

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

JAN - 8 2002

Alexandria Division

UNITED STATES OF AMERICA)

v.)

ZACARIAS MOUSSAOUI)

Criminal No. 01-455-A
(In re: Motion of Court TV)

AMICUS CURIAE MEMORANDUM OF NATIONAL NARROWCAST NETWORK, L.P.
REGARDING MOTION OF INTERVENOR COURTROOM TELEVISION NETWORK LLC
TO RECORD AND TELECAST PRETRIAL AND TRIAL PROCEEDINGS AND THE
GOVERNMENT'S OPPOSITION THERETO

National Narrowcast Network, L.P., ("NNN") files this Amicus Curiae Memorandum Regarding the Motion of Intervenor Courtroom Television Network LLC ("Court TV") to Record and Telecast Pretrial and Trial Proceedings and the Government's Opposition Thereto for the purpose of assisting the Court in considering the issues presented by the Court TV Motion. NNN's interest and experience are described in the Motion for Leave to File, which accompanies this Memorandum. NNN believes that even if this Court agrees with the Government that the Court cannot or should not permit the televising of the proceedings in this case, Court TV has presented cogent reasons why the proceedings in this case should be available to the media and public immediately, accurately and completely in some electronic form. NNN suggests that virtually all of the beneficial effects sought by Court TV can be achieved and virtually all of the risks and burdens posited by the Government can be avoided if the Court opts to allow comprehensive live audio coverage of the proceedings. Such coverage will allow the public and the media both in the United States and abroad to have complete and unfiltered access to the

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proceedings as they occur. It will reduce the public's and the media's need to rely on rushed and imperfect summaries from notes and memory by the small number of reporters physically present in the courtroom. It will reduce the role and impact of courtroom door "spinning" by adherents of one side or the other, and enhance the public's ability to follow and understand the proceedings and assess for itself the quality of the process and the substance of the case in this Court.

At the same time easy availability of the entire audio of the public portion of the proceedings will not in any way adversely affect either the quality of the judicial process or the nature of the result in the manner which the Government (and to some extent the Defendant) hypothesizes for television coverage. Of course, audio coverage requires no special lighting or equipment of any type in the courtroom, or in the courthouse for that matter. The existing sound system and ordinary phone lines can be utilized to bring the audio to one or more remote systems which can be accessed by members of the media and of the public. The defendant, witnesses, and attorneys, will see nothing that they do not ordinarily see in a courtroom, and the risk of a temptation to "perform" for the everyday microphones will be farfetched. The fear that witnesses, jurors, attorneys, and even the presiding judge will lose their anonymity, and risk confrontation or worse by disgruntled members of the remote audience virtually disappears when the proceedings are transmitted via audio without video.

Both the Supreme Court and the United States Court of Appeals for the D.C. Circuit have had longstanding traditions, rules, and practices prohibiting any electronic transmission of their proceedings outside their courthouses until long after the proceedings occur. See, *e.g.*, D.C. Circuit, Handbook of Practice and Internal Procedures, Section XI, Oral Arguments, Subsec. I

Transcription of Arguments, at 51. In fact it is widely known that one member of the High Court has said that cameras will be permitted in that Court “over my dead body.” Nevertheless, in recent cases where those courts were presented with gigantic public and media demands for quick and complete access to their proceedings in cases of overwhelming media, professional and public interest, both courts, while declining to permit camera coverage, allowed audio coverage of those particular proceedings. The Supreme Court in the 2000 Election Cases, Bush v. Palm Beach Canvassing Board, Case No. 00-836, and Bush v. Gore, Case No. 00-949, made gavel-to-gavel audiotapes available to the media for unrestricted use as soon as each argument ended. The United States Court of Appeals for the D.C. Circuit in the Microsoft Case (U.S. v. Microsoft Corporation, No. 00-5212, D.C. Cir.), dealing with much longer proceedings (three half-day sessions), allowed live audio coverage of the arguments from the courtroom. The arguments from both courts were widely available on a variety of websites live, and are still available on demand from a variety of internet sources. See, Notice Concerning Streaming of the Oral Arguments in the Microsoft case, <http://www.cadc.uscourts.gov/common/microsoft/publicinternet.pdf>. See, also, NNN’s archived streaming web audio of the arguments in those cases on its Hearings.comsm web audio service at: <http://www.hearings.com/client/hearing.asp?ID=94&HID=1115>, and <http://www.hearings.com/client/hearing.asp?HID=1440&ID=92>, respectively. (NNN believes that the Supreme Court’s tape-delay approach was much less satisfactory than the D.C. Circuit’s live transmissions, since public access to the former occurred only after the arguments in each case were completed, thus delaying availability of the unfiltered version, exaggerating the role of reporters and commentators running breathless out to the street to capsulize the complex

arguments and the court's questions, and creating unnecessary logistical problems especially for smaller media outlets outside Washington. The D.C Circuit's live transmissions met more of the public need more efficiently and effectively.)

Obviously, the legal framework for the proceedings in those courts was distinct from the legal situation facing this Court. The Supreme Court makes its own rules and has the broadest possible discretion on housekeeping issues such as the one presented in the Election Cases. The Circuit Courts are permitted by the applicable Resolution of the Judicial Conference of the United States to make their own decisions on the issue of cameras and microphones in the courtroom. See, Statement of Chief Judge Edward R. Becker on Behalf of the Judicial Conference of the United States, Senate Judiciary Subcommittee on Administrative Oversight and the Courts (September 6, 2000) at 5 (available at http://www.uscourts.gov/Press_Releases/becker.pdf) ("Becker"). Thus the Ninth Circuit allows such coverage (at the discretion of each panel) as a matter of course, and the D.C. Circuit – and all other circuits – can change their practices at will. See United States Court of Appeals for the Ninth Circuit, Guidelines for Photographing, Recording, and Broadcasting in the Courtroom, effective June 21, 1996 (available at <http://www.ca9.uscourts.gov/ca9/documents.nsf/8964389f63d547c888256a8e0052f7ee/45cab450851f626a882567710062ed97?OpenDocument>, or, go to <http://www.ca9.uscourts.gov/>, click on "Documents", then "Download", then "Camera Request Guidelines").

The situation in the District Courts, however, is more constrained. As Court TV and the Government have both pointed out, Federal Rule of Criminal Procedure 53, adopted in 1946, precludes the "taking of photographs" and "radio broadcasting" of proceedings from the

courtroom. Construed strictly on its face, the Rule does not prohibit the transmission of sounds from the courtroom other than via “radio broadcasting,” a term which arguably does not apply to the type of audio transmission suggested here. Perhaps more importantly, according to Judge Becker’s recitation of the relevant history, Becker, *supra*, at 4, the decision as to whether district courts are permitted to allow electronic coverage is now placed in the hands of each Circuit Judicial Council. In March 1996, the Judicial Conference voted to “*urge* each circuit judicial council to adopt, pursuant to its rulemaking authority articulated in 28 U.S.C. §332(d)(1), an order ... not to permit” radio or television coverage of proceedings in U.S. district courts. Becker at 4 (emphasis added). “The Conference also voted to strongly urge circuit judicial councils to abrogate any local rules that conflict with this decision, pursuant to 28 U.S.C. §2071(c)(1).” The clear implication of this analysis is that district courts may adopt their own rules on this subject, which, *unless* abrogated by the Circuit Council or precluded by the rules adopted by the Circuit council, are effective. (The Government appears to concede this point in its discussion of Katzman v. Victoria’s Secret Catalogue, 923 F. Supp. 580, 589 (S.D.N.Y. 1996), Government Opposition at 10-11 n.5: “the decision ultimately rested on the court’s conclusion that the relevant local rule gave it discretion to televise civil proceedings. *Id.* at 584-86.”)

Moreover, Judge Becker quotes the “Guide to Judiciary Policies and Procedures” as stating that a district “judge may authorize broadcasting, televising, recording or taking photographs in the courtroom” during certain specified types of proceedings (not including ordinary criminal trials), and “during other proceedings ... [*inter alia*] for security purposes ... [or] for other purposes of judicial administration.” Becker at 5. Thus, even if the present form

of Local Rule 83.3, which precludes “taking of photographs and operation of tape recorders in the courtroom” and “radio and television broadcasting from the courtroom,” is deemed to preclude any audio transmission from the courtroom, even those not involving a “tape recorder in” or a “radio broadcast from” the courtroom, the members of this Court could alter that rule to permit such audio coverage in a particular case, unless the Circuit Council abrogated that revision, or had precluded it by a preexisting rule. The Government has cited no such Circuit Rule and NNN is aware of no such rule, but even if such a rule existed, it could be revised by the Circuit Council to allow an exception in this extraordinary case. Because there is ample time for this Court to adopt or request the Circuit to adopt a permissive rule before the trial in this case begins, the existence of the local rule should not be deemed a sufficient reason for this court not even to consider either the proposal for televised proceedings or the alternative option suggested herein. It should be noted that even the U.S. Judicial Conference, which applies a very complex and extended process for national rules under the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, contemplates that “the process ... may be expedited when there is an urgent need to amend the rules.” Federal Rulemaking, The Rulemaking Process, A Summary for the Bench and Bar, “How the Rules Are Amended,” Administrative Office of the U.S. Courts, October 1997, reproduced at <http://www.uscourts.gov/rules/proceduresum.htm> .

In short, the arguments for allowing immediate full coverage of proceedings of such worldwide interest and concern are overwhelming:

- live coverage would reduce the demand for seats in the courtroom for the media and the public and the traffic flow in the courthouse, thus easing the logistical burdens and security risks for the court staff;

- complete real-time coverage provides the nation and the world with an accurate, timely and unfiltered view of these important proceedings;
- remotely available video or audio coverage gives equal access to all sizes and forms of media and reduces public reliance on rushed coverage by a small group of harried reporters, “talking heads,” and biased “spinners” for one side or the other.

At the same time, even if the Court sees the kind of problems with camera coverage feared by the government (and Judge Becker), those problems can be avoided if audio coverage is allowed. Audio access:

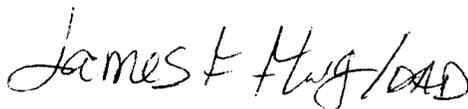
- does not invite excessive “showing off” by participants;
- does not identify the faces of participants, and thus does not create other security or privacy concerns or discourage witnesses from appearing;
- does not negatively impact the trial process, or interfere with a fair trial.

This Court need not reach the Constitutional questions raised by Court TV. The issue can be decided on the discretionary merits whether or not the existing national and local rules are construed as preventing electronic coverage as a routine matter. This is not a routine case, and the Court has the time and ability to consider the unique circumstances here and to adopt a special rule, or request that the Circuit adopt a permissive rule, permitting this court to optimize the public interest in access, the court’s interest in efficiency and security, the defendant’s interest in a fair and open trial, and the legitimate media interest in equal opportunity for full and fast coverage, just as the Supreme Court and D.C. Circuit did in the Election Cases and the Microsoft case.

CONCLUSION

NNN therefore urges this Court to consider the electronic coverage issue on its merits, to adopt a plan for electronic coverage which best meets the needs of all the interested parties, in particular to consider the advantages of audio-only coverage if it decides against video coverage, to interpret its authority broadly under existing rules and practices, and to make or seek any necessary revisions in those rules if it deems them to be a barrier to comprehensive electronic coverage. If it provides for electronic coverage, it should assure that access is readily and remotely available to all types and sizes of media. NNN stands ready to assist the Court in any way possible to plan and implement such access.

Respectfully submitted,



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Date: January 7, 2002

Certificate of Service

I certify that a true and correct copy of the foregoing AMICUS CURIAE MEMORANDUM OF NATIONAL BROADCAST NETWORK, L.P. was served by fax and U.S. mail, on January 7, 2002, on the counsel listed below:

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