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May 21, 2003

Hon. John G. Koeltl
United States District Judge
500 Pearl Street
New York, New York 10007
VIA FACSIMILE

Re: United States v. Ahmed Abdel Sattar, et al., 02 CR 395 (JGK)

Dear Judge Koeltl:

This letter brief addresses the government's Notice of Motion for Order Establishing Procedures Regarding Classified Information. The Notice was filed May 14, 2003, and served by Federal Express on counsel. The Court signed the government's proposed order on May 16, 2003 before noon, before we had a chance to comment. We are therefore taking this opportunity to address the relevant issues. We ask that this letter be made a part of the court record.

The government relies upon Security Procedures, West Federal Criminal Code & Rules 1169-71 (2003 Edition), the Classified Information Procedures Act, Fed. R. Crim. P. 57(b) and the Court's inherent power. The government proposes to submit classified documents to the Court for a determination whether those documents should be released to the defense, for rulings on the legality of certain searches and seizures, and perhaps for other purposes. Ms. Baker does not claim that she classified the documents, knows who did, knows the basis for classification, or can assure the Court that the classifications were proper. The government proposes to put in place a "court security officer" from the executive branch, which is a litigant in this case. The Justice Department will then conduct background checks on all court personnel authorized to view the classified documents. That is, a litigant in this hotly-contested case will be telling this Court which of its law clerks and other assistants are "cleared" to see the documents on which the Court must rule. In addition, under §5 the "Security Procedures," the government "may obtain information by any lawful means concerning the trustworthiness of persons associated with the defense and may bring such information to the attention of the court."

As for "lawful means," we note that this very prosecutorial team thinks that "lawful" includes videotaping lawyer-client meetings under the rubric of "minimization."

We respectfully submit that this scheme is unwise and unconstitutional.

UNCONSTITUTIONALITY OF THE GOVERNMENT'S APPROACH

The tension between fairness to litigants and claims of privilege is often present in litigation. The Supreme Court addressed this issue in Reynolds v. United States, 345 U.S. 1, 9-10 (1953)(emphasis supplied):

> Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.

The Court thus provided a small window for judicial privilege rulings without the court examining the privileged material. However, this small window is not so wide as Mercutio's imagined church door. In this case, the government has made a blanket claim, without any justification, for any and all documents that a bureaucrat has rubber-stamped. This is a long way from the privilege justification in Reynolds.

The Reynolds holding was applied in this Circuit in Halpern v. United States, 258 F.2d 36 (2d Cir. 1958). The Court stressed that when Congress has given a litigant the right to a trial, privilege issues must yield to that right. We have here specific statutes "contemplating the trial of actions that by their very nature concern security information." 258 F.2d at 44. Thus, as the Court said:

> We think that a flexible procedure in which the district court determines questions relating to the Government's privilege, as well as the mode of trial, with a discretion molded by a desire to achieve both objectives, will best effectuate the statutory purpose.

Id. at 43-44.

Since Reynolds and Halpern, we have the decisions in Alderman v. United States, 394 U.S. 165 (1969), holding that targets of illegal surveillance should receive the fruits of those searches under protective orders, even when national security is involved. And in Dennis v. United States, 384 U.S. 855, 875 and n.21 (1965), the Court stressed that even in cases involving national security, the judge has the power to decide privilege issues, citing United States v. Coplon, 185 F.2d 629 (2d Cir. 1950).

In sum, the government's filing contains no justification for the relief it seeks. The rules that purport to authorize executive branch interference in the judicial (and defense) functions violate the constitutional separation of powers and envision a privilege-deciding procedure at war with basic common law ideas. This is indeed "caprice."

Almost four centuries ago, this very issue was debated in the English Parliament, as King Charles tried to hold on to unreviewable powers over personal liberty. The King's argument, based on national security, was eloquently rebutted by Coke and Selden, two of the 17th Century's greatest legal scholars. Of the idea that national security might require executive branch interference with judicial power, Lord Coke stated bluntly:

> God send me never to live under the law of conveniency or discretion. For if the soldier and the Justice sit on the same bench, the trumpet will not let the Cryer speak in Westminster Hall."

See Book Review, 84 Colum. L. Rev. 1665, 1685-86 and n. 76 (1984)(in the cited work, the Coke quotation is partial; the remainder of it appears in the original parliamentary record).

UNWISDOM OF THE GOVERNMENT'S APPROACH

Secrecy is the enemy of democratic government. Executive interference in judicial decision-making provides opportunities for abuse. These two propositions are borne out by experience.

In 1966, undersigned counsel met with Justice William J. Brennan, Jr., in the Justice's chambers. The Justice had selected me as his law clerk, but some controversy had arisen. The Justice asked whether it was true that I had attended a Communist training camp in New Jersey. I replied that I had not, and indeed had never been in New Jersey. Much later, it turned out that the FBI had been feeding the Justice alleged "intelligence" information about me. This information was false. I lost my job. Many years later, the Justice apologized. Later, in a Freedom of Information Act request, I received military intelligence information that had not been declassified until 1978. Here are two quotes from this "classified" material, deemed vital to the national security back in 1966 and 1969. The intelligence report, from the Sixth Army HQ, was titled "Oliver!" and read in part as follows:

> Oliver Twist won the awed admiration of his fellow orphans when he had the supreme audacity to take his empty porridge bowl back to ask for more. Oliver, apparently, has his counterpart among our young radicals. In 1966, Michael TIGAR as a candidate for the post of law clerk to US Supreme Court Justice William J. Brennan, Jr. The appointment fell through when Brennan was apprised of TIGAR's left-wing background.

The report then cites an earlier dispatch, which I never received, titled "Tigar in the Courts – Almost" and dated July 1966. The 1969 report concluded:

> TIGAR may still be as radical as he ever was, but even if his political position has changed, he may find that his widely publicized left-wing activities as a young man will plague him far into the future. This is a bitter lesson many of today's young radicals may have to learn.

In the intervening years, I have litigated many cases involving "intelligence" information, and time and again the intelligence agencies have hidden falsehood behind the veil of secrecy. The stakes in this criminal case are too high to abandon any part of the judicial function to executive discretion.

In addition, the potential chilling effect on this Court's personnel, particularly its law clerks, of intelligence-based background checks, is palpable, given the historic tendency of "intelligence" agencies to equate dissent with disloyalty. The same can be said of the authorization to investigate defense counsel. There are still those in the executive branch who want to teach a "bitter lesson" to young lawyers who hold dissident views.

At the level of policy, we have seen again and again what secrecy brings. On September 18, 2000, the CIA published a report on United States actions in Chile from 1970 onwards. Under the veil of secrecy, rightist terrorists assassinated a Chilean general using weapons supplied by the CIA. The CIA station chief picked up the weapons and threw then into the sea, and then denied to U.S. Ambassador Korry that the CIA had any involvement in the killing. Under the veil of secrecy, lifted after decades, the CIA acknowledged working with human rights abusers who were using state-sponsored terrorism. The report is online at the CIA website. The assassination facts are related in the motion picture, "The Trials of Henry Kissinger," and in undersigned counsel's complaint in Schneider v. Kissinger, pending in the United States District Court for the District of Columbia on behalf of the slain general's children.

The secrecy in this case apparently relates to political activity in Egypt, which was the subject of my earlier declaration. Given the United States official support for the Mubarak regime, it is certainly possible that the government is using secrecy as a shield for preferring that regime's state-sponsored terrorism to non-governmental criminality directed at regime change.

For the foregoing reasons, we urge the court to reconsider its order of May 16, 2003, and to require the government to make a detailed and specific claim of privilege for each document it seeks to place under the mantle of secrecy. We further urge that the Court reject any interference

with the activities of its own personnel. To the extent that the government relies on regulations that authorize a different approach, we suggest that those regulations violate the constitutional separation of powers and are so at odds with the historic method for determining privilege questions as to violate due process of law.

Respectfully submitted,

Michael E. Tigar

Copy to: All counsel