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

UNITED STATES OF AMERICA	)	
v.	)	Crim. No. 1:01cr455 (LMB)
ZACARIAS MOUSSAOUI,	)	
Defendant.	)	

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

On February 17, 2006, U.S. Representative Curt Weldon moved to quash the subpoena issued to him by Defendant Zacarias Moussaoui. On February 23, 2006, Mr. Moussaoui filed Defendant's Opposition to Representative Curt Weldon's Motion to Quash Subpoena ("Opposition"), and we now reply.

The Opposition boils down to two arguments. First, the Opposition claims that under *United States v. Nixon*, 418 U.S. 683 (1974), Mr. Moussauoi's need for Congressman Weldon's documents and testimony trumps Congressman Weldon's privilege under the Speech or Debate Clause of the Constitution. Second, the Opposition argues in the alternative that even if the subpoena to Congressman Weldon does not trump his Speech or Debate privilege, the privilege does not apply anyway because the information sought is not legislative in nature. As we now show, both of these arguments are incorrect.

I. The Speech or Debate Privilege, Unlike the Executive Privilege, Is Absolute.

As set forth in detail in Congressman Weldon's Motion to Quash, well-established Supreme Court and lower court precedent clearly demonstrates that the subpoena issued to Congressman Weldon is barred by the Speech or Debate Clause. Motion to Quash at 5-11.

Because Mr. Moussaoui cannot refute this long and consistent line of case law, he attempts to circumvent it by arguing that this matter should be controlled not by applicable Speech or Debate precedent but rather by *United States v. Nixon*.

The Opposition, quoting from *Nixon*, states that "'[t]he generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.'" Opposition at 3 (quoting *Nixon*, 418 U.S. at 713). The *Nixon* court, however, was ruling only on an assertion of ***executive*** privilege, and expressly rejected President Nixon's claim that the Article II powers of the President could be read to provide an enumerated and absolute privilege. 418 U.S. at 707.

The Speech or Debate privilege, by contrast, is explicitly enumerated in the Constitution, and is an absolute privilege – not a qualified one like executive privilege. *See, e.g.*, *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501, 507, 509-10 (1975). Indeed, the Opposition itself quotes the following language from *Nixon*: "'[T]he public . . . has a right to every man's evidence, ***except for those persons protected by a constitutional, common-law, or statutory privilege***.'" Opposition at 3 (quoting *Nixon*, 418 U.S. at 709) (internal quotations and citations omitted) (emphasis added). This language makes it very clear that the Speech or Debate privilege simply cannot be trumped by even the most compelling need for evidence.

On the one occasion that the Opposition does discuss an actual Speech or Debate case, it gets it wrong. Opposition at 3-4 (quoting *Gravel*, 408 U.S. 606, 614-15 (1972)) ("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."). This language is wholly irrelevant because it addresses the Arrest Clause of the Constitution – *not* the Speech or Debate Clause. In the parts

of the opinion that do discuss the Speech or Debate Clause, the Supreme Court made it very clear that Members of Congress may not be compelled to testify about any legislative activity. *Gravel*, 408 U.S. at 615-616.

II. The Information Sought By the Subpoena Is Entirely Legislative and Therefore Is Absolutely Privileged Under the Speech or Debate Clause.

The Opposition also argues that even if the Speech or Debate privilege is absolute, the information Mr. Moussaoui seeks from Congressman Weldon is, in any event, not legislative and therefore not covered by the privilege. Opposition at 4-6. In so arguing, Mr. Moussaoui has explicitly narrowed the subpoena: "The defense has no interest in asking him any questions about any matters occurring after the spring of 2005." Opposition at 5 n.3.

Congressman Weldon has no documents responsive to the subpoena that he obtained before the spring of 2005. The single document identified in the Opposition is a chart Congressman Weldon was given shortly after the September 11, 2001 attacks. Opposition at 4. The Congressman no longer has possession, custody or control of this document, however, having given his only copy to Stephen Hadley, then deputy national security adviser to the President. *See also id.* (quoting Curt Weldon, *Countdown to Terror* 18 (Regnery Publishing 2005)).

Aside from that chart, the Congressman did not obtain any documents relating to Able Danger before spring of 2005. Accordingly, the document aspect of the subpoena (as narrowed by the Opposition) is now moot.

With respect to the testimonial aspect of the subpoena, the Speech or Debate privilege bars any compelled testimony by Congressman Weldon regarding the chart. Congressman Weldon obtained the chart in 2001 from a Department of Defense employee as a result of the

Congressman's service on the House Committee on Armed Services. Specifically, in the years prior to 2001, the Congressman had worked on legislation that provided funding for the U.S. Army's Land Information Warfare Activity ("LIWA"), which operated the Able Danger program. Beginning in 1998 the Congressman developed ongoing legislative relationships with LIWA that included LIWA personnel providing information and policy recommendations to the Congressman. It was in the context of this ongoing relationship that, shortly after September 11, 2001, the LIWA employee provided Congressman Weldon with a copy of the chart for the purpose of demonstrating the benefits of congressional funding for programs such as Able Danger.

Congressman Weldon's acquisition of the chart is therefore no different from any other committee work relating to the consideration of legislation, and as such is clearly protected by the Speech or Debate Clause. *See, e.g.*, *Eastland*, 421 U.S. at 504 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)) ("'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.'"); *Government of Virgin Islands v. Lee*, 775 F.2d 514, 521 (3d Cir. 1985) ("[F]act-finding, information gathering, and investigative activities are essential preerquisites to the drafting of bills and the enlightened debate over proposed legislation."); *Tavoulareas v. Piro*, 527 F. Supp. 676, 680 (D.D.C. 1981) ("[T]he active acquisition of information by congressional staff, whether formally or informally, is an activity within the protective ambit of the speech or debate clause.").

III. The Opposition Fails to Show That Congressman Weldon Waived His Speech or Debate Privilege.

As a final matter, we note that the Opposition makes a half-hearted effort to argue that

Congressman Weldon has waived his Speech or Debate privilege by discussing Able Danger in public.[1] However, the Opposition does not even address, much less refute, the Supreme Court precedent cited in the Motion to Quash that clearly shows that Congressman Weldon's discussing Able Danger cannot possibly constitute a waiver of the privilege. *See United States v. Helstoski*, 442 U.S. 477, 490-91 (1979) ("Assuming that [waiver of the Speech or Debate privilege] is possible, we hold that [it] can be found only after *explicit and unequivocal renunciation* of the protection.") (emphasis added). The Opposition does not (and cannot) claim that Congressman Weldon's discussing Able Danger in public constitutes an "explicit and unequivocal renunciation" of his Speech or Debate privilege.

[1] The Opposition also cites the holding in *Gravel* that the Speech or Debate Clause did not apply to Senator Gravel's actions with respect to the private republication of legislative material, and seeks to analogize this to Congressman Weldon's private publication of a book. Opposition at 4 n.2 (quoting *Gravel*, 408 U.S. at 626). This analogy is severely flawed. The whole point of the *Gravel* decision was that Senator Gravel's actions with respect to the book were entirely *separate* from his legislative activity, and therefore his aide could testify about the private republication without impinging on the legislative process. By contrast, any testimony by Congressman Weldon about Able Danger would be inherently inseparable from his legislative actions in gathering that information, and therefore would inevitably impinge on the legislative process. (It should also be noted that the paragraph from Congressman Weldon's book quoted in the Opposition is the only paragraph in the entire book that mentions Able Danger. The book is not about Able Danger – it is about the need for intelligence reform, and it is in this context that the chart is mentioned as an example of an intelligence failure.)

CONCLUSION

For all the reasons set forth in the Motion to Quash, the subpoena served on Congressman Weldon must be quashed.

Respectfully submitted,

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February 28, 2006

CERTIFICATE OF SERVICE

I certify that on February 28, 2006, I served one copy of the foregoing Reply to Defendant's Opposition to Representative Curt Weldon's Motion to Quash Subpoena, by facsimile and first-class mail, on each of the following:

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