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

UNITED STATES OF AMERICA	)	UNDER SEAL
	)	
v.	)	Crim. No. 01-455-A
	)	Hon. Leonie M. Brinkema
ZACARIAS MOUSSAOUI	)	

GOVERNMENT'S RESPONSE TO DEFENDANT'S AND STANDBY COUNSEL'S MOTIONS FOR ACCESS [redacted] AND A WRIT *AD TESTIFICANDUM* TO PRODUCE [redacted] FOR TESTIMONY AT TRIAL

The United States responds to defendant's and standby counsel's motions for access to, and the issuance of a writ *ad testificandum* for, [redacted] For the reasons set forth herein, the motions should be denied.

Introduction

The Government respectfully submits this Memorandum of Law in opposition to the motions for access to, and the issuance of a writ for, [redacted] In particular, the defendant and standby counsel seek [redacted] pre-trial access [redacted] claiming that he is a material witness in this case. Beyond this, the defendant and standby counsel ask this Court to issue a writ *ad testificandum* for the trial testimony of [redacted] In support of the materiality claim, standby counsel publicly point only to [redacted] (and apparently have offered, for the Court's review only, other reasons purporting to demonstrate [redacted] unique relevance to the defense). Both motions should be denied. There has been no showing of bad faith by the Government [redacted]

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[redacted] and not to give the prosecution a tactical advantage in the prosecution of this case. Granting the requested relief would jeopardize several national security interests, [redacted] In contrast to this clear interference with efforts to protect national security, there is little reason to believe that [redacted] will provide, in a private meeting or at trial, information that will be material to the defense. Therefore, the motion should be denied.

Factual Background

The War Against *al Qaeda*

The motion for access [redacted] must be placed in context, for [redacted] was captured during the war with *al Qaeda* and its allies. This war was not initiated by the United States and did not begin on September 11, 2001. As explained in greater detail in the accompanying declaration [redacted] the United States and its citizens have been the target of *al Qaeda* for several years. During this time, *al Qaeda* has sought the components of nuclear and chemical weapons, has obtained and used other weapons of mass destruction, and has provided training to thousands of *mujahideen* in terrorist techniques. (*See* Indictment, Count 1, ¶7). These efforts have coincided with the increasingly belligerent, and open, statements by *al Qaeda*'s leader, Usama Bin Laden, who in February 1998 proclaimed that it was the duty of Muslim men to kill American civilians anywhere in the world they could be found. (*Id.*, Overt Act 9).

Al Qaeda is a global terrorist group that has its own structure, and an enterprise that serves to support other terrorist groups. (*Id.*, Count 1, ¶¶ 4-6). Since its inception, *al Qaeda* has

been tied to several successful and attempted terrorist attacks. These attacks have occurred, or were to have occurred, in several countries, including Somalia, Kenya, Tanzania, Yemen, and the United States. (*See id.*, Count 1, ¶¶ 2, 4; Overt Acts 5, 6); *United States v. Bin Laden*, Indictment, S(10) 98 Cr. 1023, ¶¶ 14, 15, 18, 19, 22, 23, 33, 35). As alleged in the Indictment in this case, the most infamous of these attacks occurred on September 11, 2001, when *al Qaeda* operatives hijacked four airliners and crashed them into the World Trade Center, the Pentagon and the Pennsylvania countryside. Soon after the attacks, Congress authorized the President to use "force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). In authorizing such force, Congress emphasized that the forces responsible for the September 11 attacks pose an "unusual and extraordinary threat to the national security and foreign policy of the United States," and that the "President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." *Id.*

The President, acting pursuant to his authority as Commander in Chief and with congressional support, has employed every lawful means at his disposal to combat the *al Qaeda* threat. As is well known, the President dispatched the armed forces of the United States to Afghanistan to seek out and destroy the *al Qaeda* terrorist network and the Taliban regime that supported and harbored that group. Military and other operations in this effort continue to this

day, and involve the critical assistance of our allies. During this continuing effort, thousands of enemy combatants have been captured by American and allied forces[redacted] *See Hamdi v. Rumsfeld*, 296 F.3d 278, 280 (4th Cir. 2002).[redacted]

As part of a multi-national, world-wide hunt for *al Qaeda* members and associates,[redacted]

[redacted]

[redacted] Nor is there any reason to believe that [redacted] will be made available to the prosecution as a witness in this case.

Argument

I. Applicable Law

A. Pre-Trial Access

"In certain circumstances prosecutors must disclose to defendants information in their possession." *United States v. Oliver*, 908 F.2d 260, 262 (8th Cir. 1990) (citing *United States v. Agurs*, 427 U.S. 97 (1976) and *Brady v. Maryland*, 373 U.S. 83 (1963)). This obligation extends to certain witnesses available to the prosecution. *See United States v. Tipton*, 90 F.3d 861, 889 (4th Cir. 1996) ("only access is a matter of right, there is no right to have witnesses compelled to submit to interview, hence no violation by a prosecutor's advising witnesses to that effect"); *United States v. Walton*, 602 F.2d 1176, 1179-80 (4th Cir. 1979) ("A witness is not the exclusive property of either the government or a defendant; a defendant is entitled to have access to any prospective witness, although in the end the witness may refuse to be interviewed."); *United States v. Murray*, 492 F.2d 178, 194 (9th Cir. 1973) ("Both sides have the right to interview witnesses before trial."). This duty is rooted in conventional notions of both due process and fair play. As one court explained:

> [N]o witness is obligated to honor a defendant's request for an interview. But it is a different matter for the government to place a defendant at a tactical disadvantage by reserving to itself alone the ability to request an interview with a material witness.

United States v. Fischel, 686 F.2d 1082, 1092 (5th Cir. 1982) (omitting citations).

However, "a defendant's constitutional right to information held by the prosecutor – more specifically, a defendant's right to pre-trial access to a potential witness – is not unlimited." *United States v. Oliver*, 908 F.2d at 262. Access may be denied or delayed by "the clearest and most compelling considerations." *Dennis v. United States*, 384 U.S. 855, 873 (1966). Traditional law enforcement concerns that warrant denial or delay of access include the personal safety of a witness, *see Tipton*, 90 F.3d at 889 ("Their [defense counsel] access to protected witnesses was delayed, but this is justified when, as clearly was the case here, the threat of violence is palpable."); *Walton*, 602 F.2d at 1180 ("The court may delay access to a witness in protective custody until shortly before trial, when such delay is warranted by the circumstances."), the desire to encourage persons to provide information about criminal conduct, *see United States v. Smith*, 780 F.2d 1102, 1107 (4th Cir. 1985) ("the public interest is served by nondisclosure because it encourages persons to come forward with information that can aid effective law enforcement."), and the need to protect ongoing law enforcement investigations, *see Fischel*, 686 F.2d at 1092 (nondisclosure of witness' whereabouts justifiable to avoid "jeopardizing other operations"). Moreover, it bears emphasis that the law of access to witnesses was developed in the context of more routine domestic prosecutions far different than the extraordinary context of this war. It is self-evident that the need to [redacted] to prevent additional attacks on United States citizens is a paramount interest that is different in kind than the law enforcement interests involved in other cases. *See infra*, Section II.B.1.

Even when the prosecution improperly denies or delays the defendant's access to a witness, there is legal error only when the defendant has been prejudiced by the denial. *See, e.g., United States v. Padilla*, 869 F.2d 372, 377 (8th Cir. 1989) ("On this record . . . we see no reasonable probability that Lett's presence at trial could have produced a different verdict."); *United States v. Rivers*, 406 F. Supp. 709, 712 (E.D. Pa. 1975) ("There was nothing in the Government's files to indicate that this informant would, or could, offer any exculpatory evidence concerning defendant."). As with all claims of suppressed evidence, a defendant demonstrates prejudice only by establishing that the missing witness's testimony "would have been 'relevant and material, and . . . vital to the defense.'" *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (quoting *Washington v. Texas*, 388 U.S. 14, 16 (1967) (emphasis in original). [2] Suppressed evidence or testimony is "material" when it "might have affected the outcome of the trial." *United States v. Agurs*, 427 U.S. at 104; *see also Valenzuela-Bernal*, 458 U.S. at 873-74 ("sanctions will be warranted . . . only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact."); *United States v. Bagley*, 473 U.S. 667, 682 (1985) ("[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the

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[2] A similar definition of prejudice has been employed in cases where the government has been accused of unfair pre-indictment and post-indictment delay. *See United States v. McMutuary*, 217 F.3d 477, 482 (7th Cir. 2000) ("defendant's allegations of actual and substantial prejudice must be 'specific, concrete, and supported by evidence'") (quoting *Pharm v. Hatcher*, 984 F.2d 783, 787 (7th Cir. 1993)); *United States v. Serpico*, 2001 WL 417778, at *1 (N.D. Ill. 2001) (defense must show missing witness would have been "vital").

outcome."); *United States v. Coppa*, 267 F.3d 132, 142 (2d Cir. 2001) ("The result of the progression from *Brady* to *Agurs* and *Bagley* is that the nature of the prosecutor's constitutional duty to disclose has shifted from (a) an evidentiary test of materiality that can be applied rather easily to any item of evidence (would this evidence have some tendency to undermine proof of guilt?) to (b) a result-affecting test that obliges a prosecutor to make a prediction as to whether a reasonable probability will exist that the outcome would have been different if disclosure had been made.") (parentheses in original). Thus, even a deliberate effort to conceal a potential witness from the defense does constitutional harm only when there is a reasonable probability that expected testimony would have yielded a different result. *See United States v. Ariza-Ibarra*, 651 F.2d 2, 15 (1st Cir. 1981) ("In light of the complete absence of evidence that Larain's testimony would be helpful to the defendants and their failure to undertake any efforts consistent with a desire to locate the informant, . . . we hold that no prejudice to defendants resulted from the government's misconduct in this case.").

When the Government's interest in protecting the anonymity of a witness is squarely pitted against the alleged importance of the witness' testimony, "a trial judge can call on no fixed rule to guide his decision but must instead balance in each case the benefits to the defendant of disclosure against the resulting harm to the government." *United States v. Hughes*, 658 F.2d 317, 321 (5th Cir. 1981).[3] In such a case, the Government "must set forth with particularity its reason

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[3] This balancing test has its roots in *Roviaro v. United States*, 353 U.S. 53 (1957). *See United States v. Ridley*, 814 F. Supp. 992, 997 (D. Kan. 1993) ("Where the informant's identity is known to the defendant but the government has some valid reason for not disclosing the informant's whereabouts, the courts resort to [the] same balancing approach used in *Roviaro*."). In *Roviaro*, the Supreme Court considered the tension between the Government's

for nondisclosure," *United States v. Tenorio-Angel*, 756 F.2d 1505, 1511 (11th Cir. 1985), while the defendant must make a "showing that the informant's testimony would significantly aid the defendant in establishing the asserted defense." *United States v. Aguirre Aguirre*, 716 F.2d 293, 301 (5th Cir. 1983). To satisfy his burden, the defendant must allege more than "theoretical relevance." *See United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989); *see also United States v. Marcos*, 1990 WL 58825 at *3 (S.D.N.Y. 1990) (in context of defendant's request for deposition under Rule 15, court notes that relevance of testimony does not establish its materiality). Nor can a defendant successfully tender "the mere potential for favorable testimony." *United States v. Caballero*, 277 F.3d 1235, 1241 (10th Cir. 2002) (quoting *United States v. Iribe-Perez*, 129 F.3d 1167, 1173 (10th Cir. 1997)); *see also Valenzuela-Bernal*, 458 U.S. at 866-67 (rejecting "conceivable benefit" test). Instead, a "district court may order disclosure only when the information is at least essential to the defense, necessary to the defense, and neither merely cumulative nor corroborative." *United States v. Smith*, 780 F.2d at 1110

"informer's privilege" and the defendant's right to a fair trial. The purpose of the informer's privilege "is the furtherance and protection of the public interest in effective law enforcement." *Id.* at 59. In particular, "[t]he privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." *Id.*

In *Roviaro*, the Supreme Court observed that the "problem" of the competing interests of the Government and the defendant in this context "is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." *Id.* at 62. "Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Id.*

(omitting quotations).[4]

To substantiate a claim that the suppressed testimony is "material," the defendant must provide specific evidence that the witness will testify as predicted. In other words, the defendant must do more than just offer his view of why the possible testimony might be material. Rather, he must provide some basis to think that the testimony will be material. *See United States v. Iribe-Perez*, 129 F.3d at 1173 ("the appellant has not offered any credible reason to believe that Rafael would in fact provide exculpatory testimony"); *United States v. Ginsberg*, 758 F.2d 823, 831 (2d Cir. 1985) ("[W]e disagree with Piedrahita's implied assumption that to satisfy the *Valenzuela-Bernal* test he can simply posit the testimony most helpful to him that the deported witnesses could provide. We believe that he must show some reasonable basis to believe that the desired testimony would be both helpful and material to his defense."); *United States v. Esquivel*, 755 F. Supp. 434, 440 (D.D.C. 1990) ("Defendant has provided no specific information about the probable testimony these witnesses could offer, other than unsubstantiated speculation that it will exculpate him."). To that end, proffers by defense counsel, without more, are insufficient to support a claim for access. *See United States v. Sharp*, 778 F.2d 1182, 1187 (6th Cir. 1985) ("we find an abuse of discretion in the trial court's ordering disclosure based solely on defense counsel's representations"). Similarly, the "defendant must come forward with something more

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[4] While many of these cases involve demands for the identity of the informant, the Government's interest in denying access often survives even if the defendant learns of the informant's identity. This is particularly the case when the Government maintains a colorable interest in avoiding public disclosure of the informant, or his whereabouts. *See United States v. Smith*, 780 F.2d at 1108 ("The government's privilege does not give way simply because the defendant knows the informant's name or identity. Protection of the informant can justify nondisclosure of his address or location.").

than speculation as to the usefulness of [access.]." *United States v. Smith*, 780 F.2d at 1108; *see also United States v. Blevins*, 960 F.2d 1252, 1259 (4th Cir. 1992) ("The defendant must explain to the court as precisely as possible what testimony he thinks the informer could give and how this testimony would be relevant to a material issue of guilt or innocence.") (omitting quotations); *United States v. Tenorio-Angel*, 756 F.2d at 1512 ("[T]he trial court must determine whether the defendant's claim as to the helpfulness of the informant's testimony is 'mere conjecture.' In the present case, appellant produced no evidence corroborating his incredible story."). In this regard, a defendant gains no mileage from the claim that denial of access to the would-be witness unfairly prevents him from detailing the exculpatory nature of the expected testimony. *United States v. Smith*, 780 F.2d at 1108 ("Disclosure is not required despite the fact that a criminal defendant may have no other means of determining what relevant information the informant possesses.") (citing *Valenzuela-Bernal*, 458 U.S. at 870-71).

Because the court must evaluate the likelihood of the witness' impact on the trial, the court should consider the realistic possibility that the missing witness will not testify because he might invoke his right not to incriminate himself. *See United States v. Iribe-Perez*, 129 F.3d at 1173-74 ("because Rafael was charged in the same indictment as the appellant . . . , it is likely that Rafael would have invoked his Fifth Amendment privilege to remain silent had he been present as a witness for the defendant's trial."). Relatedly, it is proper for the court to consider whether there are "adequate alternative means" for the defendant to prove "the same point" that is material to his defense. *United States v. Harley*, 682 F.2d 1018, 1020 (D.C. Cir. 1982).

Separate from the balancing test, the defendant is entitled to no relief for suppressed evidence or testimony unless the defendant demonstrates bad faith by the Government. *See Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (absent bad faith, "failure to preserve potentially useful evidence does not constitute a denial of due process of law."); *United States v. Lovasco*, 431 U.S. 783, 789-90 (1977) (pre-indictment delay: proof of prejudice necessary but insufficient to establish due process violation). Thus, for example, in cases where the Government has caused the unavailability of a potential witness, even for a pre-trial interview, the courts have held that to establish constitutional error, the defendant "must make an initial showing that the Government acted in bad faith and that this conduct resulted in prejudice to the defendant's case." *United States v. Dring*, 930 F.2d 687, 693 (9th Cir. 1991) (emphasis in original). This burden reflects the axiom that while a defendant has a "right to present a defense," and a right "to compulsory process," these rights are "subject to 'countervailing public interests.'" *Buie v. Sullivan*, 923 F.2d 10, 11 (2d Cir. 1990) (quoting *Taylor v. Illinois*, 484 U.S. 400, 414 (1988)). This burden also reflects the competing demands often placed on the Executive Branch in criminal prosecutions. In *Valenzuela-Bernal*, for example, the Supreme Court found that the unavailability of witnesses to the defendant brought about by their summary deportation was a lawful and reasonable exercise of the authority vested in the Executive and Legislative Branches to "make rules for the admission of aliens." 458 U.S. at 864 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972)). Thus, in the immigration context, the failure to present evidence that the Government "departed from normal deportation procedures," defeats an assertion that the "Government deported the aliens to gain an unfair tactical advantage over him at trial." *United*

States v. Dring, 930 F.2d at 695.[5] *Compare Buie v. Sullivan*, 923 F.2d at 12 ("there is no evidence to conclude that the reason for Canady's arrest was anything other than the prosecutor's determination of probable cause for believing that Canady participated in the robbery.") *with Freeman v. Georgia*, 599 F.2d 65, 69 (5th Cir. 1979) (constitutional error where police officer intentionally concealed witness and suppression prejudiced the defense); *Lovkett v. Blackburn*, 571 F.2d 309, 311-12 (5th Cir. 1978) (prosecutors paid for informants' tickets out of state one week before trial).[6]

B. Trial Access

"Like many other constitutional rights, the right to call witnesses is not absolute." *Roussell v. Jeane*, 842 F.2d 1512, 1516 (5th Cir. 1988). For example, the "Constitution does not

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[5] The Fourth Circuit has applied this principle to other contexts. For example, in *United States v. Truong*, the Court held that the destruction of reports that would otherwise have qualified as Jencks Act material was excused where the reports were not prepared as part of a criminal investigation, and had been destroyed per standard operating procedures of the CIA. 629 F.2d 908, 921 (4th Cir. 1980).

The Fourth Circuit also has upheld refusals by the Government to grant defense witnesses immunity, absent a showing by the defendant of both government misconduct and materiality of the testimony. *See United States v. Abbas*, 74 F.3d 506, 512 (4th Cir. 1996); *United States v. Gravely*, 840 F.2d 1156, 1160 (4th Cir. 1988). The courts' reluctance to interfere in such decisions reflects a recognition that the Executive Branch is in the best position to weigh "the implications" that "flow from a grant of use immunity." *United States v. Turkish*, 623 F.2d 769, 776 (2d Cir. 1980); *see also United States v. Thevis*, 665 F.2d 616, 639-40 (5th Cir. 1982) ("the immunity decision requires a balancing of public interests which should be left to the executive branch").

[6] The Government recognizes, of course, the question of the defendant's access is independent of its obligations under *Brady*. *See United States v. Ridley*, 814 F. Supp. at 998 ("the Government's duty to provide *Brady* material relating to any potential defense witness remains"). However, the Government has complied, and recognizes its continuing obligation to comply with, its *Brady* obligations.

automatically entitle a criminal defendant to unobtainable testimony." *United States v. Resurreccion*, 978 F.2d 759, 762 (1st Cir. 1992).[7] Accordingly, as with pre-trial access, a defendant's claim that he has been improperly denied trial testimony is defeated unless the defendant establishes bad faith on the part of the Government. *See Buie v. Sullivan*, 923 F.2d at 12 (trial testimony denied by arrest of witness and subsequent refusal to immunize him not improper where no evidence that arrest of witness motivated by anything other than "probable cause" to believe witness committed a crime, even though witness exculpated defendant in statements to police before his arrest).

Moreover, even if the defendant shows bad faith, he must demonstrate prejudice from the Government's wrongful conduct. A "mere showing by the accused that some relevant evidence was excluded is insufficient; the accused must demonstrate that 'the testimony would have been both material and favorable to his defense.'" *United States v. Cruz-Jimenez*, 977 F.2d 95, 100 (3d Cir. 1992) (quoting *Government of the V.I. v. Mills*, 956 F.2d 443, 445 (3d Cir. 1992)). Such a

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[7] As an example of "unobtainable" testimony to which a defendant is not entitled, the courts have held that the Sixth Amendment does not guarantee a defendant the right to compel a witness outside the United States to appear at trial. *See United States v. Ismaili*, 828 F.2d 153, 159 n.2 (3d Cir. 1987) ("We are referred . . . to no case which holds or even suggests that when witnesses are located outside the subpoena power of the court, the 'compulsory process' clause guarantees the defendant the right to take their depositions."); *United States v. Greco*, 298 F.2d 247, 251 (2d Cir. 1962) ("[T]he Sixth Amendment can give the right to compulsory process only where it is within the power of the federal government to provide it. Otherwise any defendant could forestall trial simply by specifying that a certain person living where he could not be forced to come to this country was required as a witness in his favor."). Not surprisingly, then, "[i]t is well established . . . that convictions are not unconstitutional under the Sixth Amendment even though the United States courts lack power to subpoena witnesses, (other than American citizens) from foreign countries." *United States v. Zabaneh*, 837 F.2d 1249, 1259-60 (5th Cir. 1988) (parentheses in original).

claim must be supported by a specific and substantiated proffer of materiality. *United States v. Resurreccion*, 978 F.2d at 761-62 (proffered testimony not credible and likely would have hurt, and not helped, defendant). Furthermore, the requirement for detail is not excused by an assertion of denial of pre-trial access. *See Campbell v. Klevenhagen*, 760 F. Supp. 1206, 1214 (S.D. Tex. 1991). Any lesser standard would "open a door to discovery through which every defendant would soon walk." *United States v. Fischel*, 686 F.2d at 1095.

It bears repeating that these standards were developed in contexts far different than the present one and the precedents must be applied in a manner that takes account of the compelling interest [redacted] to prevent additional attacks against the United States and its allies.

II. Application of the Law – The Government is in Acting in Good Faith and the Balance Weighs Heavily in Favor of Denying Access

Defendant and standby counsel seek [redacted] access [redacted] who has been captured in the midst of an ongoing war [redacted] Beyond this, they ask the Court to require the United States to deliver [redacted] to the Court so that he can testify. In support of their unprecedented request for access [redacted] in the thick of war, the defendant and standby counsel offer not even a scintilla of evidence that the Government has acted in bad faith, and they do not provide a hint (other than unsubstantiated and inaccurate press reports) to the Government why they think [redacted] testimony is "vital" to the defense. [redacted]

because there are dire national security consequences should defendant's and standby counsel's requests be granted, because there has been an insufficient showing that will provide material and exculpatory testimony, and because *Brady* material, the request should be denied.

A. The Defendant and Standby Counsel have Failed to Demonstrate Bad Faith

Standby counsel assert, without any basis, that the United States a "secret trove of witnesses" and therefore demand access to him to "level [the] playing field." (Mem. at 3). The claim fails on its face. As is clear the United States Government is not collecting information to gain a tactical advantage in this prosecution.

The burden to prove bad faith rests with the defense. *See United States v. Dring*, 930 F.2d at 694; *cf. United States v. Armstrong*, 517 U.S. 456, 470 (1996) (defendant must make "credible showing" of disparate treatment to obtain discovery related to selective prosecution claim). To meet this burden, standby counsel offer no evidence of bad faith, but only cynical conjecture about a "secret trove" of potential prosecution witnesses that purportedly are being concealed from them. The allegation is not so much inadequate as it is inaccurate, for standby counsel's contention reflects a misapprehension of the war against *al Qaeda*, which as noted above, is being waged on multiple fronts by multiple countries wholly unconnected to the

prosecution of this case. [redacted] Therefore, this is not an instance where the Court needs to level the playing field.

It is for this reason that the sparse authority cited by standby counsel is wholly inapplicable. For example, in *Walton* (Mem. at 3), the Fourth Circuit explicitly noted that it was "most concerned with the possible prejudice which might occur to a defendant when a government witness is placed in protective custody." 602 F.2d at 1179 (emphasis added). In *Walton*, it was the prosecution, and only the prosecution, that held the key to access. It is in this context that the Fourth Circuit and other courts have held that the prosecution may not use the exclusive access solely for its benefit. *Id.*; *United States v. Fischel*, 686 F.2d at 1091 ("the issue narrows down to whether the government may withhold the address of an informant who is known to the defendant, when to do so presumably renders the defendant unable to seek an interview with the informant while the government has free access to him"). Here, by contrast, neither prosecutors nor standby counsel have access to the so-called witness [redacted]

This case is therefore different and involves a confluence of overlapping responsibilities that the Executive Branch has in the current war environment. As such, this case is more akin to

Valenzuela-Bernal, where the Supreme Court dealt with the "dual responsibility" of the Executive Branch "when confronted with incidents such as that which resulted in the apprehension of [the defendant.]." 458 U.S. at 864. In *Valenzuela-Bernal*, the dual responsibilities of the Executive Branch were criminal prosecution and enforcement of the immigration laws passed by Congress. *Id.* Because the prosecution of the defendant and the summary deportation of the potential witnesses were both valid exercises of authority, the Court observed that it "simply will not do . . . to minimize the Government's dilemma in cases like this with statements such as '[t]he prosecution may not deny access to a witness by hiding him out.'" *Id.* at 865-66 (quoting *Freeman v. State of Georgia*, 599 F.2d 65 (5th Cir. 1979)). In the end, "[n]o onus, in the sense of 'hiding out' or 'concealing' witnesses, attached to the Government by reason of its discharge of the obligations imposed upon it by Congress; its exercise of these manifold responsibilities is not to be judged by standards that might be appropriate if the Government's only responsibility were to prosecute a criminal offense." *Id.* at 866.

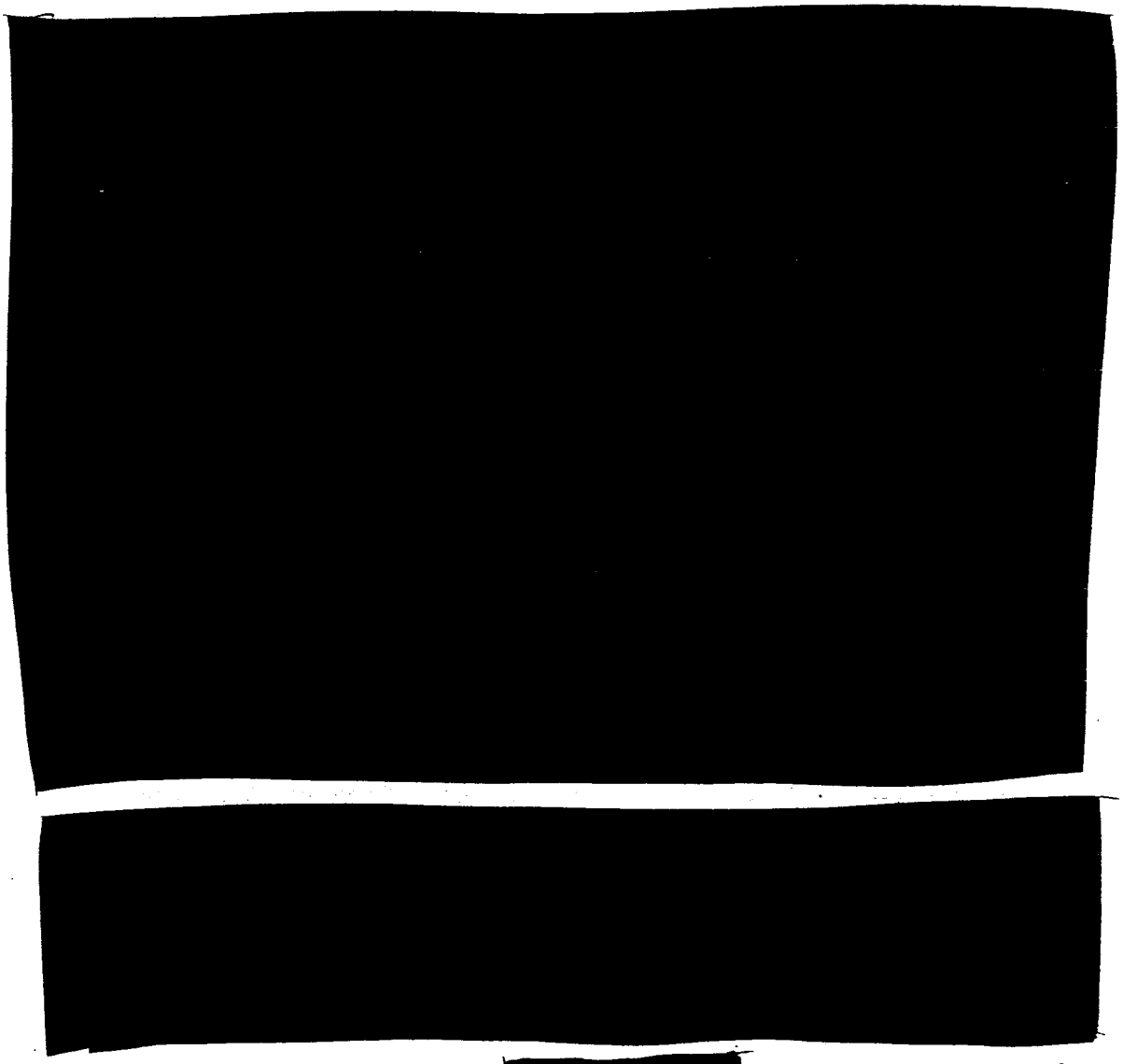
Consistent with this principle, the courts that have confronted the question of competing Executive Branch responsibilities in the context of a defendant's right to compel process have routinely required some credible showing of bad faith before finding a constitutional foul. As previously discussed, the threshold requirement is that the defendant to show bad faith in the deportation of a potential witness to establish constitutional error. *See United States v. Pena-Gutierrez*, 222 F.3d 1080, 1085 (9th Cir.) ("Pena-Gutierrez has made no showing that the government departed from normal practice in deporting Macias-Limon. Nor can Pena-Gutierrez demonstrate that the government deported Macias-Limon to 'gain an unfair tactical advantage

over him at trial.'") (quoting *United States v. Dring*, 930 F.2d at 695), *cert. denied*, 531 U.S. 1057 (2000); *United States v. Hsin-Yung*, 97 F. Supp.2d 24, 30 (D.D.C. 2000) (defendants fail to demonstrate bad faith in deportation of 200 potential witnesses). Thus, the absence of bad faith is properly fatal to a defendant's claim that it was error for the prosecutor to acquiesce to the transfer to a foreign country of a prisoner who had exculpatory evidence. As the Ninth Circuit has explained, there can be no bad faith where the prosecutor "had no control over the transfer decision," and "did not know when or even whether [witness's] request for a transfer would be granted." *United States v. Armenta*, 69 F.3d 304, 307 (9th Cir. 1995).

As in those cases, the prosecutors in this case do not [redacted] and they will not be calling him as a witness at this trial.[8] As such, there can be no claim, and there is no [redacted]

evidence supporting a claim

In addition, even where prosecutors have some control over a witness, they cannot be forced to facilitate a defendant's use of that witness at trial if to do so would conflict with



legitimate government interests. For example, absent bad faith, prosecutors cannot be forced into a Hobson's choice to immunize criminals who may have exculpatory information or face dismissal of charges against a defendant. Thus, even though, unlike the decision to deport aliens, the decision not to immunize a potential defense witness is made by the prosecution, the courts have demonstrated extreme reluctance, out of respect for separation of powers principles, to interfere in such determinations. While a court may possess the inherent authority to leave "the ultimate assessment with the prosecutor by advising that trial of the defendant will continue only if the witness's testimony is immunized," the courts have held that "confronting the prosecutor with a choice between terminating prosecution of the defendant or jeopardizing prosecution of the witness is not a task congenial to the judicial function." *United States v. Turkish*, 623 F.2d at 776; *see also United States v. Thevis*, 665 F.2d at 639-40 ("the immunity decision requires a balancing of public interests which should be left to the executive branch."). Critical to the courts' deference to the Executive Branch is that the prosecution be allowed to exercise its discretion not to immunize a witness for a proper reason. *See Autry v. Estelle*, 706 F.2d 1394, 1402 (5th Cir. 1983) (capital case: "a state prisoner seeking federal habeas must show that the state had no legitimate purpose for refusing immunity and did so to deprive the defense of essential exculpatory testimony"). In this regard, even if a prosecutor has selectively used the authority to immunize witnesses favorable to the government, thus tilting the playing field towards the government, the courts have not found violations of the compulsion process rights of defendants. *Id.* at 1401 ("there is no requirement of symmetry in the treatment of prosecution and defense witnesses"); *United States v. Gravely*, 840 F.2d at 1160 ("The mere fact that the

government chose to immunize some witnesses but not others does not constitute misconduct."); *United States v. Turkish*, 623 F.2d at 774-75 (while there is "surface appeal to the equal availability of use immunity for prosecution and defense witnesses," "such a principle will not support a constitutional interpretation of Fifth Amendment fairness."). Surely, the separation of powers concerns are correspondingly greater when the Hobson's choice is between foregoing the prosecution of an individual accused of the most serious crimes and foregoing the [redacted] prevention of additional atrocities.

Indeed, applying these principles to this case, it is plain that the Government has acted in good faith. On this score, it is important to place the motions at issue "in the context of foreign relations and national security, where a court's deference to the political branches of our national government is considerable." *Hamdi v. Rumsfeld*, 296 F.3d at 281. "The deference extends to military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle." *Id.* at 281. Here, the President, pursuant to his inherent constitutional authority as Commander in Chief, and with the explicit approval of Congress, has authorized departments of the Executive Branch that are not acting as part of the prosecution in this case to conduct sensitive intelligence and military operations. He has done this to safeguard national security, and there is every reason to believe this paramount objective has been well-served. In this realm, the President's authority is at its zenith, as is the courts' traditional reluctance to question its use. *See id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring)); *see also Regan v. Wald*, 468 U.S. 222, 242 (1984) ("matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted

to the political branches of government as to be largely immune from judicial inquiry or interference'") (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)); *Navy v. Egan*, 484 U.S. 518, 527 (1988) ("authority to classify and control access to information bearing on national security . . . flows primarily from [the] constitutional investment of power in the President [in U.S. Const. Art. II, § 2] and exists quite apart from any explicit congressional grant"); *Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."); *Tiffany v. United States*, 931 F.2d 271, 275 (4th Cir. 1991) ("Because providing for the national security is both a duty and a power explicitly reserved by the Constitution to the executive and legislative branches of government, the judiciary must proceed in this case with circumspection."). Indeed, aside from a constitutional clash, judicial deference on these matters helps to avoid "a conflict between judicial and military opinion" that might be "highly comforting to enemies of the United States." *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950).

Viewed in this context, there can be no doubt that the United States has acted in good faith [redacted] and nothing standby counsel or the defendant has alleged weakens that claim. Other departments of the Government have fulfilled their constitutional mandate to engage a hostile enemy that has declared and carried out unparalleled attacks against the United States. *Hamdi v. Rumsfeld*, 296 F.3d at 283 ("The unconventional aspects of the present struggle do not make its stakes any less grave."). A crucial component of this mandate is the capture [redacted] of those aligned with *al Qaeda* by the United States or its partners, and the related need to permit these agencies and foreign governments to pursue their vital tasks

uninhibited by litigation. *Id.* ("The executive is best prepared to exercise the military judgment attending the capture of alleged combatants."). This in turn requires respect for the assessment of the Executive Branch that there are uniquely compelling reasons [redacted] even if one effect is to deny both the defense and the prosecution direct access [redacted] *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (President "has the better opportunity of knowing the conditions which prevail in foreign countries, . . . especially . . . in time of war[,]" and "[h]e has his confidential sources of information").

[redacted] Accordingly, defendant's and standby counsel's motions should be denied.

B. The Balance of Interests Weighs Heavily Against Access

Separate from the question of good faith, the balance of the interests weighs overwhelmingly against permitting the defendant or standby counsel to have access [redacted], or to permit him to be a witness at trial [redacted]

[redacted]

[redacted] On the other hand, a review of the information provided thus far indicates that [redacted] would not be a "material" witness for the defendant, even if he chose to incriminate himself by testifying at a trial, and that any useful information [redacted] made available for use by the defendant in other ways. Therefore, the motions should be denied.

1. The Government's Compelling National Security Interests

A defendant's right to compulsory process can be limited by "countervailing public interests." "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. at 307 (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)). "[U]nless the Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered." *United States v. United States District Court*, 407 U.S. 297, 312 (1972).

"History eloquently attests that grave problems of national security and foreign policy are by no means limited to times of formally declared war." *Haig v. Agee*, 453 U.S. at 303. The current conflict is no exception. Thus, the President must be able to utilize fully his constitutional authority as Commander in Chief. This means that the President, who is "best positioned to comprehend this global war in its full context," *Hamdi v. Rumsfeld*, 296 F.3d at 283, must have the virtually unfettered ability to employ the military and intelligence agencies that operate in the front lines. Of course, by extension, these agencies are cloaked with the same

constitutional authority as their Commander. *See Webster v. Doe*, 486 U.S. 592, 605-06 (1988) (O'Connor, J., concurring in part, dissenting in part)[redacted]

The decisions of the Fourth Circuit indicate that such national security interests carry overwhelming weight when compared against a defendant's interest in access to a possible witness. In *United States v. Truong Dinh Hung*, *supra*, the Vietnamese ambassador to the United

Nations was an unindicted coconspirator in an espionage case. The State Department designated him *persona non grata* and asked Vietnam to recall him, which the Vietnamese government did, thus making him unavailable for the defendant. The Fourth Circuit held that there was no violation of the defendant's rights. It distinguished cases finding error in the deportation of aliens who might be potential witnesses by explaining that the government's interest in regulating diplomats was "much more compelling than the government's interest in deporting illegal aliens." 629 F.2d at 929. The court explained that "while the government's interest in deporting illegal aliens may be outweighed by the defendant's right to compulsory process, the balance does not tip so clearly in the defendant's favor when the national government requests the recall of an errant representative of another nation." *Id.*[10] If the "State Department's interest in holding foreign diplomats to acceptable standards of conduct," *id.* at 929, has such substantial weight when compared against a defendant's interest in securing a witness, it follows *a fortiori* that national security interest in precluding access [redacted] carries even more overwhelming weight. *See Haig v. Agee*, *supra*..

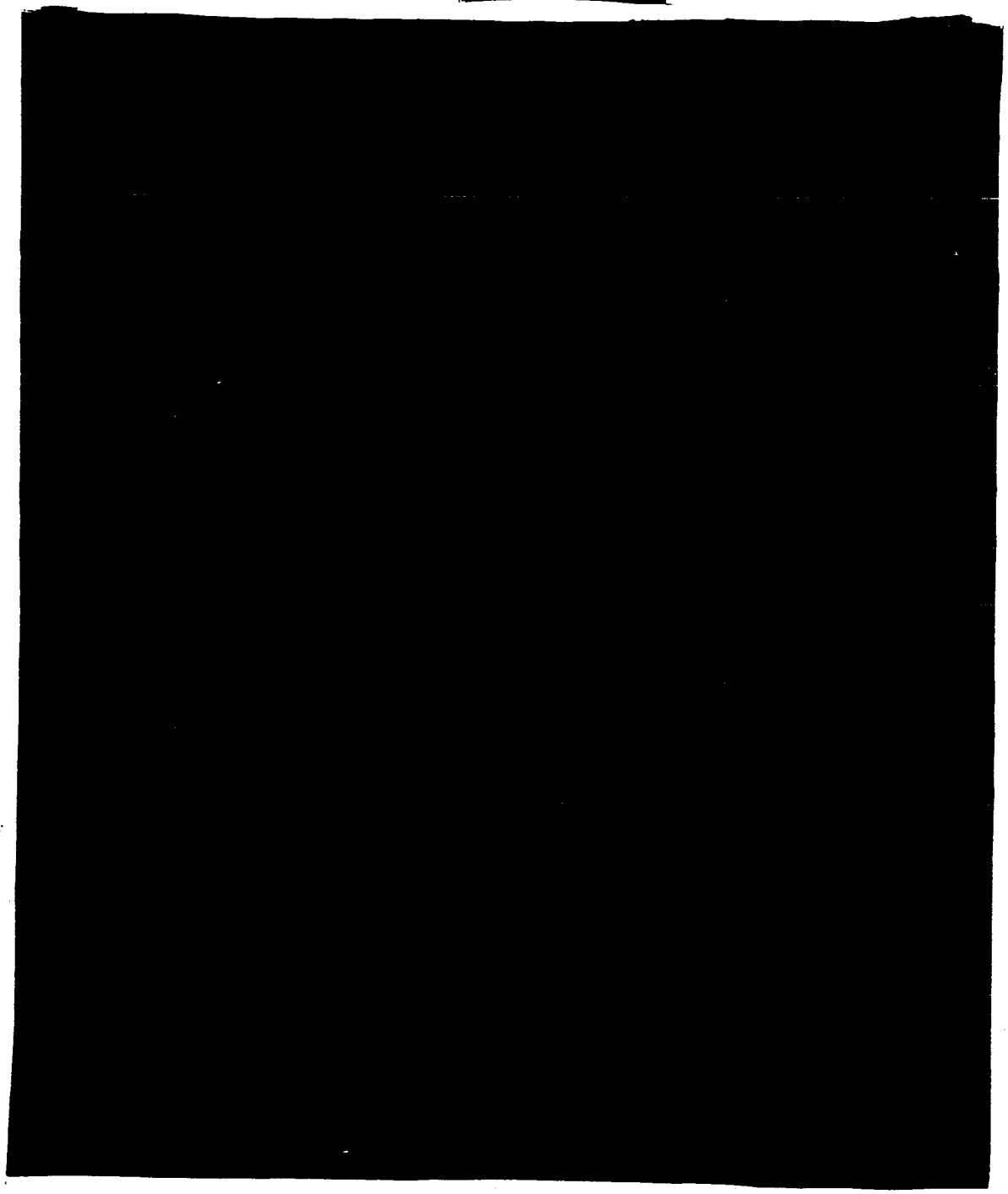
[redacted]

[10] Of course, the Fourth Circuit's comments regarding the comparative interests of the enforcement of the immigration laws were made obsolete by the Supreme Court's decision in *Valenzuela-Bernal*, *supra*.

[redacted]

[redacted] vastly outweigh any interest that the defendant in this case can have in securing access [redacted] - particularly where defendant and his standby counsel have made no adequate showing demonstrating that [redacted] would have material and exculpatory testimony to offer. [redacted] The observations of the Supreme Court in rejecting the petition for *habeas corpus* filed by certain German prisoners after World War II in *Johnson v. Eisentrager, supra*, are also apt here: "It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." 339 U.S. at 779. [redacted] The vital interests of the Nation [redacted] overwhelmingly weigh against taking such an unprecedented step.

[redacted]



Third, a decision to grant the defendant access [redacted] invites the danger of abuse, [redacted]

These same risks equally raise insuperable barriers against any attempt to make [redacted] available to testify on the defendant's behalf. Indeed, many of these risks would be magnified many times over if [redacted] presence for trial were required [redacted]

[redacted]

These are just some of the dangers raised by the motions at issue. There are others too sensitive to mention in this pleading, [redacted] It suffices to say, however, that there may be other unknown, but deleterious consequences from granting the requested relief, thus further tipping the scales against the requested relief. *See Hamdi v. Rumsfeld*, 296 F.3d at 283 ("The federal courts have many strengths, but the conduct of combat operations has been left to others.").

2. The Defendant's Minimal Interests

Given the overwhelming national security interests that require precluding access [redacted] there could be no question of permitting such access unless the defendant and standby counsel had presented an extraordinary showing demonstrating, by presenting supporting evidence, that [redacted] clearly possessed unique and vital information critical to the defense and that he would present that information at trial. Instead, the defendant and standby counsel have failed to substantiate any claim that [redacted] can and will provide exculpatory testimony. Although much of the basis for their belief in the potential materiality of [redacted] has been submitted *ex parte*, the Government nonetheless submits that the

defendant has failed to meet his burden in this regard.[12]

[redacted]

While the Government recognizes its continuing obligation to learn of and provide exculpatory material under *Brady*, the review conducted thus far leads to the good faith conclusion that [redacted] is not likely to be a material witness for the defendant. Thus, for this reason alone the motions should be denied. *See United States v. Hsin-Yung*, 97 F. Supp.2d at 30 ("INS agents interviewed all the returned persons, many of whom did not furnish any information; of those who did furnish information, the INS agents took notes, which were reviewed by two Assistant United States Attorneys and found to contain no information material or helpful to the defense.").

Second, the unsubstantiated and general assertions of materiality by the defendant and/or standby counsel are insufficient to justify the extraordinary relief requested in this case. We are unaware of any case in which a criminal defendant has obtained access in the midst of an ongoing war [redacted] The Court should not take the extraordinary and unprecedented step of being the

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[12] While standby counsel may not want to reveal the core of their strategy, we believe they should be required to provide some indication of the areas where they believe [redacted] uniquely has exculpatory information to offer. *See United States v. Smith*, 780 F.2d at 1106 (sufficient for defendant to submit a "general statement of the areas the evidence will cover" under § 5 of CIPA). This is appropriate in this case since both standby counsel and the defendant may be operating on erroneous assumptions about the Government's case that lead them to believe that [redacted] has exculpatory information. Similarly, disclosure of the areas that [redacted] may have information about is important because it might permit the Government to enter into stipulations or offer unclassified summaries for use at trial.

first to order such access based merely on self-serving speculation by the defendant or standby counsel that [redacted] might say something to exculpate the defendant. Rather, they must present other evidence that supports specific claims of materiality. *See United States v. Blevins*, 960 F.2d at 1259 (defendant must explain "as precisely as possible what testimony he thinks the informer could give and how this testimony would be relevant to a material issue of guilt or innocence"); *United States v. Ridley*, 814 F. Supp. at 996 (same). This requirement is particularly appropriate in this case given both the defendant's extensive admissions to date about his association with *al Qaeda* and his training at camps in Afghanistan, as well as his misunderstanding of the elements of the offenses with which he is charged. *See Roussell v. Jeane*, 842 F.2d at 1517 (testimony not material as it was unrelated to elements of offense).[13] It is also appropriate given the potential for abuse by the defendant, who may be seeking [redacted] appearance in the United States for reasons having nothing to do with the expected

[redacted]

substance of his testimony.[14]

Third, the defendant and standby counsel have presented no evidence to indicate that [redacted] actually will testify [redacted] Given his obvious exposure to prosecution based alone on incriminating statements he inevitably would have to make if he testified, and the duty to advise him of the consequences of making such statements, it is highly likely that [redacted] will forego testifying without immunity. And, under the circumstances having solely to do with his status as a terrorist, it is safe to assume that the Government will not be predisposed to offer [redacted] immunity.

Fourth, both the defendant and standby counsel have failed to establish the uniqueness of [redacted] expected testimony. *United States v. Harley*, 682 F.2d at 1020 (rejecting claim for privileged information because defendant failed to establish the non-existence of "alternative means of getting at the same point"). Applying this principle to this case, it is entirely possible that some of what the defendant and standby counsel wish [redacted] to testify about is something to which the Government will stipulate to, or about which the Government would seek to offer an unclassified summary. *See* 18 U.S.C. App. 3, § 6(c)(1); *United States v. Collins*, 603 F. Supp. 301, 304 (S.D. Fla. 1985) ("Section 6(c) requires that a balancing test be made in order to guarantee that the defendant is not prejudiced by any substitution. Simply put, section 6(c) does not preclude presentation of the defendant's story to the jury, it merely allows some restriction on the manner in which the story will be told."). For example, the existence and role

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[14] For example, Moussaou[redacted]

of others who may be equally or more culpable, which the defendant may wish to offer in mitigation of the death penalty, is a category of information that is subject to substitution.[15] Thus, based on the record as it currently exists, the balance of interests weighs overwhelmingly against the defendant and standby counsel.[16]

To the extent this case requires a balancing of interests, the results are extraordinarily lopsided.[17] On the one side, there is the Government's good faith efforts to further compelling

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[15] Of course, the universe of who would qualify as an equally or more culpable participant in the "offense" is something that may be the subject of disagreement, *see United States v. Beckford*, 962 F. Supp. 804 (E.D.Va. 1997), but the resolution of this issue likely would not affect the Government's ability to provide acceptable substitutions of some classified information material to this issue.

[16] Standby counsel suggest that there is a different set of rules governing the request, citing 18 U.S.C. § 3005. (Mem. at 3). However, this statute merely provides that which is already provided for in the law: the same compulsory process to obtain the testimony of a "lawful witness" as is permitted the Government. Moreover, standby counsel fail to cite any authority that suggests this statute provides more compulsory process than required by the Constitution. Thus, there is no independent basis under this statute to grant the requested relief.

[17] Even apart from the balancing of interests described in text, there is properly no constitutional issue presented by denial of access [redacted] because [redacted] of the prosecution of a war. As noted above, the right of compulsory process does not necessarily require access to witnesses [redacted] Such witnesses are simply unavailable to a defendant, and their unavailability raises no constitutional problem with continuing the prosecution. Similarly, an individual who [redacted] as part of the prosecution of a war effort should also be considered unavailable to a criminal defendant, and that unavailability should not be considered to infringe any constitutional rights of the defendant. *See United States v. Truong Dinh Hung*, 629 F.2d at 928–29 ("[w]hen a foreign diplomat

interest in defending the Nation during war[redacted] and that could potentially save thousands of lives. On the other side of the balance are the self-serving assertions -- unsupported by any specifics and by any corroborating evidence -- claiming that[redacted] will uniquely provide exculpatory testimony. There is also the distinct possibility that efforts by the defendant to gain access[redacted] are undertaken precisely in order to use the court system to disrup[redacted] Given such interests at stake, there can be no basis for this Court to take the unprecedented step of ordering access[redacted] based on a flimsy showing of need.

III. Conclusion

For the reasons stated herein, as well as the attached Declarations, the motions for access to, and a writ *ad testificandum*, for[redacted] should be denied.

Respectfully Submitted,

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By: _____
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becomes engaged in outrageous and perhaps sinister conduct . . . the United States government cannot decline to act," even if that would mean making the diplomat unavailable as a witness for the criminal trial of his coconspirator).

CERTIFICATE OF SERVICE

I certify that on October 1, 2002, a copy of the foregoing Government's Response (without a copy of the *ex parte* submissions) was provided to the Court Security Officer for service upon:

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Ex Parte Attachment Remains Classified