

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

02 CR 395 (JGK)

v.

AHMED ABDEL SATTAR,  
MOHAMMED YOUSRY  
and LYNNE STEWART,  
Defendants.

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**LYNNE STEWART'S RESPONSE TO GOVERNMENT'S MEMORANDUM OF LAW  
IN SUPPORT OF MOTION FOR AN ORDER AUTHORIZING DISCLOSURE OF  
POTENTIALLY PRIVILEGED MATERIALS  
AND LYNNE STEWART'S CROSS-MOTION FOR DISCLOSURE, FOR  
SEQUESTRATION, FOR RETURN OF PROPERTY, FOR SUPPRESSION, AND FOR  
APPOINTMENT OF A SPECIAL MASTER**

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INTRODUCTION

In its June 20, 2003, Motion, the government, at least qualifiedly, admits invading protected areas. Its proposed solution compounds the harm. We oppose that proposed solution.<sup>1</sup>

Further, we respectfully request:

- 1) Disclosure of the attorney-client privileged material to the Court;
- 2) Complete sequestration of all potentially-privileged materials from the government trial team, pending an evidentiary hearing to determine the extent of the invasion;
- 3) Return of attorney work product property that belongs to Ms. Stewart;
- 4) Suppression of the fruits of the invasion of Sheikh Abdel Rahman's privilege and of Ms. Stewart's privilege and Fourth Amendment protected rights;

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<sup>1</sup> In opposing the government's Motion, we do not concede that Mr. Sattar was not a member of Sheikh Abdel Rahman's legal team. We take no position on that point at this time, as it is irrelevant to the issues before the Court here.

- 5) Appointment of a Special Master to determine any governmental claims of right of access to the materials at issue; and
- 6) An evidentiary hearing and oral argument in order to consider these issues and make the necessary findings.

In its Motion, the government invokes Mr. Sattar's Sixth Amendment right to confront witnesses against him and his Fifth Amendment right to due process of law, as a basis for invading the rights of Sheikh Abdel Rahman. It admits this approach "not surprisingly [is] an issue of first impression" and that it is premised upon "hypothetical non-compliance with its Rule 16 and/or *Brady* obligations." Govt Mem. 7. However, the government fails to explain why it has standing to assert Mr. Sattar's constitutional rights. Further, the government does not explain why this "hypothetical" is ripe for decision at this time. However, the government's admissions in this Motion and at the June 13, 2003 motions hearing do give rise to justiciable issues that Ms. Stewart has standing to raise.

## **I. WHAT THE GOVERNMENT ADMITS**

In its latest motion, and at the June 13, 2003 hearing, the government has expanded upon, and in fact contradicted, its previous disclosures.<sup>2</sup> It now admits that it (a) overheard attorney-

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<sup>2</sup> In an October 2, 2002 letter accompanying the cassette tapes containing attorney-client phone calls, AUSA Gary Stein stated that "the trial AUSAs have not had access to these tape recordings" and that "[o]nce redacted transcripts are prepared, the tapes will be correspondingly redacted and turned over, with the redacted transcripts, to Sattar and to the trial AUSAs." Letter from Stein to Stern & Tigar, 10/2/02. This exact language was repeated by Mr. Stein in his November 6, 2002 letter accompanying the videotapes of attorney-client prison visits. Letter from Stein to Stern & Tigar, 11/6/02.

Ms. Baker's statement in the June 13, 2003 hearing that "summaries [of the privileged communications] ... were made available to the prosecution team", Trns. 06/13/03 at 87, is at odds with Mr. Stein's earlier representations. Further, according to Ms. Baker, these summaries of privileged communications were both created by and "minimized" by the FBI. *Id.* Therefore, we have a law-enforcement arm of the prosecuting authority – a body wholly lacking in neutrality – in charge of protecting the privilege it was responsible for invading in the first place. And, to

client conversations; (b) prepared summaries of the attorney-client conversations that were widely shared within the government, including with the government trial team; and (c) seized notebooks from Mr. Yousry that contain records of attorney-client communications and records of legal team plans and thoughts – hence, attorney work product.<sup>3</sup>

The government’s Motion demonstrates once again its fundamental error in attacking Shiekh Abdel Rahman’s legal team, who were after all seeking to ameliorate his condition “legally.” Indict. ¶11 (“the Sheikh’s lawyers want to deal with his case legally”). That flawed initial decision to prosecute the legal team now leads the government into contradictory and untenable positions.

The government seems to concede that Sheikh Abdel Rahman had the right to consult counsel and that these consultations were privileged. *See, e.g.*, Govt Mem. 3 (referring to “the sanctity of Rahman’s privilege”); *id.* at 4 (“Rahman would not waive his privilege”); *id.* at 5 (referring to “Rahman’s interest in maintaining the confidentiality of the communications reflected in [the Prison Recordings and Yousry Notebooks]”). While the government speaks of the “potentially privileged nature” of the materials, Govt Mem. 1, it does not provide any legal challenge to our repeated assertion that these items are subject to the attorney-client and work product privileges. Indeed, the government’s central argument, that “Rahman’s privilege must yield to Sattar’s constitutionally based right to review these materials”, Govt Mem. 1, admits that the materials are in fact subject to the privileges we assert.

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compound the invasion, Ms. Stewart has not been provided with either the “summaries” or the “minimized summaries” of these prison recordings that the trial AUSAs now admit they possess.

<sup>3</sup> The government has failed to inform the Court whether or not it is translating the non-English portions of the Yousry Notebooks and whether or not the prosecution team has benefited from summaries of the notebooks’ contents as it has from summaries of the prison recordings.

More significantly, the government does not claim that any privilege is defeated by the crime-fraud or any other exception. *See In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1039 (2d Cir. 1984) (“party seeking to overcome the privilege” bears burden of proof); *United States v. Zolin*, 491 U.S. 554, 574-75 (1989) (a party opposing privilege must establish *prima facie* case even for *in camera* review of materials by the court to determine the claim). Thus, now and for the entire course of this case, we must all assume that Lynne Stewart was acting as a legitimate lawyer providing legitimate legal services to her client. The government’s position, as stated in its Motion, waives any contrary contention. *See, e.g.*, Govt Mem. 5 (acknowledging that Sheikh Abdel Rahman possesses an “interest in maintaining the confidentiality of the communications reflected in those materials”). The consequences of this concession reinforce our demands for dismissal and severance.

## II. THE GOVERNMENT’S PROPOSED SOLUTION

The government does not propose to share the “summaries” of privileged conversations with any defendant. It simply wants to give Mr. Sattar’s lawyers the fruits of its invasion of lawyer-client communication and attorney work product. Presumably, the government hopes this procedure, while expanding the universe of persons with access to the privileged material, will also ratify its own invasion of the protected interests. To this, we cannot agree.

The government bases its proposal upon a fuzzily cosmic view of *Brady v. Maryland*, 373 U.S. 83 (1963), and FED. R. CRIM. P. 16, in sharp contrast to its usual view of those rules. It cites such cases as *Davis v. Alaska*, 415 U.S. 308 (1974), and *United States v. Nixon*, 418 U.S. 683 (1974). *Brady*, of course, established that the prosecution’s failure to disclose to the defendant, upon request, “evidence ... material either to guilt or punishment” violates due process of law. *Brady*, 373 U.S. 87. *Davis* also deals with material that must be provided to the

defense upon request, in that case to guarantee the defendant's Sixth Amendment confrontation clause rights. *Davis*, 415 U.S. at 319-20. *Nixon* deals with the issue of *executive* privilege and claims of absolute immunity by the President of the United States. The issues and posture of the parties in those cases are fundamentally different from those raised by the government's continuing invasion of the attorney-client and attorney work product privileges here. None of the cases cited by the government addresses a situation where the government has invaded a protected interest and seeks to expand the invasion by additional disclosure.

Further, the government's view of the defendants' right of access to otherwise privileged material stands in sharp contrast to its previous refusal to assist counsel in interviewing a key witness. This is the subject of a simultaneous briefing cycle. Any inconsistency in the government's position can legitimately be the subject of judicial notice, as the government conceded on June 13, 2003.

### **III. LYNNE STEWART'S RIGHTS AND RESPONSIBILITIES**

Lynne Stewart has already moved to suppress all attorney-client conversations as to which she has standing. Her standing is based on her own expectation of privacy as to such conversations. Whether or not the attorney-client privilege is of constitutional dimension, the expectation of privacy in attorney-client communication (on the part of all participants) is the hallmark of Fourth Amendment protection. *See, e.g., In re State Police Litig.*, 888 F. Supp. 1235, 1256 (D.Conn. 1995), *appeal dismissed by*, 88 F.3d 111 (2d Cir. 1996) ("where no consent exists, and where conversations consist of privileged communications between clients and their attorneys, an expectation of privacy is reasonable"); *see generally Katz v. United States*, 389 U.S. 347 (1967). Invasion of confidential communication with an attorney also implicates the client's Sixth Amendment rights. *United States v. Rosner*, 485 F.2d 1213, 1224 (2d Cir. 1973),

*cert. denied* 417 U.S. 950 (1974) (“the essence of the Sixth Amendment right is, indeed, privacy of communication with counsel”). As we discussed in our initial motions, Ms. Stewart may assert the rights of her client, Sheikh Abdel Rahman. See *United States Dep’t of Labor v. Triplett*, 494 U.S. 715, 720-21 (1990); Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 CAL L. REV. 1308 (1982); see also Memorandum of Law in Support of Lynne Stewart’s Omnibus Motion to Dismiss the Indictment and for Other Relief, Jan. 10, 2003, at 68.

In addition, Ms. Stewart now objects to the seizure of her attorney work product as embodied in the Yousry Notebooks. When a lawyer hires someone to assist her, and that person maintains copies of files and materials for that purpose, the lawyer retains an interest in such material. *Mercator Corp. v. United States (In re Grand Jury Subpoenas Dated March 19, 2002 & August 2, 2002)*, 318 F.3d 379, 383 (2d Cir. 2003) (“The attorney work product doctrine ... provides qualified protection for materials prepared by *or at the behest of* counsel in anticipation of litigation or for trial”) (emphasis added). The lawyer has standing to raise the protected interest. *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 801 (3d Cir. 1979) (“A lawyer may assert the work product privilege”); *In re Grand Jury Proceedings (Duffy)*, 473 F.2d 840, 842-43 (8th Cir. 1973) (same); accord *In re Terkeltoub*, 256 F. Supp. 683, 685-86 (S.D.N.Y. 1966) (emphasizing the interest in protecting “the privacy and confidentiality of the lawyer’s work in preparing the case” and commenting that “[t]he protection [of privacy] would be a thin illusion of the Government could have for the asking what it has, in rare lapses, sought by less genteel means”); see generally *Hickman v. Taylor*, 329 U.S. 495 (1947) (first recognizing the work product doctrine).

As this Circuit explained in *Mercator*:

In the context of a pending criminal prosecution...[attorney work product privilege] preclud[es] discovery of documents made by a defendant's attorney or the attorney's agents except with respect to "scientific or medical reports."

*Mercator*, 318 F.3d at 383 (citing Fed. R. Crim. P. 16(b)(2)).

Ms. Stewart does not now serve as Sheik Abdel Rahman's counsel, because withdrawal from that representation was a condition of her bail resulting from the instant Indictment.

However, she is still obliged to respect and protect his confidences. As Judge Kaufman explained in *United States v. Standard Oil Co.*, 136 F. Supp. 345 (S.D.N.Y. 1955):

The confidences communicated by a client to his attorney must remain inviolate for all time if the public is to have reverence for the law and confidence in its guardians ... [T]he client must be secure in his belief that the lawyer will be forever barred from disclosing confidences reposed in him.

*Id.* at 355; *see also* ABA Model Rule of Professional Responsibility 1.9(c)(1) (lawyer's duty to maintain confidences does not end with the end of representation).

She fulfills that obligation by seeking return of material unlawfully seized from her client.<sup>4</sup> That would include all the overheard materials. The government's citation of NYCPR §1200.19 supports this contention. Disciplinary Rule 4-101, of which this subsection is a part expressly recognizes the lawyer's duty to protect client confidences. The rule, in fact, emphasizes that except in the very limited circumstances specifically provided in the rule:

[A] lawyer shall not knowingly:

1. Reveal a confidence or secret of a client.
2. Use a confidence or secret of a client to the disadvantage of the client.
3. Use a confidence or secret of a client for the advantage of the lawyer or

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<sup>4</sup> Of course, prior to the adoption of the exclusionary rule in *Weeks v. United States*, 232 U.S. 383 (1918), the primary remedy available for a Fourth Amendment violation was return of the property seized. *See id.* at 394 (discussing return of some of the illegally-seized material to the defendant). The remedy of return remains available, even where exclusion of evidence is not. *See United States v. Calandra*, 414 U.S. 338, 355 n.10 (1974) (noting that even though the exclusionary rule is not extended to grand jury proceedings, an aggrieved party "may ... seek return of the illegally seized property" and therefore is not "left remediless in the face of an unlawful search and seizure").

of a third person, unless the client consents after full disclosure.

NYCPR DR 4-101 [§1200.19](B).

The government seeks to turn the protection on its head. The subsection it quotes speaks of a lawyer's right to reveal client confidences in the face of countervailing duties; it does not authorize the government to compel the lawyer to do so. Nor, of course, do Disciplinary Rules constitute rules of evidence. *See, e.g., Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Equipment Corp.*, 546 F.2d 530, 539 (3d Cir. 1976), *cert. denied*, 430 U.S. 984 (1977) ("the Code [of professional conduct] does not delineate rules of evidence but only strictures on attorney conduct").

Moreover, the cited Disciplinary Rule applies uniquely to Lynne Stewart in this case. It therefore provides an additional basis for regarding her case as separate from those of the other (non-lawyer) defendants, and reinforces our request for severance.

The government's belated admission that the prosecution trial team received summaries of attorney-client conversations means that the fruits of unlawful seizure have been widely and intentionally distributed within the government. The government first disclosed this on June 13, 2003, and repeats the admission in its Memorandum of Law. The Court can construe its own orders, but it is at least arguable that the Court's June 11, 2002 Order appointing a Special Master held that attorney-client materials should not be subjected to the government's "wall" procedure, and that such procedures were inadequate. Certainly, the spirit of that Order should have called on counsel to ask the Court for guidance. Not only are the materials seized analogous to attorney-client and attorney work product materials seized in the search of Ms. Stewart's law office, but the government has acknowledged this similarity. At the October 3, 2002 conference before the Court, Mr. Bianco claimed that the prison recordings "are being

produced through the wall that has been set up to deal with the search of the law office.” Trns. Oct. 3, 2002, at 3, lines 16-18. Of course, by this date, the Special Master process dealing with the items seized in the search of the law office was already well under way. The government, therefore, had notice that potentially privileged materials were subject to a more rigorous control than their internal procedures.

Even if the summaries can be characterized as “minimized,” they still represent privileged material as to which Ms. Stewart and her client each have an expectation of privacy, albeit somewhat different as to each. The Fourth Amendment forbids even small invasions of a legally-protected interest. *Silverman v. United States*, 365 U.S. 505 (1961) (holding even a miniscule warrantless intrusion of a protected space – a spike mike dent in a heating duct – violates the Fourth Amendment). The Court in *Silverman* explained:

The [court of appeals] was “unwilling to believe that the respective rights are to be measured in fractions of inches.” But decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area.

*Id.* at 512.

Justice Stewart, writing for the Court in *Silverman*, addressed the issue of supposedly “minor” violations of rights, warning, “[i]t may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.” *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

In earlier papers, we have cited the chilling effect of this prosecution on Lynne Stewart and other lawyers who represent unpopular clients. Omnibus Mem. at 1; *see also United States v. Reid*, 214 F. Supp. 2d 84, 95 (D. Mass. 2002) (discussing chilling effect of the Lynne Stewart

indictment on “those courageous attorneys who represent society’s most despised outcasts”). This risk is not confined to “political” cases; business lawyers are facing governmental attacks on their vigorous representation of their clients. We have noted that the right to practice one’s profession has a constitutional dimension. Omnibus Mem. at 68-70 (citing, *inter alia*, *In re Ruffalo*, 390 U.S. 544 (1968); *Ex parte Garland*, 71 U.S. 333 (1866); *Cummings v. Missouri*, 71 U.S. 277 (1866)). The government’s conduct in this case is an attack on that right. If the Court accepts the government’s legal position, what client will ever want Lynne Stewart’s services? The government may be listening in and, in the name of minimization, turning over FBI-produced summaries of attorney-client meetings to prosecutors. A search team may seize all the lawyer’s records. Another search team may visit a translator, free-lance paralegal, a copying service, a word processing service or any other paraprofessional working outside the lawyer’s own office but contributing to the legal effort. And then, all of this seized material will be available for prosecutors and FBI agents to read, and then disclosed to third parties without any meaningful judicial review except a wholesale authorization.

By its now-admitted disregard of every privacy concern of her client, and of her own privacy and work product interests, the government tells the world and all potential clients that there is a target painted on Lynne Stewart, and that any client who consults her may fear he does so with a limited expectation of private communication.

#### **IV. THE CORRECT SOLUTION**

As we discuss above, the seizure of these materials raises Fourth Amendment and evidentiary privilege issues. There may also be Sixth Amendment issues involved in this dispute. The government’s proposed solution glosses over all of them. We propose:

**1) Disclosure to the Court of all material that is arguably privileged, including the Yousry notebooks, the prison tapes, the telephone call tapes and the summaries mentioned by government counsel.**

The Court could appoint a Special Master to assist in reviewing this material to make privilege determinations. The Court's June 11, 2002 Opinion is law of the case on this subject.<sup>5</sup> The government should, in short, be ordered to divest itself immediately of all fruits of attorney-client and attorney work product surveillance, and these materials should be, at a minimum, sequestered with the Court. If the government believes it has a right to access some or all of these materials, it can pursue this through the same process involved with the items seized in the search of Ms. Stewart's law offices. This Special Master process will protect the interests at stake, maintain Court supervision over the dispute, and promote efficient resolution of these matters.

This proposed handling of the material is in sharp contrast with the government's suggestion. The government says that it does not want to "unilaterally make . . . disclosure to Sattar absent either the consent of Rahman or an order from the Court authorizing the disclosure." Govt Mem. 4. However, the government has not furnished the Court with the material it proposes to disclose. It has not even provided a detailed summary of that material. The Court is being asked to give its approval wholesale and in the dark.

The point becomes clearer if one considers what would happen if the government had sought a grand jury subpoena for attorney-client and attorney work product information. The lawyers would have fulfilled their obligation and moved to quash. *See generally Swidler & Berlin v. United States*, 524 U.S. 399 (1998). The Court would have considered the motion,

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<sup>5</sup> "[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 815-16 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)).

perhaps using the *United States v. Zolin*, 491 U.S. 554 (1989), methodology to review the material.

*Zolin* emphasized the importance of protecting this sort of privileged information from disclosure. The Court warned that “[t]oo much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses.” *Zolin*, 491 U.S. at 570-71 (quoting *United States v. Reynolds*, 345 U.S. 1 (1953)). The Court struck a balance to protect these countervailing interests, holding:

[B]efore a district judge may engage in *in camera* review at the request of the party opposing the privilege, that party must present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the [crime-fraud] exception’s applicability.

*Zolin*, 491 U.S. at 574-75.

Even disclosure to the Court of these materials, therefore, would require some preliminary showing. The government has not even raised the crime-fraud exception, or any other basis to pierce our protected interests in these materials. This failure to raise constitutes a waiver by the government. *See* FED. R. CRIM. P. 12(b)(3)(E) (requiring all Rule 16 motions for discovery to be made before trial); FED. R. CRIM. P. 12(e) (“[a] party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c)”).

- 2) **Complete sequestration of all potentially-privileged materials from the government trial team, pending an evidentiary hearing to determine the extent of invasion of protected interests.**
- 3) **Return of property.**

The Fourth Amendment is no longer “property-based.” From the government’s perspective, *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967), authorizes seizure

of “mere evidence,” and ended the property-based restriction to fruits, instrumentalities, deodands, and contraband.

For the persons subject to search, *Katz v. United States*, 389 U.S. 347 (1967), and its progeny abolish the “trespass” theory of the Fourth Amendment. *Compare Silverman*, 365 U.S. at 510-12. Nonetheless, the remedy for an unlawful search remains the same: return of the fruits of search to those rightfully entitled to them. *See* FED. R. CRIM. P. 41(g) (“A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property’s return.”). As the Advisory Committee Notes to Rule 41 explain, “equitable considerations might justify an order requiring the government to return or destroy all copies of records that it has seized.” FED. R. CRIM. P. 41, Advisory Committee Notes (1989). In *Paton v. La Prade*, 524 F.2d 862, 867-69 (3d Cir. 1975), which the Advisory Committee cites with approval, the court found that a plaintiff’s fear that information allegedly unlawfully obtained by the government would endanger her future educational and/or employment opportunities presented a cognizable injury that might require the government to expunge its files. While the case was remanded for a merits determination, it established the validity of such a claim.

Here, Lynne Stewart is harmed by the government maintaining illegally seized attorney-client communications and her attorney work product. As we state above, this painting of a target on Lynne Stewart the lawyer harms her ability to practice her profession. The government, therefore, must be ordered to expunge its files of this material. The fruits of the invasion of Sheik Abdel Rahman’s attorney-client relationship would be returned to his counsel. Attorney work product would be returned to the attorney who owns it, Lynne Stewart. Fruits of other invasions would be returned to the victims.

If the privileged material is handled in this way, the government will no longer possess it. Presumably, Mr. Sattar will also not have it. His counsel can then use FED. R. CRIM. P. 17 to subpoena it, and at that time the *Davis v. Alaska* issues will be ripe for decision.<sup>6</sup> *Davis v. Alaska*, 415 U.S. 308 (1974), is a means to vindicate defendants' Sixth Amendment rights. It is not a license for the government to launder its ill-gotten gains. Laundering is an apt metaphor: The government wants to give Mr. Sattar these materials, claiming that they may contain items that he will wish to use in his defense. Under the reciprocal discovery rules, the government expects that the material will then flow back to the government cleansed of taint.

**4) Suppression of the fruits of the invasion of protected attorney-client and attorney work product privileges.**

We have moved for suppression in separate papers. We incorporate by reference those arguments here.

**5) Appointment of a Special Master to determine any governmental claims of right of access to the materials at issue.**

Should the Court determine that the government may assert a claim of access to these materials, we respectfully request the appointment of a Special Master to oversee this process.

**6) An evidentiary hearing and oral argument in order to consider these issues and make the necessary findings.**

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<sup>6</sup> Also at that juncture, Mr. Sattar's status as to Sheikh Abdel Rahman's legal team would be ripe for consideration.

CONCLUSION

For the foregoing reasons, we oppose the government's suggested disclosure of these materials and respectfully request the relief outlined above and detailed in our accompanying Notice of Motion.

Dated: Washington, D.C.  
June 27, 2003

Respectfully submitted,

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