

~~PUBLISHED~~

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-4792

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

versus

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

Defendant - Appellee,

CENTER FOR NATIONAL SECURITY STUDIES,

Amicus Supporting Appellee.

Appeal from the United States District Court for the Eastern
District of Virginia, at Alexandria. Leonie M. Brinkema, District
Judge. (CR-01-455)

Argued: December 3, 2003

Decided: September 13, 2004

Before WILKINS, Chief Judge, and WILLIAMS and GREGORY, Circuit
Judges.

Affirmed in part, vacated in part, and remanded by published
opinion. Chief Judge Wilkins announced the judgment of the court
and wrote an opinion, in which Judge Williams concurs, and in which
Judge Gregory concurs except as to Part V.C. Judge Williams wrote
a concurring opinion. Judge Gregory wrote an opinion concurring in
part and dissenting in part.

REDACTED

ARGUED: Paul D. Clement, Deputy Solicitor General, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. Frank Willard Dunham, Jr., Federal Public Defender, Alexandria, Virginia; Edward Brian MacMahon, Jr., Middleburg, Virginia, for Appellee. **ON BRIEF:** Christopher A. Wray, Assistant Attorney General, Patrick F. Philbin, Associate Deputy Attorney General, Jonathan L. Marcus, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Paul J. McNulty, United States Attorney, Robert A. Spencer, Assistant United States Attorney, Kenneth M. Karas, Assistant United States Attorney, David J. Novak, Assistant United States Attorney, Alexandria, Virginia, for Appellant. Gerald T. Zerkin, Jr., Senior Assistant Federal Public Defender, Kenneth P. Troccoli, Assistant Federal Public Defender, Anne M. Chapman, Assistant Federal Public Defender, Alexandria, Virginia; Alan H. Yamamoto, Alexandria, Virginia, for Appellee. Kathleen Clark, Joseph Onok, CENTER FOR NATIONAL SECURITY STUDIES, Washington, D.C., for Amicus Curiae.

WILKINS, Chief Judge:

The Government appeals a series of rulings by the district court granting Appellee Zacarias Moussaoui access to certain individuals¹ ("the enemy combatant witnesses" or "the witnesses") for the purpose of deposing them pursuant to Federal Rule of Criminal Procedure 15; rejecting the Government's proposed substitutions for the depositions; and imposing sanctions for the Government's refusal to produce the witnesses. We are presented with questions of grave significance--questions that test the commitment of this nation to an independent judiciary, to the constitutional guarantee of a fair trial even to one accused of the most heinous of crimes, and to the protection of our citizens against additional terrorist attacks. These questions do not admit of easy answers.

For the reasons set forth below, we reject the Government's claim that the district court exceeded its authority in granting Moussaoui access to the witnesses. We affirm the conclusion of the district court that the enemy combatant witnesses could provide material, favorable testimony on Moussaoui's behalf, and we agree with the district court that the Government's proposed substitutions for the witnesses' deposition testimony are

¹ The names of these individuals are classified, as is much of the information pertinent to this appeal. We have avoided reference to classified material to the greatest extent possible.

inadequate. However, we reverse the district court insofar as it held that it is not possible to craft adequate substitutions, and we remand with instructions for the district court and the parties to craft substitutions under certain guidelines. Finally, we vacate the order imposing sanctions on the Government.

I.

A. Background Information

On September 11, 2001, members of the terrorist organization al Qaeda² hijacked three passenger aircraft and crashed them into the Pentagon and the World Trade Center towers in New York. A fourth plane, apparently destined for the United States Capitol, crashed in Pennsylvania after passengers wrested control from the hijackers. The attacks resulted in the deaths of over 3000 men, women, and children.

Moussaoui was arrested for an immigration violation in mid-August 2001 and, in December of that year, was indicted on several charges of conspiracy related to the September 11 attacks. In July 2002, the Government filed a superceding indictment charging Moussaoui with six offenses: conspiracy to commit acts of terrorism transcending national boundaries, 18 U.S.C.A. § 2332b(a)(2), (c) (West 2000); conspiracy to commit aircraft

² The name "al Qaeda" is transliterated from Arabic. Several spellings may be acceptable for transliterated terms; this opinion adopts the spelling conventions employed by the district court and the parties.

piracy, see 49 U.S.C.A. § 46502(a)(1)(A), (a)(2)(B) (West 1997); conspiracy to destroy aircraft, see 18 U.S.C.A. §§ 32(a)(7), 34 (West 2000); conspiracy to use weapons of mass destruction, see 18 U.S.C.A. § 2332a(a) (West 2000 & Supp. 2003); conspiracy to murder United States employees, see 18 U.S.C.A. §§ 1114, 1117 (West 2000 & Supp. 2003); and conspiracy to destroy property, see 18 U.S.C.A. § 844(f), (i), (n) (West 2000 & Supp. 2003). The Government seeks the death penalty on the first four of these charges.

According to the allegations of the indictment, Moussaoui was present at an al Qaeda training camp in April 1998. The indictment further alleges that Moussaoui arrived in the United States in late February 2001 and thereafter began flight lessons in Norman, Oklahoma. Other allegations in the indictment highlight similarities between Moussaoui's conduct and the conduct of the September 11 hijackers. Each of the four death-eligible counts of the indictment alleges that the actions of Moussaoui and his coconspirators "result[ed] in the deaths of thousands of persons on September 11, 2001." See, J.A. (03-4162) 108.

³ The materials before us include numerous joint appendices from both this and the previous appeal. We will cite such materials as follows. An appendix will be cited either J.A., to denote an unclassified appendix, or J.A.C., to denote a classified appendix. This designation will be followed by a parenthetical reference to the docket number of the appeal to which the appendix relates. For example, a reference to page 26 of the unclassified joint appendix from the previous appeal would be denoted "J.A. (03-4162) 26"; a reference to page 300 of the classified appendix from the current appeal would be denoted "J.A.C. (03-4792) 300." References to supplemental appendices will include the designation

B. Events leading to this Appeal

Simultaneously with its prosecution of Moussaoui, the Executive Branch has been engaged in ongoing efforts to eradicate al Qaeda and to capture its leader, Usama bin Laden. These efforts have resulted in the capture of numerous members of al Qaeda, including the witnesses at issue here: [REDACTED]

("Witness A"), [REDACTED]

[REDACTED] ("Witness B"), [REDACTED]

and [REDACTED]

[REDACTED] ("Witness C"), [REDACTED]

Witness A was captured [REDACTED]. Shortly thereafter, Moussaoui (who at that time was representing himself in the district court) moved for access to Witness A, asserting that the witness would be an important part of his defense. Moussaoui's motion was supported by then-standby counsel, who filed a motion seeking pretrial access to Witness A and a writ of habeas corpus ad testificandum to obtain Witness A's trial testimony. The Government opposed this request.⁴

⁴"Supp."--for example, "Supp. J.A.C. (03-4162) 25." The Government's classified appendix on rehearing will be cited as "J.A.C. (03-4792/Reh'g)," with the appropriate page number following the parenthetical.

⁵Moussaoui and standby counsel also sought access to other al Qaeda members accused of complicity in the 9/11 attacks. The

The district court conducted a hearing, after which it issued an oral ruling granting access to Witness A ("the January 30 order"). The court subsequently issued a memorandum opinion explaining its ruling in greater detail. The district court concluded that Witness A could offer material testimony in Moussaoui's defense; in particular, the court determined that Witness A had extensive knowledge of the September 11 plot and that his testimony would support Moussaoui's claim that he was not involved in the attacks. At a minimum, the court observed, Witness A's testimony could support an argument that Moussaoui should not receive the death penalty if convicted.

The district court acknowledged that Witness A is a national security asset and therefore denied standby counsel's request for unmonitored pretrial access and declined to order his production at trial. The court also determined, however, that the Government's national security interest must yield to Moussaoui's right to a fair trial. Accordingly, the court ordered that Witness A's testimony be preserved by means of a Rule 15 deposition. See Fed. R. Crim. P. 15(a)(1) (providing that court may order deposition of witness to preserve testimony for trial "because of exceptional circumstances and in the interest of justice"). In an

district court denied these requests on the basis that Moussaoui and standby counsel had failed to demonstrate that these individuals could provide material, admissible testimony. Those rulings are not before us.

attempt to minimize the effect of its order on national security, the district court ordered that certain precautions be taken. Specifically, the court directed that the deposition would be taken by remote video, with Witness A in an undisclosed location and Moussaoui, standby counsel, and counsel for the Government in the presence of the district court. [REDACTED]

While the Government's appeal of the January 30 order was pending before this court, we remanded for the purpose of allowing the district court to determine whether any substitution existed that would place Moussaoui in substantially the same position as would a deposition. On remand, both the Government and standby counsel offered proposed substitutions for Witness A's deposition testimony.¹ The district court rejected the Government's proposed substitutions, reasoning that (a) the information in the [REDACTED] reports was unreliable, and (b) the substitutions

¹ These substitutions were derived as follows. Those responsible [REDACTED] have recorded the witnesses' answers to questions in [REDACTED] Reports. These highly classified reports are intended for use in the military and intelligence communities; they were not prepared with this litigation in mind. Portions of the [REDACTED] reports concerning Moussaoui and the September 11 attacks have been excerpted and set forth in documents prepared for purposes of this litigation. These documents, deemed [REDACTED] summaries" by the parties and the district court, have been provided to defense counsel in conformance with the Government's obligations under Brady v. Maryland, 373 U.S. 83 (1963). The proposed substitutions are based on the [REDACTED] summaries.

themselves were flawed in numerous respects. Believing itself bound to consider only the Government's proposed substitutions, the district court did not review the substitutions offered by standby counsel.

The proceedings on remand complete, we conducted oral argument on June 3, 2003. Shortly thereafter, we dismissed the appeal as interlocutory. See United States v. Moussaoui (Moussaoui I), 333 F.3d 509, 517 (4th Cir. 2003). Upon receiving the mandate of this court, the district court entered an order directing the Government to inform the court whether it would comply with the January 30 order. On July 14, 2003, the Government filed a pleading indicating that it would refuse to provide access to Witness A for the purpose of conducting a deposition.

On August 29, the district court entered an order ("the August 29 order") granting access to Witnesses B and C for purposes of conducting Rule 15 depositions of those witnesses. The order imposed the same conditions as those applicable to Witness A. The court also directed the Government to file any proposed substitutions for the witnesses' testimony by September 5, and it directed standby counsel to file any response to the substitutions by September 12.

On September 8, the district court rejected the Government's proposed substitutions without requiring any response from the defense. The court stated that the Government's proposed

substitutions for the deposition testimony of Witnesses B and C failed for the same reasons as the Government's proposed substitutions for the deposition testimony of Witness A. Following the rejection of its proposed substitutions, the Government informed the court that it would not comply with the August 29 order.

The district court then directed the parties to submit briefs concerning the appropriate sanction to be imposed for the Government's refusal to comply with the January 30 and August 29 orders. Standby counsel sought dismissal but alternatively asked the district court to dismiss the death notice. The Government filed a responsive pleading stating that "[t]o present the issue most efficiently to the Court of Appeals, and because [the Classified Information Procedures Act] prescribes dismissal as the presumptive action a district court must take in these circumstances, we do not oppose standby counsel's suggestion that the appropriate action in this case is to dismiss the indictment." J.A.C. (03-4792) 487; *see id.* (asserting that "dismissal of the indictment ... is the surest route for ensuring that the questions at issue here can promptly be presented to the Fourth Circuit").

Noting that "[t]he unprecedented investment of both human and material resources in this case mandates the careful consideration of some sanction other than dismissal," J.A. (03-4792) 319, the district court rejected the parties' claims that the

indictment should be dismissed. Rather, the court dismissed the death notice, reasoning that Moussaoui had adequately demonstrated that the witnesses could provide testimony that, if believed, might preclude a jury from finding Moussaoui eligible for the death penalty. Further, because proof of Moussaoui's involvement in the September 11 attacks was not necessary to a conviction, and because the witnesses' testimony, if believed, could exonerate Moussaoui of involvement in those attacks, the district court prohibited the Government "from making any argument, or offering any evidence, suggesting that the defendant had any involvement in, or knowledge of, the September 11 attacks." *Id.* at 327. In conjunction with this ruling, the district court denied the Government's motions to admit into evidence cockpit voice recordings made on September 11; video footage of the collapse of the World Trade Center towers; and photographs of the victims of the attacks.

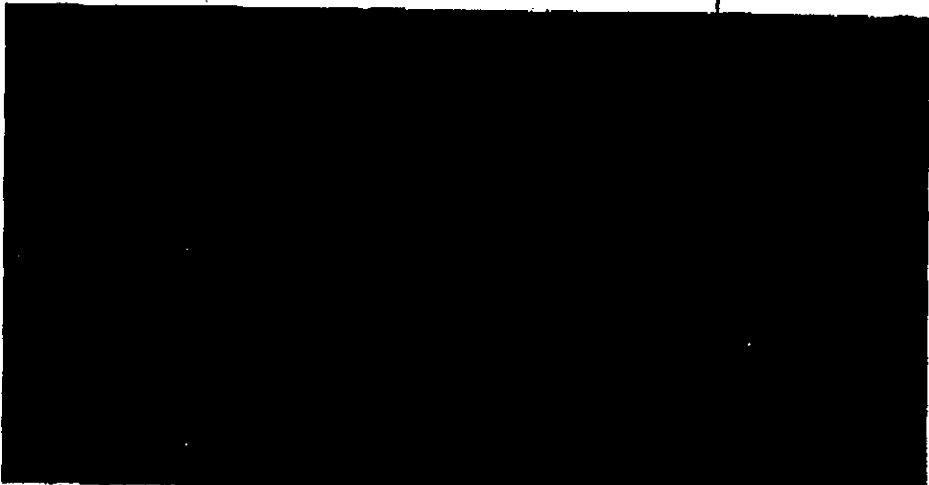
The Government appealed, attacking multiple aspects of the rulings of the district court.⁶

C. Events Leading to Issuance of this Amended Opinion

We issued our decision on April 22, 2004. See United States v. Moussaoui, 365 F.3d 292 (4th Cir. 2004). Moussaoui

⁶ Shortly before we heard oral argument on this appeal, the district court vacated its order granting Moussaoui's request to represent himself and appointed standby counsel as counsel of record. Accordingly, for the remainder of this opinion we will follow our usual practice and refer to Moussaoui and his attorneys collectively as "Moussaoui," except where necessary for the sake of clarity.

thereafter timely filed a petition for rehearing and suggestion for rehearing en banc (the Petition). On May 12, the Government submitted a letter to the court purporting to "clarify certain factual matters." Letter to Deputy Clerk from United States Attorney at 1 (May 12, 2004) [hereinafter "Letter"]. In particular, the Government referred to pages 50-51 of the classified slip opinion, where the court stated:



slip. op. at 50-51 (emphasis added); see *id.* at 55-56



⁷ Citations to "slip op." refer to the unredacted opinions of the court as issued on April 22.



In response to the emphasized portion of the above quotation, the Government stated that

members of the prosecution team, including FBI Special Agents assigned to the September 11 and other related investigations, [REDACTED]

[REDACTED] have provided [REDACTED] information consistent with the [REDACTED] desire to maximize their own efforts to obtain actionable information [REDACTED]

Letter at 2.' The Government went on to note, however, that "[a]ny information or suggested areas of inquiry that have been shared [REDACTED] have been used, like information from numerous other sources, at the sole discretion [REDACTED]

[REDACTED]

Id. at 3. The Government asserted that

[REDACTED]

The government also noted that it had been "privity to the process," Letter at 1 (quoting slip op. at 51), [REDACTED]

[REDACTED]

[REDACTED] d.

Based in part on the revelations in the May 12 letter, we directed the Government to file a response to the Petition. In particular, we directed the Government to provide answers to the following questions:

- (1) Why was the information in the May 12 Letter not provided to this court or the district court prior to May 12?
- (2) [REDACTED]
- (3) [REDACTED]
- (4) [REDACTED]
provided inculpatory or exculpatory information regarding Moussaoui?
- (5) In light of the information contained in the letter and any other pertinent developments, would it now be appropriate to submit written questions to any of the enemy combatant witnesses?
- (6) What restrictions would apply to such a process and how should it be conducted?
- (7) If access is granted by written questions, is the Compulsory Process Clause satisfied?
- (8) If access is granted by written questions, what effect, if any, would Crawford v. Washington, 124 S. Ct. 1354 (2004), have on such a process?
- (9) If circumstances have changed such that submission of written questions is now possible, when did the circumstances change and why was neither this court nor the district court so informed at that time?

See United States v. Moussaoui, No. 03-4792 (4th Cir. May 13, 2004) (order directing response to petition for rehearing and suggestion for rehearing en banc). Underlying this order were concerns among the panel members that members of the prosecution team may have [REDACTED]

[REDACTED] rendered the witnesses' statements less reliable.

The Government filed its response (the Response), supplemented by a classified joint appendix and a classified ex parte appendix, on May 19. Moussaoui filed a reply on May 24, in which, inter alia, he raised concerns [REDACTED]

[REDACTED] We conducted a sealed oral argument regarding the petition for rehearing on June 3, 2004. During a discussion [REDACTED] the panel asked the Government to provide documentation [REDACTED]

[REDACTED] On June 16, the Government filed an ex parte document responding to this request.¹⁰

¹⁰ On June 17, Moussaoui filed a letter objecting to the circumstances under which this document was submitted to the court. Because this letter was not styled as a motion, it is not clear to us that Moussaoui seeks any relief from this court. To the extent he does seek relief, however, his request is denied.

D. Additional Facts Contained in the
Government's Submissions in Response to the Petition

1. Agent Zebley and the PENTTBOM Team

The FBI team investigating the terrorist attacks of September 11, 2001 is known as "the PENTTBOM team." The Government considers these investigators to be part of the prosecution team. See Letter at 2.

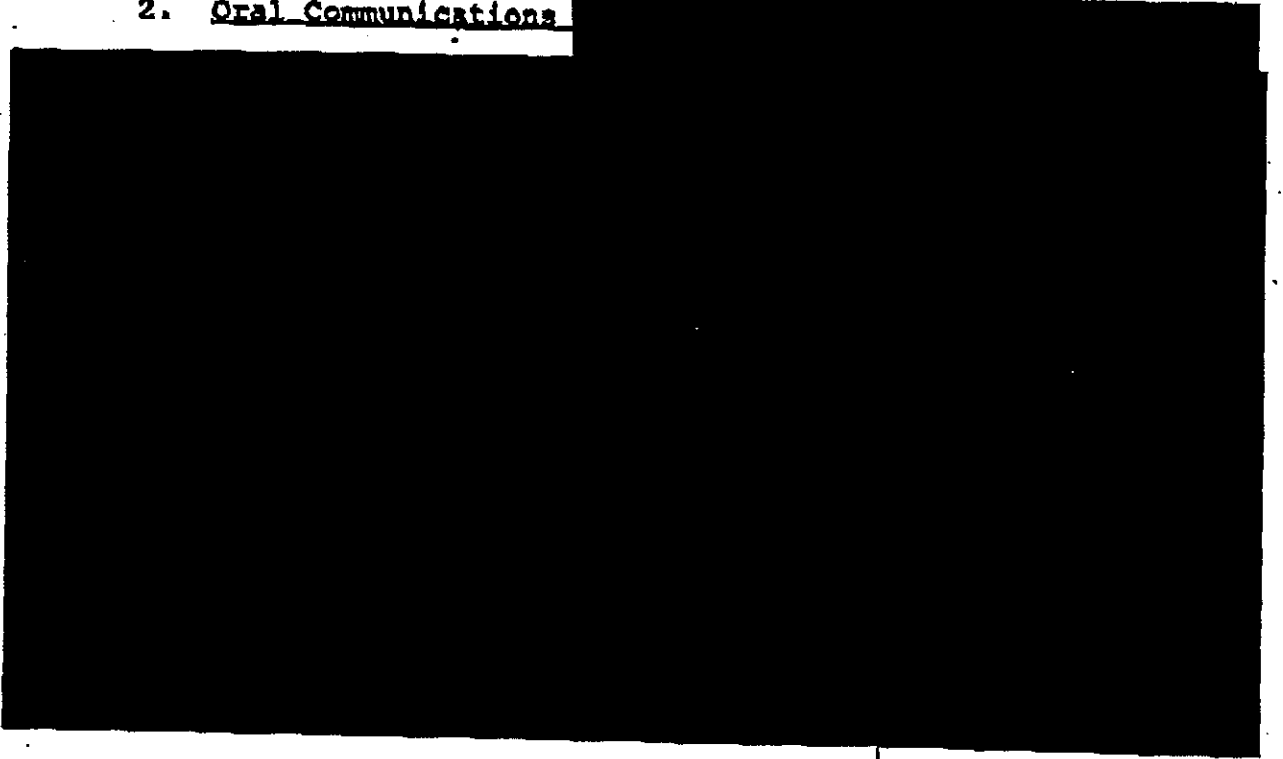
One member of the PENTTBOM team, Special Agent Aaron Zebley, responded to the World Trade Center on September 11 and has been involved in the investigation ever since. Agent Zebley's particular duty for the PENTTBOM team has been to investigate the al Qaeda cell in Hamburg, Germany [REDACTED]. Within the PENTTBOM team, Agent Zebley is regarded as having special expertise and knowledge regarding Witness A. Since November 2001 (one month prior to Moussaoui's indictment), Agent Zebley has been a case agent for the Moussaoui prosecution.

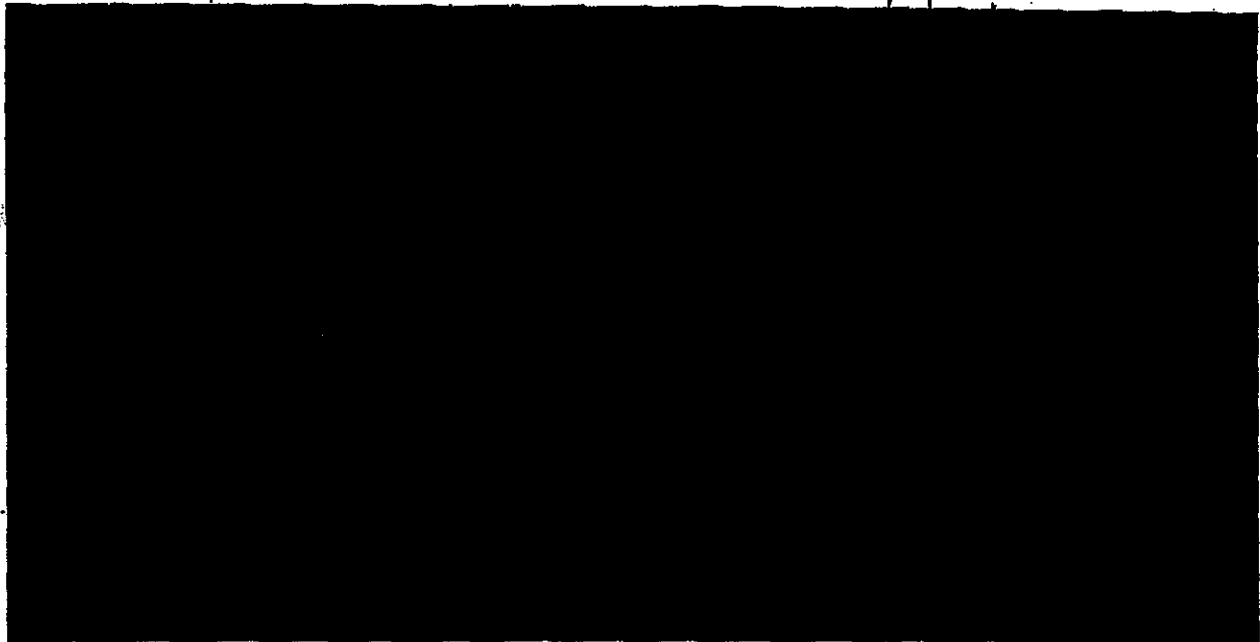
The classified joint appendix submitted by the Government with the Response includes [REDACTED]

[REDACTED]

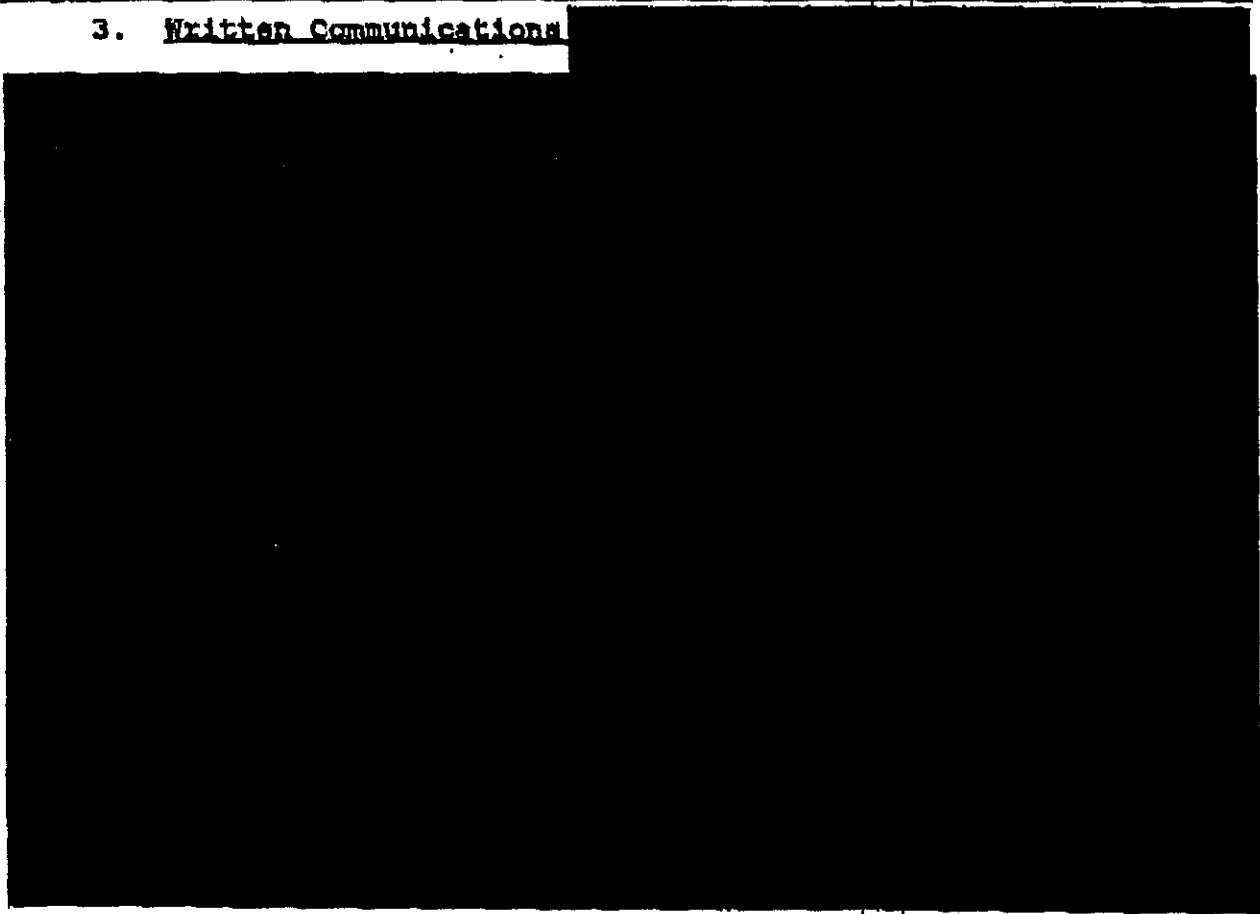


2. Oral Communications





3. Written Communications



[REDACTED]

4. Intelligence Community Use of Information

[REDACTED]

[REDACTED]¹¹ [REDACTED] the intelligence community is interested only in obtaining information that has foreign intelligence value; the intelligence community is not concerned with obtaining information to aid in the prosecution of Moussaoui. [REDACTED] not create

¹² After the Petition was filed, news articles indicated that the National Commission on Terrorist Attacks Upon the United States ("the 9/11 Commission") had submitted questions to be asked of unidentified al Qaeda detainees. See Philip Shenon, "Accord Near for 9/11 Panel to Question Qaeda Leaders," N.Y. Times, May 12, 2004, at A20 (reporting a statement by the 9/11 Commission that it was "close to an agreement with the Bush administration that would allow the panel to submit questions to captured Qaeda leaders who are believed to have been involved in planning the attacks"); see also Associated Press, "Vice Chairman Expects Responses to Written Questions Soon" (May 13, 2004), Available at www.msnbc.msn.com/id/4972789 (stating that "[t]he Sept. 11 commission has submitted written questions about the 2001 attacks to al-Qaida detainees and expects to receive responses soon").

[REDACTED]

[REDACTED] See Nat'l Comm'n on Terrorist Attacks Upon the United States, Staff Statement No. 16, at 1 (released June 16, 2004) (stating that Commission had no "direct access" to al Qaeda members but rather relied on written materials).

[REDACTED]

special [REDACTED] reports for use by the prosecution; rather, the prosecution and the PENTTBOM team receive the same reports that are distributed to the intelligence community at large. Information is included in these reports only if [REDACTED]

[REDACTED] the information to have foreign intelligence value.¹⁴

J.A.C. (03-4792/Reh'g) 48-49.

¹⁴ The Government's submissions indicate that those responsible for [REDACTED] the witnesses record and pass on only information [REDACTED] to have foreign intelligence value. Consequently, it is at least possible, albeit unlikely, that one of the witnesses has imparted significant exculpatory information related to Moussaoui that has not been included [REDACTED]. If so, there may be a due process problem under Brady v. Maryland, 373 U.S. 83 (1963). See United States v. Perdomo, 929 F.2d 967, 971 (3d Cir. 1991) (stating that prosecution is obligated under Brady to disclose all exculpatory information "in the possession of some arm of the state"). We need not consider this question, however, as there is no evidence before us that the Government possesses exculpatory material that has not been disclosed to the defense.

II.

Before turning to the merits, we consider the preliminary question of our jurisdiction. The parties do not dispute that we have jurisdiction over the present appeal. Nevertheless, because this is an interlocutory appeal, and in view of our prior dismissal for lack of an appealable order, we will examine the question. See Snowden v. Checkpoint Check Cashing, 290 F.3d 631, 635 (4th Cir.), cert. denied, 537 U.S. 1087 (2002).

In the previous appeal, we concluded that we lacked jurisdiction because (1) the Classified Information Procedures Act (CIPA), 18 U.S.C.A. App. 3 §§ 1-16 (West 2000 & Supp. 2003)--§ 7(a) of which authorizes an interlocutory appeal from certain orders of the district court regarding the disclosure of classified information--did not apply; (2) the order of the district court was not a collateral order appealable under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); and (3) mandamus jurisdiction was not appropriate. In the present appeal, the Government asserts that this court has jurisdiction pursuant to CIPA, the collateral order doctrine, and 18 U.S.C.A. § 3731 (West Supp. 2003). Because we conclude that jurisdiction for this appeal lies under § 3731, we need not address the Government's other proposed bases for jurisdiction.

Section 3731 allows the Government to pursue an interlocutory appeal of certain pretrial rulings of the district

court in a criminal case. The first paragraph of § 3731 provides, in pertinent part, that "[i]n a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information ... as to any one or more counts, or any part thereof." 18 U.S.C.A. § 3731. The second paragraph of the statute allows the United States to appeal a pretrial order suppressing or excluding evidence, provided "the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding." *Id.* Section 3731 requires courts to construe its provisions "liberally" in order "to effectuate its purposes." *Id.*; see United States v. Wilson, 420 U.S. 332, 337-39 (1975) (holding that, in enacting § 3731, Congress intended to remove all barriers to a Government appeal in a criminal case other than those imposed by the Constitution).

The district court sanctioned the Government for refusing to produce the enemy combatant witnesses for depositions by dismissing the death notice and excluding specific items of evidence. Both aspects of the sanction are appealable under § 3731--the latter under the text of the statute itself, and the former by liberal construction of the term "dismissing." See United States v. Quinones, 313 F.3d 49, 56-57 (2d Cir. 2002) (holding dismissal of death notice appealable under § 3731), cert.

denied, 124 S. Ct. 807 (2003); United States v. Bass, 266 F.3d 532, 535-36 (6th Cir. 2001) (same), rev'd on other grounds, 536 U.S. 862 (2002) (per curiam); United States v. Acosta-Martinez, 252 F.3d 13, 16-17 (1st Cir. 2001) (same); United States v. Cheely, 36 F.3d 1439, 1441 (9th Cir. 1994) (same).

III.

With respect to the merits, the Government first argues that the district court erred in ordering the production of the enemy combatant witnesses for the purpose of deposing them. Within the context of this argument, the Government makes two related claims. First, the Government asserts that because the witnesses are noncitizens outside the territorial boundaries of the United States, there is no means by which the district court can compel their appearance on Moussaoui's behalf. Second, the Government maintains that even if the district court has the power to reach the witnesses, its exercise of that power is curtailed by the reality that the witnesses are in military custody in time of war, and thus requiring them to be produced would violate constitutional principles of separation of powers. We address these arguments *seriatim*.

A. Process Power

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor." U.S.

Const. amend. VI. The compulsory process right is circumscribed, however, by the ability of the district court to obtain the presence of a witness through service of process. See United States v. Graco, 298 F.2d 247, 251 (2d Cir. 1962) ("[T]he Sixth Amendment can give the right to compulsory process only where it is within the power of the federal government to provide it."). The Government maintains that because the enemy combatant witnesses are foreign nationals outside the boundaries of the United States, they are beyond the process power of the district court and, hence, unavailable to Moussaoui.

The Government's argument rests primarily on the well established and undisputed principle that the process power of the district court does not extend to foreign nationals abroad. See United States v. Therasius Filippi, 918 F.2d 244, 246 n.2 (1st Cir. 1990) ("The United States has no subpoena power over a foreign national in a foreign country."). Were this the governing rule, Moussaoui clearly would have no claim under the Sixth Amendment. See United States v. Zahaneh, 937 F.2d 1249, 1259-60 (5th Cir. 1988) ("It is well established ... that convictions are not unconstitutional under the Sixth Amendment even though the United States courts lack power to subpoena witnesses, (other than American citizens) from foreign countries."). This is not the controlling principle, however.

The Government's argument overlooks the critical fact that the enemy combatant witnesses are [REDACTED]

[REDACTED] of the United States Government.¹⁵ Therefore, we are concerned not with the ability of the district court to issue a subpoena to the witnesses, but rather with its power to issue a writ of habeas corpus ad testificandum ("testimonial writ") to the witnesses' custodian. See 28 U.S.C.A. § 2241(c) (5) (West 1994); United States v. Cruz-Jiminez, 977 F.2d 95, 99-100 (3d Cir. 1992) (explaining that when a defendant asserts a Sixth Amendment right to the testimony of an incarcerated witness, the district court may obtain the witness' testimony by issuing a testimonial writ).

In determining whether a district court possesses the power to serve a writ of habeas corpus, the critical principle is that the writ is served not upon the prisoner, but upon the custodian. See Braden v. 30th Jud. Cir. Ct., 410 U.S. 484, 494-95 (1973) ("The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in ... custody."). As the Supreme Court has noted, "The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the

¹⁵ The Government will neither confirm nor deny that the witnesses are [REDACTED]. However, it concedes, and we agree, that for purposes of this appeal we must assume that the witnesses are [REDACTED].


latter." Ex Parte Endo, 323 U.S. 293, 306 (1944) (internal quotation marks omitted); see 28 U.S.C.A. § 2243 (West 1994) (providing that a writ of habeas corpus "shall be directed to the person having custody of the person detained"). Therefore, the relevant question is not whether the district court can serve the witnesses, but rather whether the court can serve the custodian.¹⁶

B. Person to be Served

Ordinarily, a habeas writ must be served on a prisoner's immediate custodian--"the individual with day-to-day control over" the prisoner. Henderson v. INS, 157 F.3d 106, 122 (2d Cir. 1998); cf. Rumsfeld v. Padilla, 124 S. Ct. 2711, 2720 (2004) ("In challenges to present physical confinement, we reaffirm that the

¹⁶ At oral argument, the Government described the capture of the enemy combatant witnesses as "a windfall" from which Moussaoui should not be entitled to benefit. We agree with the Government's premise; there can be no doubt that, were it not for the capture of these witnesses, Moussaoui could have no hope of obtaining their testimony. It does not follow, however, that this fortuity should not inure to Moussaoui's benefit. Indeed, the Government acknowledged that if the witnesses were brought to the United States for reasons unrelated to Moussaoui's prosecution, the district court would have the power to order their production. We are unable to discern why Moussaoui should be entitled to the benefit of the second windfall but not the first.

We also think that the Government's "windfall" argument mistakenly focuses on the ability of the district court to serve process on the witnesses, rather than on the custodian. The district court has never had--and does not now have--the power to serve process on the witnesses. But, as explained in Part III.B, the district court has always had the power to serve process on the custodian,



immediate custodian, not a supervisory official who exercises legal control, is the proper respondent."). Here, however, the immediate custodian is unknown. Under such circumstances, the writ is properly served on the prisoner's ultimate custodian. See Damianiuk v. Meese, 784 F.2d 1114, 1116 (D.C. Cir. 1985) (Bork, Circuit Judge, in chambers) (holding that a petitioner properly named the Attorney General as the respondent in his habeas petition because the identity of his immediate custodian was unknown); see also Padilla, 124 S. Ct. at 2726 n.18 (acknowledging that application of the immediate custodian rule was "impossible" in Damianiuk). It would appear--at least the Government has not disputed--that the witnesses are in military custody. Therefore, Secretary of Defense Donald Rumsfeld is their ultimate custodian. Secretary Rumsfeld--who is indisputably within the process power of the district court--is thus a proper recipient of a testimonial writ directing production of the witnesses. [REDACTED]

Even if it were necessary for the writ to be served upon the witnesses' immediate custodian, who is in a foreign country, the district court would have the power to serve the writ. In arguing otherwise, the Government points to the language of 28 U.S.C.A. § 2241(a) (West 1994)--which provides that district courts

[REDACTED]

may issue writs of habeas corpus "within their respective jurisdictions"--and notes that in Johnson v. Eisentrager, 339 U.S. 763, 781-85 (1950), the Supreme Court held that the writ of habeas corpus ad subjiciendum ("the Great Writ") did not extend to enemy aliens held abroad. But see Rasul v. Bush, 124 S. Ct. 2686, 2693-95 (2004) (explaining that Johnson addressed only the question of "the prisoners' constitutional entitlement to habeas corpus" and noting that § 2241 makes habeas relief available as a matter of statutory law even when the Constitution does not require availability of the writ). Based upon the language of § 2241 and Johnson, the Government contends that the process power of the district court does not extend overseas.

This argument is premised on the assumption that territorial limitations applicable to the Great Writ also apply to the lesser writs. This assumption is incorrect. In Carbo v. United States, 364 U.S. 611 (1961), the Supreme Court considered the question of whether the writ of habeas corpus ad prosequendum ("prosecutorial writ") applied extraterritorially. The Court traced the different histories of the Great Writ and the testimonial and prosecutorial writs, noting that the statutory authority to issue the Great Writ had been territorially limited since at least 1875. See id. at 614-18. In contrast, the prosecutorial writ (authority for which derived from a different statutory provision) existed for the purpose of bringing a

defendant into a jurisdiction for prosecution and thus was not traditionally territorially limited. See id. The Court concluded that while these distinctions were erased when Congress enacted § 2241, Congress did not intend to abandon them. See Carbo, 364 U.S. at 620. The Court therefore concluded that the prosecutorial writ may issue extraterritorially. See id. at 621.

Although the Carbo Court explicitly left the question open, its reasoning applies equally to the testimonial writ. See Muhammad v. Warden, 849 F.2d 107, 114 (4th Cir. 1988). It is thus clear that a district court can reach beyond the boundaries of its own district in order to issue a testimonial writ.

IV.

The Government next argues that even if the district court would otherwise have the power to order the production of the witnesses, the January 30 and August 29 orders are improper because they infringe on the Executive's war-making authority, in violation of separation of powers principles.¹⁸

¹⁸ Moussaoui asserts that we should not consider this argument because any conflict between the Government's interests and Moussaoui's is of the Government's making. There is no question that the Government cannot invoke national security concerns as a means of depriving Moussaoui of a fair trial. That is not what the Government is attempting to do, however. The Government's claim is that separation of powers principles place the enemy combatant witnesses beyond the reach of the district court. If that is so (although we ultimately conclude it is not), then Moussaoui would not have an enforceable Sixth Amendment right to the witnesses' testimony.

A. Immunity Cases

We begin by examining the Government's reliance on cases concerning governmental refusal to grant immunity to potential defense witnesses. The Government argues that these cases stand for the proposition that the district court may be precluded from issuing certain orders that implicate the separation of powers. We reject this characterization of these cases.

"The Self-Incrimination Clause of the Fifth Amendment guarantees that no person 'shall be compelled in any criminal case to be a witness against himself.'" Withrow v. Williams, 507 U.S. 680, 688 (1993) (quoting U.S. Const. amend. V). Nothing in the Fifth Amendment, or in any other constitutional provision, provides a means for overcoming this privilege once a potential witness has invoked it. See, e.g., United States v. Lenz, 616 F.2d 960, 962 (6th Cir. 1980). However, through the Immunity of Witnesses Act, 18 U.S.C.A. §§ 6001-6005 (West 2000 & Supp. 2003), Congress has conferred upon the Attorney General statutory authority to grant use immunity to witnesses in order to obtain their testimony at trial. See generally Kastigar v. United States, 406 U.S. 441, 446 (1972) (explaining that immunity statutes "seek a rational accommodation between the imperatives of the [Fifth Amendment] privilege and the legitimate demands of government to compel citizens to testify"). The Immunity Act grants the Attorney General or his designee exclusive authority and discretion to

confer immunity. See 18 U.S.C.A. § 6003(b); United States v. Washington, 318 F.3d 845, 855 (8th Cir.), cert. denied, 124 S. Ct. 209, 251 (2003).

The circuit courts, including the Fourth Circuit, have uniformly held that district courts do not have any authority to grant immunity, even when a grant of immunity would allow a defendant to present material, favorable testimony. See, e.g., United States v. Bowling, 239 F.3d 973, 976 (8th Cir. 2001); United States v. Abbas, 74 F.3d 506, 511-12 (4th Cir. 1996); Lenz, 616 F.2d at 962. These holdings have been based on the facts that no power to grant immunity is found in the Constitution and that Congress reserved the statutory immunity power to the Attorney General. Cf. Earl v. United States, 361 F.2d 531, 534 (D.C. Cir. 1966) (observing, in an opinion by then-Circuit Judge Warren Burger, that the power to grant immunity "is one of the highest forms of discretion conferred by Congress on the Executive" and cannot be assumed by the judiciary). Because a district court has no power to grant immunity to compel the testimony of a potential witness who has invoked the privilege against self-incrimination, a defendant has no Sixth Amendment right to such testimony. See United States v. Turkish, 623 F.2d 769, 773-74 (2d Cir. 1980) ("Traditionally, the Sixth Amendment's Compulsory Process Clause gives the defendant the right to bring his witness to court and have the witness's non-privileged testimony heard, but does no[t]

carry with it the additional right to displace a proper claim of privilege, including the privilege against self-incrimination.”).

The circuits are divided with respect to the question of whether a district court can ever compel the government, on pain of dismissal, to grant immunity to a potential defense witness. Compare United States v. Mackey, 117 F.3d 24, 27 (1st Cir. 1997) (stating that “in certain extreme cases of prosecutorial misconduct,” government’s refusal to grant immunity may justify dismissal of prosecution); United States v. Westerdahl, 945 F.2d 1093, 1096 (9th Cir. 1991) (court may compel government to grant immunity to potential defense witness when “the fact-finding process is intentionally distorted by prosecutorial misconduct”); Blissett v. Lafayre, 924 F.2d 434, 441-42 (2d Cir. 1991) (“[A] trial court should order the prosecutor to grant a defense witness immunity only in extraordinary circumstances.”), and United States v. Frang, 697 F.2d 188, 191 (7th Cir. 1983) (“[W]e have implied that review [of refusal to grant immunity] may be proper if there is a clear abuse of discretion violating the due process clause.”), with Bowling, 239 F.3d at 976-77 (holding that district court has no authority to compel government to grant immunity); cf. United States v. Talley, 164 F.3d 989, 997 (6th Cir. 1999) (noting that the Sixth Circuit has not yet decided whether, and under what circumstances, a district court could compel the government to grant immunity to a potential witness); Autry v. Estelle, 706 F.2d

1394, 1401 (5th Cir. 1983) (leaving open possibility that compelled grant of immunity may be justified by prosecutorial misconduct). The Fourth Circuit, consistent with the majority rule, has held that a district court may compel the government to grant immunity upon a showing of prosecutorial misconduct and materiality. See Abbas, 74 F.3d at 512.

Courts have noted that compelling the prosecution to grant immunity implicates the separation of powers.¹⁹ See, e.g., Turkish, 623 F.2d at 775-76. Decisions to grant or deny immunity are intimately tied to decisions regarding which perpetrators of crimes will be prosecuted, a core aspect of the Executive's duty to enforce the laws. See United States v. Pennell, 737 F.2d 521, 528 (5th Cir. 1984). On a related note, a grant of immunity creates substantial burdens on the Executive's ability to prosecute the witness. Prosecuting a previously immunized witness requires the government to bear the "heavy burden" of proving that the prosecution does not rest on immunized testimony. Turkish, 623 F.2d at 775 (internal quotation marks omitted). Further, "awareness of the obstacles to successful prosecution of an immunized witness may force the prosecution to curtail its cross-examination of the witness in the case on trial to narrow the scope

¹⁹ There is also a concern that the opportunity to compel the government to grant immunity may induce "cooperative perjury among law violators." Turkish, 623 F.2d at 775.

of the testimony that the witness will later claim tainted his subsequent prosecution." Id.

The Government claims that these "immunity cases" stand for the proposition that, under certain circumstances, legitimate separation of powers concerns effectually insulate the Government from being compelled to produce evidence or witnesses. In fact, the majority rule and the law of this circuit stand for precisely the opposite proposition, namely, that courts will compel a grant of immunity, ~~despite the existence of separation of powers concerns,~~ when the defendant demonstrates that the Government's refusal to grant immunity to an essential defense witness constitutes an abuse of the discretion granted to the Government by the Immunity Act. A showing of misconduct is necessary because, as explained above, a defendant has no Sixth Amendment right to the testimony of a potential witness who has invoked the Fifth Amendment right against self-incrimination; therefore, the defendant has no Sixth Amendment right that could outweigh the Government's interest in using its immunity power sparingly. Governmental abuse of the immunity power, however, vitiates this interest because when the Government's misconduct threatens to impair the defendant's right to a fair trial, it is proper for the district court to protect that right by compelling the Government to immunize the witness.

For these reasons, the analogy between this case and the immunity cases is inapt. The witnesses at issue here, unlike potential witnesses who have invoked their Fifth Amendment rights, are within the process power of the district court, and Moussaoui therefore has a Sixth Amendment right to their testimony. As discussed below, this right must be balanced against the Government's legitimate interest in preventing disruption [REDACTED]

[REDACTED] of the enemy combatant witnesses.

B. Governing Principles

The concept that the various forms of governmental power--legislative, executive, and judicial--should be exercised by different bodies predates the Constitution. See Loving v. United States, 517 U.S. 748, 756 (1996) (citing Montesquieu, The Spirit of the Laws 151-52 (Thomas Nugent trans., 1949), and 1 William Blackstone, Commentaries *146-*147, *269-*270). The alternative, "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, ... may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 244 (James Madison) (Gary Wills ed., 1982). "The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." Buckley v. Valeo, 424 U.S. 1, 124 (1976) (per curiam); see INS v. Chadha, 462 U.S. 919, 946 (1983) ("The very structure of the Articles delegating and

separating powers under Arts. I, II, and III exemplifies the concept of separation of powers"). And, the Supreme Court "consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." Mistretta v. United States, 488 U.S. 361, 380 (1989).

Separation of powers does not mean, however, that each branch is prohibited from any activity that might have an impact on another. See The Federalist No. 47, at 245 (James Madison) (explaining that separation of powers does not mean that the branches "ought to have no partial agency in, or no controul over the acts of each other," but rather means "that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution, are subverted" (emphasis omitted)). "[A] hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." Buckley, 424 U.S. at 121. Indeed, the Supreme Court has observed that "even quite burdensome interactions" between the judiciary and the Executive do not "necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." Clinton v. Jones, 520 U.S.

681, 702 (1997). One example of permissible but burdensome interaction is judicial review of official Executive conduct. See id. at 703.

Stated in its simplest terms, the separation of powers doctrine prohibits each branch of the government from "intrud[ing] upon the central prerogatives of another." Loving, 517 U.S. at 757. Such an intrusion occurs when one branch arrogates to itself powers constitutionally assigned to another branch or when the otherwise legitimate actions of one branch impair the functions of another. See id.; see Clinton, 520 U.S. at 701-02.

This is not a case involving arrogation of the powers or duties of another branch. The district court orders requiring production of the enemy combatant witnesses involved the resolution of questions properly--indeed, exclusively--reserved to the judiciary. Therefore, if there is a separation of powers problem at all, it arises only from the burden the actions of the district court place on the Executive's performance of its duties. See Clinton, 520 U.S. at 701-06 (addressing claim that separation of powers principles barred "an otherwise traditional exercise of judicial power" that would "impose an unacceptable burden on the President's time and energy, and thereby impair the effective performance of his office").

The Supreme Court has explained on several occasions that determining whether a judicial act places impermissible burdens on

another branch of government requires balancing the competing interests. See, e.g., Nixon v. Admin'r of Gen. Servs., 433 U.S. 425, 443 (1977). In a case concerning the extent of the President's executive immunity, the Supreme Court noted that "[c]ourts traditionally have recognized the President's constitutional responsibilities and status as factors counseling judicial deference and restraint." Nixon v. Fitzgerald, 457 U.S. 731, 753 (1982). The Court continued,

It is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States. But our cases also have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch.

Id. at 753-54 (citations & footnote omitted).

C. Balancing

1. The Burden on the Government

The Constitution charges the Congress and the Executive with the making and conduct of war. See U.S. Const. art. I, § 8, cl. 11-16 (setting forth Congress' war powers); id. art. II, § 2, cl. 1 (providing that "[t]he President shall be Commander in Chief of the Army and Navy of the United States"); Hamdi v. Rumsfeld (Hamdi II), 296 F.3d 278, 281 (4th Cir. 2002). It is not an exaggeration to state that the effective performance of these duties is essential to our continued existence as a sovereign

nation. Indeed, "no governmental interest is more compelling than the security of the Nation." Haig v. Agee, 453 U.S. 280, 307 (1981); see Hamdi II, 296 F.3d at 283 (observing, in the post-September 11 context, that "government has no more profound responsibility than the protection of Americans ... against additional unprovoked attack"). Thus, "[i]n accordance with [the] constitutional text, the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs." Hamdi II, 296 F.3d at 281.

The Government alleges--and we accept as true--that [REDACTED] the enemy combatant witnesses is critical to the ongoing effort to combat terrorism by al Qaeda. The witnesses are [REDACTED] al Qaeda operatives who have extensive knowledge concerning not just the September 11 attacks, but also other past attacks, future operations, and the structure, personnel, and tactics of al Qaeda. Their value as intelligence sources can hardly be overstated. And, we must defer to the Government's assertion that interruption [REDACTED] of these witnesses will have devastating effects on the ability to gather information from them. CF. CIA v. Sims, 471 U.S. 159, 176 (1985) (noting that "whether an intelligence source will be harmed if his identity is revealed will often require complex political, historical, and psychological judgments" that courts are poorly equipped to make).

[REDACTED] it is not unreasonable to suppose that interruption [REDACTED] could result in the loss of information that might prevent future terrorist attacks.

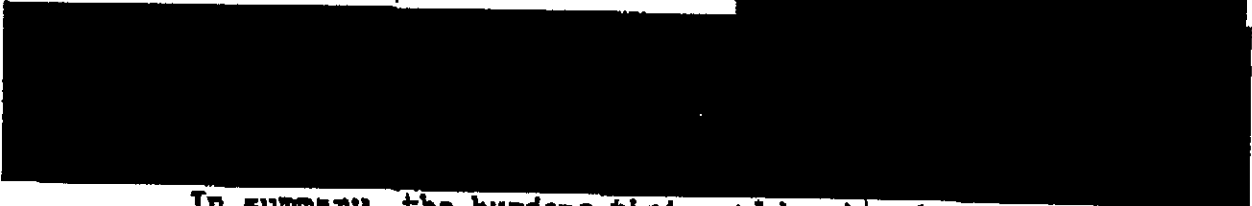

The Government also asserts that production of the witnesses would burden the Executive's ability to conduct foreign relations. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) ("In this vast external realm, ... the President alone has the power to speak or listen as a representative of the nation."). The Government claims that if the Executive's assurances of confidentiality can be abrogated by the judiciary, the vital ability to obtain the cooperation of other governments will be devastated.

The Government also reminds us of the bolstering effect production of the witnesses might have on our enemies. In Johnson, the Supreme Court considered the question of whether enemy aliens, captured and detained abroad, should be able to assert Fifth Amendment claims by means of a petition for the Great Writ. See Johnson, 339 U.S. at 767. In rejecting this claim, the Court noted that issuance of the writ to enemy aliens would not only impose direct burdens on military commanders, but would also bolster the enemy in a manner inimical to the war effort:

A basic consideration in habeas corpus practice is that the prisoner will be produced before the court.... To grant the writ to these prisoners might mean that our army must

transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations.... The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

Id. at 778-79. Although the concerns expressed in Johnson do not exactly translate to the present context, the Government asserts that they are nevertheless relevant.



In summary, the burdens that would arise from production of the enemy combatant witnesses are substantial.

2. Moussaoui's Interest

The importance of the Sixth Amendment right to compulsory process is not subject to question--it is integral to our adversarial criminal justice system:

The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. 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. To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

United States v. Nixon, 418 U.S. 683, 709 (1974); see Washington v. Texas, 388 U.S. 14, 19 (1967) ("The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense."). To state the matter more succinctly, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

The compulsory process right does not attach to any witness the defendant wishes to call, however. Rather, a defendant must demonstrate that the witness he desires to have produced would testify "in his favor." U.S. Const. amend. VI; see United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982). Thus, in order to assess Moussaoui's interest, we must determine whether the enemy combatant witnesses could provide testimony material to Moussaoui's defense.

In the CIPA context,²⁰ we have adopted the standard articulated by the Supreme Court in Roviaro v. United States, 353 U.S. 53 (1957), for determining whether the government's privilege in classified information must give way. See United States v. Smith, 780 F.2d 1102, 1107-10 (4th Cir. 1985) (en banc). Under that standard, a defendant becomes entitled to disclosure of classified information upon a showing that the information "is relevant and helpful to the defense ... or is essential to a fair determination of a cause." Id. at 1107 (quoting Roviaro, 353 U.S. at 60-61); see United States v. Fernandez, 913 F.2d 148, 154 (4th Cir. 1990) (explaining that "Smith requires the admission of classified information" once the defendant has satisfied the Roviaro standard).

Because Moussaoui has not had--and will not receive--direct access to any of the witnesses, he cannot be required to show materiality with the degree of specificity that applies in the ordinary case. See Valenzuela-Bernal, 458 U.S. at 870-71, 873. Rather, it is sufficient if Moussaoui can make a "plausible

²⁰ We adhere to our prior ruling that CIPA does not apply because the January 30 and August 29 orders of the district court are not covered by either of the potentially relevant provisions of CIPA: § 4 (concerning deletion of classified information from documents to be turned over to the defendant during discovery) or § 6 (concerning the disclosure of classified information by the defense during pretrial or trial proceedings). See Moussaoui I, 333 F.3d at 514-15. Like the district court, however, we believe that CIPA provides a useful framework for considering the questions raised by Moussaoui's request for access to the enemy combatant witnesses.

showing" of materiality. *Id.* at 873; *cf. id.* at 871 (noting that a defendant who has not interviewed a potential witness may demonstrate materiality by relating "the events to which a witness might testify[] and the relevance of those events to the crime charged"). However, in determining whether Moussaoui has made a plausible showing, we must bear in mind that Moussaoui does have access to the [REDACTED] summaries. See Part V.B, *infra*.

Before considering whether Moussaoui has made the necessary showing with respect to each witness, we pause to consider some general arguments raised by the Government concerning materiality. First, the Government maintains that Moussaoui can demonstrate materiality only by relying on admissible evidence. We agree with the Government to a certain extent--Moussaoui should not be allowed to rely on obviously inadmissible statements (e.g., statements resting on a witness' belief rather than his personal knowledge). *Cf. Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (*per curiam*) (holding that inadmissible materials that are not likely to lead to the discovery of admissible exculpatory evidence are not subject to disclosure under *Brady v. Maryland*, 373 U.S. 83 (1963)). However, because many rulings on admissibility--particularly those relating to relevance--can only be decided in the context of a trial, most of the witnesses' statements cannot meaningfully be assessed for admissibility at this time. Moreover, statements that may not be admissible at the guilt phase may be admissible during

the penalty phase, with its more relaxed evidentiary standards.
See 18 U.S.C.A. § 3593(c) (West Supp. 2003).

Second, the Government maintains that Moussaoui cannot establish materiality unless he can prove that the witnesses would not invoke their Fifth Amendment rights against self-incrimination. We have previously indicated, however, that a court should not assume that a potential witness will invoke the Fifth Amendment. Cf. United States v. Walton, 602 F.2d 1176, 1180 (4th Cir. 1979) (noting that, when a potential defense witness is in protective custody, "[t]he better procedure is to allow the defense counsel to hear directly from the witness whether he would be willing to talk to the defense attorney"). While circumstances indicating that a potential witness will refuse to testify may support a decision not to compel disclosures sought by the defense, see United States v. Polonichak, 783 F.2d 410, 414 (4th Cir. 1986), such circumstances are not present here. While it is possible that the witnesses would be reluctant to testify in a deposition setting, there is no particular reason to assume that they would refuse. Cf. Watkins v. Calahan, 724 F.2d 1038, 1044 (1st Cir. 1984) (noting that a potential defense witness who was charged with the same murder as the defendant, and who was resisting extradition, "in all likelihood would refuse to testify").

Additionally, the Government argues that even if the witnesses' testimony would tend to exonerate Moussaoui of

involvement in the September 11 attacks, such testimony would not be material because the conspiracies with which Moussaoui is charged are broader than September 11. Thus, the Government argues, Moussaoui can be convicted even if he lacked any prior knowledge of September 11. This argument ignores the principle that the scope of an alleged conspiracy is a jury question, see United States v. Sharps, 193 F.3d 852, 867 (5th Cir. 1999), and the possibility that Moussaoui may assert that the conspiracy culminating in the September 11 attacks was distinct from any conspiracy in which he was involved. Moreover, even if the jury accepts the Government's claims regarding the scope of the charged conspiracy, testimony regarding Moussaoui's non-involvement in September 11 is critical to the penalty phase. If Moussaoui had no involvement in or knowledge of September 11, it is entirely possible that he would not be found eligible for the death penalty.²¹

²¹ For example, the Government maintains that even if Moussaoui was not part of the September 11 attacks, he may be subject to the death penalty for withholding information regarding the upcoming attacks after his arrest. See 18 U.S.C.A. § 3591(a)(2)(C) (West 2000) (providing that a defendant is eligible for the death penalty if the jury finds, beyond a reasonable doubt, that the defendant "intentionally participated in an act, contemplating that the life of a person would be taken . . . , and the victim died as a direct result of the act"); Br. for the United States at 89 (asserting that Moussaoui "lied in a way that concealed the conspiracy and prevented discovery of the September 11 attacks"). A finding by the jury that Moussaoui lacked any knowledge of the planned September 11 attacks would substantially undermine this theory, although the Government might still be able to establish Moussaoui's eligibility for the death penalty based on

We now consider the rulings of the district court regarding the ability of each witness to provide material testimony in Moussaoui's favor.

a. Witness A

The district court did not err in concluding that Witness A could offer material evidence on Moussaoui's behalf.²² [REDACTED]

[REDACTED]

Several statements by Witness A tend to exculpate Moussaoui.

[REDACTED]

[REDACTED] to undermine the theory (which the Government may or may not intend to advance at trial) that Moussaoui was to pilot a fifth plane into the White House. [REDACTED]

[REDACTED]

his failure to disclose whatever knowledge he did have.

²² The parties dispute whether the materiality determinations by the district court are reviewed de novo or for abuse of discretion. We do not decide this question because we would affirm the district court under either standard.

[REDACTED] This statement is significant in light of other evidence [REDACTED]

[REDACTED] This is consistent with Moussaoui's claim that he was to be part of a post-September 11 operation.

The Government argues that Witness A's statements are actually incriminatory of Moussaoui.¹³ It is true that Witness A has made some statements that arguably implicate Moussaoui in the September 11 attacks. [REDACTED]

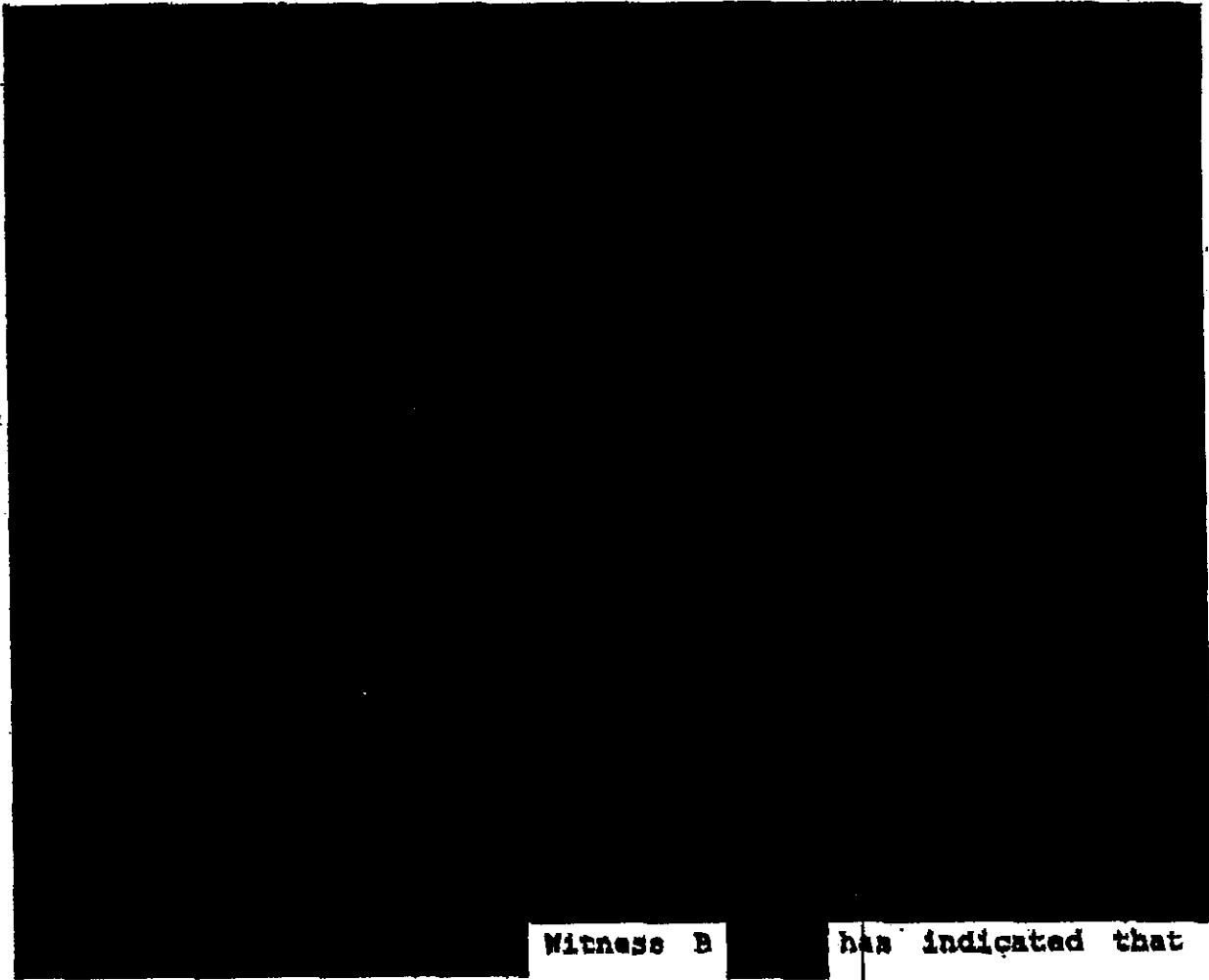
[REDACTED] On balance, however, Moussaoui has made a sufficient showing that evidence from Witness A would be more helpful than

¹³ The Government points to several statements relating Witness A's belief that Moussaoui was involved in the September 11 attacks. However, a witness' "belief" is not admissible evidence. See United States v. Tanner, 941 F.2d 574, 585 (7th Cir. 1991) (noting that witnesses cannot testify to events of which they do not have personal knowledge).

hurtful, or at least that we cannot have confidence in the outcome of the trial without Witness A's evidence.

b. Witness B

There can be no question that Witness B could provide material evidence on behalf of Moussaoui. [REDACTED]



[REDACTED] Witness B [REDACTED] has indicated that Moussaoui's operational knowledge was limited, a fact that is clearly of exculpatory value as to both guilt and penalty.





Thus, of all three witnesses, Witness B is of the
greatest exculpatory value.

c. Witness C

