

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA)	
)	
v.)	No. 08-CR-888
)	
)	Honorable James B. Zagel
ROD BLAGOJEVICH)	

MOTION TO LIFT THE PROTECTIVE ORDER *IN ITS ENTIRETY*

NOW COMES Rod Blagojevich, by and through his counsel, and hereby requests that this Court lift the Protective Order in this case. In support, Blagojevich states as follows:

A Protective Order was entered on the evidence in this case on April 14, 2009. Blagojevich has made prior requests to release recordings and other evidence in this case (the most recent filing of this nature was on February 8, 2011, Pacer Document #602). The instant request is of a global nature and requests that the Protective Order be lifted in its entirety.

The Protective Order provides that “the government may designate as ‘confidential’ items that it believes require special protection” and that the “Defendant reserves the right to contest any government designation” of material as “confidential”. The Order illustrates an example of items requiring “confidential” special protection: “an example of such an item includes discovery material that

may contain information relating to an ongoing or potential investigation of criminal wrongdoing.”

To the defense’s knowledge, there is no ongoing or potential investigation of criminal wrongdoing related to the discovery material and there exist no other pending cases related to the 2008 Illinois Senate appointment. Nor will any future cases be prosecuted on the matter. Moreover, the government aired its case at the first trial and played the recordings it sought to release.

The defense is put in the disadvantaged position of having to examine all filings to be sure the Protective Order has not been violated. The defense must also carefully craft arguments in such a manner to not violate the Protective Order. This impairs counsel’s ability to vigorously and zealously defend Blagojevich. Yet the government is not circumscribed at all by the Protective Order. It is a fundamentally unfair playing field.

A recent example: Blagojevich filed a *Motion for Discovery to Obtain Contents of Missing Telephone Calls*, which was heavily and painstakingly redacted prior to filing. The government’s response to Blagojevich’s Motion (which was contained in a footnote in *Government’s Response to Defendant’s Motion to Play Excerpts of Tape-Recorded Conversations*) would be considered a violation of the Protective Order had the defense released the non-public information. The government stated: “In fact, as is clearly reflected in the FBI reports, again produced to the defendant well before the June 2010 trial, the person who talked to the government about the call is not certain on which phone line the call occurred.

It is clear, however, that the call did not occur on a phone line the government was monitoring.”

This government assertion is worth highlighting in several respects. First, as discussed *supra*, it demonstrates the ‘one-way street’ of the protective order. The defense is required to meticulously redact, and then the government responds with an argument and publicly reveals information. In addition, the government presents this information in an incomplete and misleading fashion. While it may be accurate that “the person who talked to the government about the call is not *certain* on which phone line the call occurred,” that person also told the government that he thought the call occurred on his [REDACTED]

[REDACTED].¹

Blagojevich has long argued for the release of recordings in this case. At this point, after a full airing of the government’s case at the first trial, and at a time in which there are no pending investigations into the alleged conduct at issue in this case, there exists no legitimate basis to continue to keep the evidence in this case under Protective Order.

The prosecution has manipulated the judicial system to obtain an unfair advantage in this case. The prosecution held a sensational news conference, lobbed outrageous false allegations and then released mere snippets of conversations, out of context, that poisoned the jury pool (and arguably the country) against Governor

¹ The fact that the defense must redact this statement further illustrates the restriction which is placed *only* on Blagojevich.

Blagojevich². The prosecution then sought and obtained a Protective Order. The protective order has only served to permit the government to present half-truths and distortions and has handicapped Blagojevich's ability to fight back against false government allegations and set the record straight.

The simple fact is that there was an unprecedented and deliberate effort by the government to prosecute and win this case based on distortions and half-truths before it ever reached the Courthouse.

Blagojevich has consistently sought to clear his name. The fact that he seeks to play *government-recorded* tapes should thrill the government, if what it alleges is true.

Indeed, the parameters for recording wiretapped conversations are such that the F.B.I. is only to record conversations that it believes are pertinent to the charges that form the basis for the wiretap authorization. With thousands of recordings, making up many hundreds of hours, one would think the government would seek to play as much as possible to meet its heavy burden of proof beyond a reasonable doubt. However, the opposite is true – the government has released and played in

² The statements of the U.S. Attorney were a violation of the "Special Duty" of prosecutors as required by the Model Rules of Professional Responsibility. See, for example, Comment 5 to Rule 3.8: ". . . In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused." Not only was the U.S. Attorney not careful to "avoid comments" of this nature, but the comments were actually intended to create such bias against Blagojevich.

court only *fractions of a fraction* (approximately 2%) of the recordings. If Blagojevich has violated the law, as the government alleges, why would the government seek to keep the evidence under lock and key?

If the prosecution is indeed interested in the truth, and not just seeking a notch-in-the-belt conviction, then the government should not challenge this request to lift the Protective Order.

Prosecutors have one job – to do justice. *See, Berger v. United States*, 295 U.S. 78, 88, (1935) (the U.S. Attorney’s sole interest is that “justice shall be done. . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”). *See also*, ABA Opinion 150 (1936) (“The Prosecuting attorney is the attorney of the state, and it is his primary duty not to convict but to see that justice is done.”)

The role of prosecutor is powerful. That power, often unchecked, must be tempered with an acknowledgement of the solemn responsibility of that office – to do justice.

“The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The freedom elsewhere wisely granted to a partisan advocate must be severely curtailed if the prosecutor’s duties are to be properly discharged. The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to furnish that adversary element essential to the informed decision of any controversy, but being possessed, on the other, of important governmental power that are pledged to the accomplishment of one objective only, that of impartial justice. Where the prosecutor is recreant to

the trust implicit in his office, he undermines confidence, not only in his profession, but in government and the very ideal of justice itself.”

Professional Responsibility: Report of the Joint Conference, 44 A.B.A.J. 1159,1218 (1958).

The “Special Duty” of prosecutors is plainly stated in Model Rule of Professional Responsibility 3.8. The Comments to Rule 3.8 provide, *inter alia*:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

Surely, the government cannot prosecute this case, in this manner, within the bounds of its ethical duty. As “ministers of justice”, the government must ensure “that guilt is decided upon the basis of sufficient evidence” – to cherry-pick evidence, taking pieces of calls out of context does not meet this ethical standard. Moreover, the Protective Order prevents the *whole* truth from being heard. This not only violates the prosecution’s ethical duties to ‘do justice’ but instead leads to a vast injustice against Blagojevich.

Blagojevich seeks a fair trial, effective representation and an impartial jury. U.S. Const. Amend. V, VI. Blagojevich’s effort to defend himself is stymied. Blagojevich’s First Amendment right is also being improperly restricted. The constitutional rights of the defendant far outweigh any possible need for the Protective Order.

If the government objects to Blagojevich's request, then Blagojevich requests that the government be ordered to provide its reason for declaring this evidence "confidential" and explain why it must be kept under seal.

WHEREFORE, Rod Blagojevich prays that this Court lift the Protective Order in this case.

Respectfully Submitted,

/s/ Lauren Kaeseberg

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