

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FAWZI KHALID ABDULLAH FAHAD AL ODAH,)
et al.,)
Plaintiffs,)
))
v.) **No. CV 02-0828 (CKK)**
))
UNITED STATES OF AMERICA, et al.,)
))
Defendants.)
))

RESPONSE TO DEFENDANTS' NOTICE OF FILING OF MOUSSAOUI ORDER

Although the government concedes it mistakenly advised Judge Green at the hearing on October 20, 2004, that the protective order in *United States v. Moussaoui*, Crim. No. 01-455-A (E.D. Va.) dealt with a category labeled “protected information,” the government persists in arguing that the restrictions on the dissemination of “particularly sensitive discovery materials” in the *Moussaoui* order are precedent for the restrictions it proposed to impose on the dissemination of “protected information” in this case. *See* Defendants’ Notice of Filing, dated October 21, 2004, at 1. But that argument is without foundation. There are critical differences between the “particularly sensitive discovery materials” restricted in *Moussaoui* and the “protected information” the government wants to restrict in its proposed protected order (“PPO”) in this case, and they vividly demonstrate that the government’s proposal to restrict the dissemination of “protected information” in the PPO is both unprecedented and invalid.

First, under the *Moussaoui* order (at 1) the government was required to produce “particularly sensitive discovery materials” both “to the defendant and his counsel of record.” In contrast, under the PPO (¶¶ at 36, 39) “protected information” is made available only to

detainees' counsel and they are *prohibited* from disclosing it to the detainee "without prior concurrence of counsel for the government" (unless the detainee provided the information).

Second, under the *Moussaoui* order (at 1) the government was required to provide the defendant and his counsel with all "particularly sensitive discovery materials" relevant to the defendant's case, consistent with Rule 16(d) of the Federal Rules of Criminal Procedure. In contrast, under the PPO (at ¶ 48) the government is *not* required to disclose to the detainee's counsel "protected information" relevant to the detainee's case.

Third, under the *Moussaoui* order (at 1) the only materials subject to restriction were "particularly sensitive discovery materials" in the government's possession. In contrast, under the PPO (at ¶ 11) *any* information "designated by the government as protected" is subject to restriction, even if it is not in the possession of the government.

Fourth, under the *Moussaoui* order (at 1, 2) the defendant and his counsel were restricted from further disseminating only materials "clearly identified" by the government as "particularly sensitive discovery materials." In contrast, under the PPO (at ¶ 40) detainees counsel are prohibited from disclosing any information known "*or believed to be*" (emphasis added) protected, and the PPO does not specify "believed to be" by whom.

Fifth, under the *Moussaoui* order (at 2) the government was prohibited from disseminating to the media "particularly sensitive discovery materials" provided to the defendant and his counsel. In contrast, under the PPO (at ¶ 43) "[n]othing ... shall prevent the government from using *for any purpose* protected information it provides to a party (emphasis added)."

Sixth, under the *Moussaoui* order (at 1) the only materials to which dissemination restrictions applied were those that were "particularly sensitive." In contrast, the dissemination restrictions in the PPO apply, under the broad definition of "protected information" (at ¶ 11), to

information the government says requires special handling to protect *either* “the security of United States government personnel and facilities” *or* “other significant government interests,” whatever that means.

In sum, and for the reasons given in plaintiffs’ separate report and by its counsel at the hearing on October 20, 2004, the government’s proposal in the PPO to restrict the dissemination of “protected information” has no precedent and is overbroad, burdensome, and intrusive. The Court should reject this and the other provisions in the PPO to which plaintiffs object.

Respectfully submitted,

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