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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 SANCTION

As directed by the Court on September 11, 2003, the United States respectfully submits its position on what sanction the Court should impose for the Government's decision under the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3, not to disclose classified information by complying with the Court's Orders of January 31 and August 29, 2003, (the "Deposition Orders"), which directed that the uncleared defendant and his standby counsel be allowed to depose [redacted] enemy combatants being detained abroad during armed hostilities.

As noted in our earlier pleadings, the depositions ordered by the Court would entail the disclosure of classified information and the United States cannot permit the damage to national security that would result were the depositions to go forward. As also set forth in our previous pleadings in this case, the United States maintains that the defendant does not have a right to compel the production of [redacted] enemy combatants detained abroad. Moreover, the United States has explained why the testimony of these enemy combatants is not exculpatory, material, or admissible, and respectfully disagrees with the Court's rulings concerning those points. For these reasons, the Government has sought and will seek appellate review, as specifically authorized by CIPA § 7. The Fourth Circuit has made clear, however, that the Government must

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refuse to comply with this Court's Deposition Orders and then be sanctioned before the Fourth Circuit will review the merits of the Government's appeal. United States v. Moussaoui, 333 F.3d 509, 515-16 (4th Cir. June 26, 2003).

To present the issue most efficiently to the Court of Appeals, and because CIPA prescribes dismissal as the presumptive action a district court must take in these circumstances, we do not oppose standby counsel's suggestion that the appropriate action in this case is to dismiss the indictment. Section 6(e)(2) of CIPA mandates that:

> Whenever a defendant is prevented by an order under paragraph (1) from disclosing or causing the disclosure of classified information, the court shall dismiss the indictment . . . except that, when the interests of justice would not be served by dismissal of the indictment . . . the court shall order such other action . . . as the court determines is appropriate.

The Government respectfully reiterates its disagreement with the Court's conclusions concerning the exculpatory nature and materiality of the evidence that the enemy combatants at issue could offer. In light of the rulings this Court has already made, however, the Government believes that, at this juncture, dismissal of the indictment under CIPA § 6 is the surest route for ensuring that the questions at issue here can promptly be presented to the Fourth Circuit.

Further, should the Court dismiss the indictment or take some other action, CIPA § 6(e)(2) 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 that it will "expedite any subsequent appeal that may be taken." United States v. Moussaoui, 333 F.3d at 512, 517.

The issue before this Court, and that will soon be before the Fourth Circuit, is whether the Compulsory Process Clause gives a defendant the right to compel the testimony at his trial (here, through videotaped deposition) of an enemy combatant seized and held abroad during armed hostilities. As the Government has explained, the Constitution provides an accused terrorist with no such right to [redacted] questioning of his confederates detained by the military overseas. Standby Counsel seek to bolster their claim by arguing that [redacted] access is critical because without it, the defendant cannot receive a fundamentally fair trial. See Standby Counsel's Mot. at 33-40. The Government agrees that every criminal defendant is entitled to a trial that is fundamentally fair under the Due Process Clause and, in capital cases, consistent with the Eighth Amendment. But those constitutional provisions do not expand the scope of the compulsory process right to compel the attendance of witnesses for testimony.

Moreover, the appeal to fundamental fairness as a basis for claiming that trial depositions are indispensable here rests on the unstated assumption that the only way to introduce purportedly exculpatory evidence from these enemy combatants is by presenting their direct testimony at trial. But that is not true – direct testimony is not the only way to put evidence before a jury. Indeed, it may be that in certain circumstances the Due Process Clause and its guarantee of a fair trial, even though it cannot expand the right of compulsory process expressly addressed in the Sixth Amendment, might nevertheless require that a defendant have some

mechanism for placing truly material and exculpatory evidence before the jury in some form (although in compliance with applicable rules of procedure and evidence that shape our conceptions of fundamental fairness and with appropriate regard for national security. See, e.g., United States v. Scheffer, 523 U.S. 303, 308 (1998)). Resolution of that issue is premature until the Fourth Circuit rules on the defense's request for [redacted] access. It would also require the defense first to identify the specific information it would offer at trial and the evidentiary rules or other law that supports the admission of the information. The Government may then decide not to contest some or all of that proffer, and the Court may then be required to address some additional, difficult constitutional issues. But all of those questions are distinct from the question – currently before the Court – of compulsory access to enemy combatants for trial testimony, and they should not be reached until necessary. See Ashwander v. TVA, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

For these reasons, the Court should simply address the sanction issue presented.

Respectfully submitted,

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Certificate of Service

I certify that on September 24, 2003, a copy of the foregoing pleading was provided to the Court Security Officer for service on the counsel listed below:

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