No. 03-4162

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

ZACARIAS MOUSSAOUI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

PETITION FOR PANEL REHEARING OR REHEARING EN BANC

PAUL J. McNULTY
United States Attorney
Eastern District of Virginia

ROBERT A. SPENCER
KENNETH M. KARAS
DAVID J. NOVAK
MICHAEL J. ELSTON
Assistant United States Attorneys
Eastern District of Virginia

Of Counsel:

CHRISTOPHER A. WRAY
Acting Assistant Attorney General
Criminal Division

MICHAEL R. DREEBEN
Deputy Solicitor General

DAN HIMMELFARB
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Chief, Appellate Section
Criminal Division

STATEMENT OF COUNSEL

We believe, based on a reasoned and studied professional judgment, that this appeal involves questions of exceptional importance. See Fed. R. App. P. 35(b)(1)(B); 4th Cir. R. 40(b)(iv). One of the panel's holdings -- that an order requiring the Government to disclose classified information to the defendant is not an order from which the Government may take an interlocutory appeal under Section 7 of the Classified Information Procedures Act -- conflicts both with the unambiguous language of the statute and with decisions by other courts of appeals, see United States v. Clegg, 740 F.2d 16, 18 (9th Cir. 1984); United States v. Yunis, 867 F.2d 617, 618, 621 (D.C. Cir. 1989). Another of the panel's holdings -- that the district court's order is not immediately appealable under the collateral order doctrine because it is "a discovery order like any other," slip op. 13 -- also involves an issue of exceptional importance. The district court's order, which requires the disruption of an ongoing military operation aimed at gathering vital intelligence so that a terrorism defendant can have access to an enemy combatant detained overseas, interferes with core authorities assigned to the Executive Branch under the Constitution and will result in irreparable harm if the United States cannot obtain immediate appellate review.

Michael J. Elston

PRELIMINARY STATEMENT

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and Rules 35 and 40 of the Rules of this Court, appellant United States petitions for panel rehearing or rehearing en banc of the decision in this case, which dismissed on jurisdictional grounds the Government's appeal of the district court's order directing that the defendant be given access to an enemy combatant. The panel (Wilkins, C.J., and Williams and Gregory, JJ.) rendered its decision on June 26, 2003.

STATEMENT OF THE ISSUES

1. Whether a district court order directing the Government to disclose classified information by producing an enemy combatant held overseas for a trial deposition is immediately appealable under Section 7 of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3.

2. Whether, alternatively, the district court's order requiring the Government to provide access to an enemy combatant held abroad for military and intelligence purposes is appealable under the collateral order doctrine.

STATEMENT OF FACTS

The defendant is charged with participating in the conspiracies that resulted in the September 11, 2001 terrorist

attacks against the United States and the murder of thousands of individuals in New York, Virginia, and Pennsylvania. The Government seeks the death penalty. The defendant, who is proceeding pro se but has standby counsel, has admitted that he is an al Qaeda operative but contends that he had no involvement in the September 11 attacks. The defendant does not have a security clearance, and the protective order entered by the district court, which has been adopted by this Court, therefore provides that he may not have access to classified information without court authorization. Trial has not yet commenced.

In an order dated January 31, 2003, which was supplemented by an opinion dated March 10, 2003, the district court directed the Government to produce an enemy combatant, who is detained abroad and has provided information with critical intelligence value in the ongoing war against terror, for a videotaped trial deposition, via satellite, under Federal Rule of Criminal Procedure 15. The Government appealed the order.[1] On June 26, 2003, a panel of this Court dismissed the appeal, finding that it had no jurisdiction

[1] On April 14, 2003, this Court entered an order giving the Government an opportunity to propose substitutions for the classified information whose disclosure the district court authorized. The Government proposed substitutions and, in support of its proposal, submitted an affidavit under Section 6(c) of CIPA certifying that disclosure of the information would cause identifiable damage to national security. In an opinion dated May 15, 2003, the district court rejected the substitutions. The Government has not yet submitted an affidavit under Section 6(e) of CIPA, which would obligate the district court to prohibit disclosure--and dismiss the indictment (or impose some other sanction).

criminal case authorizing the disclosure of classified information." As the panel acknowledged, the district court's order authorizes "disclosure of classified information." Slip op. 9. By requiring the Government to make an enemy combatant available to the defendant and his standby counsel, and permitting them to elicit testimony from the enemy combatant for use at trial, the order will necessarily result in such a disclosure. The enemy combatant is a source for intelligence, and the Executive Branch, in a decision entitled to deference, see United States v. Smith, 750 F.2d 1215, 1217 (4th Cir. 1984), vacatur on other grounds noted, 780 F.2d 1102, 1104 (4th Cir. 1985) (en banc), has determined that everything he says that indicates his cooperation or lack of cooperation and, indeed, everything he says in the circumstances of a court-ordered deposition is properly classified.

The panel believed that Section 7 does not apply, however, because the order in question concerned "the pretrial disclosure of classified information to the defendant [and] his attorneys," not "the disclosure of classified information by the defendant to the public at a trial or pretrial proceeding." Slip op. 9.[2] But CIPA does not impose any such limitation on appellate jurisdiction. Section 7(a) unambiguously, and without qualification, provides that the Government may appeal an order that authorizes "the

[2] This theory was not even advanced by the defendant's standby counsel, and the Government therefore had no opportunity to address it before the panel issued its decision.

disclosure of classified information." It does not require that the disclosure involve "the public at a trial or pretrial proceeding." Nor is there any basis for interpreting "disclosure" in Section 7 to mean "disclosure to the public" or "disclosure by the defendant," particularly since the term is used in other provisions of CIPA involving disclosure by the Government to the defendant. See 18 U.S.C. App. 3, § 3 ("classified information disclosed by the United States to any defendant"); id. § 6(f) ("The court may place the United States under a continuing duty to disclose such rebuttal information.").[3] In short, "CIPA provides that no trial court order for disclosure of classified information can become effective . . . before the government has had an opportunity to take the matter to a higher court on appeal." United States v. LaRouche Campaign, 695 F. Supp. 1282, 1285 (D. Mass. 1988) (emphasis added).

The panel's decision is inconsistent not only with the plain language of Section 7, but also with CIPA's core purpose. The panel observed that "CIPA was enacted . . . to combat the problem of 'graymail,'" which it described as "an attempt by a defendant to derail a criminal trial by threatening to disclose classified information" in his possession. Slip op. 8. A criminal trial can

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[3] Nor is there anything in the broad definition of "classified information" in Section 1(a) of CIPA, which includes "any information or material that has been determined by the United States Government . . . to require protection against unauthorized disclosure--for reasons of national security," that supports the view that "disclosure" means disclosure to the public.

as easily be derailed, however, by a defendant's efforts to obtain classified information that he knows the Government is unwilling to give him. See H.R. Rep. No. 96-831, pt. 1, at 7 (1980) ("graymail" includes both "seeking access to" and "revealing[] or threatening to reveal" classified information); S. Rep. No. 96-823, at 3 (1980), reprinted in 1980 U.S.C.C.A.N. 4294, 4297 (Government may be faced with "disclose or dismiss" dilemma based on defendant's efforts to "'obtain or disclose classified information'"). Indeed, when an accused spy or terrorist is provided with more classified information than he already has, the potential for graymail is even greater than it was before the disclosure. It is therefore unsurprising that Section 7 enables the Government to take an interlocutory appeal of any order authorizing disclosure of classified information, whether the order authorizes disclosure to the defendant or to the public. Moreover, the dichotomy between disclosure to the public and disclosure to the defendant ignores the fact that disclosure to an uncleared defendant is disclosure to the public.

The Government's interpretation of Section 7 is also confirmed by CIPA's legislative history. Section 7 originated in the Senate bill. See H.R. Conf. Rep. No. 96-1436, at 13 (1980), reprinted in 1980 U.S.C.C.A.N. at 4311. Using language every bit as broad as the statutory language, the report on that bill states that "[t]his section authorizes the government to take interlocutory appeals from adverse district court orders relating to the disclosure of

information." S. Rep. No. 96-823, at 10, reprinted in 1980 U.S.C.C.A.N. at 4303.

The panel's opinion might be read as holding that there is no jurisdiction under Section 7, not because the district court's order did not authorize the disclosure of classified information by the defendant to the public, but because the order was not issued under Section 6. See slip op. 8-9 & n.6. But Section 7(a) of CIPA does not provide for interlocutory appeals solely from orders issued under Section 6 -- or, for that matter, under any particular section or sections of CIPA. If that had been Congress's intent, it would have been easy enough to write such a statute, as Congress has done in other contexts.[4] Instead, Section 7(a) provides, without restriction, that an appeal may be taken under any of three circumstances: when a district court "authoriz[es] the disclosure of classified information"; when it "impos[es] sanctions for nondisclosure of classified information"; or when it "refus[es] a protective order sought by the United States to prevent the disclosure of classified information." Whether one of these circumstances is present in any given case has no necessary

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[4] See, e.g., 12 U.S.C. § 3105(f)(1)(B) ("an order under subsection (e) of this section or section 3107(b) of this title" may be appealed to court of appeals); 28 U.S.C. § 158(a)(2) (certain "interlocutory orders and decrees issued under section 1121(d) of title 11" may be appealed to district court); 29 U.S.C. § 210(a) ("an order of the Secretary issued under section 208 of this title" may be appealed to court of appeals); 33 U.S.C. § 520 ("[a]ny order made or issued under section 516 of this title" may be appealed to court of appeals).

connection to the provision of CIPA, if any, under which the order in question was entered. Nor do the risks from disclosure and graymail depend on whether a specific section of CIPA is mentioned in a district court's order.[5]

Finally, the panel's decision is erroneous even if appellate jurisdiction under Section 7 did depend on having an order issued under Section 6, because the district court's order is in fact a Section 6 order. Section 6(a) speaks of "determinations concerning the use . . . of classified information . . . [at] trial or [a] pretrial proceeding," and the district court made just such a determination in permitting the defendant to elicit classified information at a pre-trial proceeding -- the Rule 15 deposition -- both for use at that pre-trial proceeding and for later use at trial.

B. The Panel's Decision Creates a Square Circuit Conflict.

Inasmuch as the panel's interpretation of Section 7 conflicts with CIPA's text, purpose, and legislative history, it is not

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[5] Since the basis for appellate jurisdiction is found in Section 7, it is not surprising that, as the panel observed, the Government "does not rely on § 4" (which governs discovery) as a "basis for jurisdiction." Slip op. 9 n.6. And the panel was mistaken in its apparent belief that the Government was relying on Section 6, see id. at 9, because the Government has always relied on Section 7. See Gov't Rep. Br. 3-4 ("Section 7(a)'s text straightforwardly and without further limitation authorizes the Government to seek an interlocutory appeal 'from a decision or order or a district court in a criminal case authorizing the disclosure of classified information."); id. at 6 ("[C]ourts have consistently stated that section 7(a) permits exactly what its text describes -- an immediate interlocutory government appeal of any adverse decision requiring disclosure of classified information.").

surprising that other courts of appeals have interpreted Section 7 differently. In United States v. Clegg, 740 F.2d 16 (9th Cir. 1984), a decision that is not cited in the panel's opinion, the Ninth Circuit explicitly rejected the view that Section 7 does not permit an interlocutory appeal from an order requiring the Government to disclose classified information to the defendant. And in United States v. Yunis, 867 F.2d 617 (D.C. Cir. 1989), which is also unacknowledged by the panel, the D.C. Circuit likewise found that Section 7 permits review of an order requiring disclosure to the defendant.[6]

In Clegg, the district court granted the defendant's motion for discovery of classified information. 740 F.2d at 17. When the Government appealed under Section 7, the defendant moved to dismiss, arguing that the district court had not "authoriz[ed] the disclosure of classified information," as that term is used in Section 7, because "'disclosure' means to the public, not to the defendant." Id. at 18. The Ninth Circuit held that "[t]he plain language of the Act forecloses [this] argument." Id. Observing that "CIPA is as concerned with controlling disclosures to the defendant as it is with controlling disclosures to the public," the court concluded that "section 7 provides for appellate jurisdiction" over a district court order requiring the Government

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[6] The only case that the panel did cite, United States v. Smith, 780 F.2d 1102 (4th Cir. 1985) (en banc), "concern[ed] the construction and meaning of § 6 of CIPA," id. at 1106, not Section 7. See slip op. 9.

to disclose classified information to the defendant. Id.

In Yunis, the district court granted a discovery motion seeking classified transcripts of tape-recorded conversations between the defendant and an informant. Yunis, 867 F.2d at 619-621. The Government appealed. Although jurisdiction does not appear to have been contested, the D.C. Circuit concluded that "Section 7 of CIPA provides for the instant interlocutory appeal." Id. at 618 (citation omitted); see also id. at 621.[7]

C. The Panel's Decision Will Impair the Government's Ability To Prosecute Cases Involving Classified Discovery.

If permitted to stand, the panel's opinion will hinder the prosecution of international terrorism cases, espionage cases, and other cases in which the defendant seeks access to classified information, a disproportionate number of which, due to the location of the Central Intelligence Agency and Department of Defense, are prosecuted in this Circuit. The report accompanying the Senate bill observed that Section 7 of CIPA "is essential to the statutory scheme," because, without a procedure for interlocutory appeal, the Government would "face a choice of

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[7] The Sixth Circuit has also found that it has jurisdiction under Section 7 of CIPA to review an order authorizing the disclosure of classified information to individuals other than members of the public -- in that case, court personnel. United States v. Smith, 899 F.2d 564, 566-67 (6th Cir.), cert. denied, 498 U.S. 848 (1990). And because neither Clegg nor Yunis nor Smith involved an appeal from a disclosure order issued under Section 6, the panel's opinion conflicts with these decisions even if it is read to hold that an interlocutory appeal under Section 7 may be taken only from an order under Section 6.

disclosing information or having the case dismissed." S. Rep. No. 96-823, at 10, reprinted in 1980 U.S.C.C.A.N. at 4303. By misinterpreting Section 7 to preclude an immediate appeal of an order requiring the disclosure of classified information to the defendant, the panel has returned the Government to the precise predicament that Congress sought to eliminate by enacting CIPA. In this case, for example, the Government has been put to the choice of disclosing highly classified information to an avowed al Qaeda terrorist or having charges dismissed, evidence precluded, or a damaging instruction given to the jury in the prosecution of that terrorist for his participation in conspiracies that resulted in the September 11, 2001 attacks. Congress specifically declined to put the Executive Branch to that choice by giving it the option to appeal either from an order "authorizing the disclosure of classified information" or from an order "imposing sanctions for nondisclosure." The panel's opinion rejects CIPA's use of the disjunctive to describe appealable orders and Congress's decision that the Government should not have to face the "disclose or dismiss dilemma." H.R. Rep. No. 96-831, pt. 1, at 7.

II. The Order Granting Access to an Enemy Combatant for a Trial Deposition Is Appealable Under the Collateral Order Doctrine.

Even if the district court's order is not appealable under Section 7 of CIPA because it authorizes the disclosure of classified information, an order granting access to an enemy combatant held abroad as part of an ongoing war against terrorism

is appealable under 28 U.S.C. § 1291 as a collateral order. An order is appealable under the collateral order doctrine when it "(1) 'conclusively determine[s] the disputed question,' (2) 'resolve[s] an important issue completely separate from the merits of the action,' and (3) is 'effectively unreviewable on appeal from a final judgment.'" Sell v. United States, 123 S. Ct. 2174, 2182 (2003) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)). Each of these requirements is met here.

The district court's order conclusively determined the disputed question. The order clearly grants the defendant access to the enemy combatant and there is no reason to believe that it is "'tentative, informal or incomplete,'" Swint v. Chambers County Comm'n, 514 U.S. 35, 42 (1995) (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)), particularly in view of the district court's rejection of substitutions. The order also intrudes on a matter of great importance -- indeed, of national security -- that is distinct from the merits of the criminal case. And it is effectively unreviewable on appeal from a final judgment, because, once access is granted and an ongoing interrogation to promote military and intelligence objectives is halted, the injury to the Government will be complete. That injury cannot be remedied on appeal from a final judgment. The Government may not appeal after an acquittal and may appeal only the sentence after a conviction, see 18 U.S.C. §§ 3731, 3742, and the Government's interest in preventing disclosure would in any event "be destroyed

v. Rumsfeld, 316 F.3d 450, 466 (4th Cir. 2003). See also Hamdi v. Rumsfeld, 294 F.3d 598, 602 n.2 (4th Cir. 2002) (treating order mandating access to enemy combatant as appealable injunction). Far from being a discovery order like any other, therefore, the district court's order may well be one like no other. The Government should not be required to accept a sanction to secure immediate review of an order of this type. Cf. United States v. Nixon, 418 U.S. 683, 691 (1974) (noting that "[t]he requirement of submitting to contempt . . . is not without exception," and finding that "the traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question [in the case] arises").[8]

CONCLUSION

The Petition for Panel Rehearing or Rehearing En Banc should be granted.

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[8] In its opinion, the panel stated that it "intend[s] to expedite any subsequent appeal that may be taken" after a sanction is imposed, and urged the parties and the district court "to proceed expeditiously." Slip op. 15. The Government is aware that a rehearing on the jurisdictional question may further delay the resolution of the substantive question presented in its appeal. But because it believes that it is not required to accept a sanction to obtain review of an order mandating the disclosure of classified information, and because of the likely effect of the panel's decision on other cases, the Government has concluded that a petition for rehearing is necessary. To minimize delay, the Government is filing a motion to expedite consideration of the petition.

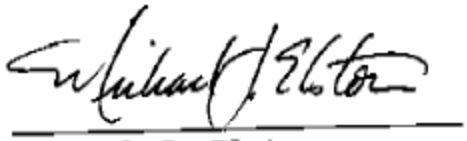
CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Panel Rehearing or Rehearing En Banc were sent this 10th day of July, 2003, to defendant-appellee via delivery to the U.S. Marshals Service, and by first-class mail and facsimile to counsel listed below:

Edward B. MacMahon, Jr., Esq.
107 East Washington Street
P.O. Box 903
Middleburg, VA 20118
(540) 687-3902
Fax: (540) 687-6366

Frank W. Dunham, Jr., Esq.
Public Defender's Office
Eastern District of Virginia
1650 King Street
Alexandria, VA 22314
(703) 600-0808
Fax: (703) 600-0880

Alan H. Yamamoto, Esq.
108 N. Alfred Street
Alexandria, VA 22314
(703) 684-4700
Fax: (703) 684-9700



Michael J. Elston
Assistant United States Attorney