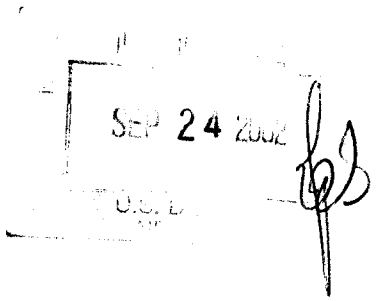
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA **vs.** **ZACARIAS MOUSSAOUI,** **Defendant.** **THE NEW YORK TIMES COMPANY,** **Movant-Intervenor.**	**Criminal No. 01-455-A**



THE NEW YORK TIMES COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR CLARIFICATION OR MODIFICATION OF PROTECTIVE ORDER

The New York Times Company ("The Times") respectfully submits this memorandum of law in support of its motion for clarification or modification of the Court's Protective Order entered on February 5, 2002 (the "Order").

INTRODUCTION

By this motion, The Times seeks to have the Court clarify that the Order does not bind a non-party, the Port Authority of New York and New Jersey (the "Port Authority"), which has provided documents and other materials (the "PA Records") to the prosecution in this case. The Times requests this relief because it has filed freedom-of-information requests with the Port Authority for certain of the PA Records and been informed that the Port Authority is prevented by the Order from making any of the PA Records public. As a result, The Times and the public

Exh 1

have been barred from obtaining materials that would otherwise be available under the Port Authority's freedom-of-information policy and state law.

The Times obviously does not look to this Court to determine the ultimate question of whether the requested materials must be disclosed by the Port Authority under the agency's policy and New York law. Instead, it seeks only clarification as to whether the Order reaches the requested materials and prevents the Port Authority from releasing those materials that would otherwise be disclosable. The Times respectfully submits that the Order does not and should not bind the Port Authority, at least as to those materials requested, both under the plain language of the Order and under applicable law.

BACKGROUND

Over the past year, The Times has published a series of in-depth stories analyzing the operations of the New York Fire Department, the New York Police Department, the Port Authority's Police Department, and other emergency agencies at the scene of the World Trade Center on September 11, 2001. (Affidavit of David E. McCraw, sworn to September 23, 2002 ("McCraw Aff."), ¶ 2.) Those articles have raised troubling questions about whether confusion and communication failures within and between the agencies needlessly caused the deaths of scores of emergency workers that day. (*Id.*) The stories have also underscored the urgent need for the public to know more completely how the emergency agencies responded that day so that the ongoing public debate about what those agencies need to do in the future to be better prepared for mass emergencies is illuminated by a full factual record.

As part of its research for these stories, The Times on March 26, 2002 requested that the Port Authority release the following items: (1) tapes and transcripts of all radio transmissions from Port Authority staff and police officers from 8:45 a.m. to noon on September 11; (2) written

reports by the Port Authority about September 11; and (3) daily reports by the Port Authority police concerning the recovery operations at the World Trade Center. (*Id.* ¶ 3 and Exhibit A thereto.) Later, The Times learned that the Port Authority had recovered a tape of Fire Department radio transmissions (the "FDNY Tape") from September 11 in the wreckage of 5 World Trade Center. (*Id.* ¶ 4.) The Times then requested a copy of the FDNY Tape from the Port Authority. (*Id.*) (The items requested on March 26, along with the FDNY Tape, are collectively referred to herein as the "Requested Materials.")[1]

The Port Authority is a public entity jointly created by the States of New Jersey and New York. Because the freedom-of-information statutes in those two states vary, the Port Authority adopted a separate Freedom of Information Policy and Procedure (the "FOIL Policy") based on the two statutes to facilitate orderly disclosure of information by the agency. (*Id.* ¶ 5 and Exhibit B thereto.)

In response to the requests by The Times, the Port Authority refused to release the Requested Materials and subsequently affirmed that denial when The Times appealed to the Port Authority's General Counsel, Jeffrey S. Green. (*Id.* ¶ 6 and Exhibit C thereto.) By a letter dated June 7, 2002, Mr. Green advised The Times that copies of the Requested Materials had been provided to the prosecution in this case. (*Id.* Exhibit C.) As a result, Mr. Green concluded, the Requested Materials "are under protective order . . .and not releasable by rule of court." (*Id.*)

---

[1] The Times is also seeking other materials about the rescue operations from the New York Fire Department in a lawsuit brought under the state Freedom of Information Law (The New York Times Company v. City of New York Fire Department, N.Y. Sup. Ct., N.Y. County, No. 110753/02). The Fire Department has cited the Moussaoui prosecution as a basis for withholding materials under the law enforcement exemption in the state law. However, unlike the Port Authority, the Fire Department does *not* resist disclosure on the ground that it is bound by the Order. That action remains pending.

Mr. Green enclosed an e-mail from David Novak, Assistant United States Attorney, in support of the denial. (*Id.* ¶ 6.) In subsequent communication with The Times, Mr. Green said that the FDNY Tape was being withheld solely on the basis of the Order in this action and would be released if this Court permitted it. (*Id.* ¶ 7.)

The Order, on its face, does not mention the Port Authority or any other agencies that may have provided materials to the Government. Instead, by its terms, it bars the defendant and his counsel of record from disseminating materials produced by the Government, except to members of the defense team. It further bars the Government from disseminating discovery materials to the media.

The limited scope of the Order was highlighted in the Government's own motion of August 19, 2002, in which it sought clarification of the Order in response to inquiries from congressional investigators for copies of materials that were included in discovery. (*See* 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 (docket no. 436) ("Clarification Motion").) In that motion, the Government acknowledged that the Order bound the Justice Department but did not bind Congress and then noted that the "[Justice] Department's concern is the applicability of the [Order] and Local Rule *to the Department* with regard to the information it has provided to the Committees." (Clarification Motion, p. 7 n. 5 (emphasis in original).)

Later in the Clarification Motion, the Government acknowledged that no prejudice to the defendant would arise from public disclosure of matters that were not to be contested at trial: "To the extent that he does not dispute the facts presented regarding the planning and execution

of the September 11 attacks – disputing only his knowledge and involvement in those events – the public presentation of those facts before trial is not prejudicial." (*Id.*, p. 9.) The Government then urged the Court to give "considerable weight" to the "enormous public interest in understanding the September 11 attacks" in deciding whether to modify the Order so that discovery material could be released to Congress and, ultimately, to the public. (*Id.*, pp. 9-10.) Of significance to the present motion, standby counsel for the defense have now submitted papers acknowledging that the defense does not dispute the destruction at the World Trade Center and the enormous loss of life there, which of course are the subject of the PA Records sought by The Times. (*See* Response of Standby Counsel to Government's Motion to Use Summary Witness Regarding World Trade Center Attacks (docket no. 482) ("Response to Witness Motion").)

On August 29, 2002, the Court ruled that the Order was to be vacated in response to the Clarification Motion. However, the Court directed that the Order was to remain in place until counsel for the Government, in consultation with standby defense counsel, had submitted a revised order for the Court's review. So far as the public docket reveals, that has not yet occurred.

ARGUMENT

I. THE ORDER DOES NOT BIND AN INDEPENDENT STATE-CREATED AGENCY THAT IS NOT A PARTY TO THIS ACTION

The construction of the Order advocated by the Justice Department and accepted by the Port Authority is contravened by the plain text of the Order and by the teachings of the case law construing protective orders. Because that construction interferes with the rights of citizens of New York to obtain information under state law from a public, state-created agency, it also raises

questions about the proper balance between state sovereignty and federal power under our system of federalism.

First, by its terms the Order binds only the Justice Department and the defendant and his counsel. It does not mention – let alone bind – private individuals or state and local agencies that have provided information to the Government for use in this prosecution. In its Clarification Motion, the Justice Department acknowledged that the Order does not apply either to another branch of the federal government or to information obtained by another governmental entity from sources other than the Justice Department. (Clarification Motion, p. 7 n. 5.)[2]

Those same principles apply with equal or greater force here. The Port Authority is a state agency, created and existing independent of the federal government. The Requested Materials were not created by, nor obtained from, the Justice Department, but instead are records of the Port Authority, which continues to possess them. The Justice Department should not be permitted to ignore the plain meaning and intent of the Order and, in effect, convert it into an elastic gag order stretching across state lines, abrogating the authority of a state-created agency, and overruling state law and agency policy.

In reviewing the scope of protective orders, the courts have been careful to distinguish between documents obtained from the opposing party through the discovery process – which may properly be subject to nondisclosure orders – and information that is either obtained

---

[2] Indeed, with respect to an analogous question concerning the reach of Local Criminal Rule 57, at a hearing on the Clarification Motion on August 29, 2002, the Court itself observed that Rule 57, by its terms, applies only to the Department of Justice, not to other government agencies, each of which "has to be guided by its own requirements as to what can and cannot be disclosed in a public context." 08/29/02 Tr. at 24:16-18. The arguments set forth here with respect to the Order apply with equal force to Rule 57, to the extent it is invoked by the Government, and vice versa.

independently by the party or in the hands of a party not before the court. In *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981), for example, the First Circuit was asked to prevent the Puerto Rico Senate from obtaining by subpoena documents in the possession of the Puerto Rico Department of Justice. The First Circuit refused to quash the Senate's subpoena, reasoning 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 investigation." *Id.* at 118. In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), a newspaper was a party to a lawsuit, and the Supreme Court recognized the paper's continuing right to publish material about the party suing it, provided that information was obtained independent of the lawsuit and its protective order. In its Clarification Motion, the Government approvingly – and correctly – cites *Seattle Times* for the proposition that a "protective order may limit one party's ability to publicize information obtained from the other party through the civil discovery process, but does not apply to information obtained independent of that process." (Clarification Motion, p. 7 n. 5.) That principle should likewise bar a protective order from reaching an entity that is not even a party to an action and has in its possession documents that it obtained (in fact, created) independently.

Indisputably, criminal proceedings provide one additional consideration not found in civil matters: The Government may be stopped from disclosing information in its possession in order to preserve the fair trial rights of the defendant. As important as that objective is, however, it does not afford a basis to extend a protective order to independent governmental entities. Those entities, whether separate branches of the federal government or state agencies, are entitled to act with the independence envisioned by the principles of comity and federalism. The holding in *Federal Trade Commission v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966 (D.C. Cir. 1980),

is instructive. There, the court rejected the notion that Congress must be stopped from receiving information obtained in confidence by an executive branch agency because of the possibility that it would then be made public. The court held that the "courts must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties." *Id.* at 970 (internal quotation and citation omitted).

That same deference should be accorded to the Port Authority and any other state or local agencies that have provided materials to the prosecutors. Reading the Order in such a way as to diminish the power of a state-created agency to determine on its own how and whether, under applicable state law, to make its own documents public undermines the balance envisioned by federalism. *See New York v. United States*, 505 U.S. 144, 160 (1992) (discussing how accountability of both federal and state governments is diminished when federal government coerces state to act according to federal dictates). That is especially so here, where the restraint imposed interferes not only with the sovereignty of a state-created agency but also with the rights of the people under state law to obtain significant information about how well their local governmental agencies served them in the face of an unprecedented public emergency. The Times believes that the Order was not intended, and should not be construed, to create such a conflict.

II. RELEASE OF THE REQUESTED MATERIALS WOULD NOT INTERFERE WITH DEFENDANT'S RIGHT TO A FAIR TRIAL

Even if the Order were construed to reach the Port Authority, it would still be subject to review as a restraint on speech under the First Amendment. *In re Morrissey*, 168 F.3d 134, 139-40 (4th Cir. 1999) (subjecting Local Criminal Rule 57 to First Amendment scrutiny where construed to prohibit criminal defense attorney from disclosing information); *In re Application*

of Dow Jones & Co., 842 F.2d 603, 610 (2d Cir. 1988) (on media intervenors' motion, subjecting protective order restraining extrajudicial statements by participants in criminal proceeding to First Amendment scrutiny where order interfered with media's ability to gather news); *In re Russell*, 726 F.2d 1007, 1010 (4th Cir. 1984) (protective order in criminal proceeding subjected to First Amendment scrutiny where persons bound by order challenged limits on their ability to speak to press). Where an order limits the speech of those involved in a court proceeding, the restraint will be upheld only when (i) there is a reasonable likelihood that the prohibited speech will prejudice a fair trial and (ii) the restraint is narrowly tailored so as to not restrict First Amendment rights unnecessarily. *Morrissey*, 168 F.3d at 139-40; *Dow Jones*, 842 F.2d at 610-11. To the extent that the Order is construed to restrain the Port Authority from releasing the Requested Materials in the circumstances presented here, that standard cannot be met. There is no reasonable basis for believing that public disclosure of the Requested Materials would prejudice the rights of the defendant.

All the materials requested by The Times deal with what happened at the World Trade Center after the planes struck the buildings on September 11 and, overwhelmingly, with the response of emergency workers in the first critical hours. Standby counsel has conceded that the facts of the devastation in New York that morning are not in dispute in this action. (Response to Witness Motion, p. 4.) And the Government has conceded that public disclosure of undisputed facts does not raise concerns about prejudice that necessitate restraint on publicity. (Clarification Motion, pp. 9-10.) Further, the Government acknowledges that a "rigorous voir dire" is capable of protecting the defendant's rights, despite the overwhelming publicity that has surrounded September 11 for more than a year. (Clarification Motion, p. 10.)

It cannot seriously be contended that the release of these materials will have any measurable impact on the potential for prejudice to Mr. Moussaoui's fair trial rights. While the Requested Materials are vitally important to The Times's investigation into the rescue operations, their disclosure would be a minuscule drop of information in the ocean of publicity that already exists about the World Trade Center attacks. The content of the Requested Materials should also be considered. The information has virtually no connection to the truly relevant legal issues in this case. The Requested Materials show nothing about whether, when, or how Mr. Moussaoui conspired with others to engage in terrorism. Thus, their release is not likely to prompt any potential juror to prejudge the evidence or Mr. Moussaoui's guilt or innocence.[3]

In short, to the extent that the Order is construed to bar the Port Authority from releasing the Requested Materials, the Order fails to meet the standard of *Morrissey* and constitutes an impermissible burden on speech.

---

[3] Even if some portion of the Requested Materials were relevant, barring the Port Authority from releasing them would be both underinclusive and overinclusive. Witnesses who provided information to the Port Authority for reports or who are heard on tapes remain free to publicize what they said in any forum they choose: through interviews with the news media or their own writing and speaking. On the other hand, material that had no bearing on a disputed fact in the Moussaoui prosecution would be swept up in the restraint solely on the ground that it had been provided to the prosecutors by the Port Authority. A restraint on speech must be more narrowly tailored to its purposes. *Morrissey*, 168 F.3d at 139-40.

CONCLUSION

For the foregoing reasons, The Times respectfully requests that this Court enter an order clarifying or modifying the Order so that it (i) does not bind the Port Authority, or (ii) in the alternative, does not apply to the specific materials requested by The Times.

Dated: September 24, 2002

Respectfully submitted,

LEVINE SULLIVAN & KOCH, L.L.P.

By: _____

Jay Ward Brown, Va. Bar No. 34355
1050 Seventeenth Street, N.W., Suite 800
Washington, D.C. 20036
(202) 508-1100
Facsimile (202) 861-9888

ATTORNEYS FOR MOVANT-INTERVENOR
THE NEW YORK TIMES COMPANY

Of Counsel:

David E. McCraw
Counsel
The New York Times Company
229 W. 43rd Street
New York, NY 10039
(212) 556-4031
Facsimile: (212) 556-4634

CERTIFICATE OF SERVICE

I hereby certify that, on this 24th day of September 2002, I caused true and correct copies of the foregoing Memorandum of Law to be served by the means indicated, upon counsel and the defendant as follows:

By Hand Delivery:

Zacarias Moussaoui, Inmate
c/o John Clark
United States Marshals Service
401 Courthouse Square
Alexandria, Virginia 22314

Robert A. Spencer, Esq.
Brian D. Miller, Esq.
Michael J. Elston, Esq.
United States Attorney's Office
2100 Jamieson Avenue
Alexandria, Virginia 22314-5794

By Facsimile and First Class Mail:

Frank W. Dunham, Jr., Esq.
Office of the Federal Public Defender
1650 King Street, Suite 500
Alexandria, Virginia 22314
Facsimile: (703) 600-0880

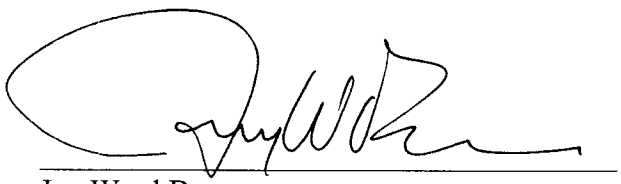
Gerald Zerkin, Esq.
Assistant Public Defender
One Capital Square, 11th Floor
830 East Main Street
Richmond, Virginia 23219
Facsimile: (804) 648-5033

Edward B. MacMahon, Jr., Esq.
107 East Washington Street
Middleburg, Virginia 20118
Facsimile: (540) 687-6366

Alan H. Yamamoto, Esq.
108 North Alfred Street, 1st Floor
Alexandria, Virginia 22314-3032
Facsimile: (703) 684-9700

By Federal Express

Jeffrey S. Green, Esq.
The Port Authority of NY & NJ
225 Park Avenue South, 18th Floor
New York, New York 10003



Jay Ward Brown