IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellant,

v.

ZACARIAS MOUSSAOUI,
Defendant/Appellee.

Case No. 03-4162

DEFENDANT'S OPPOSITION TO GOVERNMENT'S EMERGENCY MOTION TO RECONSIDER DENIAL OF MOTION TO RECALL THE MANDATE AND REQUEST FOR SUBMISSION OF EMERGENCY MOTION TO THE EN BANC COURT FOR DISPOSITION

Appellee, Zacarias Moussaoui, by and through appointed counsel, now files his opposition to the government's emergency motion for reconsideration of the denial of its motion to recall the mandate in the above-styled case and to its request for submission of its emergency motion to the en banc court for disposition.

INTRODUCTION

On June 26, 2003, this Court issued a published opinion in this case. In that opinion, this Court unanimously agreed that the Court did not have jurisdiction at the present time to hear the government's appeal of the district court's order directing the government to produce an individual for a deposition pursuant to Federal Rule of Criminal Procedure 15, even though the Court was otherwise ready to rule on the

substantive issue presented by the appeal, an issue "of extraordinary importance," to wit, the "direct conflict between a criminal defendant's right 'to have compulsory process for obtaining witnesses in his favor' . . . and the Government's essential duty to preserve the security of this nation and its citizens." (Slip. op. at 3-4.) The Court explained clearly what the government must do to put the case into the appropriate procedural posture, (slip op. at 9-10), and urged the parties to move expeditiously to place the case into that posture, (slip op. at 11). The Court ordered that the mandate issue forthwith, which it did four days later, on June 30, 2003.

On July 1, 2003, the government moved to recall that mandate so that it could petition for rehearing on the issue of this Court's jurisdiction. The panel denied that motion.

On July 7, the district court, in accordance with the panel's original opinion, directed the government to advise the court as to whether it intended to comply with that court's order to permit Mr. Moussaoui to depose by video a witness potentially critical to his defense who is being held by the government as an enemy combatant. Specifically, the order provides:

> In light of the return of the mandate from the United States Court of Appeals for the Fourth Circuit, and consistent with the Fourth Circuit's suggestion that this matter be resolved expeditiously, it is hereby

> ORDERED that the United States advise the Court by Monday, July 14, 2003, whether it intends to comply with our Order of January 31, 2003.
>
> Since the United States noticed its appeal of that Order, the defendant filed a number of motions which the Court deferred ruling on pending resolution of the United States' interlocutory appeal. (See Orders of March 10, 2003 docket as #s 783 and 784). To facilitate the prompt resolution of the issues raised in these motions as well, it is hereby
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> ORDERED that the parties file any submissions in support of, or in opposition to, the motions addressed by the Court's Orders of March 10, 2003 by Monday, July 14, 2003.

Late on Thursday, July 10, the government served on counsel both a petition for panel rehearing and rehearing en banc, and an emergency motion to reconsider the denial of the government's motion to recall the mandate and request for disposition by the en banc court. Counsel received these documents by facsimile at 5:39 p.m. At 9:00 a.m. today, this Court directed counsel to respond to the emergency motion by 12:00 p.m. today and to the petition for rehearing by 10:00 a.m. on Monday, July 14.

Mr. Moussaoui respectfully submits that this Court should deny the government's emergency motion for reconsideration of the denial of its motion for recall of the mandate for the following reasons.

ARGUMENT

Although this Court has the inherent power to recall the mandate in a case, that power is an extraordinary remedy that should be used sparingly and only in unusual circumstances, where good cause is shown, to protect the integrity of the judicial process, or to avoid an injustice. *American Iron & Steel Inst. v. E.P.A.*, 560 F.2d 589, 593-94 (3d Cir. 1977); *see also Alphin v. Henson*, 552 F.2d 1033, 1035 (4th Cir. 1977) (noting that "in exceptional cases, we may even recall our mandate to avoid injustice"); *see generally* Charles Alan Wright et al., *Federal Practice and Procedure* § 3938 (discussing recall of mandate).

The government's argument in its original motion to recall the mandate in this case, and thus in favor of further delay in the district court proceedings that would result from such a recall, was that it intended to file a petition for rehearing. Of course, when a request for recall of the mandate is prompted by a petition for rehearing, this Court need not reacquire jurisdiction in order to consider rehearing. *United States v. Black*, 733 F.2d 349, 351 (4th Cir. 1984). Put another way, this Court need recall the mandate only if it determines that a petition for rehearing should be granted. *United States v. DiLapi*, 651 F.2d, 140, 144 (2d Cir. 1981), *cert. denied*, 455 U.S. 938 (1982).

Having failed in its earlier request to recall the mandate, the government now asserts that an emergency situation exists justifying reconsideration of the Court's earlier denial. This so-called "emergency" is neither an emergency nor a valid basis to grant the requested relief.

A. No "Emergency" Exists

The emergency posited by the government is that the district court may issue sanctions in proceedings that the government says are scheduled for July 14, 2003. This is entirely misleading. As the district court order reflects, all the district court has done is require the government to state whether or not it intends to comply with the court's order of January 31, 2003.[1] The district court has, of course, not scheduled a hearing or even set a briefing schedule on the issue of sanctions. This is because no one has any idea what the government's answer will be. For all that any one knows, the government may decide to produce the witness rather than face the possibility of sanctions—and thus moot this entire appeal. It is of significance that neither in its motion to reconsider its earlier motion to recall the mandate or in its

[1] That the imposition of district court sanctions is not imminent also is apparent from the second component of the district court's order, in which it directs the parties to "file any submissions in support of, or in opposition to, the motions addressed by the [district court's] Orders of March 10, 2003." The March 10 orders concern Mr. Moussaoui's trial access to other defense witnesses who are in the exclusive custody or control of the United States. Apparently, the district court intends to resolve the issues related to these other witnesses before addressing the issue of sanctions. Thus, no "emergency" exists.

petition for rehearing, both of which were filed yesterday, the government persists in its refusal to answer this question. It is, after all, a question requiring only a "yes" or "no" answer. With the matter pending for over ten months in the district court, we can assume the national security ramifications of how to answer the question have already been debated and resolved. As this Court noted,

> Here, despite indications that it will refuse to produce the enemy combatant witness under any circumstances, and despite ample opportunity to make its position known, the Government has not notified the district court of its refusal to comply with the testimonial writ. And, we cannot acquire jurisdiction through speculation about what action the Government may or may not take and what sanction the district court may or may not impose.

(Slip. op. at 10.) For this very reason, this Court was entirely correct in expeditiously returning the mandate to the district court.

B. There Is No Valid Basis for Rehearing

Irrespective of whether there is an emergency, reconsideration motions are granted only to correct manifest errors of law or fact. The government's motion to recall the mandate, which was denied and which the government now asks this full Court to reconsider, does not set forth a colorable basis for rehearing, and in seeking to establish one, the government mischaracterizes the panel's opinion.

First, the government argues that this Court misconstrued the Classified Information Procedures Act, 18 U.S.C. App. 3 (hereafter "CIPA"), thereby creating a split among the federal circuits, (Gov. Mot. to Recall Mandate at 4-6; *see* Fourth Cir. Loc. Rule 40(b)(iii)). Second, the government argues that the Court erred when it applied the collateral order doctrine as it would in any other case instead of expanding the doctrine to allow interlocutory review "in this extraordinary situation," (Gov. Mot. to Recall Mandate at 7; *see* Fourth Cir. Loc. Rule 40(b)(iv)). The government appears to believe that those bases, standing alone, are sufficient to meet the criteria for recalling a mandate. For the following reasons, the government's bases do not meet even the criteria for rehearing, much less the criteria for recalling a mandate.

As to the government's first ground for rehearing and recalling the mandate, it argues that the Court's opinion creates a split of authority on the applicability of CIPA § 7 appellate jurisdiction. That argument is misleading and inaccurate for two reasons. First, this Court observed that CIPA applies in this case only by analogy, and that "[b]ecause CIPA is not directly applicable, § 7 does not authorize an interlocutory appeal." (Slip op. at 8.) There can be no split between this Court's opinion and the opinion of any other court construing CIPA § 7 when it is clear that this Court uses CIPA only by analogy as an analytical framework for addressing the

question of access to a witness. Second, this Court's determination that an order resulting in disclosure of classified information to a criminal defendant is not "'a decision or order . . . authorizing the disclosure of classified information' from which [the government] may take an immediate appeal," (slip op. at 7), creates no conflict with any other circuit, even if it were not dictum but were instead the holding of the Court.

Although it is true, as the government has argued, that some courts have held that CIPA § 4 determinations disclosing discovery to defendants may be appealable under § 7, those cases are inapposite where the government endeavors to appeal after a proceeding involving CIPA § 6. The CIPA § 4 cases cited by the government each involved orders disclosing documents to defendants who had not, prior to the orders, been privy to the information and who had no clearance to see it. *See, e.g., United States v. Clegg*, 740 F.2d 16 (9th Cir. 1984); *United States v. Yunnis*, 867 F.2d 617 (D.C. Cir. 1989).[2] In this case, however, the government maintains that any information the witness might reveal during his deposition testimony has already been disclosed to Mr. Moussaoui, who has been granted a limited security clearance to see

[2] The other case cited by the government, *United States v. Smith*, 899 F.2d 564 (6th Cir. 1990), involves the enabling statute of CIPA, which delegates to the Chief Justice of the United States the authority to issue regulations governing the security clearance process of judicial employees in cases involving classified information. That case is simply not relevant to the jurisdictional issues here.

it. (Supp. J.A. Classified at 37, 40, 101-02.)[3] Consequently, the "split" among the circuits that the government attempts to create is in fact illusory and does not justify the grant of rehearing.

Further, even if the Court were mistaken in its view of jurisdiction under CIPA, a mistake in the law is not enough to justify a recall of the mandate. *See Hines v. Royal Indem. Co.*, 253 F.2d 111 (6th Cir. 1958) (declining to recall mandate where claim that court was mistaken in its interpretation of law was nothing more than petition for rehearing under a different name); *see also Oneida of Thames Band v. New York*, 771 F.2d 51 (2d Cir. 1985) (declining to recall mandate in case in which jurisdiction over interlocutory appeal of order disqualifying counsel was at issue, court found it had jurisdiction, but after mandate had issued Supreme Court issued opinion in another case holding that order disqualifying counsel was not subject to interlocutory appeal). *But see Austin v. United States*, 353 F.2d 512 (4th Cir. 1962) (recalling mandate where subsequent Supreme Court case made appeal interlocutory and therefore unreviewable).

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[3] Mr. Moussaoui's counsel advanced a different reason as to why there is no CIPA § 7 appellate jurisdiction at the present time. Whether by analogy or otherwise, this case was clearly in a CIPA § 6 posture after this Court's remand for consideration of substitutes under CIPA § 6(c) in lieu of the deposition ordered by the district court. (Supp. J.A. Unclassified at ___.) Counsel contended that there could be no "disclosure of classified information" giving rise to an appeal under CIPA § 7 until the deposition was actually taken and there was an attempt by Mr. Moussaoui to disclose the deposition at trial. (*See* Supp. Br. of Appellee at 3, 4, n.7.)

As its second basis for rehearing and recalling the mandate, the government argues in its original motion to recall the mandate that the collateral order doctrine should permit an appeal in this case. The collateral order doctrine is separate and apart from CIPA and the panel opinion suggests that this doctrine and not CIPA § 7, is the appropriate jurisdictional basis for appeal if and when the district court imposes sanctions. This is because the district court and this Court used CIPA only by analogy.

The government posits that it will be placed "in the untenable position of having to suffer a sanction in order to protect the national security . . . ." (Gov. Mot. to Recall Mandate at 1.) The government further claims that "[i]n this extraordinary situation, the government should not be forced to suffer a sanction for refusing to permit a deposition that will endanger national security . . . ." (Gov. Mot. to Recall Mandate at 7.) The essence of the government's argument on the collateral order doctrine, then, is not that this Court misapplied the doctrine or interpreted it in such a way that creates a split with another circuit's interpretation, but rather that the Court should make an exception to the doctrine in this case.

The government attempts to change the jurisprudence of the collateral order doctrine by asserting, without any authority, that this "extraordinary situation" requires its expansion when it otherwise permits only very limited exceptions to the

general rule that interlocutory (non-final) orders can be appealed immediately. But as this Court correctly noted, (slip op. at 8-9, 10), the appealability of an interlocutory order is not to be determined on a case-by-case basis, but instead must be looked upon as classes of cases to be strictly construed. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). "We have accordingly described the conditions for collateral order appeal as stringent, and have warned that the issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs without regard to the chance that the litigation at hand might be speeded or a particular injustice averted by a prompt appellate court decision." *Id.* (internal quotations and citations omitted). Put another way, any exception to the rule cannot be created by the particular harm asserted by the government to be averted here but must instead be based on reasons relating to an entire class of decisions. Moreover, the requirements of the collateral order exception to the final judgment rule should be applied "with the utmost strictness in criminal cases." *Flanagan v. United States*, 465 U.S. 259, 265 (1984).

Further, the fact that the government must suffer a sanction in order to take an appeal is simply not an extraordinary circumstance warranting either rehearing or the recall of the mandate. As to rehearing, the requirement of the sufferance of a penalty is a fundamental premise of the ability to appeal, collaterally or otherwise. Certainly,

a criminal defendant must suffer sanctions before he can appeal an adverse but non-final ruling of a district court: he must be convicted and sentenced—including sentenced to death. There is no reason to exempt the government in this case from that long-standing requirement.

More importantly, the threat of sanctions is not enough to warrant recall of the mandate. To the contrary, even the actual occurrence of irreparable harm is not enough. In *Faulkner v. Jones*, 66 F.3d 661, 662 (4th Cir. 1995), which was part of the high-profile litigation involving the admission of women to South Carolina's all-male military institute, the Citadel, this Court refused to recall the mandate despite the fact that its refusal meant that the school would be forced to allow Ms. Faulkner to enroll before either the constitutionality of its men-only admissions policy had been considered by the U.S. Supreme Court or the constitutionality of its alternative program for women had been evaluated by the district court. As Judge Hamilton pointed out in his dissent from the denial of the motion for recall, "[i]f there ever was a case demonstrating 'good cause,' 'injustice,' or 'exceptional circumstances,' this is it." *Id.* at 663. Yet two of the three judges on the panel disagreed with that assessment and declined to recall the mandate in that case.

In short, the government claims that it wants this Court to reach the substantive issue presented by its appeal, and to reach it as quickly as possible. Yet the

government, by the very filing of its motion to recall the mandate, has engaged in litigation that will only delay a decision on the merits. The government does not need to have this Court recall the mandate in order to receive its wish. Rather, it must simply follow this Court's instructions to tell the district court whether it will comply with that court's order. This Court's opinion clearly contemplated the possibility of the imposition of sanctions on the government on remand in the event it refused to comply, but remanded nonetheless. If the government opts to produce the witness as ordered by the district court, this entire matter is rendered moot.

CONCLUSION

For the foregoing reasons, Mr. Moussaoui respectfully moves the Court to deny the government's emergency motion to reconsider the denial of its earlier motion to recall the mandate in this case.

Respectfully submitted this 11th day of July.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Defendant's Opposition to Government's Emergency Motion to Reconsider Denial of Motion to Recall the Mandate and Request for Submission of Emergency Motion to the En Banc Court for Disposition was sent by facsimile and by U.S. Mail to AUSA Robert A. Spencer, AUSA David Novak and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314, on this 11th day of July, 2003.

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