

United States Court of Appeals
for the
Fourth Circuit

UNITED STATES OF AMERICA,

Petitioner--Appellant,

— v. —

ZACARIAS MOUSSAOUI,

Respondent--Appellee.

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

BRIEF OF AMICUS CURIAE
CENTER FOR NATIONAL SECURITY
STUDIES

KATHLEEN CLARK
JOSEPH ONEK
CENTER FOR NATIONAL
SECURITY STUDIES
1120 19th Street NW, 8th Floor
Washington, DC 20036
(202) 721-5650

Counsel for Amicus Curiae

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

No. 03-4792 *United States v. Zacarias Moussaoui*

Pursuant to F.R.A.P. 26.1 and Local Rule 26.1, amicus curiae Center for National Security Studies, makes the following disclosure:

The Center for National Security Studies is a project of the National Security Archive Fund, Inc., a non-profit corporation. The National Security Archive has no parent corporation and no publicly held corporation owns 10% or more of its stock.

1. Is amicus a publicly held corporation or other publicly held entity?

Yes No

2. Does amicus have any parent corporation?

Yes No

3. Is 10% of the stock of amicus owned by a publicly held corporation or other publicly held entity?

Yes No

4. Is there any other publicly held corporation that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?

Yes No

5. Is amicus a trade association?

Yes No


Kathleen Clark

11-21-03
date

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF INTEREST 1

QUESTION PRESENTED 1

INTRODUCTION 1

STATEMENT OF FACTS..... 2

THE DISTRICT COURT PROCEEDINGS 3

ARGUMENT 5

 I. Fundamental fairness prohibits the government from seeking the death penalty while denying defendant access to witnesses in the government’s control who could provide exculpatory testimony..... 5

 II. The Government’s claims that the District Court’s ruling will harm future cases is without basis..... 9

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

<u>Berger v. United States</u> , 295 U.S. 78 (1935).....	8
<u>Brady v. Maryland</u> , 373 U.S. 83 (1963).....	8
<u>Jencks v. United States</u> , 353 U.S. 657 (1957).....	5
<u>Kyles v. Whitley</u> , 514 U.S. 419 (1995).....	7
<u>Rovario v United States</u> , 353 U.S. 53 (1957).....	6
<u>Stirone v. United States</u> , 361 U.S. 212 (1960).....	7
<u>United States v. Fernandez</u> , 913 F.2d 148 (4 th Cir. 1990).....	6, 9
<u>United States v. Moussaoui</u> , 2003 U.S. Dist. LEXIS 17253 (E.D. Va. Oct. 2, 2003).....	passim
<u>United States v. Reynolds</u> , 345 U.S. 1 (1953).....	5
<u>United States v. Smith</u> , 780 F.2d 1102 (4 th Cir. 1985).....	10

Statutes

18 U.S.C. App. 3 § 6(e)(2)..... 6

Other Authorities

Susan Schmidt and Dan Eggen, *Al Qaeda Official Tells of Planned Attacks*,
Wash. Post A10 (Mar. 10, 2003)..... 2

Susan Schmidt and Ellen Nakashima, *Moussaoui Said Not Be Part of 9/11 Plot*,
Wash. Post A4 (March 28, 2003)..... 3

STATEMENT OF INTEREST

The Center for National Security Studies (the Center) is a nonprofit, nongovernmental civil liberties organization in Washington D.C. that was founded in 1974 to ensure that civil liberties are not eroded in the name of national security. The Center works to protect due process rights of individuals and to find solutions that protect both civil liberties and the national security. It worked for the enactment of the Classified Information Procedures Act, and since then has filed amicus briefs in several cases concerning the application of that statute. The Center has also filed amicus briefs in the case challenging the detention of Jose Padilla as an enemy combatant in both the Southern District of New York and the Court of Appeals for the Second Circuit.

QUESTION PRESENTED

Whether, consistent with the constitutional right to a fair trial, the government may seek to prove particular allegations while denying a criminal defendant access to witnesses under the government's control who would testify that those allegations are false.

INTRODUCTION

The government has charged defendant Zacarias Moussaoui with conspiracy in the September 11, 2001 attacks and is seeking the death penalty against him. It has captured and is holding incommunicado three members of al Qaeda whom the

District Court found were likely to provide exculpatory testimony for Moussaoui, supporting his claim that he was not involved in the September 11th attacks. The government is refusing to make these witnesses available, yet continues to seek the death penalty against Moussaoui on the basis that he was involved in the attacks. Fundamental principles of due process prohibit the execution of an individual when the government prevents exculpatory witnesses from testifying in his defense.

STATEMENT OF FACTS

The government has charged Zacarias Moussaoui with participation in a conspiracy to commit terrorism. The first four counts of the six count indictment include allegations relating to the events of September 11th and the resulting 3000 deaths. The government is seeking the death penalty for these counts. United States v. Moussaoui, 2003 U.S. Dist. LEXIS 17253 at *7 (E.D. Va. Oct. 2, 2003).

Moussaoui has acknowledged in open court that he is a member of al Qaeda; transcript July 18, 2002 hearing at 26-27; and has admitted that he was part of a plot to commit terrorist acts some time after September 11, 2001. United States v. Moussaoui at 3 (E.D. Va. Mar. 10, 2003). But Moussaoui maintains that he was not involved with the September 11th attacks. United States v. Moussaoui, 2003 U.S. Dist. LEXIS 17253 at *8, n.11 (E.D. Va. Oct. 2, 2003).

The government has captured and is holding incommunicado certain members of al Qaeda who have information about the September 11th conspiracy. According to press accounts citing unnamed government sources, these individuals include the masterminds of the attack, who reportedly told their interrogators that Moussaoui was not part of the September 11 plot. See Susan Schmidt and Ellen Nakashima, *Moussaoui Said Not Be Part of 9/11 Plot*, Wash. Post A4 (March 28, 2003); Susan Schmidt and Dan Eggen, *Al Qaeda Official Tells of Planned Attacks*, Wash. Post A10 (Mar. 10, 2003). One of these al detainees is reportedly Ramzi Bin al Shibh, who, the indictment alleges, paid Moussaoui approximately \$14,000 in August, 2001. Superseding Indictment in United States v. Moussaoui, Count I, Overt Act ¶ 65.

THE DISTRICT COURT PROCEEDINGS

The District Court found that certain members of al Qaeda held by the government “could offer testimony which would undermine the Government’s contention that the defendant intentionally ‘participated in an act’ or ‘engaged in an act of violence’ that directly resulted in thousands of deaths on September 11, 2001,” and thus save Moussaoui from the death penalty. United States v. Moussaoui, 2003 U.S. Dist. LEXIS 17253 at *14 (E.D. Va. Oct. 2, 2003). The defense asked that these witnesses be made available for unmonitored pre-trial questioning and for in-person trial testimony. United States v. Moussaoui at 13

(E.D. Va. Aug. 29, 2003). After considering the government's security concerns, the court denied the defense request for unmonitored pre-trial access, but ordered videotaped depositions of the witnesses. This method, the District Court stated, would enable the government to protect its security interests and permit the defense to obtain the exculpatory testimony required for a fair trial. United States v. Moussaoui at 24-25 (E.D. Va. Mar. 10, 2003).

The government objected to this arrangement, and offered a written substitution in lieu of depositions. The District Court rejected the substitution because of "its unreliability, incompleteness and inaccuracy," noting that it "omits some exculpatory information reflected in the classified summaries." United States v. Moussaoui at 6, 11 (E.D. Va. May 15, 2003). After the government advised the Court that it would not provide the witnesses for deposition, the defense requested that the court dismiss all charges against Moussaoui. The government did not contest that request. United States v. Moussaoui, 2003 U.S. Dist. LEXIS 17253 at *4 (E.D. Va. Oct. 2, 2003). The court rejected the motion for dismissal, ruling that the prosecution could go forward but prohibiting the government from "making any argument, or offering any evidence, suggesting that the defendant had any involvement in, or knowledge of, the September 11 attacks." Id. at *16. With only the more general conspiracy allegations

remaining against Moussaoui, the Court dismissed the Death Notice against him.

The government appealed this decision.

ARGUMENT

I. Fundamental fairness prohibits the government from seeking the death penalty while denying defendant access to witnesses in the government's control who could provide exculpatory testimony.

Fundamental fairness prohibits the government from seeking to prove particular allegations in a criminal trial while denying access to witnesses under its control who could testify for the defendant that those allegations are false. Due process requires that if the government decides not to make the testimony of such witnesses available, then it may not seek to prove those particular allegations. Where the government's interest in prosecuting a crime or proving certain allegations conflicts with the government's interest in denying access to witnesses, the executive branch must choose which of these interests to pursue in order to assure a defendant due process of law.

The Supreme Court has made clear that it would be "unconscionable to allow [the government] to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. . . ." Jencks v. United States, 353 U.S. 657, 671 (1957) (quoting United States v. Reynolds, 345 U.S. 1, 12 (1953)). In a civil proceeding, when the government is a defendant, it is free to invoke the state

secrets privilege. But in a criminal proceeding, if the government invokes the privilege with respect to information that the defendant needs, due process prohibits the government from prosecuting the defendant on charges that are related to the information being shielded by the privilege. Jencks, 353 U.S. 657. Similarly, the prosecution may invoke the informant's privilege to avoid disclosing the identity of its informants, but the scope of that privilege is limited by

the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.

Roviaro v. United States. 353 U.S. 53, 60-61 (1957).

This understanding of the requirements of due process is incorporated in the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3. CIPA sets out procedures for determining in advance of trial what evidence is material and exculpatory. Then the government can then choose between disclosing the classified information in the manner deemed appropriate by the court or withholding the information with the result that the charges will be amended or dismissed as appropriate. 18 U.S.C. App. 3 § 6(e)(2). CIPA rests on an understanding that while a court arguably has no authority to order disclosure of classified information, due process requires that if the government chooses to

withhold material exculpatory information, the court must ensure a fair trial by amending or dismissing the charges. "Were it otherwise, CIPA would be in tension with the defendant's fundamental constitutional right to present a complete defense." United States v. Fernandez, 913 F.2d 148, 154 (4th Cir. 1990).

The District Court properly conducted such a pre-trial inquiry here and found that the testimony of these witnesses is material and exculpatory. Having found that the testimony is necessary for a fair trial, the Court correctly held that the government's arguments against disclosure must give way. As the Supreme Court ruled in Jencks,

The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession.

353 U.S. at 672. Having been informed that the government nevertheless chooses to withhold access to the al Qaeda witnesses, the District Court appropriately restricted the allegations that the government can seek to prove. United States v. Moussaoui, 2003 U.S. Dist. LEXIS 17253 (E.D. Va. Oct. 2, 2003).

The government's argument about the court's reach under the Sixth Amendment Compulsory Process clause is beside the point. The issue is not the court's power to reach these witnesses. Whether the court has the power to reach

these witnesses, the government does, and it is the government that is refusing to make them available. Cf. Berger v. United States, 295 U.S. 78, 88 (1935) (the government's "interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."), overruled on other grounds, Stirone v. United States, 361 U.S. 212 (1960); see also Kyles v. Whitley, 514 U.S. 419, 439 (1995); Brady v. Maryland, 373 U.S. 83, 88 (1963). In the face of the government's refusal, it is the court's obligation to ensure a fair trial. The district court here correctly did so, and its decision in no way interferes with executive branch powers beyond judicial reach. The court determined that these witnesses could help the defendant, and so ordered their testimony. When informed that the government would refuse to make them available, the Court properly prohibited the government from seeking to prove the particular allegations that these witnesses could rebut.

The District Court's order fully protects the key interests at stake in this case. It protects the government's asserted national security interest by permitting the government to continue holding the al Qaeda witnesses incommunicado.¹ It

¹ The government's national security interest in this case rests upon showing that a deposition of the detainees would be likely to cause them to refuse to disclose information important to national security that they would otherwise disclose. Such a showing might be difficult in this case, where the detainees have been in captivity for several months and have already reportedly disclosed important information.

protects the public interest in law enforcement by permitting the government to continue to prosecute and seek a severe penalty against this defendant. It protects the constitutional interest in according this defendant a fair trial.

The only interest that the District Court's decision does not accommodate is the government's interest in seeking the death penalty against Moussaoui. But since "the government's interest in protecting national security . . . cannot override the defendant's right to a fair trial," United States v. Fernandez, 913 F.2d 148, 154 (4th Cir. 1990), a fortiori the government's interest in securing the death penalty – a lesser interest than protecting the national security – cannot override a defendant's due process right to a fair trial. Indeed, a defendant's need for a fair trial is at its greatest in a capital case.

II. The Government's claims that the District Court's ruling will harm future cases is without basis.

Even with the limitations imposed by the District Court, Moussaoui faces possible life imprisonment if found guilty of the charges against him. Presumably concerned that it can make no showing of harm in this case, the government puts forward a purely speculative argument about the effect the District Court's ruling might have in future criminal cases. Government Fourth Circuit Brief, pp. 43-44 ("[T]he district court's decision jeopardizes national security . . . by setting a precedent that will invite abuse by defendants in subsequent prosecutions of al Qaeda operatives."). But a defendant's due process rights in a capital case may not

be sacrificed for the government's claimed interest in some future wholly speculative prosecution.

Moreover, the government's claim of harm has no basis in fact. The Government asserts that its terrorism prosecutions will be jeopardized because "any defendant charged with criminal responsibility for terrorist operations related to al Qaeda will be able to make a plausible claim to have access to these combatants." *Id.* at 3. But the government claims 143 successful prosecutions to date. Prepared Remarks of Attorney General John Ashcroft, "The Proven Tactics in the Fight against Crime," Washington D.C., September 15, 2003 (available at: www.usdoj.gov/ag/speeches/2003/091503nationalrestaurant.htm). None of these prosecutions has resulted in interference with the interrogation of the al Qaeda detainees. In any future case where a defendant seeks access to al Qaeda detainees, a district court will grant access only after determining that their testimony is necessary to the defense, not on mere speculation that their testimony might be useful. See United States v. Smith, 780 F.2d 1102, 1110 (4th Cir. 1985).

Finally, in any future case, a district court has the tools to adequately protect all the interests at stake. In some future case, for example, a court after reviewing all the facts and circumstances might conclude that a substitution is adequate and that there is no need to amend the charges. On the facts and circumstances of this capital case, the District Court, consistent with the requirements of fundamental

fairness, reached a different conclusion.

CONCLUSION

For the reasons set forth above, amicus respectfully urges this Court to affirm the District Court's order.

Respectfully submitted,

A handwritten signature in black ink that reads "Kathleen Clark" followed by the initials "IBB". The signature is written in a cursive style.


Kathleen Clark
Joseph Onek

Counsel for *amicus curiae*
CENTER FOR NATIONAL SECURITY
STUDIES
1120 19th St. NW, 8th floor
Washington, DC 20036
(202) 721-5650

November 21, 2003

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for Amicus curiae complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). Exclusive of the exempted portions described in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 2891 words. This count was undertaken by the word processing system used to prepare the brief.


Kathleen Clark

CERTIFICATE OF SERVICE

I hereby certify that on November 21st, 2003

- 8 copies of the brief and 6 copies of the appendix (civil or criminal retained)
- 6 copies of the brief and 5 copies of the appendix (criminal justice act)
- 4 copies of the sealed appendix
- 4 copies of the motion
- 8 copy / copies of Amicus Curiae Brief

were filed in the Clerk's Office of the United States Court of Appeals for the Fourth Circuit.
This same date

- 2 copies of the brief and 1 copy of the appendix (civil or criminal retained)
- 1 copy of the brief and 1 copy of the appendix (criminal justice act)
- 1 copy of the motion
- 2 copy / copies of Amicus Curiae Brief

were sent via First Class Mail 3rd party commercial carrier for delivery within 3 days to:

Frank W. Dunham, Jr.
FEDERAL PUBLIC DEFENDER
Office of the Public Defender
1650 King Street, Suite 500
Alexandria, VA 22314

Robert Spencer
Office of the United States Attorney
2100 Jamieson Avenue
Alexandria, VA 22314

/s/ Bridget L. Beirne

Counsel Press, L.L.C.
1011 East Main Street
Suite LL-50
Richmond, Virginia 23219
(804) 648-3664 (800) 275-0668

Filing and service were performed by direction of counsel.