Filed with the Court Security Officer 9/20/03

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	)	[redacted]
	)	**FILING/UNDER SEAL**

STANDBY COUNSEL'S MOTION FOR SANCTIONS AND OTHER RELIEF

Standby counsel, on behalf of and in support of motions filed by Zacarias Moussaoui, move this Court, pursuant to CIPA § 6(e)(2) or alternatively, the common law, to dismiss this case as a sanction because of the government's refusal, as set forth in affidavits filed by the Attorney General of the United States pursuant to CIPA § 6(e)(1), to grant defense access through Rule 15 depositions, as previously ordered by the Court, to [redacted] material witnesses to the charges in the indictment [redacted] These witnesses are [redacted] unavailable.

Standby counsel also move that the indictment be dismissed, or at least that the death penalty be stricken, not as a sanction, but as recognition of the fact that the national security privilege and the separation of powers doctrine, as invoked here by the Executive, will preclude this Court from performing its quintessential function of providing Moussaoui with a fair trial. Regardless, to proceed with this case under the current circumstances [redacted] would violate the Eighth Amendment. This relief is warranted irrespective of whether the Court has the power to compel the Rule 15 depositions at issue.

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PROCEDURAL HISTORY

By Order dated January 31, 2003, this Court ordered the United States to "make [redacted] available for trial testimony in the form of a videotaped deposition pursuant to Fed. R. Crim. P. 15."[1] The Court concluded that the defense "has made a significant showing that [redacted] would be able to provide material, favorable testimony on the defendant's behalf - both as to guilt and potential punishment."[2] In issuing this Order, the Court considered information submitted by the government (some *ex parte* and *in camera*) concerning the government's national security concerns. The Court endeavored to balance those concerns against the defense need for the testimony by denying defense access [redacted] prior to his testimony, and by ordering that the testimony be taken by a Rule 15 teleconferenced deposition with additional safeguards to protect national security.[3] The Court characterized its ruling as "essentially a compromise," "to minimize the harm to the government and yet allow the proper processes of the criminal justice system to go forward."[4] Later, the Court provided an explanation of its Order in a March 10 Memorandum Opinion.

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[1] Order at 1-2 (filed Jan. 31, 2003, dkt. no. 732) (the "January 31 Order"). At the same time, the Court denied defense motions for pre-trial access [redacted] and denied pre-trial and trial access [redacted] *Id.*

[2] Memorandum Opinion at 16-17 (filed Mar. 10, 2003, dkt. no. 785) ("March 10 Memorandum Opinion").

[3] March 10 Memorandum Opinion at 20-26.

[4] Transcript of January 30, 2003 CIPA Hearing at 77-78 (filed Feb. 4, 2003, dkt. no. 734).

On February 7, 2003, the United States noticed its appeal from the January 31 Order.[5] On February 12, 2003, the district court granted in part the government's Motion for Stay and removed the case from the trial calendar pending the appeal.[6] On April 14, 2003, after the parties had submitted their briefs, the Court of Appeals stayed the appeal and remanded to allow the government the opportunity to propose substitutions [redacted] expected testimony.[7]

On April 24, 2003, the government filed a proposed substitution [redacted] testimony, to which the defense objected.[8] The Court rejected that substitution on May 15, 2003, finding that "because of its unreliability, incompleteness and inaccuracy," it would not "'provide the defendant with substantially the same ability to make his defense as would' the court-ordered, [redacted] videotaped deposition [redacted]"[9]

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[5] *See* Notice of Appeal (filed Feb. 7, 2003, dkt. no. 740).

[6] *See* Order at 2 (filed Feb. 12, 2003, dkt. no. 752).

[7] Order (4th Cir., No. 03-4162, filed Apr. 14, 2003).

[8] *See* Government's Submission of Proposed Substitutions (filed Apr. 24, 2003, dkt. no. 863); [redacted] (filed Apr. 28, 2003, dkt. no. 869); Standby Counsel's Response and Objection to the Government's Submission of Proposed Substitutions (filed May 1, 2003, dkt. no. 875); "Memorial Strike by Slave of Allah, Zacarias Moussaoui to Destroy Fake [redacted] Substitution [redacted] (filed May 7, 2003, dkt. no. 896); *see also* Memorandum Opinion at 3 (filed May 15, 2003, dkt. no. 925) and pro se pleadings cited therein.

[9] *See* Memorandum Opinion at 6 (filed May 15, 2003, dkt. no. 925); *see also* Order at 1 (filed May 15, 2003, dkt. no. 924).

This case then returned to the Court of Appeals, where, on May 23, 2003, the government and the defense filed supplemental briefs.[10] Among the issues set by the Court of Appeals for argument was whether separation of powers concerns mandated reversal of this Court's January 31 Order.[11]

Oral argument in the Court of Appeals was held on June 3, 2003. On June 26, 2003, the Court of Appeals dismissed the government's appeal for lack of jurisdiction, concluding that none of the three asserted bases for jurisdiction - CIPA § 7(a), the Collateral Order Doctrine, and Mandamus - conferred appellate jurisdiction at that time.[12] In so doing, the Court of Appeals ruled that "[t]he order of the district court will not become final [for jurisdictional purposes] unless and until the Government refuses to comply [with the January 31, 2003 Order] and the district court imposes a sanction."[13] Noting that it was "prepared at this time to rule on the substantive questions before us," and that it "intend[s] to expedite any subsequent appeal that may be taken," the Court of Appeals "urged [the parties and the district court] to continue to [pursue these matters with diligence]."[14]

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[10] *See* Supplemental Brief for the United States (4th Cir., No. 03-4162, filed May 23, 2003); Supplemental Brief of the Appellee (4th Cir., No. 03-4162, filed May 23, 2003).

[11] *See* Order at 16 (4th Cir., No. 03-4162, filed May 15, 2003).

[12] *See United States v. Moussaoui*, 333 F.3d 509, 514 (4th Cir. June 26, 2003). The mandate was issued on June 30, 2003.

[13] *Id.* at 515.

[14] *Id.* at 512, 517. On July 1, 2003, the government filed a motion with the Court of Appeals to recall the mandate. *See* Motion to Recall the Mandate (4th Cir., (continued...)

Following the decision of the Court of Appeals, the District Court, on July 7, 2003, ordered the government to "advise the Court by Monday, July 14, 2003 whether it intends to comply with our Order of January 31, 2003."[15] The Court also ordered the parties to address Moussaoui's pending motions for access [redacted][16] Those motions had been stayed pending resolution of the government's appeal of the January 31 Order.[17] Subsequently, by Order dated July 11, 2003, the

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[14] (...continued)
No. 03-4162, filed July 1, 2003). The Court of Appeals denied that motion on July 3, 2003. *See* Order (4th Cir., No. 03-4162, filed July 3, 2003). On July 10, 2003, the government filed (1) an Emergency Motion to Reconsider Denial of Motion to Recall the Mandate and Request for Submission of this Motion to the En Banc Court for Disposition, (2) a Petition for Panel Rehearing or Rehearing En Banc, and (3) a Motion to Expedite Consideration of the Government's Petition for Panel Rehearing or Rehearing En Banc, all of which standby counsel opposed. On July 14, 2003, the Court of Appeals denied the first and second and granted the third of these motions. *See* Order (4th Cir., No. 03-4162, filed July 14, 2003); *United States v. Moussaoui*, 336 F.3d 279 (4th Cir. July 14, 2003) (denying Petition for Panel Rehearing or Rehearing En Banc).

[15] Order (filed July 7, 2003, dkt. no. 959). At the government's request, this deadline was subsequently extended to July 14, 2003 at 6:00 p.m. *See* Order (filed July 14, 2003, dkt. no. 975).

[16] Order (filed July 7, 2003, dkt. no. 959). Moussaoui moved to get access [redacted]

[17] *See* Order (filed July 7, 2003, dkt. no. 959). After the Court stayed resolution of these motions, standby counsel requested the government, by letter dated March 18, 2003, to produce any *Brady* information [redacted] Moussaoui made a similar request in a motion [redacted]

Court adopted a briefing schedule for the parties' responses to the [redacted] access motions.[18]

[redacted] The United States opposed these requests, arguing that the Court had stayed resolution of the motions for access [redacted] By Order dated March 28, 2003, the Court denied the defendant's motion, but ordered that "any statements [redacted] [that] constitute *Brady* material . . . must be promptly produced to the defense in compliance with the Government's continuing obligation to produce exculpatory evidence in its possession." Order at 1, n.1 (filed Mar. 28, 2003, dkt. no. 801); *see also* Order at 1-2 (filed Apr. 1, 2003, dkt. no. 805) (denying defendant's motion for reconsideration of the Court's ruling on access to [redacted] but stating that "the United States is under a continuing obligation to produce to the defense any statements in its possession which may exculpate the defendant from the charged offenses or help him avoid a death sentence").

On April 18, 2003, standby counsel filed a classified motion to provide a status report [redacted] *See* Standby Counsel's Motion for Status Report [redacted] (filed Apr. 18, 2003, dkt. no. 843). In that motion, counsel stated that they had, as yet, received no [redacted] summaries [redacted] That motion was denied as moot on April 22, 2003, after the government filed with the Court and produced to counsel classified summaries [redacted] *See* Order (filed Apr. 22, 2003, dkt. no. 854); letter to Frank Dunham, Jr. from AUSA Kenneth Karas dated Apr. 22, 2003, attaching [redacted] summaries [redacted] Also produced via the April 22 letter were [redacted] summaries. Additional classified summaries [redacted] were produced to standby counsel on July 15 and 22, 2003.

[18] *See* Order (filed July 11, 2003, dkt. no. 970).

On July 14, 2003, the government informed the Court that it would not comply with the Court's January 31 Order granting the defense trial access [redacted][19] (Attached to the government's pleading was an affidavit from Attorney General John Ashcroft pursuant to CIPA § 6(e)(1).) In so doing, the government recognized that the government's action "means that the deposition cannot go forward and obligates the Court now to dismiss the indictment unless the Court finds that the interests of justice can be served by another action."[20]

In light of the government's position, on July 17, 2003, the Court adopted a briefing schedule for submission of the parties' positions on the appropriate sanction(s) to be imposed for the government's refusal to comply with the January 31 Order.[21] The following day the Court vacated that schedule because it wished to resolve the [redacted] access motions before considering the issue of sanctions.[22] In this way, the Court would "avoid piecemeal litigation and . . . ensure that the record is complete."[23]

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[19] *See* Government's Position Regarding the Court-Ordered Deposition (filed July 14, 2003, dkt. no. 976).

[20] *Id.* at 2 (citing CIPA § 6(e)(2)).

[21] *See* Order (filed July 17, 2003, dkt. no. 982).

[22] Order (filed July 18, 2003, dkt. no. 989); Memorandum Opinion at 3 (filed Aug. 29, 2003, dkt. no. 1033) ("August 29 Memorandum Opinion").

[23] August 29 Memorandum Opinion at 3.

Thereafter, on July 23, 2003, standby counsel filed its pleading requesting pre-trial and trial access [redacted][24] The government filed its opposition on July 29, 2003, and standby counsel responded on August 1, 2003.[25] Moussaoui also filed pleadings supporting his original requests for access [redacted][26]

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[24] *See* Standby Counsel's Motion for Pre-Trial Access and for Writs *Ad Testificandum* [redacted] (filed July 23, 2003, dkt. no. 997).

[25] *See* Government's Opposition to Defendant's Motions for Access [redacted] (filed July 29, 2003, dkt. no. 999); Standby Counsel's Response to the Government's Opposition to Defendant's Motions for Access [redacted] (filed Aug. 1, 2003, dkt. no. 1007).

[26] *See, e.g.*, [redacted] "Memorial Strike by Slave of Allah, Zacarias Moussaoui to Destroy Fake [redacted] Substitution [redacted] at 4, 8 (filed May 7, 2003, dkt. no. 896); [redacted] "Renew Strike on 9/11 Witness Stars [redacted] for Their Appearance at the Zacarias Moussaoui Extravaganza Trial" (filed July 2, 2003, dkt. no. 955); "Insider Dealer [redacted] Wanted for Accounting of Record Bonus 9/11 Operation at the WTC by the Master in International Bombing Business Zacarias Moussaoui" (filed July 18, 2003, dkt. no. 987); "Collateral Strike by the Suicide Pilot Missing in Action (a/k/47 Zacarias Moussaoui) for the Live Testimony of the [redacted] and Against Lieonie Travesty of

(continued...)

On August 29, 2003, the Court issued its Order and a separate Memorandum Opinion ruling on the motions for access [redacted], the Court denied the defense pre-trial access to [redacted] witnesses and production of them in court as live witnesses for Moussaoui's trial. However, the Court granted the defense limited trial access [redacted] by ordering the government "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."[27] The Court concluded that [redacted] detainees will likely be able to provide exculpatory testimony which the defendant has a constitutional right to present to the jury at trial."[28]

As part of its August 29 Order, the Court, at the government's request, granted the latter an opportunity to propose substitutions for the expected testimony [redacted][29] The Court reminded the government that its substitution [redacted] testimony, as a "tendered [redacted] summaries," was an "unreliable, incomplete and inaccurate substitute" for his

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[26] (...continued)
Video Justice" (filed Aug. 11, 2003, dkt. no. 1018); "Collateral Strike to Audit the 9/11 Mortgagor Account Live in the World Trade Conspiracy" (filed Aug. 11, 2003, dkt. no. 1019).

[27] Order at 1 (filed Aug. 29, 2003, dkt. no. 1034) ("August 29 Order").

[28] August 29 Memorandum Opinion at 4.

[29] *Id.* at 14; August 29 Order at 1-2.

testimony.[30] Thus, the Court admonished the government that to be adequate, the [redacted] substitutes must "accommodate some form of defense interaction or input and result in a reliable, verbatim record of the witnesses' testimony."[31]

On September 5, 2003, pursuant to CIPA § 6(c), the government submitted its proposed substitutions [redacted] testimony.[32] Those substitutions suffered from the same deficiencies as the government's proposed substitution for [redacted] testimony and, more pointedly, completely failed to follow the Court's August 29 admonition to "accommodate some form of defense interaction or input" and be "a reliable, verbatim record of the witnesses' testimony."[33] Accordingly, on September 8, 2003, the Court rejected the substitutions stating, "[f]or the reasons stated in our Memorandum Opinion of May 15, 2003, we find the Proposed Substitutions to be inadequate substitutes for the Fed. R. Crim. P. 15 depositions ordered by the Court on August 29, 2003."[34]

Also on September 8, the Court ordered the government to "advise the Court by Wednesday, September 10, 2003 whether it intends to comply with our Order of August

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30 August 29 Memorandum Opinion at 14.

31 *Id.* at 14.

32 *See* Government's Motion for Substitutions Pursuant to CIPA § 6(c)(2) with the attached Government's Proposed Substitution [redacted] (filed Sept. 5, 2003, dkt. no. 1038).

33 August 29 Memorandum Opinion at 14.

34 Order at 1 (filed Sept. 8, 2003, dkt. no. 1043).

29, 2003."[35] The government did so on September 10 stating, through a memorandum and attached classified affidavit from the Attorney General filed pursuant to CIPA § 6(e)(1), that "the Attorney General . . . objects to the Court's Order of August 29, 2003."[36] Like it did on July 14, 2003, the government again "recognize[d] that the Attorney General's objection means that the depositions cannot go forward and obligates the Court now to dismiss the indictment unless the Court finds that the interests of justice can be served by another action."[37]

The following day, September 11, 2003, the Court ordered the defense and the prosecution to file their positions on sanctions by September 16 at 5:00 p.m. and September 19, 2003 at 12:00 p.m., respectively.[38] At the request of standby counsel, the Court subsequently extended each of these deadlines to noon on September 19 and 5:00 p.m. on September 24, 2003, with Moussaoui given until September 29, 2003 to respond to the government's filing.[39]

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35 *Id.*

36 *See* Government's Position Regarding the Depositions Ordered August 29, 2003 at 2 (filed Sept. 10, 2003, dkt. no. 1048).

37 *Id.* (citing CIPA § 6(e)(2)).

38 Order at 1 (filed Sept. 11, 2003, dkt. no. 1050).

39 Order at 1 (filed Sept. 11, 2003, dkt. no. 1053).

THE COURT'S FINDINGS ON MATERIALITY

Despite the government's recent attempt to distance its case from the events of September 11,[40] it is clear from the indictment that those events form the heart of the government's case against Moussaoui. As the Court recently observed, "the United [States desires] to hold Moussaoui responsible for the tragic events of September 11, 2001 by seeking a penalty of death in this case."[41] Thus, any evidence that moves Moussaoui out of an intended role in, or knowledge of, the specific operation on September 11 greatly diminishes the chance that a jury would, or could, convict him of some or all of the charged offenses or impose a sentence of death.[42] And, in this regard, as the Court also correctly noted, "Moussaoui's knowledge and intent are critical issues in this case."[43]

Accordingly, the Court's findings on materiality[44] have addressed the ability of [redacted] either singly or in combination, to distance Moussaoui from the September 11 participants and any involvement in, or opportunity

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[40] *See* Government's Opposition to Defendant's Motions for Access [redacted] at 7-8 (filed July 29, 2003, dkt. no. 999) ("Moussaoui is not charged . . . with 'September 11.'").

[41] August 29 Memorandum Opinion at 7.

[42] *See id.* at 9, n.15 (questioning whether a second attack operation after September 11 "is within the scope of the six charged conspiracies"); *see also id.* at 8-9 (finding that [redacted] expected testimony "would eliminate the possibility of a death sentence, and could exculpate him from the specific conspiracies charged in this case").

[43] *Id.* at 8, n.14.

[44] The Court's findings on the materiality [redacted] were made in its Memorandum Opinions of March 10 and August 29, 2003.

to be involved in, the September 11 attacks. Further, because the testimony of each of these witnesses is interlocking and supportive of each other, the Court also has correctly noted that the value of the testimony of these witnesses to Moussaoui, and the corresponding prejudice to him from being denied access to that testimony, should be measured cumulatively and not in isolation.[45]

[redacted]

In its March 10 Memorandum Opinion, the Court held that "the defense has made a significant showing that [redacted] would be able to provide material, favorable testimony on the defendant's behalf - both as to guilt and potential punishment."[46] The assessment of the credibility of this testimony, the Court ruled, "is for the jury, rather than the prosecution, to make in the context of the other evidence introduced at trial."[47]

First, the Court noted that [redacted]

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45 *See* August 29 Memorandum Opinion at 10 (stating that the fact "[t]hat [redacted] testimony would corroborate [redacted] testimony regarding [redacted] for the September 11 operation would not, as the Government contends, be unnecessarily cumulative, but rather, would lend credibility to the testimony of each witness").

46 March 10 Memorandum Opinion at 16-17.

47 *Id.* at 19; *accord* August 29 Memorandum Opinion at 9.

48 March 10 Memorandum Opinion at 17. The [redacted] also referred to in the March 10 Memorandum Opinion [redacted]

Second, [redacted]

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

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49 *Id.* at 17.

50 *Id.*

51 *Id.* at 17-18.

52 *Id.* at 18. After the Court issued its March 10 Memorandum Opinion, the government produced a [redacted] summary [redacted] (produced on May 19, 2003 via the Government's Supplemental Motion for a Protective Order Pursuant to Section 4 of CIPA (dkt. no. 930).

[redacted][53]

Third, the Court found that the fact that [redacted]

Fourth, and finally, the Court determined that "[e]ven if [redacted] testimony could not help the defendant escape liability, [redacted] support the defense argument that Moussaoui should not be sentenced to death."[55] In particular, the Court found that [redacted] may be considered mitigating evidence of the defendant's minor role in the offense(s)" and that, "[t]hose same statements, if believed, also undermine the Government's argument that Moussaoui's alleged lies to federal officials at the time of his August, 2001 arrest should be considered in support of a sentence of death."[56]

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53 March 10 Memorandum Opinion at 18.

54 *Id.*

55 *Id.*

56 *Id.* at 18-19.

[redacted]

In its August 29 Memorandum Opinion, the Court concluded that [redacted] "will likely be able to provide exculpatory testimony which the defendant has a constitutional right to present to the jury at trial."[57]

More particularly, the Court first found that

[redacted] at minimum, such testimony would eliminate the possibility of a death sentence, and could exculpate him from the specific conspiracies charged in this case.[58]

The Court cited four examples of such [redacted]

[redacted]

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57 August 29 Memorandum Opinion at 4.

58 *Id.* at 8-9.

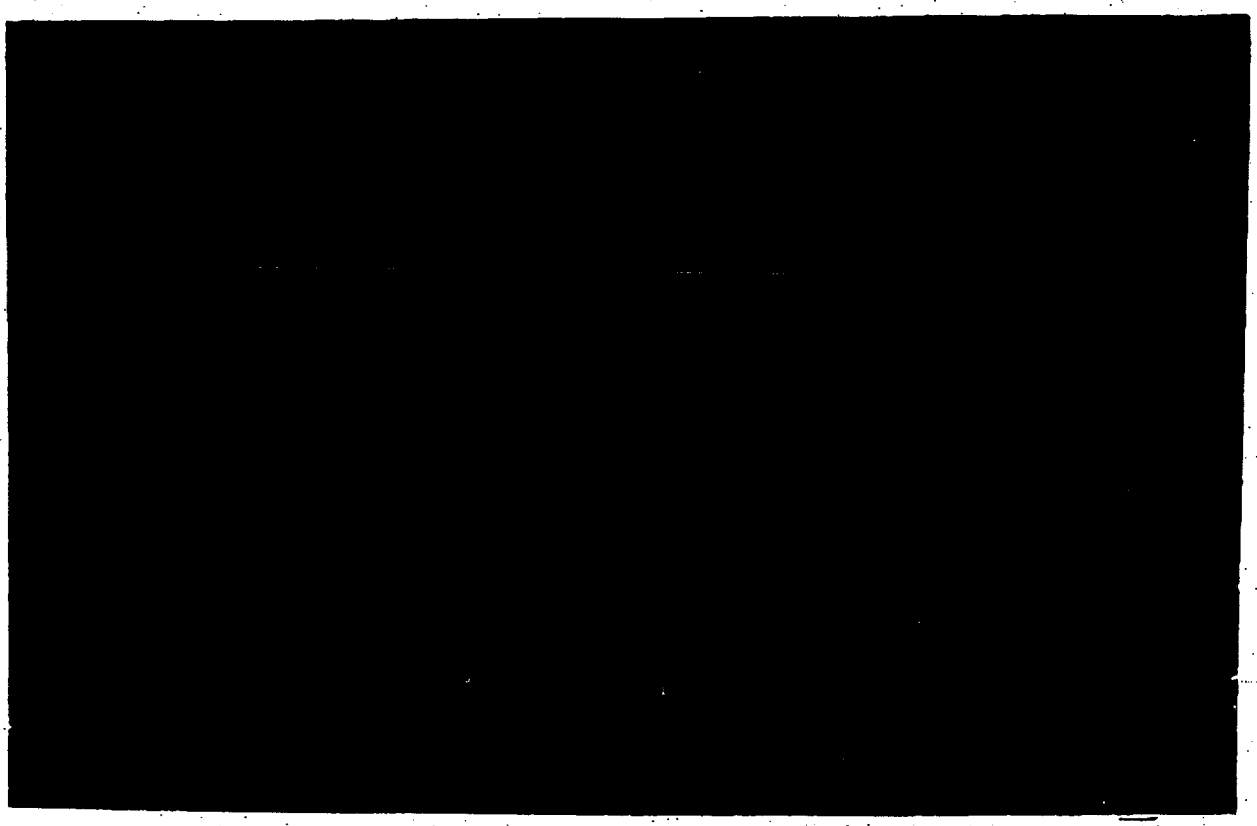
59 *Id.* at 5.

[redacted]

[redacted]

Second, the Court found [redacted] "could undoubtedly offer unique insight into the defendant's role, if any, in the charged offenses."[65] This conclusion, the Court stated, flowed from the fact that [redacted]

[redacted]



[redacted] the Court in its August 29 Memorandum Opinion concluded [redacted] "could provide material, exculpatory testimony on the defendant's behalf."[71] First, the Court found that his testimony would "support[ ] the defense contention that Moussaoui was not involved in the September 11 operation,"

[redacted]

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[71] August 29 Memorandum Opinion at 11; *see also id.* at 4 (stating that [redacted] detainees will likely be able to provide exculpatory testimony which the defendant has a constitutional right to present to the jury at trial").

[redacted]

SUMMARY OF ARGUMENT

The Indictment in this case is replete with references to circumstantial evidence which, the government contends, shows that Moussaoui was a participant in the September 11 operation. [redacted] witnesses at issue here are uniquely situated to know the truth as to Moussaoui's non-involvement in that operation. The testimony of these witnesses [redacted] - entirely exculpates Moussaoui from any involvement in or knowledge of the events of September 11. Stated otherwise, the government's circumstantial case is decimated [redacted] are permitted to testify in this case. Therefore, it is not hyperbole to state that Moussaoui cannot defend himself without these witnesses.

[redacted] Nonetheless, the government insists on moving ahead with its death penalty case while simultaneously denying these witnesses to the defendant, the Court and the jury.

As the Court well knows from its long involvement reviewing documents and pleadings *in camera* in this most unusual of cases, while no one witness standing alone tells the whole story, the statements [redacted] interlock in such a way as to be self-corroborating. [redacted]

Further, the Court knows from the many defense submissions that there is significant circumstantial evidence corroborating the picture painted by these witnesses of Moussaoui's non-involvement in September 11. Yet, Moussaoui's alleged involvement in September 11 is the central thrust of the indictment. Because of this, the only suitable sanction for the failure to produce [redacted] is dismissal of the entire indictment. The alternative sanctions enumerated in CIPA § 6(e)(2) are insufficient to vindicate the interests of justice in this capital case.

Once sanctions are imposed, the Fourth Circuit has said it is prepared to promptly rule on the government's assertion that this Court did not have the power in the first instance to issue writs *ad testificandum*, i.e., access orders for Rule 15 depositions. It is the government's refusal to comply with these orders that has given rise to the need for sanctions. Therefore, in addition to imposing sanctions, and in order to avoid piecemeal appeals, standby counsel urge the Court also to find, independent of whether the Court has the power to order access to enemy combatants held overseas under U.S. control, that, given the circumstances confronting the Court here, the Due Process Clause precludes proceeding with this case without the witnesses, and, similarly, the Eighth Amendment precludes imposition of the death penalty. Reaching this issue now will eliminate further piecemeal appellate review in this case should the Court of Appeals decide that this Court's process cannot reach the [redacted] witnesses.

ARGUMENT

I. SANCTIONS SHOULD BE IMPOSED UNDER THE CLASSIFIED INFORMATION PROCEDURES ACT

The affidavits of the Attorney General filed on July 14, 2003 and September 10, 2003 objecting to the access orders, were filed with this Court in accordance with and pursuant to CIPA § 6(e)(1). Upon such a filing, the Court is required to order "that the defendant not disclose or cause the disclosure of [the] classified information." CIPA § 6(e)(1).[75] Section 6(e)(1) is invoked only after a court denies a motion by the United States for an order under CIPA § 6(c), which provides for substitutions,[76] and the Attorney General then files an affidavit "objecting to disclosure of the classified information at issue." CIPA § 6(e)(1). Such an affidavit automatically bars the disclosure of the classified information and is, in effect, the government's "silver bullet" under CIPA.[77] Once filed, the affidavit automatically triggers CIPA § 6(e)(2), which mandates the imposition of sanctions.

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[75] The Court, of course, need not enter such an order where there has been no disclosure authorized under CIPA § 6(a). *United States v. Moussaoui*, 333 F.3d 509, 514 (4th Cir. 2003); *United States v. Moussaoui*, 336 F.3d 279, 280-81 (4th Cir. 2003).

[76] [redacted] the Court has denied a motion by the government pursuant to CIPA § 6(c) to permit substitutions for the testimony [redacted] *See* Procedural History *supra*.

[77] While it may be argued that because this Court's original order granting Rule 15 access to the witnesses applied CIPA only by analogy and that therefore the sanctions issue should not proceed under CIPA § 6, the plain statutory language of § 6(e) invokes this Court's statutory obligation to impose sanctions whenever both an order is issued denying a government motion under § 6(c) and the Attorney General files an affidavit under § 6(e)(1). Therefore, whether the original access order is or is not a CIPA order is not determinative of whether CIPA sanction procedures are now properly before the Court. All conditions precedent, then, to a sanctions order under § 6(e)(2) have been satisfied.

II. THE APPROPRIATE SANCTION UNDER THE CLASSIFIED INFORMATION PROCEDURES ACT IS DISMISSAL OF THE INDICTMENT

A. The Classified Information Procedures Act Mandates Dismissal Of The Indictment Unless The Interests Of Justice Would Not Be Served Thereby

As the government concedes, the presumptive sanction under CIPA § 6(e)(2) is dismissal of the indictment.[78] In pertinent part, that section requires:

> Whenever a defendant is prevented by an order under paragraph (1) from disclosing or causing the disclosure of classified information, the court *shall* dismiss the indictment or information; except that, when the court determines that the interests of justice would not be served by dismissal of the indictment or information, the court shall order such other action . . . as the court determines is appropriate.

CIPA § 6(e)(2) (emphasis added). The district court is accorded wide discretion in issuing the appropriate sanction and its ruling will be reviewed under an abuse of discretion standard. *United States v. Fernandez*, 913 F.2d 148, 163 (4th Cir. 1990) ("We believe that this review should accord significant deference to the district court's ruling on sanctions."). For the reasons stated below, the interests of justice will not be served by imposing any sanction short of dismissal.[79]

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[78] *See* Government's Position Regarding the Court-Ordered Deposition at 2 (filed July 14, 2003, dkt. no. 976); Government's Position Regarding the Depositions Ordered August 29, 2003 at 2 (filed Sept. 10, 2003, dkt. no. 1048).

[79] The statute goes on to list several alternative sanctions, noting that this list is not exhaustive. These alternative sanctions include dismissing specified counts, finding against the United States on any issue as to which the excluded classified information relates, and striking or precluding all or part of the testimony of a witness. CIPA § 6(e)(2)(A)-(C). Other possible sanctions include: dismissal of the Death Notice, striking of overt acts, a missing witness instruction, and a contempt citation. None of these alternates would sufficiently cure the harm to Moussaoui from the loss of the material evidence possessed by [redacted] witnesses or ensure his constitutional right to a fair trial and reliable sentencing.

B. Dismissal Is In The Interests Of Justice Because Without The Witnesses, Moussaoui Will Be Denied His Constitutional Right To A Fair Trial

It is axiomatic that the sanction to be imposed should be commensurate with the prejudice Moussaoui will suffer from the government's refusal to obey the Court's January 31 and August 29 Orders. That prejudice, of course, is magnified here because, as the Court has noted, this is a capital case requiring a heightened degree of reliability.[80]

For Moussaoui, the prejudice will be extreme. He will be denied the constitutional and statutory right to fully investigate his case, fully confront the government's evidence, effectively develop and present his case at trial, and effectively challenge his eligibility for the death penalty and the government's assertion that death is the appropriate punishment, to name only a few. What will be sacrificed here is nothing short of Moussaoui's absolute right to a fair trial.[81] *See Fernandez*, 913 F.2d 148, 154 (stating that "courts must not be remiss in protecting a defendant's right to a full and meaningful presentation of his claim to innocence"). Perhaps this is why the government has candidly and correctly recognized on two occasions that CIPA

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[80] See March 10 Memorandum Opinion at 17 (citing to *Woodson v. North Carolina*, 428 U.S. 280 (1976)).

[81] Moussaoui's fair trial right includes not only his Fifth, Sixth and Eighth Amendment rights, but also his right to act as his own lawyer pursuant to *Faretta v. California*, 422 U.S. 806 (1975). His statutory rights under 18 U.S.C. § 3005 and Fed. R. Crim. P. 16 also are infringed. The power of the court to impose sanctions derives from all of these sources as well as CIPA § 6(e)(2).

"obligates the Court now to dismiss the indictment unless the Court finds that the interests of justice can be served by another action."[82]

There is no other action. Given the harm to Moussaoui from the government's actions, dismissal is the only appropriate sanction.

It also was the only appropriate sanction in *Fernandez*, the only other reported case where the Attorney General has filed a CIPA § 6(e) affidavit. In *Fernandez*, the Fourth Circuit affirmed the district court's ruling that the government's suppression of the classified evidence "deprived [the defendant] of any real chance to defend himself," and that dismissal of the indictment was therefore warranted. *Id.* at 164. The classified information, the trial court held, "was 'essential for the defendant to put forth a defense in this case and to receive a fair trial.'" *Id.* at 163 (quoting the district court).

As with *Fernandez*, the classified information in the instant case is, as this Court has already ruled, material, favorable evidence "which [Moussaoui] has a constitutional right to present to the jury at trial."[83] Proceeding with the case without this evidence, would deny Moussaoui a fair trial and, if convicted, a constitutionally adequate sentencing proceeding because it would permit the government to present a circumstantial case of Moussaoui's knowledge of and involvement in September 11 that is flatly contradicted by direct evidence [redacted]. Accordingly, dismissal is the only adequate sanction because no other sanction can

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[82] *See* note 78 *supra*.

[83] August 29 Memorandum Opinion at 4; *see also* March 10 Memorandum Opinion at 16-17.

cure the harm to Moussaoui from being deprived access to and use of this exculpatory evidence.[84]

The government has argued that the indictment is broader than the operation that occurred on September 11, and that just because the witnesses may exculpate Moussaoui from that operation, they do not necessarily exculpate him from being part of a post-September 11 operation which could, the government argues, be subsumed within the sweep of the indictment. The Court has questioned whether the indictment is that broad.[85] However, even assuming that the indictment is sufficiently broad to encompass a post-September 11 attack, dismissal of the indictment nevertheless is required because [redacted] witnesses, [redacted] exculpate Moussaoui from any later operation as well.

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[84] Specifically, the alternative sanctions suggested by CIPA § 6(e)(2) are either inadequate or not apropos. For example, there is no government witness to strike or exclude. *See* CIPA § 6(e)(2)(C). Further, if the Court were to consider striking counts of the indictment, *see id.* at § 6(e)(2)(A), where the determination of guilt or innocence might turn on the testimony of the witnesses at issue, the Court would have to strike all of the counts, thus essentially dismissing the indictment in its entirety anyway. Finally, as the Court recently observed, "the United [States desires] to hold Moussaoui responsible for the tragic events of September 11, 2001." August 29 Memorandum Opinion at 7. This is the focus of the indictment. A finding against the United States on the issue to which the classified information it seeks to exclude relates, *see* CIPA § 6(e)(2)(B), that is, Moussaoui's knowledge of and participation in September 11, would so disable the government's case as to be the virtual equivalent of a dismissal of the indictment.

[85] *See* August 29 Memorandum Opinion at 9, n. 15 ("Whether such an operation is within the scope of the six charged conspiracies is an open question.").

As standby counsel have explained previously, [redacted] testimony would establish Moussaoui's limited knowledge of the post-September 11 plan.[86] [redacted]

[redacted]

[86] See Standby Counsel's Motion for Pre-Trial Access and for Writs *Ad Testificandum* [redacted] at 21 (filed July 23, 2003, dkt. no. 997); Standby Counsel's Response to the Government's Opposition to Defendant's Motions for Access [redacted] 11-12 (filed Aug. 1, 2003, dkt. no. 1007).

[redacted]

[redacted] a jury could reasonably infer that Moussaoui did not have "knowledge of the essential objectives of the conspiracy," *United States v. Stewart*, 256 F.3d 231, 250 (4th Cir. 2001), sufficient to find him guilty of the charged offenses.[94] Further, since that plan never took shape and no one died from it, [redacted] testimony is clearly exculpatory as to punishment.

Moreover, as also argued previously, [redacted] likely testimony [redacted]

[redacted]

[94] *See also* August 29 Memorandum Opinion at 7 (finding that [redacted] (citing to *United States v. Stewart*, 256 F.3d 231, 250 (4th Cir. 2001)).

[95] *See* Standby Counsel's Motion for Pre-Trial Access and for Writs *Ad Testificandum* [redacted] at 12-13 (filed July 23, 2003, dkt. no. 997).

[redacted]

[redacted]

For these reasons, and given that Moussaoui's knowledge and intent are "critical issues in this case,"[102] dismissal of the indictment is necessary even if the events of September 11, and those leading up September 11, were somehow completely excised from the indictment. (Of course, standby counsel believe that such an excision is not

[redacted]

102 August 29 Memorandum Opinion at 8, n.14.

possible given that those events permeate the entirety of the indictment and is the foundation for the death penalty.)

III. DISMISSAL OF THE INDICTMENT ALSO IS THE APPROPRIATE SANCTION UNDER THE COMMON LAW

Given CIPA's explicit statutory mandate, the Court need not rely on the common law to justify dismissal of the indictment against Moussaoui as a sanction for the government's refusal to comply with the Court's orders [redacted] However, like CIPA, the common law supports such a sanction.[103]

In *Roviaro v. United States*, 353 U.S. 53 (1957), the Supreme Court held that dismissal of the indictment would be the appropriate sanction if the government refused to produce to the defense information that is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." *Id.* at 60-61.[104] "In these situations," the Court stated, "the trial court may require disclosure and, if the Government withholds the information, dismiss the action." *Id.* at 61; *see also id.* at 65, n.15 (holding that the trial court also erred in refusing to require the government, under another count of the indictment, to reveal the identify and address of the informant, and stating, "the Government should have been required to supply that information or suffer dismissal of that count").

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[103] In refusing to produce the witnesses, the government relies on the national security/state secrets privilege in addition to CIPA. *See* Government's Position Regarding the Depositions Ordered August 29, 2003 at 1 (filed Sept. 10, 2003, dkt. no. 1048) (citing to *United States v. Reynolds*, 345 U.S. 1, 10-12 (1953)).

[104] In *Roviaro*, the information was a confidential informant's identity and/or the contents of his communications. 353 U.S. at 60, n.8.

As authority for its holding in *Roviaro*, the Supreme Court cited *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944) and *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950), *cert. denied*, 342 U.S. 920 (1952), cases in which the government refused to release confidential government records to the defense. *See* 353 U.S. at 61, n.10. As standby counsel have discussed before,[105] the rationale of this line of cases has been summarized by the Supreme Court as "since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." *United States v. Reynolds*, 345 U.S. 1, 12 (1953) (summarizing the rationale of the *Andolschek* line of cases and distinguishing the government's obligation in civil cases from criminal cases where national security information is involved).

The Supreme Court also relied on *Roviaro* and *Andolschek* in *Jencks v. United States*, in which the government, relying on confidentiality rules, refused to produce to defense counsel reports prepared by two FBI informants that related to events as to which the informants testified at trial. 353 U.S. 657, 668, 670-72 (1957). The Court reversed the conviction of the defendant and directed the district court to order the government to produce the reports. *Id.* at 672. The Court's words are apropos to the current situation.

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[105] *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] at 43-48 (filed Jan. 23, 2003, dkt. no. 724).

> We hold that the criminal action *must be dismissed* when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. *Accord*, Roviaro v. *United States*, 353 U.S. 53, 60-61 [1957]. The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession.

Id. at 672 (emphasis added).

In reliance on the holdings in *Roviaro* and *Andolschek*, numerous other cases have found that dismissal is an appropriate sanction for the government's refusal to produce to the defense relevant, material evidence. *See, e.g, McLawhorn v. North Carolina*, 484 F.2d 1, 7-8 (4th Cir. 1973) (reversing the judgment of the district court and directing that the defendant be discharged from custody in the absence of a retrial for the district court's erroneous failure to order disclosure of the identity and whereabouts of a government informant); *United States v. Padilla*, 869 F.2d 372, 377 (8th Cir. 1989) (stating that the government's failure to produce a defense witness would have been "grounds for reversal" if the witness "had information which might have exculpated [the defendant]"); *United States v. Ariza-Ibarra*, 651 F.2d 2, 14 (1st Cir. 1981) (dismissal of the indictment for government's failure to locate material witness would have been appropriate had the defendants established prejudice from the absence of the witness' testimony); *United States v. Grayson*, 166 F.2d 863, 870 (2d Cir. 1948) (noting the "distinction between documents held by officials who are themselves charged with the administration of those laws for whose violation the accused has been indicted, and those which are not so held" and holding that "when

the [government confidentiality] privilege is conditional upon the consent of such a department, the prosecution will fail unless the officials are willing to produce them"); *United States v. Wang*, 1999 WL 138930, *53-55, 1999 U.S. Dist. LEXIS 2913, *164-68 (S.D.N.Y. 1999) (government's failure to procure the availability of a material witness necessary to the defense who was in the government's control merits dismissal of the indictment); *United States v. Powell*, 156 F. Supp. 526, 530 (N.D. Cal. 1957) (holding that government's continued refusal to allow defense access to material evidence necessary for the defense would result in "a discontinuance of the present prosecution").

Accordingly, based on the above authority, and given the prejudice detailed above that Moussaoui will suffer due to the government's actions, dismissal of the entire indictment is the appropriate sanction to impose even if CIPA is not applicable to the situation here.

IV. INDEPENDENT OF THE COURT'S POWER TO IMPOSE SANCTIONS FOR THE GOVERNMENT'S REFUSAL TO COMPLY WITH THE ORDERS GRANTING ACCESS TO THE WITNESSES, THE CONSTITUTION PRECLUDES PROCEEDING WITH THIS PROSECUTION OR IMPOSING A SENTENCE OF DEATH

A. The Due Process Clause Precludes Proceeding With This Prosecution Regardless Of The Court's Power To Order Production Of The Witnesses

This Court has determined [redacted] have material, exculpatory testimony for Moussaoui. The government [redacted][106] has declined to do so

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[106] Before the Court of Appeals on June 3, 2003, Assistant Attorney General Michael Chertoff had the following to say on this point:

(continued...)

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on grounds of national security.[107] Moreover, the government argues that the Court has no power to reach these witnesses because separation of powers concerns preclude an Article III court from compelling the Executive to produce witnesses who are detainees in the control of the U.S. military overseas.[108]

Even assuming that separation of powers concerns preclude an Article III court from utilizing its compulsory process powers under the Sixth Amendment to compel the

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[106] (...continued)

Judge Wilkins:	We have to know if, if the Sixth Amendment power would stretch across the ocean, would you be able to defend against the court order, [redacted]
Mr. Chertoff:	No, that's not the defense we would make here. The argument we would make here is that the Court should assume [redacted] in the military context.
Judge Wilkins:	Yes, sir.
Mr. Chertoff:	And that for the reasons we say, that is legally unavailable.
Judge Wilkins:	All right.
Mr. Chertoff:	And that it's immaterial whether the degree of control - - the Court could assume even if we had him on a warship, the same legal principles would apply if he's, if he's overseas.

Transcript of CIPA Proceedings Held on June 3, 2003, before the United States Court of Appeals for the Fourth Circuit in Richmond, Virginia 60-61 (4th Cir. 2003, Nos. 03-4162 and 03-4261).

[107] *See* Government's Position Regarding the Depositions Ordered August 29, 2003 at 1 (filed Sept. 10, 2003, dkt. no. 1048) (relying on CIPA and *United States v. Reynolds*, 345 U.S. 1, 10-12 (1953)).

[108] *See* Brief for Petitioners - Appellants at 20-33 (4th Cir., No. 03-4162, filed Mar. 14, 2003).

attendance of witnesses in such circumstances, this does not give license for the prosecution to simply proceed without the witnesses. Both the government and the Court have an obligation to see that justice is done in this case.

Fundamental notions of due process guarantee to every criminal defendant the right to a trial that is fair. *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967) ("[T]he Due Process Clause guarantees the fundamental elements of fairness in a criminal trial."); *see also In re Murchison*, 349 U.S. 133, 136 (1955) (stating that "[a] fair trial in a fair tribunal is a basic requirement of due process . . . [O]ur system of law has always endeavored to prevent even the probability of unfairness."); *Strickland v. Washington*, 466 U.S. 668, 684 (1984) (describing the right to a fair trial as "fundamental"); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971) (noting that "the concern of due process is with the fair administration of justice").

Yet this right does not just belong to the defendant, for society and the criminal justice system as a whole have a stake in ensuring that verdicts and sentences are just and fair. This is why the right to a fair trial has been described as "the most fundamental of all freedoms [that] must be maintained at all costs." *Estes v. Texas*, 381 U.S. 532, 540 (1965). Indeed, "the denial of [a fair trial] is repugnant to the conscience of a free people. [It is among those rights that] express those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions', and are implied in the comprehensive concept of 'due process of law'." *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring in part) (citations omitted).

It is for these reasons that the United States Government and the Court are independently and jointly responsible for ensuring that Moussaoui receives a fair trial, or more pointedly, that an unfair trial not be permitted to proceed. *See Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."); *Wheat v. United States*, 486 U.S. 153, 160 (1988) (declining to permit waiver of conflict-free counsel, saying that "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them" and that "[n]ot only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation"); *see also United States v. Nixon*, 418 U.S. 683, 709 (1974) ("The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.").

When the government decides that there are overriding governmental interests that preclude it from honoring its obligation to see that "justice shall be done," as in this case by deciding that national security interests override production of witnesses that the government could otherwise produce and which are essential to a fair disposition of a prosecution it initiated, then that prosecution must be dismissed. Otherwise, the

exercise of Article II prerogatives unduly interfere with the constitutionally mandated obligation of an Article III court to ensure a fair trial for all who come before it.

B. The Eighth Amendment Precludes Imposition Of A Sentence Of Death Regardless Of The Court's Power To Order Production Of The Witnesses

Even assuming that the Court could proceed with this case [redacted] in the event the government's Sixth Amendment and separation of powers arguments were to prevail, the Eighth Amendment would nevertheless bar imposition of the death penalty.

The defendant has sought the elimination of the death penalty from this case on several occasions and on several bases, from the unconstitutionality of the Federal Death Penalty Act ("FDPA" or the "Act"), to the absence of any factual basis for death eligibility under the plain language of the Act.[109] The Court has not directly addressed

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[109] The government filed it's Notice of Intent to Seek a Sentence of Death on March 28, 2002. *See* dkt. no. 89. Standby counsel, then counsel, filed their Motion to Strike Government's Notice of Intent to Seek a Sentence of Death on April 25, 2002, *see* dkt. no. 117, arguing, among other things, that the government was unable to satisfy the requirements for death eligibility under the FDPA, specifically the requirement that the defendant participated in an act which directly resulted in the deaths of the victims. Oral argument on this motion was scheduled for Wednesday May 15, 2002, *see* dkt. nos. 18 and 83, but that argument was postponed given Moussaoui's April 22, 2002 motion to dismiss his court appointed counsel. *See* dkt. no. 127. Thereafter, on April 29, 2002, the defense filed its Reply to the Notice of Intent to Seek a Sentence of Death by the United States of America. *See* dkt. no. 126. The government filed its Response in Opposition to Defendant's Motion to Strike Government's Notice of Intent to Seek a Sentence of Death on May 10, 2002, *see* dkt. no. 140, and the defense replied on May 15, 2002. *See* dkt. no. 147.

On July 10, 2002, standby counsel submitted a Supplemental Memorandum, *see* dkt. no. 303, addressing the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002). Thereafter, the Court ordered the government to file any response to the Supplemental Memorandum by July 22, 2002, *see* dkt. no. 312, and the government did so on that date. *See* Opposition to Standby Counsel's Supplemental Memorandum (continued...)

any of those arguments; nor has it yet ruled on the motions which directly challenged the death penalty, generally, or in this case. However, in its most recent decision, the Court did conclude that the testimony [redacted] "would eliminate the possibility of a death sentence [in this case]."[110] The Court also found, [redacted] testimony would be exculpatory to Moussaoui on the issue of punishment.[111]

Irrespective of other constitutional and statutory provisions on which sanctions would be based if the Court's access orders are lawful orders, the Eighth Amendment bars the government from seeking the death penalty under these circumstances. Simply put, even assuming arguendo that the government may be entitled to withhold the witnesses for the national security reasons it has advanced, or that the Sixth Amendment Compulsory Process Clause does not reach witnesses held by the U.S. overseas, the Eighth Amendment cannot tolerate a death sentence where, regardless of the reasons, the government has, as here, control over, but will not produce for

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[109] (...continued)
(filed July 22, 2003, dkt. no. 353). Standby counsel replied on July 25, 2002. *See* dkt. no. 359.

On February 7, 2003, standby counsel filed a Second Supplemental Memorandum in Support of Motion to Dismiss Notice of Intent to Seek Penalty of Death in response to the government's submission to the Court, *see* dkt. no. 746, of two recent death penalty decisions: *United States v. Johnson*, 239 F. Supp.2d 924 (N.D. Iowa 2003) and *Sattahzan v. Pennsylvania*, 537 U.S. 101 (2003). The government responded to the Second Supplemental Memorandum on February 26, 2003. *See* dkt. no. 767. Lastly, on August 4, 2003, Moussaoui filed an additional motion seeking to have the death penalty dismissed. *See* dkt. no. 1008.

[110] August 29 Memorandum Opinion at 8-9.

[111] March 10 Memorandum Opinion at 16-17.

testimony, witnesses who could exculpate the defendant on the issue of the death penalty, even to the point of making him capitally ineligible.

The defense here only briefly notes the principles of capital jurisprudence it has previously discussed. The most basic tenets are that death is different;[112] that capital cases demand heightened reliability[113] and, consequently, special procedures attend both the guilt and penalty phases of the trial;[114] and that the defendant may not be restricted in the presentation of relevant, mitigating evidence, or in his ability to confront the evidence against him.[115] Further, application of the Eighth Amendment must be informed by "the fundamental respect for humanity [which] underl[ies] the *Eighth Amendment* [citation omitted]." *Woodson*, 428 U.S. at 304 (plurality opinion). Indeed, "'[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . .The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958) (opinion of Warren, CJ)).

This foundation of the Eighth Amendment "requires consideration of . . . the circumstances of the particular offense as a *constitutionally indispensable* part of the

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112 *See, e.g., Beck v. Alabama*, 447 U.S. 625, 637-38 (1980).

113 *See, e.g., Murray v. Giarratano*, 492 U.S. 1, 8 (1989) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

114 *Beck*, 447 U.S. at 638; *Giarratano*, 492 U.S. at 8.

115 *See Lockett v. Ohio*, 438 U.S. 586 (1978); *Gardner v. Florida*, 430 U.S. 349, 357, 358 (1977).

process of inflicting the penalty of death." *Woodson*, 428 U.S. at 304 (plurality opinion) (emphasis added). Thus, in *Lockett*, the Court concluded that the Ohio death penalty scheme violated the Eighth Amendment because the three mitigating circumstances set forth in the statute did not enable the jury to give effect to, *inter alia*, evidence "of a defendant's comparatively minor role in the offense." 438 U.S. at 608. That problem, of course, is substantially exacerbated where the evidence as to the defendant's role in the offense not only mitigates against a sentence of death, but potentially exculpates him from the death penalty altogether, even as a constitutional matter.

What is clear is that the Eighth Amendment - the Constitution's embodiment of "the dignity of man" - cannot, on the one hand, prohibit the execution of one who has, at most, played a minor role in a capital offense, *see Enmund v. Florida*, 458 U.S. 782 (1982), and, on the other hand, countenance a proceeding in which the government seeks the death penalty even as it declines to provide trial access to the very witnesses whose testimony could render the defendant ineligible for the death penalty *under that same constitutional provision*. The utter illogic of the contrary result is made no more tolerable should it be determined that the government's countervailing interests in producing the witnesses are legitimate limitations on the Court's power to order them to be produced or to sanction their non-production. The government is free to make those interests paramount, but what it cannot do is seek the death penalty against the defendant under these circumstances.

CONCLUSION

For the foregoing reasons, and any others adduced at a hearing on this motion, standby counsel respectfully request that the Court dismiss the indictment against Moussaoui as a sanction for the government's refusal to produce, for a Rule 15 deposition, material witnesses [redacted] Additionally, standby counsel respectfully request the Court to dismiss the indictment and strike the death penalty from this case, not as a sanction for the government's refusal to produce the witnesses, but because denial of these witnesses to the defense would violate the defendant's rights under the Due Process Clause and the Eighth Amendment.

ZACARIAS MOUSSAOUI

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CERTIFICATE OF SERVICE[116]

I HEREBY CERTIFY that a true copy of the foregoing Standby Counsel's Motion for Sanctions and Other Relief 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 of same to the Court Security Officer on this 20th day of September 2003.[117]

/s/

Kenneth P. Troccoli

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[116] Pursuant to the Court's Order of October 3, 2002 (dkt. no. 594), on the date that the instant 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 Moussaoui until standby counsel receive confirmation from the CSO and/or classification specialist that they may do so.

[117] In compliance with the Court's order that this pleading be filed by 12:00 p.m., September 19, 2003, this pleading was completed and ready for filing by close of business on September 18, 2003. However, due to inclement weather, the Courthouse was closed on September 18 and was expected to be closed on September 19, 2003. Thus, the pleading could not be filed or officially served on those days. Accordingly, arrangements were made with the Court Security Officer to file and serve this pleading on the morning of Saturday, September 20, 2003.