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FILED WITH
COURT SECURITY OFFICER
DATE 12-12-02

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

UNITED STATES OF AMERICA	)	UNDER SEAL
	)	
v.	)	Crim. No. 01-455-A
	)	Hon. Leonie M. Brinkema
ZACARIAS MOUSSAOUI	)	

GOVERNMENT'S MOTION TO RECONSIDER
ORDER TO DISCLOSE DECLARATION

The United States respectfully requests that the Court reconsider its December 13, 2002, Order that the United States, forthwith, turn over to standby defense counsel the classified, ex parte Declaration of Robert A. Spencer ("Declaration") appended to the Government's filing of December 2, 2002. There is no basis at this time for requiring disclosure of the classified information contained in the Declaration to defense counsel. First, the sole purpose of the filing was to comply with the Court's Order of October 2, 2002, to provide a status report to the Court [redacted] therefore, defense counsel did not have a "need to know" any of the information in the Declaration to respond to the Status Report, on which the Court has already ruled. Defense counsel's "need to know" certain information in the Declaration to respond to the Government's January 9, 2003, pleading on access issues need not and should not be resolved at this time. Second, as the Court indicated on October 2, 2002, any decision to provide defense counsel access to this type of classified information presented to the Court ex parte should be made only pursuant to the process set forth in the Classified Information Procedures Act, 18 U.S.C. App. 3 (CIPA). Following CIPA will ensure that standby defense counsel's need for any particular pieces of classified information can be evaluated in light of the Government's national

security concerns and that if a legitimate basis for disclosure of particular information is established, the Government can be afforded the opportunity to offer redactions, summaries, or other substitutes rather than simply turning over the entire classified Declaration. Finally, defense counsel does not have an independent discovery right to any information in the Declaration now, six months before trial.

1. The purpose of the Government's Declaration was to comply with the Court's order during the October 2, 2002, CIPA hearing, "to keep fully apprised as to what's going on [redacted] you've got to provide that information or at least I'm in 60 days going to ask you where it's at." Tr. 38. The Court then noted "We're going to have to then perhaps face the ultimate CIPA issue as to, you know, whether or not that information can be given to the defense team." Ibid. The Declaration was filed to comply with the Court's October 2, 2002, order and to request that the Court postpone consideration of the defense motions for access for 45 days. The Court has ruled on that issue by ordering that the Government advise the Court as to its ultimate position regarding access by January 9, 2003. The Court's review of the classified Declaration without its disclosure to defense counsel in making that ruling was proper and is fully consistent with precedent. See, e.g., United States v. Bin Laden, 126 F. Supp. 2d 264, 287 (S.D.N.Y. 2000) (permitting in camera and ex parte review of sensitive material submitted by the government for the purposes of reviewing defendant's motion to suppress); United States v. Squillacote, 221 F.3d 542 (4th Cir. 2000)(permitting the government to submit its FISA application in camera and ex parte), cert. denied, 532 U.S. 971 (2001).

Therefore, given the limited purpose of the Declaration and the Court's comments on October 2, 2002, standby defense counsel currently do not have a need to know any such information for the purpose of the Status Report pleadings – on which the Court has already ruled. Of course, the mere fact that standby counsel have security clearances is not sufficient to provide a basis for an order requiring the Government to turn over the classified Declaration. "[S]ecurity clearances enable [defense counsel] to review classified documents, but they do not entitle them to see all documents with that classification." United States v. Bin Laden, 126 F.Supp.2d 264, 287 n.27 (S.D.N.Y. 2000) (emphasis added). See also United States v. Ott, 827 F.2d 473, 477 (9th Cir. 1987) (rejecting the argument that an ex parte, in camera proceeding regarding FISA material violated due process because the defendant's attorneys all had high security clearances). The Court has recognized this principle before when, in its order of August 23, 2002, it explained that it may "not grant the defendant access to classified discovery unless the Court is satisfied that there is a 'need to know' the particular information." United States v. Moussaoui, 2002 WL 1987964, *1 (E.D. Va. Aug. 23, 2002). Here, however, the Court's Order of December 13, 2002, did not indicate that such a determination had been made. Rather, in requiring the Government to turn over the Declaration, the Order states only that there was no legitimate reason to file the declaration "ex parte given that standby counsel have been granted national security clearances." Order, at 3.

Even if it might later appear that some of the material in the Declaration might be necessary for standby defense counsel to fairly brief the access issues to be addressed in January, there is no basis for turning over the entire Declaration to defense counsel now. It is possible

that, if some information in the Declaration is material that would be necessary for defense counsel to litigate fairly the question of access, disclosure could be appropriate – an issue on which the Government takes no position now. The Government must finalize its legal position on access, however, before the Declaration even plausibly becomes necessary for the defense to respond. Whether any particular information from the Declaration will even be relevant, therefore, cannot be determined now, because, for example, the Government may seek to litigate the question of access on an assumption that [redacted] possess material exculpatory evidence. Therefore, the Government respectfully submits that there is no need to determine, before the issues in our January 9, 2003, pleading are precisely framed, whether the defense is entitled to any of the information contained in the Declaration.

2. Moreover, even if the Court believes that there is some basis for requiring disclosure of some information from the Declaration at some point, any such decision should be made pursuant to the procedures provided in CIPA. Under CIPA, before any disclosure of classified information, the Government, in an effort to protect national security information, is entitled to delete specified items, to offer substitute summaries, or to substitute statements admitting relevant facts that classified information would tend to prove. 18 U.S.C. App. 3, §4. The Government may demonstrate that the use of such alternatives is warranted in an in camera, ex parte submission to the Court. Ibid. Therefore, even if standby defense counsel are ultimately entitled to some of the information contained in the Declaration, they may not receive the information before the Court and the parties employ proper CIPA procedures.

If disclosure were to be considered, the analysis should begin with the fact that the

information contained in the Declaration is [redacted] classified [redacted] The "authority to classify and control access to information bearing on national security" lies with the President, as Commander in Chief. Department of Navy v. Egan, 484 U.S. 518, 527 (1988). That authority serves "the Government's 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business." Ibid.

3. Finally, Standby defense counsel also have no independent discovery right at this juncture to any information contained in the Declaration. The trial is six months away, and even assuming certain information contained in the Declaration may qualify as Brady material – an issue on which the Government takes no position here – the Government respectfully submits that it need not be disclosed at this early date.[1]

For the foregoing reasons, the Government requests that the Court reconsider its Order that the United States forthwith produce the entire classified Declaration to standby defense counsel. Alternatively, if the Court believes that the fact that the Court has read the ex parte Declaration is problematic, then the Government requests leave to withdraw the Declaration. The Government respectfully submits that the decision whether any specific information in the Declaration should be produced to standby defense counsel need not be made before the

[1]See, e.g., United States v. O'Keefe, 128 F.3d 885, 898-899 (5th Cir. 1997)(no Brady violation in delayed disclosure of FBI 302 citing inconsistent witness statements where defendant was able to use 302 in cross-examination); United States v. Walter, 217 F.3d 443, 450-51 (7th Cir. 2000) (no Brady violation where delayed disclosure of phone records because defendant was able to make effective use of evidence at trial); United States v. Alvarez, 86 F.3d 901, 905 (9th Cir. 1996) (no Brady violating in late disclosure of exculpatory notes where defendant was able to cross-examine officer about discrepancies in report).

Government's pleading on January 9, 2003, frames the context in which the question of access will be litigated.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I certify that on December 18, 2002, a copy of the foregoing pleading was served on the Court Security Officer for distribution to the following counsel:

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