

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

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CLERK OF COURT
U.S. DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA, VA 22304

UNITED STATES OF AMERICA)
)
 v.) Crim. No. 01-455-A
) **UNDER SEAL**
ZACARIAS MOUSSAOUI)

**STANDBY COUNSEL'S OPPOSITION TO GOVERNMENT'S MOTION TO QUASH
SUBPOENA DUCES TECUM SERVED ON CENTRAL INTELLIGENCE AGENCY**

INTRODUCTION

The government seeks to quash standby counsel's subpoena *duces tecum*, a subpoena that was authorized by this Court on three different occasions, and ultimately served on the Central Intelligence Agency on October 28, 2002.¹ In essence, the government argues that the subpoena fails to meet the *Nixon* test, and is a fishing expedition for discovery.

In order to resolve the dispute, and without conceding anything with regard to the validity of the subpoena as issued, standby counsel have offered to narrow the subpoena. Our offer was to reduce the subpoena to standby counsel's original intent, with the addition of the Bafana information, and with a recognition of Mr. Moussaoui's right to pursue additional information.² The government refused the offer to resolve the dispute.³ By way of reply to the government's motion to quash, standby counsel seeks to have this Court order compliance with a narrowed subpoena

¹ The initial subpoena was faxed to the General Counsel of the CIA on September 27, 2002, but never timely served. The U.S. Attorney's office called on or about September 30, 2002 asking for more time for the CIA to respond.

² See letter from standby counsel to government counsel, dated December 4, 2002, attached as Exhibit A.

³ The government rejected standby counsel's offer to narrow the scope of the subpoena in a telephone call on December 11, 2002 between standby counsel Edward MacMahon and Assistant United States Attorney Robert Spencer.

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duces tecum, and to direct the CIA to produce to the Court Security Officer, for production to the defense:

“any and all time lines or other chronologies, and the underlying supporting documentation, which was produced to either house or any subcommittee of the United States Congress, that refer or relate to Mr. Moussaoui and/or any of the alleged 19 hijackers and other alleged 9/11 plotters, and which show the activities and whereabouts of Mr. Moussaoui and/or the alleged 19 hijackers and other alleged 9/11 plotters from January 1, 1997 up to the attacks on 9/11/01, and any and all information regarding Faiz Bafana.”

We make this request without prejudice to Mr. Moussaoui to renew his previous request for additional information.

FACTUAL BACKGROUND

Standby counsel learned from press reports and discovery in this case that the CIA had produced to the U.S. Congress a time line or time lines of the alleged 19 hijackers and other alleged 9/11 plotters, including documentation supporting the time line(s). The government advised that it would not produce these time lines as either Rule 16 materials or as *Brady*. On September 6, 2002, standby counsel filed an “*Ex Parte* Motion for Issuance of Subpoena *Duces Tecum* to Central Intelligence Agency (corrected)” (hereinafter “Motion for Subpoena”) seeking “[a]ny and all timelines or other chronologies, including but not limited to any timelines or chronologies produced to either house or any committee of the United States Congress, that refer or relate to any of the following [twenty-six listed] persons in particular, and the al Qaeda network in general, for their activities and whereabouts from any point in time from January 1, 1997 up to the attacks on September 11, 2001, and from that time to the present, including all underlying documentation on which these timelines/chronologies are based.” The Motion for Subpoena addressed and met the *Nixon* factors. On September 9, 2002, the Court issued an order finding the requests to be reasonable, and directed the Clerk to issue the requested subpoena. Three days later, before the

subpoena was served, Mr. Moussaoui filed an “*Ex Parte* Motion for Issuance of Subpoena *Duces Tecum* to Central Intelligence Agency” seeking additional names and information. The next day, September 13, 2002, standby counsel filed an “*Ex Parte* Submission in Support of Moussaoui *Pro Se Ex Parte* Motion for Issuance of Subpoena *Duces Tecum* to Central Intelligence Agency” in support of Mr. Moussaoui’s request. Thereafter, on September 23, 2002, the Court found Mr. Moussaoui’s additional request to be reasonable, and issued an order granting his motion to add names. The Court ordered that standby counsel submit an appropriate subpoena *duces tecum* to the Clerk, and that the subpoena direct the CIA to produce any classified responsive documents to the Court Security Officer.

On September 27, 2002, a revised subpoena was issued with two categories of documents requested. The first category included the thirteen names requested by Mr. Moussaoui⁴ and requested the identical information sought in the initial subpoena. The second category sought “[a]ll information on any of the below named individuals for the time period January 1, 1997 to the present which can reasonably be located by diligent search . . .” and listed twenty-nine people (29), including the twenty-six (26) listed in the original subpoena and the three (3) names from Mr. Moussaoui’s list. Because of technical difficulties (referral of the subpoena to the U.S. Marshal in D.C.), this subpoena was never served.⁵

Standby counsel learned the subpoena had not been timely served at about the same time that Mr. Bafana’s deposition was scheduled. As a result, on October 24, 2002, standby counsel filed a “Motion to Reissue CIA Subpoenas and to Provide Additional Information Relevant to Defendant

⁴ One additional name was included but appears to be a spelling error.

⁵ It was, however, delivered by mail and fax to the General Counsel of the CIA. The U.S. Attorneys Office contacted standby counsel on or about September 30, 2002 to request additional time to respond to the subpoena.

Moussaoui's Motion to Continue the Deposition of Faiz Bafana." In this Motion, which was served on government counsel, standby counsel requested to add four (4) names to the second category in the subpoena that were specifically relevant to the Bafana deposition. On October 25, 2002, the Court granted the Motion to Reissue the subpoenas *duces tecum* and directed the Clerk to issue the subpoenas.⁶ The subpoena was then reissued with fourteen (14) names in the first category and thirty-three (33) names in second category. On November 26, 2002, the government filed a Motion to Quash Subpoena *Duces Tecum* Served on Central Intelligence Agency (CIA)."

ARGUMENT

The government condemns standby counsel for failing to establish the relevance, admissibility and specificity of the documents sought in the subpoena *duces tecum*. However, these claims are made in the absence of knowledge that this Court has three times authorized the subpoena *duces tecum*, after the proper showing was made. The decision whether to require production of documents pretrial rests ultimately within the sound discretion of the trial court. *See United States v. Nixon*, 418 U.S. 683, 702 (1974) ("[e]nforcement of a pretrial subpoena *duces tecum* must necessarily be committed to the sound discretion of the trial court because the necessity for the pretrial subpoena most often turns upon a determination of factual issues.") In accordance with the requirements of Rule 17(c), this Court weighed the request for issuance of the subpoena *duces tecum*, permitted expansion of the subpoena pursuant to the request of a *pro se* defendant, and, finding that the request was reasonable, directed that the Clerk issue the subpoena.

⁶ In declining to continue the Bafana deposition, the Court found that "[i]f subsequent discovery productions, including any response to the CIA subpoenas, reveal information which would have been relevant to the Bafana deposition, and the Court determines that the defendant has been prejudiced by his inability to use such evidence in his cross-examination of the witness, the United States will not be permitted to use the Bafana deposition in its case-in-chief unless it is able to arrange a second deposition." [See October 25, 2002 Order, Under Seal].

In addition, even the government must acknowledge that the items sought by this subpoena, particularly as originally requested and as narrowed above, are relevant and admissible, and the subpoena is sufficiently specific.⁷ As set forth in the original *ex parte* application, the evidence is admissible under F.R.E. 803(8), 803(6) and 801(d)(2). The evidence sought by the subpoena is relevant to show the lack of connection between Mr. Moussaoui and the alleged 9/11 plotters, including the alleged 19 hijackers—and as such can establish either a guilt and/or penalty phase defense for Mr. Moussaoui. The subpoena, particularly as originally sought and as narrowed above, is sufficiently specific so as to not be a “fishing expedition” through government files.⁸

The government argues that the proper mechanism for obtaining this evidence is through “an appropriate discovery motion,” but at the same time notes “a real question exists whether the scope of the government’s discovery responsibilities encompass the intelligence agencies . . .” [*See* Government Motion at p. 2]. Continuing with this almost slight-of-hand, the government tells the Court that it has far exceeded the demands of Rule 16 and 18 U.S.C. § 3500, and also that it has searched the files of the intelligence agencies for discovery—leading to the inescapable conclusion that the government’s response to any “appropriate discovery motion” would be what the government has already advised standby counsel—that the evidence sought will not be provided in discovery.⁹

⁷ The government seems to complain that the subpoena itself does not establish the *Nixon* criteria, but does so in the apparent absence of knowledge that the justification was provided to the Court *ex parte*.

⁸ By narrowing the request we do not concede that the subpoena *duces tecum* is a “fishing expedition.” We seek simply to obtain the evidence that was originally at issue, and the information on Mr. Bafana, and leave for another day any broader requests.

⁹ The government’s brief reiterates the unremarkable proposition that Rule 17(c) is not a discovery device. Undersigned have no objection to production of the evidence under Rule 16, but as noted, have previously been advised by government counsel that the time line(s) will not be
(continued...)

Contrary to the government's position, production of the material sought by the subpoena—timelines and supporting documentation already provided to the U.S. Congress—does not mandate the CIA to empty its files regarding members or associates of *al Qaeda* “while we are at war.” This subpoena does not require the CIA to empty any files—it has already provided the requested time lines and supporting documents to the U.S. Congress, and should be able to easily provide them pursuant to a Rule 17(c) subpoena.

Finally, outside of the various *ex parte* requests for the CIA timeline(s) and supporting documentation and Mr. Moussaoui's additional requests, standby counsel sought evidence regarding Faiz Bafana. For the reasons already argued, standby counsel continue to seek all evidence in the CIA files regarding Mr. Bafana. Indeed, as set forth above at footnote six (6), the Court noted the potential need for a second deposition should any response to the CIA subpoena reveal information relevant to the Bafana deposition that should have been available at the time he was deposed.

CONCLUSION

Accordingly, for the foregoing reasons, and any others adduced at a hearing on this motion, standby counsel, on behalf of *pro se* defendant Zacarias Moussaoui, move this Court to deny the Government's Motion to Quash and to compel production of the items sought, as originally sought and as narrowed above and including the CIA information on Faiz Bafana, to the defense. We ask that the requested relief be granted without prejudice to Mr. Moussaoui to renew his previous request for additional information.

Respectfully submitted,

ZACARIAS MOUSSAOUI
By Standby Counsel

⁹ (...continued)
produced as Rule 16 or *Brady*.

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Frank W. Dunham, Jr.
Federal Public Defender
Gerald T. Zerkin
Senior Assistant Federal Public Defender
Kenneth P. Troccoli
Anne M. Chapman
Assistant Federal Public Defenders
Eastern District of Virginia
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800

181
Edward B. MacMahon, Jr.
107 East Washington Street
P.O. Box 903
Middleburg, VA 20117
(540) 687-3902

181
Alan Yamamoto
108 North Alfred Street
First Floor
Alexandria, VA 22314
(703) 684-4700

181
Judy Clarke
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101
(703) 600-0855; (619) 234-8467

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Standby Counsel's Opposition to Government's Motion to Quash Subpoena *Duces Tecum* Served on Central Intelligence Agency was served upon AUSA Robert A. Spencer, AUSA David Novak and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, by placing a copy BY HAND in the box designated for the United States Attorney's Office in the Clerk's Office of the U.S. District Court for the Eastern District of Virginia and UPON APPROVAL FROM THE COURT SECURITY OFFICER via first class mail to Zacarias Moussaoui, c/o Alexandria Detention Center, 2001 Mill Road, Alexandria, VA 22314 this 12 day of December 2002.

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Frank W. Dunham, Jr.

FEDERAL PUBLIC DEFENDER

EASTERN DISTRICT OF VIRGINIA
1650 KING STREET, SUITE 500
ALEXANDRIA, VIRGINIA 22314
TELEPHONE: (703) 600-0808
FAX: (703) 600-0880

COPY

Frank W. Dunham, Jr.
Federal Public Defender

December 4, 2002

VIA FACSIMILE AND FIRST CLASS MAIL

AUSA Robert Spencer
U.S. Attorney's Office
2100 Jamieson Avenue
Alexandria, Virginia 22314

Re: *U.S. v. Moussaoui*

Dear Rob:

We have received the government's motion to quash the subpoena *duces tecum* served on the CIA and write in an attempt to resolve the government's objections by narrowing our request to what we originally sought before Mr. Moussaoui caused our initially proposed subpoena to be expanded. We understood from discovery and from press reports that the CIA produced a time line (or time lines) of activities of the 19 hijackers and other plotters of the 9/11 attacks, and presented it to one or more Congressional subcommittees along with supporting documentation. It is these time lines and supporting documents that we originally intended to subpoena from the CIA.

The government may not be aware of the history of our attempts to subpoena these time lines as the initial request for a Rule 17(c) subpoena was made *ex parte*. We originally filed an "Ex Parte Motion for Issuance of Subpoena *Duces Tecum* To Central Intelligence Agency" seeking nothing more than the time lines and supporting documentation, and establishing compliance with *Nixon*.¹ (A copy of that subpoena which was never actually issued is attached.) Judge Brinkema granted the motion, finding our requests to be reasonable. In our attempt to describe the time line(s) sought, this proposed subpoena contained a listing of names of the 19 hijackers and others named in the

¹ These time lines and supporting documentation are evidentiary and relevant—they are admissible as summaries as well as under FRE 803(8), 803(6) and 801(d)(2), and are also evidence in mitigation for the penalty phase to show Mr. Moussaoui's lack of, or at least, minimal involvement in 9/11. Standby counsel cannot properly prepare for trial without advance production, and a delay in production could cause delays in the trial. The request was made in good faith, and is not a fishing expedition.

AUSA Robert Spencer
December 4, 2002
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Indictment. Before any subpoena was actually issued, Mr. Moussaoui noted in an *ex parte* filing that his name had been omitted from the listing in the subpoena, and he further requested that additional names be added. Being standby counsel, we supported his request, and the Court ordered the additional names added. The revised subpoena as issued, therefore, went beyond what we were initially seeking.

When we learned that our subpoena had not been served timely and that the Bafana deposition was to be held, as you know, we asked the Court to re-issue the CIA subpoena revised to also seek information on Bafana and others and delay the Bafana deposition until after receipt of the CIA response. The Court denied the continuance of the Bafana deposition, but ordered that the Clerk reissue the requested subpoena *duces tecum*. The Court further ordered that if subsequent discovery productions, including any response to the CIA subpoenas, reveal information that would have been relevant to the Bafana deposition and the defendant was thereby prejudiced, the United States would not be permitted to use the deposition in its case in chief unless it arranged a second deposition. It appears clear from these various Court Orders that Judge Brinkema believed the CIA subpoena to be a proper use of Rule 17(c).

We offer to resolve the government's objections as to overbreadth and lack of specificity by narrowing the subpoena request to the specific time lines and supporting documents which were prepared by the CIA and provided to the Congressional committees or subcommittees to show the activities of the 19 hijackers, other 9/11 plotters, and the defendant during the period prior to the 9/11 attacks as set forth in the original subpoena. We also seek any CIA information on Bafana. We make this offer without prejudice to Mr. Moussaoui's right to further litigate the broader range of additional information sought at his request and our right to future use of Rule 17(c) should circumstances warrant.

Please let me know as soon as possible if we can resolve the subpoena issue in this manner.

Very truly yours,

Frank W. Dunham, Jr.
Federal Public Defender

Enclosure

cc: Edward B. McMahon, Jr., Esq.
Alan H. Yamamoto, Esq.
Zacarias Moussaoui

UNITED STATES DISTRICT COURT

EASTERN

DISTRICT OF

VIRGINIA

UNITED STATES

V.

SUBPOENA IN A
CRIMINAL CASE

ZACARIAS MOUSSAOUI

Case Number: Cr. No. 01-455-A

TO: George J. Tenet
Director
Central Intelligence Agency
Langley, VA

SERVE: General Counsel
Central Intelligence Agency
Washington, D.C. 20505

OR

Authorized Custodian of Records

X YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below, or any subsequent place, date and time set by the court, to testify in the above referenced case. This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

PLACE United States District Court Eastern District of Virginia, 401 Courthouse Square Alexandria, Virginia 22314	COURTROOM TBD <hr/> DATE AND TIME 09/30/02 @ 10:00 a.m.
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X YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

In lieu of your appearance, please provide the following:

SEE ATTACHMENT A

U.S. MAGISTRATE JUDGE OR CLERK OF COURT ELIZABETH H. PARET, CLERK OF THE COURT	DATE
(By) Deputy Clerk	September 6, 2002

ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER:
 Frank W. Dunham, Jr.
 Federal Public Defender
 1650 King Street, Suite 500
 Alexandria, VA 22314 (703) 600-0800

ATTACHMENT A

Any and all timelines or other chronologies, including but not limited to any timelines or chronologies produced to either house or any committee of the United States Congress, that refer or relate to any of the following persons in particular, and the al Qaeda network in general, for their activities and whereabouts from any point in time from January 1, 1997 up to the attacks on 9/11/01 and from that time to the present, including all underlying documentation on which these timelines/chronologies are based:

1. Ayman al-Zawahiri
2. Mohammed Atta
3. Abdul-Aziz Alomari
4. Wail al-Shehri
5. Waleed al-Shehri
6. Satam al-Suqami
7. Marwan al-Shehhi
8. Fayez Ahmed als "Fayez Banihammad"
9. Ahmed al-Ghamdi
10. Hamza al-Ghamdi
11. Mohamed al-Shehri
12. Khalid al-Midhar
13. Nawaf al-Hamzi
14. Hani Hanjour
15. Salem al-Hamzi
16. Majed Modeq
17. Ziad Jerrah
18. Ahmed al-Haznawi
19. Saeed al-Ghamdi
20. Ahmed al-Nami
21. Ramzi Bin al-Shibh aka Ahad Sabet aka Ramzi Mohammed Abdellah Omar
22. Hashim Ahmed
23. Hashim Abdulrahman
24. Mustafa Ahmed al-Hawsawi
25. Osama Bin Laden
26. Abu Zubaydah"