E-FILED
Thursday, 08 December, 2016 12:44:51 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>AARON J. SCHOCK,<br><br>Defendant. | ) | Case No. 16-cr-30061<br><br>**RESPONSE TO GOVERNMENT'S MOTION FOR ORDER RESTRICTING EXTRAJUDICIAL STATEMENTS** |

Defendant Aaron J. Schock, by and through counsel, submits this response to the Government's Motion for Order Restricting Extrajudicial Statements. (Dkt. No. 13). For the reasons stated below, Mr. Schock respectfully asks that the Court deny the government's motion.

## INTRODUCTION

After months of lobbing outrageous accusations against Mr. Schock,[1] culminating in an indictment that describes at great length an alleged scheme to betray the public trust, the government comes before this Court asking for a gag order to silence Mr. Schock and his attorneys. The government seeks this extraordinary measure because Mr. Schock and his attorneys have exercised a constitutional right to assert Mr. Schock's innocence and question the government's conduct in public. That the government would seek such a sweeping and constitutionally-fraught remedy is breathtaking.

[1] Throughout the investigation process the government, in public filings, made allegations that Mr. Schock intentionally obstructed the proceedings of the grand jury and repeatedly characterized Mr. Schock's valid assertion of his rights as "deceptive" and "defiant" conduct, even going so far as to threaten to jail him. *See, e.g.*, Government's Motion to Enforce Grand Jury Subpoena and Response to Aaron Schock's Emergency Motion to Quash Subpoena at ¶ 36, In re Grand Jury Subpoena, No. 3:15-mc-03005-SEM (No. 80) (stating that Mr. Schock's "representations to this Court . . . are simply a continuation of his deceptive defiance and callous disregard of this Court's and the Supreme Court's authority that he has displayed for months and from the outset of this litigation.") (emphasis added). Further, the government suggested that Mr. Schock sought to "screen himself" from public scrutiny and turn himself into a "'super-citizen, immune from criminal responsibility.'" *See id.* at ¶¶ 1-2. Comments such as these were picked up and repeated in the media, where coverage has been extensively one-sided.

In its motion, the government, without any argument or evidence, asserts that it is entitled to a content-based prior restraint on political speech critical of its actions. This request takes aim at the heart of the First Amendment. As such, the government's motion is meritless for the following reasons. *First*, in the context of a criminal trial, the law allows for a restriction on First Amendment speech in only very limited circumstances, namely where there is an imminent threat to the administration of justice. *Second*, the government in this case has not—nor can it—demonstrate facts sufficient to meet that narrow exception to the constitutional protections on speech and thus establish that such an extraordinary restriction is warranted. Accordingly, the Court should deny the government's motion.

## DISCUSSION

### I. FIRST AMENDMENT SPEECH IN THE CONTEXT OF A CRIMINAL TRIAL IS AFFORDED PROTECTION SUBJECT TO NARROW RESTRICTIONS

As a content-based prior restraint on free speech, the government's requested gag order comes to the Court "with a 'heavy presumption' against its constitutional validity." *Neb. Press Assoc. v. Stuart*, 427 U.S. 539, 558 (1976) (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 418-20 (1971)) (quotation marks omitted)). "[P]rior restraints on speech and publication are the most serious and the least tolerable infringements on First Amendment rights." *Id.* at 559. In the context of a criminal trial, only two kinds of comments are subject to restriction: "(1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991).

The government's motion is particularly misguided because it is aimed at the kind of speech that the First Amendment was enacted to protect: speech that seeks to hold the government

accountable when it acts against its citizens. As the Supreme Court observed, "[t]here is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Id.* at 1034. Nowhere is the exercise of the government's power more evident than in a criminal proceeding. The Seventh Circuit has recognized the importance of the attorney's role in protecting against government overreach when accusing a citizen of a crime. In the leading Seventh Circuit case in this area, *Chicago Council of Lawyers v. Bauer*, the court stated that "lawyers involved in investigations or trials often are in a position to act as a check on government by exposing abuses or urging action." 522 F.2d 242, 250 (7th Cir. 1975). Indeed, as one commentator has argued, the speech of attorneys and of the accused may help safeguard the fairness of proceedings. *See* Erwin Chemerinsky, *Lawyers Have Free Speech Rights, Too*, 17 Loy. of L.A. Ent. L. J. 311, 313 (1997) (arguing "if such gag orders have an effect, it likely is counterproductive to the goal of fair judicial proceedings."). To that end, the Seventh Circuit has recognized that "the scales of justice in the eyes of the public are weighed extraordinarily heavy against an accused after his indictment. A bare denial and a possible reminder that a charged person is presumed innocent until proved guilty is often insufficient to balance the scales." *Bauer*, 522 F.2d at 250. Indeed, "there is a societal interest in having the discretion of the prosecutor's office reviewed. This interest still exists after the presentation of formal charges." *Id.* at 253. That vital speech cannot wait until after the proceedings: "It is not sufficient to argue that such comment can always be made later since immediate action might be necessary and it is only when the litigation is pending and current news that the public's attention can be commanded." *Id.* at 250.

In order to protect the core free speech rights enjoyed by a criminal defendant and his attorneys, the Seventh Circuit has articulated a stringent test governing the prior restraint of pretrial statements. In order for this Court to enter such an extraordinary order, "the record must contain

sufficient specific findings . . . establishing that defendants' and their attorneys' conduct is 'a serious and imminent threat to the administration of justice.'" *Chase v. Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970) (quoting *Craig v. Harney*, 331 U.S. 367, 373 (1947)). Mr. Schock submits that, in light of the government's request for a content-based prior restraint on political speech, the Court should apply strict scrutiny to the government's request.[2] Thus, the government must show that its gag order is the least restrictive means of addressing any prejudice. *See Neb. Press Assoc.*, 427 U.S. at 565 ("The more difficult prospective or predictive assessment that a trial judge must make also calls for a judgment as to whether other precautionary steps will suffice.").

## II. THE GOVERNMENT FAILS TO OFFER A LEGAL OR FACTUAL BASIS TO REFUTE THE PRESUMPTION OF CONSTITUTIONAL PROTECTION

The government's two-page motion (which seems to treat the invasion of core, constitutionally-protected speech as a self-evident proposition) fails to provide any facts or analysis to support its request for a gag order. The government does not even argue, let alone prove, that Mr. Schock's or his attorneys' conduct poses a serious or imminent threat to the administration of justice. Nor does the government provide any argument whatsoever that the gag order it seeks is the least restrictive means of assuring a fair trial. As such, the government's request easily fails. The presumption against the constitutional validity of a prior restraint, which the government does not acknowledge let alone seek to refute, compels denial of the instant motion.

Rather than provide argument, the government merely highlights two statements by Mr. Schock and Mr. Terwilliger. Although the government goes on at length about these comments in its response to Mr. Schock's motion for an intradistrict transfer, they boil down to nothing more than an assertion that Mr. Schock did not commit the crimes of which he is accused and he will be

[2] *See* Chemerinsky, *supra*, at 314-26.

tried by a jury of his peers. Thus, these statements cannot be the "specific findings" that compel a gag order. Neither Mr. Schock nor Mr. Terwilliger discussed the particulars of the evidence, and no reasonable factfinder could be prejudiced by their statements. While Mr. Schock and Mr. Terwilliger did have pointed words for the government, such speech is at the very core of their First Amendment rights because it provides a check on the government's discretion. *See Bauer*, 522 F.2d at 250. Additionally, the government could not demonstrate that there is an "imminent danger" to the proceedings. The comments were made before the indictment was filed, long before a potential jury will be selected. As such, these statements provide no basis on which to grant the government's motion.[3]

The government's motion appears to seek to ban all or nearly all extrajudicial statements.[4] The government has not made—nor could it make—any argument that a sweeping ban on speech is the least restrictive means of protecting the integrity of the proceedings. Indeed, such a broad prohibition on constitutionally protected speech has been soundly rejected by the Supreme Court and the Seventh Circuit in the precedents cited above. This Court should reject it as well.

**CONCLUSION**

For the reasons stated above, Aaron J. Schock respectfully requests that the Court deny the Government's Motion for Order Restricting Extrajudicial Statements.

[3] Other cases where courts in the Seventh Circuit have applied this standard further demonstrate how the government's request falls entirely short of the legal standards. For example, in *United States v. Calabrese*, the district court imposed a gag order only after the parties and their attorneys made extensive prejudicial comments on the merits of the case and disclosed information that had been protected in a sealed pleading. No. 02 CR 1050, 2007 WL 2075630 at *1-*2 (N.D. Ill. July 13, 2007). There is no indication that the speech in *Calabrese* pertained to abuses or the discretion of the prosecutor's office.

[4] To the extent the government has something else in mind, it has failed to articulate it. The government should not be permitted to ambush Mr. Schock and the Court at oral argument with a more concrete proposal.

Dated: December 8, 2016

Respectfully submitted,

*/s/ Robert J. Bittman*

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**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing instrument was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record at their respective email addresses disclosed on the pleadings on this 8th day of December, 2016.

*/s/ Robert J. Bittman*

Robert J. Bittman