

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 DEPOSITIONS ORDERED AUGUST 29, 2003

On August 29, 2003, the Court ordered depositions of two detained enemy combatants via satellite transmission in lieu of the enemy combatants' testimony at trial. As we stated in our July 14, 2003, pleading regarding the first enemy combatant for whom the Court ordered a similar deposition, and as we have established through the *ex parte* affidavits filed with the Court, these unprecedented depositions of three enemy combatants would needlessly jeopardize national security at a time of war with an enemy who has already murdered thousands of our citizens. For each of the three enemy combatants, the Government has tendered detailed substitutions in lieu of their live testimony as specifically authorized by the Classified Information Procedures Act ("CIPA"); however, the Court has rejected the proposed substitutions. Consequently, the Government cannot, consistent with the interests of national security, comply with the Court's Order of August 29, 2003, for the same reasons it could not comply with the Court's similar Order of January 31, 2003. Instead, the Government is exercising its right not to disclose classified information and to seek review in the Fourth Circuit Court of Appeals -- a right clearly protected by CIPA, and a right that exists independent of CIPA. See, e.g., United States v. Reynolds, 345 U.S. 1, 10-12 (1953).

Because the depositions 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 CIPA, the Attorney General, in an attached, classified affidavit filed pursuant to CIPA

§ 6(e)(1), objects to the Court's Order of August 29, 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 depositions 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.¹

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

¹ We respectfully submit that the briefing schedule on the issue of what sanction to impose on the United States for refusing to comply with the Court's Orders of January 31 and August 29, 2003, should provide that the defense first request a sanction, that the United States then respond, and then the defense reply to the United States.

“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, 333 F.3d 509, 512, 517 (4th Cir. June 26, 2003).

Respectfully submitted,

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Certificate of Service

I certify that on September 10, 2003, a copy of the foregoing pleading was provided to the defendant without the classified affidavit attached via delivery to the U.S. Marshals Service and was served via the Court's Security Officer on the counsel listed below with the classified affidavit:

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