

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)

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 of America, by the undersigned attorneys, seeks an order from the Court clarifying that the Protective Order for Unclassified But Sensitive Material in this case and this Court’s Local Criminal Rule 57 apply to information about “the Moussaoui investigation,” but do not apply to other information, provided by the Federal Bureau of Investigation (“FBI”) and other Executive Branch agencies to the Senate and House Intelligence Committees’ Joint 9/11 Inquiry if that information is to be used in public hearings and reports. The United States also requests an expedited hearing on its motion.

In support of this motion, the United States states as follows:

The Protective Order and the Local Rule

On February 5, 2002, pursuant to Rule 16(d) of the Federal Rules of Criminal Procedure, the Court entered a Protective Order for Unclassified But Sensitive Material (“Protective Order” or “Order”) in this case. The Protective Order imposes various restrictions on the dissemination

of unclassified discovery materials by the defendant and defense counsel, including a prohibition on dissemination to the media. See Order at 1-3. The Order also directs that “none of the discovery materials produced by the government to the defense shall be disseminated to the media by the government.” Id. at 3. “Disseminate” is defined as “to provide a copy of the particular piece of material or quotations from it.” Id. at 1 n.2. As the Court is aware, the government has produced an enormous amount of discovery material to the defendant and/or his standby counsel, the unclassified portions of which are subject to the Order.

Local Criminal Rule 57 of the Eastern District of Virginia (“Local Rule” or “Rule”) provides, in connection with all pending criminal litigation in this district, that “it is the duty of [a lawyer or law firm associated with the litigation] not to release or authorize the release of information or opinion (1) if a reasonable person would expect such information or opinion to be further disseminated by any means of public communication, and (2) if there is a reasonable likelihood that such dissemination would interfere with a fair trial or otherwise prejudice the due administration of justice.” LCrR 57(A). The Local Rule then sets forth several categories of information that the law firm “shall not” release or authorize the release of extrajudicially until the termination of trial, including “the character or reputation of the accused”; “[t]he existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement”; “[t]he performance of any examinations or tests or the accused’s refusal or failure to submit to an examination or test”; “[t]he identity, testimony, or credibility of prospective witnesses” (other than the victim); and “[a]ny opinion as to the accused’s guilt or innocence or as to the merits of the case or the evidence in the case.” Id. 57(C).

The Joint 9/11 Inquiry

The Select Committee on Intelligence of the United States Senate and the Permanent Select Committee on Intelligence of the United States House of Representatives (the “Committees”) are conducting a Joint Inquiry into the terrorist attacks committed against the United States on September 11, 2001. A statement of the Initial Scope of the Joint Inquiry was published in the Congressional Record in June 2002. See Enclosure 2 to the Letter dated Aug. 5, 2000 from Eleanor Hill, Director, Joint Inquiry Staff, to Michael Chertoff, Assistant Attorney General, Criminal Division, Department of Justice (attached hereto as Exhibit A).¹ In short, the purpose of the Joint Inquiry is to ascertain why the Intelligence Community did not learn of the September 11 attacks in advance and to identify what, if anything, might be done to better position the Intelligence Community (“IC”) to prevent terrorist attacks against the United States and address other emerging threats of the 21st Century. The Joint Inquiry is being conducted “to fulfill the Constitutional oversight and informing functions of the Congress with respect to the matters examined in the Joint Inquiry.” Id.

The Committees hired a separate staff to assist in conducting a comprehensive investigation. In the course of the investigation, the staff has requested, from the FBI, other components of the Department of Justice (the “Department”) such as the Immigration and Naturalization Service (“INS”), and other agencies of the Intelligence Community, a wide range of documents and interviews of agency personnel relating to, among other things, the defendant in this case, the events leading up to the attacks on September 11 (which are encompassed by the

¹ Ms. Hill’s letter followed, and attached as its Enclosure 1, a letter dated June 27, 2002, from the leaders of the Committees to the Attorney General. See Enclosure 1 to Exhibit A.

conspiracy indictment in this case), and previous terrorist attacks. The Committees have held several closed hearings and have indicated their intention to hold public hearings beginning the first week of September. See Exhibit A at 1. The Committees also intend to prepare a final report, portions of which will be made public. The entire process, at least at the outset, was to be completed in this calendar year.

The Department's Cooperation with the Joint Inquiry, Subject to Legal Limitations

From the outset, the Department of Justice has fully supported the mission of the Joint Inquiry and has pledged to assist the Committees and their staff in obtaining information requested from the Department and other Federal agencies, subject only to limitations imposed by law, including prohibitions on disclosure of matters occurring before grand juries, see Fed. R. Crim. P. 6(e), and matters sealed by court order.² As explained to the Joint Inquiry staff from the beginning of their interactions with the Department, and as reiterated in writing after a meeting on May 21 between the Attorney General and the leaders of the Joint Inquiry, the legal limitations faced by the Department also include the Protective Order in this case and Local

² As part of this cooperation, and because of the relevance of the materials to the Joint Inquiry's work, in July 2002, at the Committees' request, the Department obtained orders from the appropriate judges in the District of Minnesota, the Western District of Oklahoma, the District of Colorado, and the Northern District of California, unsealing search warrant materials from those districts that are related to the defendant, to the limited extent that they could be provided to the Committees for use in the Joint Inquiry, but with the express caveat that such use remained subject to the Protective Order in this case.

Criminal Rule 57.³ See Letter dated May 31, 2002, from Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, Department of Justice to Bob Graham, Chairman, and Richard C. Shelby, Vice Chairman, Select Committee on Intelligence, United States Senate (attached hereto as Exhibit B).

The Protective Order and Local Criminal Rule 57 prohibit the Department of Justice, as the prosecutor in this case, from disseminating information covered by those provisions to the public or the news media. The Department has also explained to the Joint Inquiry that it cannot circumvent the prohibitions of the Protective Order and Local Rule by providing information about this case to a third party, such as the Committees, with the expectation that the third party will make the information public (nor would the Department endorse other Federal agencies' providing information about the case to the Committees with such an expectation). This posed a concern, given the Committees' announced intention of holding public hearings and publishing a public report on aspects of its investigation related to this case. On the other hand, particularly in light of the Joint Inquiry's short timetable, the Department did not want to delay or impede the staff's review of thousands of documents and interviews of dozens of personnel arguably covered by the Protective Order and Local Rule but also clearly relevant to the Joint Inquiry's mission, or the Committees' use of such information in closed proceedings and nonpublic reports.

³ The Joint Inquiry's requests for documents and interviews have encompassed information related to other pending terrorism investigations and prosecutions as well, such as the East Africa Embassy bombing case in the Southern District of New York. The Department has advised the staff that similar protective orders and/or local rules may restrict public disclosure of that information as well, although much more information in those cases is already in the public record. Those matters, however, if they arise, would be properly addressed by the Department to the district courts overseeing those particular cases.

The Department therefore agreed to provide requested information to the Joint Inquiry based upon express representations that the Committees will not publicly disclose any information arguably subject to the Protective Order and Local Rule before consulting with the Department. If, after such consultation, the Committees nonetheless wished to make the arguably covered information public, then the Department would report the matter to this Court and request appropriate guidance before the information is publicly released. See Exhibit B at 3-4; Exhibit A, Enclosure 1 at 2. Cf. United States v. King, 192 F.R.D. 527, 535 n.5 (E.D. Va. 2000) (protective order restraining government witnesses from making extrajudicial statements does not limit their “ability to speak with members of the public other than the media or those who the potential witness authorizes, intends, or expects to disseminate such statement by means of public communication”).⁴

The Department also advised the Committees that, when the matter was brought before the Court, the Department might have to oppose efforts to release publicly certain protected information prior to the trial of this case, to the extent that it would impair the government’s ability to present its case, infringe upon the defendant’s right to a fair trial, or compromise the integrity of other investigations. Exhibit B at 3. The Department’s arrangement with the Joint Inquiry does not, of course, apply to information the Committees obtain from sources other than

⁴ Such representations are particularly reliable coming from the Intelligence Committees, which are accustomed to securely handling classified and other highly sensitive information. See Exhibit B at 4. Indeed, much of the information being gathered during the Joint Inquiry (particularly from the Intelligence Community) is classified and will not be disseminated in public hearings or reports, unless formally declassified.

the Executive Branch.⁵

Pursuant to the Department's understanding with the Committees, since March the FBI has provided the Joint Inquiry with about 23,000 pages of documents and enabled its staff to conduct more than 110 interviews, and other Federal agencies have provided thousands of additional documents (many of them classified) and facilitated dozens more interviews.⁶

The Timing of This Motion

The Department's early discussions with the Joint Inquiry staff also raised the issue of when this matter should be brought before the Court. It was the Department's view that, rather than requesting a general and advisory opinion from the Court at the outset, the Committees should identify specific information, arguably covered by the Protective Order or Local Rule, that they wish to make public, which would provide the Court with a concrete issue on which to provide guidance. Although the Committees have requested that such guidance not be limited to specific documents or information, to obviate the need for multiple appearances before the Court as additional hearings are scheduled, see Exhibit A, Enclosure 1 at 2, the Staff Director for the Joint Inquiry recently provided the Department with a description of several subjects that the

⁵ The Committees have noted that "the Protective Order, on its face, does not seek to govern the public proceedings of the Congress," and that subsection (E) of the Local Rule expressly states that "[n]othing in this Rule is intended . . . to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies." Exhibit A, Enclosure 1 at 1. The Department does not disagree -- as to information obtained by Congress independently. The Department's concern is the applicability of the Protective Order and Local Rule to the Department with regard to the information it has provided to the Committees. Cf. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 31-34 (1984) (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).

⁶ A general index of the FBI documents provided to the Joint Inquiry, and a list of the FBI witnesses interviewed, can be provided upon request by the Court.

Committees plan to address during their public hearings in September, see Exhibit A, and the Department now presents the matter to the Court.

We note that the Committees have expressly requested that the Senate Legal Counsel and House General Counsel be advised of and provided an opportunity to request to participate in any hearing the Court holds on this issue. See Exhibit A at 3; Exhibit A, Enclosure 1 at 2. The Department also respectfully suggests that the Committees be invited to have their Members, staff, or other appropriate representatives attend any hearing. The Court's invitation to these non-parties to attend a hearing is necessary if the hearing is closed, as requested below.

The Department's Views as to the Subject Areas Identified for Public Hearings

The Department's views regarding the applicability of the Protective Order and Local Rule to the subject areas identified for the Committees' public hearings are as follows:

1. The Planning and Execution of the Attack

The Committees first propose a broad examination of "what the United States Government now knows about the planning and execution of the September 11 attacks." Exhibit A at 1-2. The information to be placed on the public record will begin with declassified versions of the testimony on this subject previously presented by the Director of Central Intelligence ("DCI") and the Director of the FBI in closed hearings of the Joint Inquiry on June 18 and 19, 2002. A copy of the draft declassified statement of FBI Director Robert Mueller is attached hereto as Exhibit C. (An unclassified statement of DCI Director George Tenet will be submitted as soon as it is prepared.)

The indictment in this case encompasses the September 11 attacks, and the government has provided to the defense discovery materials regarding most of the unclassified (and some

classified) information that the government now knows about the planning and execution of the attacks. Review of the draft statement of Director Mueller reveals substantial overlap with information that has been provided to the defendant in the discovery materials, which appears to bring his testimony within the scope of the Protective Order.⁷ The Local Rule appears to be implicated only to the extent that the Director's statements about the attacks may mirror "testimony . . . of prospective [trial] witnesses," or are deemed to be "opinion as to . . . the evidence in the case," LCrR 57(C)(4).

A few points are worth noting. First, and most important, Director Mueller's draft statement does not discuss the defendant and expressly notes that he is not discussing Moussaoui because of the pendency of this case. Second, the factual information in the statements does not identify specific trial witnesses or present specific exhibits (e.g., particular documents). Third, the outline of those basic facts is already in the public record because it parallels the indictment (albeit now presented as fact rather than allegation), and much of the additional information about Usama Bin Laden and Al Qaeda is in the public record through prior hearings on those issues, as well as evidence presented during the Embassy Bombings trial in New York last year.

Fourth, whether any of this testimony would be prejudicial to the defendant's right to a fair trial depends in large part upon his defense. To the extent that he does not dispute the facts presented regarding the planning and execution of the September 11 attacks -- disputing only his own knowledge and involvement in those events -- the public presentation of those facts before

⁷ The Department has not sought at this time to identify the specific discovery documents that pertain to each item discussed in the Directors' statements, or to the other subjects described in Exhibit A, which would be an extremely laborious project. Rather, the statements in the text regarding overlap with discovery materials are based upon review of Exhibit A by and discussions with prosecutors handling this case and others familiar with the discovery materials.

trial is not prejudicial. Finally, but worthy of considerable weight, the Court should balance against any possible prejudice to the defendant the enormous public interest in understanding the September 11 attacks, which indeed is the basis for the Joint Inquiry. To the extent prospective jury members may be exposed to this aspect of the Committees' public hearings, rigorous voir dire -- which is needed in any event due to the extensive publicity that already exists regarding the September 11 attacks -- should fully protect the defendant's rights.

For these reasons, the Department requests that the Court clarify that the Protective Order and Local Rule do not preclude Director Mueller from providing the final version of his statement (assuming it does not change significantly) to the Committees for use in public hearings, or from answering questions within the scope of his statement during the public hearings.

The Staff Director's letter also states that, "[i]n the course of the public hearings, Members may utilize, and the Committees may place on the record, additional materials provided to the Committees by the Intelligence Community on these and related subjects." Exhibit A at 2. Without a clearer definition of what information the Committees wish to make public (which the Court may be able to elicit from representatives of the Committees at a hearing), the Department cannot specifically address this aspect of the Committees' plan. Assuming, however, that the Committees remain within the general scope of the Director's statement -- in particular, not asking or placing on the public record information specifically about the defendant -- the Department requests that the Court clarify that the Protective Order and Local Rule do not preclude the provision of such information for public use by the Committees.

2. Al-Mihdhar and Al-Hazmi

The second subject area identified in the Staff Director's letter involves a detailed examination of the Intelligence Community's information regarding two hijackers, Khalid Al-Mihdhar and Nawaf Al-Hazmi, including questions regarding why they were not placed on watchlists before the September 11 attacks. To the extent the Committees focus on the IC's processes -- that is, its acquisition, handling, and sharing of information about Al-Mihdhar and Al-Hazmi -- the Local Rule does not appear to be squarely implicated. However, most of the unclassified information regarding the two hijackers' activities that the FBI and other IC agencies have provided to the Joint Inquiry overlaps with material provided to the defendant in discovery, implicating the Protective Order.

The Department takes the same view on this subject as it does on discussion of the September 11 attacks in general: The information to be made public does not appear to refer directly to the defendant and may not implicate his defense at trial; some of the information is already in the public domain; and this is an area of significant and appropriate public concern that falls squarely within the Joint Inquiry's mandate. The Department therefore respectfully requests that the Court clarify that the Protective Order and Local Rule do not affect the Department's provision of information on this subject for public use by the Committees.

3. The Moussaoui Investigation

The Committees also plan, in their public hearings, to examine "FBI activity concerning Zacarias Moussaoui from August 15, 2001, when an intelligence investigation was opened, through September 11, 2001," although "some actions taken and information obtained after the attacks may be included to the extent that they shed light on what happened before the attacks."

Exhibit A at 2.

This subject matter most directly implicates the Protective Order and Local Rule, as it will focus the public's attention on the defendant and the evidence collected against him both before and after September 11. Virtually all of the unclassified information on this matter that has been provided to the Committees by the FBI and other agencies, which includes information regarding the handling of the pre-September 11 investigation by the FBI in Minneapolis, at Headquarters, and elsewhere, has also been provided to the defendant in discovery and therefore is covered by the terms of the Protective Order.

Moreover, in publicly reviewing the investigation of the defendant both before and after September 11 and the information that was developed about him, most of the subjects expressly covered by the Local Rule are likely to be addressed, including "the character or reputation of the accused"; "the existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement"; "[t]he performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test"; and "[t]he identity, testimony, or credibility or prospective witnesses." See LCrR 57 (C)(1-4). It will also be difficult, in discussing this matter, to avoid statements of "opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case," LCrR 57(C)(6) -- in part because those issues arose in the communications within the FBI that the Committees propose to publicly examine. These concerns would be exacerbated if the Committees intended to call potential trial witnesses or use potential trial exhibits during the public hearings, which is not clear from Exhibit A but has been suggested to the Department previously.

In addition, this subject may impair the government's ability to present its case, by leading some prospective jurors to form opinions regarding the defendant's guilt or innocence before all of the relevant and admissible evidence is properly presented through trial in a court of law. Likewise, this subject appears to implicate a defense raised by the defendant, namely, his assertion that he was under FBI surveillance from the time he entered the United States. The Court should be especially cautious in this area (unless, of course, the defendant does not object) because the Joint Inquiry's examination of this topic will result in the authoritative public presentation of information that is directly contrary to that defense.

To be sure, much of the information about the defendant and the course of his investigation is in the public domain; this issue is of great public concern; and it is incumbent upon the Joint Inquiry to investigate this subject as part of its mandate. Also, the continuance of the trial date may lessen the effect that public hearings may have on jury selection. Nevertheless, on balance, and without objection if the Court is inclined to strike the balance differently, the Department believes that the Court should clarify that this subject matter is covered by the Protective Order and Local Rule.⁸

Such a ruling would not leave the Committees unable to address the subject. After a fair and impartial jury has been selected and the defendant has received the fair trial that is his right, the concerns raised by extrajudicial disclosure of information that the Department has provided to the Committees will not exist. The Committees could therefore postpone public hearings, or a

⁸ The Department assumes that the Committees would follow the Court's guidance on these issues. In any event, the Department will ensure 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.

public report, on this particular subject until the conclusion of the trial. In the meantime, they may address this subject in closed hearings, much as they must address other important issues they are considering that involve classified information.

4. Other Issues

Finally, the Staff Director's letter states that:

The Committees will examine a variety of other issues concerning the gathering, analysis and use of intelligence information. In doing so, they will consider historical data that embraces what the Intelligence Community has known or not known, and has done and not done, over a period of years that includes the span of time identified in the Moussaoui indictment, which includes events from 1989 to the present. To aid them in that undertaking, the Committees will draw on materials provided to them by the Intelligence Community in the course of this Joint Inquiry.

Exhibit A at 3.

Without greater definition as to what additional materials provided by the Intelligence Community may be made public by the Committees under this rubric, the Department cannot specifically address how the Protective Order and Local Rule may be implicated. Assuming, however, that the Committees do not intend to discuss the defendant or the dead hijackers specifically or to raise matters directly affecting this case -- a clarification which the Court may be able to obtain at a hearing -- the Department does not believe the Protective Order or Local Rule should impinge upon public hearings and reports. The issue that most affects the defendant's rights and the integrity of the criminal justice process is the proposed pre-trial, public airing of selected portions of the evidence that may be presented at trial and of opinions about the defendant's guilt or innocence. So long as Congress does not use information derived from the Justice Department to prematurely publicize those issues, the Department does not view the

Protective Order or Local Rule as a significant barrier.

Request for Sealing and for Expedited Consideration

Pursuant to the Protective Order, this motion and its attachments are filed under seal, as the attachments include draft testimony that refers to discovery materials. The Department further requests that any related hearings or orders in which discovery materials are discussed also be sealed at least until the conclusion of the trial. The Committees have also requested confidential treatment of this matter “because, among other reasons, the Committees have not yet made public the details or substance of their hearing schedule.” Exhibit A at 1. In light of the Committees’ role in these issues, however, the Department requests that the Court authorize the service of pleadings and orders on representatives of the Committees and, as discussed above, that the Court invite such representatives to attend any hearings.

Because the Committees’ public hearings may begin as soon as early September, the Department also requests that the Court expedite consideration of this motion.

Conclusion

For the reasons set forth above, the United States respectfully requests that the Court issue an Order clarifying that the Protective Order for Unclassified But Sensitive Material in this case and Local Criminal Rule 57 apply to information that the Department of Justice has provided to, or endorsed other agencies’ providing to, the Congressional Intelligence Committees’ Joint 9/11 Inquiry, as follows:

- (1) The Order and Rule do not preclude the provision of information regarding “the planning and execution of the [September 11] attack,” as described in Exhibit A, for public use by the Committees;

- (2) The Order and Rule do not preclude the provision of information regarding “Al-Mihdhar and Al-Hazmi,” as described in Exhibit A, for public use by the Committees;
- (3) The Order and Rule would preclude the provision of information regarding “The Moussaoui Investigation,” as described in Exhibit A, for public use by the Committees;
- (4) The Order and Rule would not preclude provision of information regarding other issues for public use by the Committees, so long as the information does not directly involve the defendant or the dead September 11 hijackers or other matters directly affecting this case; and
- (5) The Order will continue in effect as to all other matters.

The Department also respectfully requests that the Court invite the Committees to have their Members, staff, and/or other appropriate representatives, and the Senate Legal Counsel and House General Counsel, attend any hearing on this matter. Because of the scheduled timetable for the Committees’ public hearings, the Department requests that the Court expedite consideration of this matter.

Finally, the Department respectfully requests that the Court order that this motion, the attachments thereto, and any related hearings and orders be filed under seal at least until the conclusion of the defendant’s trial, except that the pleadings and orders may be served upon representatives of the Committees.

CERTIFICATE OF SERVICE

I certify that on August 19, 2002, a copy of the attached 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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