IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNDER SEAL

UNITED STATES OF AMERICA	)	
	)	
v.	)	Crim. No. 01-455-A
	)	
ZACARIAS MOUSSAOUI,	)	
Defendant	)	

REPLY OF THE UNITED STATES IN SUPPORT OF ITS EXPEDITED MOTION OF THE UNITED STATES FOR CLARIFICATION REGARDING THE APPLICABILITY OF THE PROTECTIVE ORDER FOR UNCLASSIFIED BUT SENSITIVE MATERIAL AND LOCAL CRIMINAL RULE 57 TO INFORMATION THAT MAY BE MADE PUBLIC IN CONGRESSIONAL PROCEEDINGS

The United States filed a motion asking this Court to clarify the scope of its Protective Order in this case, as well as the application of Local Criminal Rule 57 to this matter. The impetus for the government's motion was the August 5, 2002 letter from the Staff Director of the congressional intelligence committees' Joint Inquiry notifying the Department of Justice that the Joint Inquiry intended soon to commence public hearings that would delve into various areas that are or might be covered by the Protective Order and Rule 57. The Joint Inquiry and defendant's standby counsel have now responded to our motion, and we are filing this reply in order to address several points made in those responses.

As an initial point, we wish to make clear that the government has three main interests in this matter: (1) to make certain that defendant's constitutional fair trial right is preserved so that this prosecution can proceed as scheduled; (2) to assist the Joint Inquiry to the fullest extent

possible as it carries out its important public function; and (3) to obey procedural orders and rules entered or enforced by this Court.

1. The Joint Inquiry asserts that the government is attempting to expand the scope of the Protective Order and Rule 57. We have no desire to do so, and merely wish this Court to clarify for the government what it is allowed to do so that its witnesses in the legislative hearings do not inadvertently violate the orders or rules of this Court. In other words, as long as the fair trial rights of the defendant are preserved, the government has no interest of its own in this matter and is quite content to work cooperatively with the Joint Inquiry in its important endeavor.

The Joint Inquiry nevertheless contends (at 5) that, by suggesting that Rule 57 would cover public testimony by government officials concerning the defendant and the prospective evidence in the case, the government has rendered the language of subsection (E) of that rule meaningless. That subsection provides that the rule is not intended to preclude the holding of hearings or the issuance of reports by legislative bodies.

The Joint Inquiry's argument is overstated. As we pointed out in our motion, Rule 57 covers extrajudicial statements that a reasonable person would expect to be publicly disseminated and that would be reasonably likely to interfere with a fair trial or prejudice the due administration of justice. Our understanding is that subsection (E) would therefore allow public disclosure of all sorts of information, as long as it would not interfere with a fair trial for the defendant. Thus, in this instance, the Joint Inquiry can gather evidence or testimony from government witnesses for public release, if that disclosure would not undermine defendant's fair trial rights.

Thus, contrary to the Joint Inquiry's claim that our reading of Rule 57 would severely limit the ability of legislative bodies to obtain information from sources other than the government or the defense attorneys, that reading leaves legislative bodies free to gather and disseminate information gleaned from those sources, as long as that dissemination would not harm fair trial rights.

2. The Joint Inquiry further argues that case law supports the notion that the Protective Order and Rule 57 were not meant to cover public testimony before congressional committees, even by prosecutors providing information highly incriminating for the defendant. The Joint Inquiry contends that case law supports the view that the order and rule were not meant to cover in any way testimony before congressional committees. However, neither of the cases cited to the Court by the Joint Inquiry support that position.

The decision in FTC v. Owens-Corning Fiberglas Corp., 626 F.2d 966 (D.C. Cir. 1980), dealt with the question of whether Congressional requests for confidential documents held by the FTC would lead to a public disclosure forbidden by the FTC Act. The D.C. Circuit explained that the FTC may not deny Congress access to confidential information, and that a court may not block disclosure of material in Congress' possession, when the disclosure would serve a valid legislative purpose. But those statements are quite different from what is involved here: the Joint Inquiry's apparent belief that this Court lacks any authority to preserve constitutional fair trial rights by issuing protective orders that would govern the conduct of federal law enforcement officials as they testify publicly during Congressional hearings about a pending criminal case. Indeed, the D.C. Circuit expressly noted that "[l]anguage in some cases indicates that courts may

be able to order an agency not to deliver documents when it is 'evident' that the congressional requestor intends to divulge trade secrets without good cause." Id. at 970.

The decision in In re San Juan Star Co., 662 F.2d 108 (1st Cir. 1981), is similarly problematic for the Joint Inquiry's position. There, the First Circuit ruled that the district court had erred in quashing subpoenas issued by a Puerto Rican legislative body seeking deposition testimony. But the court made clear its belief that, given the proper facts involving a grave and immediate threat to a fair trial, the district court could issue such an order. Id. at 119. Significantly, the First Circuit went on to say that the district court should have explored narrower orders than a broad one quashing the legislative subpoenas; the court could have, for example, "sought simply to avoid publication of the subpoenaed documents by the Senate." Ibid.

In this case, we at no point suggested that this Court should quash any subpoenas from, or even limit the provision of information to, the United States Congress. Rather, we have indicated merely that, if this Court rules that specified material that could interfere with defendant's fair trial right should not be publicly disclosed at this time, the Department of Justice will take steps to ensure that this Court's order is not violated by government officials as they testify.

3. Standby counsel for defendant have made two responses. First, they ask that the filings in connection with our motion, and the hearing about it, be unsealed. We explained in our motion why our filing was made under seal. However, the government does not object to unsealing if the Court does not believe that defendant's fair trial rights will be harmed. The only exception covers the draft public statement by the Director of the FBI. Since that document is a draft only and was provided to the Court in that form solely for its consideration of the issues

connected with this sealed motion, it should not be publicly disclosed at this point. Thus, this draft statement should be kept under seal, and the Director's actual statement to the Joint Inquiry will instead be public when it is made to the Joint Inquiry.

Second, standby counsel argue that our motion means that the Protective Order entered in this case should be dissolved insofar as it applies to non-classified information we have provided to Congress. Standby counsels' argument is simply that any information provided to Congress will inevitably be leaked to the press or public. We strongly disagree. The Protective Order was entered by this Court for good reasons provided by the government. Those reasons still remain, and the Protective Order serves many valuable purposes, including protecting defendant's fair trial rights. Accordingly, the Protective Order should not be dissolved, at the behest of the defendant or his standby counsel. Moreover, no modification to the Protective Order should be considered at the behest of the defendant or his standby counsel without a clear and unequivocal waiver *by the defendant himself* of any argument that the resultant pre-trial publicity affected his ability to obtain a fair trial by an impartial jury. Otherwise, standby counsel's motion will allow the defendant and counsel to create additional pre-trial publicity that would support stand-by counsel's argument – which he has already made in his motion – that defendant cannot receive a fair trial because of pre-trial publicity. *See United States ex rel. Bloeth v. Denno*, 313 F2d 364, 379 (2d Cir. 1963) (en banc) ("Poor tactics of experienced counsel . . . even with disastrous result, may hardly be considered lack of due process, in contrast to failure of provision of an unbiased trier, which assuredly is a lack of due process."). The defendant and his stand-by counsel obviously should not be permitted to pursue a strategy that would create the very

impediment to a fair trial on which counsel will rely in seeking reversal of a conviction.

Accordingly, we oppose this change sought by the standby counsel.

Respectfully submitted,

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Date: August 27, 2002

CERTIFICATE OF SERVICE

I certify that on August 27, 2002, a copy of the attached Reply of the United States in Support of Its Expedited Motion of the United States for Clarification Regarding the Applicability of the Protective Order for Unclassified but Sensitive Material and Local Criminal Rule 57 to Information That May Be Made Public in Congressional Proceedings was sent by hand delivery, via the United States Marshal's Service to:

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I further certify that on the same day a copy of the same attached pleading was sent by facsimile and regular mail to:

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I further certify that on the same day a copy of the same attached pleading was sent by facsimile and regular mail to:

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