

**FILED**

JUL 10 2003

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

**U.S. Court of Appeals  
Fourth Circuit**

UNITED STATES OF AMERICA, )

Appellant )

v. )

No. 03-4162

ZACARIAS MOUSSAOUI, )

Appellee )

**EMERGENCY MOTION TO RECONSIDER DENIAL OF  
MOTION TO RECALL THE MANDATE  
AND REQUEST FOR SUBMISSION OF THIS MOTION  
TO THE EN BANC COURT FOR DISPOSITION**

The United States respectfully moves this Court to recall the mandate pending disposition of its Petition for Panel Rehearing or Rehearing En Banc, filed today. This relief is necessary so that proceedings in the district court – **which are now scheduled for Monday, July 14, 2003** – will be stayed pending review of the government's Petition. If the proceedings below are not stayed, the district court may impose a sanction in this case, thereby effectively mooting the government's opportunity to obtain review of the panel's jurisdictional holding. The government's Petition demonstrates that the panel erred in dismissing on jurisdictional grounds the government's appeal from an order granting defendant and his standby counsel access to an enemy combatant detained overseas. As our Petition shows, Section 7 of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3, allows the government to take an immediate appeal from any order disclosing classified information without the necessity of a sanction. The panel's holding that CIPA does not apply to discovery orders conflicts with the statutory language, CIPA's legislative history, and the decisions of other circuits.

The panel has twice denied the government the opportunity to seek meaningful review of its jurisdictional ruling – a decision that has ramifications not only for this case but also for future terrorism or espionage cases in which a district court grants a defendant access to classified information over the government’s objection. First, on June 26, 2003, when the panel dismissed the government’s appeal for lack of jurisdiction, it directed that “THE MANDATE SHALL ISSUE FORTHWITH.” Slip op. 15. Then, on July 3, 2003, the panel denied the government’s motion to recall the mandate pending the filing and disposition of a petition for rehearing with suggestion for rehearing en banc, even though the government advised the Court that the Solicitor General had authorized the prosecutors to seek en banc review, and that the government’s petition would be filed within the 14-day period provided by F.R.App.P. 35(c) & 40(a)(1). Four days later, the district court ordered the government to “advise the Court by Monday, July 14, 2003 whether it intends to comply” with its order granting the defendant access to the enemy combatant. The United States accordingly asks the panel once again, and the full Court if the panel is disinclined to grant the requested relief, to recall the mandate pending disposition of the government’s Petition for Panel Rehearing or Rehearing En Banc, filed today. *See Uzzell v. Friday*, 625 F.2d 1117, 1119-1120 (4<sup>th</sup> Cir. 1980) (recall of mandate by en banc court). Moreover, we ask that the Court do so as soon as possible, to prevent the district court from imposing a sanction while the full Court considers the government’s jurisdictional arguments.

### **BACKGROUND**

The defendant is charged with capital offenses arising out of the September 11, 2001 terrorist attacks on the United States. The present appeal is taken from an order of the district

court directing the government to produce for a Rule 15 deposition an enemy combatant who is detained overseas under the control of the United States. As the panel stated, “[t]his appeal is one of extraordinary importance, presenting a direct conflict between a criminal defendant’s right ‘to have compulsory process for obtaining witnesses in his favor,’ U.S. Const. amend VI, and the Government’s essential duty to preserve the security of this nation and its citizens.” Slip op. 3. The panel dismissed the government’s appeal because it concluded that the district court’s order “is not yet an appealable one” (Slip op. 4) and returned the case to the district court for imposition of a sanction, should the government defy the order (Slip op. 12). The panel directed that the mandate issue forthwith (Slip op. 15) and urged the district court to proceed expeditiously (*id.*). On July 3, 2003, the panel denied the government’s motion to recall the mandate pending the timely filing and disposition of a Petition for Panel Rehearing or Rehearing En Banc, which the Solicitor General had already authorized. The district court thereafter directed that the government “advise the Court by Monday, July 14, 2003” whether it intends to produce the combatant for the deposition.

### ARGUMENT

A court of appeals has the inherent authority to recall its mandate, whether on its own motion or on the motion of a party. *Calderon v. Thompson*, 523 U.S. 538, 549 (1998). *Accord Alphin v. Henson*, 552 F.2d 1033, 1035 (4<sup>th</sup> Cir. 1977); *United States v. Black*, 733 F.2d 349, 351 (4<sup>th</sup> Cir. 1984) (court had “inherent power” to recall mandate to consider government’s late en banc petition, authorized by the Solicitor General and filed after the mandate had issued; “[h]ad we granted the government’s petition, we would have recalled the mandate”); 16 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3938, p. 712 (2d ed. 1996). Ordinarily,

the mandate does not issue until seven days after the rehearing time has expired or after the denial of a rehearing petition or a motion to stay the mandate. See F. R. App. P. 41(b). Once these events occur, the strong interest in finality dictates that a court may recall its mandate only in "extraordinary circumstances." *Calderon*, 532 U.S. at 550; *Alphin v. Henson*, *supra*, 552 U.S. at 1035 (court may recall its mandate "to avoid injustice"); cf. *Calderon*, 523 U.S. at 558 (federal court of appeals may recall mandate in state habeas case only where a "miscarriage of justice" would otherwise result).

In this case, however, the interest in repose is not as great. The mandate issued forthwith, before the 14-day period for seeking rehearing expired. Moreover, the government has filed a timely Petition for Panel Rehearing or Rehearing En Banc. Recalling the mandate is particularly appropriate where, as here, the party seeking further review – in this case, the government – will be irreparably harmed if jurisdiction is returned to the district court and the opposing party – in this case, defendant Moussaoui – will not be prejudiced by a brief continuation of the proceedings in the court of appeals. *In re Union Nacional De Trabajadores*, 527 F.2d 602, 603-604 (1<sup>st</sup> Cir. 1975) (mandate recalled to stop district court proceedings where those proceedings would have burdened the United States and where recall of mandate would not "substantially prejudice" defendants).

The panel dismissed the government's appeal because it determined that the district court's order will not become "final" until "the district court imposes a sanction" (Slip op. 12). But CIPA was enacted to permit the government to appeal orders disclosing classified information to defendants and others without first suffering a sanction. See Petition for Panel Rehearing or Rehearing En Banc, pp. 3-10. Accordingly, this case presents a paradigm for

recalling the mandate. See Wright, Miller & Cooper § 3938, p. 725 (recalling a mandate “is easily justified if an appeal was mistakenly dismissed for want of a final judgment”). In *Patterson v. Crabb*, 904 F.2d 1179, 1180 (1990), the Seventh Circuit recalled its mandate where the court had erroneously dismissed an appeal for lack of a final order. See also *Cohen v. Empire Blue Cross & Blue Shield*, 142 F.3d 116, 119 (2d Cir. 1998) (recalling mandate and directing parties to brief issue of appellate jurisdiction). This Court should do the same.

To be sure, the Court need not recall its mandate to circulate, consider, and act on the government’s petition. *Black*, 733 F.2d at 350-351 (court considered government’s en banc petition – filed after the mandate had issued – for 27 days before denying it). Indeed, it may wait until it votes to grant the petition to recall the mandate. *Black, supra*; *Songer v. Wainwright*, 769 F.2d 1497 (11<sup>th</sup> Cir. 1985) (after panel denied motion to recall the mandate, a majority of the court voted to recall the mandate and rehear the appeal en banc); *Uzzell v. Friday, supra* (en banc court voted to recall mandate *sua sponte* to reconsider prior decision); *Sparks v. Duval Cty. Ranch Co.*, 604 F.2d 976, 979 (5<sup>th</sup> Cir. 1979) (court may grant en banc review after the mandate has issued). But it should not wait in this case. Unless the mandate is recalled, the district court may sanction the government before this Court can act on the pending Petition, thereby depriving the government of the very relief it is seeking to avoid on rehearing. Thus, recalling the mandate is necessary to stop the proceedings in the district court so that the government can obtain meaningful review of its jurisdictional arguments.

Finally, this Court should not place the burden of staying further proceedings in this case on the district court, particularly where the panel has urged the district court to “proceed expeditiously.” Slip op. 15. The government alleges in its rehearing petition an error by the

panel, not by the district court. In these circumstances, where "the request for relief goes directly to the correctness of the court of appeals ruling, \* \* \* the district court lacks power to review the court of appeals decision and any relief must be provided by the court of appeals." Wright, Miller & Cooper § 3938, p. 724. Accordingly, the case should not be returned to the district court until the full court has considered the government's Petition for Panel Rehearing or Rehearing En Banc.

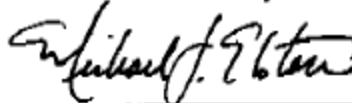
### CONCLUSION

For the foregoing reasons, the Court should recall the mandate pending disposition of the government's Petition for Panel Rehearing or Rehearing En Banc.

Respectfully submitted,

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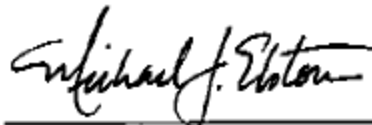
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10<sup>th</sup> day of July, 2003, a copy of the foregoing pleading was provided to the defendant via delivery to the U.S. Marshals Service and to counsel listed below by facsimile and first class United States mail:

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