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	)	

GOVERNMENT'S OPPOSITION TO COURT'S ORDER
FOR DEFENDANT TO ATTEND CIPA HEARING

The United States respectfully opposes the Court's Order of April 28, 2003, in which the Court ordered that the defendant be present at the May 7, 2003, Classified Information Procedures Act ("CIPA") hearing scheduled in this case "unless the Government advises the Court . . . of a legitimate reason to exclude the defendant." In short, the defendant cannot be present at any such hearing at which classified material that the Executive Branch has not officially disclosed to the defendant may be discussed and the Court has no authority to require the Government to disclose classified material to an uncleared defendant.

On April 15, 2003, the Court set a hearing for May 7, 2003, under CIPA § 6(c)(1) on the subject of substitutions.[1] This hearing was scheduled in anticipation of the parties submitting their proposed substitutions. Presumably, there will be disagreement between the parties on what statements are to be included in the final substitutions, and the CIPA hearing will aid the Court in

[1] The United States files with this Opposition a Petition of the Assistant Attorney General that the hearing scheduled for May 7, 2003, be held *in camera*, pursuant to CIPA section 6(c). Further, the United States is preparing a second affidavit, to be filed shortly, pursuant to CIPA section 6(c)(2), in which the Attorney General or his delegate will state that disclosure of the classified material in the summaries at issue here would cause identifiable damage to the national security of the United States and explain the basis for the classification of such information.

formulating substitutions. Indeed, any meaningful hearing will necessarily include discussion of the summaries and what was included and excluded in the parties' proposed substitutions, as well as other classified discovery provided to cleared standby counsel. The summaries are classified at the Top Secret and Codeword levels and were produced to cleared standby counsel under CIPA § 4 instead of the raw intelligence information on which the summaries are based.

The defendant, an admitted member of a terrorist organization, does not have a security clearance and properly never will. The classified information contained in the summaries at issue here cannot be disclosed to the defendant without causing identifiable damage to the national security of the United States. See CIPA § 6(c)(2).[2]

The Fourth Circuit, in its remand Order of April 14, 2003, did not order or even suggest that the defendant be permitted to attend a CIPA hearing where classified information was to be discussed. Instead, the Fourth Circuit ordered only that "the defendant and standby counsel are to be given an opportunity to respond to any proposed substitutions." The defendant has been given that opportunity by being provided with proposed substitutions (under a limited authorized disclosure) that would be declassified if used at trial. Indeed, the defendant has already submitted one *pro se* pleading in response to the Government's proposed substitutions. Nothing in the Fourth Circuit's Order suggests that the classified information underlying the proposed substitutions be disclosed to the defendant, and, indeed, a court cannot require that classified information be disclosed to an uncleared person. See United States v. Smith, 750 F.2d 1215,

[2] As noted above, the United States will file shortly the affidavit of the Attorney General or his delegate certifying that disclosure of the underlying summaries at issue here would cause identifiable damage to the national security of the United States.

1218 (4th Cir. 1984) ("[T]he decision whether to permit disclosure of the classified evidence ultimately rests not with the court but with the Attorney General subject to the sanctions provided in section 6(e)(2).") (citation and footnote omitted), vacated and remanded on other grounds, United States v. Smith, 780 F.2d 1102 (4th Cir. 1985) (en banc). See also id. (noting that CIPA "leaves to the Executive the ultimate decision whether to expose the classified materials subject to the sanctions [CIPA] mandates.").[3] To require the United States to disclose the classified information that CIPA is designed to protect – and not merely the government substitutions – would turn CIPA on its head.

The Court's suggestion that by complying with the Court's Order of April 24, 2003, and making a limited authorized disclosure of the Government's proposed substitutions, the Government has somehow agreed that Moussaoui can have access to the underlying classified summaries or classified material is mistaken. The defendant is a sworn member of a terrorist organization at war with the United States. Although the Government is willing to grant him slightly early access to the proposed substitutions – material that the Executive Branch has determined after careful review could be appropriately declassified for use at trial – the Government will not disclose other classified material to Moussaoui. As with any defendant in a case involving classified material, the defendant must rely on his cleared counsel to represent his interests or, if he insists on representing himself, waive his right to see such classified material, as Moussaoui did last summer. See United States v. Bin Laden, 2001 WL 66393 at *2-4 (S.D.N.Y. 2001) (upholding protective order barring defendant terrorists from reviewing

[3] Likewise, the Court cannot require the Executive Branch to make a limited authorized disclosure of classified information to an uncleared person.

classified materials in lieu of access to materials by cleared defense counsel); United States v. Rezaq, 156 F.R.D. 514, 524-25 (D.D.C. 1994), vacated in part on other grounds, United States v. Rezaq, 899 F. Supp. 697 (D.D.C. 1995) (upholding protective order barring classified information from defendant terrorist) ("Clearly, disclosing the sensitive evidence to Mr. Rezaq [charged with a terrorist hijacking] poses a risk to national security."). If the Court feels that this case cannot proceed with Moussaoui *pro se* and the classified material at issue, then the Court may consider revoking his *pro se* status.[4]

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[4] The United States did not join Moussaoui's motion to represent himself. Instead, the Government merely set forth its understanding of the Supreme Court's decisions recognizing a defendant's right of self-representation. As these decisions make clear, until the defendant forfeits his right to represent himself, he continues to hold that right. See McKaskle v. Wiggins, 465 U.S. 168 (1984); Faretta v. California, 422 U.S. 806 (1975). Under these decisions, it is also clear that the defendant – if he unwisely chooses to defend himself – can waive his right to have access to classified material. See United States v. McDowell, 814 F.2d 245, 250 (6th Cir. 1987) ("[J]ust as it is the accused's right to plead guilty or *nolo contendere* to the charges against him, it is equally an accused's personal constitutional right to face the charges alone, either by standing mute and forcing the state to its proofs or by attempting to defend himself. The *only* condition on this right is that it be asserted by the accused with his 'eyes open.'") (emphasis in original). Of course, as spelled out in detail in the Government's pleadings, the Court has the option of revoking Moussaoui's qualified right to represent himself any time he engages in misconduct. See Illinois v. Allen, 397 U.S. at 343 (*pro se* defendant forfeits Sixth Amendment right to confront witnesses by virtue of his own unlawful conduct); McKaskle, 465 U.S. at 173; United States v. Frazier-El, 204 F.3d 553, 559 (4th Cir. 2000) ("government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer") (citation omitted); United States v. West, 877 F.2d 281, 287 (4th Cir. 1989) (court properly terminated *pro se* proceedings because defendant flouted responsibility to act as officer of court); Davis v. Morris, 719 F.2d 324 (9th Cir. 1983) (upholding trial court's decision to deny defendant's application to proceed *pro se* based, in part, on a desire to prevent the type of obstructive conduct engaged in by co-defendants). For example, as the Court has previously observed, the defendant can be deemed to have forfeited his qualified right of self-representation if he uses court pleadings as a vehicle to make inappropriate comments. See Illinois v. Allen, 397 U.S. at 351 ("A courtroom is a hallowed place where trials must proceed with dignity and not become occasions for entertainment by the participants, by extraneous persons, by modern mass media, or otherwise.") (Douglas, J., concurring); United States v. Dujanovich, 486 F.2d 182, 187 (9th Cir. 1973) ("actual" or "potential unruly" obstreperous

The Court's apparent intention to permit the defendant to attend a CIPA hearing where classified information may be discussed is tantamount to granting the defendant greater rights and access to information than if he had not elected to represent himself. A represented defendant would not be permitted to attend a hearing where classified information is discussed; instead, his cleared counsel would attend. See Bin Laden, 2001 WL 66393 at *3-4 (defense counsel can act as proxy for defendant in reviewing classified materials). Again, this disadvantages the United States because of the defendant's decision to represent himself, even though the defendant was explicitly warned that representing himself would result in not seeing classified evidence. Moreover, granting *pro se* defendants greater access to classified information will encourage other defendants, in the most serious cases involving terrorism and espionage, to exercise their Faretta rights to gain access to classified information.

Conversely, if the Court wishes to hold a hearing pursuant to CIPA § 6(c) in which the discussion is confined to the Government's proposed substitutions which were provided to the defendant on April 25, 2003, then the United States does not object to that procedure.[5] After all,

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activities "can well stand as a voluntary relinquishment or forfeiture of the limited constitutional right to proceed *pro se*, just as the trial court may take appropriate steps to quiet or remove obstreperous accused including binding and gagging, if necessary . . . ."); United States v. Abdel Rahman, 189 F.3d 88, 117 (2d Cir. 1999) ("Notwithstanding that political speech and religious exercise are among the activities most jealously guarded by the First Amendment, one is not immunized from prosecution for such speech-based offenses merely because one commits them through the medium of political speech or religious preaching."); cf. Halpern v. Kissinger, 807 F.2d 180, 187 (D.C. Cir. 1986) ("The concept of a special rule for national security matters is no stranger to court-made law – from reduced due process requirements, to increased ability to impinge upon interests protected by the first amendment, to authority (where foreign powers are involved) to conduct warrantless searches.") (omitting citations) (parentheses in original).

[5] Nor would the Government object to two hearings: one at which the defendant would be present and at which only material that was officially disclosed to the defendant was

the United States disclosed to the defendant proposed substitutions of classified material to be used at trial. The practical difficulties of conducting a proceeding where discussion would be limited to the government's proposed substitutions are obvious, however. The defendant could not be present for any discussion of, for example, the underlying summaries. Generally, CIPA provides that a hearing under § 6 is closed on request of the Attorney General even when the proceeding "may result in the disclosure of classified information." CIPA § 6(a) (emphasis added).

If, however, the Court orders the defendant's appearance at the May 7, 2003, CIPA hearing and intends to discuss, or where it is foreseeable that cleared counsel will discuss, classified matters not officially disclosed to the defendant, then the Government respectfully requests a stay so that it may exercise its appeal rights under CIPA § 7.

Respectfully submitted,

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By: _____
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discussed; and a second hearing from which the defendant would be excluded and at which the classified summaries would be discussed.

Certificate of Service

I certify that on the 30th day of April 2003, a copy of the foregoing pleading was provided to the defendant via delivery to the U.S. Marshals Service and was served by fax and mail on the counsel listed below:

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