

*****TO BE FILED UNDER SEAL*****

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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

| | | |
|---------------------------|---|--------------|
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| V. |) | CR00-S-422-S |
| |) | |
| ERIC ROBERT RUDOLPH, |) | |
| |) | |
| Defendant. |) | |

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* unsealed 5/25/04 per order doc #223

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FILED
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04 APR 30 PM 12:06
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES OF AMERICA,)

Plaintiff,)

V.)

ERIC ROBERT RUDOLPH,)

Defendant.)

FILED UNDER SEAL

Case No. CR-00-S-422-S

**DEFENDANT'S REPLY TO MOTION TO QUASH SUBPOENAS
ISSUED TO THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES**

BACKGROUND

On March 31, 2004, this Court authorized the issuance of three subpoenas duces tecum to the Bureau of Alcohol, Tobacco, Firearms & Explosives (BATF) (sealed, Docket #163). The return date was set for April 15, 2004. However, instead of compliance, on April 15, 2004, the Civil Division of the U.S. Department of Justice and the United States Attorney's Office for the Northern District of Alabama moved to quash the subpoenas.¹ The gist of the government's argument is that the Department of Justice regulations, codified at 28 CFR § 16.21-16.28, require that the individual prosecutors responsible for the prosecution of Eric Rudolph must review the subpoenas and determine whether the materials may be released. [Motion at p. 5]. The government asserts that no other Department of Justice employee can make a decision on the "request" because the sealing order prevents officials tasked with the responsibility (the individual prosecutors on this case) from being informed of the request.

¹ Prior to the filing of the Motion to Quash, undersigned counsel offered alternative compromises which are set forth in the attached letter of April 13, 2004 (see Exhibit 1).

THE COURT SHOULD DENY THE MOTION TO QUASH

(1) The government concedes that neither the authorizing legislation (5 U.S.C. §301), nor its “*Touhy* regulations” provide a substantive reason for denying a request for information. [Motion, p. 6].² Indeed, the government focuses solely on its inability to “process” the subpoenas because the sealing order prevents the prosecutors from reviewing it in accordance with Department of Justice (DOJ) regulations. [Motion, p. 7]. Thus, the issue that comes to this court is whether the individual prosecutors responsible for the capital prosecution of Eric Rudolph must be permitted access to duly authorized *ex parte, sealed* defense requested subpoenas in order to determine whether the materials should be produced. The government’s position is based solely on its own DOJ created regulations.

In moving to quash, the government does not appear to appreciate the stated interest of the prosecution in seeking the death penalty for Eric Rudolph or the apparent impropriety of seeking to compel Mr. Rudolph to permit those directly responsible for this prosecution access to the *ex parte* work of the defense. The government asks this court to adhere to DOJ “process” in order to ultimately permit the individual prosecutors to make a decision whether or not to provide Eric Rudolph with documents both he and this court have determined to be relevant and material to his defense.

The position of the government is not in fact supported by the case that it relies upon to sustain the validity of these DOJ regulations (and for which the regulations are now referred).

² At issue here is 28 CFR §16.23(a) which provides in part: “Every attorney in the Department of Justice *in charge of a case* . . . in which the United States is a party is authorized . . . to furnish to . . . a court . . . documents . . . as such attorney shall deem necessary or desirable to the discharge of the attorney’s official duties. . . .” (emphasis added).

See, *United States ex rel Touhy v. Ragen*, 340 U.S. 462 (1951).³ Indeed, *Touhy* neither involved, nor addressed a situation where the government was a party to the litigation; it involved private litigation. In *Touhy*, the Supreme Court clearly stated:

“The validity of the superior’s action is in issue only insofar as we must determine whether the Attorney General can validly withdraw from his subordinates the power to release department papers. *Nor are we here concerned with the effect of a refusal to produce in a prosecution by the United States* or with the right of a custodian of government papers to refuse to produce them on the ground that they are state secrets or that they would disclose the names of informants.”

Touhy, 340 U.S. at 467-468 (emphasis added).⁴ Justice Frankfurter’s concurrence addresses what the Court did and did not decide in *Touhy*:

“There is not a hint ... that the Government can shut off an appropriate judicial demand for ... papers. ... Specifically, the decision and opinion in this case cannot afford a basis for a future suggestion that the Attorney General can forbid every subordinate who is capable of being served by process from producing relevant documents and later contest a requirement upon him to produce on the ground that procedurally he cannot be reached.”

Touhy, 340 U.S. at 472. Consequently, this court should reject the application of these DOJ regulations to this federal capital case, and compel compliance with the subpoenas.

³ The government also cites to *United States v. Blizzard*, 674 F.2d 1382, 1387 (11th Cir. 1981) for the proposition that its regulations are constitutional. In *Blizzard*, the defendant failed to follow the regulations in providing a summary of the testimony sought from a former employee of the Department of Justice and the subpoena was quashed. The opinion does not indicate that the defendant offered to alleviate any privilege or security concerns by offering to have either the court or non-prosecution attorneys review the content of the testimony. Furthermore, there is no indication in the opinion that the testimony had been determined by a court to be material and relevant.

⁴ In noting this important distinction, the Court cited *United States v. Ardolschek*, 142 F.2d 503, 506 (2d Cir. 1944), a case in which the Second Circuit reversed criminal convictions where the government, relying on regulatory authority, withheld important documents sought by the defendants.

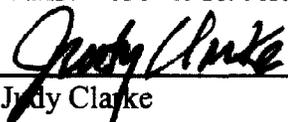
(2) In the alternative and consistent with the compromise offered in our letter of April 13, 2004 (Exhibit 1), should this court determine that the DOJ regulations at issue have a legitimate role in this capital case, it could unseal the subpoenas for the limited purpose of permitting review by a lawyer who is not involved in the prosecution of Mr. Rudolph. If the BATF needs more information about the case in order to make such determination, it could inform defense counsel or this court of what additional information it needs to make a determination regarding production. Regardless of the ultimate position of the government on the existence of any privilege covering the documents, the materials sought by these subpoenas must be provided to this court in accordance with these lawfully issued, *ex parte*, sealed subpoenas.

CONCLUSION

The motion to quash the subpoenas at issue wrongly seeks to place DOJ administrative procedures superior to this Court's *ex parte*, sealed order authorizing issuance of the subpoenas. That same motion to quash further seeks to infringe upon Mr. Rudolph's right to prepare his defense without control, or interference, by the prosecutors who seek his death. Mr. Rudolph's right and ability to investigate his defense without the prosecution being informed of his investigation (and his ongoing work product) must prevail over administrative regulations that merely provide guidance for the internal operations of the Department of Justice, that do not create substantive rights, and are simply a set of administrative procedures to be followed when demands for information are received.

Dated: April 30, 2004

Respectfully Submitted,
RICHARD JAFFE, BILL BOWEN
JUDY CLARKE, MICHAEL BURT
EMORY ANTHONY
Counsel for Eric Robert Rudolph

By:  _____
Judy Clarke

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served upon the following by mailing the same by facsimile transmission and by first class United States mail, properly addressed and postage prepaid, on this 30th day of April, 2004 to:

Edward Q. Ragland
Sharon D. Simmons
Assistant United States Attorneys
1801 4th Avenue North
Birmingham, Alabama 35203
(205) 244-2109
(205) 244-2181 (FAX)

The document was also emailed to Mr. Ragland at ed.ragland@usdoj.gov.



FEDERAL
DEFENDERS
OF
SAN DIEGO
INC.

April 13, 2004

Ed Ragland
Assistant U.S. Attorney, Civil Division
Northern District of Alabama
1801 4th Avenue North
Birmingham, Alabama 35203
VIA FAX: 205-244-2181

Re: ATF Subpoena

Dear Mr. Ragland:

This letter is to follow up on our telephone conversations of April 12, 2004 regarding the *ex parte, sealed* subpoena directed to the ATF which was brought to your attention by the Chief of the Civil Division, through the Chief of the Criminal Division and Mike Whisonant, all members of your office in the Northern District of Alabama. It is my understanding that no one in your office has reviewed the subpoena at issue because it was issued under seal. You contacted defense counsel for Mr. Rudolph to determine whether or not we could agree to your unsealing the subpoena before determining how to proceed. You and I talked about the possible options of having the subpoena reviewed by a member of your office who has no connection to the prosecution of Mr. Rudolph, or alternatively by the U.S. Attorney, Alice Martin (whom I noted to you had some involvement in the criminal case, or had appeared in court in connection with it). After consultation with folks in your office, you advised me that the *Touhy* regulations required that the subpoena be reviewed by the actual prosecutors on the case.¹

While it is our position that the ATF must comply with these lawfully authorized *ex parte, sealed* subpoenas, I write to offer to resolve this issue with one of the compromises that we discussed on the telephone, or by way of an alternative compromise.

(1) Upon authorization of the issuing Court, we would agree that the *ex parte, sealed* subpoena be released to a member of your office who is "walled off" from the actual prosecution team, and who will agree not to discuss the contents of the subpoena with those responsible for the prosecution of Mr. Rudolph. The "walled off" attorney reviewing the subpoena would be able to raise whatever legitimate objection there may be, e.g. a claim of privilege or statutory violation, for it is that kind of document that the regulations appear designed to protect. *See* 28 C.F.R. 16.26(b) (disclosure prohibited where it would violate a statute, a specific regulation, reveal classified material, a confidential source, investigatory records or trade secrets).

¹So named after the Supreme Court case that addressed a DOJ subpoena regulation, *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). The regulation you cited was 28 C.F.R. 16.23(a), which empower the attorneys "in charge of the case or matter in which the United States is a party" to authorize release of government material.

The Federal Community
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(2) Alternatively, the ATF could provide the documents directly to the issuing Court for review to determine whether there is any legitimate impediment to production.

We do not believe that the attorneys for the government who are prosecuting Mr. Rudolph in this capital case should be able to track the work of the defense by assertion of the authority of the *Touhy* regulations, nor should they have the authority to deny production of documents sought by a duly authorized *ex parte, sealed* application of the defense.

Please let me know if one of these alternatives is agreeable and we can proceed forthwith with seeking authorization of the court to proceed in this manner. It is probably easiest to reach me on my cell phone (619-279-3804). As you know, the subpoena directed compliance by April 16, 2004.

Sincerely,



Judy Clarke

cc: Richard Jaffe
Bill Bowen
Michael Burt
Emory Anthony