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

FILED WITH
COURT SECURITY OFFICER
M. J. Jensen
DATE 10-22-02

UNITED STATES OF AMERICA)
)
 v.) Criminal No. 01-455-A
)
 ZACARIAS MOUSSAOUI) CLASSIFIED DOCUMENT FILED
) UNDER SEAL

MOTION TO ESTABLISH PROCEDURES FOR THE DEPOSITION OF FAIZ BAFANA

On behalf of Zacarias Moussaoui, standby counsel move this Court to establish the procedures for the deposition of Faiz Bafana or to grant other relief as set forth herein.

On September 18, 2002, the Government moved to take the deposition of Faiz Bafana on October 30, 2002.¹ The Court granted this motion by written order dated September 18, 2002. Thereafter, both Mr. Moussaoui and standby counsel requested that the Court continue the deposition.² One of the bases for this request was that counsel needed time to re-review the classified material in the SCIF to determine whether any such material referenced Bafana.³ Another basis, to be raised in a motion that must first be reviewed [REDACTED] before it can be filed, is that standby counsel be permitted to review materials subpoenaed [REDACTED] (but not yet produced) before

¹ See Government's Motion for Rule 15 Deposition of Faiz Bafana (filed Sept. 18, 2002).


² See Motion to Postpone the "Satellite" Interrogation of Brother Bafana (filed Oct. 7, 2002 by Mr. Moussaoui) and Motion in Support of Mr. Moussaoui's Motion to Postpone the "Satellite" Interrogation of Brother Bafana (filed Oct. 10, 2002 by standby counsel).


³ The other bases for the request were to re-review the non-classified discovery for references to Bafana and to conduct an investigation of Bafana in Malaysia. See Motion in Support of Mr. Moussaoui's Motion to Postpone the "Satellite" Interrogation of Brother Bafana (filed Oct. 10, 2002 by standby counsel). Likewise, additional time is needed to obtain "information about the al-Qaeda activities in Malaysia" and information about Bafana's assertions [REDACTED] See Motion to Postpone the "Satellite" Interrogation of Brother Bafana at 3-4 (filed Oct. 7, 2002 by Mr. Moussaoui).

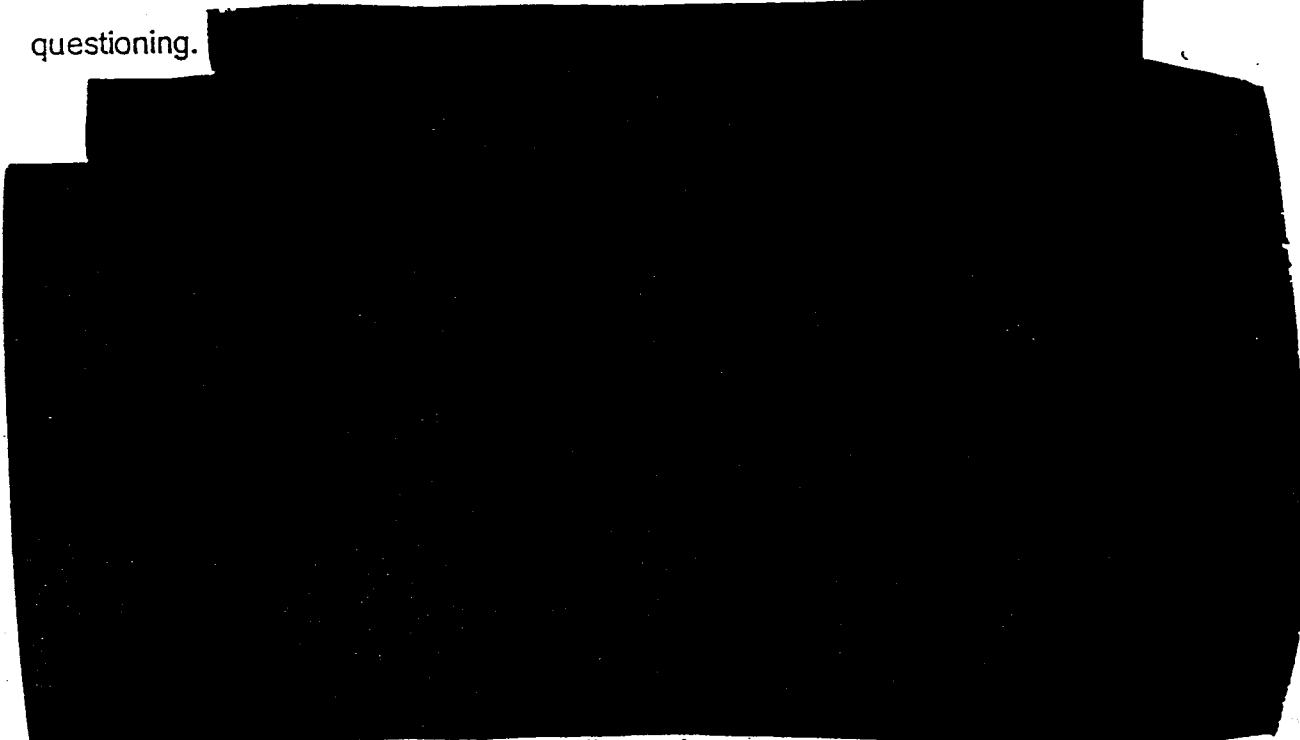
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proceeding with the Bafana deposition. We anticipate that much of this information will be classified as well.

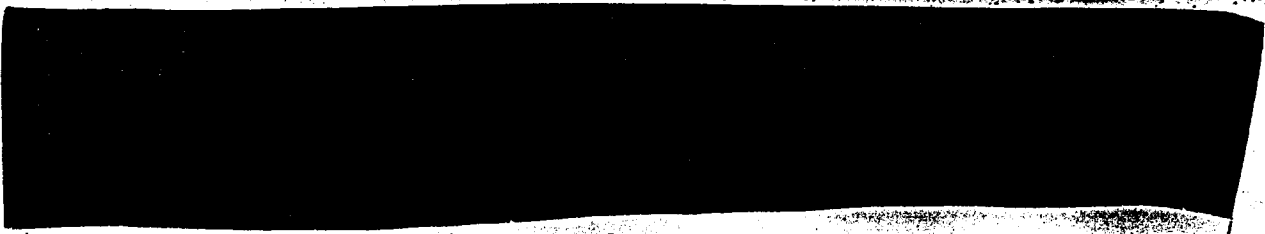
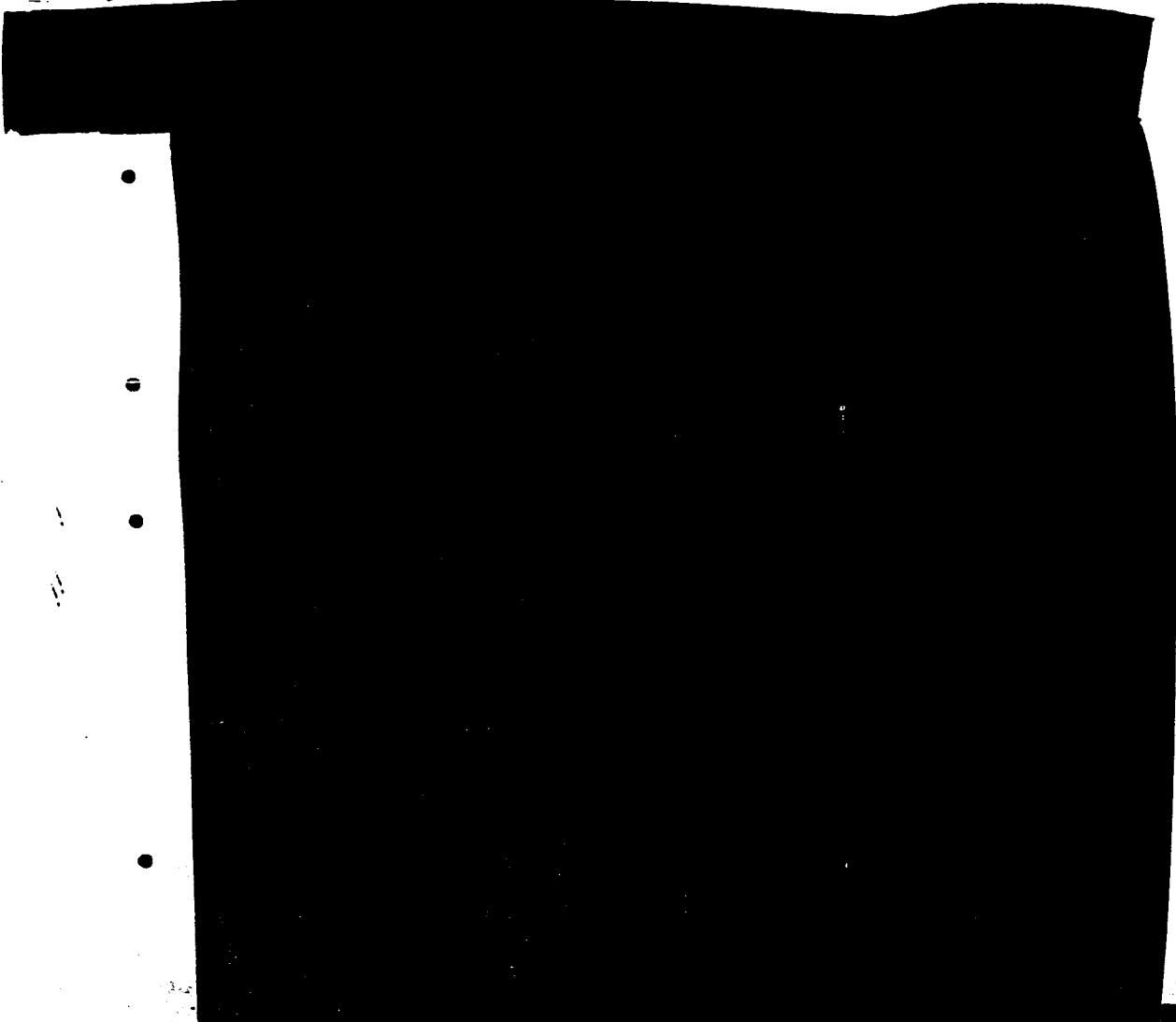
As was noted in standby counsel's Supplemental Memorandum in Support of Motion to Postpone the Deposition of Faiz Bafana, a partial review of classified material indicates the existence of classified information, not known or presently available to Mr. Moussaoui, that bears directly upon the matters raised  ⁴

Since the date that the Supplemental Memorandum was filed, standby counsel have endeavored to search the SCIF for additional materials that may be required to conduct a complete examination of Bafana and for materials that may suggest additional lines of questioning. 



⁴ See Supplemental Memorandum in Support of Motion to Postpone the Deposition of Faiz Bafana ("Supplemental Memorandum") at 1 (filed Oct. 17, 2002).

⁵ See *id. passim*.



[REDACTED]

Moussaoui is entitled to know what information

exists

[REDACTED] Bafana's testimony before the jury.⁹

[REDACTED]

Thus, as requested in our Supplemental Memorandum, a CIPA hearing should be held before the Bafana deposition so that [REDACTED]

[REDACTED] cleared for Mr. Moussaoui's use at the deposition. Standby counsel reiterates that were Bafana simply called as a Government witness at trial, none of

[REDACTED]

⁹ We do not know whether Bafana is being made available to the Government as the result of any agreement or understanding between the United States and the Governments of Singapore and/or Malaysia. If that is the case, or if Bafana has entered into any plea bargain with the United States, or any other country, those matters must be disclosed prior to the deposition. Counsel anticipates that these lines of questioning may involve classified information.

these exigencies would exist. The Government would have made its § 6 disclosures and the Court would have made its pre-trial rulings regarding the admissibility and use of classified information by the defense. Moreover, the defense would have access to the reciprocal classified discovery required by § 6(f) of CIPA. Despite the fact that none of these events has occurred, the Government still insists on going forward with the deposition of this crucial Government witness at this time.

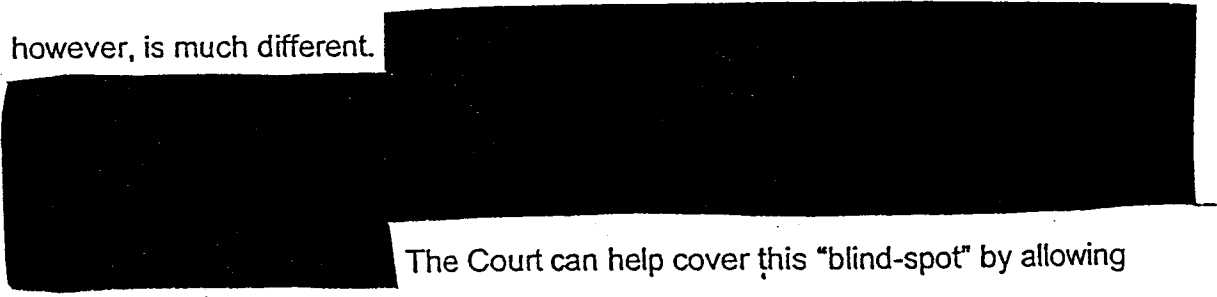
Alternatively, standby counsel, who are privy to the classified information, should be given permission to question Bafana at the deposition. One of the reasons given by the Court to continue to ask standby counsel to continue to work on this case was that they were cleared to review classified information. We have continued to do so and are now aware of many areas of inquiry that can be developed through the testimony of Bafana. We believe more areas of inquiry will become apparent [REDACTED]

[REDACTED] We suggest that allowing standby counsel to actively participate in the Bafana deposition, in the manner suggested below, is necessary and will not prejudice Moussaoui's pro se rights in any way. Indeed, the procedure we suggest will not be unique to this witness [REDACTED]

In this regard, counsel suggest the following procedure: the Government conducts its direct examination of Bafana to be followed by Mr. Moussaoui's cross-examination and the Government's re-direct. At that point, standby counsel will conduct a cross-examination of Bafana with the benefit of the knowledge of the

classified information. The Government will then conduct a second re-direct if it so chooses. In this way, the deposition videotape can be easily edited to delete entirely the questioning of standby counsel if Mr. Moussaoui is indeed his own lawyer at trial and/or if Mr. Moussaoui decides not to use the information gleaned from that questioning. Likewise, Mr. Moussaoui's questioning of Bafana can be easily edited out should circumstances change and standby counsel are required to assume an active trial counsel role.

Counsel note that with the deposition of Agus Budiman, the Court prohibited standby counsel from conducting any cross-examination unless Mr. Moussaoui "refuse[d] to participate in the [deposition] process."¹⁰ The situation with Bafana, however, is much different.



The Court can help cover this "blind-spot" by allowing counsel to participate in the deposition.

Second, the Court's order with respect to Budiman was issued before the Court's order on August 22, 2002 granting standby counsel's request to file motions in this case.¹¹ The logic of that order was to allow standby counsel to shape the defense in the event Mr. Moussaoui lost or abandoned his pro se status. Allowing standby counsel to participate in the Bafana deposition is consistent with that ruling.

¹⁰ See Order by U.S. District Judge Leonie M. Brinkema at 2 (filed June 24, 2002).

¹¹ See Motion for Guidance with Regard to Filing Motions (filed Aug. 9, 2002) and Order from U.S. District Judge Leonie M. Brinkema granting same (filed Aug. 22, 2002).

Finally, Bafana is a critical Government witness whose testimony is so important that AUSA Karas has traveled at least twice to Singapore to question him.¹² Bafana's testimony will bear directly on Mr. Moussaoui's culpability in the September 11 conspiracy and on whether Mr. Moussaoui's should receive the death penalty. Such a witness should be examined by an experienced litigator, particularly where, as here, death is at stake and there is little downside to permitting counsel's participation. Doing so does not impermissibly infringe upon Mr. Moussaoui's pro se rights as standby counsel's portion of the deposition can be easily excised from the videotape and never shown to the jury if that is Mr. Moussaoui's ultimate wish.

Conclusion

There is no question that allowing standby counsel to examine Bafana will result in some redundant questioning. However, some redundancy is preferable to having to re-take Bafana's deposition should Mr. Moussaoui abandon or lose his right to act as his own lawyer. Further, even if Mr. Moussaoui remains as his own counsel, he may ultimately adopt portions of standby counsel's questioning which may be prompted by classified information to which Mr. Moussaoui does not have access and which defense counsel cannot discuss with him.

Accordingly, standby counsel move to continue Bafana's deposition and schedule a CIPA hearing to determine [REDACTED] [REDACTED] disclosed to Mr. Moussaoui in advance of the deposition or, alternatively, permit standby counsel to orally examine Bafana at the deposition pursuant to the procedures

¹² Mr. Karas questioned Bafana from May 16 to May 20, 2002 and August 8, 2002.

outlined herein. Finally, the deposition should be continued in any event until [REDACTED]
material is received and reviewed.

Respectfully submitted,

ZACARIAS MOUSSAOUI
By Standby Counsel

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing pleading was served by hand via the Court Security Officer upon AUSAs Robert A. Spencer, David Novak and Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, on this 22nd day of October 2002.

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~~_____
Kenneth P. Troccoli~~

Attachments Remain Classified