

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

Alexandria Division

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 01-455-A
)	
ZACARIAS MOUSSAOUI,)	
Defendant)	

GOVERNMENT’S POSITION REGARDING THE
JURISDICTION OF THE COURT PENDING INTERLOCUTORY APPEAL

In its Proposed CIPA Schedule, the Government noted that the Court may not have jurisdiction over some pre-trial matters involving CIPA during the pendency of the appeal to the Fourth Circuit. The Government has since researched this issue and, although there is no case directly on point, the Government respectfully submits that the Court may continue to litigate any issue not associated with the issue now pending before the Fourth Circuit. The basis for this position follows.

“The filing of a notice of appeal is an event of jurisdictional significance--it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982); United States v. Christy, 3 F.3d 765, 767 (4th Cir. 1993) (same, quoting Griggs). In Christy, the defendant simultaneously filed in the district court a motion for reconsideration of the denial of his motion for a new trial and a notice of appeal. The Fourth Circuit ruled that “[b]ecause the district court’s judgment was final, when the notice of appeal was filed it divested the district court of its jurisdiction over the case and conferred jurisdiction upon this Court.” Id.

at 767. Of course, there is no final judgment in this case and the appeal filed by the Government is interlocutory in nature.

The Government has been unable to find any case addressing the issue of jurisdiction where the Government has filed a notice of interlocutory appeal based, at least in part, on the CIPA statute. However, the Fourth Circuit recently provided the following guidance regarding the issue of jurisdiction while an interlocutory appeal has been taken:

Obviously that which is contemplated is a review of the interlocutory order, and of that only. It was not intended that the cause as a whole should be transferred to the appellate court prior to the final decree. The case, except for the hearing on the appeal from interlocutory order, is to proceed in the lower court as though no such appeal had been taken, unless otherwise specially ordered.

Columbus-America Discovery Group v. Atlantic Mutual Insurance Company, 203 F.3d 291, 301-02 (4th Cir. 2000) (quoting Ex parte Nat. Enameling & Stamping Co., 201 U.S. 156, 162 (1906)). Similarly, in United States v. Montgomery, 262 F.3d 233, 239-40 (4th Cir. 2001), the Fourth Circuit followed the “dual jurisdiction” rule, which allows a district court to proceed with trial while a defendant pursues a frivolous double jeopardy claim, because the risk of confusion or the waste of judicial resources, which are the policy reasons behind the “divestiture of jurisdiction rule,” did not exist. See also Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 379 (1985) (although “filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court over those aspects of the case involved in the appeal,” it “does not imply that an appeal from a judgment of criminal contempt based on noncompliance with a discovery order transfers jurisdiction over the entire case to the court of appeals.”); United States v. Powell, 24 F.3d 28, 31 (9th Cir. 1994) (“This is not a case in which the same issues were before two courts at the same times,” so “[a]pplication of the divestiture

rule in this case would not only create needless paper shuffling, but it would significantly delay and disrupt the criminal trial proceedings.”); Britton v. Co-op Banking Group, 916 F.2d 1405, 1412 (9th Cir. 1990) (“Absent a stay, an appeal seeking review of collateral orders does not deprive the trial court of jurisdiction over other proceedings in the case, and an appeal of an interlocutory order does not ordinarily deprive the district court of jurisdiction except with regard to the matters that are the subject of the appeal.”).

The Government respectfully suggests that the Court should retain jurisdiction over pre-trial litigation of this case, except as to any matter associated with the issues raised in the interlocutory appeal. Continued litigation of the many other issues in this case will not result in a needless waste of resources or a confusion of issues, but, instead, will lead to an earlier trial of this case after resolution of the interlocutory appeal. To be clear, although the Government has filed an interlocutory appeal, we very much would like to try this case as soon as reasonably possible after the conclusion of the appellate process.

Respectfully submitted,

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Certificate of Service

I certify that on the 21st day of February 2003, a copy of the foregoing Government's Position was provided to defendant Zacarias Moussaoui through the U.S. Marshals Service and faxed and mailed to the following::

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