IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSSAOUI	)	
	)	

GOVERNMENT'S OPPOSITION TO MOTION OF
DEFENDANT FOR RELIEF FROM CONDITIONS OF CONFINEMENT

Pursuant to this Court's order dated April 12, 2002, the United States hereby opposes the motion filed by Defendant Zacarias Moussaoui for relief from conditions of confinement. As discussed below, except where the Government agrees to certain modifications in the conditions of confinement, Moussaoui's motion should be denied because the conditions imposed on him are entirely reasonable under the circumstances and are designed to promote valid and compelling security concerns.

I. Background

A. The Nature And Seriousness Of The Charges Filed Against Moussaoui

On December 11, 2001, a Grand Jury sitting in the Eastern District of Virginia returned a six-count indictment against defendant Zacarias Moussaoui. The Indictment alleges, *inter alia*, that Moussaoui conspired with members and associates of Usama Bin Laden's *al Qaeda* organization to commit the terrorist attacks that resulted in the September 11, 2001, deaths of thousands of people in New York, Virginia, and Pennsylvania. *See* Indictment at 2-31. The Indictment charges Moussaoui with six separate conspiracy offenses, including: Conspiracy to commit acts of terrorism transcending national boundaries, in violation of 18 U.S.C. §§

2332b(a)(2) & (c) (Count One); conspiracy to commit aircraft piracy, in violation of 49 U.S.C. §§ 46502(a)(1)(A) and (a)(2)(B) (Count Two); conspiracy to destroy aircraft, in violation of 18 U.S.C. §§ 32(a)(7) and 34 (Count Three); conspiracy to use weapons of mass destruction, in violation of 18 U.S.C. § 2332a(a) (Count Four); conspiracy to murder United States employees, in violation of 18 U.S.C. §§ 1114 & 1117 (Count Five) ; and conspiracy to destroy property, in violation of 18 U.S.C. §§ 844(f), (i), (n) (Count Six). *Id.*

All six conspiracy counts involve the global efforts of Moussaoui, Usama Bin Laden, and others associated with the terrorist organization *al Qaeda* to carry out a *jihad* (holy war) against the United States. To this extent, these charges are similar to those brought in the Southern District of New York (Indictment S(7) 98 Cr. 1023 – "the *Bin Laden* Indictment") against several other associates/members of *al Qaeda*. In May of last year, a jury sitting in New York found four Bin Laden associates guilty of several conspiracy counts relating to Bin Laden's declared war against the United States, and hundreds of substantive counts related to the bombings of the American embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, on August 7, 1998. According to the *Bin Laden* Indictment and evidence presented at trial before the Honorable Leonard B. Sand, United States District Judge for the Southern District of New York, the *jihad* against the United States began in the early 1990's and involved plots to attack both military and civilian targets.

The Indictment in this case alleges that Moussaoui is an associate of Usama Bin Laden's group, *al Qaeda*, who has been trained at an *al Qaeda*-sponsored terrorist camp in Afghanistan. As the evidence presented at the recently completed trial before Judge Sand demonstrated, Bin Laden has led an unprecedented war against the United States through his

well-financed and highly-motivated international terrorist organization and other closely affiliated organizations.

Bin Laden took *al Qaeda*'s war against the United States public in August 1996, declaring that American military personnel in the Gulf region should be attacked for their presence in the land of the Holy Places. In February 1998, Bin Laden, indicted fugitive Ayman al-Zawahiri, and others issued a *fatwah* that stated it was the obligation of all Muslim men to kill United States civilians anywhere in the world they could be found.

The evidence at the *Bin Laden* trial before Judge Sand established that to conduct the declared war, and to honor the *fatwahs* issued by Bin Laden, *al Qaeda* has gone to great lengths to train and equip a virtual army of devout soldiers who are willing to die in their zeal to kill Americans anywhere they can be found. For example, two defendants in that case, Mohamed al-'Owhali and Khalfan Khamis Mohamed, admitted in their post-arrest statements to receiving extensive training in Afghanistan in fields such as explosives, kidnaping, assassination and counter-intelligence techniques. Testimony at the *Bin Laden* trial also confirmed that to protect itself from detection, *al Qaeda* members sought out and killed suspected informants, and monitored court proceedings of those affiliated with the group, as the Indictment in this case alleges *al Qaeda* has trained its members to do.

Bin Laden's declared war on the United States continues to this day. Indeed, since charges were first brought *al Qaeda* associates, Bin Laden has continued to call for the murder of United States civilians in the world. For example, in September 2000, Bin Laden and the leaders of other groups, including indicted fugitive Ayman al-Zawahiri (the leader of Egyptian Islamic Jihad, an *al Qaeda*-affiliated terrorist group), pledged to do all they could to

release "our brothers in jails everywhere," including in the United States. More recently, after the attacks of September 11, Bin Laden swore "by Almighty God who raised the heavens without pillars that neither the United States nor he who lives in the United States will enjoy security before we can see the reality in Palestine and before all the infidel armies leave the land of Mohammed . . . ."

B. The Continuing *Jihad* After Apprehension

Others associated with *al Qaeda* have exhibited an unparalleled contempt for the criminal justice system, even after their apprehension and detention. For example, as noted in prior filings with Judge Sand and the United States Court of Appeals for the Second Circuit, on June 22, 1999, the defendants el Hage and al-'Owhali coordinated an attack in the courtroom. During the June 22nd court proceeding, el Hage demanded that Judge Sand read *verbatim* a letter el Hage wrote in which he blamed the U.S. Government (naming U.S. law enforcement officials) for the embassy bombings. Judge Sand refused to read the entire letter, instead providing a summary of the letter's contents. Later during that proceeding, el Hage leaped out of the jury box (where all the defendants had been placed due to a lack of table space) and dashed toward the front of the courtroom, toward Judge Sand. El Hage was tackled by a Deputy U.S. Marshal on the steps leading to the bench, a few feet past the exit door and several feet from Judge Sand.[1]

This attack was followed by the vicious attack on Corrections Officer Louis Pepe on November 1, 2000. On that day, fellow officers and personnel in the Metropolitan Corrections Center in Manhattan responded to a body alarm, evidently triggered when Officer

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[1] After el Hage jumped from his seat in the jury box, al-'Owhali interfered with one of the Deputy U.S. Marshals who attempted to pursue el Hage.

Pepe fell horizontally. What the rescue crew discovered when they approached a cell shared by Mamdouh Salim and Khalfan Khamis Mohammed (two *al Qaeda* members/associates charged in the *Bin Laden* indictment) was Officer Pepe lying on the ground with a "shank" stuck into his eye.[2] A later examination of Officer Pepe revealed that the shank had been rammed through his eye socket and over two inches into his brain. To this day, Officer Pepe is unable to care for himself and continues to suffer severe medical complications from the assault. A subsequent search of the prison cell in which Officer Pepe was stabbed uncovered several notes that indicated that Officer Pepe was brutally attacked as part of a broader plot to take hostages (including defense counsel) and escape from prison. On April 3, 2002, Mamdouh Salim pled guilty in the Southern District of New York to attempted murder in connection with his role in the vicious assault on Officer Pepe.[3]

These post-apprehension efforts are unsurprising given the explicit instructions *al Qaeda* has provided to its members/associates. In April 2000, British law enforcement officials discovered a training manual in the Manchester residence of a known *al Qaeda* member. This manual, entitled "Declaration of Jihad Against the Country's Tyrants – Military Series," is a veritable how-to guide on *al Qaeda* terrorist activities. There is an entire section on the use of "secret writing" (invisible ink) and the use of ciphers and codes. Within this section, there is the

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[2] Salim and Khalfan Mohammed, along with their co-defendants, had been paired up in a cell after complaints had been raised by a co-defendant about the allegedly deleterious effects of solitary confinement. After the attack, the SAM provision calling for solitary confinement was re-instituted.

[3] Salim is scheduled to be sentenced in August and is facing up to life imprisonment. Khalfan Mohammed, having been convicted for his role in the embassy bombings and having been sentenced to mandatory life imprisonment, was not charged for his role in the Pepe assault.

instruction to use "an innocent-looking letter (family-personal greeting)" to pass on coded or secret messages. There is also a detailed description of several cipher systems that *al Qaeda* trains its members/associates, such as Moussaoui, to use.

Of even greater significance is the express instructions *al Qaeda* provides to its followers regarding continuing the *jihad from* prison. In this "Lesson," *al Qaeda* tells its members/associates to "complain [to the court] of mistreatment while in prison." The manual also instructs *al Qaeda* detainees to "*[t]ake advantage of visits to communicate with brothers outside prison and exchange information that may be helpful to them in their work outside prison [according to what occurred during the investigations]. The importance of mastering the art of hiding messages is self evident here.*"

C. The Government's Efforts to Thwart *al Qaeda's* Counterintelligence Techniques

Pursuant to 28 C.F.R. § 501.3(c), the United States Marshals Service ("USMS") has imposed "Special Administrative Measures" ("SAM") regulating the privileges of the defendant.[4] Thus, while the SAM permit attorney visits (and the attorneys' approved staff

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[4] The regulations set forth in 28 C.F.R. § 501.3, entitled "Prevention of acts of violence and terrorism," permit the Government, upon the direction of the Attorney General, to impose Special Administrative Measures (including, but not limited to, housing the inmate in administrative detention and restricting privileges such as mail, telephone and visitation privileges) where, *inter alia*, the Attorney General finds that "there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons . . . ." 28 C.F.R. § 501.3(a). The SAM are imposed for up to a one-year period, subject to renewal. 28 C.F.R. § 501.3(c). By letter dated January 7, 2002, Moussaoui received notification from the Attorney General that the SAM were being imposed on him. The SAM imposed on Moussaoui were modified on April 4, 2002. (A copy of the most recent SAM is attached hereto as Exhibit A).

To further protect the sensitive discovery materials in this case, the Court also has issued two orders designed to protect against the unnecessary and/or unlawful disclosure of the discovery materials in this case. One order, dated February 5, 2002 ("the Non-Classified

members), allow defense counsel to share legal materials with the defendant, grant the defendant telephone access to contact his lawyer and approved family members, authorize the defendant to mail family members (and his counsel), and to have certain visitors, there are limitations on these privileges. Among other things, the SAM outline the requirements that must be followed in order to visit the defendant in prison. For example, no translator is permitted to visit with the defendant "without prior written clearance/approval from FBI, which shall only be granted after consultation with the FBI and the USA/EDVA." (SAM § 1dii). Moreover, any "use of a translator by the attorney shall be in the physical and immediate presence of the attorney – in the same room." (SAM § 2bii). Also, with respect to prison visits, the SAM provide that "[t]he inmate's attorney's pre-cleared co-counsel or paralegal(s) may meet with the client/inmate without the necessity of the inmate's attorney being present." (SAM § 2e). However, "[a]n investigator or translator may not meet alone with the inmate." (*Id.*). The SAM define "precleared" as a defense counsel staff member, including co-counsel, paralegal, investigator or translator, "who has submitted to a background check by the FBI and USA/EDVA, who has successfully been cleared by the FBI and USA/EDVA . . . ." (SAM § 2e, n.2).[5]

II. The Conditions of Confinement Are Entirely Reasonable

Discovery Protective Order"), governs the handling and disclosure of non-classified discovery in this case. The second order ("the Classified Discovery Protective Order"), which is not directly implicated in the instant motion, regulates the handling, dissemination and storage of classified materials.

[5] The Government applied virtually identical SAM against the defendants in the *Bin Laden* case in the SDNY. As discussed below, the SAM were upheld against vigorous constitutional challenge by both Judge Sand and the Second Circuit. *See United States v. El-Hage*, 213 F.3d 74 (2d Cir.), *cert. denied,* 121 S. Ct. 193 (2000). In addition, similar measures are routinely applied to defendants charged in this District in cases involving espionage where the U.S. national security is threatened.

Moussaoui lodges a laundry list of complaints regarding the conditions of his confinement at the Alexandria Detention Center. (Mem. at 4-5). Included in his list of grievances are the imposition of solitary confinement, and other restrictions and physical limitations relating to his prison cell and the prison in general. (*Id.*).[6] As discussed below, however, the SAM and other restrictions imposed on Moussaoui are reasonably related to overwhelming security concerns borne out of the unique and extraordinarily lethal criminal enterprise which Moussaoui has loyally served in a variety of capacities over several years. While some of the limitations imposed on Moussaoui are rigorous, they promote a valid public interest in preventing additional terrorist acts by Moussaoui's co-conspirators who remain at-large. In short, the restrictive measures are not intended to, nor do they, punish Moussaoui, and they are plainly constitutional.

Equally constitutional are the physical conditions of Moussaoui's cell and the prison in general. While Moussaoui may find these conditions uncomfortable, they comply with the Constitution, and therefore Moussaoui's efforts at micro-managing the prison should be rejected.

A. Applicable Standards

1. Prison Regulations Limiting Detainees' Privileges

"Not every disability imposed during pretrial detention amounts to 'punishment'

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[6] Moussaoui also complains that the SAM unfairly restrict his access to media representatives and wrongly require his non-legal calls to be monitored. These types of restrictions, motivated as they are in this case by a compelling need to prevent Moussaoui from passing on lethal messages, are plainly lawful. *See Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (inmates have no Fourth Amendment expectation of privacy); *El-Hage*, 213 F.3d at 81; *Sidebottom v. Schiriro*, 927 F. Supp. 1221, 1225 (E.D. Mo. 1996) (no due process right to media access).

in the constitutional sense." *Bell v. Wolfish*, 441 U.S. 520, 537 (1979). "Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention." *Id.* "Traditionally, this has meant confinement in a facility which, no matter how modern or how antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial." *Id.* Consistent with this notion, "the Government must be able to take steps to maintain security and order at the institution . . . " *Id.* at 540.

Of course, there are limits on the restrictions that prison officials may impose on a pretrial detainee. Specifically, "under the Due Process Clause, a detainee must not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.* at 535. Following this axiom, "[a] court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Id.* at 538. "Absent proof of intent to punish, . . . this determination 'generally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].''" *Block v. Rutherford*, 468 U.S. 576, 584 (1984) (quoting *Wolfish*, 441 U.S. at 538) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)) (parentheses in original). "Restraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomforting and are restrictions that the detainee would not have experienced had he been released while awaiting trial." *Wolfish* at 540. "Conversely, if a restriction or condition is not reasonably related to a legitimate goal – if it

is arbitrary and purposeless – a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees." *Id.* at 539.

While as Moussaoui asserts, this Court may have the authority to release Moussaoui from pre-trial detention (Mem. at 3-4), in determining whether prison regulations are justifiable, this Court should defer to the decisions of prison officials since, "prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations." *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 128 (1977). Indeed, "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Turner v. Safley*, 482 U.S. 78, 89 (1987). Moreover, if the level of constitutional scrutiny were greater, "[c]ourts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby 'unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration.'" *Id.* (quoting *Procunier v. Martinez*, 416 U.S. 396, 407 (1974), *overruled in part*, *Thornburgh v. Abbott*, 490 U.S. 401 (1989)). This type of judicial intrusion would be problematic as "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials." *Pell v. Procunier*, 417 U.S. 817, 827 (1974). Thus, "in the absence of substantial evidence in the record to indicate the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment." *Id.*

Deference is particularly appropriate when the restrictions at issue purport to

promote security interests. For example, "prison officials may well conclude that certain proposed interactions, though seemingly innocuous to laymen, have potentially significant implications for the order and security of the prison." *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989). Thus, as long as prison officials "'put forward' a legitimate government interest, and provide some evidence that the interest put forward is the actual reason for the regulation," the restriction likely will be upheld. *Casey v. Lewis*, 4 F.3d 1516, 1520-21 (9th Cir. 1993) (quoting *Walker v. Sumner*, 917 F.2d 382, 385 (9th Cir. 1990)). Moreover, prison officials are allowed constitutional room to "anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Turner*, 482 U.S. at 89. Therefore, as an example, a prison administrator's failure "to specify a past event wherein a contact visit resulted in assault, escape, or hostage-taking, does not render irrational the adoption and implementation of a non-contact policy." *Casey*, 4 F.3d at 1521.

Following these principles, the Supreme Court has suggested that four factors be considered in evaluating the reasonableness of a prison regulation. *El-Hage*, 213 F.3d at 81 (applying four factor test to uphold constitutionality of nearly identical SAM at issue here). "First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89. This factor requires the court to reject a restriction where "the logical connection between the regulation and the asserted goals is so remote as to render the policy arbitrary and irrational." *Id.* at 89-90 (emphasis added). Second, the court should determine "whether there are alternative means of exercising the right that remain open to prison inmates." *Id.* at 90. "Where 'other avenues' remain available for the exercise of the asserted right, courts should be particularly conscious of

the measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation." *Id.* Third is the "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* Fourth, the court should consider "the absence of ready alternatives [as] evidence of the reasonableness of a prison regulation." *Id.* "This is not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the [defendant's] constitutional complaint." *Id.* at 90-91. But, if a defendant can identify an "alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* at 91.

2. Prison Conditions

Due process also prohibits prison officials from adopting or permitting prison conditions which themselves inflict punishment on pre-trial detainees. Although the Due Process Clause is the source for constitutional shelter from substandard prison conditions for pretrial detainees, "the protection is at least as extensive as that provided for convicted prisoners by the Cruel and Unusual Punishment Clause of the Eighth Amendment." *Stone-el v. Sheahan*, 914 F. Supp. 202, 205 (N.D. Ill. 1995); *see also Salazar v. City of Chicago*, 940 F.2d 233, 239-40 (7th Cir. 1991). Accordingly, to establish a constitutional violation the complaining detainee must show that the conditions of confinement at issue fail to meet "the minimal civilized measure of life's necessities," or there is no constitutional harm. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

B. Applying the Standards

1. The SAM Generally

The Government imposed the SAM in this case to avoid the "substantial risk" that the defendant will communicate with others outside the prison to facilitate or incite additional acts of terrorism. The likelihood that Moussaoui would attempt to communicate with others is amply supported in the record in this case. The record includes evidence of: the vast and global nature of *al Qaeda*; the demonstrated loyalty of its members; the efforts the group has undertaken to avoid detection, including careful monitoring of prior court proceedings against its members and associates, and the widespread use of codes; as well as the proven desire and ability to commit mass murder. *El-Hage*, 213 F.3d at 81 (citing sufficient evidence to establish threat posed by outside communications by *al Qaeda* associate). To avoid this risk, which is uniquely significant both in the probability and the magnitude of its occurrence, the Government adopted regulations aimed at limiting the ability of a defendant to communicate with their co-conspirators. In so doing, the Government has tailored the SAM to the legitimate and compelling purpose of preventing future terrorist acts. It is clear that they are far from "arbitrary" and "purposeless." Indeed, the Second Circuit in evaluating the constitutionality of a SAM nearly identical to those at issue in this case held that the SAM were "reasonably related to the government's asserted security concerns" and rejected a series of constitutional objections to the SAM. *El-Hage*, 213 F.3d at 81-2.

The four-factor *Turner* test is plainly applicable here as it focuses not on the status of the detained individual, *i.e.*, a pre-trial detainee, but on whether the regulation at issue is reasonably related to a valid government interest. Thus, "[i]t is no answer . . . that we deal here with restrictions on pretrial detainees rather than convicted criminals," *Rutherford*, 468 U.S. at

587, because "[t]here is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates." *Wolfish*, 441 U.S. at 546 n.28. "Indeed, it may be that in certain circumstances [pretrial detainees] present a greater risk to jail security and order." *Id.* In fact, based on the clear and convincing evidence of the extraordinary danger posed by *al Qaeda*, it hardly can be challenged that the defendant, though not convicted, represents a far greater risk to society than virtually any convicted defendant or group of defendants. Also, while Moussaoui may be presumed innocent at trial (Mem. at 4-5), he gains no advantage from this status for these purposes. "The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial . . . .[b]ut it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." *Id.* at 533.

As discussed below, however, the Government is confident that it will arrange, on an experimental basis, to permit Moussaoui to have access (in a separate, secure room) to a stand-alone computer to review the discovery materials in this case, an offer that the SAM otherwise do not bar.[6] By permitting Moussaoui this access, however, the Government submits there is an even greater need to maintain the remaining provisions of the SAM to prevent Moussaoui from gaining any advantage from this opportunity to collaborate. Continued enforcement of these remaining provisions, which deal with mail, telephone and visitation

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[6] The U.S. Attorney's Office has asked the USMS and the Alexandria Detention Center to provide such a room. The USMS and the Alexandria Detention Center have agreed that such a facility would be appropriate and, in spite of severe space limitations, are working out the details.

privileges, as well as other routine prison security measures, presents no constitutional difficulties as such restrictions all regularly have been upheld in cases involving pretrial detainees. *See Rutherford*, 468 U.S. at 586 (prohibition of contact visits); *Wolfish*, 441 U.S. at 557-59 (random, unattended cell room searches and body cavity searches); *United States v. Workman*, 80 F.3d 688, 693, 699 (2d Cir.) (monitoring of detainees' calls and review of mail with good cause), *cert. denied*, 519 U.S. 938 (1996).

2. General Prison Conditions

Separate from the particular administrative measures imposed in this case, Moussaoui objects to other physical conditions of his confinement. (Mem. at 4-6). Moussaoui's objection should be swiftly rejected. Whether taken individually or collectively, these conditions do not remotely rise to the level of constitutional infirmity.

Specifically, Moussaoui implies that the Constitution has been violated because his cell is small, made of concrete, and has no desk and chair, and because he is subject to on-going surveillance. (Mem. at 5). The Government does not dispute that many of the conditions in the jail are unpleasant.[7] But they do not amount to a violation of the Constitution, for none of these conditions reflect an intent to punish Moussaoui, and all are reasonably designed to fulfill the security requirements of the institution.[8] Moreover, these conditions do not deny Moussaoui

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[7] Alexandria Detention Center officials have advised that they will dim the brighter of the two lights in Moussaoui's cell in the evening, thus addressing one of Moussaoui's concerns. (Mem. at 5). The other light will remain on for security reasons. Moreover, another of Moussaoui's complaints that guards wake him during the night (Mem. at 5), appears to be exaggerated since the guards only peer through the door to check on Moussaoui, a practice that evidently is followed throughout the Commonwealth of Virginia.

[8] Officials at the Alexandria Detention Center have indicated that no cell in the facility is equipped with a chair and desk.

"the minimal civilized measure of life's necessities." *Chapman*, 452 U.S. at 347. Moussaoui may be frustrated by the lack of certain accommodations and privacy in prison, but these do not amount to constitutional injury. *See Harris v. Fleming*, 839 F.2d 1232, 1235 (7th Cir. 1988) (inmate "cannot expect the amenities, conveniences and services of a good hotel"); *see also Lunsford v. Bennett*, 17 F.3d 1574, 1580 (7th Cir. 1994) ("Subjecting a prisoner to a few hours of periodic loud noises that merely annoy, rather than injure the prisoner does not demonstrate a disregard for the prisoner's welfare."); *Stone-El v. Sheahan*, 914 F. Supp. at 206 (sleeping on the floor without a mattress in a noisy prison is "not sufficiently serious to implicate the Constitution"); *Coniglio v. Thomas*, 657 F. Supp. 409, 414 (S.D.N.Y. 1987) ("Unless objective assessment of prison conditions compels the conclusion that inmates are being subjected to unreasonable safety risks, the federal courts must avoid becoming enmeshed in the minutiae of prison operations, and should decline to second-guess prison administrators in the operation of correctional facilities.").

Moreover, to the extent some of the conditions have uniquely been imposed on the defendant in this case, such as the constant monitoring, they are clearly related to valid security concerns presented by this defendant who has exhibited a commitment to join a deadly war against American civilians, which war, from his and his cohorts' viewpoint, has no reason to be put on hold merely by virtue of imprisonment. As such, this defendant is squarely out of the norm of criminal defendants who are detained (in general population) pending trial for past crimes they may have committed. Therefore, in this atypical case, these measures are not so "remote" from the goal they seek to promote as to make them "irrational." *Turner*, 482 U.S. at 89-90.

Finally, there can be no claim about the collective impact of the security conditions in effect at the Alexandria Detention Center. (Mem. at 1). "Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." *Wilson v. Seiter*, 501 U.S. 294, 305 (1991).

C. The SAM Do Not Interfere With Moussaoui's Right to Participate in His Defense

Moussaoui claims that his Sixth Amendment right to participate in his own defense is threatened by the SAM. (Mem. at 4-9). In particular, Moussaoui claims that because his cell is so small it cannot accommodate his interest in obtaining a desk and chair to review, on a laptop computer and a printer, the discovery materials the Government has been providing to counsel. The specific claim should be rejected, particularly in light of the Government's willingness to offer, on an experimental basis, Moussaoui access to a stand-alone computer in a separate and secure room within the Alexandria Detention Center to review the discovery materials.

As Moussaoui concedes, the SAM do not speak to the cell size. (Mem. at 5). While Moussaoui complains that he was moved to a smaller cell after the arrival of another defendant (Mem. at 5), we are advised by prison officials that this move was not borne out of ill-will towards Moussaoui, but out of prison practice of rotating dangerous inmates among the limited number of high-security cells.[9] Thus, given that the SAM has not limited Moussaoui's cell size, and given that Moussaoui cites no constitutional minimum for cell size, the issue really

[9] Because Moussaoui has been found in possession of contraband (*e.g.*, old food that has hardened), he will continue to be housed in his current cell, which is viewed as more secure. However, if Moussaoui ceases to horde such contraband, prison officials have indicated that he may be rotated to another cell.

amounts to a claim to access to the discovery materials, a claim the Government does not, as a matter of law dispute.[10] However, Moussaoui cites no authority that establishes either his constitutional right to a laptop computer and printer, or his right to such materials in his cell.

Accordingly, we have spoken with the proper officials at the Alexandria Detention Center and have asked that they establish a secure room and a stand-alone desktop computer.[11] We further have asked whether Moussaoui can be given reasonable access to this room and a place to store the CDs that the Government has provided, and will continue to provide, in discovery. Moreover, we can ask prison officials to provide a storage space (outside of Moussaoui's cell) for the other discovery materials made available to the defense. A small portion of these materials could then be made available to Moussaoui in his cell for review.

Similar procedures were implemented under the auspices of the SAM in the *Bin Laden* case to great effect. The defendants were able to access the electronically-stored discovery material, while prison officials were secure from any of the defendants converting computer equipment (such as laptops, broken CDs, or other accessories) into weapons. We hope to be able to implement a similar system in this case as well, as soon as possible, all of which is consistent with the requirements of the SAM.

D. The SAM Do Not Interfere With Moussaoui's Right to Communication With Counsel

1. Moussaoui is Given Reasonable Access to Privileged Information and to Communicate With His Counsel

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[10] Of course, nothing prevents defense counsel from printing the discovery materials and providing them to Moussaoui on a rotating basis.

[11] The computer can be equipped with a "mouse," in lieu of a keyboard (which can be used as a weapon), to scroll through each CD of material.

Moussaoui objects to the routine searches of his cell, which involves prison officials going through his legal materials. This objection, however, has been squarely rejected by the courts and should be similarly rejected here. The searches of Moussaoui's cell, including the search of his legal materials, is plainly related to a valid security interest. One need to look no further than the items found in the cell of *al Qaeda* members/associates Mamdouh Salim and Khalfan Mohamed, after Officer Pepe was assaulted. There was a note announcing that the perpetrators of the assault intended to take defense counsel (and others) hostage in an effort to escape and a note outlining the plan to block the security camera in the cell and to override the electrical system on the floor of the prison. Prison officials also found plastic bottles of hot sauce used in the attack on Pepe and his rescue party, and markings on the cement in the cell where Salim and/or Mohamed had sharpened the shank that was shoved through Pepe's eye.

Moussaoui, perhaps carrying out the instructions in the Manchester terrorist training manual, claims that prison officials have read through his legal papers. In response, officials from the Alexandria Detention Center have advised us that the policy of the institution is not to read legal mail or papers, but merely to search it for contraband. Moreover, these officials have indicated that they will remind their staff of this policy.[12] That said, given that the primary purpose of the SAM is to prevent Moussaoui from receiving or passing on potentially harmful messages, prison officials are well within their authority to review the materials to

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[12] It is critical to note that the enforcement of the SAM is conducted by law enforcement officials walled off from the prosecution team. For example, the FBI agents who are assigned to review Moussaoui's mail and/or to monitor his non-legal calls are not assigned to the prosecution team by the prison officials and have been instructed not to discuss any information contained in Moussaoui's mail or phone calls without clearing the information over an ethical firewall person assigned in the U.S. Attorney's Office.

ensure that Moussaoui is not circumventing the requirements of the SAM and passing on lethal (and coded) communications to his fanatical adherents on the outside. *See Wolfish*, 441 U.S. at 557-60 (upholding random, unattended cell room searches and body cavity searches); *Bin Laden*, 213 F.3d at 81 (upholding constitutionality of SAM in *al Qaeda* context);*Oliver v. Fauver*, 118 F.3d. 175, 178 (3d Cir. 1997) (absent actual interference with inmate's actual access to court, no constitutional violation from search of legal materials); *Mitchell v. Dupnik*, 75 F.3d 517, 523 (9th Cir. 1996) (inspection of pretrial detainee's legal papers, even in his absence, does not violate Constitution); *Smith v. Maschner*, 899 F.2d 940, 944 (10th Cir. 1990) (single incident of review of legal materials "without any evidence of improper motive or resulting interference with [inmate's] right to counsel or access to the courts, does not give rise to a constitutional violation"); *Kalka v. Megathlin*, 10 F. Supp. 2d 1117, 1121 (D. Ariz. 1998) (prison officials may search legal materials during cell inspection); *but see Marquez v. Miranda*, 1998 WL 57000 at *2 (N.D. Cal. 1998) (Sixth Amendment violation from reading inmate's mail from "chilling effect").[13]

Moussaoui also contends that the oral communications between him and his counsel are insufficiently secure. (Mem. at 10-11). This claim is in two parts. One is that

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[13] It is important to stress that the Government did not implement the SAM, or believe they are justified, by any untoward conduct by counsel in this case. (Mem. at 9). Rather, the SAM have been adopted in this case because of the belief, substantiated by the evidence available to the Government, that Moussaoui poses a security risk. Indeed, one critical assumption of the SAM is the good faith and professionalism of defense counsel, who commit, for example, not to wittingly pass on messages by the defendant or to facilitate his improper communication with others. Thus, there should be no doubt about the integrity of counsel in this case to vigorously defend their client. *Compare United States v. Sattar*, 02 Cr. 395 (JGK) (S.D.N.Y.) (indictment of defense of counsel for violating SAM and facilitating messages from convicted defendant to others in terrorist group).

Moussaoui claims that prison officials who assist Moussaoui in placing the call to counsel are improperly listening in on his side of the telephone conversations. (Mem. at 10). The other is that Moussaoui believes that prison officials may be monitoring counsel meetings that occur, because of scheduling/space limitations, in the hallway outside his cell. (Mem. at 11).

With respect to the telephone calls, prison officials are required under the SAM to place the call to counsel to ensure that Moussaoui is not call to an unknown party to whom he can pass on harmful messages, as phones used to call defense counsel are not recorded. Moussaoui is allowed to speak to his attorneys on the phone in a staff office. He must be escorted to that room and a correctional officer is required, as a security measure, to remain with him to prevent him from secreting contraband or becoming violent.

As for the hallway visits, we have been advised that prison officials have not been recording any hallway conversations, including those involving defense counsel. However, rather than bar the use of such investigative techniques, which may be necessary to deter or capture communications between inmates, we have asked prison officials to allow more access to counsel rooms to provide a more secure environment for counsel to meet with Moussaoui. Alexandria Detention Center officials have represented to us that in the future, no meetings between Moussaoui and his counsel will be permitted at his cell or in the adjacent hallway (which meetings had been allowed at the request of defense counsel). Instead, all future meetings between Moussaoui and his counsel will occur in the attorney-client rooms.

2. There is no Constitutional Right to a Visit by John Doe

As Moussaoui notes, the SAM require any individuals other than counsel of record to be cleared by the Government before being granted access to Moussaoui in prison.

SAM ¶¶ 2.a. n.1, h. ii. & n.4. This is one of the cornerstone requirements of the SAM as it is prevents a miscreant sympathizer from meeting with Moussaoui and passing on or receiving deadly information (names of witnesses not yet publicly revealed, etc.), as called for in the *al Qaeda* terrorism manual discussed above. Yet, Moussaoui wants to visit with an individual not yet identified ("John Doe") to provide him with cultural/religious advice. (Mem. at 14). Moussaoui, however, is not being denied access to John Doe because the Government has rejected him. Rather, Moussaoui is being denied access because John Doe does not want to be vetted, allegedly because of the SAM themselves and because of the "extraordinary actions by the Attorney General towards Muslims and Arabs since September 11." (Mem. at 10).[14]

Moussaoui contends that this condition violates the Sixth Amendment. Among other things, this claim appears to rest on the untenable (and unsubstantiated) assumption that there is no one else available to provide the consultation John Doe purports to offer. Thus, given that there is no right to choice of counsel, *see Wheat v. United States*, 486 U.S. 153, 160 (1988), it seems spurious to suggest that there is a Sixth Amendment right to access to John Doe as a defense consultant of choice, *Cf. United States v. Musa*, 833 F. Supp. 752, 756 (E.D. Mo. 1993) ("nothing in [the 6th Amendment] guarantees a defendant an unlimited right to the paralegals, secretaries, or translators of his own choosing."), or that this right requires his unfettered access to the prison. Indeed, to the extent Sixth Amendment permits the Government to deny a defendant access to counsel who refuses, for his own personal reasons, to provide the information necessary to obtain a security clearance in national security cases, the same holds

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[14] While Moussaoui wishes to maintain the anonymity of this individual, it is also his hope to call John Doe as a witness. (Mem. at 15 n.11).

true for a defense "consultant." *See United States v. Bin Laden*, 58 F. Supp. 2d 113, 123 (S.D.N.Y. 1999) ("[T]here is plainly a substantial governmental objective in guarding against the unauthorized disclosure of classified information, this interest manifestly outweighs counsel's desire not to disclose personal information needed to conduct a thorough background check, and the clearance procedure presents a reasonable method for effecting the Government's legitimate goals.").[15]

Moussaoui's request for modification of the SAM is plainly unreasonable as it is tantamount to a nullification of the SAM. Under Moussaoui's view, he would be given access to anybody who might claim to have "advice" for Moussaoui in fighting the prosecution and who would rather not have his background checked by the Government. Indeed, under this view of the Sixth Amendment, Moussaoui would have the constitutional right to be visited by Usama Bin Laden himself as somebody who presumably could provide guidance to Moussaoui and who understandably would not want to be vetted by the Government. Of course, this is an extreme example and one that would be avoided by counsel who, as dutiful officers of the court, would never intentionally undermine the SAM or any orders of this Court. However, it is not beyond the pale to suggest that counsel would not always be aware of the security risks posed by somebody holding himself out as a religious or cultural expert, and would have no way to police who that individual speaks with after visiting Moussaoui. The more prudent course, then, is to

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[15] It again bears noting that a "walled off" team of investigators and prosecutors would handle the investigation of John Doe and nothing that would reveal defense strategy would be shared with the prosecution team. Moreover, any unreasonable denial of access based on factors unrelated to valid security concerns would likely be met with great skepticism by the Court. These procedures more than suffice to safeguard the defendant's Sixth Amendment rights. *Cf. Bin Laden*, 58 F. Supp. at 123 ("the procedure contains numerous attendant security features that minimize the possibility of any subsequent disclosures by Government officials").

adopt, through an ethical wall, some procedure for screening individuals before they are given access to Moussaoui. Therefore, Moussaoui's request for relief from this condition of confinement should be denied.

Conclusion

For the reasons addressed above, the United States respectfully suggests that the motion of the defendant to obtain relief from his conditions of confinement, except where otherwise agreed to, should be denied.

Respectfully submitted,

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Date: April 17, 2002

Certificate of Service

I certify that a true and correct copy of the foregoing Government's Opposition to Motion of the Defendant for Relief from Conditions of Confinement was served by fax and U.S. mail, on April 17, 2002, on the counsel listed below:

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