

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 07-20999-CR-LENARD
Magistrate Judge Barry L. Garber**

UNITED STATES OF AMERICA

vs.

**MOISES MAIONICA,
ANTONIO JOSE CANCHICA GOMEZ,
RODOLFO WANSEELE PACIELLO,
FRANKLIN DURAN, and
CARLOS KAUFFMANN,
Defendants.**

**GOVERNMENT'S MOTION *IN LIMINE*
TO PRECLUDE EVIDENCE AND ARGUMENT REGARDING
THE FOREIGN POLICY OF THE UNITED STATES TOWARDS VENEZUELA**

The United States of America, through undersigned counsel, hereby moves *in limine* to exclude improper evidence and argument (including cross-examination) relating to United States policy regarding Venezuela or its current government, especially as this policy supposedly affects the instant prosecution.¹ Relations between the United States and Venezuela have nothing to do with Duran's specific criminal conduct or the statutes he violated. Evidence and argument on this subject by Duran's counsel will distract the jury from the task at hand, delay the trial, and inevitably inject into the trial a host of irrelevant political and foreign policy issues that have nothing to do with Duran's offense of acting as an unregistered foreign agent.

¹Pursuant to S.D. Fla. L.R. 88.9A, counsel have conferred in a good faith effort to resolve the issues raised in the motion and have been unable to do so.

Background

On December 29, 2007, Duran's defense counsel stated that the charges against Duran "strongly suggests a possible political motive behind this case: to promote an international strategy on behalf of the United States to embarrass Chavez's government." According to the Miami Herald, defense counsel referred to the firing of U.S. prosecutors who were not in line with White House policies as part of the Bush administration's political motivations in the Antonini case. See attached Miami Herald article. These remarks by Duran's counsel indicate an intention to politicize the trial and distract the jury and the court from the specific offenses charged in the indictment.

Argument

The relationship between the United States and Venezuela and its current government are plainly irrelevant to the issues this jury must decide. Moreover, even if such evidence had some minimal probative value, the value of that evidence is substantially outweighed by the risk that the jury will be confused, trial will be significantly delayed and the jurors will decide the case based on politics or misguided sympathy rather than on the merits.

Only relevant evidence may be admitted at trial. Fed. R. Evid. 402. To be relevant, evidence must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. "Implicit in that definition are two distinct requirements: (1) The evidence must be probative of the proposition it is offered to prove, and (2) the proposition to be proved must be one that is of consequence to the determination of the action." *United States v. Williams*, 773 F.2d 1553, 1559 n.4 (citing *United States v. Hall*, 653 F.2d 1002, 1005 (5th Cir. 1981)). "Whether a proposition is of consequence to the determination of the action is a question that is governed by the substantive

law” under which the defendant has been charged. *Hall*, 653 F.2d at 1005.

In December 20, 2007, a federal grand jury returned an indictment against Duran and his co-defendants, charging that between August, 2007 and December 12, 2007, in Miami-Dade County, in the Southern District of Florida, and elsewhere, Franklin Duran, Carlos Kauffmann, Moises Maionica, Antonio Jose Canchica Gomez, Rodolfo Wanseele Paciello, and others knowingly and willfully conspired to commit an offense against the United States, that is, to knowingly act in the United States as agents of a foreign government, specifically, the government of the Bolivarian Republic of Venezuela, without prior notification to the Attorney General of the United States as required by law, in violation of 18 U.S.C. § 951; all in violation of 18 U.S.C. § 371; and further that between August, 2007 and December 12, 2007, in Miami-Dade County, in the Southern District of Florida, and elsewhere, Franklin Duran, Carlos Kauffmann, Moises Maionica, Antonio Jose Canchica Gomez, Rodolfo Wanseele Paciello, and others knowingly, without prior notification to the Attorney General as required by law, acted in the United States as agents of a foreign government, specifically, the government of the Bolivarian Republic of Venezuela, in violation of 18 U.S.C. §§ 951 and 2. (D.E. 24).

None of the charges against Duran depends on the status of relations – good, bad or otherwise – between the United States and Venezuela. The indictment does not refer to that issue. Clearly, as a general, rule, broad issues of international politics and American foreign policy are not appropriate topics for jury consideration. *See, e.g., Aktepe v. United States*, 105 F.3d 1400, 1403 (11th Cir. 1997) (observing that “[t]he Supreme Court has declared that ‘[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.’”) (quoting *Haig v. Agee*, 453 U.S. 280, 292 (1981)).

Arguments by Duran about the strained relations between the United States and Venezuela, and the supposed politics behind this prosecution, would not provide a legal defense at trial to the charges against him, and thus must be excluded. *See, e.g., United States v. Bailey*, 444 U.S. 394, 416 (1980) (“it is a testament to the importance of trial by jury and the need to husband the resources necessary for that process by limiting evidence in a trial to that directed at the elements of the crime or at affirmative defenses”); *United States v. Anderson*, 872 F.2d 1508, 1516 n.12 (11th Cir. 1989) (same). Claims about tensions between the United States and Venezuela would not make more probable or less probable any fact of consequence to the elements of the charged offenses. To the extent Duran or his counsel seeks to develop these issues at trial, he should be prohibited from doing so under Rules 401 and 402.

Such evidence or argument should also be excluded under Rule 403. Rule 403 provides that relevant evidence may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or waste of time” Allowing Duran to advance extreme allegations about the relationship between the United States and the current Venezuelan government would confuse and distract the jury by shifting the focus of trial away from the defendants’ activities in furtherance of the conspiracy. It would also delay the trial inordinately, forcing the government to present witnesses and evidence addressing the actions of the Venezuelan government and the falsity of Duran’s claims about the supposed motive for this prosecution.

Finally, to the extent Duran’s counsel seeks to exonerate his client by claiming that he is only being prosecuted for “political” reasons, such an argument would be an invitation to jury nullification, which is improper. In *United States v. Funches*, 135 F. 3d 1405 (11th Cir. 1998), the Eleventh

Circuit commented on evidence that the defendant insisted was relevant, but in reality was simply an invitation to the jury to ignore the facts and law. As the court put it, the defendant's real contention, given his failure to proffer facts sufficient to support a purported affirmative defense, was that "he had a due process right to present evidence the only relevance of which is to inspire a jury to exercise its power of nullification." *Id.* at 1408. However, nullification is not a right of the jury, and the exercise of such power is a dereliction of the jury's sworn duty. *Id.*

A jury has no more "right" to find a "guilty" defendant "not guilty" than it has to find a "not guilty" defendant "guilty," and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law. Such verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power. *Id.* at 1409 (quoting *United States v. Washington*, 705 F. 2d 489, 494 (D.C. Cir. 1983)).

"Because the jury enjoys no right to nullify criminal laws, and the defendant enjoys a right to neither a nullification instruction nor a nullification argument to the jury, the potential for nullification is no basis for admitting otherwise irrelevant evidence." *Id.* at 1409. Other courts have made the same point. *See United States v. Baptista-Rodriguez*, 17 F. 3d 1354, 1363 (11th Cir. 1994) ("If the court determines that the defendant's proffered evidence is irrelevant or otherwise inadmissible, it should issue a ruling *in limine* precluding the introduction of that information at trial."); *see also Zal v. Steppe*, 968 F. 2d 924, 930-31 (9th Cir. 1992) (Trott, J., concurring) (defendant has no right to present evidence that is not relevant to a legal defense); *United States v. Bifield*, 702 F. 2d 342, 350 (2nd Cir. 1983) ("A defendant's right to present a full defense, including the right to testify in his own behalf, is not without limits. In responding to the charges against him

an accused must comply with the established rules of procedure and evidence, as must the prosecution, in order to insure a fair trial . . . A criminal defendant's right to present a full defense and to receive a fair trial does not entitle him to place before the jury evidence normally inadmissible."); *United States v. Gorham*, 523 F. 2d 1088, 1097-98 (D.C. Cir.1975) (affirming trial court's refusal to admit evidence bearing no legal relation to the charges but which might encourage a "conscience verdict" of acquittal), supplemented by 536 F. 2d 410 (D.C. Cir. 1976); *United States v. Lucero*, 895 F. Supp. 1421, 1426 (D. Kan. 1995) ("defendants are not entitled to present evidence which is irrelevant for any purpose other than to provoke the finder of fact to disregard the law."). Both Rule 402 and Rule 403 prohibit jury nullification, and they prevent from reaching the jury the kind of extreme allegations already made by Duran's counsel in the press.

