

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

CASE NO:07-20999-CR-LENARD/TORRES

UNITED STATES OF AMERICA,

Plaintiff,

v.

FRANKLIN DURAN,

Defendant.

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

Defendant, Franklin Duran (“Duran”), by and through his undersigned counsel, hereby responds to the Government’s Motion in Limine to Preclude Evidence and Argument Regarding the Foreign Policy of the United States towards Venezuela (D.E. 180) and says:

The Government’s Motion seeks to preclude the defense from actually presenting evidence as to or stating the obvious: that this is a politically motivated prosecution. Why else would the U.S. Government devote the resources they have devoted to investigate and prosecute individuals, such as Duran, who unquestionably acted without any intent to violate a registration requirement they had no idea existed? In other words, why would the government prosecute individuals who did not even know they were committing a crime, under circumstances where no espionage, intelligence gathering or other subversive activities contrary to U.S. interests were involved? Ordinarily, persons found to be acting

as agents of a foreign government without intent to violate the registration requirement receive a letter notifying them of their obligation to register. The Department of Justice's ("DOJ") own Criminal Resource Manual, in a section entitled "Foreign Agents Registration Act Enforcement" ("FARA"), provides:

"If the Department receives credible information establishing a *prima facie* registration obligation, where evidence of intent is lacking, the Department usually sends a letter advising the person of the existence of FARA and the possible obligations thereunder. FARA, after all, is a *malum prohibitum* enactment **not well known** outside the legal/lobbying community."

U.S. DOJ Crim. Resource Manual, available at: http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02062.htm. (emphasis added). No such notification was provided in this case. Instead, enormous taxpayer resources have been devoted to an investigation and prosecution¹ involving a Latin American political scandal that just happens to implicate the government of Venezuelan President Hugo Chávez, an avowed and outspoken political enemy of the U.S., in an effort to smuggle cash into Argentina allegedly intended to support the election of the President of that country. Yet, heaven forbid Duran's defense should state what appears to be quite obvious to everyone else. Nevertheless, as will be demonstrated below, evidence of U.S. foreign policy is, as the government is fond of arguing in other contexts, "inextricably intertwined" with the facts of this case².

¹There now appears to be three (3) prosecutors working this now single defendant case.

²Based upon information and belief, the government intends to introduce other evidence in this case having no real purpose but to embarrass the government of Hugo

Viewed in the abstract, which is the only view the government presents in its motion, the government's assertion that "relations between the United States and Venezuela have nothing to do with Duran's specific criminal conduct or the statutes he violated" is arguably correct. However, the government does not even attempt in its motion to relate this argument to the expected evidence and testimony at trial. In light of the testimony and evidence which the government will be introducing in this case, their motion is a *non sequitur*. This is so because evidence concerning relations between the United States and Venezuela and various witnesses' perceptions of that relationship have independent relevance in this case.

The government's motion also is entirely premature. Two months before any testimony has been taken at trial, the government is seeking to have this Court issue a blanket prohibition preventing the defense from making any argument which addresses relations between the United States and Venezuela or introducing any evidence concerning this issue. This without any consideration of the evidence which the government will introduce during its case in chief at trial, evidence which will certainly "open the door" to the introduction of the very evidence the government seeks to exclude. It is fundamentally unfair for the government to ask this Court to make a blanket, factually uninformed ruling based upon an abstract principle, without regard to the actual evidence which will be introduced at trial. It also is fundamentally unfair for this Court to enter a pretrial order prohibiting the defense from introducing evidence which may very well be

Chávez. The defense is prepared to proffer this expected evidence to the court *in camera* on request. A separate motion *in limine* regarding this evidence is in preparation.

directly responsive to evidence introduced by the government.

To prove Duran guilty of these charges, the burden is upon the government to prove that he acted in the United States as an agent of a foreign government which, pursuant to §951(d), means that he “agree[d] to operate within the United States subject to the direction or control of a foreign government or official”. First, the recorded conversations which will certainly be introduced in this case, either by the government or by the defense on cross examination or otherwise, are full of references to Venezuelan /U.S. foreign relations and their impact on the action of the witnesses and parties. Moreover, one of the witnesses whom the government intends to call to prove its case is Carlos Kauffmann. In an FBI interview, the report of which has been provided to the defense in discovery, Kauffmann claims, *inter alia*, that this case involved a cover up to protect the governments of Venezuela and Argentina. Based on the FBI report, Kauffmann can be expected to testify that he was told by Juan Bracamonte, a Venezuelan attorney, that “this could be a big mess for the campaign and Venezuela’s role in the campaign”, that co-defendant Moises Maionica told him and others that President Chávez was involved in the matter and had put DISIP Director Rangel Silva in charge, and that Rangel told him that President Chávez personally was involved in the matter. This testimony from Kauffmann will be introduced by the government in its case in chief in order to prove that Duran was acting as an agent of Venezuela.

In light of Kauffmann’s testimony, evidence concerning the poor relations between the United States and the Hugo Chávez Government of Venezuela is directly relevant to establish a motive for Kauffmann to lie concerning the involvement of the Venezuelan

Government in this matter. Even if one were to believe that the U.S. Government has no secret agenda to embarrass the Chávez Government, Kauffmann's belief that the United States government would like to see the Chávez Government embarrassed provides a strong motive for him to embellish his testimony and to lie about these conversations. Put otherwise, Kauffmann's obvious and logical desire to curry favor with the U.S. government by damning the Venezuelan government so as to be permitted, along with his wife and children, to remain in the U.S. notwithstanding his guilty plea, consequent felony conviction and otherwise inevitable deportation to the very country his testimony will excoriate, is direct evidence of his motive to lie in this case.

This Court must be cognizant of the fact that the alleged object of the charged conspiracy in this case – to obtain the assistance of Antonini in concealing the source and destination of, and the role of the Government of Venezuela, in the attempted delivery of the approximately \$800,000 that was confiscated. . . in Buenos Aires, Argentina³ – was not in violation of any federal or state law in the United States. Neither Duran nor any of the other individuals charged in this case were involved in espionage, subversive activities or propaganda activities in this country. Certainly, it is no stretch for Kauffmann and other cooperating witnesses to believe that one of the reasons why the FBI and the United States Attorney's office developed an interest in this case was because of the poor foreign relations between the United States and the Chávez Government and that the more he/they can make up testimony which will embarrass the Chávez Government, the more

³Indictment ¶3 page 4.

he/they will benefit. The Duran defense is entitled to thoroughly explore Kauffmann's motivations for testifying against Duran. The same will apply to every other cooperating witness in this case. Evidence concerning the witnesses' motive to lie about this does not go to some tangential issue in the case, but to the very heart of this prosecution, whether Duran was acting as an agent of the Venezuelan government.

Additionally, as pointed out in Duran's Response to the Government's Motion In Limine to Preclude Defenses of Duress or Necessity, at this point in time, Duran does not know whether he will be formally seeking to raise such a defense. If Duran does raise a "justification defense,"⁴ evidence concerning the relations between the United States and Venezuela may very well be relevant to the third prong of that defense, since it would be relevant to help establish why it was not reasonable for Duran to report threats made against him and his family in Venezuela to law enforcement authorities in the United States.⁵

It must be emphasized that if the defense ultimately seeks to introduce evidence concerning the relations between the United States and Venezuela, this will not be for the purpose of arguing that Duran is only being prosecuted for "political" reasons in order to obtain a "jury nullification." Indeed, the government's use of the term "jury nullification", is nothing more than a shibboleth, since the introduction of evidence concerning relations

⁴In *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2002), the Court found it unnecessary to explore a distinction between duress and necessity, pointing out that both fall under the general category of a "Justification Defense."

⁵This is addressed in more detail in Duran's Response to the Government's Motion to Preclude Defenses or Duress or Necessity.

between the United States and Venezuela would not be for the purpose of proving this is a political prosecution of Duran, but for other relevant reasons.

In conclusion, the defendant submits that this Court should not predetermine the question of whether evidence concerning relations between the United States and Venezuela would be relevant to the issues in this case based upon an argument made by the government in the abstract without any relation to the actual evidence. At the time of trial based on a fully developed record this Court will be much better able to assess the relevancy of any evidence sought to be introduced by either party and can make the decision, at that time, whether or not to admit this evidence and, if the evidence is admitted, under what limitations and possible limiting instructions. Accordingly, the government's Motion in Limine should be denied.

Respectfully submitted,

BIERMAN, SHOHAT, LOEWY & KEGERREIS

Attorneys for Defendant DURAN

800 Brickell Avenue

Penthouse Two

Miami, FL 33131-2911

Telephone: 305-358-7000

Facsimile: 305-358-4010

E-mail: eshohat@bslcrimlaw.com

/S/ Edward R. Shohat

By: _____
EDWARD R. SHOHAT, ESQ. #152634

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on June 27, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify the foregoing document is being served this day on all counsel of record identified on the attached service list in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in another authorized manner for those counsel or parties not authorized to receive electronically Notices of Electronic Filing.

Thomas Mulvihill
Assistant United States Attorney's Office
99 NE 4th Street
Miami, Florida 33132
Email: thomas.mulvihill@usdoj.gov

/s/ Edward R. Shohat

EDWARD R. SHOHAT, ESQ.