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in Camera and under seal

*Chadd*  
DATE 09.25.03

THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

UNITED STATES OF AMERICA )  
 )  
 v. )  
 )  
 ZACARIAS MOUSSAOUI )

Criminal No. 01-455-A

~~SECRET~~ [REDACTED]  
~~FILING~~

**STANDBY COUNSEL'S RESPONSE TO THE GOVERNMENT'S POSITION  
REGARDING SANCTION**

The Government's Position Regarding Sanction (the "Government's Position,"  
dkt. no. 1063) advocates an approach to this case that could spawn multiple appeals by  
suggesting that the Court defer action on one of two grounds raised by standby counsel  
in moving for dismissal of the indictment. We respectfully request that the Court's ruling  
on sanctions address both grounds for dismissal raised by standby counsel so that if  
the government appeals as it says it intends to do, both issues can be addressed by the  
Court of Appeals.

In Standby Counsel's Motion for Sanctions and Other Relief (dkt. no. 1056),  
standby counsel raised two grounds upon which dismissal should be based. The first  
was our position on sanctions (the "sanctions issue"), i.e., that the indictment should be  
dismissed as a sanction for failure to comply with the Court's orders of January 31 and  
August 29, 2003 directing that access be provided to [REDACTED]  
[REDACTED] material witnesses in this case. The government contends, relying on  
separation of powers principles, that the Court's authority under the Compulsory

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Process Clause of the Sixth Amendment does not reach these witnesses who the government says are enemy combatants detained abroad. ■

The second ground for dismissing the indictment (the "due process/Eighth Amendment issue") was that the indictment should be dismissed not as a sanction, but rather as a recognition of the fair trial obligations imposed on both the Article II and Article III branches of the U.S. Government by the Due Process Clause and the Eighth Amendment. Standby counsel discuss this due process/Eighth Amendment issue in more detail in our Motion for Sanctions and Other Relief at pages 33 through 40.

The government would have the Court defer ruling on the due process/Eighth Amendment issue until after the Fourth Circuit has reviewed the sanctions issue. See Government's Position at 4. At the same time, it acknowledges that the due process/Eighth Amendment issue raises "some additional, difficult constitutional issues." *Id.* It avers that there are other ways to get the exculpatory evidence from the witnesses without ■■■■■ questioning, but does not suggest what those might be. Instead, it would leave it to the defense to suggest alternatives on remand if the Court of Appeals decides that this Court improperly imposed sanctions. Of course, as long as the government continues to advance a prosecutive theory which includes Moussaoui's knowledge of and/or participation in September 11, seeking the death penalty for the deaths resulting therefrom, and/or suggesting that he was a knowing participant in a

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plot for a post-September 11 attack, there is no substitute for these witnesses that would cure the due process/Eighth Amendment problem. Therefore, there is no reason to delay addressing this issue now.

In sum, we respectfully request that the Court address the merits of this issue now in order to put before the Fourth Circuit at one time all aspects of the grave constitutional questions related to the witnesses/detainees at issue.

ZACARIAS MOUSSAOUI

By Standby Counsel

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Frank W. Dunham, Jr.  
Federal Public Defender  
Gerald T. Zerk  
Senior Assistant Federal Public Defender  
Kenneth P. Troccoll  
Anne M. Chapman  
Assistant Federal Public Defenders  
Eastern District of Virginia  
1650 King Street, Suite 500  
Alexandria, Virginia 22314  
(703) 600-0800

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Edward B. MacMahon, Jr.  
107 East Washington Street  
P.O. Box 903  
Middleburg, Virginia 20117  
(540) 687-3902

181

Alan H. Yamamoto  
108 North Alfred Street  
Alexandria, Virginia 22314  
(703) 684-4700

181

Judy Clarke  
Federal Defenders of  
San Diego, Inc.  
255 Broadway, Suite 900  
San Diego, California 92101  
(703) 600-0855

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Standby Counsel's Response to the Government's Position Regarding Sanction was served upon AUSA Robert A. Spencer, AUSA David Novak and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, by hand-delivering a copy of same to the Court Security Officer on this 25th day of September 2003.<sup>2</sup>

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Kenneth P. Troccoli

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<sup>2</sup> Pursuant to the Court's Order of October 3, 2002 (dkt. no. 594), on the date that the instant pleading was filed, a copy of the pleading was provided to the Court Security Officer ("CSO") for submission to a designated classification specialist who will "portion-mark" the pleading and return a redacted version of it, if any, to standby counsel. A copy of this pleading, in redacted form or otherwise, will not be provided to Moussaoui until standby counsel receive confirmation from the CSO and/or classification specialist that they may do so.

**Attached Pages 1-3  
Are Denied in their Entirety**