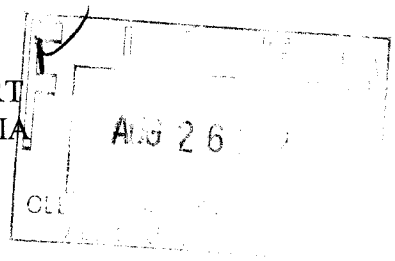
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION



UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	**UNDER SEAL**
ZACARIAS MOUSSAOUI,	)	
	)	
Defendant.	)	

REPLY ON BEHALF OF THE JOINT INQUIRY
OF THE SENATE SELECT COMMITTEE ON INTELLIGENCE
AND THE HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE
TO THE MOTION OF THE UNITED STATES FOR CLARIFICATION
OF THIS COURT'S PROTECTIVE ORDER

On August 20, 2002, this Court entered an order granting the request of the United States to serve on representatives of the congressional intelligence committees its motion for clarification of the Court's February 5, 2002 protective order in this case. One purpose of the service is to enable the committees to reply; this reply is pursuant to that invitation. The relief sought by the United States would not clarify the existing protective order but instead would markedly extend it. Insofar as that is the case, we respectfully suggest that the Court not grant the requested relief for three principal reasons: (1) the protective order does not govern testimony before Congress, nor does it govern the production of documents to Congress, the use of documents by it, or the issuance of its reports; (2) Local Criminal Rule 57 specifically does not preclude the holding of legislative hearings or the issuance of legislative reports; and (3) the proposed expansion of the order by the Department of Justice runs afoul of the separation of powers.

1. The relief sought by the motion of the United States for clarification would have an adverse effect, in several respects, on the ability of the committees to carry out their responsibilities. Paragraph (c) of the Proposed Order, submitted by the United States, "would preclude the provision of information regarding 'The Moussaoui Investigation,' as described in Exhibit A [of] the motion of the United States, for public use by the Committees." Paragraph (d) of the Proposed Order would govern the use in public proceedings of the committees, in regard to a potentially broad range of issues, not only matters directly relating to the defendant but also "the dead September 11 hijackers." See also Motion, Conclusion, at 16. The Department of Justice would implement the relief it requests by "ensur[ing] that government employees called as witnesses before the committees are advised of the Court's order and will follow any other direction from the Court as to how its rulings should be implemented." Motion, at 13 n.8. The Department, it thus appears, intends to instruct government witnesses to invoke the order as a basis for not testifying at public hearings of the committees. By extending the order to any "public use" of information, Motion, at 16, and Proposed Order, at 2, the Department's proposed "clarification" would also have the Court expand its order to any "public report" of the committees. Motion, at 1 and 14.

2. In their letter of June 27, 2002, the chairman and vice chairman of the Senate Committee, and chairman and ranking minority member of the House Committee, advised the Attorney General that at upcoming public hearings the committees will examine "F.B.I. activity concerning Zacarias Moussaoui from August 15, 2001, when an intelligence investigation was opened, through September 11, 2001." The committee leaders made clear that "[o]ur purpose, of course, is not to consider the guilt or innocence of Mr. Moussaoui, which is a matter for the

Judicial Branch, but to examine the counterterrorist efforts of U.S. Government personnel and the organizations and authorities under which they operate." Motion, Exhibit A, Enclosure 1, at 1. In response to a request for additional information about the committee's prospective hearings, the Joint Inquiry's Staff Director added this in an August 5, 2002 letter to the Assistant Attorney General for the Criminal Division:

> That examination will include information relating to the initiation of the investigation; the substance and process of communications between and within the FBI Minneapolis Field Office and Headquarters; how, what, and why decisions were made by those entities and their personnel; the substance and process of communications among components of the Intelligence Community; and the legal framework within which these various actions and decisions occurred.

Motion, Exhibit A, at 2.

3. In a published statement of Initial Scope of Joint Inquiry, the committees set forth the substantive issues into which they will inquire in assessing "the Intelligence Community's activities before and after the September 11, 2001 terrorist attacks on the United States." Motion, Exhibit A, Enclosure 2, at 1 (reprinted at 148 Cong. Rec. S5033 (daily ed. June 5, 2002) and H3493 (daily ed. June 12, 2002)). The committees also stated their obligation, in language drawn from authorizations for other major congressional inquiries, "to fulfill the Constitutional oversight and informing functions of the Congress with regard to the matters examined in the Joint Inquiry." *Id.* at 2. In deciding whether, in carrying out the oversight and informing functions of the Congress, certain matters should be addressed in closed hearings, both Houses have rules that authorize, but do not require, committees to close hearings to the public. Rule 26.5(b)(3) and (5) of the Standing Rules of the Senate authorizes closed hearings when testimony "will tend to charge an individual with crime" or "will disclose any information relating to the

investigation or prosecution of a criminal offense that is required to be kept secret in the interests of effective law enforcement." Standing Rules of the Senate, S. Doc. No. 106-15 (1999). House Rule XI, cl. 2(g)(2)(A) similarly authorizes closed hearings when testimony "would compromise sensitive law enforcement information." *Available at* http://www.house.gov/rules/107rules. These are exceptions, however, to the general provision of each rule that hearings "shall be open to the public." In each House, a committee must vote to close a hearing. That process requires each committee and its members, in exercising their discretion under the rules of the House or Senate, to weigh the values served by open hearings against the particular grounds on which a hearing may be closed.

4. The protective order that this Court entered on February 5, 2002, "UPON the application of the United States," for the most part sets forth limits on what the defendant or his counsel may do with discovery material provided to them by the government, including a provision that none of the material may be "disseminated to the media" by the defendant or his counsel. The order also provides "that none of the discovery materials produced by the government to the defense shall be disseminated to the media by the government." That is the sole limitation imposed on the government, pursuant to the order that it drafted and submitted to the Court. No part of the order addresses the provision by the United States, or any of its departments or agencies, of documentary material to the Congress. Nor does any part of it address the testimony by any official or employee of the United States before a committee of the Congress. Nor does any part of it address the making of any report by a committee to either House of Congress.

5. Local Criminal Rule 57 of this Court, under the heading of "Free Press – Fair Trial Directives," prohibits the release by the prosecution or defense of "any extrajudicial statement which a reasonable person would expect to be further disseminated by any means of public communication," Rule 57(C), on certain topics, several of which are specifically cited in the motion for clarification. Motion, at 12. However, in "Provisos" to it, this Court explicitly provides that "Nothing in this Rule is intended ... to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies ...." Local Criminal Rule 57(E). The Department asserts, in essence, that subsection (E) merely preserves the ability of the Congress to obtain information "independently" of the Department or other Executive agencies. Motion, at 7 n.5. However, under no reasonable reading of Rule 57, which by its terms applies only to lawyers and law firms associated with criminal litigation, would the Rule restrict the ability of legislative bodies to obtain information from sources other than those covered by the Rule. The Department's narrow reading of subsection (E) therefore renders its language meaningless. In sum, the protective order applies only to "dissemination to the media by the government," not the production of documents for use at congressional hearings, testimony by government witnesses at such hearings, or the issuance of reports by committees of Congress. And the Local Rule is explicit that it does not restrict or limit legislative hearings or reports.

6. The textual limitations of the protective order and the Local Rule reflect well-recognized constitutional values. In one line of cases, for example, the United States Court of Appeals for the District of Columbia Circuit considered a series of challenges to the enforcement of Federal Trade Commission subpoenas. Companies resisting the subpoenas asserted that the

potential release by the Commission to Congress of information would violate a prohibition that the Commission not "make public," 15 U.S.C. 46(f), trade secret information that it obtained from them. The D.C. Circuit held repeatedly, however, that release to Congress "is not a public disclosure" within the meaning of the Act. *Federal Trade Commission v. Owens-Corning Fiberglas Corporation*, 626 F.2d 966, 970 (D.C. Cir. 1980). "Once documents are in congressional hands," *id.*, the court adhered to the fundamental principle of interbranch comity that "'courts must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties.'" *Id.* (quoting *Exxon Corp. v. FTC*, 589 F.2d 582, 589 (D.C. Cir. 1978)).

7. The position advanced by the Executive Branch here – that a protective order it sought prohibited it from complying with a legislative request for information related to the government's investigation of suspected terrorists – was also flatly rejected by the First Circuit in a remarkably similar situation. In *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981), the district court had quashed an investigatory subpoena issued by the Puerto Rico Senate for information in the possession of the Puerto Rico Department of Justice pertaining to "one of the most controversial and well-publicized events in recent Puerto Rico history," the killing of two suspected terrorists in a shootout with police officers. *Id.* at 110-11. The district court quashed the legislative subpoenas, reasoning, *inter alia*, that compliance with them would violate the protective order and deny a fair trial to the defendants, law enforcement officials in a civil rights action brought by the relatives of the two deceased. *Id.* at 111.

The First Circuit reversed, stating that it was "clear that the protective order cannot possibly be said to *compel* the Secretary not to disclose the documents in question." *Id.* at 119.

The "key fact," the court stated, was that "the documents sought had come into the Secretary's possession through means entirely unrelated to the federal court's discovery process – indeed, had come through the Department's own investigations." *Id.* at 118. Accordingly, it concluded that quashing the legislative subpoenas was not within the trial court's power to take action necessary to ensure a fair trial. Importantly, for the matter before this Court, the First Circuit recognized that "the constraints on the court's action are perhaps at their most acute where the nonparty whose nonjudicial access is precluded is a legislative body of a separate sovereign." *Id.* at 119. That observation has at least equal force when the legislative body, as here, is a co-equal branch of the same sovereign. *See also Colon Berrios v. Hernandez Agosto*, 716 F.2d 85 (1st Cir. 1983).

8. It is well-settled that "the power of inquiry – with process to enforce it – is an essential and appropriate auxiliary to the legislative function." *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927). The essential reason for this is that "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information -- which not infrequently is true -- recourse must be had to others who do possess it." *Id.* at 175. In the present matter, knowledge of how the FBI undertook its investigation of Mr. Moussaoui is uniquely within the FBI, and the officials who can explain to the Congress the basis on which decisions were made (or not made) are within the FBI. The ability of the Congress to inquire into the important issues raised thus depends on the ability to examine those witnesses and their documents.

9. The judgment whether the examination of those witnesses and their documents should be in public or closed hearings of the Congress involves an exercise of power that is textually committed to each House of Congress by the Constitution. Article I, section 5, clause 2 provides that "Each House may determine the Rules of its Proceedings." As described above, each House has adopted rules that generally require public hearings but permit, by votes of committees, the closing of hearings. It is a matter plainly within the internal governance of the Congress. Open hearings serve to inform members of the Congress who are not within the committees conducting the hearings, but who may nonetheless need to consider matters inquired into at the hearings. Open hearings also inform the public's understanding of national issues and the views of the public on proposals for change. The Department itself recognizes "the enormous public interest in understanding the September 11 attacks, which indeed is the basis for the Joint Inquiry." Motion, at 10. It is also part of that Inquiry, and also in the public interest, to understand "what the Intelligence Community knew prior to September 11 about the scope and nature of any possible attacks against the United States." Motion, Exhibit A, Enclosure 2, at 2 (Initial Scope of Joint Inquiry). If it is the judgment of Congress through its committees that the circumstances warrant adherence to the general rule on open hearings, in considering these and other subjects, then that judgment merits the respect of the coordinate branches of government.

10. While Congress is subject to public accountability for the balance it strikes on matters within its constitutional responsibility, the Supreme Court has made clear that the separation of powers and its specific implementing provisions, such as the Speech or Debate Clause, "forbid invocation of judicial power to challenge the wisdom of Congress' use of its investigative authority." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 511

(1975). Of course, the court has "traditional means of insuring a fair trial," that include the scheduling of trial and the voir dire of jurors. *Colon Berrios*, 716 F.2d at 92; *see also Delaney v. United States*, 199 F.2d 107 (1st Cir. 1952). In fact, this Court's order continuing the beginning of trial until January 6, 2003, assures there will be time between any public hearings in September or October and the start of trial. *See* Motion, at 13 ("continuance of the trial date may lessen the effect that public hearings may have on jury selection"). The continuance also demonstrates the impact of the Department's suggestion that the committees postpone public hearings, or a public report, on matters relating to the Moussaoui investigation "until the conclusion of the trial," Motion, at 14, as the trial will not begin until next year.

11. Their June 27, 2002 letter to the Attorney General restates the commitment of the leadership of the Joint Inquiry "to consulting with the Department of Justice about the public use of material obtained from the Intelligence Community that may constitute evidence in a criminal proceeding." Motion, Exhibit A, Enclosure 1, at 2. For example, if a potential witness before the Joint Inquiry also is likely to be a witness in a proceeding in this Court, we have advised the Department of Justice that its concerns about that witness will be considered with great seriousness. The same will occur if the Department identifies any particular document, produced to the committees, that it is likely to introduce at trial. *See* Motion, at 12 (stating a special concern "if the Committees intended to call potential trial witnesses or use potential trial exhibits during the public hearings.")

12. In their letter to the Attorney General, the Joint Inquiry leadership noted that they had been advised by the Offices of House General Counsel and Senate Legal Counsel that the protective order on its face does not govern the public proceedings of the Congress, and that this

understanding was consistent with the proviso that Local Rule 57 did not preclude the holding of hearings or the issuance of reports by legislative bodies. Because the issues raised by the motion of the Department of Justice present important institutional questions for the Congress, we have reviewed this reply with those offices and can represent that the views expressed here are in accord with their positions on those questions.

For these reasons, we respectfully suggest that the Court affirm that the existing protective order does not govern testimony by government witnesses nor the provision of documents by the Department of Justice or any other Executive agency to the Congress, or the issuance of reports by committees of the Congress. Accordingly, the Court should also decline to extend its protective order to testimony by government witnesses before the committees in open hearings, if it is the determination of the committees under the rules of each House to hold such hearings, or to extend the order to the use, in any public report of the committees, of testimony of government witnesses or documents provided by the Department or other Executive agencies.

Respectfully submitted

/ S /

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Dated: August 26, 2002

CERTIFICATE OF SERVICE

I certify that on August 26, 2002, a copy of the attached Reply on Behalf of the Joint Inquiry of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence to the Motion of the United States for Clarification on this Court's Protective Order, was delivered by hand to:

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

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