing. *See United States v. Apple*, 915 F.2d 899, 905 (4th Cir. 1990) (to substantiate § 3504 claim, claimant must make a "prima facie showing" that he was intercepted unlawfully); *In re Millow*, 529 F.2d 770, 774 (2d Cir. 1976) (Section 3504 claim must "not be based upon mere suspicion but must at least appear to have a 'colorable' basis before it may function to trigger the government's obligation to respond under Section 3504"). Here, the defendant has offered no basis to suggest that he was under surveillance by the U.S. Government. Instead, he has tendered pure speculation.

The defendant is, of course, free to seek to subpoena whatever witnesses he believes are relevant for trial. If he intends to subpoena government employees, such as the Director of the FBI, he is required to comply with the *Touhy* regulations. *See* 28 C.F.R. §§ 16.21 *et. seq.*

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[3] Section 3504 permits an "aggrieved party" to make a "claim" that evidence is inadmissible "because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act." Under this provision, an "unlawful act" is defined as the "use of any electronic mechanical or other device (as defined in section 2510(5) [of title 18]) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto."

Next, the defendant demands a certification that before August 16, 2001, the U.S. Government received no information from the British government that the defendant was linked to terrorists. We are unaware of any information received from the British, or from any other foreign government, before August 16, 2001, that the defendant was linked to terrorism. Again, there is no legal basis whatever to provide a "certification."

Finally, the defendant alleges that the U.S. Government knew of, surveilled, and facilitated the movement of the 19 September 11 hijackers in and out of the U.S., and, in general, the defendant seeks the same assurances on U.S. Government surveillance of the 19 hijackers.

Again, as a threshold matter, any such surveillance would not exculpate the defendant. Moreover, the defendant does not have standing to challenge any surveillance of or seizures from third parties, namely, the 19 hijackers. *See United States v. Padilla*, 508 U.S. 77 (1993) (defendant had no standing to challenge admission of evidence illegally obtained from co-defendants and co-conspirators); *Apple*, 915 F.2d at 905 (person must be "'aggrieved,'" that is, a party to illegally intercepted communications, to challenge them).

Nonetheless, even though the defendant is not entitled to such assurances, we state: The U.S. Government did not facilitate the movement of any of the 19 hijackers; the U.S. Government did not have any of the 19 under surveillance while they were in the U.S.; and, what if anything the U.S. intelligence services knew of the 19 hijackers was produced to defense counsel as classified discovery.

In sum, the defendant's motions for certifications and hearings on whether he and the 19 hijackers were under surveillance should be denied. Whether such surveillance existed is not relevant and the Government's statements that there was no surveillance are sufficient.[4]

Respectfully Submitted,

Paul J. McNulty
United States Attorney

By: /s/
Robert A. Spencer
Kenneth M. Karas
David J. Novak
Assistant United States Attorneys

[4] To the extent the defendant files future motions that repeat these demands, as has been his practice on other issues (such as the question of standby counsel), the Government will rely on this response, unless otherwise directed by the Court.

CERTIFICATE OF SERVICE

I certify that on July 1, 2002, a copy of the attached Government's Response to Defendant's Motions Regarding Government Surveillance was sent by hand delivery, via the United States Marshal's Service to:

Zacarias Moussaoui
Alexandria Detention Center
2001 Mill Road
Alexandria, Virginia 22314

I further certify that on the same day a copy of the attached Government's Response Defendant's Motion for Production was sent by facsimile and regular mail to:

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_/s/_____
Robert A. Spencer
Assistant U.S. Attorney