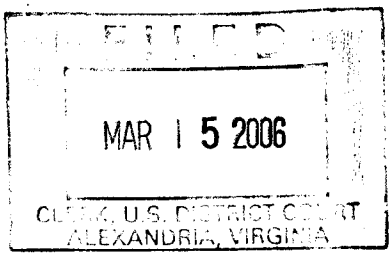
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division



UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	Hon. Leonie M. Brinkema
ZACARIAS MOUSSAOUI,	)	
a/k/a "Shaqil,"	)	
a/k/a "Abu Khalid al Sahrawi,"	)	
	)	
Defendant	)	

GOVERNMENT'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER STRIKING ALL AVIATION EVIDENCE IN THIS CASE

The United States respectfully moves for reconsideration of the Court's order sanctioning the Government from offering an entire component of its case — witnesses and exhibits constituting the so-called aviation portion — because of the misguided conduct of a single Transportation Security Administration attorney, who does not appear to have been taken very seriously by any of the aviation witnesses. The Court should reconsider the order in its entirety, or at least narrow it substantially.

First, the Court's Order is patently disproportionate to the prejudice that the defendant could conceivably have suffered in this case. The hearing testimony made it abundantly clear that the aviation witnesses, who have spent entire careers studying aviation safety and security, were not the least bit affected by Ms. Martin's e-mails and comments, other than to be annoyed by them. They learned no fact from Ms. Martin that they had not already known for years. The thought that Ms. Martin somehow saved Ms. Osmus or Mr. Manno from being "tripped up" by defense cross-examination on such time-worn aviation subjects as Hakim Murad's story of a half-baked plot to fly an explosive-laden Cessna into CIA headquarters is simply unrealistic. The

hearing evidence proved that the defendant will not be prejudiced at all. To the extent there is any prejudice, it easily can be cured through vigorous examination of the "tainted" witnesses and by allowing witnesses who were denied an opportunity to meet with the defense a chance to do so if they choose.

Second, the sanction is unprecedented and overly broad. The Court not only struck evidence that it deemed tainted by Ms. Martin's actions, and evidence that conceivably could have been tainted by Ms. Martin, but the sanction also precludes the Government from using any and all alternative means to offer demonstrably untainted aviation evidence — through, for example, witnesses with whom Ms. Martin never dealt or even knew. The sanction is terribly excessive. We have found no case imposing a sanction even bordering on this magnitude for misconduct of a person who, like Ms. Martin, acted essentially as outside counsel. There are any number of ways the Government can present completely untainted aviation proof. The Court has not even offered the Government an opportunity to try.

Third, the sanction is simply too severe, making it impossible for us to present our theory of the case to the jury. The aviation evidence was not some thrown-in supplement; it is one of the two essential and interconnected components to our case. As we previewed in our opening statement, had the defendant told the truth, the FBI could have gathered information about the hijackers (the first essential component) and given it to the FAA, which could have used that information to keep the hijackers off airplanes on September 11 (the second essential component). Eliminating the entire FAA portion of the equation — its "no fly" lists, enhanced gate security, and use of the CAPPS system — severely limits the Government's case, leaving us no way to show what the FBI could have done with information it had obtained about the

hijackers. More important, unless the Court reconsiders its sanction, this jury and the public will see only half the picture of what could have happened had the defendant told the truth.

Finally, the Court's sanction is grossly punitive, penalizing the Government beyond what is necessary to ensure that the defendant receives a fair trial. What is more, the penalty is misplaced. Punitive measures, to the extent necessary, should be Ms. Martin's problem. To direct them at this case — what the prosecution may present and what the jury, the victims and the public may see — as the Court has done, "hinders, rather than forwards, the 'public interest in a full and truthful disclosure of critical facts.'" *United States v. Gonzalez*, 164 F.3d 1285, 1292 (10th Cir. 1999) (reversing district court's exclusion of a "tainted" witness in capital murder case, in which the prosecution team — the actual prosecutors on the case — intentionally violated the trial court's orders concerning witness availability and lied to the defense counsel, because alternative remedies were available) (quoting *Taylor v. Illinois*, 484 U.S. 400 (1988)).

For over four years, scores of Government agents and attorneys (many from outside agencies) have interviewed thousands of witnesses and assembled millions of documents. All discoverable material — over 160,000 FBI 302's and over a million documents — has been produced to the defense. In this sea of Government attorneys and agents who have assiduously played by the rules, Ms. Martin stands as the lone miscreant. Her aberrant and apparently criminal behavior should not be the basis for undoing the good work of so many, particularly where there is no prejudice to the defendant.

For these reasons, set forth more fully below, the Government asks that the Court reconsider its order. We submit, as we have argued before, that the proper remedy is full-bodied examination by the defense, rather than exclusion of witnesses. Alternatively, the Court should

strike only evidence that the Court deems actually tainted, and should not preclude the Government from pursuing other ways to present non-tainted witnesses and evidence to the jury. At a minimum, we ask the Court to permit us to present only the narrow, "no-fly" list portion of our aviation case — through an untainted witness — which will, at least, allow us to present our complete theory of the case to the jury, albeit in imperfect form.

A. The Hearing Evidence

1. Background: The Government's Aviation Evidence

The Government's aviation evidence would consist of the following. Claudio Manno, an FAA security specialist, would describe the threat level during the summer 2001 as it related to the aviation industry. Mr. Manno would also testify about information that the FAA received in a cable from the FBI about the defendant, which prompted Mr. Manno to write a memo to his superiors that same day. (*See* CIPA nos. 121, 345). Next, Lynne Osmus, another FAA security witness, would identify the security measures that could have been implemented in a security directive had the defendant told the truth. In this regard, Ms. Osmus's testimony will be based on security directives that were issued in 1995 as a result of a threat to commercial aviation that sprung from the Bojinka plot. We plan to introduce those prior directives through Ms. Osmus. The list of ten security countermeasures (including the "no fly" instruction, the banning of short-blade knives, and the changing of the use of the CAPPS system) would be identified in a PowerPoint presentation, a copy of which the Government provided to the defense in discovery during the morning of March 7, 2006, before any of Ms. Martin's e-mails.

The defense would likely focus their cross-examination on intelligence reporting about threats to aviation, specifically the possibility of flying airplanes into buildings. This reporting

has been produced to the defense in discovery. Moreover, this issue has been exhaustively scrutinized by both the 9/11 Commission and the JICI before which Mr. Manno testified. Thus, the defense has what amounts to a pre-prepared set of facts etched in stone from which to cross-examine Mr. Manno on this point.

2. Carla Martin

The evidence revealed that Ms. Martin's misconduct consisted of two principal infractions. First, she violated the sequestration order by her e-mails. The substance of the e-mails focused on three areas: (1) countermeasures that the FAA could impose to prevent the hijackers from carrying knives on board (Govt. Exh. 1-5); (2) information about Hakim Murad flying a plane into CIA headquarters (Govt. Exh. 1, 4-6); and (3) intelligence sharing including the "Phoenix Memo" and the DCI briefing on Moussaoui (Govt. Exh. 6).

Ms. Martin's misconduct also included her denial to the defense of access to two TSA employees (Kormann and White).[1] Ms. Martin told the Government that none of the defense witnesses would consent to a defense interview and AUSA Novak (who had yet to meet White) unknowingly relayed this false information to defense counsel in a letter dated February 2, 2006. (Def. Exh. 2). The testimony revealed that Ms. Martin instructed Mr. Kormann not to talk to the defense (Tr. 125-26) and had not asked Mr. White whether he would be willing to do so. (Tr. 160-62).

The Court also expressed concerns about Ms. Martin's role in the discovery process. Although it is true that Ms. Martin served as the prosecutors' contact with TSA (which holds

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[1] Prospective defense witnesses McDonnell and Hawley indicated that they did not want to talk with defense counsel.

FAA's intelligence records), Ms. Martin never made discovery decisions. In 2002, she arranged for teams of prosecutors to comb through TSA/FAA files. In 2005, after the defendant's guilty plea and in preparation for the penalty phase, AUSA Novak reviewed relevant TSA/FAA files himself, a review that was arranged through Ms. Martin. Although Ms. Martin helped to locate files that were relevant to this case, she did not make discovery decisions such as determining what constituted *Brady* material. In both 2002 and 2005, the discovery decisions were made by prosecutors. There is no evidence that Ms. Martin's actions affected discovery in this case in any manner. She served only as a coordinator for discovery, and made no substantive decisions.

Further, Ms. Martin had a very limited role in the CIPA process. She simply served as a conduit to the security personnel at TSA. She made no substantive decisions on the redactions of classified documents. Indeed, much of the classified information in the FAA documents contained derivative information from other agencies, who had their security personnel review the documents for classification purposes. Consequently, Ms. Martin's liaison role had no impact on the CIPA process.

3. Lynne Osmus

Ms. Osmus is the FAA Assistant Administrator for Security and Hazardous Materials. She has worked for FAA for 26 years. When asked on direct examination what effect Ms. Martin's e-mails would have on her testimony at trial, Ms. Osmus stated, "They'd have no impact." (Tr. 36). Clearly, Ms. Osmus paid little heed to Ms. Martin's comments, as demonstrated by this portion of her hearing testimony:

> Although I'm not an attorney and I don't know the legal nuances that Carla Martin was referencing, the substantive observations she made about the accuracy of the statement and the one

> countermeasure proposal which she made didn't make sense to me. . . . I looked at the statement. It wasn't stated as if someone who grew up in the aviation security environment might have said it, but there was nothing about it that gave me any concern in terms of being contradictory or difficult at all when I would make my testimony.

(Tr. 37).

On cross-examination, when Mr. MacMahon challenged Ms. Osmus, suggesting that it was inconceivable that Ms. Martin's e-mails would not "help [Ms. Osmus] testify in this case," Ms. Osmus did not waver an inch, stating: "It is not going to help me testify in this case." (Tr. 41). Ms. Osmus explained to Mr. MacMahon that she was generally aware of the arguments in this case before receiving Ms. Martin's e-mails. (Tr. 41). Moreover, Ms. Osmus rejected Mr. MacMahon's suggestions that Ms. Martin's comments "prepared" her to testify, stating that she "had been [prepared] prior to seeing her note." (Tr. 43). Then, she held her ground in the following exchange:

Q. That doesn't help you at all, to know how the trial is going or what arguments the government has made before you testified?

A. No, it really doesn't.

(Tr. 46).

In addition, the substance of Ms. Osmus's testimony as it existed before Ms. Martin's e-mails is demonstrable and is possessed by the defense. The Government worked with Ms. Osmus to create a PowerPoint presentation to describe the ten security countermeasures that the FAA could have implemented had the defendant told the truth. The PowerPoint presentation (Govt. Exh. OG 117) was produced to the defense in discovery before court started on Tuesday, March 7, 2006 — before Ms. Martin sent any of her e-mails. Thus, the defense knows the substance of Ms. Osmus's testimony before Ms. Martin's e-mails and, if Ms. Osmus's testimony changes, then the defense will have ample fodder with which to cross-examine Ms. Osmus.

4. Claudio Manno

Claudio Manno is the FAA Deputy Assistant Administrator for Security and Hazardous Materials. Previously, he had been FAA's Director of the Office of Intelligence. He has testified on numerous occasions before commissions and committees investigating the September 11 attacks. Transcripts of this testimony have been provided to the defense.

Mr. Manno's prospective testimony includes the other half of the PowerPoint presentation prepared for Ms. Osmus. Thus, that part of his testimony was set forth before Ms. Martin's e-mails and provided to the defense. At the hearing, Mr. Manno testified that Ms. Martin's e-mails had no influence upon what that PowerPoint presentation looked like. (Tr. 59-60). When asked on direct examination about the impact Ms. Martin's comment about Murad

might have on his trial testimony, Mr. Manno stated, "I don't think it would have any, because the facts were as I knew them and as it was reported, so I don't, I don't see it." (Tr. 60). As to the impact that any or all of Ms. Martin's three e-mails might have on his testimony, Mr. Manno stated, "In my opinion, none at all, because I can only testify to the facts as I know them, and that's it." (Tr. 68).

On cross-examination, Mr. Manno reiterated that he "received no benefit as a witness" as a result of having seen a copy of the opening statements in this case, stating that "all I could do is answer the questions based on the facts as I know them." (Tr. 75). Mr. Manno rebuffed Mr. MacMahon's efforts to suggest that an unfair advantage had been obtained:

> Q. And that's a subject that Ms. Martin wanted you to be prepared to answer on cross-examination, right?
>
> A. Yes.
>
> Q. And now you are, aren't you?
>
> A. I would have been prepared to discuss that no matter what, because the Phoenix memo was the subject both in front of the Joint Intelligence Committee and the 9/11 Commission.
>
> Q. Of your testimony?
>
> A. Yes. I was asked about that.
>
> . . . .
>
> Q. Now you are prepared to answer that question in court?
>
> A. I was prepared for that before.

(Tr. 81-82).

As with Ms. Osmus, it was clear from Mr. Manno's testimony that he did not take Ms. Martin's "advice" very seriously. When Mr. MacMahon asked whether Mr. Manno was concerned about an FAA attorney stating that she disagreed with the Government's opening statement in the middle of a capital case, Mr. Manno stated:

> You know, again, I have no idea what was going through Ms. Martin's mind. The only thing I can tell you is that I would have been prepared. I was prepared to discuss all of this, even prior to receiving her e-mail.

(Tr. 82-83).

On re-direct examination, Mr. Manno confirmed that Ms. Martin's e-mails had no impact on his testimony:

> Q. Now, these e-mails which are Exhibits 1, 2, and 6, is there anything in these e-mails that you didn't know about before you received the e-mails? For example, did you know about Murad before you received the e-mail?
>
> A. Yes.
>
> Q. Did you know about the Phoenix memo before you received the memo?
>
> A. Yes.
>
> Q. On Exhibit 6, that block of questions that Mr. MacMahon just went over with you, have those questions, those very same questions or similar questions been asked of you repeatedly by the various committees that you have testified in front of?
>
> A. Probably, yes.
>
> Q. The thrust has been what the FAA knew; is that right?
>
> A. Correct.

Q. Now, before receiving these e-mails, were you prepared to testify from my questions about the Bojinka plot?

A. Yes.

Q. So did anything about these e-mails affect your testimony about that?

A. No.

. . . .

Q. Could you tell us have these e-mails or any of your contact with Ms. Martin affected your testimony in any way, if Judge Brinkema gives you the opportunity to testify?

A. No.

(Tr. 88-89).

5. Patrick McDonnell

Patrick McDonnell is a former FAA Director of Intelligence. He left that post in May 2001. Mr. McDonnell is on the defense witness list.

In response to one of AUSA Novak's questions on direct examination, Mr. McDonnell stated that nothing about his interactions with Ms. Martin, either by telephone or by e-mail, would have affected his testimony.[2] (Tr. 104). On cross-examination, Mr. McDonnell explained that he was aware of the Government's theory in this death penalty case before he received any communication about it from Ms. Martin. (Tr. 105-06).

6. Matt Kormann

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[2] The e-mail Ms. Martin sent to Mr. McDonnell (Govt. Exh. 4) discussed security countermeasures, with one exception — the well-documented reporting on Murad.

Matthew Kormann is a liaison officer within TSA's Transportation Security Intelligence Service, and he previously worked as an intelligence watch officer for FAA. Mr. Kormann authored three classified intelligence notes in the late 1990s (Tr. 115), which are the subject of CIPA litigation in this case. Mr. Kormann stated that nothing about his contact with Ms. Martin influenced the testimony he would give if the defense decided to call him as a witness in this case. (Tr. 122-23).

Mr. Kormann testified that he did not read the e-mail sent to him by Ms. Martin. (Tr. 114). He did, however, speak to Ms. Martin about the opening statements and the testimony of Agent Anticev. (Tr. 115-16). Ms. Martin told Mr. Kormann that the defense was portraying the defendant as crazy. (Tr. 116). She also asked him to pull unclassified reporting on Murad, which he did. (Tr. 117). Mr. Kormann testified that he learned nothing from pulling the Murad documents that he did not already know. (Tr. 138).

In response to questions from the Court, Mr. Kormann confirmed that he was aware of Murad's statement about a plot to fly a plane into CIA headquarters before Ms. Martin called his attention to it. (Tr. 129). Mr. Kormann reiterated the point in response to additional questions from Mr. Yamamoto:

> Q. But once you were designated as a potential witness, didn't Ms. Martin talk to you then about your testimony or your potential testimony?
>
> A. She didn't ask me about my testimony. (Tr. 134).
>
> . . . .
>
> Q. And the questions she asked you about, were those matters that you already knew and were prepared to testify about?

A. Yes, yes. I was aware of Murad. . . .

Q. But she asked you to check on certain aspects of Murad?

A. I told her I was already aware of the fact that Murad was, in fact, a pilot. And she said: Did you know that for a fact? And I said: Yes, because we did airman checks on it.

(Tr. 134, 136).

On cross-examination, Mr. Kormann stated that he received the Government's opening statement from Ms. Martin, but that he was aware of the prosecution's arguments already from his meeting with Mr. Novak before the start of trial. (Tr. 123-24).

Mr. Kormann advised that he was told by Ms. Martin not to have contact with defense counsel. (Tr. 125-26).

On re-direct examination, Mr. Kormann confirmed that he did not learn anything new — apart from what he already knew from his prior work on pulling discovery in this case — from the documents that he was asked to pull by Ms. Martin in her e-mail. (Tr. 138).

7. Robert White

Robert White is employed by TSA as a manager of a liaison division at the Office of Intelligence. Mr. White did not read the e-mail sent to him by Carla Martin, which was admitted as Govt. Exh. 5. (Tr. 151). In addition, Mr. White stated that there was nothing about his communications with Ms. Martin that would affect his ability to provide testimony if the defense called him as a witness. (Tr. 155).

Mr. White stated that neither Ms. Martin, nor anyone else at TSA, discussed with him his options regarding speaking with the defense team before the trial. (Tr. 161). The Court then asked the following questions and Mr. White gave the following answers:

Court: If this statement is correct, is it correct that you would not agree to meet with a defense attorney before trial?

A. No.

Court: And was that question ever asked of you, whether you were willing to meet?

A. I have no recollection of ever having been asked that question, your Honor.

(Tr. 164).

8. John Hawley

John Hawley is an intelligence analyst with TSA. Mr. Hawley stated that nothing about his communications with Ms. Martin, his reading of her e-mails and their attachments, would have affected the testimony he could give in this case. (Tr. 170, 172-73).

Mr. Hawley told Ms. Martin that he would rather not talk to the defense team before testifying in this case. (Tr. 175). Mr. Yamamoto followed up by asking, "You just came out and said: I would rather not talk to them?" Mr. Hawley's response was, "Correct." (Tr. 175). Later, Mr. Yamamoto asked whether Ms. Martin said anything that would affect his testimony, to which Mr. Hawley responded, "No, it didn't affect me at all." (Tr. 188).

B. The Court's Order Sanctioning the Government

At the conclusion of the evidentiary portion of the hearing, the Court stated that the case has problems that are essentially insurmountable "[r]egardless of [Martin's] motivation" for violating, or causing the violation of the sequestration order. (Tr. 215).

The Court explained that, even after hearing from the witnesses, it was "almost impossible to tell" whether the witnesses were actually tainted by Martin's transgressions. The Court stated:

> I don't think I can tell from this record. I mean, the six witnesses who did testify appear to be honest, credible people. I just can't tell the degree to which their testimony may have changed because of this improper communication.

(Tr. 216). The Court explained, for example, that to the extent that Government witnesses might have been tipped off as to what the defense might ask them, "there clearly could be damage done to the defense's ability to make its case." (Tr. 215-16).

Additionally, the Court was further concerned about testimony indicating that Ms. Martin had either told witnesses not to meet with the defense, or told the prosecutors that witnesses would not meet with the defense team without first consulting with the witnesses. As a result, the defense received incorrect information that two potential witnesses were unwilling to talk to them. This conduct, as the Court stated, violated not only the sequestration order, but "the ethical canons for lawyers" and possibly another "government requirement." (Tr. 216).

The conglomeration of errors, the Court stated, are "so serious that I think that at least a portion of the government's case has been significantly eroded." (Tr. 216-17). The Court stated that it "wouldn't trust anything that Ms. Martin had anything to do with" in this case, and added that there was simply "no way of knowing how much, if any, impact she may have had on the selection of evidence." (Tr. 217). In sum, the Court stated that the portion of the case upon which Ms. Martin worked was "simply too riddled with problems." (Tr. 217).

The Court declined to strike the death notice, as requested by the defense, because there was "no precedent for doing that." (Tr. 217). The Court ordered that the "appropriate sanction" was to strike that portion of the case that had been "irremediably contaminated by the misconduct of this attorney." (Tr. 217). Specifically, the Court's sanction was to strike "from this case any and all witnesses and evidence dealing whatsoever with the, what we will call the aviation component of this case." (Tr. 217). The Court's written Order precludes the Government from "introducing aviation related evidence, including witness testimony and exhibits." Order March 14, 2006.

C. Discussion

What the hearing addressed were the unforeseeable and unfortunate transgressions of an attorney who was at best peripherally involved in this matter. Ms. Martin's misconduct can be fully dealt with elsewhere and at another time. The effect that she has had on this case — the real effect, in terms of what real influence she had on potential witnesses and the document collection process — is negligible and easily can be cured without any prejudice to the defendant. There was a question to a witness that the Court deemed improper; the jury was admonished not to consider it. There were access issues that the Fourth Circuit has resolved, and numerous CIPA issues that have been resolved in this Court. Throughout it all, the defendant's fair-trial rights have remained fully intact.

Against this backdrop, we submit, the Court's order eliminating a swath of the Government's case is entirely unwarranted. "The Supreme Court has long recognized that a trial court may employ one of three remedies when a sequestration order has been violated: sanction of the witness; instructions to the jury that they may consider the violation toward the issue of

credibility; or exclusion of witness testimony." *United States v. Cropp*, 127 F.3d 354, 363 (4th Cir. 1997) (citing *Holder v. United States*, 150 U.S. 91 (1893)). Moreover, exclusion is so extraordinary and the most severe of the available options, that it should only be used when witness's testimony is "incredible as a matter of law." *Taylor v. United States*, 388 F.2d 786, 788 (9th Cir. 1967). Yet the order here sweeps well beyond the most extreme of the options available to a court.

The facts here — the facts as they pertain to the witnesses who could testify at this trial — are far from extraordinary. The witnesses contacted by Ms. Martin uniformly demonstrated at the hearing that they were not, in fact, tainted. Ms. Osmus and Mr. Manno basically considered Ms. Martin a hindrance and rarely had time to read any of her many, many e-mails. Neither of them took Ms. Martin's comments as anything more than what they were — inappropriate and unwarranted rants and musings. Ms. Osmus, after all, brought the communications to the Government's attention. At the hearing, one witness after another testified that Ms. Martin's comments did not educate them to facts they did not already know and did not provided them with any meaningful advantage in dealing with questions from the defense. Defense examination will likely expose any taint that may exist, and, at a minimum, will display for the jury the missteps of a government lawyer, which in this case — where government credibility and competence is a defense theme — is tremendously useful to them. *See United States v. Rhynes*, 218 F.3d 310 (4th Cir. 2000) (stating that "sequestration is not the only technique utilized to ensure the pursuit of truth at trial" and that cross-examination is the "swift antidote" for witness coaching); *Geders v. United States*, 425 U.S. 80, 89-90 (1976). Witnesses who were effectively deprived of the option to talk to the defense can talk to the defense now. We had not planned to

offer the aviation evidence until the end of our case, so there is still plenty of time. There is simply no actual prejudice and any conceivable prejudice can be cured.

Indeed, the Court imposed the sanction of exclusion based solely on the possibility of contamination. (Tr. 216 ("I just can't tell the degree to which their testimony may have changed . . . .")). As a result, the Court has not identified particular witnesses or particular subjects of testimony that conceivably could be tainted, but instead has concluded that a whole area of the case, as to which a lawyer loosely associated with the case engaged in discrete acts of misconduct, was "simply too riddled with problems." What is left is an order of exclusion that goes well beyond remedying any prejudice to the defendant, striking not only testimony that conceivably could be tainted, but all evidence on the subject of aviation, whether tainted or untainted. This is excessive. The Fourth Circuit has made clear that when a trial court "sanctions the government in a criminal case for its failure to obey court orders, it must use the least severe sanction which will adequately punish the government and secure future compliance." *United States v. Hastings*, 126 F.3d 310, 317 (4th Cir.1997) (reversing district court dismissal of indictment because of government delay in discovery). The Court has not selected the least severe sanction here. On the contrary, the Court has excised an integral segment of the Government's case, above and beyond what is necessary to ensure both that the defendant receives a fair trial and that Ms. Martin's misconduct is not repeated. In light of the ample alternative options for fully curing Ms. Martin's misconduct, there is no basis for depriving the public and victims of a comprehensive sentencing proceeding for conduct to which the defendant has pleaded guilty.

United States v. Gonzales, 164 F.3d 1285 (10th Cir. 1999), was a capital murder case involving prosecutors' knowing and intentional violation of a district court's pre-trial orders to produce and make available a defense witness, as well as their misrepresentation of the witness's status and whereabouts to the court and defense counsel. The misconduct in *Gonzales* was extraordinary and it was the work of the trial prosecutors themselves, as opposed to an agency lawyer with peripheral involvement in the case. The Tenth Circuit affirmed the district court's sanctioning of counsel, but reversed its suppression of the Government's witnesses and related evidence. As the Tenth Circuit explained:

> The district court in this case effectively considered the three factors. After reviewing the record, we agree with the court that the government's conduct was the product of flagrant bad faith and that defendants' ability to prepare for trial was prejudiced by the government's obstruction of access to the subject witness. However, we do not share the court's view that the prejudice to defendants was irreparable. In particular, we are not convinced the witness' testimony is forever "tainted" by the government's discovery violations. Indeed, we find no record support whatsoever for that conclusion. Accordingly, we reject, as an abuse of discretion, the court's conclusion that "[t]he problems attendant with the Government's misconduct . . . cannot be cured by granting the defense a continuance."
>
> We further conclude the district court abused its discretion in imposing what was obviously the most severe available sanction, *i.e.*, complete suppression of the witness' statements and trial testimony. In reaching this conclusion, we emphasize the Supreme Court has never approved exclusion of evidence as a sanction for government misconduct in the absence of a constitutional violation or statutory authority for such exclusion. Indeed, the Court has emphasized that "penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve." *United States v. Caecilian*, 435 U.S. 268, 279 (1978). Here, we are convinced the sanction of total exclusion is too severe and hinders, rather than forwards, the "public interest in a full and truthful

> disclosure of critical facts." *Taylor v. Illinois*, 484 U.S. 400, 412, (1988). Accordingly, we find it necessary to remand to the district court for consideration of less severe sanctions. Although the court is free to fashion an appropriate remedy, possible sanctions could include, among other things, allowing the witness to be redeposed by defense at government expense, censuring or fining the government attorneys involved in the misconduct, or recommending disciplinary proceedings against the government attorneys involved.

Id. at 1292-93. (Record citation and footnote omitted).

The Court should follow the pragmatic approach taken by the Tenth Circuit in *Gonzales*, which remanded with instructions for the trial court to consider alternative sanctions with more deterrent value and less debilitating effect on the publicly presented evidence than exclusion of witness testimony. That conclusion applies, *a fortiori*, when the court's remedy would go beyond the exclusion of particular witnesses to throwing out an entire aspect of the government's case, including evidence that could not have been tainted by the misconduct. That aspect of the Court's order goes far beyond curing the effects of trial-related misconduct, and, as the Tenth Circuit indicated, amounts to an exclusion of critical evidence without basis in the Constitution or statute. The Court's order — unless reconsidered — will hamstring the Government's case. The aviation evidence is an essential component in the case, one that was featured at length in our opening statement and one that we expect will feature prominently in our closing arguments. The evidence goes to the very core of our theory of the case. Accordingly, the public has a strong interest in seeing and hearing it, and the Court should not eliminate it from the case, particularly not in these circumstances where other remedies are available. Those remedies include cross-examination; providing the defense access to the two witnesses to whom they were wrongly denied access by Ms. Martin's transgressions; or, alternatively, the Court should strike

only evidence that is in fact tainted, and should not preclude the Government from pursuing other ways to present non-tainted witnesses and evidence to the jury.

At a minimum, the Court should have considered alternatives such as allowing the Government to introduce that portion of the aviation evidence related to the "no transport" security directive, commonly referred to as the "no fly list." This evidence is simple, straightforward, and entirely uncontroversial, consisting mainly of FAA security directives issued over the years. We would call one witness to explain what they are and how they are used to keep suspected terrorists from boarding commercial aircraft. Most important, permitting the Government to offer this evidence will allow us to present our complete theory of the case, albeit in imperfect form — that is, we can then carry out our arguments from the FBI through to the FAA "no transport" directive and present to the jury some semblance of what really could have happened had the defendant told the truth upon arrest. Exclusion of the remaining aviation evidence — evidence about prospective countermeasures that FAA could have employed, such as banning knives on airplanes and modifying the CAPPS system — would fully remedy any conceivable impact of Ms. Martin's misconduct.

The "no-transport" security directive portion of the aviation evidence has the added benefit — particularly important here — of being easily freed of the specter of taint caused by Ms. Martin. To do so, we can readily call a witness who worked at the FAA during August 2001, and who had no contact with Ms. Martin during this prosecution. This untainted witness would explain that, as part of the FAA's regular procedures authorized by statute, they issue security directives prohibiting the transportation of suspected terrorists. Indeed, the FAA did just that for Khalid Sheikh Mohammed. (*See* CIPA Item No. 586). The witness would be untainted,

because he or she had no contact with Ms. Martin. Moreover, neither would the relevant documents be tainted because there is a historical record of each security directive that the FAA has issued. This should alleviate any concern that the Court may harbor about discovery failures potentially resulting from Ms. Martin's actions. Surely, the Government should be permitted to introduce documents through an FAA witness where there is a proven record that they exist untainted. There is no controversy whether the FAA had the ability to issue such a "no transport" security directives, nor is there any controversy that the FAA had issued these directives in the past. And, finally, none of Ms. Martin's e-mails discussed the "no transport" security directive. (Govt. Exh. 1-6).

Again, allowing this evidence would permit the Government to lay out both central components to its theory of our case — namely, that the FBI would have identified some of the hijackers and the FAA, through the issuance of "no-transport" security directives, would have prohibited them from boarding the planes on September 11. Although former Special Agent Zebley will testify about the steps that could have led to the pilot hijackers, those steps are severely undercut unless the Government is permitted to prove that the investigation could have culminated in prohibiting at least some of the hijackers from boarding the flights. We respectfully submit that this is a modest modification of the Court's order, which would fully cure the impact of misconduct under the broadest conception of taint, but would permit the public to see at least an imperfect variation of the Government's complete case, though a complete case nonetheless.

Conclusion

For the foregoing reasons, we respectfully request that the Court reconsider the sanction striking the Government's aviation evidence in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 15, 2006, a copy of the foregoing Government pleading was served, by hand, on the following counsel:

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