

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)
)
 v.) CR. NO 05-394 (RBW)
)
 I. LEWIS LIBBY,)
 also known as "Scooter Libby")

**GOVERNMENT'S RESPONSE TO RULE TO SHOW CAUSE
DATED APRIL 13, 2006**

The UNITED STATES OF AMERICA, by PATRICK J. FITZGERALD, SPECIAL COUNSEL, respectfully submits the following response to the Court's Order of April 13, 2006, directing that the parties show cause why an order should not be entered pursuant to Local Criminal Rule 57.7(c).

Legal Standard

It is well established that, while the interest in free speech regarding judicial proceedings is weighty, the speech of those participating in such proceedings may be restricted in order to ensure the fairness of those proceedings. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1073-75 (1991); *Nebraska Press Ass'n v. Stuart*; 427 U.S. 539, 561 (1976). While the Supreme Court has approved the issuance of a gag order restricting extrajudicial statements having a substantial likelihood of materially prejudicing the parties' right to a fair trial, the Court has not articulated a minimum standard to be applied in evaluating the question of whether a gag order directed to attorney or non-attorney trial participants may be issued, nor has the Court specified precisely what such an order may prohibit. The Court has indicated, however, that such an order legitimately may be entered in order to prevent a "carnival atmosphere" in a high-profile case. *See Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966). *See also United States v. Scarfo*, 263 F.3d 80, 94 (3d Cir.

2001); *United States v. Brown*, 218 F3d 415, 429 (5th Cir. 2000). As this Court has noted, the Court's local rules specifically provide in widely publicized or sensational criminal cases for the issuance of orders prohibiting extrajudicial statements by parties, witnesses and attorneys likely to interfere with the rights of the parties to a fair trial by an impartial jury.

Necessity of an Order in this Case

In the April 13 Order, the Court referred to "several occasions" upon which "information has been disseminated to the press by counsel, which has included not only public statements, but also the dissemination of material that had not been filed on the public docket." As demonstrated by the attached Affidavit of Special Counsel Patrick J. Fitzgerald, however, no attorney or agent of the Special Counsel's office has made any substantive extrajudicial statements regarding this case since the announcement of the indictment in October 2005, much less any such statements likely to interfere with the defendant's right to a fair trial. Nor has any member of the Special Counsel team released to the press any non-public documents. Moreover, making extrajudicial statements likely to interfere with the right of the accused to a fair trial and disclosing non-public documents would violate the consistent policy of the Special Counsel, as well as applicable Department of Justice regulations and the local rules of this Court. Accordingly, no past or prospective conduct of government attorneys or agents would warrant the entry of an order pursuant to LCrR 57.7(c).

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 21st day of April, 2006, I caused true and correct copies of the foregoing to be served on the following parties by electronic mail:

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By: _____/s/_____
Kathleen M. Kedian
Deputy Special Counsel

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AFFIDAVIT

PATRICK J. FITZGERALD, being duly sworn, deposes and says:

1. I am the United States Attorney for the Northern District of Illinois. For purposes of the instant matter, I serve in the capacity as "Special Counsel." I submit this affidavit in response to the Court's Order of April 13, 2006, directing that the parties show cause why an order should not be entered pursuant to Local Criminal Rule 57.7(c).


2. In the April 13 Order, the Court referred to "several occasions" upon which "information has been disseminated to the press by counsel, which has included not only public statements, but also the dissemination of material that had not been filed on the public docket."

3. I can assure the Court unequivocally that government counsel have made no public statements concerning this matter during pre-trial litigation. From the commencement of the investigation of this matter, the attorneys and staff have refrained from public comment on the matter. Following the announcement of the Indictment on October 28, 2005, no substantive statements regarding the case have been made by me or by any other attorneys on my staff outside of court pleadings or proceedings. When asked about the matter by media members covering matters involving Chicago prosecutions, I and my staff consistently have declined comment, or commented only to make plain that there would be no comments on any questions regarding this matter.

4. It has also been the consistent policy of the attorneys on the team, including AUSA Randall Samborn, the Public Information Officer for the United States Attorney's Office for the Northern District of Illinois who handles press matters in this case, not to disseminate documents unless they have already been publicly docketed. Consistent with that policy, on April 11, 2006, when government counsel submitted to the Court (and copied to the defense) a letter correcting a sentence in the Government's Response to the Defendant's Third Motion to Compel, the letter was not provided to the press because the letter had not yet been filed publicly. During the evening of April 11, Mr. Samborn was surprised by a request for comment regarding the letter from a reporter who indicated that he had a copy of the letter. Mr. Samborn himself did not have a copy of the letter, nor could he find the letter on the docket. Subsequently, some articles were published indicating that government filings had been distributed to the media before they were publicly documented.

5. I can assure the court that none of the prosecutors or staff on the prosecution team distributed my April 11, 2006 letter to the media prior to the letter being docketed on Wednesday, April 12, 2006, or distributed to the press any other pleading prior to its being publicly filed. To the contrary, it is our policy to make available whatever documents are requested by the media only after they are publicly docketed.

6. I understand and appreciate that the press and the public have a right to attend, observe and report on public proceedings, and to obtain documents that become public. However, I also understand that the intense media scrutiny can interfere with a fair trial. Therefore, I can assure the Court that the attorneys working for the government on this matter will not make any substantive extrajudicial statements about this matter, and will not disseminate any non-public documents, whether or not the Court enters an order pursuant to LCrR 57.7(c).



PATRICK J. FITZGERALD
Special Counsel

Sworn to before me this
21st day of April 2006.



Notary Public

