

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

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UNITED STATES OF AMERICA )

UNDER SEAL

v. )

Crim. No. 01-455-A

ZACARIAS MOUSSAOUI )

Hon. Leonie M. Brinkema

GOVERNMENT'S RESPONSE TO STANDBY COUNSEL'S MOTION TO UNSEAL

The United States responds to standby counsel's motion to unseal the motion filed by the defendant on September 19, 2002 (Docket #537), and the motion submitted by standby counsel on September 20, 2002 (Docket #542). For the reasons stated herein, as well as those articulated in the Government's letter to the Court, dated September 11, 2002, and the Government's Response to standby counsel's motion to unseal another motion (Docket # 526), the Government respectfully requests that these motions remain under seal.

The latest motions submitted by the defendant and standby counsel, as is true of the motion filed by standby counsel on September 10, 2002 (Docket ## 488, 489), likely will require the Government to disclose classified material in its response, and therefore should be governed by the Classified Information Procedures Act. *See* 18 U.S.C. App.3, § 5 (requiring the defendant to give notice when it intends to disclose classified information or cause the disclosure of classified information). Indeed, we have been advised by other elements of the United States government that our response will be classified and that this will require classification of the pleadings filed by standby counsel, thus requiring the entire matter to be classified and under seal, as required by CIPA. *United States v. Sarkissian*, 841 F.2d 959, 965 (9<sup>th</sup> Cir. 1988) ("Congress enacted CIPA to prevent the problem of 'graymail,' where defendants pressed for the release of classified information to force the government to drop the prosecution.") (quoting S.

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Rep. No. 96-823, at 4 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4294-4297)). Thus, it is of no import that standby counsel have only cited press commentary in support of their motion, particularly since it should be no surprise to standby counsel that, at a minimum, the Government's response will be entirely under seal, if not classified.<sup>1</sup>

Moreover, there may be other compelling reasons to seal the motions at issue. Among other grounds, there may be national security or foreign policy concerns created from the public airing of the requested relief. For example, if foreign governments perceive that their assistance might become the subject of litigation in the American court system, they may terminate their cooperative relations with our government, something that could prove costly in the current efforts to combat the *al Qaeda* threat. *See Central Intelligence Agency v. Sims*, 471 U.S. 159, 175 (1985) ("If potentially valuable intelligence sources come to think that the [U.S. Government] will be unable to maintain the confidentiality of its relationship to them, many could well refuse to supply information to the Agency in the first place."); *cf. Webster v. Doe*, 486 U.S. at 621 (Scalia, J., dissenting) ("I would . . . not like to be the agent who has to explain to the intelligence services of other nations, with which we sometimes cooperate, that they need have no worry that the secret information they give us will be subjected to the notoriously broad discovery powers of our courts, because, although we have to litigate the dismissal of our spies, we have available a somewhat uncertain scope known as executive privilege, which the President can invoke if he is willing to take the political damage that it often entails."). The point is that

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<sup>1</sup> Indeed, standby counsel recently argued that one of the defendant's recent pleadings should remain sealed because counsel's response will be sealed. *See* Letter of Frank W. Dunham, Jr., September 20, 2002.

the defense motions potentially involve highly sensitive matters that are in their nascent stages, and may threaten national security in ways that cannot yet be assessed. Thus, while there may come a point where standby counsel's motion can be unsealed, the Government requests that it remain temporarily under seal.<sup>2</sup>

The Court has not yet had an opportunity to consider fully the merits of the motions at issue. However, it bears noting that the courts have held that there is a lesser First Amendment interest in pleadings that involve the question of the materiality or relevance of certain materials. *See United States v. Ressam*, 2002 WL 1906113 at \*4 (W.D. Wash. Aug. 15, 2002) (“When the materiality or relevance of potential evidence in a criminal proceeding is contested, the documents are typically submitted to the court for *in camera review*. This procedure preserves the confidentiality of the information that the court determines is non-discoverable.”). Thus, for example, there is no traditional First Amendment protection of pleadings relating to requests for information that are denied by the courts. *Id.*; *see also United States v. Wolfson*, 55 F.3d 58, 60 (2d Cir. 1995) (“We are unaware of any traditional right of access on the part of the public to documents to which the defendant himself has been denied access.”).

Finally, the principle at issue is one that the Government has lived by throughout this case. For example, in its recent motion to depose Faiz Bafana, the Government did not publicly file the pleading, which outlines the incriminating testimony that Mr. Bafana is expected to provide at trial. (Nor did standby counsel file any motions to unseal the Government's pleading.)

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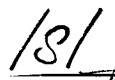
<sup>2</sup> For example, should the Court require further information, the Government is prepared to provide greater detail of the particular national security interests threatened by the pending motions. However, given the Court's order requiring a rapid response to the unsealing motion, the necessary support relating to these matters could not be assembled in time.

Moreover, we have little doubt that standby counsel would object to the public filing of any response to the motion at issue that would publicly reveal additional incriminating information about the defendant. Thus, as with other pleadings in this case that involve similar questions the Government respectfully submits that until there has been a full airing of the issues raised by the motions, the prudent (and appropriate) procedure is to seal the motions and the related pleadings. Should the need for the continued sealing of these motions disappear, they can then be unsealed. Accordingly, we respectfully submit that standby counsel's motion to unseal the above-described pleadings be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on September 24, 2002, a copy of the foregoing Government's Response was sent by facsimile and regular mail to:

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