

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 POSITION REGARDING THE COURT-ORDERED DEPOSITION

On January 31, 2003, the Court ordered a deposition of an enemy combatant via satellite transmission in lieu of the enemy combatant's testimony at trial. In *ex parte* affidavits dated September 27, 2002; October 1, 2002; January 8, 2003; May 7, 2003; and May 9, 2003, filed with the Court, and updated with an additional *ex parte* affidavit filed today, the Government has established the damage to national security that such a deposition will cause. Moreover, the deposition, which would involve an admitted and unrepentant terrorist (the defendant) questioning one of his al Qaeda confederates, would necessarily result in the unauthorized disclosure of classified information. Such a scenario is unacceptable to the Government, which not only carries the responsibility of prosecuting the defendant, but also of protecting this nation's security at a time of war with an enemy who has already murdered thousands of our citizens. Therefore, the Government cannot, consistent with the interests of national security, comply with the Court's Order of January 31, 2003.

Because the deposition will result in the disclosure of classified information compromising national security, and because the Court has rejected proposed substitutions tendered under Section 6(c) of the Classified Information Procedures Act (CIPA), 18 U.S.C.

App. III, the Attorney General, in an attached, classified affidavit filed pursuant to CIPA § 6(e)(1), objects to the Court's Order of January 31, 2003, which requires the disclosure of classified information. Section 6(e)(1) mandates that:

- (1) Whenever the court denies a motion by the United States that it issue an order under subsection (c) and the United States files with the court an affidavit of the Attorney General objecting to disclosure of the classified information at issue, the court shall order that the defendant not disclose or cause the disclosure of such information.

The Government recognizes that the Attorney General's objection means that the deposition cannot go forward and obligates the Court now to dismiss the indictment unless the Court finds that the interests of justice can be served by another action. CIPA § 6(e)(2). If the Court considers an action other than dismissal of the indictment, the Government respectfully requests the Court to establish a briefing schedule so that the Government may be heard on any action that the Court considers as an alternative. Moreover, the Government respectfully submits that the Court should rule under CIPA § 6(e)(2) only after it addresses the motions subject to the Court's Orders docketed as numbers 783 and 784, so it has a clear picture of this entire issue.

Regardless of the action taken by the Court under CIPA § 6(e)(2), that section provides:

An order under this paragraph shall not take effect until the court has afforded the United States an opportunity to appeal such order under section 7, and thereafter to withdraw its objection to the disclosure of the classified information at issue.

Consequently, the Government respectfully requests the Court to stay any action taken by the Court pending the Government's appeal. The Fourth Circuit has already indicated that it is "prepared at this

time to rule on the substantive questions before [it] . . ." and it will "expedite any subsequent appeal that may be taken." United States v. Moussaoui, 2003 WL 21467775 at *1, *6 (4th Cir. June 26, 2003).

Respectfully submitted,

Paul J. McNulty
United States Attorney

By: _____ /s/

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David J. Novak
Assistant United States Attorneys

Certificate of Service

I certify that on the 14th day of July, 2003, a copy of the foregoing pleading was provided to the defendant without the classified affidavits attached via delivery to the U.S. Marshals

Service and was served via the Court's Security Officer on the counsel listed below without the classified, *ex parte* affidavit:

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