

MUG 29 103 14:58 LITIGATION SECURITY



P.4
FILED WITH
COURT SECURITY OFFICER
11/2/03
DATE 8/29/03

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

UNITED STATES OF AMERICA,

v.

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

Defendant.

Criminal No: 01-455-A

MEMORANDUM OPINION

I. Introduction

Before the Court are the defendant's pro se motions to
compel the trial appearances [redacted]
[redacted] and Standby
Counsel's Motion for Pre-trial Access and for Writs Ad
Testificandum [redacted]
[redacted] ("Standby Counsel's Motion for Access to and Writs for
[redacted] (Docket #997). For the reasons stated
herein, the motions will be granted in part and denied in part by
an appropriate order issued with this Memorandum Opinion.

II. Background



¹ See also Docket #s [redacted] 955, 987,



AUG 29 '03 14:55 LITIGATION SECURITY

P.3

[REDACTED]

[REDACTED]

Moussaoui filed motions seeking to compel appearances at trial as witnesses on his behalf. Because the United States had, at that time, noticed its appeal of the Court's Order of January 31, 2003, which granted in part and denied in part similar defense motions requesting pretrial access to, and to compel the trial appearance [REDACTED]

[REDACTED] the Court stayed resolution of the motions regarding [REDACTED] until the United States' appeal was resolved. (Orders of March 10, 2003 docketed as #s 783 and 784). On June 26, 2003, the United States Court of Appeals for the Fourth Circuit dismissed the appeal for lack of jurisdiction after which the mandate was promptly returned to this Court for further proceedings. Since the return of the mandate, the United States has advised the Court, pursuant to Section 6(e) of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3, that it will not comply with the Court's Order of January 31, 2003, and will not make [REDACTED] available for any Fed. R.

[REDACTED]

[REDACTED]

[REDACTED]

F.b

Crim. P. 15 deposition.

Given the United States' refusal to comply with that Order, the Court is now tasked with imposing appropriate sanctions on the United States. However, because the same legal issues are implicated in the defendant's motions concerning [REDACTED] to avoid piecemeal litigation and to ensure that the record is complete, the Court decided to resolve the defense motions concerning [REDACTED] before sanctions are imposed.

In accordance with the Court's Order of July 11, 2003, which directed the parties to further brief the defendant's pro se motions to compel the trial appearances [REDACTED] on July 23, 2003, standby defense counsel filed their Motion for Pre-trial Access and for Writs Ad Testificandum [REDACTED] [REDACTED] (Docket #997), primarily contending that testimony from [REDACTED] would exculpate Moussaoui by eliminating him from any role in the September 11 plot. The United States argues that the defense request for pre-trial access to these detainees should be denied because the Court previously declined to grant a similar request [REDACTED] and reiterates its contention that the defendant does not have a constitutional right to compel the trial testimony of "enemy combatants captured in the theater of war and detained abroad." (Government's Opposition at 3). The Government also

[REDACTED]

argues that its national security concerns outweigh the defendant's need for, or right to, the trial testimony of [REDACTED] these detainees; and further contends that the potential trial testimony [REDACTED] is not as valuable as the defense claims because it would either be inculpatory or unnecessarily cumulative.

III. Discussion

Having carefully reviewed Moussaoui's pro se pleadings, counsel's memoranda, and attachments thereto, as well as the

[REDACTED] summaries [REDACTED]

[REDACTED], the Court concludes [REDACTED]

[REDACTED] detainees will likely be able to provide exculpatory testimony which the defendant has a constitutional right to present to the jury at trial. The Court's previous finding in its Memorandum Opinion of March 10, 2003 that the United States' national security concerns do not outweigh the defendant's Sixth Amendment right to compel the trial appearances of witnesses in his favor is incorporated herein.

A. [REDACTED]

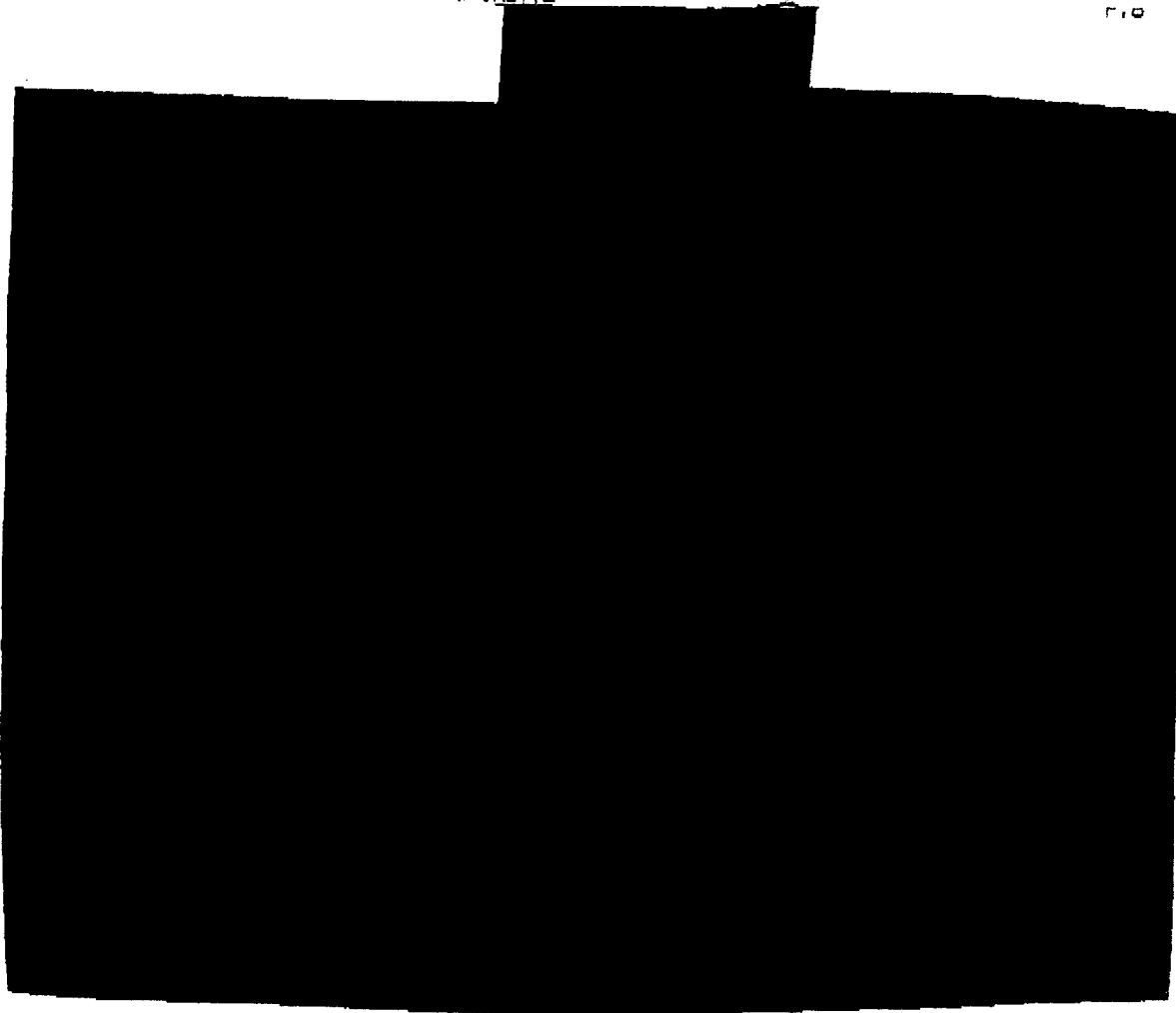
[REDACTED]

[REDACTED]

[REDACTED]

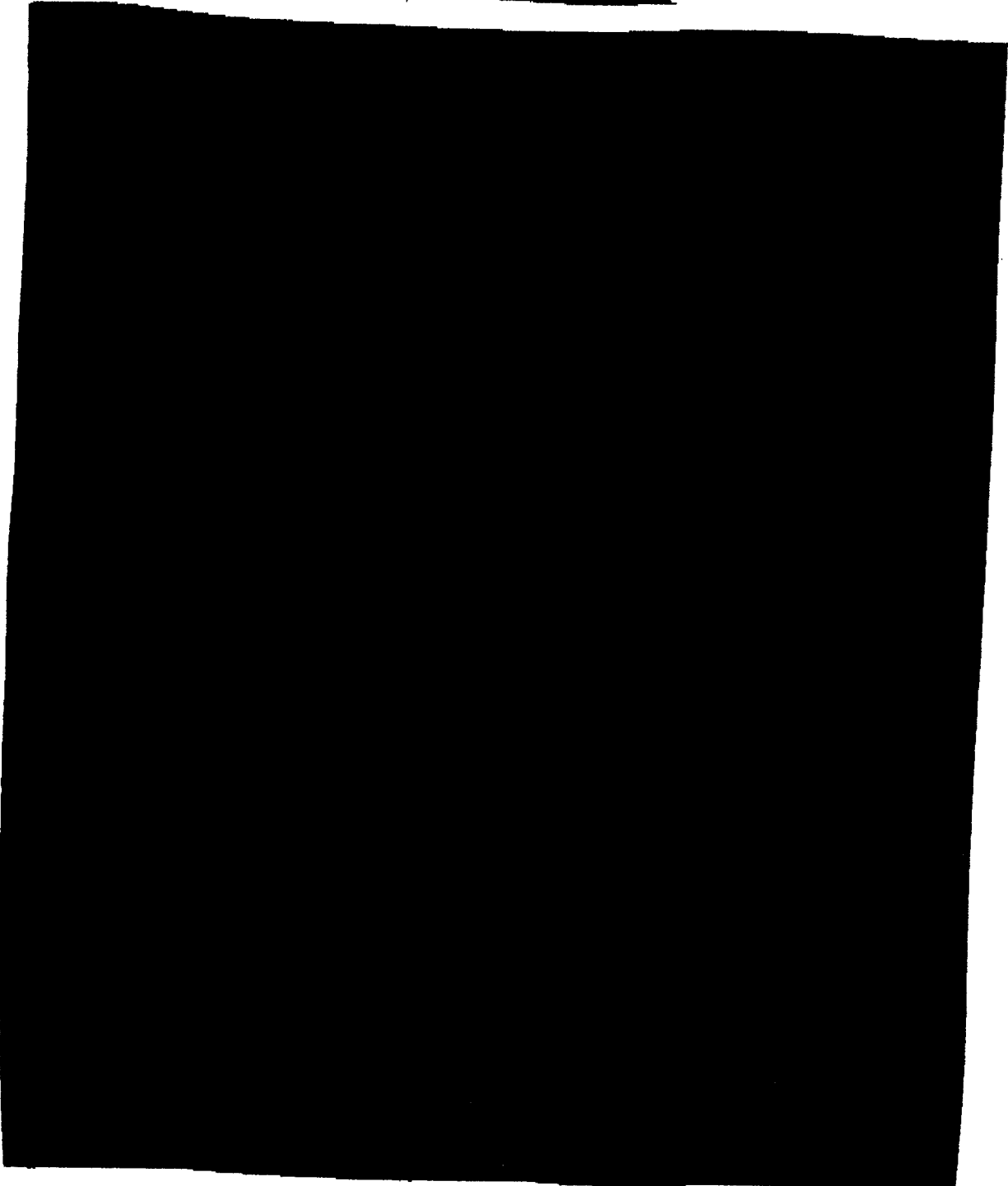
ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

Page



AUG 29 '23 15:05 LITIGATION SECURITY

P.1



C

AUG 29 '03 15:07 LITIGATION SECURITY

P.2

In light of the particular allegations in the indictment and the United States' desire to hold Moussaoui responsible for the tragic events of September 11, 2001 by seeking a penalty of death in this case,¹¹ the Court finds that the defense has made a

¹¹ Moussaoui is charged with Conspiracy to Commit Acts of Terrorism Transcending National Boundaries in violation of 18 U.S.C. § 2332(a)(2) and (c) (Count I), Conspiracy to Commit Aircraft Piracy in violation of 18 U.S.C. § 46502(a)(1)(A) and (a)(2)(B) (Count II), Conspiracy to Destroy Aircraft in violation of 18 U.S.C. §§ 32(a)(7) and 34 (Count III), Conspiracy to Use Weapons of Mass Destruction in violation of 18 U.S.C. § 2332a(a) (Count IV), Conspiracy to Murder United States Employees in violation of 18 U.S.C. §§ 1114 and 1117 (Count V), and Conspiracy to Destroy Property in violation of 18 U.S.C. § 844(f), (j) and

sufficient showing [REDACTED] could provide material and favorable testimony on Moussaoui's behalf.¹² See United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982).

[REDACTED]

At minimum, such testimony would eliminate the

(n) (Count VI). Because the United States has alleged that the charged conspiracies resulted in thousands of deaths on September 11, 2001, if convicted of any of the first four counts, the defendant faces the death penalty.

¹² The testimony of a witness may be favorable if it would tend to exculpate a defendant or reduce the penalty he potentially faces, see Brady v. United States, 373 U.S. 83, 88 (1963), create a reasonable doubt as to the defendant's guilt, see United States v. Agurs, 427 U.S. 97, 112 (1976), or undermine confidence in the outcome of the trial if suppressed, see United States v. Bagley, 473 U.S. 667, 679 (1985).

[REDACTED]

¹⁴ Moussaoui's knowledge and intent are critical issues in this case. Before the July 25, 2002 hearing at which the defendant attempted to enter a guilty plea, the United States provided the defendant with a proposed Statement of Facts to which he would have had to admit for the Government to agree to proceed with the plea. Specifically, the Government sought to

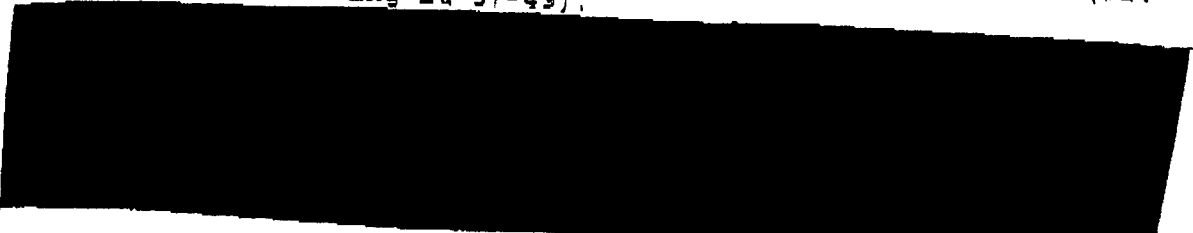


possibility of a death sentence, and could exculpate him from the specific conspiracies charged in this case.¹⁵

The Court finds unpersuasive the Government's contention [redacted] inculcates, rather than exculpates, the defendant in the charged offenses. As stated in our Memorandum Opinion of March 10, 2003, the ultimate determination as to the value of a witness' testimony is for the jury to make in the context of the other evidence introduced at trial. The prosecution does not make this evaluation.

The Government's argument [redacted] trial testimony would be unnecessarily cumulative is also without merit. [redacted]

[redacted] require the defendant to admit that "as part of al Qaeda's conspiracy to attack the United States, an operation was conceived in which civilian commercial airliners would be hijacked and flown into prominent buildings, including government buildings, in the U.S.," (Proposed Statement of Facts at ¶ 6), that he "knew of a plan to fly airplanes into prominent buildings in the United States and he agreed to travel to the United States to participate in the plan," (id. at ¶ 7), that he "intended to use his training as a pilot in furtherance of the plan," (id. at ¶ 8), and that, on September 11, 2001, four commercial airliners were hijacked and crashed into the World Trade Center towers, the Pentagon and a field in rural Pennsylvania killing thousands of people, (id. at ¶¶ 14-19). That plea colloquy broke down because the defendant was, and continues to be, unwilling to admit to knowledge of, or involvement in, the September 11 attacks. (Tr. July 25, 2002 hearing at 37-49).



AUG 29 '03 15:13 LITIGATION SECURITY

P.5

[REDACTED]

[REDACTED]

[REDACTED] could undoubtedly offer unique insight into the defendant's role, if any, in the charged offenses. Further, as the defense contends, [REDACTED] could both bolster and expand upon the trial testimony the defense would attempt to elicit [REDACTED]. That [REDACTED] testimony would corroborate [REDACTED]

[REDACTED] for the September 11 operation would not, as the Government contends, be unnecessarily cumulative, [REDACTED]

[REDACTED] The United States' contention that this testimony would be cumulative is simply disingenuous in light of its representations that the Government will neither make [REDACTED] available for the court-ordered Fed. R. Crim. P. 15 deposition, nor declassify [REDACTED] summaries [REDACTED]

[REDACTED] c. [REDACTED]

[REDACTED]

[REDACTED]

AUG 29 '03 15:15 LITIGATION SECURITY

P.6

[REDACTED]

[REDACTED]

The Court finds that the defense has adequately demonstrated that, if called as a witness at trial, [REDACTED] could provide material, exculpatory testimony on the defendant's behalf. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

AUG 29 '03 15:17 LITIGATION SECURITY

P.7

[REDACTED]

[REDACTED]

supports the defense

contention that Moussaoui was not involved in the September 11 operation.

[REDACTED]

supports the claim that Moussaoui was not part of the September 11 plot because the defendant was in the United States at the time, but was not contacted

[REDACTED]

III. Conclusion

For the reasons stated in the Court's Memorandum Opinion of March 10, 2003,

[REDACTED]

However, as we did

in the context of similar defense requests concerning pretrial

access [REDACTED] in consideration of the United States'

[REDACTED]

[REDACTED]

[REDACTED]

national security concerns, the Court will not grant standby defense counsel unmonitored, pretrial access to these detainees.

[REDACTED]

Although Moussaoui vigorously opposes any outcome short of the Court securing the physical presence of these witnesses at trial, (Docket #s [REDACTED] 958, 968, 971, 972, 1010, [REDACTED]), we find that the proper balance of the parties' interests favors treating [REDACTED]

just as [REDACTED]. Therefore, by an appropriate order issued with this Memorandum Opinion, the Court will direct the United States to make [REDACTED] available for Fed. R. Crim. P. 15 depositions under the same terms and conditions articulated in the Court's Order of January 31, 2003.

Pursuant to Section 6(c) of CIPA, 18 U.S.C. App. 3, [REDACTED] the United States requests an opportunity "to propose appropriate substitutions... for the specific evidence identified by the Court," (Government's Opposition at 20), or "to suggest substitutions for those statements the Court has deemed material and admissible." (Government's Opposition at 6).²⁰ The defendant

[REDACTED]

²⁰ Other than rely, in part, on [REDACTED] summaries in support of its finding that the defense has made adequate showings regarding the materiality of the potential trial testimony [REDACTED] the Court has not endeavored

[REDACTED]

[REDACTED]

opposes this request.

[REDACTED]

The Court previously considered and rejected the United States' proposed substitution for the Fed. R. Crim. P. 15 deposition [REDACTED] finding that the tendered [REDACTED] summaries was an unreliable, incomplete and inaccurate substitute for [REDACTED] deposition testimony. (Memorandum Opinion of May 15, 2003). To the extent that the United States seeks an opportunity to propose substitutes for, or alternatives to, the Fed. R. Crim. P. 15 depositions [REDACTED], which would accommodate some form of defense interaction or input and result in a reliable, verbatim record of the witnesses' testimony, the Court will grant the United States a brief opportunity to do so.

The Court Security Officer is directed to forward copies of

to make relevance or admissibility determinations as to particular statements [REDACTED]. Rather, we agree with standby counsel that such determinations should be made as they arise during any Fed. R. Crim. P. 15 deposition and/or any future proceeding pursuant to Section 6(a) of CIPA at which the Court will rule on the "use, relevance or admissibility" of specific classified information identified by standby counsel pursuant to Section 5(a) of CIPA, [REDACTED]

[REDACTED]

[REDACTED]

AUG 29 '03 15:29 LITIGATION SECURITY_

P.10



this Memorandum Opinion to counsel for the United States and standby defense counsel; and is further instructed to submit this Memorandum Opinion for an expedited classification review so that an appropriate version can be provided to the pro se defendant and placed in the public record as soon as possible.

Entered this 29th day of August, 2003.

/s/

Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

