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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 REPLY TO STANDBY COUNSEL'S RESPONSE
TO GOVERNMENT'S PROPOSED SUBSTITUTIONS

The United States replies to standby counsel's response to the Government's proposed substitutions for the testimony [redacted]

Introduction

On January 31, 2003, the Court ordered that [redacted] be made available as a deposition witness, based on a finding that he would provide testimony that is material to this case. (1/31/03 Order at 1). The Government appealed this decision, arguing, *inter alia*, that the Court was without authority to order the Government to produce an alien enemy combatant [redacted] for a deposition, and that the Court erred by not considering whether substitutions under the Classified Information Procedures Act ("CIPA") in lieu of [redacted] deposition testimony could satisfy constitutional concerns. In its response to the Government's appeal, standby counsel suggested a remand to permit the Government to propose substitutions [redacted] testimony. (Appellee Br. at 13).

On April 14, 2003, the Fourth Circuit issued an order staying the appeal and remanding the case to permit the Government to "propose substitutions for the classified information to be disclosed by the district court in its order of January 31, 2003." On April 24, 2003, the

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Government submitted its proposed substitutions for the deposition testimony ordered by this Court. By filing these substitutions, the Government did not waive any of its arguments in either the Fourth Circuit or the District Court on this issue. Indeed, the Government reiterates its view that the witness is beyond the Court's jurisdiction and that, accordingly, the issue of substitutions should not be reached.

Notwithstanding its consent to a remand to consider substitutions, standby counsel now claim that no substitution can replace the live testimony [redacted] (Response at 3). According to standby counsel, such substitutions are improper "triple hearsay" that deny the jury an opportunity to assess the credibility [redacted] (Response at 3). As an alternative, standby counsel insist that only "a stipulation or judicial admission of at least the exculpatory facts set forth" in the Court's March 10th Opinion is sufficient, and that the jury should be told that the Government is responsible [redacted] (Response at 5, 23).

Standby counsel's objections are meritless for several reasons. First, they rest on a fundamental misapprehension of the interplay between CIPA and the Federal Rules of Evidence. While CIPA permits alternative forms for the introduction of classified information, it does not supersede the Rules of Evidence. Thus, classified information that may be relevant to the defense, but otherwise inadmissible, is not transformed into admissible evidence by virtue of CIPA. Conversely, and contrary to standby counsel's suggestion, the use of substitutions for classified information is not a *per se* violation of the hearsay rule. Therefore, classified information that would be admissible remains admissible even if presented in the form of an unclassified substitution. If the rule were as standby counsel represent, there never could be

substitutions for classified information. Finally, because CIPA does not alter the Rules of Evidence, the rules relating to completeness apply. Therefore, standby counsel cannot be permitted to circumvent the search for the truth by submitting to the jury isolated portions [redacted] that are plainly inconsistent with the entirety [redacted].

Second, standby counsel misstate the scope of the Fourth Circuit's April 14 Order. In standby counsel's self-serving view, substitutions are needed only for the handful of out-of-context snippets that they claim exculpate the defendant. However, the Fourth Circuit's Order is broader and requires consideration of substitutions "for the classified information authorized to be disclosed by" this Court. What this Court ordered disclosed was not just the limited portions [redacted] that standby counsel cite, but the deposition [redacted] including the examination [redacted] by both parties, to serve as a substitute for [redacted] trial testimony. Of course, if [redacted] were available to testify at trial, the Government would be able to cross-examine [redacted] and bring out the balance of [redacted] story. Because the information [redacted] provided to date, and [redacted] provide at a deposition, is classified, the proposed substitutions properly reflect [redacted] expected testimony, and not just a handful of [redacted] isolated statements.

Third, [redacted] is not a "witness" who is being secreted to benefit the prosecution. Instead, as this Court has observed, [redacted] is an enemy combatant [redacted] unavailability, therefore, has nothing to do with the substance of [redacted] testimony, which, again, is highly incriminating. Thus, there is nothing to standby counsel's

claims that the circumstances [redacted] are relevant, or that the jury should be told that the Government has [redacted] for testimony. (Response at 23).

The latest of standby counsel's ever-shifting positions regarding the purported need for [redacted] testimony, and more specifically, the use of substitutions for such testimony, represent precisely the type of graymail that CIPA was enacted to combat. Initially, without proffering any specifics about the substance of testimony [redacted] standby counsel sought access [redacted] knowing full well that valid national security interests would require the prosecution in good faith to oppose the request. Then, after the Government – acting well beyond its *Brady* obligation – provided [redacted] summaries [redacted] standby counsel carefully selected isolated statements [redacted] from which they claim to infer the defendant's innocence, [redacted] and even though standby counsel's spin of [redacted] contradicts the defendant's purported interest in [redacted] testimony.

A similar pattern is found in standby counsel's view towards substitutions. When the Government first proposed the idea of substitutions as an alternative to physical access [redacted], standby counsel claimed that "[n]o stipulation or substitution of evidence can fill the void left if [redacted] cannot provide testimony . . . ." [redacted] Later, when the Government again proposed the alternative of substitutions [redacted], standby counsel argued that substitutions were

"not a viable option given Mr. Moussaoui's *pro se* status." (1/23/03 Standby Counsel Response at 9).[1] Still later, after the Government submitted its brief to the Fourth Circuit and argued that substitutions in lieu of the deposition testimony should remain a fall-back option if the Fourth Circuit rejected the Government's broader appeal, standby counsel suddenly proclaimed their desire to consider substitutions.[2] (Appellee Br. at 13). Now, after the Government has proposed extensive substitutions, standby counsel have reverted to their earlier stance and insist that nothing could substitute [redacted] testimony. (Response at 4, 6-7).

This procedural history plainly exposes that standby counsel's interest [redacted] is not in presenting the full facts to the jury, but rather in leveraging well-founded national security interests to deter this important prosecution. This purpose is further revealed in standby counsel's position regarding the Government's proposed substitutions. In standby counsel's view, isolated statements identified by standby counsel as favorable to the defendant are immutable facts, while highly incriminating statements are the suspicious product [redacted] When offered by the Government, substitutions are condemned as inaccurate

[1] Standby counsel went on to conclude: "Therefore, the government's proposed procedure of using stipulations, summaries or substitutions should be rejected." (1/23/03 Standby Counsel Response at 50).

[2] In a letter to the Government before submitting their response on appeal, standby counsel "confirm[ed]" their interest in "consider[ing] an adequate declassified substitute for the testimony at issue as a means of resolving the pending appeal." (Letter from Frank W. Dunham, Jr., Esq., to AUSA Kenneth Karas, March 18, 2003). (A copy of this letter is attached hereto as Tab A.) Further, in comments to the media, standby counsel stated that they "wished the government had offered the substitutions before taking the appeal." *Washington Post*, Apr. 16, 2003, at A12 (quotation from Frank W. Dunham, Jr.). A week later, however, standby counsel told the media that they had "grave doubts" that there ever could be any substitutes for live testimony. *Washington Post*, Apr. 24, 2003, at A8 (quotation from Frank W. Dunham, Jr.).

"scripts" of "triple hearsay" improperly gleaned from [redacted] reports, but when offered by the defense, and even though based on the very same [redacted] reports, substitutions are admissible golden nuggets of truth. When the Government submits substitutions that reflect the complete statements [redacted] it clogs the "engine of truth," but standby counsel can offer more limited substitutions that plainly mislead the jury and deny it the truth.

As previously noted, the Government's stake [redacted] is the protection of compelling national security interests. It is this reason, and not any desire to shield the truth from the jury, that has compelled the Government to object to the deposition [redacted]. In contrast, standby counsel's position reflects not a search for the truth, but a search for a means to dismiss this case. Therefore, standby counsel's objections to the proposed substitutions should be rejected.

Argument

I. The Government's Substitutions Are Admissible and Provide the Defendant With Substantially the Same Ability to Make his Defense as Would the Deposition Ordered by the Court

A. CIPA and The Fourth Circuit's Order

"CIPA was enacted by Congress . . . to combat the growing problem of graymail, a practice whereby 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." *United States v. Smith*, 780 F.2d 1102, 1105 (4th Cir. 1985) (*en banc*). To avoid graymail, CIPA requires, *inter alia*, the defense to identify, well in advance of trial, any classified information that it "expects to disclose or to cause the disclosure of" at trial. CIPA § 5. Mere claims of

relevance will not authorize disclosure. 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. Further, "[u]pon the government's motion, the district court then must determine whether such evidence would be admissible at trial under the Federal Rules of Evidence." *United States v. Noriega*, 117 F.3d 1206, 1215 (11th Cir. 1997). *See also Smith*, 780 F.2d at 1105 ("The circuits that have considered the matter agree with the legislative history cited that ordinary rules of evidence determine admissibility under CIPA."). The defendant bears the burden of demonstrating admissibility. *See United States v. Rewald*, 889 F.2d 836, 846 (9th Cir. 1989); *United States v. Cardoen*, 898 F. Supp. 1563, 1570-71 (S.D. Fla. 1995) ("After the Court determines the viability of the proffered defenses, the burden of showing the relevance and admissibility of the classified information, sought to be introduced at trial in support of such defenses, falls on the defendant.").

"If the evidence [identified by the defense] would be admissible at trial, the burden shifts to the government to offer in lieu of the classified evidence either a statement admitting relevant facts that the classified information would tend to prove or a summary of the specific classified information." *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1363 (11th Cir. 1994) (emphasis added). "The court shall allow a substitution if it finds that the alternate submission will provide the defendant with substantially the same ability to present his or her defense as would disclosure of the specific classified information." *Id.*; *see also* CIPA § 6(c).

Here, the Fourth Circuit ordered that the Government be permitted to submit substitutions "for the classified information authorized to be disclosed by the district court in its order of

January 31, 2003." (Remand Order at 1). In its January 31st Order, the Court required that [redacted] be made available for a deposition, pursuant to Fed. R. Crim. P. 15. (1/31/03 Order at 1). [redacted] Therefore, the "classified information authorized to be disclosed by the district court" is the substance of [redacted] expected testimony at the deposition.[3] It is not, as standby counsel have wishfully assumed, merely the enumerated list of those out-of-context snippets of [redacted] that standby counsel claim are material to the defense. (Response at 17).

In compliance with the Fourth Circuit's Order, the Government has submitted proposed substitutions for the expected testimony that this Court ordered, incorporating the statements this Court found were material to the defense and other statements that are required for completeness, or otherwise would have been the subject of the Government's cross-examination of [redacted] at the deposition. As standby counsel have done in preparing their proposed substitutions, the Government has relied solely on the classified summaries [redacted] that this Court authorized for disclosure to cleared counsel in preparing its substitutions. And, as is clearly permitted under CIPA, the Government's proposed substitutions are written to replace the substance of [redacted] expected testimony with the explicit preamble of what [redacted]

[3] As noted in our brief to the Fourth Circuit, CIPA applies to the January 31st Order, [redacted]

"would testify" to if called as a witness.[4] *See* CIPA, §§ 6(c)(1)(A) & (B) (permitting Government to submit a "statement admitting relevant facts that the specific classified

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[4] Though still classified, the Government's proposed substitutions have been provided to the *pro se* defendant, who has had an opportunity to review and respond to them. Even though the Fourth Circuit ordered the Government to provide them to the defendant, standby counsel profess outrage, calling the Government's limited disclosure of the substitutions "a cynical ploy." (Response at 2, n.2).

Standby counsel's complaint is misplaced and inappropriate. First, in providing the proposed substitutions to the *pro se* defendant, the Government not only has complied with the Fourth Circuit's remand, but has exhibited a high degree of flexibility in an effort to make substitutions viable, should the Government's appeal fail. One of the few consistent themes of standby counsel is that the Government must face a "Hobson's Choice" in this case, electing either to maximize protection of national security information, or to absorb the costs associated with disclosure of such information to provide the defendant with a fair trial. In this instance, the Government has chosen to permit a limited disclosure to defendant in order to explore the possibility of substitutions, and therefore standby counsel have no basis to complain. Second, the Government has provided the defendant with only a small amount of the classified information [redacted] Through this restrictive disclosure, the Executive has been able to limit national security risks while at the same time permitting consideration of substitutions as a potential fall-back in the event that the Government's appeal does not succeed. This is no "ploy," but instead the good faith exercise of the Executive's exclusive authority over the dissemination of classified intelligence. *See Dept. of Navy v. Egan*, 484 U.S. 518, 529-30 (1988) (Executive Branch has authority to classify and control access to intelligence); *United States v. Fernandez*, 887 F.2d 465, 470 (4th Cir. 1989) ("What is never affected by this interpretation of CIPA is the Attorney General's constitutionally-based power to protect information important to national security."); *United States v. Smith*, 750 F.2d 1215, 1218 (4th Cir. 1984) ("[T]he decision whether to permit disclosure of the classified evidence ultimately rests not with the court but with the Attorney General subject to the sanctions provided in section 6(e)(2).") (citation and footnote omitted), *vacated and remanded on other grounds, United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985) (*en banc*); *see also id.* (noting that CIPA "leaves to the Executive the ultimate decision whether to expose the classified materials subject to the sanctions [CIPA] mandates.").

Finally, contrary to standby counsel's complaint (Response at 2, n.4), there is no inconsistency between limited disclosure of the proposed substitutions to the defendant and the protection of other national security interests threatened by the deposition. As outlined in the [redacted] Declarations previously submitted to the Court, the taking of a deposition involves risks to the national security wholly independent of the disclosure [redacted] statements. In fact, we will submit shortly an affidavit under CIPA § 6(c)(2) declaring that any deposition [redacted] will lead to identifiable damage to the national security.

information would tend to prove," or "a summary of the specific classified information").[5] As such, the substitutions comport with CIPA in that they leave standby counsel in substantially the same position they would have been had there been a deposition.

B. Standby Counsel's Objections to the Proposed Substitutions Are Meritless

Standby counsel object to the Government's proposed substitutions. First, standby counsel claim that the proposed substitutions are *per se* inadmissible hearsay statements that do not provide them with substantially the same defense as live testimony. Second, standby counsel assert that the substitutions are too broad in that they improperly include certain inculpatory statements. According to standby counsel, inclusion of any inculpatory statements rewards the Government for "secreting" a witness and violates the Confrontation Clause. Third, standby counsel argue that the substitutions also are too narrow in that they exclude certain exculpatory statements. Fourth, standby counsel contend that the substitutions mischaracterize the unavailability [redacted]. Finally, standby counsel claim that there are variations between the Government's proposed substitutions and the underlying classified summaries. None of these objections has any merit.

1. The Proposed Substitutes Are Not Hearsay and are Otherwise Adequate

Standby counsel complain that the proposed substitutes are inadmissable hearsay statements that are not substantially the same as live testimony. (Response at 5). Actually,

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[5] As noted in the proposed substitutions, the Government also has included other statements identified by the defense or the Court that, while not admissible under the Rules of Evidence at the guilt phase, might be admissible at a penalty phase.

standby counsel's claim is two-fold. First, standby counsel object to the use of *any* substitutes for live testimony. According to this view, no substitute could replace the impact of a live witness whose credibility can be evaluated by a jury. (Response at 5-6). Second, standby counsel object to the particular substitutes offered here because they consist of "distinctly separate hearsay statements made on different dates" that are improperly "mixed together as if they were one." (Response at 5). And because these "triple hearsay" statements are not adopted by stipulation as irrefutable fact, they are insufficient. (Response at 6-7). Both claims are meritless.

The general objection to *any* substitutes is, to say the least, surprising given the enthusiasm that standby counsel expressed for substitutes in the Fourth Circuit. (Appellee Br. at 10, 13; Appellee Mandamus Br. at 8). After explicitly calling for a remand to consider government-proposed CIPA substitutions (Appellee Br. at 13), standby counsel now argue that there is no point to the remand because no substitute could replace a live witness.

Standby counsel's position not only appears to contradict earlier statements, it also finds no support in the cases. There is no *per se* bar to introducing substitutions in place of live testimony.[6] In fact, CIPA prescribes no particular form in which classified information is to be

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[6] Standby counsel claim that "no reported CIPA decision allows the use of a hearsay substitution for the testimony of a witness." (Response at 6). The claim, however, has no weight whatsoever. First, it is not true as at least one court has allowed the use of an affidavit in place of live testimony. *See United States v. Scarfo*, *infra*. Second, it is a truism to say that no "hearsay substitution" should be allowed in place of testimony, but that is due to the hearsay nature of the substitution, not the fact of the substitution. Third, as even standby counsel must concede, there also are no cases that say that CIPA bars the use of substitutes when a witness's testimony would otherwise be classified.

presented, but merely requires the presentation of the substance of that information. As the Fourth Circuit has observed, for example, "§6(a) of CIPA requires the district court to determine the 'use, relevance, or admissibility of *classified information,*' not particular classified documents." *United States v. Fernandez*, 913 F.2d 148, 156 (4th Cir. 1990) (emphasis in original, but not in quoted CIPA provision). Thus, the fact that certain classified information may lose its aesthetic gloss when converted into substitutes is of no import under CIPA, as long as the substance of that information is preserved. *Id.; see also United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998) (rejecting defendant's claim that "the process of transforming the documents into desiccated statements of material fact might have hampered the 'evidentiary richness and narrative integrity' of the defense he was able to present.") (quoting *Old Chief v. United States*, 519 U.S. 172, 187 (1997)). This includes the use of substitutes in place of live witnesses. *See United States v. Scarfo*, 180 F. Supp.2d 572, 581 (D. N.J. 2001) (permitting use of affidavit in lieu of agent testimony regarding classified information during suppression hearing).[7]

Similarly unpersuasive are standby counsel's specific objections to the form in which the substitutions are presented. Standby counsel characterize the substitutions as "a series of distinctly separate hearsay statements made on different dates and mixed together as if they were

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[7] Standby counsel argue that the "the law prefers live testimony over hearsay," noting specifically that live testimony allows the jury to assess the demeanor of the witness. (Response at 6). Of course, while the law "prefers" live witnesses for this reason, it does not always require it. *See United States v. Salim*, 855 F.2d 944 (2d Cir. 1988) (Transcript of Rule 15 deposition of prosecution witness taken abroad only in presence of foreign magistrate and court stenographer properly admitted at trial); *see also* Fed. R. Evid. 801, 803, and 804 (permitting introduction of hearsay).

one." (Response at 5). According to standby counsel, this "triple hearsay recitation of what the government says [redacted] is inferior to "a series of stipulated facts or judicial admissions" that can be used "to eliminate litigation over certain factual issues." (Response at 7). Thus, standby counsel posit, aside from being "triple hearsay," because based on [redacted] reports, the Government's proposed stipulations fail because they reflect only what [redacted] if called as a witness, but do not accord these statements status as divine truth. Since this format "leaves the government free to ask the jury to infer and/or find facts contrary to the Substitution," the Court is asked to adopt, as an alternative, standby counsel's own "script" of stipulated facts. (Response at 7).

Standby counsel's hearsay objection is baseless. Standby counsel are confusing the hearsay nature of the substance of any classified information with the means by which the substitute is presented to a jury. A substitute that reads: "if allowed to testify, John Doe would say that Jane Smith told him X," is a hearsay statement because it relates what somebody told John Doe (if admitted for the truth of "X"), and not because it is presented in the form of a substitution or stipulation. Nor is it hearsay because it is based on a written report of what John Doe has said. Here, all that the Government has done is propose stipulations [redacted] Standby counsel cannot fault the Government for using this method to draft its substitutions since they have used the same method in drafting theirs, the only difference being standby counsel were

[redacted]

more selective in the statements they plucked from the classified summaries. As long as the statements themselves are not hearsay, or are recognized exceptions to the hearsay rule, there is no error. Thus, a substitute that reads: "if allowed to testify, John Doe would say that he met with Jane Smith" is not hearsay and is properly included in a Section 6 substitution. *See United States v. Ivy*, 1993 WL 316215 at *1 (E.D. Pa. 1993) (under CIPA, "both documentary and testimonial evidence may be admitted if admissible under the Federal Rules of Evidence").

Further, standby counsel's suggestion that the only valid substitution is one that is adopted as irrefutable fact must be rejected. Simply put, the suggestion vaults form over substance, and leaves unanswered the ultimate question of what should be included in any substitution for the deposition testimony that is at issue. To begin, it would distort the truth to present as fact something that [redacted] contradicted, or which contradicts other evidence. It also would inevitably confuse the jury. More important, all that the substitutes are supposed to do is give standby counsel the same ability they had to present a defense. If there were a deposition, they would not get stipulations as to the truth of what [redacted] So, neither can they get that result with a substitution.

Further, standby counsel should not assume that their proposed form of substitutions will benefit the defendant. If the Government is correct, and the Rules of Evidence and circumstances of this case require a more complete recitation [redacted] then the substitutions should include, as irrefutable facts, that: [redacted]

[redacted] Of course, standby counsel reject the notion that a more complete recitation of [redacted] should be put before the jury, but this merely exposes the heart of their strategy, which is to present a one-sided version of [redacted] to the jury. A more appropriate form, then, is to present a more complete recitation of [redacted] and instruct the jury to treat them as it would any other stipulation to testimony. *See United States v. Benally*, 756 F.2d 773, 778 (10th Cir. 1985) ("[A] stipulation as to the testimony a witness would give if called . . . is not an admission of the truth of such testimony and does not prevent a party from attacking it as he might attack the testimony itself, had it been given.") (quoting *United States v. Spann*, 515 F.2d 579, 583 (10th Cir. 1975)); *United States v. Hellman*, 560 F.2d 1235 (5th Cir. 1977) (stipulation to testimony not agreement to fact but only what testimony would be).[9]

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[9] *See also* 1 Sand & Siffert, *et al.*, *Modern Federal Jury Instructions* 5-7 (2002):

> A stipulation of testimony is an agreement among the parties that, if called, a witness would have given certain testimony. You must accept as true the fact that the witness would have given that testimony. However, it is for you to determine the effect to be given that testimony.

2. The Substitutions Are Not Too Broad

Standby counsel rightly note that the Government's proposed substitutions contain some of [redacted] that standby counsel likely would not elicit during the deposition. (Response at 8-9). According to standby counsel, the inclusion of these statements is error for three reasons: (1) the inclusion of these incriminating statements contravenes CIPA, which requires substitutions that provide "the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." (Response at 11) (quoting CIPA § 6(c)(1)); (2) the use of incriminating statements violates the Confrontation Clause (Response at 12-15); and (3) the Government's proposed stipulations "rewards the Government for secreting a material witness," (Response at 15-17).

a. The Substitutions Comply With CIPA and the Fourth Circuit's Order

Standby counsel admit that they wish to deny the jury the opportunity to learn of [redacted] that plainly put Moussaoui in the charged conspiracies. They claim this is their right under CIPA because the inclusion of such statements is inconsistent with CIPA's requirement that any Section 6 substitutions "provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." That theory is meritless. It misreads CIPA, ignores the fundamental evidentiary principle of completeness, and misconstrues both this Court's Order disclosing classified information and the Fourth Circuit's remand.

As previously noted, CIPA does nothing to alter the Rules of Evidence. *See United States v. Smith*, 780 F.2d at 1106 ("The legislative history is clear that Congress did not intend to alter

the existing law governing the admissibility of evidence."). Here, the incriminating statements must be admitted to place into context those isolated statements cited by standby counsel as being material to the defense. Simply put, these statements are potentially exculpatory only when viewed out of context. Therefore, the introduction of the related statements is necessary to put these statements into their proper setting and to avoid misleading the jury.

The rule of completeness is designed to prevent parties from misleading jurors through selective use of evidence. *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996) (purpose of rule of completeness "is to prevent a party from misleading the jury by allowing into the record relevant portions of the excluded testimony which clarify or explain the part already received."). Put succinctly, the rule of completeness provides: "'[T]he opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance.'" *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988) (quoting 7 J. Wigmore, Evidence in Trials at Common Law § 2113, at 653 (J. Chadbourn rev. 1978)).

Under this rule, "it is the trial court's responsibility to exercise common sense and a sense of fairness to protect the rights of the parties while remaining ever mindful of the court's obligation to protect the interest of society in the 'ascertainment of the truth.'" *United States v. Castro*, 813 F.2d 571, 576 (2d Cir. 1987) (quoting Fed. R. Evid. 611(a)). Rule 106 of the Federal Rules of Evidence explicitly applies the rule to written or recorded statements. *See United States v. Mohr*, 318 F.3d 613, 626 (4th Cir. 2003) (upholding district court's ruling under the "Doctrine of Completeness" that allowed a witness to read a written statement that he previously drafted);

Howard v. Moore, 131 F.3d 399, 415 n. 18 (1997) (Rule 106 applies to statements introduced in written form).[10] Under Rule 106, "the omitted portion of a statement must be placed in evidence if necessary to explain the admitted portion, to place the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial understanding of the admitted portion." *United States v. Castro*, 813 F.2d at 575-76. As for verbal statements, "courts historically have required a party offering testimony as to an utterance to present fairly the 'substance or effect' and context of the statement. In other words, while verbal precision may be unnecessary, the testimony 'should at least represent the tenor of the utterance as a whole, and not mere fragments of it.'" *Id.* at 576 (quoting 7 Wigmore on Evidence, § 2099, at 618). *See also* 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 106[01], at 106-4 (1986 ed.) (Rule 611(a) "provides equivalent control over testimonial proof").

The rule of completeness often requires the introduction of, for example, other portions of a transcript or report of a witness's prior statements. *See, e.g., United States v. Ellis*, 121 F.3d 908, 920 (4th Cir. 1997) (applying "Doctrine of Completeness" to introduction of FBI interview of witness); *United States v. Haddad*, 10 F.3d 1252, 1258 (7th Cir. 1993) (error to exclude exculpatory portion of defendant's statements that were "part and parcel of the very statement a portion of which the Government was properly bringing before the jury . . . ."). The rule also

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[10] Fed. R. Evid. 106 provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

requires the introduction of relevant portions of multiple reports or transcripts to avoid misleading the jury. *See, e.g., United States v. Sweiss*, 814 F.2d 1208, 1211 (7th Cir. 1987) (rule applies to multiple tape recordings); *United States v. Maccini*, 721 F.2d 840, 844 (1st Cir. 1983) (proper to admit additional portions of witness's prior trial and grand jury testimony).

"To lay a sufficient foundation . . . for a rule of completeness claim, the offeror need only specify the portion of the testimony that is relevant to the issue at trial and that qualifies or explains portions already admitted. This is a minimal burden that can be met without unreasonable specificity." *United States v. Sweiss*, 814 F.2d at 1212. Here, even minimal scrutiny exposes the certainty of misleading the jury from standby counsel's strategic carving of [redacted] Indeed, virtually every statement standby counsel include in their proposed substitution has a related statement that "counter-balance[s]" the inference standby counsel wish the jury to draw from their selected statement. *United States v. Walker*, 652 F.2d 708, 713 (7th Cir. 1981) (exculpatory statements would have "counter-balanced" admissions of guilt).[11] Conversely, virtually every inculpatory statement finds a sibling in standby counsel's

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selective list of purportedly helpful statements. Indeed, the very statements standby counsel identify in their response serve to make the point. [redacted] This is unsurprising because it effectively counter-balances the statements standby counsel cite. [redacted] Standby counsel heavily rely on these comments to argue that Moussaoui could not have been part of the September 11th plot. However, this is plainly misleading. [redacted] Standby counsel also reject the inclusion of the statement [redacted] More [redacted]

important, this statement is admissible to put into context the isolated statements cited by standby counsel [redacted]

Standby counsel's desire to shield the jury from the plethora of incriminating information that [redacted] is an understandable strategy, but legally unsupportable. Even in the context of CIPA, a defendant cannot ignore the rule of completeness. CIPA requires that any substitutes are to leave the defendant in substantially the same position he would be in if given access to classified information, but neither CIPA nor the Rules of Evidence give a defendant license to place himself in a better position than he would have been in without substitutions by picking and choosing out-of-context pieces of classified information to introduce as evidence. *United States v. Gravely*, 840 F.2d 1156, 1163 (4th Cir. 1988) ("The rule [of

[redacted]

completeness] simply speaks to the obvious notion that parties should not be able to lift selected portions out of context.").

Beyond this, standby counsel's claim to excise all incriminating statements misconstrues the extent of the classified information ordered disclosed by the Court. According to standby counsel: "The Substitution is supposed to be a substitute for the testimony that the defense wants to elicit [redacted], not a substitute for anything [redacted] about matters related to this case." (Response at 17). That statement, however, finds no support in the record. Indeed, the Court's January 31st Order did not limit the disclosure of classified information only to "testimony that the defense wants to elicit." Instead, it required that [redacted] be made available for a Rule 15 deposition to be deposed by standby counsel, the defendant and the Government. Because anything that [redacted] is classified, any answer he would have given at the deposition would disclose classified information. Therefore, the Fourth Circuit's remand order, which encompasses "the classified information authorized to be disclosed by the" January 31st order, covers the extent of expected deposition testimony.

Because standby counsel would not have been permitted to bar any relevant cross-examination by the Government that would elicit incriminating answers [redacted], they cannot achieve the same result by removing the relevant and admissible incriminating portions from the substitutions. To do otherwise would dramatically alter the CIPA standard by providing the defendant with a "substantially improved ability to make his defense." Put another way, the proposed substitutions leave defendant no worse off than if the deposition proceeded. Therefore,

the Government's proposed substitutions are permissible under both CIPA and the Rules of Evidence and should be accepted by the Court.

b. **There Is No Violation of the Confrontation Clause**

Standby counsel argue that introduction of the more complete substitutions would violate the defendant's Sixth Amendment right to confront and cross-examine witnesses.

In raising this claim, standby counsel ignore the text of the Confrontation Clause, which provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. Amend. VI. [redacted] is being offered by defendant, not the Government, and, therefore, [redacted] testimony does not come from a witness *against* him. Therefore, standby counsel cannot raise a Confrontation Clause objection. *See Cooper v. State of California*, 386 U.S. 58, 62 n. 2 (1967) (no Confrontation Clause violation where state "did not produce the informant to testify against" defendant); *United States v. Crockett*, 813 F.2d 1310, 1313 (4th Cir. 1987) (upholding refusal to allow defendant to cross-examine co-defendant because Confrontation Clause "does not give defendants a plenary right to elicit friendly testimony."); *United States v. Andrews*, 765 F.2d 1491, 1501 (11th Cir. 1985) ("the Sixth Amendment guarantees only the opportunity to confront *adverse* witnesses; it does not guarantee the right to confront witnesses who testify not against but rather in favor of the party asserting the right.") (emphasis in original, internal citation omitted); *Stribling v. Smith*, 2000 WL 796181 at *14 (E.D. Mich. 2000) (no Confrontation Clause violation where defendant

agreed to introduction of witness' unsworn statement to the police after witness declared unavailable due to health problems).[13]

Moreover, the Supreme Court has "never insisted on an actual face-to-face encounter at trial in *every* instance in which testimony is admitted against a defendant." *Maryland v. Craig*, 497 U.S. 836, 847 (1990) (emphasis in original). Instead, the Court's "precedents establish that 'the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial, a preference that 'must occasionally give way to considerations of public policy and the necessities of the case." *Id.* at 849 (Internal citations omitted). "The critical inquiry in this case, therefore, is whether use of the procedure is necessary to further an important state interest." *Id.* at 852. The Government's proposed substitutions offer a procedure designed to accommodate the overwhelming governmental interests at stake in this case while also ensuring that the jury is not deceived by the introduction of isolated nuggets [redacted]

Therefore, Standby counsel should not be allowed to use the Confrontation Clause as a shield to defeat the rules of evidence. It is standby counsel who hold the key to the admissibility of the more complete introduction of [redacted] If they persist in seeking to use out-of-context statements it will be standby counsel who will trigger the introduction of the fuller presentation of [redacted], under the rule of completeness, thereby waiving any constitutional claim against introduction of the more complete and accurate statements. *See*

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[13]Standby counsel's reliance on *United States v. Baptista-Rodriguez*, 17 F.3d 1354 (11th Cir. 1994) is therefore misplaced. (Response at 14). That case involved the impropriety of limiting the cross-examination of a government witness. Here, the rule of completeness is being invoked to avoid the defense misleading the jury through the selective presentation of statements from a putative defense witness.

United States v. Salemme, 91 F. Supp.2d 141, 329 (D. Mass. 1999) ("although Flemmi may otherwise have a right to preclude statements to the FBI that could disclose his status as an informant from being offered against him at trial, if he persists in his intention to introduce some of those statements himself, the government will be permitted to offer any of his other statements that are necessary to the fair 'ascertainment of truth.'"), *rev'd on other grounds*, *United States v. Flemmi*, 225 F.3d 78 (1st Cir. 2000).

c. The Government is Seeking No Reward for [redacted]

Finally, standby counsel argue that because the Government has caused the [redacted] the "hearsay statements" contained in the proposed substitutions cannot be admitted under Fed. R. Evid. 804. (Response at 15-16). This claim requires little discussion as it has been squarely rejected by the Fourth Circuit.

In *United States v. Gravely*, the defendant sought to introduce at trial portions of the grand jury testimony of a witness whom the Government refused to immunize. 840 F.2d at 1163. The district court permitted the defendant to introduce the selected portions, but allowed the Government to "cross-designate" portions of the same testimony on completeness grounds. *Id.* On appeal, the defendant argued that the cross-designation was improper hearsay under Fed. R. Evid. 804 because the putative witness was available to the Government by virtue of its power to immunize the witness. In rejecting the claim, the Fourth Circuit held that while the cross-designated portions were "perhaps not admissible standing alone," it was proper to introduce them under Rule 106. *Id.* In words directly applicable here, the Court observed: Rule 106

"simply speaks to the obvious notion that parties should not be able to lift selected portions out of context." *Id.*[14]

3. The Substitutions Are Not Too Narrow

Standby counsel further claim that the proposed substitutions are "far too narrow" primarily because: (1) they do not reflect what [redacted] (2) they are limited to the language adopted by the Government; (3) they are based on "embedded" hearsay statements that could "be avoided" if the witness [redacted] differently or if the questions were "framed within a proper foundation"; and (4) omit other "important exculpatory information reflected in the [redacted] summaries." (Response at 18). The first three claims

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[14] Standby counsel also claim that they alone should be allowed to introduce the classified summaries under Rule 803(8)(c) as a public report. (Response at 16, n.13). This is a specious claim given standby counsel's other comments ridiculing the reports as mere summaries [redacted] (Response at 3).

Further, standby counsel imply that the incriminating statements are not admissible as co-conspirator statements under Fed. R. Evid. 801(d)(2)(E) since they post-date the conspiracy, and claim that, in any event, any such statements only could be admitted if the Government [redacted] This is wrong. [redacted] *See United States v. Howard*, 115 F.3d 1151, 1156-57 (4th Cir. 1997) (retrospective statements are in furtherance of the conspiracy if they serve to inform a conspirator of the status of the conspiracy); *United States v. Shores*, 33 F.3d 438, 444 (4th Cir. 1994) ("A particular statement may be found to be 'in furtherance' of the conspiracy even though it is 'susceptible of alternative interpretations' and was not 'exclusively, or even primarily, made to further the conspiracy,' so long as there is some 'reasonable basis' for concluding that it was designed to further the conspiracy.") (quoting *United States v. Shoffner*, 826 F.2d 619, 628 (7th Cir. 1987)); *United States v. Kocher*, 948 F.2d 483, 485 (8th Cir. 1991) ("'in furtherance language is to be broadly construed;' "Statements by a coconspirator identifying a fellow conspirator are considered to be in furtherance of the conspiracy. Moreover, statements which reveal the existence and progress of a conspiracy are also in furtherance of the conspiracy.'). [redacted]

are entirely speculative and should therefore be rejected. As for the fourth claim, the government has proposed substitutions for all of the statements that the Court found material. If the Court rules that there are other material and admissible statements, substitutions may be possible for those statements as well.

The first claim involves speculation about what [redacted] that could be material to the defense. In particular, standby counsel note [redacted] that Moussaoui was to be a pilot of a plane that was to crash into the White House. (Response at 18-19). These non-statements, however, are neither *Brady* material nor admissible. Instead, they represent, at best, an inference that could be drawn from [redacted]. However, there is no basis to go down the endless road of things [redacted] and, as standby counsel would do, adopt those non-statements as metaphysical truth, particularly since many non-statements could support multiple inferences. [redacted] Such matters are properly reserved for closing argument.

Second, standby counsel claim that the substitutions are insufficient because they fail to account for efforts standby counsel would make during a deposition to "flesh out" additional information. Two examples are provided. [redacted]

As for the former, standby counsel profess a sincere need to further question [redacted] to make the point that [redacted] This is supposedly important to the defense because Moussaoui "was a terrible student pilot and never obtained a pilot's license." (Response at 20).[15] As standby counsel put it: "If you had to have a license to be a pilot for Bin Laden, Moussaoui certainly never came close to satisfying that requirement." (Response at 20). [redacted] Indeed, since none of the pilot hijackers obtained anything more than the private pilot's license, which no more qualified them to fly a commercial airliner than would a driver's license, the claim is specious at best. As such, it hardly merits rejection of the Government's proposed substitutions. *See United States v. Caballero*, 277 F.3d 1235, 1241 (10th Cir. 2002) (defendant "must show more than the mere potential for favorable testimony") (quotation marks omitted); *United States v. Iribe-Perez*, 129 F.3d 1167, 1173 (10th Cir. 1997) (rejecting as insufficient claims by defendant that another witness "might" have testified that only defendant's brother "could" have had sufficient knowledge to commit crime); *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

[15] The evidence at trial will show that most of the pilot hijackers were terrible student pilots, yet three of them managed to fly their planes into their targets.

informer could give and how this testimony would be relevant to a material issue of guilt or innocence.") (quoting 2 Weinstein & Berger, *Weinstein's Evidence* ¶ 510[06] (1991)).

Similarly unpersuasive is standby counsel's purported need to follow-up on [redacted] Unsatisfied with this statement, standby counsel still want to ask [redacted] Standby counsel profess confidence that the answers will be: [redacted] Even if that speculation were accurate, we fail to see the relevance to any of this since [redacted] a conclusion that is entirely consistent with the overwhelming evidence relating to Moussaoui's flight training and his comments to Faiz Bafana. Therefore, there is no prejudice to the defendant from the Government's proposed substitutions.

Next, standby counsel argue that because they can "flesh out" [redacted] they will be able to establish a foundation [redacted] Once in this mode, standby counsel believe this will eliminate the hearsay objections "bracketed in the Government's proposed substitutions." (Response at 21). This claim is as bold as it is baseless. It amounts to nothing more than an admission that standby counsel believe they can circumvent the hearsay rule by cleverly phrasing their questions on direct examination. This is hardly a basis to reject the proposed substitutions, particularly since any effort to lay a "proper foundation" at the deposition would fail to change the fact that [redacted] Moreover, even if

standby counsel were able to establish a valid basis to have [redacted] testify about [redacted] they still will have to deal with the fact that [redacted]

Finally, standby counsel claim that the substitutions fail to include certain other statements that standby counsel suggest [redacted] (Response at 21-22). As previously noted, to the extent the Court finds that there are other statements that are admissible and material to the defense, the Government would be willing to consider including them in an amended substitution.

4. The Reasons for [redacted] Are Irrelevant

Adding to its graymail, standby counsel insist the jury be told that the substitutions are based on [redacted] reports and that [redacted] Standby counsel also demand that the jury be told that the defense has never been able to communicate with [redacted], and that the defense would like [redacted] produced live in the courtroom, but that the Government, [redacted]

There is not a shred of authority to support standby counsel's demands, particularly given the Court's finding that the Government has acted in good faith in its war-time treatment of [redacted][16] [redacted]

[16]During the January 30 CIPA hearing, the Court observed:

There is no issue in this case of bad faith by the United States

standby counsel were able to establish a valid basis to have [redacted] testify about [redacted] they still will have to deal with the fact that [redacted]

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[16]During the January 30 CIPA hearing, the Court observed:

There is no issue in this case of bad faith by the United States

[redacted]

Accordingly, standby counsel are not even entitled to a missing witness charge, let alone their laundry list of extortionate demands. *See United States v. Norris*, 873 F.2d 1519, 1523-24 (D.C. Cir. 1989) (no missing witness charge when reasons unrelated to substance of expected testimony lead to unavailability). Moreover, because standby counsel would not be permitted to inquire into such areas during any deposition, there can be no error in not disclosing that information to the jury in a substitution.[17]

5. There are No Significant Variations between the Government's Proposed Substitutions and the Classified Summaries

Standby counsel provide a chart setting out "variations" between the Government's proposed substitutions and the summaries from which the proposed substitutions are taken. The variations that standby counsel complain of are manifestly unremarkable and insignificant. In the end, of course, we drafted and proposed our substitution to be a fair and complete substitution [redacted] The substitutions are not intended to be a verbatim recitation of the summaries. We organized our proposed substitutions under headings

government or any improper conduct on their part [redacted]

(1/30/03 Tr. at 12).

[17]The Court, in ordering the deposition, strove to protect the Government's interests [redacted]. Thus, permitting counsel to expose information relating to these areas would undercut the efforts of the Court.

taken from the areas the Court cited as potentially material to the defense in the March 10, 2003, Order. Even standby counsel, while going to the effort to chart 31 variations, cannot complain that we have misrepresented the import of the summaries. Indeed, in the few instances where language appears in our proposed substitutions that cannot be precisely located in the cited summary, the substitution is accurate and fairly represents the summaries as a whole.

On the other hand, standby counsel have proposed substitutions that even they concede are by design neither complete nor fair.

Our proposed substitutions fairly summarize [redacted]

[redacted]

18 [redacted]

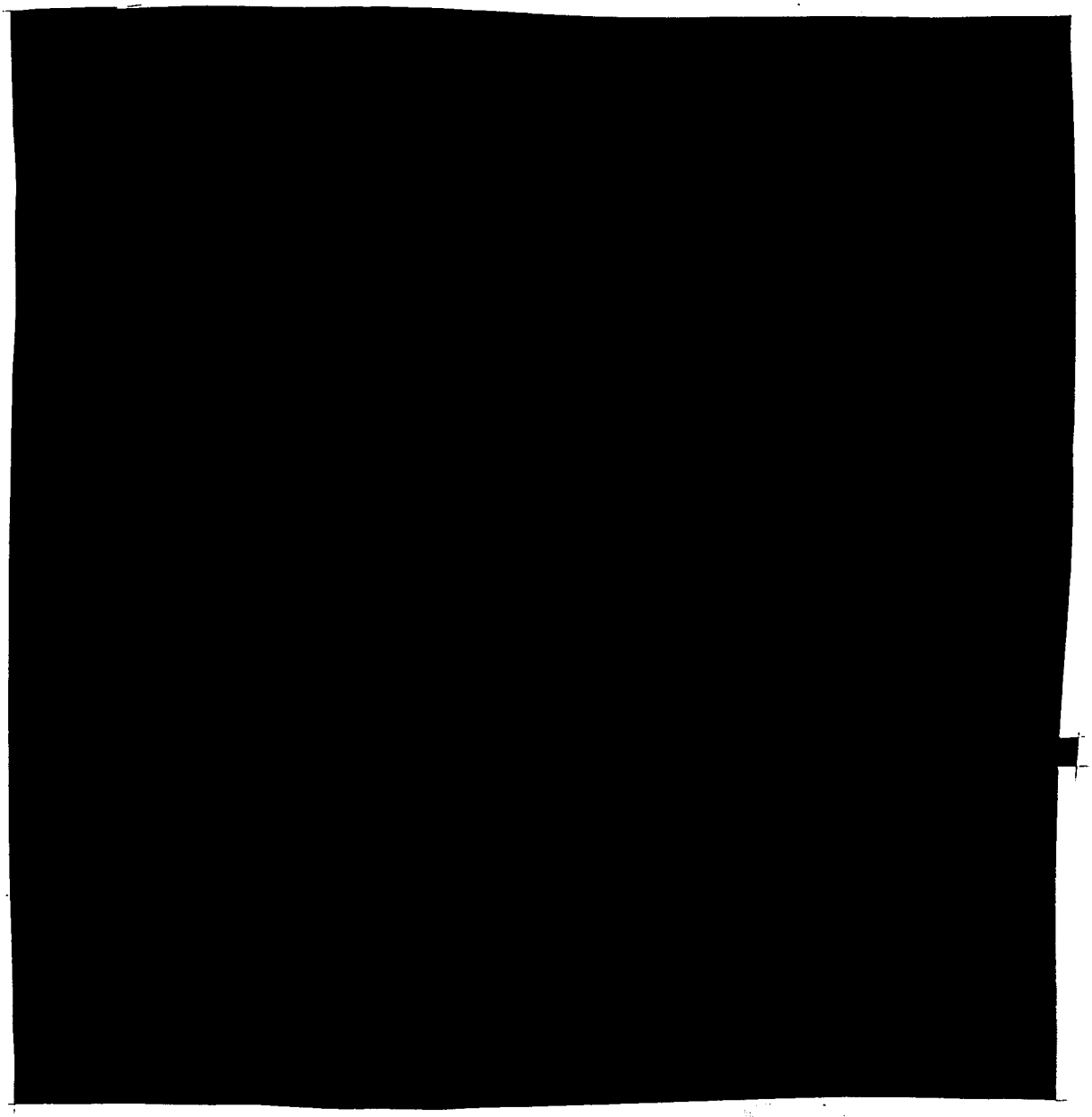
[redacted]

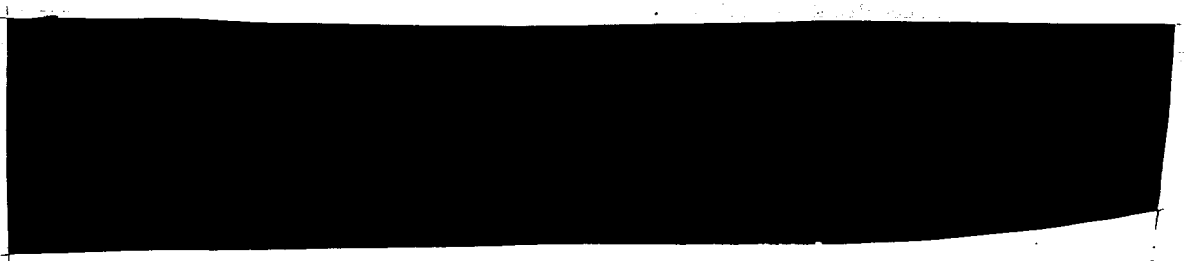
19 [redacted]

[redacted]

[redacted]

20 [redacted]





[redacted]

II. Standby Counsel's Substitutions Should Be Rejected

We attach at Tab B specific comments on the substitutions proposed by standby counsel. In general, standby counsel's proposed substitutions illustrate their patent attempt to graymail the United States instead of seeking a fair proxy for [redacted] testimony.

The primary problem with many of standby counsel's proposed substitutions is that they offer as statements of fact inferences that standby counsel wish to argue to a jury. This shows that instead of fairly summarizing what [redacted], standby counsel seek to distort the process by seeking to have the Court adopt their conclusions and inferences instead of the evidence that [redacted] Standby counsel are, of course, free to argue inferences to the jury based on [redacted], but they are not entitled to a blank check on which to have the Court adopt their defense theories.

Second, many of the substitutions proposed by standby counsel are inadmissible hearsay if offered for admission by the defense in the guilt phase of the case. At Tab B, we note which statements are inadmissible.

Third, some of standby counsel's proposed substitutions are not supported -- in part and definitely not in whole -- by the [redacted] summaries. At Tab B, we note the inaccuracies in standby counsel's proposed substitutions.

Finally, although we believe, as stated above, that any substitutions should be in the form of "if called to testify, [redacted] would testify," instead of as agreed-upon fact without

source, in the proper context, the Government is willing to consider inclusion of any additional statements the Court finds are material and admissible.

Respectfully Submitted,

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United States Attorney

By: /s/
Robert A. Spencer
Kenneth M. Karas
David J. Novak
Assistant United States Attorneys

~~TOP SECRET~~

CERTIFICATE OF SERVICE

I certify that on May 5, 2003, a copy of the foregoing Government's Response was provided to the Court Security Officer for service upon:

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Frank W. Dunham, Jr.
Federal Public Defender

March 18, 2003

AUSA Kenneth Karas
U.S. Attorney's Office
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Alexandria, VA 22314

Re: *U.S. v. Zacarias Moussaoui*

Dear Ken:

As I told you in our telephone conversation, I was surprised to read in the government's brief that it feels it was deprived of the opportunity to submit substitutes for the testimony ordered by the District Court. This is to confirm my overture to consider an adequate declassified substitute for the testimony at issue as a means of resolving the pending appeal.

CIPA contemplates that the government propose the substitutes presumably because it knows best what form of substitution eliminates classification problems. If there is interest in this approach, I would give serious consideration to whatever the government intended to propose as a substitute but feels it has been somehow precluded from doing so and advise whether I think it is adequate. If we could agree on an adequate substitute, it would moot the appeal.

For guidance, for us to consider any substitute to be adequate it must include factually equivalent information to that summarized at pages 6-9 of the District Court's Memorandum Opinion. Facts the government might seek to elicit from the witness should not be included in the substitute as the government does not need a substitute. It has the power to call the witness if there is information it needs from him in order to prove its case.

Very truly yours,

/s/

Frank W. Dunham, Jr.
Federal Public Defender

cc: AUSA Robert Spencer
AUSA David Novak
Edward B. MacMahon, Jr.
Alan H. Yamamoto

[redacted]

Tab B

Government's Reply to Standby Counsel's Proposed Substitutions

[redacted]