IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA **vs.** **ZACARIAS MOUSSAOUI,** **Defendant.** **COURTROOM TELEVISION NETWORK LLC,** **Movant-Intervenor.**	**Criminal No. 1:01cr455**

GM

COURTROOM TELEVISION NETWORK LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR LEAVE TO RECORD AND TELECAST PRETRIAL AND TRIAL PROCEEDINGS

Courtroom Television Network LLC ("Court TV") respectfully submits this memorandum of law in support of its motion to record and telecast pretrial and trial proceedings in this matter.

Preliminary Statement

Court TV seeks an order permitting it to televise the pretrial and trial proceedings in this criminal prosecution of extraordinary significance. While all fifty states permit some type of television coverage in their courtrooms, and thirty-seven allow cameras in criminal proceedings, cameras are prohibited in federal criminal trials by both Rule 53 of the Federal Rules of Criminal Procedure and Local Rule 83.3 of the United States District Court for the Eastern District of Virginia. This *per se* ban on all cameras in all federal criminal trials is unconstitutional. The

12

First Amendment gives the public and press the right of access to courtroom proceedings. There is no principled constitutional distinction between the right to observe legal proceedings first-hand and the right to record and telecast those proceedings for the benefit of persons who, for any of a variety of reasons, cannot attend the proceedings at the courthouse. Put a different way, the nature of the constitutional right does not change depending on the means by which trials are observed. If a reporter may take notes and a sketch artist may draw a portrait, there simply is no principled basis on which to exclude cameras.

Court TV does not here contend that the First Amendment right of access is absolute and Court TV does not here seek a ruling that cameras must be permitted into all criminal trials. Nevertheless, a constitutionally mandated presumption in favor of televised access should appropriately be recognized under current law, subject to the trial court's determination in any particular case of identified, specific, and compelling risks of such coverage to the fairness, from the prospective of the defendant, of all or a portion of the proceedings. There are no such risks in this matter that cannot be mitigated by procedural orders regulating the conduct of trial proceedings.

Court TV is aware that there is precedent that weighs against its position. But, much has changed in the years since the Supreme Court decided *Estes v. Texas*, 381 U.S. 532 (1965), in which it reversed the conviction of the defendant because of the prejudicial impact of the televising of portions of pre-trial and trial proceedings. Similarly, the four Circuits that have addressed the constitutionality of Rule 53 did so in an earlier era without the technological advances that have since been made in recording and broadcasting criminal trials. *See Conway v. United States*, 852 F.2d 187 (6th Cir. 1988); *United States v. Edwards*, 785 F.2d 1293 (5th Cir. 1986); *United States v. Kerley*, 753 F.2d 617 (7th Cir., 1985), *United States v. Hastings,* 695

F.2d 1278 (11th Cir. 1983). Indeed, in his dispositive concurring opinion in *Estes*, Justice Harlan recognized that "the day may come" when television could safely be admitted to our courtrooms because "all reasonable likelihood that its use in courtrooms may disparage the judicial process" would have been dissipated. 381 U.S. at 595-96. That day is today.

Technology has evolved to the point that the presence of a camera in a courtroom can be — and is — entirely unobtrusive. Thirty-six years ago, when *Estes* was decided, audio-visual technology was crude, and cameras and other recording devices frequently intruded upon the dignity and conduct of courtroom proceedings with noisy cameras, bright klieg lights, snaking cables, and numerous technicians scurrying about the courtroom. Today, Court TV and other electronic media routinely record trial court proceedings without disturbing in the slightest the serenity of those proceedings, via the use of a silent camera, inconspicuously placed away from the participants, with no additional lighting required, and with few, if any, wires or technicians in sight. *Katzman v. Victoria's Secret Catalogue*, 923 F. Supp. 580, 582 (S.D.N.Y. 1996) (even as early as 1996, Court TV's "equipment [wa]s no more distracting in appearance than reporters with notebooks or artists with sketch pads"). In 1965, judges, juries, witnesses, counsel and parties to a proceeding could rightly claim to feel self-conscious, intimidated or distracted by the presence of the crude technology, and by the knowledge that they were being filmed and would be seen by a television audience. Today, as numerous studies have found — most recently, two commissioned by the Legislature of New York and submitted in 1994 and 1997 and a third commissioned by the California Supreme Court in 1996 *after* the O.J. Simpson criminal trial — those attitudes, and the risks to the proceedings they once posed, rarely, if ever exist, and when risks do exist, trial judges can and have taken appropriate remedial precautions. There is now, in short, no "reasonable likelihood" that the simple presence of an in-court camera "disparages the

judicial process." As Justice Harlan intimated thirty years ago, "re-examination" is now required of the case law that permits cameras to be banned under Rule 53 of the Federal Rules of Criminal Procedure and Local Rule 83.3.

Most important, none of the cases addressing the role of cameras in the courtroom arose in the context of the extraordinary public interest and concern generated by the events of September 11, not just in the United States, but throughout the world. Recognizing that a wider audience than can sit in the public gallery of the courtroom is entitled to observe the first trial arising from this unprecedented event, the United States Senate yesterday approved, by unanimous consent, S. 1858, a measure introduced by Virginia's Senator George Allen. The legislation would *require* the closed circuit television broadcasting of the trial proceedings in this case to certain cities for families of victims of the attacks. The House is expected to take up the measure in January. *See, e.g.,* Bob Port, *TV Eyed for Terror Trial, Senate Bill Pushes Closed-Circuit Viewing for Victims' Kin*, N.Y. Daily News, Dec. 21, 2001 (on-line edition) (describing legislation and quoting some survivors of victims as saying that legislation requiring closed circuit feeds in specified cities will not be sufficient since victims' families are spread around country, and expressly referring to Court TV as one appropriate forum for public broadcast). As Senator Allen himself pointed out, in New York City alone, literally millions of citizens probably can properly claim to be victims or survivors of victims of the attacks. *Id.*

If the public is truly to exercise its right to observe this criminal trial, however, that right must be more than theoretical, and must be available to more than the limited audience contemplated by Senator Allen's legislation. To vindicate the right of access granted to the public and press under the First Amendment, Court TV should be permitted to record and telecast the proceedings publicly.

The world's eyes are upon the United States at this critical moment in history. There are undoubtedly those throughout the world who believe that the defendant in this case cannot obtain a fair trial. There may be others who question the weight of the evidence against him. But, the strength of our democratic system of government has been – and continues to be – the openness of our institutions. We can survive any attack, except one that cripples those values.

Background

On September 11, 2001, thousands of Americans and citizens of dozens of other countries were killed or injured in terrorist attacks on the United States. The attacks – the most severe acts of terrorism in the history of this nation – captured the attention not only of citizens across the country, but of all people around the world.

On December 11, 2001, the United States filed its first criminal charge directly related to the terrorist attacks, accusing Zacarias Moussaoui of "conspiring with Osama bin Laden and Al Qaeda to murder thousands of innocent people in New York, Virginia and Pennsylvania." David Johnston & Philip Shenon, *A Nation Challenged: The Government's Case; Man Held Since August Is Charged With a Role In Sept. 11 Terror Plot*, N.Y. Times, Dec. 12, 2001, at A1. Moussaoui had been in custody since being arrested on August 16 after officials at a flight school alerted authorities of what they viewed as suspicious behavior. *Id.* The indictment alleges that Moussaoui had been trained in terrorist camps run by al Qaeda in Afghanistan and received money from al Qaeda's operations in Germany. Dan Eggen, *Ashcroft Announces Indictment in Sept. Probe*, Wash. Post, Dec. 11, 2001. United States officials believe Moussaoui was meant to be the "20th hijacker." David Johnston & Philip Shenon, *A Nation Challenged: The Government's Case; Man Held Since August Is Charged With a Role In Sept. 11 Terror Plot*, N.Y. Times, Dec. 12, 2001, at A1.

Moussaoui is charged with conspiracy to commit acts of terrorism, to commit aircraft piracy, to destroy aircraft, to use airplanes as weapons of mass destruction, to murder government employees, and to destroy property. Four of the six counts in the indictment carry the death penalty. *Id.* Following the indictment, Moussaoui was transferred from the New York area, where he was being held, to Virginia, where he is to stand trial. James Vicini, *Moussaoui Remains in Jail, Pending Trial*, Reuters, Dec. 19, 2001. This Court ruled on December 19, 2001, that Moussaoui should remain in prison pending trial. *Id.* Moussaoui is scheduled to be arraigned on January 2, 2002.

Court TV[1]

Court TV is a national cable legal news network dedicated to reporting on the legal and judicial systems of the United States, the fifty states, and the District of Columbia. Since its creation in 1991, Court TV's cornerstone has been to televise gavel-to-gavel coverage of civil and criminal trials. Court TV also has covered parole hearings, death penalty hearings, and municipal and night courts across the United States, and trials in federal courts, as well as proceedings in countries around the world, including the former Soviet Union, El Salvador, Serbia, and at the International Court of Justice at The Hague.

By stationing a single, silent unobtrusive camera inside a courtroom, Court TV seeks to enable viewers to observe the proceedings as though they themselves were in the courtroom. Court TV does this to inform and educate the public in the most accurate fashion possible, differentiating its coverage from the sound-bites and "spin" frequently attending out-of-court

---

[1] The facts recited herein concerning Court TV are a matter of public record, both in the press and in judicial opinions, *see, e.g., Katzman v. Victoria's Secret Catalogue*, 923 F. Supp. 580, 582 (S.D.N.Y. 1996), and Court TV respectfully requests that the Court take judicial notice thereof.

coverage of judicial proceedings. Court TV permits citizens to watch for themselves the moment-to-moment work of the United States judicial process as it unfolds.

Court TV has covered a wide variety of criminal trials. Many have raised important social, economic, political and cultural questions. Most that have been reported on by Court TV have been covered far less extensively elsewhere. The underlying premise in all these cases is the same: to capture the public workings of the justice system as accurately as possible.

Court TV has televised over 700 trials and other judicial proceedings. Its presence in the courtroom is non-disruptive. Prior to and throughout each proceeding it covers, Court TV works with the presiding judge and/or court personnel to ensure that all requirements concerning equipment placement and camera coverage are satisfied. It employs a single, stationary camera, which produces no noise and requires no lighting other than existing courtroom lighting. The camera is placed away from the proceedings and, if necessary, it can be operated by remote control by a Court TV technician. Wiring is unobtrusive. Microphones are small and are never operated in such a way as to record conversations between attorneys and clients; they are turned off during all parts of the proceedings that are not part of the public record. As a matter of policy, Court TV does not photograph jurors in any jurisdiction where it is not expressly permitted to do so, and then, only with the permission of the presiding judge. Although not required to do so by any jurisdiction, as a matter of policy Court TV edits out the names of jurors and the addresses of witnesses.

Court TV seeks to televise the entirety of the pretrial proceedings and the trial in this case, from preliminary proceedings to opening statements through verdict. Court TV will visually obscure the image of any non-party witness during his or her testimony upon request by such person, refrain from covering any aspect of jury selection, and observe all technical and

equipment criteria concerning camera placement. If family members of victims desire that their images not be telecast, Court TV will, of course, comply with any such request.

ARGUMENT

THE COURT SHOULD PERMIT COURT TV TO RECORD AND TELECAST PRE-TRIAL AND TRIAL PROCEEDINGS IN THIS MATTER

A. The Public and Press Have a Right of Access to These Court Proceedings.

The Supreme Court has held that the First Amendment requires that all criminal trials be open to the press and public, absent compelling and clearly articulated reasons for closing such proceedings. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 & n.17 (1980) (press and public possess First Amendment right to observe criminal trials); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (right to attend testimony at criminal trial of minor victim of sexual offense).

The Fourth Circuit has also recognized the paramount importance of public access to criminal trial proceedings. *See, e.g., In re Charlotte Observer*, 882 F.2d 850 (4th Cir. 1989) (order barring public from change of venue hearing in criminal proceeding violated First Amendment); *In re Washington Post,* 807 F.2d 383, 393 (4th Cir. 1986) (holding that First Amendment right of access extends to criminal plea and sentencing hearings). "Openness is a value in itself that the trial judge must consider even when the participants in the trial may wish otherwise. . . . [T]he ready resort to suppression is for societies other than our own; an accommodation of competing values remains the commendable course." *Washington Post Co. v. Hughes*, 923 F.2d 324, 331 (4th Cir. 1991) (upholding district court's decision to unseal search warrant affidavit at newspaper's request) (footnote omitted).

This right of access also inheres in a variety of pre-trial proceedings. *See, e.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (preliminary hearing in criminal case); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (voir dire examinations of jury venire) ("*Press-Enterprise I*").

The public's First Amendment-based right of access to judicial proceedings may be denied only where the court finds "a compelling government interest" in secrecy and where the remedy afforded is "narrowly tailored to serve that interest." *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (citations omitted). Put differently, access to judicial proceedings and the record therein may be prohibited consistent with the First Amendment "only if (1) closure serves a compelling interest; (2) there is a 'substantial probability' that, in the absence of closure, that compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect that compelling interest." *In re Washington Post Co.*, 807 F.2d 383, 392 & n.9 (4th Cir. 1986). "Moreover, the court may not base its decision on conclusory assertions alone, but must make specific factual findings." *Id.* at 392 (citations omitted).

The Supreme Court has observed that:

> The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Press Enterprise I, 464 U.S. at 508. Closed proceedings, in contrast, inhibit the "crucial prophylactic aspects of the administration of justice" and lead to distrust of the judicial system if,

for example, the outcome is unexpected and the reasons for it are hidden from public view. *Richmond Newspapers*, 448 U.S. at 571.

Here, there can be no dispute that the public and press have a right of access to these proceedings. The extraordinary nature of the proceedings, and the unprecedented events that led to them, call for public observation. Indeed, both press and public have already attended pretrial proceedings in this matter. Thus, it is beyond cavil that the right of access extends to these proceedings.

B. The Right of Properly Access Includes the Right to Record and Telecast the Proceedings.

The right of access to judicial proceedings founded upon the First Amendment must be more than merely theoretical. The constitutional right to view criminal trials is not simply one of physical access by the public (or press) to venture inside the courtroom door. The right is one of *observation* — by the public. "People in an open society do not demand infallibility from their institutions," the Supreme Court has explained, "*but it is difficult for them to accept what they are prohibited from observing.*" *Richmond Newspapers,* 448 U.S. at 572 (emphasis added). What concerned the Court in *Richmond Newspapers* was that "what takes place at a trial would lose much meaning if access *to observe* the trial could, as it was here, be foreclosed arbitrarily." *Id.* at 576-77 (emphasis added).

In *Richmond Newspapers*, the Court took pains to rest its holding upon historical tradition, dating back to the "days before the Norman Conquest." 448 U.S. at 565. Throughout the middle ages and during the American colonial period, the Court noted, "part of the very nature of a criminal trial was its openness to those who wished to attend." *Id.* at 568. Members of the community always possessed the "right to observe the conduct of trials." *Id.* at 572. In late colonial and early federalist America, this constituted much more than a formalistic privilege

of "access." Rather, observing proceedings — going to them, learning about them, judging them — was interwoven into the fabric of routine social life. The "administration of justice" was built upon participation by nearly all of the local community in what was referred to as "court day." "It would be hard to overemphasize the importance of the ceremonial at the center of coming together on court day." Rhys Isaac, *The Transformation of Virginia 1740 - 1790* 88 (1982). In the small, face-to-face communities that comprised the era of the Founders, citizens encountered authority chiefly "through participation in courthouse proceedings," and attending them involved "participat[ing] in discovering the meaning of the law. . . ." A.G. Roeber, *Faithful Magistrates and Republican Lawyers* 74 (1981). Doing so "served not only to make the community a witness to important decisions and transactions but also to teach men the very nature and forms of government." Isaac, *supra*, at 88. Citizens "left the stage of court day . . . secure in the sense that they had shaped and ratified communal affairs." Roeber, *supra,* at 74.

But, as the Court in *Richmond Newspapers* realized, in the twentieth century "access to observe" only goes so far. Space constraints and changing times simply preclude the vast majority of Americans from physically attending trials and, therefore, from observing them. Thus, "[i]nstead of acquiring information about trials by first hand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense this validates the media claim of functioning as surrogates for the public." 448 U.S. at 572-73. Here, where the proceedings are certain to generate international scrutiny, the media will play an even more important role not only as the eyes and ears of the citizens of America, but also as a window on our system for justice for citizens of the world.

Today, the means exist — through television — for *all* Americans to exercise their constitutional right to observe trials. Indeed, to suggest that, under the First Amendment, the *only* persons who may exercise their right to observe trial court proceedings are the few members of the press and public able to squeeze into a courtroom would be to turn *Richmond Newspapers* on its head — by compelling, in Chief Justice Burger's words, the "community [to] surrender its right to observe the conduct of trials." 448 U.S. at 572; *see United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994) "([F]or what exists of the right of access if it extends only to those who can squeeze through the door?"). To so suggest would effectively penalize citizens for having had the misfortune to have been born in an age of greater population, and densely packed urban areas, where courtrooms cannot accommodate them. Thus, if the technological means exist to provide to all citizens the "'right of visitation,'" 448 U.S. at 527, it must be that *Richmond Newspapers* and its progeny require that those means — at least as a presumptive matter — must be allowed into courtrooms.[2]

Television not only provides an opportunity to attend and observe, but is the best and most effective opportunity to do so. Indeed, as other courts have noted, the values identified at the core of *Richmond Newspapers* "can be fully vindicated only if the opportunity for personal observation is extended to persons other than those few who can manage to attend the trial in

---

[2] It is undoubtedly these concerns for the space limitations of the courthouse in the Eastern District of Virginia that led the Senate, on December 20, 2001, to pass S. 1858 requiring the closed circuit television coverage of the trial in certain cities. As Senator Allen observed in explaining why he introduced S. 1858, "'If it is an open trial . . . and the courtroom facilities are simply insufficient for the victims to be able to view the trial and the proceedings, then you have to do something like this.'" Jesse J. Holland, *Assoc. Press*, Dec. 20, 2001. While the bill permits access only for family members of victims, it will likely lead to an impassioned debate over who are the victims of September 11, and who qualifies as "family." This debate can be resolved by granting the public access to the trial through television. Indeed, the same concerns animating the passage of the bill – access to the trial – are those implicated in Court TV's motion before this Court.

person." *United States v. Criden*, 648 F.2d 814, 822 (3d Cir. 1981); *accord Cable News Network, Inc. v. American Broadcasting Cos.*, 518 F. Supp. 1238, 1245 (N.D. Ga. 1981) ("[I]t cannot be denied that television news coverage plays an increasingly prominent part in informing the public at large of the workings of government.").

The purposes of the constitutional right to attend and observe trials are well established. They serve to reinforce public acceptance — crucial in a democratic society — of "both the process and its results." *Richmond Newspapers,* 448 U.S. at 570-71. As Justice Brennan put it:

> Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.

Nebraska Press Ass'n v. Stuart, 427 U.S. at 587 (Brennan, J., concurring); *accord, e.g., Globe Newspaper Co.,* 457 U.S. at 606 ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and the society as a whole[,] permit[ting] the public to participate in and serve as a check upon the judicial process — an essential component in our structure of self-government.") (footnotes omitted).

In criminal trial court proceedings, the constitutional right to observe has additional force. As the Chief Justice Burger observed in *Richmond Newspapers*:

> Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done — or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner." It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where

> the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process "satisfy the appearance of justice," and the appearance of justice can best be provided by allowing people to observe it.

448 U.S. at 571 (alteration in original) (citations omitted).

The law is clear: The public and the press possess constitutional rights to attend and observe trial court proceedings. The mere fact that cameras — no less a tool of the press than the sketch artist's drawing pad or the print reporter's pen and paper — provide *all* of the public with the opportunity to vindicate such rights cannot itself be a basis for refusing to allow cameras into courtrooms. Whether cameras generally pose greater risks to the administration of justice than do the other tools routinely used by the press, or whether they pose particular risks in this case, are separate questions (discussed below). But these questions have no bearing on whether direct observation on television is capable of being distinguished, on a principled basis, from direct observation in person. Indeed, there can be no legal basis for distinguishing, as a matter of constitutional right, between the recording devices such as cameras and those such as pencils and paper. *See, e.g., Minneapolis Star Tribune Co. v. Minnesota Commission of Revenue*, 460 U.S. 575, 591 (1983) (striking down state tax statute singling out small group within the press because it "presents such a potential for abuse that no interest suggested by [the state] can justify the scheme"); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (same); *see also Cosmos Broadcasting Corp. v. Brown*, 471 N.E.2d 874, 882 (Ohio Ct. App. 1984) ("[I]f the print media, with its pens, pencils and note pads, have a right to access to a criminal trial, then the electronic media, with its cameras, must be given *equal* access too.").

C. A Per Se Ban on Recording and Broadcasting Trials is Unconstitutional.

Despite the constitutional right of access to criminal trials, Rule 53 of the Federal Rules of Criminal Procedure and Local Rule 83.3 of the United States District Court for the Eastern District of Virginia purport to prohibit the use of cameras in the courtroom.[3] The rules are unconstitutional.

In *Estes v. Texas*, 381 U.S. 532 (1965), the Supreme Court reversed the criminal conviction of Billy Sol Estes. Four members of the Court, in an opinion by Justice Clark, emphasized what they viewed as the prejudicial impact of the televising of the *Estes* pretrial hearing and portions of the trial. In response to the argument "that the ever-advancing techniques of public television communication and the adjustment of the public to its presence may bring about a change in the impact of telecasting upon the fairness of criminal trials," Justice Clark's opinion observed that "we are not dealing here with future developments in the field of electronics," nor with "the hypothesis of tomorrow," but with "the facts as they are presented today." 381 U.S. at 551-52. Justice Harlan's dispositive concurring opinion struck the same note: Limiting his agreement with the majority to the specific facts of the *Estes* case, Justice Harlan, too, observed that "the day may come" when television could safely be admitted to our courtrooms because "all reasonable likelihood that its use in courtrooms may disparage the judicial process" would have been dissipated. "If and when that day arrives," Justice Harlan concluded, "the constitutional judgment called for now would of course be subject to re-examination." 381 U.S. at 595-96 (Harlan, J., concurring).

---

[3] In relevant part, Rule 53 provides that "The taking of photographs in the court room during the progress of judicial proceedings . . . shall not be permitted by the court." Fed. R. Crim. P. 53. In relevant part, Local Rule 83.3 provides that "television broadcasting from the Courtroom or its environs during the progress of or in connection with judicial proceedings . . . is prohibited." E.D. Va. Rule 83.3.

That day has arrived. First, *Richmond Newspapers* and its progeny, which substantially broadened press and public rights to attend and observe trial court proceedings, were decided nearly two decades after *Estes*. Second, the Supreme Court in *Chandler v. Florida*, 449 U.S. 560 (1981), determined that televised proceedings do not in and of themselves amount to a *per se* violation of a criminal defendant's Sixth Amendment rights. *Id.* at 582-83 (holding that "[a]bsent a showing of prejudice of constitutional dimensions," the Constitution does not prohibit states from experimenting with televised court proceedings). Indeed, the Court in *Chandler* all but overruled *Estes*, pointedly noting that Justice Harlan's concurrence — the dispositive vote in a 5-4 decision — was "limited to the proposition that '*what was done in this case* infringed the fundamental right to a fair trial.'" *Id.* at 573 (quoting Justice Harlan). In determining that Justice Harlan's concurrence "must be read as defining the scope of [the *Estes*] holding," *id.*, *Chandler* thus limited *Estes* to its facts.[4]

Third, thirty-six years later, those facts — and the concerns that informed them — are demonstrably of no moment. In contrast to the situation presented in *Estes,* today cameras are small, silent, produce no light, and are placed unobtrusively away from participants. *See Estes,* 381 U.S. at 536 (noting that "the picture presented was not one of that judicial serenity and calm to which petitioner was entitled. Indeed, at least 12 cameramen were engaged in the courtroom

---

[4] Dicta in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), is not to the contrary. In *Nixon,* a record company and certain broadcasters petitioned for immediate access to President Nixon's White House Tapes for the purpose of copying, broadcasting and selling them. The issue in *Nixon* was not whether the First Amendment guaranteed any right of access to bring cameras into courtrooms, but whether the First Amendment guaranteed the press a broader right of access to the tapes themselves, "to which the public had never had *physical* access." *Id.* at 609. "The First Amendment generally grants the press no right to information about a trial *superior* to that of the general public." *Id.* Court TV does not seek rights "superior" to those of the general public, but only to vindicate the *public's* right to attend and observe. *See Richmond Newspapers*, 448 U.S. at 572-73.

throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table."). As the New York State legislature noted, in approving an experiment in audio-visual coverage of civil and criminal trial court proceedings:

> [i]t was the experience of an earlier generation that bright lights, large cameras and other noisy equipment intruded upon the dignity and decorum of the courtroom and tended to create an atmosphere unsuited to calm deliberation and impartial decision making. Various improvements in the technology of photography and of the audio and video broadcast media, [however,] in addition to the development of procedural safeguards as provided for in various state programs, make it feasible to permit in this state, on an experimental basis, audio-visual coverage of court proceedings without disruptive effect.

Act of June 15, 1987, ch. 113, § 1, 1987 N.Y. Laws 231 (McKinney).

Beyond that, television has become the primary source of information for the public. According to a recent survey, all fifty states allow cameras in their courtrooms in at least some types of judicial proceedings, and thirty-seven states allow cameras in criminal proceedings. *See* National Center for State Courts, Summary of TV Cameras in the State Courts (August 1, 2001). Virginia, for example, authorizes the exclusion of cameras in criminal proceedings only "'for good cause shown.'" *Diehl v. Commonwealth*, 385 S.E.2d 228, 232 (Va. Ct. App. 1989) (upholding camera access in first-degree murder trial) (citation omitted). Study after study – including studies conducted after the O.J. Simpson criminal trial – has concluded that in-court cameras have not impaired the administration of justice. *See, e.g., Report of the Chief Administrative Judge to the Legislature, the Governor, and the Chief Judge of the State of New York on the Effect of Audio-Visual Coverage on the Conduct of Judicial Proceedings*, March 1999; *In re Petition of Post-Newsweek Stations, Inc.*, 370 So. 2d 768, 775 (Fla. 1979) (finding

that, after a one-year experiment, concern that cameras in the courtroom would negatively affect lawyers, judges, witnesses or jurors was "unsupported by any evidence.").[5] Indeed, Court TV is not aware of a single appellate decision "overturning a judgment, verdict or conviction based on the presence of cameras at trial." *Katzman v. Victoria's Secret Catalogue*, 923 F. Supp. at 589; *see id.* ("twenty-two years after the *Estes* holding, the advances in technology . . . have demonstrated that the stated objections [to televising trials] can readily be addressed and should no longer stand as a bar to a presumptive First Amendment right of the press to televise as well as publish court proceedings, and of the public to view those proceedings on television.").

Finally, arbitrary, *per se* closures of trial court proceedings without *any* specific findings as to the particularized, identifiable harm to the parties' rights or to the fair administration of justice are unconstitutional. *E.g., Globe Newspaper Co.*, 457 U.S. at 611 n.27 ("[A] mandatory rule, requiring no particularized determination in individual cases, is unconstitutional."). To defeat the presumptive constitutional rights of press and the public to observe trial court proceedings, as the Supreme Court has repeatedly held, closure must be justified by "an overriding interest based on findings that [it] is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise*, 464 U.S. at 510; *accord Globe Newspaper Co.*, 457 U.S. at 608.

Thus, the *per se* ban on cameras in the courtroom reflected in Rule 53 of the Federal Rules of Criminal Procedure and Local Rule 83.3 is, by definition, unconstitutional. Both rules

---

[5] *See also* New York State Committee to Review Audio Visual Coverage of Court Proceedings, *An Open Courtroom: Cameras in New York Courts 1995-1997*, April 4, 1997; Federal Judicial Center, *Electronic Media Coverage of Federal Civil Proceedings*, 1994; *Report of the Committee On Audio-Visual Coverage of Court Proceedings*, May 1994; Alaska Judicial Council, *News Cameras in the Alaska Courts: Assessing the Impact*, Jan. 1988; Ernest H. Short & Assocs., *Evaluation of California's Experiment with Extended Media Coverage of Courts*, September 1981.

rest on an assumption that in all cases audio-visual coverage is or could be harmful. That assumption may have had some force in 1944, when Rule 53 was enacted. But in the Internet age, that assumption is simply wrong. Relying upon it to support an absolute ban on cameras in courtrooms does not in any way begin to meet the constitutional standards required by the law set forth above, which governs today.

D. Closing This Trial To Cameras Is Not Justified Under Constitutional Standards

While the First Amendment surely does not require that all trials be televised, it does create a presumptive constitutional right to observe court proceedings. That right may only be overcome on a case-by-case basis, and only where identifiable, specific, and compelling risks have been identified and articulated. Court TV does not take issue with restrictions on coverage and the judicial discretion set forth in numerous court rules governing the televising of court proceedings. But any exclusion of cameras must take account of the constitutional principles outlined herein. *E.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. at 15 (First Amendment right "cannot be overcome by the conclusory assertion that publicity might deprive defendant" of fair trial rights). There are no constitutionally sufficient grounds to support barring in-court cameras from pretrial and trial proceedings in this case.

1. Concerns with the impact of cameras on the proceedings themselves.

There is no doubt that this high profile case has aroused passions or that it will be heavily scrutinized throughout the world. That reality not only militates in favor of the widest, most accurate dissemination of information available; it also reinforces the proposition that, to the extent there exists any witness or juror "self-consciousness" at these proceedings, it will necessarily flow from the unavoidable fact of the trial's notoriety. There is no evidence that cameras increase whatever self-awareness exists in all highly publicized trials. Whether cameras

are present or not, the Court will surely rule as appropriate to bar jurors and witnesses from following news of the trial – which will be reported every day in the headlines of all major newspapers.

The same is true of the alleged concern that attorneys tend to "grandstand" when cameras are present. Attorney misbehavior and melodrama are hardly new phenomena: For centuries — and without in-court television — the bombast of lawyers from Patrick Henry to William Jennings Bryan to William Kunstler has been legendary — and, sometimes, criticized. *See, e.g.,* Lawrence M. Friedman, *Crime and Punishment in American History* 252-53 (1993) (reporting that in 19th Century, "It was in those cases that lawyers outdid themselves in oratory and in maneuvering. . . . The newspapers of the 1880s and 1890s, of course, reported the show for the curious millions who were not lucky enough to squeeze into the courtroom."). The solution to such conduct, in whatever context it occurs, is the imposition of appropriate penalties on such lawyers by the Court.

2. Concerns about the news coverage of a televised trial.

Opponents of televised proceedings frequently raise the specter of the manner in which trials are reported by the press. The law has long had a dispositive answer to orders barring cameras on this basis: It is unconstitutional to do so. Trials are open to the public and the press, and even sensationalistic reporting about them is fully protected. To condition the exercise of a constitutional right — access to a courtroom — on relinquishment of another — disseminating information or opinion about what happens in courtrooms — is impermissible. *Rosenberger v. University of Virginia*, 515 U.S. 819, 829 (1995).

There remains concern that "sensationalist" reporting about court proceedings is itself an affront to the dignity of the judiciary. As to this, the Supreme Court's admonition in *Bridges v. California*, 314 U.S. 252 (1941), is instructive:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Id. at 270-71 (footnote omitted). Moreover, Court TV's coverage of the trial in this case will be complete and responsible, not sensational. Thus, none of the concerns about the content of televised trial coverage are implicated by Court TV's coverage.

Once again, there will be extensive coverage of this trial and the pretrial proceedings, with or without cameras. *See In re Petition of Post-Newsweek Stations, Inc.*, 370 So. 2d at 776 ("[N]ewsworthy trials are newsworthy trials, and . . . they will be extensively covered by the media both within and without the courtroom" whether cameras are permitted or not.). *Without* cameras in the courtroom, however, the only information about what happens inside the courtroom will come from those few members of the media and public able to fit inside the courtroom or from individuals surmising — or guessing — what has occurred. Without cameras, "sound bites" from out of court interviews will be played, perhaps juxtaposed against photographs, taken out of court, of participants. Without cameras, citizens will judge the proceedings with whatever information they possess, however truncated, salacious, or inaccurate.

The Supreme Court long ago and many times has made clear that the solution to these problems is not to limit speech about proceedings or access to them, but for the trial judge to exercise the firmest control over the proceedings themselves by invoking a variety of curative

devices to lessen the risk of prejudice. *E.g., Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966); *accord Nebraska Press*, 427 U.S. at 552-55. The Court may conduct probing *voir dire* of prospective jurors to ensure that they are able to discharge their responsibilities free from the impact of prejudicial publicity. *E.g., Press Enterprise*, 478 U.S. at 15 ("Through voir dire . . . a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict."); *Stroble v. California*, 343 U.S. 181, 194-95 (1952) (refusing to overturn conviction on ground that pretrial news accounts were inflammatory because, *inter alia*, trial court had carefully screened jurors). The Court may admonish the jury and witnesses, as often as necessary and on pain of contempt, not to read, watch or listen to any press reports. *See Chandler*, 449 U.S. at 582. The Court may request counsel to enter and leave the courthouse in a manner most likely to avoid being surrounded by the public and press. The Court may levy sanctions upon attorneys who "play to the public," and may, if ultimately required, impose a narrowly tailored order restricting attorneys from discussing the case out of court.

The question raised by this application, then, is not whether this trial will generate publicity. The question is whether public information about this trial is to come *solely* from second-hand summaries presented on the news, and potentially prejudicial and inflammatory characterizations by interested third parties; or whether the public will be permitted, as well, to observe the entirety of the actual in-court proceedings — dignified, somber and under the control of the Court. Court TV respectfully submits that the latter is not only the constitutionally required state of affairs, but the far preferable one as well. As Justice Kennedy stated in testimony to Congress:

> You can make the argument that the most rational, the most dispassionate, the most orderly presentation of the issue is in the courtroom and it is the outside coverage that is really the problem. In a way, it seems somewhat perverse to exclude television from

> the area in which the most orderly presentation of the evidence takes place.

Hearings Before a Subcomm. of the House Comm. on Appropriations, 104th Cong., 2d Sess. 30 (1996).

Seldom has there been a criminal trial for which televised coverage could be more clearly warranted. The central purpose of the constitutional right of access — the law that governs here — is, in fact, to *ensure* fair trials and to promote confidence in the justice system. As the Supreme Court concluded in *Globe Newspaper Co.*, in overturning an order closing a trial involving a sexual offense alleged to have been committed against a minor victim:

> [T]he right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. . . . And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process — an essential component in our structure of self-government.

457 U.S. at 606 (footnote omitted). Confidence in the United States judicial system is especially crucial in light of the international nature of the conspiracy alleged against the defendant, and the extraordinary interest throughout the world in these proceedings.

In-court cameras do not cause out-of-court reporting; they capture only what happens in court, nothing more. There is thus no prudential reason — constitutional questions aside — to exclude them from this trial. And, there is every reason to permit them. It is elemental that the public is better served by first-hand observation than by second-hand summaries. It would seem apparent that the better state of affairs is one in which coverage of the trial is supplemented by a genuine understanding, obtained through first-hand observation, of what has actually gone on in the courtroom.

CONCLUSION

For the foregoing reasons, Court TV respectfully requests that this Court enter an order granting Court TV's request to record and telecast the pre-trial and trial proceedings in this case.

Dated: December 21, 2001

Respectfully submitted,

LEVINE SULLIVAN & KOCH, L.L.P.

By: _____

Lee Levine
Jay Ward Brown, Va. Bar No. 34355
Cameron A. Stracher
1050 Seventeenth Street, N.W., Suite 800
Washington, D.C. 20036
(202) 508-1100
Facsimile (202) 861-9888

ATTORNEYS FOR MOVANT- INTERVENOR
COURTROOM TELEVISION NETWORK LLC

CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of December 2001, I served true and correct copies of the foregoing Courtroom Television Network LLC's Memorandum of Law in Support of Its Motion For Leave to Record and Telecast Pretrial and Trial Proceedings by hand-delivery or courier for next-business-day delivery, as indicated below, upon counsel for the parties as follows:

By Hand Delivery

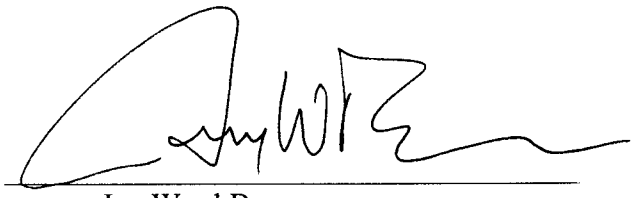
Frank W. Dunham, Jr.
Office of the Federal Public Defender
401 Courthouse Square
Alexandria, Virginia 22314

Robert A. Spencer
United States Attorney's Office
2100 Jamieson Avenue
Alexandria, Virginia 22314-5794

By Federal Express

Edward B. MacMahon
107 East Washington Street
Middleburg, Virginia 20118

Gerald Thomas Zerkin
Office of the Public Defender
One Capital Square, Suite 1100
830 East Main Street
Richmond, Virginia 23219



Jay Ward Brown