~~TOP SECRET~~ [redacted]

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

FILED
MAR 10 2003
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

UNITED STATES OF AMERICA,

v.

ZACARIAS MOUSSAOUI,
a/k/a "Shaqil"
a/k/a "Abu Khalid
al Sahrawi,"

Defendant.

Criminal No. 01-455-A

UNDER SEAL

FILED WITH
COURT SECURITY OFFICER
DATE 3-10-2003

MEMORANDUM OPINION

I. Introduction

The Court has already ruled on several defense motions for pretrial access to, and to compel the trial appearances of, [redacted] al Qaeda associates captured in the post-September 11 "War on Terrorism" (Docket #s [redacted]). This Memorandum Opinion is a more formal explanation of the Court's decision.

[1] These motions have been on the Court's docket since mid-September, 2002. On October 2, 2002, the United States was ordered to advise the Court of its position as to these defense requests by December 2, 2002. On December 2, 2002, the United States requested an additional forty-five days to respond. The Court granted the request and directed the United States to submit its response by January 9, 2003. On January 9, 2003, the Court granted yet another request by the United States for additional time to respond. The United States filed its consolidated Response on January 13, 2003. Oral argument was held on January 30, 2003 in a sealed courtroom. Because classified information was discussed, Moussaoui was not present. However, per the Court's instructions, the pro se defendant has since been provided with a heavily redacted copy of the transcript of the proceedings.

In these motions, the defense claims that [redacted] are critical to Moussaoui's ability to defend against the charges in the indictment and to avoid a sentence of death. The United States categorically opposes these motions, arguing that to grant the defense any kind of pretrial access to these detainees or to grant the defense requests to produce them at trial "would entangle the court in the post hoc micro-management of the conduct of the war." (Consolidated Response ("CR") at 1.) The specific issues raised by the instant motions and the factual environment in which they arise are unprecedented, and graphically underscore the difficulty of balancing the due process rights of a defendant charged with capital offenses against the United States' interest in fighting a war against terrorism.

II. Factual Background

The United States has charged the defendant, who is a French citizen of Moroccan origin, with Conspiracy to Commit Acts of Terrorism Transcending National Boundaries in violation of 18 U.S.C. § 2332(a)(2) and (c) (Count I), Conspiracy to Commit Aircraft Piracy in violation of 18 U.S.C. § 46502(a)(1)(A) and (a)(2)(B) (Count II), Conspiracy to Destroy Aircraft in violation of 18 U.S.C. §§ 32(a)(7) and 34 (Count III), Conspiracy to Use Weapons of Mass Destruction in violation of 18 U.S.C. § 2332a(a) (Count IV), Conspiracy to Murder United States Employees in

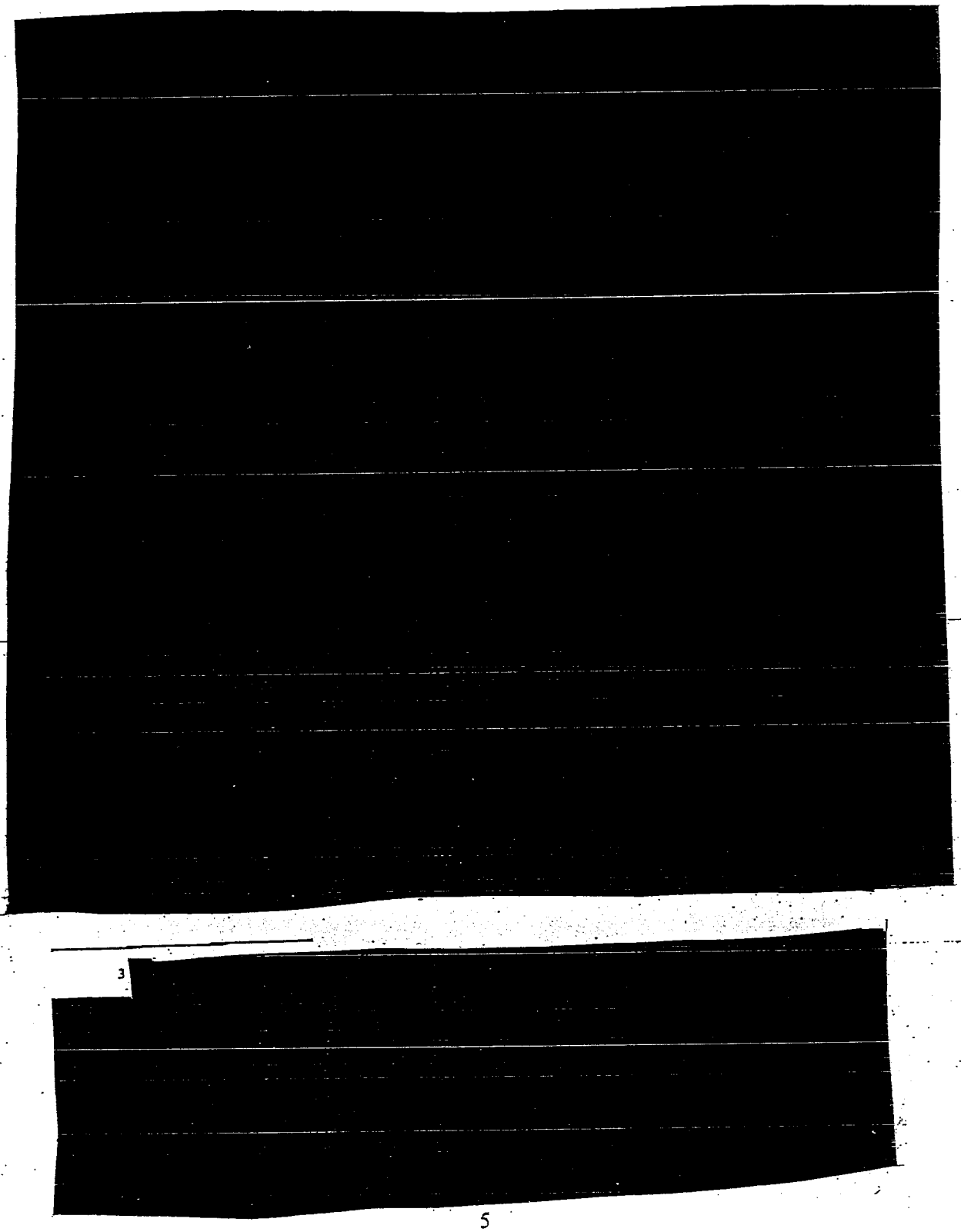
violation of 18 U.S.C. §§ 1114 and 1117 (Count V), and Conspiracy to Destroy Property in violation of 18 U.S.C. § 844(f),(i) and (n) (Count VI). Although the allegations in the indictment and the evidence of which the Court is aware are circumstantial, the United States' apparent theory of the case is that Moussaoui was to pilot a fifth hijacked airplane and crash it into the White House. (Tr. Jan. 30, 2003 closed hearing ("Tr.") at 23, 25, 62-63.) If convicted of any of the first four counts, the defendant faces the death penalty.

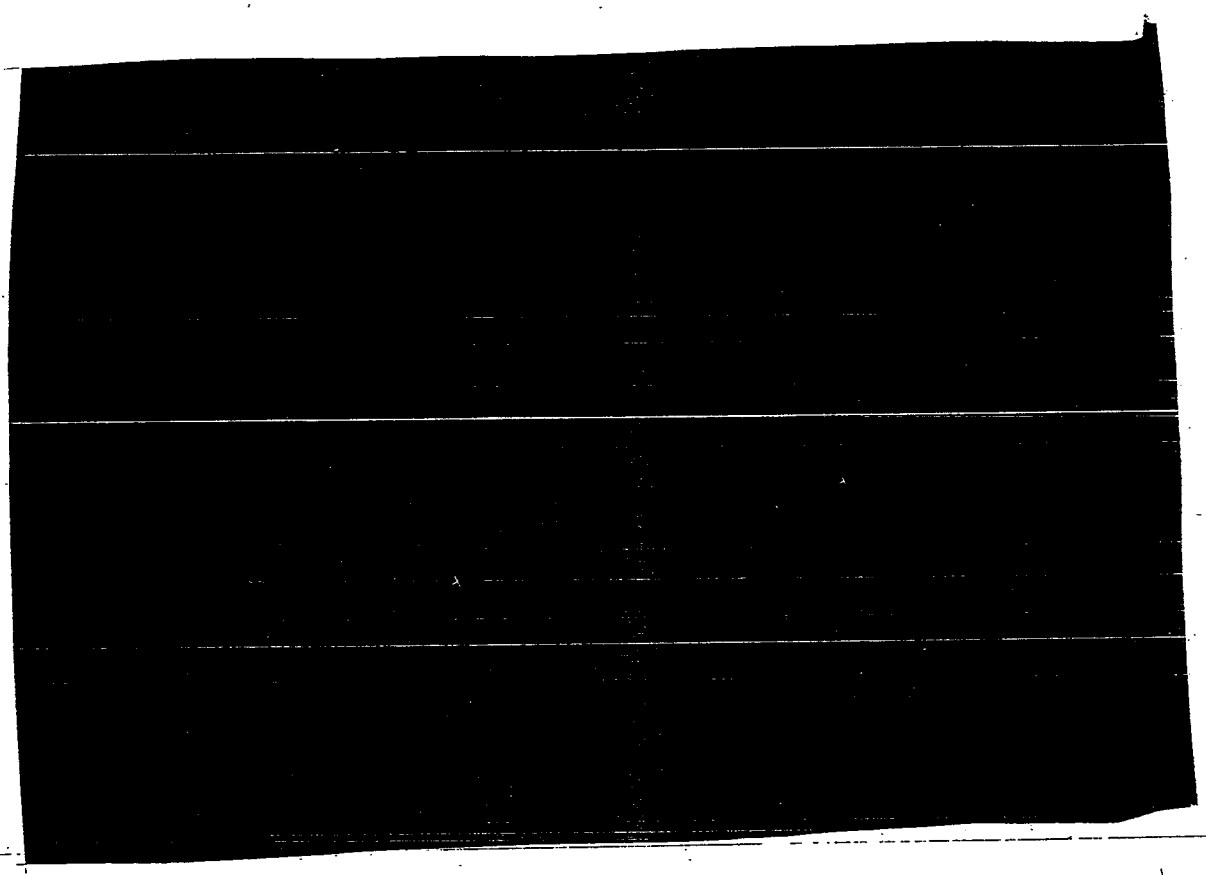
Although he has readily admitted to being a member of al Qaeda and has pledged allegiance to Osama bin Laden, Moussaoui has consistently claimed that he was not a participant in the September 11 plot.[2] Instead, he suggests that he was part of another operation to occur outside the United States after September 11 involving different members of al Qaeda. [redacted]

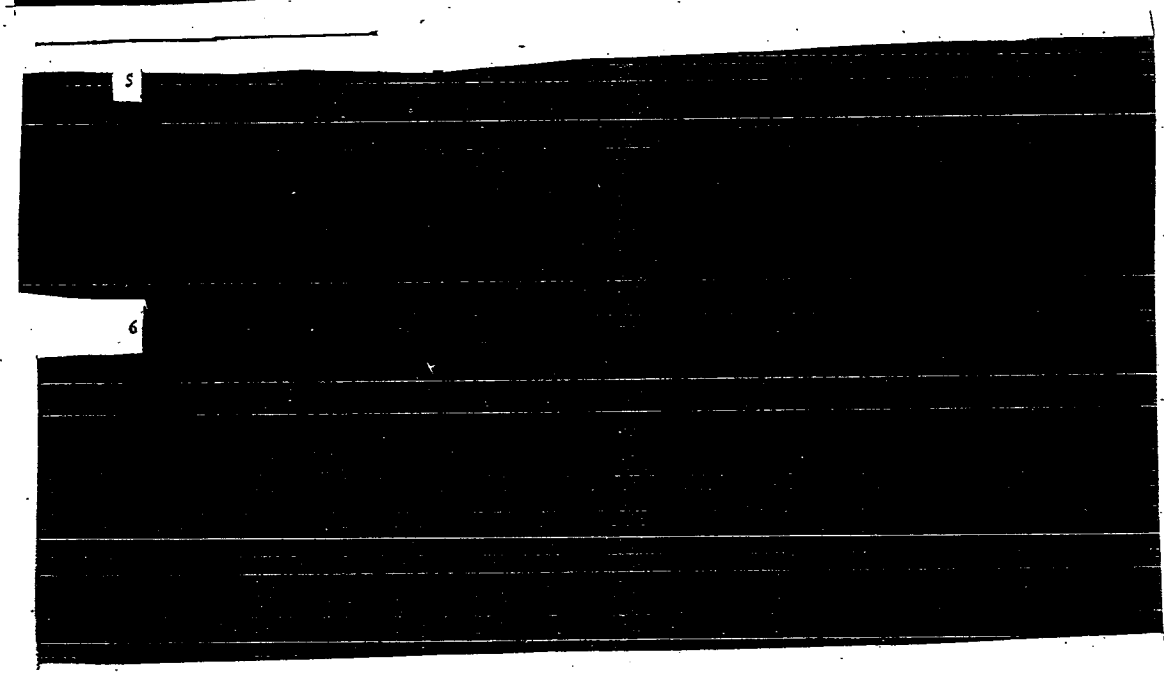
[2] [redacted]

[redacted].) The defense argues that [redacted] could provide the following evidence which would undercut the Government's theory of the defendant's culpability:

[redacted]







[redacted]

[7] [redacted]

[8] See July 23, 2002 Letter from United States to Moussaoui and [proposed] Statement of Facts.

[9] [redacted]

[redacted] did not mention Moussaoui, any "twentieth hijacker" or a plan for a fifth plane to crash into the White House.

[redacted]

[redacted]

III. Discussion

The Government strenuously opposes these defense motions for pretrial access to, and to compel the trial appearances of, any [redacted] detainees arguing that its national security interest in gathering "intelligence vital to saving American lives and

winning an ongoing war... is easily sufficient to warrant denying the defense motions."[10] (CR at 20.) Specifically, it argues that an essential component of the ongoing war against terrorism is its ability [redacted], without judicial interference, enemies it has successfully captured [redacted][11]. To support its argument, the United States relies heavily on United States v. Valenzuela-Bernal, 458 U.S. 858 (1982) (finding no Fifth or Sixth Amendment violation when the United States deported an alien witness who was determined by the Government not to posses material evidence relevant to the prosecution or the defense), and Buie v. Sullivan, 923 F.2d 10 (2nd Cir. 1990) (finding that the State's arrest and refusal to

[10] In its Consolidated Response, [redacted], the United States argued that the defense requests to compel the trial appearances of [redacted] were premature because the defense might determine, [redacted] that their testimony would not be of value to the defendant. Moussaoui has been unwavering in his desire to have these individuals appear as witnesses on his behalf, and standby counsel, too, have unequivocally indicated that, if thrust into the role of trial counsel, they would call [redacted] as a witness on Moussaoui's behalf. (Tr. at 11-12-)

[11] [redacted]

immunize an exculpatory witness, who asserted his Fifth Amendment privilege when called as a defense witness at trial, did not violate defendant's Sixth Amendment right), for the general proposition that when the Government's good faith pursuit of a legitimate obligation bars a defendant from being able to call an exculpatory witness at trial, a defendant's due process rights are not violated. (CR at 2-30; Tr. at 34-41.)

In response, standby counsel contend that the Government's reliance on Valenzuela-Bernal and its progeny is misplaced because those cases concern "lost" evidence. Rather, the defense contends that Moussaoui's Sixth Amendment right to secure the trial testimony of favorable witnesses outweighs the national security concerns articulated by the United States.

A. Good Faith of United States Not Dispositive

"Despite the clear allocation of war powers to the political branches, judicial deference to executive decisions made in the name of war is not unlimited." Hamdi v. Rumsfeld, 316 F.3d 450, 464 (4th Cir. 2003). "The duty of the judicial branch to protect [individual rights] does not simply cease whenever our military forces are committed by the political branches to armed conflict." Id. Rather, certain protections guaranteed by the Bill of Rights are triggered when an individual is charged with a crime. See id. at 465, 475.

The Government's good faith interest in protecting national

security does not categorically override a defendant's right to a fair trial. See United States v. Fernandez, 913 F.2d 148, 154 (4th Cir. 1990). This right includes the Sixth Amendment right to compulsory process for favorable witnesses. See U.S. Const. Amend. VI; Taylor v. Illinois, 484 U.S. 400, 408 (1988); Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987); Washington v. Texas, 388 U.S. 14, 19 (1967); Chambers v. Mississippi, 410 U.S. 284, 302 (1973).[12]

The Court in no respect questions the good faith of the United States in its efforts to wage war against terrorism. (Tr. at 12.) However, because the individuals to whom the defense seeks access are not "lost," we agree with standby counsel that the good or bad faith of the Government is not dispositive. [redacted]

[12] The right to compulsory process is, however, not absolute. Rather, a defendant must make a plausible showing that the witness' testimony would be both material and favorable to his defense. See Valenzuela-Bernal, 458 U.S. at 867. Moreover, as the Government argues, a criminal defendant's ability to present favorable witness testimony may be tempered by the United States' good faith exercise of legitimate executive functions, including the rights to remove illegal aliens, see, e.g., Valenzuela-Bernal, 458 U.S. 858, to pursue a criminal prosecution of, rather than immunize, a witness who may exculpate a defendant, see United States v. Gravely, 840 F.2d 1156, 1160 (4th Cir. 1988), to request that a foreign government recall a national who commits criminal wrongdoing while in the United States, see United States v. Truong, 629 F.2d 908, 929 (4th Cir. 1980), or to prescribe and enforce regulations which limit the ability of its employees to cooperate with federal or state matters in which the United States is not a party, see Smith v. Cromer, 159 F.3d 875, 882-83 (4th Cir. 1998).

[redacted]

Moreover, unlike the "immunity cases" such as Buie, the issue is not whether the Court can force the Executive Branch to abandon its good faith pursuit of duties uniquely within its discretion. The Court is not being asked to preclude the United States from pursuing a criminal prosecution of these detainees, or to require the Government to immunize them. See United States v. Abbas, 74 F.3d 506, 511 (4th Cir. 1996)(finding that the privilege against self-incrimination outweighs the right to compulsory process); United States v. Gravely, 840 F.2d 1156, 1160 (4th Cir. 1988); United States v. Tindle, 808 F.2d 319, 326 (4th Cir. 1986)(finding that the Sixth Amendment gives the defendant the right to bring his witness to court to have the witness' non-privileged testimony heard). At issue is whether the Government may categorically refuse to produce exculpatory evidence, including witnesses [redacted], on the ground that such production may interfere with its war on terrorism. [redacted]

[redacted]

B. CIPA Analogy

Although these defense requests do not literally implicate the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3, which governs the relevance, use and admissibility of classified information at trial, the Court finds that it provides the most analogous legal framework within which to resolve these motions. (Tr. at 4.) By invoking Section 7 of CIPA in its Notice of Appeal, the Government also appears to acknowledge that this statute offers guidance as to how to resolve the instant dispute.[13]

Under CIPA, a defendant seeking to use classified information at trial must serve notice on the Government. 18 U.S.C. App. 3 § 5. To the extent that prospective trial testimony of [redacted] is "classified information" as defined in Section 1, the defense has complied with the notice provision.[14] Upon a motion by the United States,

[13] Section 7 permits the United States to take an interlocutory appeal of a district court's decision "authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information."

[14] Section 1 defines "classified information" as "any information or material which has been determined by the United States Government pursuant to an Executive Order, statute, or regulation to require protection against unauthorized disclosure

the court must make determinations concerning the use, relevance or admissibility of the designated classified information. 18 U.S.C. App. 3 § 6.[15] If the court finds the specific classified information the defense seeks to introduce at trial to be relevant, the United States may propose substitutes or alternatives to the public disclosure of the particular classified information. 18 U.S.C. App. 3 § 6(c). However, if the court determines that the proposed substitutes or alternatives do not provide the defendant with "substantially the same ability to make his defense as would disclosure of the specific classified information," the court must reject the proposed substitutes or alternatives. The court may not authorize the public disclosure of the classified information. Instead, the court must dismiss the indictment unless it determines that the interests of justice dictate some other measure. Id.; see also Fernandez, 913 F.2d at 154 (affirming a district court's dismissal of indictment after finding the Government's proposed substitutes for relevant classified information to be inadequate).

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for reasons of national security." Although a natural human being cannot be "classified information," the Government has classified nearly every shred of information concerning [redacted] detainees. See, e.g., fn. 21 infra.

[15] These determinations are governed by the Federal Rules of Evidence.

i. Relevance

Using the multi-step analysis mandated by CIPA, the Court has first considered the relevance of the prospective witnesses' testimony. Consistent with established principles of due process, the Government may not suppress evidence favorable to an accused that is "material either to guilt or punishment." Brady v. Maryland, 373 U.S. 83, 87 (1963); see also Jencks v. United States, 353 U.S. 657, 671 (1957); Rovario v. United States, 353 U.S. 53, 60-61 (1957). Evidence, whether documentary or testimonial, is material if it would tend to exculpate a defendant or reduce the penalty he potentially faces, id. at 88, create a reasonable doubt as to the defendant's guilt, see United States v. Agurs, 427 U.S. 97, 112 (1976), or undermine confidence in the outcome of the trial if suppressed, see United States v. Bagley, 473 U.S. 667, 679 (1985).

The United States concedes that [redacted] is a material witness,[16] but does not intend to offer [redacted] testimony at trial. Therefore, at issue is whether the defense has made a plausible showing that [redacted] could offer testimony that would be favorable to Moussaoui. See Valenzuela-Bernal, 458 U.S. at 867.

The defense has made a significant showing that [redacted] would be able to provide material, favorable testimony on the

[16] "[I]f [redacted] were available to either side, the prosecution or the defense, I can assure you he would be called as a witness." (Tr. at 15.)

defendant's behalf – both as to guilt and potential punishment.[17] See Valenzuela-Bernal, 458 U.S. at 867; Brady, 353 U.S. at 87; see also Woodson v. North Carolina, 428 U.S. 280 (1976) (requiring heightened reliability in death penalty cases).

[redacted]

[17] Under the Federal Death Penalty Act, a defendant becomes death-eligible in limited circumstances. See 18 U.S.C. § 3591(a)(2)(C) (requiring the United States to prove beyond a reasonable doubt that the defendant "intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act.") Moreover, under § 3592(a)(3) and (4), a defendant's minor participation in the offense and that equally culpable defendants will not be punished by death may be considered as mitigating factors.

[redacted]

[redacted] undermines the prosecution theory that Moussaoui was to pilot a fifth hijacked airplane into the White House. [redacted]

These facts support the defense theory that Moussaoui was not a participant in the charged conspiracies [redacted]

Even if [redacted] testimony could not help the defendant escape liability, [redacted] support the defense argument that Moussaoui should not be sentenced to death. Specifically, [redacted] may be considered mitigating evidence of the defendant's minor role in the offense(s). Those same [redacted], if believed, also undermine the Government's argument that Moussaoui's alleged lies

to federal officials at the time of his August, 2001 arrest should be considered in support of a sentence of death.[19]

The United States argues that, "in context," [redacted] would inculpate, rather than exculpate the defendant. (Tr. at 14, 24.) Although the United States may be able to present evidence, [redacted] which "place the defendant in the September 11 plot," (CR at 53-56; Tr. at 14, 16-17, 22-24, 26), the Court is fully satisfied that several [redacted], if believed, are both material and exculpatory. The ultimate determination as to the value of [redacted] testimony is for the jury, rather than the prosecution, to make in the context of the other evidence introduced at trial. See Rovario, 353 U.S. at 64, United States v. Colin, 928 F.2d 676, 679 (5th Cir. 1991), United States v. Tsutagawa, 500 F.2d 420, 423 (9th Cir. 1974).

The defense has not, however, made sufficient showings regarding the materiality and favorability of any testimony from [redacted]

[19] In paragraph 72 of the Second Superseding Indictment, the United States alleges that "[o]n or about August 17, 2001, [the defendant], while being interviewed by federal agents in Minneapolis, attempted to explain his presence in the United States by falsely stating that he was simply interested in learning how to fly." In its Opposition to standby counsel's Motion to Strike Notice of Intent to Seek a Sentence of Death, the Government contends that Moussaoui's alleged lies to federal agents constitute "acts" for purposes of 18 U.S.C. § 3592(a)(2)(C).

[redacted]

ii. Balancing

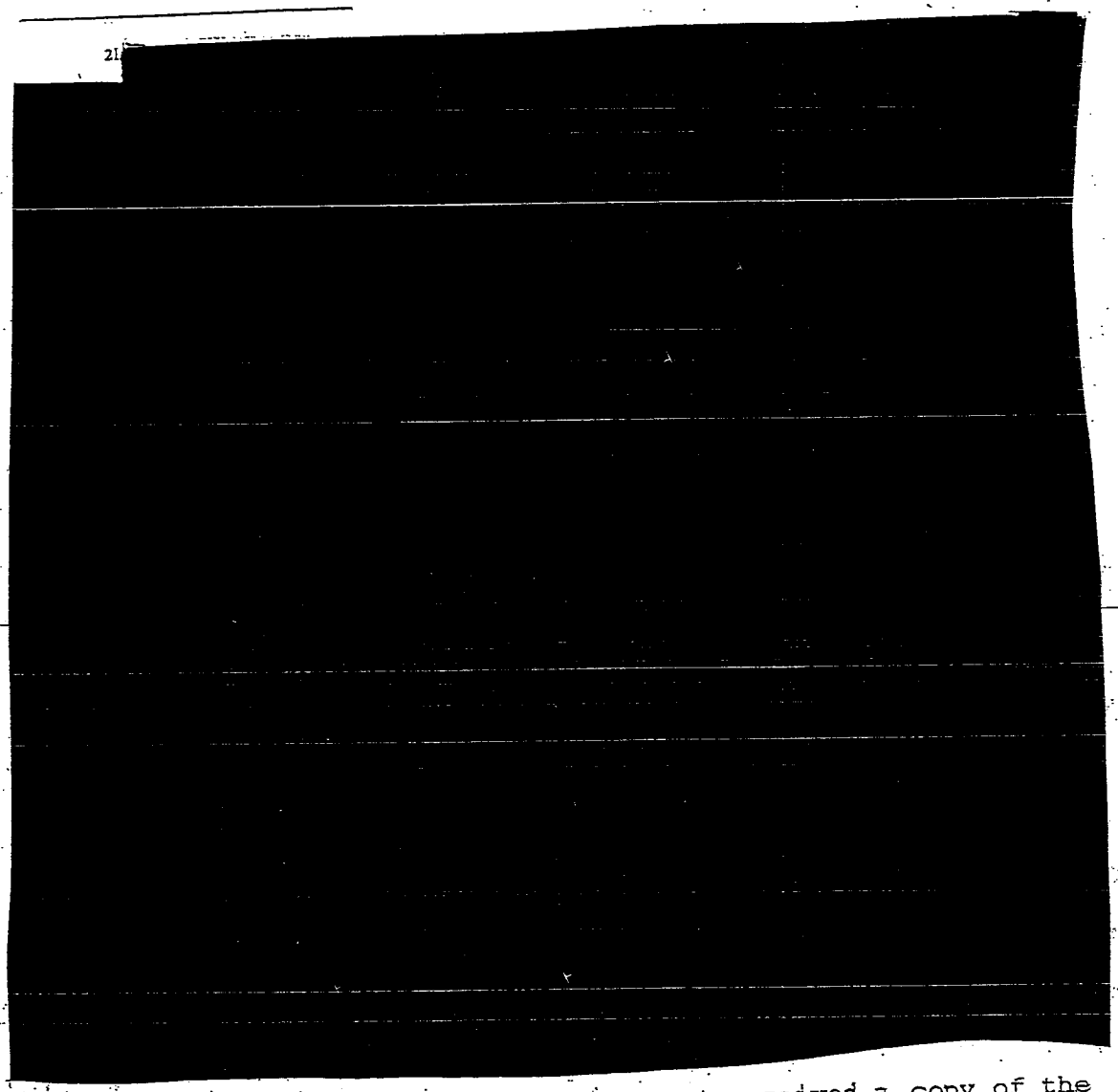
The United States maintains that a decision to grant the defense pretrial access to [redacted] or require his presence as a witness at trial would amount to improper judicial interference with the conduct of war [redacted] divert attention from military offensives abroad, and interrupt the flow of ongoing intelligence gathering. (CR at 62; Tr. at 39, 41.) The Government contends that these national security concerns outweigh any due process or Sixth Amendment rights of the defendant to present [redacted] testimony at

trial.

Although the initial relevance determination under CIPA must be done without regard for the Government's national security concerns, see United States v. Baptista-Rodriguez, 17 F.3d 1354, 1364 (11th Cir. 1994), the statute implicitly requires a court to balance the Government's national security interests against a defendant's right to mount an effective defense when it considers the adequacy of proposed substitutes or alternatives. See Fernandez, 913 F.2d at 154.[20] In this case, the United States has not proposed any alternatives to, or substitutes for, [redacted] trial testimony despite the pendency of these motions for over four months. In fact, during oral argument, the Assistant Attorney General conceded that he did not know what the Government's position would be with respect to alternatives, although trial counsel suggested that [redacted] might be used as evidence. (Tr. at 25, 37.) The level at which materials related to [redacted] detainees have been and continue to be classified, however, leads the Court to conclude

[20] Even if these motions were not resolved within the CIPA framework, traditionally, a court must balance the Government's justification for refusing to produce evidence against a defendant's right to a fair trial. "[A] proper balance... must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the [witness'] testimony, and other relevant factors." Rovario, 353 at 62; see also Smith v. Cromer, 159 F.3d 875 (4th Cir. 1998) (balancing the defendant's Sixth Amendment right to compulsory process for favorable witnesses against the Government's claim of privilege).

that the United States does not intend to offer any reasonable alternative to [redacted] trial testimony.[21] [redacted]



Moreover, on March 5, 2003, the Court received a copy of the transcript of the January 30, 2003 hearing, which had been redacted [redacted] per the Court's instructions so that an appropriate version could be provided to Moussaoui. The redacted transcript reveals that the United States continues to take the position that anything concerning [redacted] detainees is classified. In addition, for reasons not apparent to the Court, [redacted] has

[redacted]. Therefore, the Court must perform the critical balancing of interests in the absence of any proposed alternatives or substitutes.

The Court fully appreciates that the United States has a compelling interest in [redacted] captured key al Qaeda operatives [redacted]. However, this legitimate Government concern must be balanced against the equally compelling right of a defendant in a capital prosecution to receive the fair trial to which he is entitled under the Constitution and laws of the United States. Because a criminal trial is a quest for the truth, see Williams v. Florida, 399 U.S. 78, 80-81 (1970); United States v. Jackson, 757 F.2d 1486, 1494 (4th Cir. 1985)(Wilkinson, J., concurring); Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966), both the defendant and the public will be denied a fair trial if Moussaoui is deprived of the opportunity to present [redacted] testimony.

Although CIPA permits the ultimate sanction of dismissal if the Government is unwilling or unable to propose adequate substitutes or alternatives to the "classified information" at issue, the statute also requires courts to consider less draconian measures if "the interests of justice would not be

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also redacted any and all references to the prosecution's theory that Moussaoui was to fly a fifth hijacked airplane into the White House.

served by dismissal." 18 U.S.C. App. 3 § 6(e)(2). Accordingly, in the spirit of CIPA, the Court has carefully considered each of the specific concerns identified by the United States and has fashioned a resolution to the defense motions which accommodates most of the United States' security concerns while preserving Moussaoui's fundamental right to present the testimony of a favorable witness in this capital prosecution.

Although a criminal defendant or his counsel normally have an opportunity to meet with and prepare a witness whose testimony they intend to present at trial, in this case, the Court finds that granting standby counsel unmonitored, pretrial access to [redacted] would implicate too many of the security concerns identified by the United States.[22] However, [redacted] trial testimony can be secured under the following conditions.

[redacted]

[22] The defendant, himself, acknowledged that he understood that his ability to prepare his defense, including personally interviewing potential witnesses, would be limited when he insisted on proceeding pro se. (Tr. June 13, 2002 hearing at 32), and he has not requested pretrial access to this witness.

[23] [redacted]

[redacted]

These

conditions should resolve any Government concerns [redacted]

[redacted]

[redacted]

Further, the Government's suggestion that any defense access [redacted] will divert the military's attention from its offensive efforts abroad is unpersuasive. [redacted]

When the Government elected to bring Moussaoui to trial in this civilian tribunal, it assumed the responsibility of abiding by well-established principles of due process. See Jencks, 353 U.S. at 671 ("the Government which prosecutes an accused also has the duty to see that justice is done..."). To the extent that the United States seeks a categorical, "wartime" exception to the Sixth Amendment, it should reconsider whether the civilian criminal courts are the appropriate fora in which to prosecute alleged terrorists captured in the context of an ongoing war.

IV. Conclusion

For the foregoing reasons and for the additional reasons stated from the bench during the closed hearing held on January 30, 2003, defense motions docketed as #s [redacted] have been DENIED to the extent that they request

pretrial access to [redacted] and seek to compel the trial appearances of [redacted]; but have been GRANTED to the extent that they seek to compel the trial testimony [redacted] under the limitations articulated from the bench, in the Order of January 31, 2003 and in this Memorandum Opinion.

The Clerk is directed to forward copies of this Memorandum Opinion to counsel for the United States; standby defense counsel; and the Court Security Officer, who is to submit this Memorandum Opinion for classification review so that an appropriate version can be provided to the pro se defendant.

Entered this 10th day of March, 2003.

/S/

Leonie M. Brinkema
United States District Judge

Alexandria, Virginia