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

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	Hon. Leonie M. Brinkema
ZACARIAS MOUSSAOUI,	)	
a/k/a "Shaqil,"	)	
a/k/a "Abu Khalid al Sahrawi"	)	
	)	

DEFENDANT'S OPPOSITION TO REPRESENTATIVE CURT WELDON'S MOTION TO QUASH SUBPOENA

Zacarias Moussaoui, by counsel, hereby files this Opposition to Representative Curt Weldon's Motion to Quash.

1. Introduction.

Congressman Weldon's attempt to place himself above the President of the United States, as a matter of law, may be predictable but it is also, with all due respect, frivolous. The Supreme Court of the United States has held that the public has a right to every man's evidence and ordered the President of the United States to comply with a grand jury subpoena. United States v. Nixon, 418 U.S. 683, 709 (1974). Congressman Weldon cannot distinguish that case so he does not even try. In fact, his Memorandum does not cite a single criminal case that supports the proposition he advances in this Motion that he somehow, pursuant to the Speech or Debate Clause, has immunity from a criminal subpoena. The only test this Court should apply is whether the subpoena seeks evidence or information that is demonstrably relevant to the issues in this case. His status as a Congressman is wholly irrelevant.

Also, if such a privilege exists it is a qualified one that has been waived by the Congressman since the information sought by the defense is information that has been published, in a book that the Congressman is selling for $27.95, and has been the subject of many television and radio appearances by the Congressman. It is difficult for the defense to fathom why the Congressman would be eager to discuss these matters on Oprah, yet he would refuse to swear, in a capital case, that the same information is actually true. Regardless, there is absolutely nothing about this subpoena that touches in any way upon the Congressman's legislative functions. As such, the motion should be denied.[1]

2. The Nixon Case is Dispositive.

The holding in United States v. Nixon is, we believe, dispositive of this motion. As the Court is well aware, in Nixon the Supreme Court was faced with the question of whether the President of the United States could lawfully be compelled, over the asserted privileges, to comply with a subpoena duces tecum seeking information relevant to the Watergate investigation. The Court specifically rejected the President's claim that he enjoyed an absolute privilege of immunity from judicial process under all circumstances and ruled that demonstrably relevant evidence must be produced.

"[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." Id. at 706.

The impediment that an absolute, unqualified privilege would place in the way of

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[1] The Congressman has invoked that right, by letter attached to his motion, in a case pending in the Eastern District of Pennsylvania. We assume that is a mistake.

> the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence .... To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Art. III.

Id. at 707.

"But this presumptive privilege must be considered in light of our historic commitment to the rule of law." Id. at 708. "'[T]he public ... has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege." Id. at 709 (citations omitted). "The right to production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right 'to be confronted with the witnesses against him' and 'to have compulsory process for obtaining witnesses in his favor." Id. at 711. "[T]he allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." Id. at 712. "The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial." Id. at 713.

This same analysis applies in this case as it relates to the Speech or Debate Clause. Indeed, the Supreme Court has rejected a claim of immunity, premised upon that Clause, by a United States Senator. In Gravel v. United States, 408 U.S. 606 (1972), the Supreme Court held that questioning a Senate aide about the leaking of the Pentagon Papers would not infringe upon the Speech or Debate Clause. The Court, relying on Long v. Ansell, 293 U.S. 76 (1934), stated

"nor does freedom from arrest confer immunity on a Member from service of process as a defendant in civil matters ... or as a witness in a criminal case." Gravel, 408 U.S. at 614-615 (citing Ansell, 293 U.S. at 82-83). The Court went on to state,

> [t]he constitution gives to every man, charged with an offence, the benefit of compulsory process, to secure the attendance of witnesses. I do not know of any privilege to exempt members of congress from the service, or the obligations, of a subpoena, in such cases.'

Gravel at 615 (citation omitted).

Thus, Congressman Weldon enjoys no immunity whatsoever so long as any legislative acts are not implicated. As is set forth below, the subpoena issued here seeks relevant information and does not seek any information involving any legislative acts.

2. The Requested Information is Plainly Relevant and Does Not Involve Any Legislative Act.

The defense did not learn that Congressman Weldon possessed information about Able Danger from reading the Congressional Record or from attending hearings on the Hill. In June of 2005, Congressman Weldon wrote a book, ostensibly for profit, titled Countdown to Terror.[2] On page 18 of that book is the following passage:

> Then 9/11 happened and the need for the capability to share intelligence reached a crisis point. I wanted our government to act quickly. On September 25, 2001, just two weeks after 9/11, I met in the White House with Stephen Hadley, the deputy national security adviser to the president. I presented him with a 2' x 3' chart I had been given in the aftermath of 9/11. The chart was developed in 1999, as part of a Defense Department initiative dubbed "Able Danger." It diagrammed the affiliations of al Qaeda and showed Mohammed Atta and the infamous

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[2] Senator Gravel also facilitated the publication of a book, The Pentagon Papers, and the Supreme Court found those efforts beyond the reach of the Speech or Debate Clause. "Private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence." Gravel at 626.

Brooklyn Cell. Hadley's response was, "I have to show this to the big man." Information such as this, which was apparently available but not widely distributed to key U.S. officials, made NOAH even more of a priority.

It is this specific information that the defense seeks to elicit in this case. And, it was possessed by the Congressman in September of 2001, long before he claims in his Motion that he developed legislative interest in the subject and four years before his investigation was commenced.[3] This information is plainly helpful to the defense as it shows that the Government possessed specific information about the presence of the ring leader of the September 11 attacks in the United States before September 11. For the many reasons spelled out in previous filings in this case, this information is relevant, admissible and exculpatory. Congressman Weldon does not say in his book precisely how he came to be in possession of this chart and he does not address this question in his Motion. He does not say that it was given to him for the purpose of developing or seeking any legislation he has sought to introduce. The Speech or Debate Clause reaches beyond the actual legislative process only when the matters at issues are "an integral part of the deliberative function and communicative process by which Members participate in committee and House proceedings with respect to the consideration and passage of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." Gravel at 625. All we know here is that he saw this chart, can testify to its contents and is subject to the subpoena power of this Court. This issue is especially relevant since the Government denies that any such chart exists or that it ever existed. As such, that

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[3] In his Motion, the Congressman avers that in the "spring of 2005," he "started to form a strong belief that federal legislation might be necessary to insure that the technologies and methods of Able Danger were not abandoned." Memorandum of Point and Authorities in Support of Motion to Quash at 2-3. The defense has no interest in asking him any questions about any matters occurring after the spring of 2005.

information must be produced in this trial and the fact that the witness who can testify to these facts won an election in Pennsylvania does not alter the analysis in any regard.

Finally, Congressman Weldon continues to discuss these matters in public up to and including the day that he filed his motion. Attached hereto is a recent article quoting Congressman Weldon addressing these very same issues. His public profile on this matter is so elevated that it is difficult to identify a more obvious instance of waiver of any privilege other than this.

3. Conclusion.

For the reasons stated above the instant motion should be denied.

Respectfully Submitted,

Zacarias Moussaoui

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2006, a true copy of the foregoing pleading (with attachments) was served upon the following:

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COUNTDOWN TO TERROR

THE TOP-SECRET INFORMATION THAT COULD PREVENT THE NEXT TERRORIST ATTACK ON AMERICA... AND HOW THE CIA HAS IGNORED IT

CURT WELDON

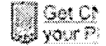
VICE CHAIRMAN, HOUSE ARMED SERVICES COMMITTEE

At Hamre's suggestion, on November 4, 1999, I arranged a meeting in my Washington office with Hamre and his counterparts at the FBI and the CIA. I provided the brief to all three officials personally. The brief was entitled "National Operations and Analysis Hub: Policy Makers Tool for Acting Against Emerging Transnational Threats and Dangers to U.S. National Security," and described an overarching plan to fuse intelligence data from all thirty-three classified systems of the federal intelligence bureaucracy. It also mandated use of "open source" data, which was not being used by the CIA in their threat assessments.

When I finished the briefing, the agents from the FBI and CIA said, "Congressman, we really don't need this capability." Frustrated, but undaunted, I continued to hold classified and open hearings on this intelligence need. I gave numerous speeches to intelligence gatherings. I even inserted language in three successive defense authorization bills requiring continuing DOD pursuit of intelligence system collaboration. Because the defense authorization bills have no jurisdiction over the CIA or FBI, I could not mandate their participation or cooperation.

Then 9/11 happened and the need for the capability to share intelligence reached a crisis point. I wanted our government to act quickly. On September 25, 2001, just two weeks after 9/11, I met in the White House with Stephen Hadley, the deputy national security adviser to the president. I presented him with a 2' × 3' chart I had been given in the aftermath of 9/11. The chart was developed in 1999, as part of a Defense Department initiative dubbed "Able Danger." It diagrammed the affiliations of al Qaeda and showed Mohammed Atta and the infamous Brooklyn Cell. Hadley's response was, "I have to show this to the big man." Information such as this, which was apparently available but not widely distributed to key U.S. officials, made NOAH even more of a priority.

Two years before 9/11, I gave our intelligence community a plan, a system, and a challenge to end the "stovepipes" created by thirty-three classified systems operated by some sixteen different federal agencies and jurisdictions. Intelligence community officials did not listen. Not



The Nation

'Able Danger' Identified 9/11 Hijacker 13 Times

By Sherrie Gossett
CNSNews.com Staff Writer
February 15, 2006

Washington (CNSNews.com) - The top-secret, military intelligence unit known as "Able Danger" identified Mohammed Atta, the leader of the Sept. 11 hijackers, 13 times before the 2001 attacks, according to new information released Tuesday by U.S. Rep. Curt Weldon, (R-Pa.), chairman of the House Armed Services and Homeland Security Committees.

Able Danger has been identified by Weldon and team member Lt. Col. Anthony Shaffer as an elite group of approximately two dozen individuals tasked with identifying and targeting the links and relationships of al Qaeda worldwide.

On June 27, 2005, Weldon said that Able Danger had offered in the year before the Sept. 11, 2001, terrorist attacks to share its intelligence with the FBI and to work with them to take down the New York City terrorist cell involving Mohammed Atta and two other 9/11 terrorists. Weldon said Clinton administration lawyers prevented the information from being shared with the FBI.

According to Weldon, the lawyers told Able Danger members, " [Y] ou cannot pursue contact with the FBI against that cell. Mohamed Atta is in the U.S. on a green card and we are fearful of the fallout from the Waco incident," a reference to the FBI's raid on the David Koresh-led Branch Davidian compound in Waco, Tex., in April 1993.

Media reports indicated that lawyers for Able Danger were concerned that sharing data with domestic law enforcement was illegal.

Weldon on Tuesday said that despite testimony indicating that Able Danger's data had been destroyed, he has discovered data still available. "And I am in contact with people who are still able to [do] data mining runs on pre-9/11 data," Weldon said. "In those data runs that are now being done today, in spite of what DOD (Department of

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Defense) said I have 13 hits on Mohammed Atta ..."

Weldon would not name the individual helping him obtain the Able Danger data.

As recently as two weeks ago additional Able Danger material was found in files at the Pentagon, Weldon said. "[A] general was present as the information was taken out of file cabinets ..."

The program and its pre-9/11 intelligence will be the subject of hearings Wednesday conducted by the Armed Services Committee. Most of the hearings will be open, but parts will be closed, Weldon said, due to witness fears of retaliation.

The witness list includes Dr. Steve Cambone, Eric Kleinsmith, J.D. Smith, Lt. Col. Shaffer, Commander Scott Philpot and Dr. Eileen Pricer.

Weldon also said his staff is still identifying additional witnesses. "At least one additional witness has come forward who just retired from one of the intelligence agencies, who will also testify under oath that he was well-aware of and identified Mohammed Atta's both name and photo prior to 9/11 occurring," Weldon said.

"Today and tomorrow, Lieutenant Colonel Shaffer will testify in his uniform under oath in spite of an aggressive effort by [Defense Intelligence Agency] bureaucrats to tarnish his image," Weldon said.

The congressman has detailed a "smear campaign," allegedly conducted by DIA officials against Shaffer.

The information provided by Shaffer contradicts the official conclusion of the 9/11 Commission, that U.S. intelligence had not identified Atta as a terrorist before the attacks on New York City and the Pentagon.

Weldon also said that despite the fact that Dr. Philip Zelikow, executive director of the 9/11 Commission has denied meeting with Shaffer, "irrefutable evidence" of a meeting will be presented at Wednesday's congressional hearing.

During a hearing Tuesday afternoon before the Subcommittee on National Security, Shaffer testified under oath that he met with Zelikow at Bagram Air Force Base in Afghanistan. According to Shaffer, Zelikow said: "What you said today is very important. We need to continue this dialog when you return to the U.S." Zelikow gave him his business card at the time, Shaffer said. It is not known whether the business card is the "physical evidence of that meeting" Weldon said would be presented at Wednesday's hearing.

Weldon also said that within days of the Able Danger story breaking

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in the New York Times, his office received a call from 9/11 Commission member Jamie Gorelick, assistant attorney general during the Clinton administration. In an interview after the press conference, Weldon told **Cybercast News Service** that Gorelick told a Weldon aide that the message was "extremely urgent." Weldon was in Pennsylvania at the time and Gorelick was on vacation in Cape Cod.

Gorelick reportedly told Weldon's staff to pass on to Weldon the following message: "I did nothing wrong." Weldon also said Gorelick later called the Senate Judiciary Committee staff twice with the same message.

During his press conference Weldon also said the Able Danger group warned officials from the U.S. Central Command (CENTCOM) that terrorists were likely to target an American platform in Yemen at the Port of Aden. This message was relayed two days before the USS Cole Navy destroyer was attacked by al Qaeda on Oct. 12, 2000. Seventeen sailors died and 40 were injured in the attack.

Navy Captain Scott Philpott, also affiliated with Able Danger, reportedly briefed the head of Special Operations Command (SOCOM), Gen. Peter Schoomaker on the threat. Schoomaker is currently the chief of staff for the U.S. Army.

The USS Cole, which was headed to the Port of Aden to refuel, was never warned to stay away from the port, according to Weldon, who added that Able Danger had also warned CENTCOM two weeks prior to the USS Cole attack that there was massive terrorist activity in Yemen.

"I don't know what's going on. But I can tell you that this country needs to get to the bottom of who does not want the American people to know the facts leading up to 9/11; why the 9/11 Commission deliberately denied information to the commissioners ..." Weldon said.

He indicated that there were parties on both sides of the aisle who did not want the Able Danger issue to be pursued, and that he had been under unidentified pressure. Weldon would not elaborate.

"Was this an effort by both (Clinton and Bush) administrations to keep information from the American people about what was known before 9/11?" Weldon asked "If that's the case that is outrageous and wrong."

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