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	)	*TOP SECRET CLASSIFIED*
	)	*FILING/UNDER SEAL*

STANDBY COUNSEL'S RESPONSE AND OBJECTION TO THE GOVERNMENT'S SUBMISSION OF PROPOSED SUBSTITUTIONS

Standby counsel herewith file their response to the Government's Submission of Proposed Substitutions (the "Government's Submission") and their objections to the Government's Proposed Substitution For [redacted] (the "Substitution" or the "Substitute").[1]

OVERVIEW

The highly classified information that the government has for many months sought to protect from unauthorized disclosure is apparently not so sensitive after all and can be released, at a time and in a form of the government's choosing, to the

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[1] Standby counsel also file this response and objection in support of Mr. Moussaoui's objection to the government's proposed Substitution. *See* "Mujahid Zacarias Moussaoui Strike to Throughout George Tenet Nasty Dirty 'Cuisine' in the World Top Criminal Ashcroft Face" (filed Apr. 28, 2003). Standby counsel's response should not be interpreted as a waiver of any rights the *pro se* defendant has to participate in the CIPA substitution process. As standby counsel have said on other occasions, we cannot agree to a substitution or stipulation in this case, for doing so would constitute making a "significant tactical decision" or "speak[ing] instead of the defendant on [a] matter of importance." *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984). Standby counsel could, of course, agree to a substitution or stipulation that would enter into force only if or when they were elevated to the role of trial counsel. Further, standby counsel can make recommendations to Mr. Moussaoui as to proposed substitutions and stipulations. *See* Standby Counsel's Reply to the Government's Consolidated Response in Opposition to Defense Motions for Pretrial Access and for Writs *Ad Testificandum* [redacted] Standby Counsel's Reply to Government's Response in Opposition to Defendant's *Pro Se* Pleading Entitled "Redaction to Coverup Their Lies" *passim* (filed Apr. 24, 2003).

general public.[2] The government's proposed Substitution for the video deposition testimony of [redacted], which is itself a substitution for his live testimony at trial, is nothing more than a chronologically organized rendition of excerpts from the [redacted] classified government summaries of the [redacted] reports [redacted][3] While maintaining that this information must still be protected, *see* Government's Submission at 2, the government has permitted what was once [redacted] sensitive [redacted] information to be given to Mr. Moussaoui. Further, the government also states that the information may later be released to the public at trial. *Id.* at 1-2.[4]

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[2] Standby counsel have long maintained that Mr. Moussaoui should have access to all of the classified *Brady* material produced in this case and are pleased that at least some of this information has been provided to him. It must be stated, however, that the government's almost breathless objections - voiced to this Court in repeated filings - that national security required that this information never be disclosed to Mr. Moussaoui, could appear to some as a cynical ploy, likely by persons not directly responsible for this prosecution. The Substitution provides Mr. Moussaoui with information that the government sought to protect for all of these months without providing any reason for refusing to provide this information to the *pro se* defendant in the past. The Court will recall that Mr. Moussaoui was excluded from the January 30, 2003 hearing because of the likelihood that the very classified information to which he has now been given access would be discussed. Before that hearing began, the courtroom was swept for listening devices, attendance was limited to persons with specified clearance levels, and all present were admonished not to discuss the hearing or the result of that hearing with anyone. It now appears there was no reason to exclude Mr. Moussaoui from that hearing.

[3] The [redacted] government summaries are themselves CIPA § 4 substitutes for the [redacted] reports.

[4] It is worth noting that the government, which is now willing to release what was previously unreleasable, has failed to provide a national security justification as to the need for a substitution for the video deposition. CIPA § 6(c)(2) sets forth a process by which the Court can be informed about the gravity of the risk of a contemplated disclosure of classified information. That section provides:

> The United States may, in connection with a motion under paragraph (1), submit to the court an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information. If so requested by the United States, the court shall examine such affidavit in camera and ex parte.

The Court is required to consider this risk in weighing whether to allow proposed substitutes if so

As is explained below, the proposed Substitution is at once both far too narrow and far too broad. It is far too narrow because the [redacted] Summaries [redacted] upon which the Substitution is based, are but a significant indicator of the nature of the testimony that one might expect to be able to elicit from the witness. Those summaries are not an exhaustive catalog of everything [redacted] on a particular topic. The Substitution is far too broad because it combines into one document different statements [redacted] made on different dates, including information that is of no interest to the defense, and mixes them together as if they were all made at the same time. In so doing, the Substitution goes far beyond the scope of anything the defense would intend to elicit [redacted], thereby defeating the purpose of CIPA and raising Confrontation Clause problems.[5]

More importantly, the Substitution is simply too far removed from what the government proposes to substitute it for, i.e., live testimony of a witness. As hearsay based upon hearsay based upon hearsay, it provides no basis whatsoever for the jury to assess the credibility of a witness whose testimony will be crucial to this jury in discharging its awesome responsibility in this capital case. The Court's January 30, 2003 order requiring a Rule 15 deposition in lieu of live trial testimony for such a key

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requested by an affidavit from the Attorney General. *Id.* It is quite telling that the Attorney General has not yet filed such an affidavit in this case concerning the Rule 15 deposition [redacted]

5 [redacted]

witness has already made this task more difficult for the jury than it would be if the witness were to give testimony in open court. However, the Rule 15 video deposition is still far preferable to the proposed Substitution. The Substitution provides no basis upon which the jury could measure the demeanor of the declarant and therefore almost eliminates the possibility that the jury might credit [redacted] version of events if that version was contradicted by any other evidence in the case.[6]

In sum, the proposed Substitution does not provide the defendant with the same ability to make his defense as the Rule 15 deposition ordered by the Court because: (1) hearsay is not substantially the same as live testimony; (2) it is far too broad, thereby contravening CIPA, raising Confrontation Clause problems, and rewarding the government for making [redacted] unavailable to the defense; (3) it is far too narrow, limiting what the defense might elicit from [redacted]; and (4) it mischaracterizes [redacted] unavailability as a neutral fact.

[6] On appeal, the government surprisingly alleged that this Court had denied it the opportunity to propose substitutes for [redacted] live testimony. *See* Brief for Petitioners-Appellants at 66 (No. 03-4162, filed Mar. 14, 2003). Standby counsel had believed, as did the Court, that if the government intended to offer any reasonable substitute for [redacted] testimony, it would have done so during the months that the [redacted] access issue was pending. *See* Memorandum Opinion at 21-22 (filed Mar. 10, 2003). Nevertheless, confronted with a government claim that it had substitutes to offer which it had been denied the opportunity to submit, and concerned that district court consideration of any such substitutes after resolution of the other appellate issues raised by the government would likely result in multiple appeals on the same basic issue, standby counsel requested remand for consideration of substitutes in the first instance. Standby counsel did so over the government's contention that the appeal should proceed, with remand for consideration of substitutes only if it was unsuccessful on the other issues. The government has vindicated standby counsel's concern by threatening another CIPA § 7 appeal in the Government's Opposition to Court's Order for Defendant to Attend CIPA Hearing (filed Apr. 30, 2003).

However, by urging remand on jurisdictional grounds so that the CIPA issue could be addressed in a logical and judicially economic sequence, standby counsel never suggested that the government could craft a substitute that would provide Mr. Moussaoui with substantially the same ability to make his defense as the video deposition ordered by the Court. Absent factual admissions or stipulations by the government as to the truth of the facts the defense intends to establish through [redacted], any proposed substitute is inadequate. The government's Substitution does not come close to such an admission or stipulation.

Standby counsel respectfully suggest that if any substitute is to be the equivalent of the testimony of the video deposition of the witness, the substitute would have to be in the form of a stipulation or judicial admission of at least the exculpatory facts set forth in this Court's March 10, 2003 Memorandum Opinion. *See* Memorandum Opinion at 8-9, 17-19. A triple hearsay recitation, authored by the government [redacted], which is what the government has offered, can never be the equivalent of his live testimony.

DISCUSSION

I. THE GOVERNMENT'S SUBSTITUTION IS INADEQUATE AS IT FAILS TO PROVIDE THE DEFENDANT WITH SUBSTANTIALLY THE SAME ABILITY TO MAKE HIS DEFENSE AS WOULD THE DEFENSE DEPOSITION ORDERED BY THE DISTRICT COURT

A. Hearsay Authored By The Government Is Not Substantially The Same As Live Testimony

"CIPA contemplates that the government may propose substitutions for relevant classified information, and that the trial court shall accept these substitution proposals if they 'provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.'" *United States v. Fernandez*, 913 F.2d 148, 157 (4th Cir. 1990) (quoting CIPA § 6(c)(1)). The government proposes here to substitute a series of distinctly separate hearsay statements made on different dates and mixed together as if they were one, for the live testimony [redacted]. By definition, hearsay is not "substantially the same" as live testimony and therefore, it cannot provide Mr. Moussaoui with "substantially the same ability to make his

defense."[7]

It goes without saying that the law prefers live testimony over hearsay. *See* Fed. R. Evid. 804, Advisory Committee Notes, 1972 Proposed Rules, Note to Subdivision (b) (stating that the preference of the hearsay rule is that "testimony given on the stand in person is preferred over hearsay"). This preference for live testimony "is apparent also in rules and statutes on the use of depositions, which deal with substantially the same problem." *Id.*, Exception (1). Live testimony is indispensable for determining the witness' credibility. The "opportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination." *Id.* *Accord United States v. Lynch*, 499 F.2d 1011, 1022 (D.C. Cir. 1974) ("The appearance of the witness will permit the jury to observe his demeanor and enable it to better assess his credibility.") Accordingly, "tradition, founded in experience, uniformly favors production of the witness if he is available." Fed. R. Evid. 804, Advisory Committee Notes, *supra*, Exception 1. *See also Old Chief v. United States*, 519 U.S. 172, 187-89 (1997) (discussing the "descriptive richness" that comes from live testimony and noting that "'[t]o substitute for [a proponent's evidence] a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight'") (citations omitted).

Perhaps for this reason, no reported CIPA decision allows the use of a hearsay substitution for the testimony of a witness. The proposed faceless, colorless, inanimate Substitution provides no basis for the jury to evaluate [redacted] credibility. Further,

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[7] Mr. Moussaoui, when he says that the substitute for [redacted] is CIA Director George Tenet, *see* "Mujahid Zacarias Moussaoui Strike to Throughout George Tenet Nasty Dirty 'Cuisine' in the World Top Criminal Ashcroft Face" at 2 (filed Apr. 28, 2003), makes a good point [redacted]

as in *Fernandez*, the Substitution here shackles the defense "'to a script written by the prosecution'" that precludes the defense from "'present[ing] a coherent case of its own.'" 913 F.2d at 158 (citation omitted).

It would be one thing if a series of stipulated facts or judicial admissions were offered as substitutes to eliminate litigation over certain factual issues. But all the government offers as its Substitution is a triple hearsay recitation of what the government says [redacted], and it does so without any concession as to the truth of information favorable to the defendant appearing in government summaries [redacted] This leaves the government free to ask the jury to infer and/or find facts contrary to the Substitution – and indeed, free to introduce evidence in contradiction to the Substitution.[8] At least with a live witness, the defendant can reap the benefit of whatever credibility the jury assigns to the witness' testimony - in order to mitigate the force of any contrary evidence the government might adduce.

For this reason, live testimony [redacted] would make any jury verdict and

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[8] Standby counsel assume that the government intends to offer evidence to rebut many of the statements in the Substitution. [redacted]

Because standby counsel expect the government to offer evidence rebutting statements in the Substitution, we have requested reciprocal discovery from the government pursuant to CIPA § 6(f). That section provides that the government, unless the interests of fairness do not so require, must produce all evidence which it expects to use to rebut any of the classified information disclosed pursuant to CIPA § 6(a). The government has declined to produce such evidence at this time, but says it will do so after a CIPA § 6(a) hearing. *See* letter to Robert Spencer from Edward MacMahon, Jr. (dated Apr. 28, 2003) and letter to Edward MacMahon, Jr. from Robert Spencer (dated Apr. 29, 2003) (both appended hereto at Tab B). Standby counsel are perplexed at how a CIPA § 6(c) hearing can proceed if a § 6(a) hearing has not already occurred.

sentence much more reliable. As this Court has correctly recognized, there is a heightened degree of reliability that attends a capital case. *See* Memorandum Opinion at 17 (filed Mar. 10, 2003) (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976)). This is true not only as to the sentencing phase, but also to the guilt/innocence phase of the trial. *See Beck v. Alabama*, 447 U.S. 625, 637-38 (1980); *Murray v. Giarratano*, 492 U.S.1, 8-9 (1989) (plurality opinion). This recognition comes from the knowledge that death is "[a] qualitatively different" form of punishment, and that "there is a corresponding difference in the need for reliability." *Woodson*, 428 U.S. at 305. *See also Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality opinion) ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.") (citations omitted).

B. The Substitution Is Far Too Broad

The government asserts that the purpose of the Substitution is to summarize all [redacted] statements as if "[he were] called as a witness at trial." Substitution at 1. The government then advances a single substitute for what really appears to be a series of separate and distinct [redacted] statements made on separate dates over a period of several months and set forth in separate government documents, [redacted] The government mixes and matches and integrates these separate statements into one seamless "script." According to the government, the scope of the Substitution should encompass all of these statements, including information that the government would endeavor to

elicit from [redacted] if he were called as a witness, not just information that the defense would seek to elicit. The Substitution is thus riddled with information from statements made by [redacted] that the defense would not even seek to use.[9] Accordingly, the government's approach results in a Substitution that is far too broad, violating the intent of CIPA, infringing Confrontation Clause rights, and providing an evidentiary windfall to the government.

The government's approach permeates the entirety of the Substitution, but two examples will suffice to illustrate the point. [redacted]

[redacted]

9 [redacted]

[redacted][10]

At the January 30, 2003 hearing, the government made much of this testimony, describing it as "devastating evidence" against Mr. Moussaoui. Transcript of CIPA Hearing held on January 30, 2003 at 15 (filed Feb. 4, 2003). At that hearing, the government offered this testimony as "proof of Moussaoui's role [in the September 11 plot] [redacted]. According to the government, such testimony established that [redacted] statements were "not *Brady*." *Id*. Hence, paragraph 4 of the Substitution is not the kind of testimony that, assuming the government's characterization of it is accurate, the defense would seek to elicit from [redacted] at his deposition. [redacted] The defense has no present intention of using at trial any information from the report containing the statement [redacted] is reported to have made on this date, so there is no need to include any information from that report in any proposed substitute.

Another example is the statement in paragraph 15 of the Substitution, [redacted]

[10] [redacted]

[redacted] This statement comes from [redacted], which the defense would never attempt to use if for some reason it did not have access [redacted] for testimony. The statement's only purpose is to create an inference, which might not stand up if the witness could actually be questioned, that Moussaoui must have been related to the September 11 plot in some way. [redacted] Nevertheless, this extraneous, conjectural, post-September 11 statement, is included in the Substitution which is supposed to be for the defendant's benefit.

There are at least three reasons why any substitution for [redacted] deposition testimony should not include testimony that the government would like to elicit from him. Each of these reasons will be discussed in turn.

1. The Substitution Contraveries CIPA

CIPA § 6(c), which circumscribes the scope of any substitution, does not contemplate the inclusion in the Substitution of the government's evidence. That section requires rejection of any proposed substitution unless the court finds that it "will provide *the defendant* with substantially the same ability to make his defense as would disclosure of the specific classified information." CIPA § 6(c)(1) (emphasis added). The words "the defendant," make clear that this section is for the defendant's benefit, not the government's.

This conclusion is supported by the purpose of CIPA, which is to combat the problem of "graymail." *United States v. Smith*, 780 F.2d 1102, 1105 (4th Cir. 1985). This problem arises when "a criminal defendant threatens to reveal classified

information during the course of his trial in the hope of forcing the government to drop the criminal charge against him." *Id.* CIPA establishes a procedure whereby the defendant must notify the government of his expected use of classified information and, after the information is found to be admissible, the government may, pursuant to § 6(c), offer a substitute for it. *Id.* Since the government cannot graymail itself, it cannot claim that the procedures and protections afforded under CIPA § 6(c) are for its benefit.

Consistent with this view is the language in CIPA § 6(e), which specifies the remedies available to a defendant who is denied the use of classified information. That section authorizes relief only when "a *defendant*," not the government, is prevented from disclosing classified information. *See* CIPA § 6(e)(2) (emphasis added). Remedies for the government's inability - for any reason including national security - to secure live testimony from a witness [redacted] are neither constitutional nor permissible under CIPA.

2. The Substitution Violates The Confrontation Clause

Using the proposed Substitution to admit evidence against Mr. Moussaoui that the government would want to elicit [redacted] if he were a witness, would also violate Mr. Moussaoui's Sixth Amendment right to confront and cross-examine the prosecution's witnesses and evidence. This right, which the Supreme Court calls "'the greatest legal engine ever invented for the discovery of truth,'" *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 Wigmore § 1367), is "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405 (1965) (stating that "[t]here are few subjects, perhaps, upon

which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal").

The aims of the confrontation/cross-examination right are worth noting. The right:

> (1) insures that the witness will give his statements under oath - thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth;" [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness making his statement, thus aiding the jury in assessing his credibility.

Green, 399 U.S. at 158 (citation omitted); *accord Lee v. Illinois*, 476 U.S.530, 540 (1986) (same).

All of these aims will be frustrated if the government is permitted to introduce against Mr. Moussaoui, via the proposed Substitution, statements from a witness who, should the Substitution be approved, Mr. Moussaoui cannot place under oath, confront and cross-examine. Use of a substitution in this manner amounts to "trial by affidavit," a practice common in 16th and 17th century England, but prohibited now under even the narrowest reading of the Confrontation Clause. *White v. Illinois*, 502 U.S. 346, 352-53 (1992); *see also Dutton v. Evans*, 400 U.S. 74, 94-96 (1970) (Harlan, J., concurring) (discussing the practice of "trial by affidavit"). In this instance, the government's Substitute, by lumping all [redacted] statements into one, makes the price of obtaining favorable information [redacted] the waiver of his Confrontation rights as to other unfavorable information. While there is always a risk when one calls a

witness who has both positive and negative information, the party calling the witness nevertheless would have the opportunity to test the information, place it in proper context, and insist that it be given under oath. In the end, it is always a tactical decision as to whether to call such a witness and here, the defense has chosen to call the witness to elicit identifiable *Brady* information.

The kind of Confrontation Clause problem the government creates with its Substitution was aptly illustrated in *United States v. Baptista-Rodriquez*, 17 F.3d 1354 (11th Cir. 1994), in which the Eleventh Circuit Court of Appeals found that the defendant was deprived of his Confrontation Clause rights when the district court prohibited him from cross-examining a prosecution witness about the contents and existence of a classified document that the district court had correctly ruled was inadmissible in the defendant's case-in-chief. The document concerned the defendant's pre-indictment termination as a civilian operative for the FBI, and was relevant to rebut the prosecution's claim that his authorized work for the FBI was finished by the time the defendant engaged in the narcotics activities for which he was on trial. *Id.* at 1366-67. The Eleventh Circuit held that the defendant's Sixth Amendment rights were violated when he was prohibited from cross-examining the government's witness about the classified document. *Id.* at 1366.[11] As the court stated, "the defendant must be given a "full and fair opportunity to probe and expose [the] infirmities [in a witness' testimony] through cross-examination, thereby calling to the

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[11] In this regard, the [redacted] summaries may be put to significant use in this case by the defense without regard to their being substituted for the live testimony of the witness. This is why Moussaoui, as *pro se*, needs these [redacted] summaries even if we were not addressing a substitute for the testimony [redacted]

attention of the factfinder the reasons for giving scant weight to the witness' testimony.'" *Id.* at 1366 (citations omitted).

Numerous other cases are in accord that the government cannot rely on evidence at trial that the defendant has not had an effective opportunity to confront. *See, e.g, Pointer v. Texas*, 380 U.S. 400, 406-07 (1965) (introduction by government at the defendant's trial of transcript of complainant's preliminary hearing testimony violated defendant's right to confront the complainant); *Douglas v. Alabama*, 380 U.S. 415, 419-20 (1965) (admission against defendant at his trial of a co-defendant's confession which was read to the co-defendant who repeatedly invoked his right to remain silent violated the Confrontation Clause where the defendant could not cross-examine the co-defendant given the latter's unavailability); *Davis v. Alaska*, 415 U.S. 308, 319 (1974) (defendant was denied right of Confrontation when a state's confidentiality policy prohibited the defendant from cross-examining a prosecution witness about his juvenile record, particularly where "the prosecution insisted on using [the witness] to make its case"); *Lilly v. Virginia*, 527 U.S. 116, 139 (1999) (holding that the admission against the accused of a co-defendant's confession admitted as a declaration against penal interest violated the accused's Confrontation Clause rights where the co-defendant was unavailable for cross-examination).

3. The Substitution Rewards The Government For Secreting a Material Witness

Allowing the government to use the Substitution to admit evidence that the government wants to elicit [redacted] also grants the government a windfall from making [redacted] unavailable. Because the unavailability of [redacted]

[redacted], only the defendant, and not the government, would be allowed under the Federal Rules of Evidence to introduce the hearsay statements reflected in the [redacted] summaries into evidence on grounds of witness unavailability. With regard to unavailable witnesses, Rule 804 provides:

> "Unavailability as a witness" includes situations in which the declarant . . . is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means.
>
> A declarant is not unavailable as a witness if . . . absence is due to the procurement . . . of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

Fed. R. Evid. 804(a)(5) & 804(a). Accordingly, since the government [redacted], only the defense could introduce his hearsay statements on that basis.[12] The government's Substitution would allow the government to offer hearsay statements [redacted] CIPA was never intended to provide such an evidentiary advantage to the government.[13]

In sum, the government cannot piggyback off a substitution for the defendant's

[redacted]

benefit by including in it evidence the government wants to use at trial, whether in its case-in-chief or in cross-examination. The Substitution is supposed to be a substitute for the testimony that the defense wants to elicit [redacted] not a substitute for anything [redacted] matters related to this case. If the government wants to elicit evidence [redacted], then it has the power to do so by bringing him to court and placing him on the witness stand. Any other procedure would contravene the purpose of CIPA § 6(c), violate Mr. Moussaoui's Sixth Amendment's Confrontation Clause rights, and reward the government for secreting from the defense a material witness who has information favorable to the defendant in both the guilt and sentencing phases of this capital case.

C. The Substitution Is Far Too Narrow

The Substitution is based on [redacted]

[redacted]

14 [redacted]

[redacted]

The Substitution is too narrow because: (1) it does not take account of what [redacted] does not say; (2) it forces the defendant to adopt a government script, limiting him explicitly to the government-digested language from the summaries [redacted] without the explanations or amplification which the witness in most instances would certainly be able to provide; (3) it includes [redacted] drafted in such a way as to embed potential hearsay problems within them; hearsay problems that could be avoided [redacted] response differently [redacted][15] and most importantly, (4) it does not include important exculpatory information reflected in the [redacted] summaries.

One example best illustrates the problem with the Substitution not taking into account [redacted]

The proposed Substitution does not include this fact because it only recites what the [redacted] summaries do say, not what they are silent about. However, it is

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15 [redacted]

[redacted]. Based on the absence of any information in the [redacted] summaries that [redacted] if [redacted] were on the witness stand, standby counsel would not hesitate to inquire [redacted]

Another example of significant silence in the [redacted] summaries is the absence of any statement with regard to the government's fifth plane to the White House theory. [redacted]

Two other examples illustrate the point that the Substitution eliminates the opportunity to flesh out the information in the [redacted] summaries with obvious questions triggered by the summaries. [redacted]

[redacted]

If limited to the proposed Substitution, the information on this point would be restricted [redacted] when the true usefulness of this information is that it prompts counsel to ask more questions. [redacted] This would, of course, be important to Mr. Moussaoui's defense because he was a terrible student pilot and never obtained a pilot's license. If you had to have a license to be a pilot for Bin Laden, Moussaoui certainly never came close to satisfying that requirement.

[redacted]

[redacted] Standby counsel feel confident in inferring from other information of which we are aware that the answers would be: [redacted]

A final example illustrates the point that hearsay objections embedded in the [redacted] summaries, assuming that any such objections are valid, could nevertheless be overcome by questioning of the witness. [redacted]

Finally, the Substitution fails to include exculpatory statements made by [redacted] which the defense would seek to introduce establishing that Moussaoui was

not intended to pilot a fifth plane or to be a member of the September 11 plot. [redacted] This evidence, if believed by the jury, would rebut entirely not only the government's latest theory of this case, but its earlier theory of the case as well, and possibly even the one they might use at trial. Moreover, this statement demonstrates as much as any other why this trial cannot go forward without this witness.

D. The Substitution Mischaracterizes The Unavailability [redacted]

The government's Substitution is misleading. It offers a neutral explanation for why the jury will not hear [redacted] as a live witness. *See* Substitution at 1 ("If called as a witness at trial, [redacted] would testify:"). This neutral explanation contains material omissions which prejudice the defendant because they conceal the circumstances under which the information in the Substitution was obtained.

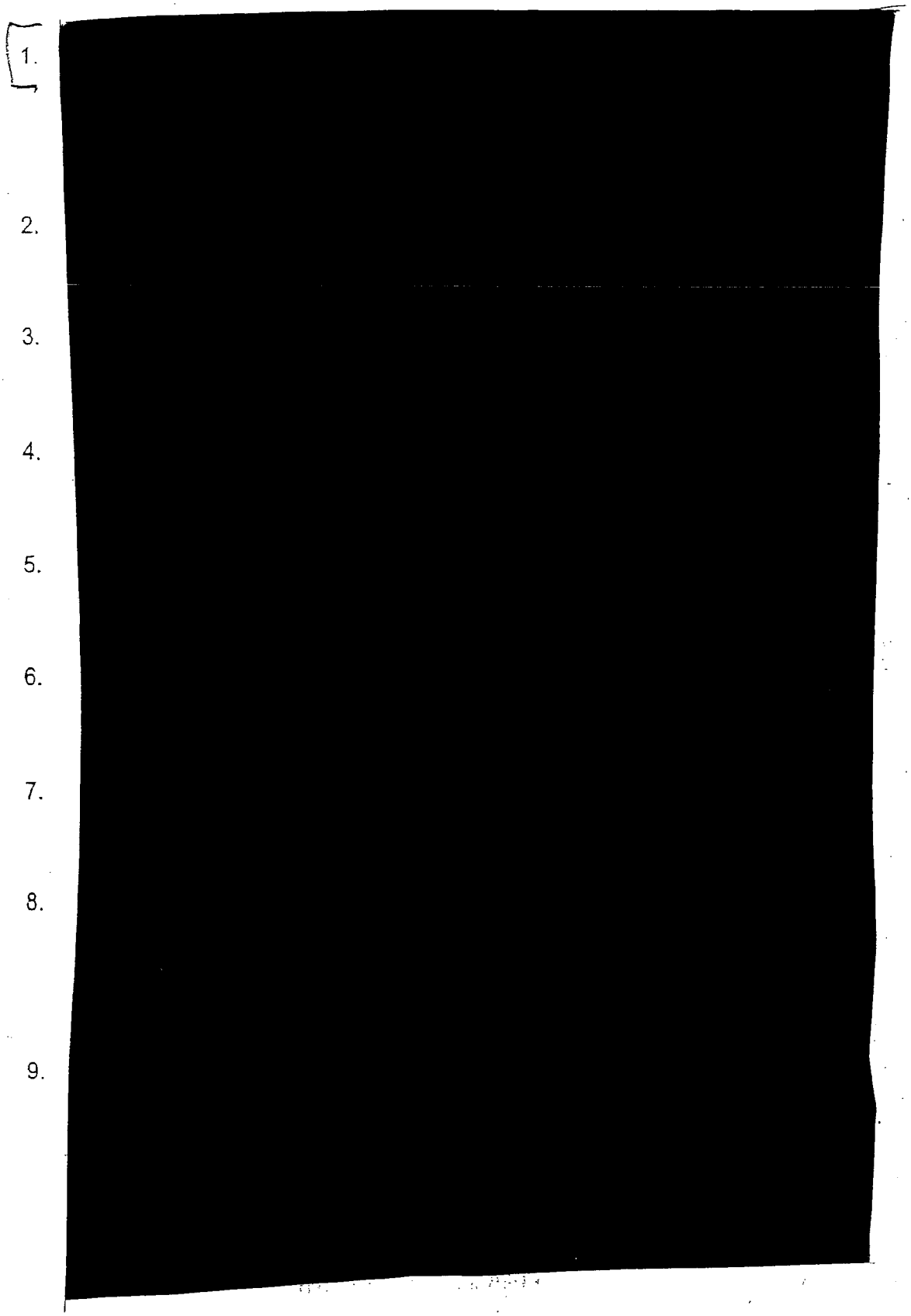
To place the Substitute in a fair light, a jury should know that the document is a "script" prepared by the government by patching together several less inclusive but

separate and distinct statements [redacted] Finally, a jury should know that the defense would like [redacted] produced live in the courtroom, or at least live by video deposition. [redacted]

II. STANDBY COUNSEL'S ALTERNATIVE TO THE GOVERNMENT'S SUBSTITUTION

It should be clear from the foregoing discussion that the Substitution does not provide Mr. Moussaoui with "substantially the same ability to make his defense" as would the [redacted] video deposition. To provide a substitution that would do so requires stipulations or judicial admissions that at least establish the *Brady* facts that this Court has held [redacted] may be able to provide. *See* Memorandum Opinion at 8-9, 17-19 (filed Mar. 10, 2003). Accordingly, standby counsel submit the following stipulation as an example of a substitution for the deposition [redacted] that would give Mr. Moussaoui "substantially the same ability to make the defense" as the deposition ordered by the Court.

The parties hereby stipulate and agree that the following facts are true and accurate:



10. [redacted]

11. [redacted]

12. [redacted]

13. [redacted]

14. [redacted]

15. [redacted]

16. [redacted]

17. [redacted]

18. [redacted]

19. [redacted]

20. [redacted]

CONCLUSION

For the foregoing reasons and any others adduced at any hearings on this matter, standby counsel respectfully request that the proposed Substitution be rejected in its entirety as not providing Mr. Moussaoui with substantially the same ability to make his defense as would the deposition testimony [redacted].

Respectfully submitted,

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Alexandria, VA 22314
(703) 684-4700

CERTIFICATE OF SERVICE[16]

I HEREBY CERTIFY that a true copy of the foregoing pleading was served upon AUSA Robert A. Spencer, AUSA David Novak and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, by hand-delivering a copy to the Court Security Officer on this 1st day of May 2003.

/s/

Kenneth P. Troccoli

[16] Pursuant to the Court's Order of October 3, 2002, on the date this pleading was filed, a copy of the pleading was provided to the Court Security Officer ("CSO") for submission to a designated classification specialist who will "portion-mark" the pleading and return a redacted version of it, if any, to standby counsel. A copy of this pleading, in redacted form or otherwise, will not be provided to Mr. Moussaoui until standby counsel receive confirmation from the CSO and/or classification specialist that they may do so.

[redacted]

LIST OF VARIATIONS BETWEEN THE STATEMENTS
IN THE SUBSTITUTION[1] AND THE STATEMENTS IN THE [redacted]
[redacted] SUMMARIES REFERENCED IN THE SUBSTITUTION[2]

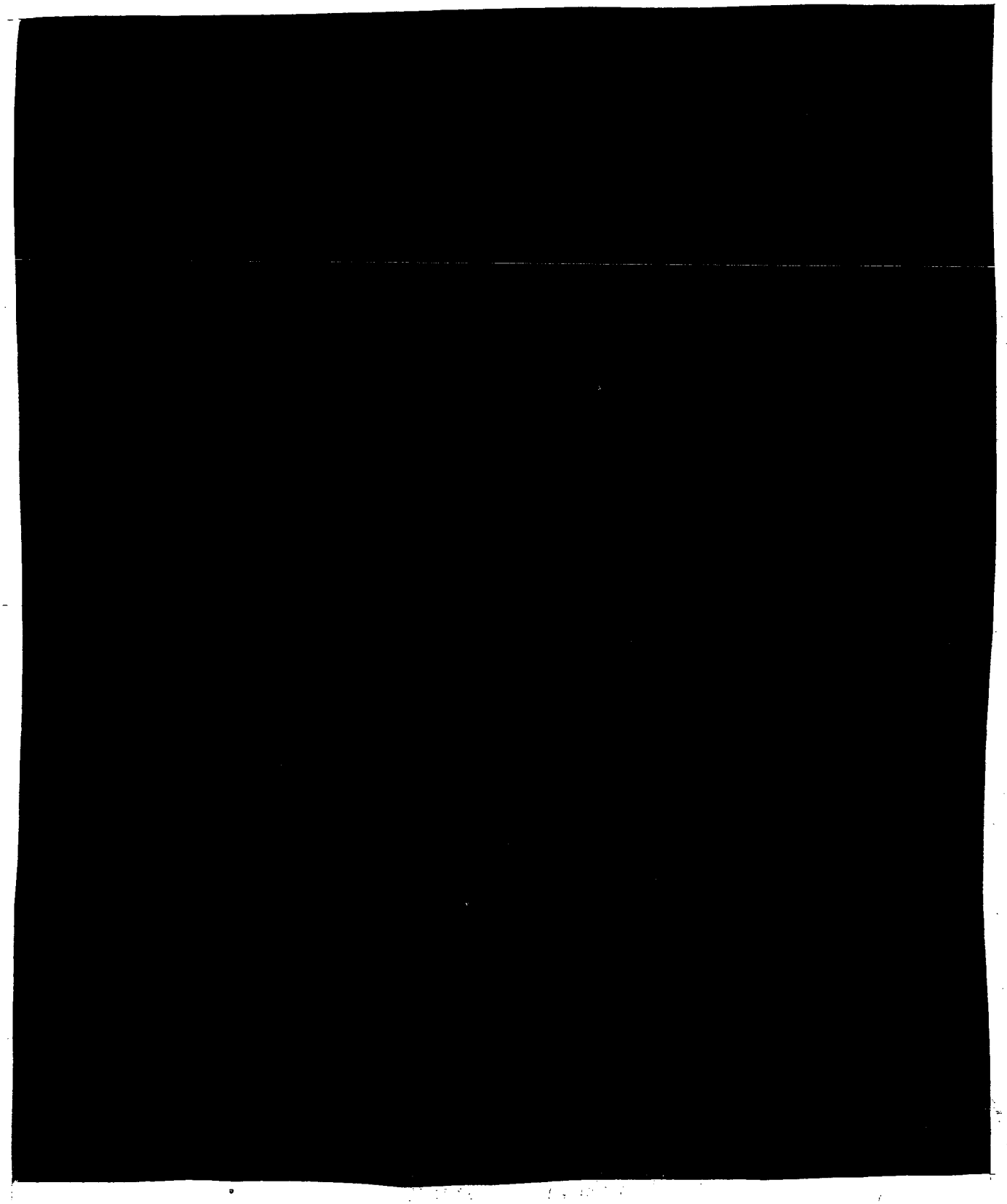
May 1, 2003

[redacted]

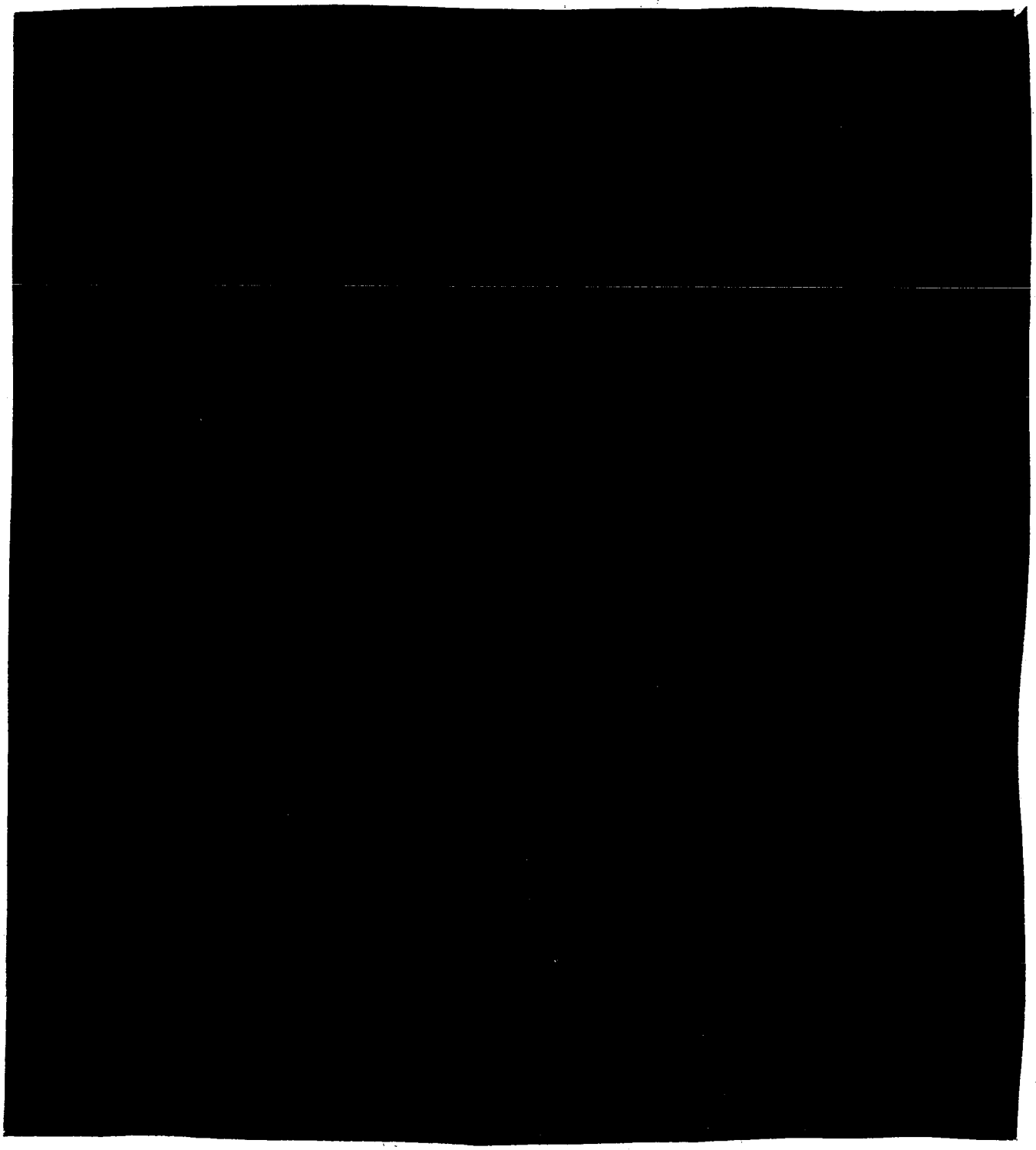
1 [redacted]

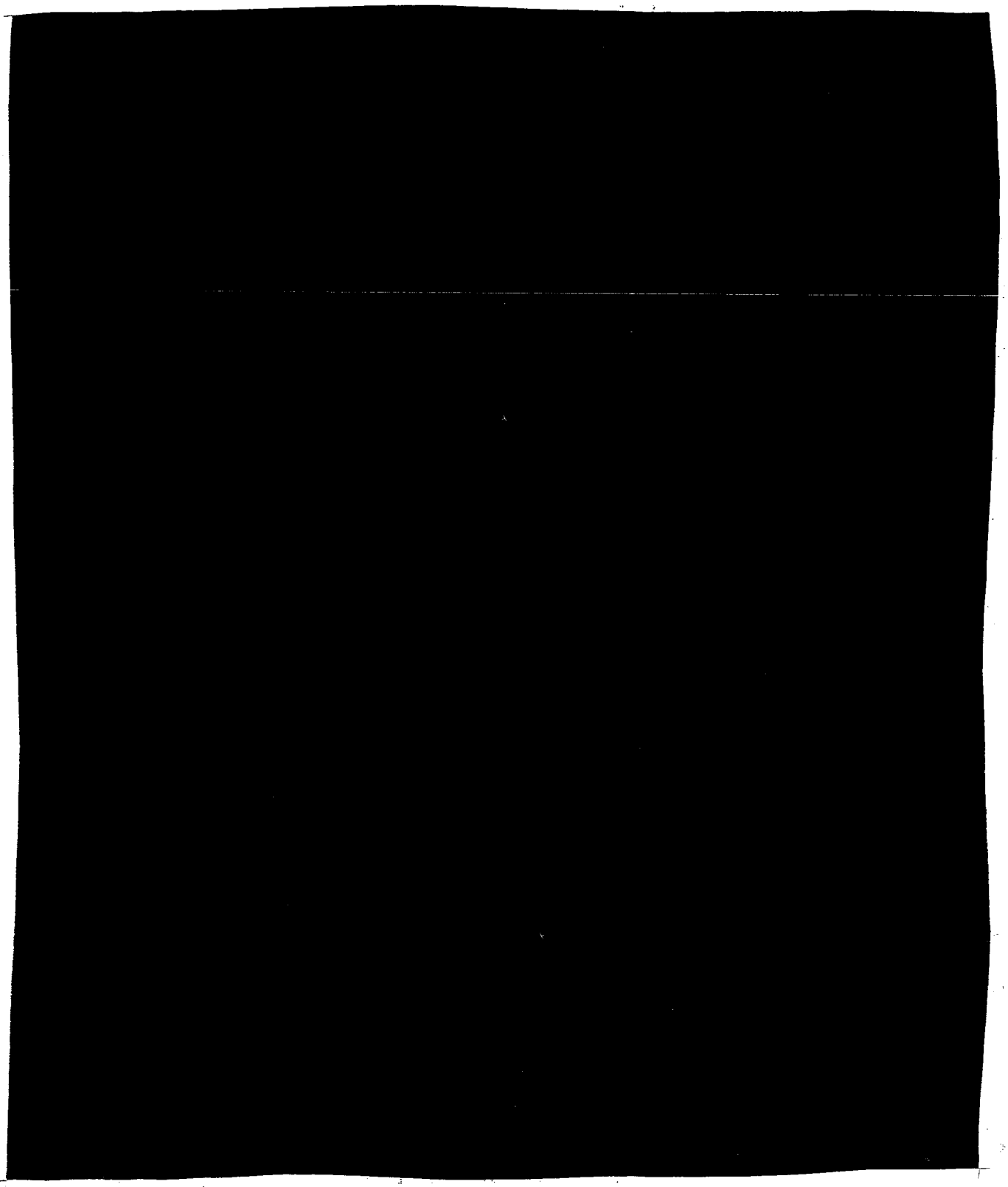
2

3



[redacted]





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April 28, 2003

Via Facsimile and U.S. Mail

Robert Spencer, Esquire
Assistant United States Attorney
2100 Jamieson Avenue
Alexandria, Virginia 22314

Re: United States v. Zacarias Moussaoui

Dear Rob:

We are currently reviewing the substitutes that the government has proposed in this case. As part of our response, we would request that the government indicate that it has complied with Section 6 (f) of CIPA to the extent that the government possesses any information that it expects to use to rebut any of the classified information set forth in the proposed substitutes. If such information exists, we request that it be disclosed prior to the date of the hearing on the substitutes.

Best regards,

/s/

Edward B. MacMahon, Jr.

EBM/mlj

U.S. Department of Justice

United States Attorney

Eastern District of Virginia

2100 Jamieson Avenue (703)299-3700
Alexandria, Virginia 22314

April 29, 2003

By fax and regular mail

Edward B. MacMahon, Jr.
107 East Washington Street
Middleburg, VA 20118

Re: United States v. Zacarias Moussaoui; Crim. No. 01-455-A

Dear Ed:

I write in response to your letter dated April 28, 2003, in which you demand reciprocal discovery, citing CIPA § 6(f).

Your request is premature. Section 6(f) of CIPA requires a court to make a finding pursuant to § 6(a) before a court may order the government to disclose classified rebuttal evidence under § 6(f). See United States v. Lopez-Lima, 738 F.Supp. 1404, 1414-15 (S.D. Fla. 1990). Accordingly, we decline to produce any such evidence before the May 7, 2003, hearing or to indicate whether we have already done so.

I note, however, that our proposed substitutions are designed to include complete statements by the putative witness on subject areas that the Court noted as potentially material to the defense. As such, they may include potential rebuttal material.

Sincerely,

Paul J. McNulty
United States Attorney

By: /s/
Robert A. Spencer
Assistant U.S. Attorney