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

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSSAOUI	)	
	)	

GOVERNMENT'S OPPOSITION TO MOTION OF
COURTROOM TELEVISION NETWORK LLC FOR LEAVE TO
RECORD AND TELECAST PRETRIAL AND TRIAL PROCEEDINGS

Pursuant to this Court's order dated December 26, 2001, the United States hereby opposes the motion filed by Intervenor Courtroom Television Network LLC ("Court TV") for leave to record and telecast the pretrial and trial proceedings in this criminal case. As discussed below, Court TV's motion should be denied because the televising of federal criminal proceedings is prohibited by both Federal Rule of Criminal Procedure 53 and Local Rule 83.3 of the United States District Court for the Eastern District of Virginia. Furthermore, contrary to Intervenor's claim, neither rule is unconstitutional. While the First Amendment includes a right to attend criminal trials, it does not include a right to observe such proceedings on television. Instead, the case law draws a clear distinction between an open trial and a televised trial, and rejects any claim that the media has a First Amendment right to broadcast criminal proceedings. This case law makes good sense because the purposes of public trials can be served without having televised proceedings, and because the televising of criminal trials poses significant risks to the administration of justice. Moreover, Court TV provides no substantial reason why the existing case law, which permits Congress, individual states, and governing court bodies to decide the proper role of television cameras in the courts, should be discarded in favor of a

blanket constitutional rule. Finally, although a weighing of the various arguments for and against televising these proceedings is not appropriate here, there are in fact compelling reasons why these proceedings should not be televised. Accordingly, the government respectfully requests that Court TV's motion be denied.

I. BACKGROUND.

On December 11, 2001, a Grand Jury sitting in the Eastern District of Virginia returned a six count indictment against defendant Zacarias Moussaoui. The indictment alleges, inter alia, that Moussaoui conspired with members and associates of Usama Bin Laden's al Qaeda organization to commit the terrorist attacks that resulted in the September 11, 2001, deaths of thousands of people in New York, Virginia, and Pennsylvania. See Indictment at 2-31. The indictment charges Moussaoui with six separate conspiracy offenses, including: Conspiracy to commit acts of terrorism transcending national boundaries, in violation of 18 U.S.C. §§ 2332b(a)(2) & (c) (Count One); conspiracy to commit aircraft piracy, in violation of 49 U.S.C. §§ 46502(a)(1)(A) and (a)(2)(B) (Count Two); conspiracy to destroy aircraft, in violation of 18 U.S.C. §§ 32(a)(7) and 34 (Count Three); conspiracy to use weapons of mass destruction, in violation of 18 U.S.C. § 2332a(a) (Count Four); conspiracy to murder United States employees, in violation of 18 U.S.C. §§ 1114 & 1117 (Count Five) ; and conspiracy to destroy property, in violation of 18 U.S.C. §§ 844(f), (i), (n) (Count Six). Id.

Moussaoui was arraigned by this Court on January 2, 2002, and jury selection is currently scheduled for September 30, 2002. On December 21, 2001, Court TV, a national cable news network, sought leave to intervene in these proceedings for the purpose of requesting permission to televise the pretrial and trial proceedings. This Court granted Court TV's motion

to intervene on December 26, 2001, and set a hearing on its motion to record and telecast the proceedings for January 9, 2002.[1]

II. TELEVISING THE PROCEEDINGS IN THIS CASE WOULD VIOLATE FEDERAL RULE OF CRIMINAL PROCEDURE 53 AND LOCAL RULE 83.3.

Citing to the "extraordinary public interest and concern generated by the events of September 11," 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." Courtroom Television Network LLC's Memorandum of Law in Support of its Motion for Leave to Record and Telecast Pretrial and Trial Proceedings ("Memo.") at 4, 7. But as Court TV acknowledges (Memo. 1), this request is precluded by Federal Rule of Criminal Procedure 53 and by Local Rule 83.3 of the United States District Court for the Eastern District of Virginia.

Rule 53 provides:

> The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court.

This rule does not grant individual judges discretion to televise criminal proceedings. United States v. Kerley, 753 F.2d 617, 619 (7th Cir. 1985). Instead, "[t]he words 'shall not' can only mean that the rule applies in all situations with no exceptions." Id.; see Estes v. Texas, 381 U.S. 532, 581-82 (1965) (Warren, C.J., concurring) ("Rule 53 of the Federal Rules of Criminal Procedure prohibits the 'broadcasting' of trials"). Likewise, Local Rule 83.3 bans the televising

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[1] On January 3, 2002, this Court granted C-SPAN Networks ("C-SPAN") leave to intervene for the limited purpose of participating in the argument of Court TV's motion to record and telecast. Because C-SPAN has adopted the arguments advanced by Court TV, any reference in this motion to Court TV is also intended to refer to C-SPAN.

of all judicial proceedings, and cannot be interpreted to permit exceptions based on the perceived importance of the matter before the Court. Rule 83.3, Rules of Practice of the United States District Court for the Eastern District of Virginia ("[T]elevision broadcasting from the Courtroom or its environs during the progress of or in connection with judicial proceedings, * * * whether or not Court is actually in session, is prohibited.").

II. THERE IS NO FIRST AMENDMENT RIGHT TO TELEVISE CRIMINAL TRIALS.

Recognizing that Fed. R. Crim. P. 53 and Local Rule 83.3 preclude this Court from granting its request, Court TV mounts a broad attack on the constitutionality of these rules. In particular, Court TV contends that the First Amendment mandates "[a] presumption in favor of televised access" that is subject only 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 [sic] of the defendant, of all or a portion of the proceedings." Memo. 2.

The central problem with this argument is that it conflicts with current law. Memo. 2 (Intervenor acknowledges that "there is precedent that weighs against its position."). In fact, numerous cases, beginning with the Supreme Court's decision in Estes v. Texas, 381 U.S. 532 (1965), specifically foreclose Court TV's constitutional challenge.

In Estes, the Court considered whether the presence of television cameras in the courtroom during a criminal trial denied the defendant due process of law. Five justices adopted an apparent per se ban on the use of television cameras, at least in high profile or notorious cases. Id. at 540-52 (plurality opinion); id. at 552-86 (concurring opinion of Warren, C.J.), id. at 587-96 (concurring opinion of Harlan, J.). In addition, the same five justices specifically considered and

rejected the argument that the news media has a First Amendment right to televise from the courtroom. In the Court's view, this argument was a "misconception of the rights of the press," which, while broad, "must necessarily be subject to the maintenance of absolute fairness in the judicial process." Id. at 539 (plurality opinion); see also id. at 583-84 (Warren, C.J., concurring) ("Nor does the exclusion of television cameras from the courtroom in any way impinge upon the freedoms of speech or the press."); id. at 588 (Harlan, J., concurring) ("No constitutional provision guarantees a right to televise trials."). The Court also rejected the argument that prohibiting cameras in courtrooms discriminates against television reporters, noting that "[t]he news reporter is not permitted to bring his typewriter or printing press." Id. at 540 (plurality opinion).[2]

The Court reaffirmed this holding in Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978). In Warner Communications, the Court denied the television networks the right to copy tapes made by President Nixon that were introduced in Watergate-related criminal trials. In responding to the argument that release of the tapes was required by the Sixth Amendment's constitutional guarantee of a public trial, the Court reasoned as follows:

> In the first place, this argument proves too much. The same could be said of the testimony of a live witness, yet there is no constitutional right to have such testimony recorded and broadcast. Estes v. Texas, supra, 381 U.S., at 539-542, 85 S. Ct., at 1631-1632. Second, while the guarantee of a public trial, in the words of Mr. Justice Black, is 'a safeguard against any attempt to employ our courts as instruments of persecution,' In re: Oliver, 333 U.S. 257, 270 (1948), it confers no special benefit on the press. Estes v. Texas, 381 U.S., at 583, 85 S. Ct., at 1653 (Warren, C.J., concurring); id. at 588-589, 85 S. Ct., at 1662-1663 (Harlan, J.,

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[2] The remaining four justices dissented from the Court's conclusion that the Due Process Clause prohibits television cameras in criminal trials but did not reach the First Amendment question presented here. Id. at 601-15.

> concurring). Nor does the Sixth Amendment require that the trial – or any part of it – be broadcast live or on tape to the public.

435 U.S. at 610.

Intervenor suggests that the Court's decision in Chandler v. Florida, 449 U.S. 560 (1981), "all but overruled Estes" and "limited Estes to its facts." Memo. 16. As applied to Estes's First Amendment holding, this claim is incorrect. To be sure, the Chandler Court retreated from Estes's per se ban on televised criminal trials, concluding instead that the defendant who challenges the televising of his trial on due process grounds must show some prejudice in his particular case. 449 U.S. at 581. Chandler thereby opened the way for the states (and the federal government) to experiment with allowing television cameras in criminal trials. Id. at 582. The Chandler Court did not, however, question Estes's rejection of the media's purported right to televise criminal proceedings. To the contrary, the Court noted approvingly that, in permitting the televising of criminal trials on an experimental basis, "the Florida Supreme Court had rejected any state or federal constitutional right of access on the part of photographers or the broadcast media to televise * * * court proceedings." Id. at 569. Likewise, the Court noted that the Florida Supreme Court's "carefully framed holding" rested on the passage from Warner Communications quoted above. Id.; see supra at 6.. Accordingly, to the extent that Chandler addressed Intervenor's First Amendment argument at all, it simply reaffirmed the earlier holdings in Estes and Warner Communications.

In short, the Supreme Court cases that directly address the televising of criminal proceedings undermine Court TV's First Amendment claim. Not surprisingly, Court TV attempts to ground its claim on a different line of cases dealing with constitutional challenges to

closed criminal proceedings. Noting that "[t]he First Amendment gives the public and press the right of access to courtroom proceedings" (Memo 1-2), Court TV argues that this right of access requires that "[television cameras] – at least as a presumptive matter – must be allowed into courtrooms." Memo. 12.

We agree that "[t]he First Amendment clearly guarantees the right of the press and public to attend criminal trials." In re: Washington Post Co., 807 F.2d 383, 388 (4th Cir. 1986). While the Constitution itself does not mention such a right, the Supreme Court has inferred its existence from other First Amendment rights, including the rights to free speech and free press. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575-81 (1980) (plurality opinion); see Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603 (1982). The constitutional right of access also extends to some pre-trial proceedings in criminal cases. Press Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (Press-Enterprise I); Press Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (Press-Enterprise II).[3]

The present motion, however, does not present a choice between open and closed proceedings. Kerley, 753 F.2d at 621. Absent special circumstances, see supra at n.3, these

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[3] The public's First Amendment right of access to court proceedings is qualified, not absolute. It must yield to other interests, including a criminal defendant's right to a fair trial, see Press Enterprise II, 478 U.S. at 14-15 (defendant's right to a fair trial can limit media access to criminal proceedings); the protection of witnesses, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 608-09 (1982) (protecting victims who testify in a sex-offense trial is a compelling interest), the secrecy of grand jury proceedings, Butterworth v. Smith, 494 U.S. 624, 636-37 (1990) (Scalia, J., concurring); Branzburg v. Hayes, 408 U.S. 665, 684 (1972); and public safety. In re Herald Company, 734 F.2d 93, 100 (2d Cir. 1984) (closure can be invoked "upon a showing of a significant risk of . . . danger to persons, [or] property"); United States ex rel. Lloyd v. Vincent, 520 F.2d 1272, 1274 (2d Cir.) (proper for court to seal records "the revelation of which might, for example, endanger a witness's safety").

proceedings will be open to the public. Instead, the motion presents a choice between televised proceedings and non-televised proceedings. This is a very different choice. As the Second Circuit has noted, "[t]here is a long leap * * * between a public right under the First Amendment to attend trials and a public right under the First Amendment to see a given trial televised." Westmoreland v. CBS, 752 F.2d 16, 23 (2d Cir. 1984), cert. denied sub nom, CNN v. U.S. District Court, 472 U.S. 1017 (1985).

The premise underlying Court TV's argument is that, since the Constitution requires public access to criminal trials, then it must also require that courts maximize the number of people who can observe these proceedings. Memo. 12 ("if the technological means exist to provide all citizens with 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.").[4] The Supreme Court has repeatedly rejected this argument. As Chief Justice Warren observed in his Estes opinion:

> [the prohibition on televising criminal trials] does not conflict with the constitutional guarantee of a public trial, because a trial is public, in the constitutional sense, when a courtroom has facilities for a reasonable number of the public to observe the proceedings, which facilities are not so small as to render the openness negligible and not so large as to distract the trial participants from their proper function, when the public is free to use those facilities, and when all those who attend the trial are free to report what they observed at the proceedings." Id. at 584.

See Estes, 381 U.S. at 583-84 (Warren, C.J., concurring) see also id. at 588 (Harlan, J., concurring) ("Obviously the public trial guarantee is not violated if an individual member of the

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[4] As framed by Court TV, this argument appears to require not only that the media be allowed to broadcast criminal trials, but also that the government be required to televise such trials if the media declines to do so in order to maximize the public access to the proceedings.

public cannot gain admittance to a courtroom because there are no available seats."). The Court reemphasized this point in Warner Communications, where it noted, in connection with its observation that there is no constitutional right to broadcast criminal proceedings, that "[t]he requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed." 435 U.S. at 610; see also Richmond Newspapers, 448 U.S. at 581 n.18 ("[S]ince courtrooms have limited capacity, there may be occasions when not every person who wishes to attend can be accommodated.").

Likewise, the specific argument that Court TV advances here has been rejected numerous times by federal courts of appeals. In United States v. Hastings, 695 F.2d 1278 (11th Cir.), cert. denied sub nom, Post-Newsweek Stations, Florida, Inc. v. United States, 461 U.S. 931 (1983), for example, news organizations asserted a First Amendment right to televise the trial of a federal district judge indicted for accepting bribes. The court rejected this claim, concluding that the right of access to observe criminal trials does not extend to "the right to televise, record, and broadcast trials." Id. at 1280. The court also considered and rejected the media's claim that Fed. R. Crim. P. 53 and a related local rule were unconstitutional. The court found that these rules "resemble 'time, place, and manner' restrictions," and that they were reasonable given the "significant institutional interests" supporting them. Id. at 1282-84.

Similarly, in Westmoreland v. CBS, Inc., 752 F.2d at 21-24, the Second Circuit rejected a First Amendment challenge to a local court rule that prohibited the presence of cameras at civil trials. Assuming arguendo that the case before it presented "the paradigm case for televising a federal trial," id. at 17, the Court nonetheless upheld the validity of the local rule, concluding that "the public interest in television access to the courtroom does not now lie within the First

Amendment." Id. at 24. Other cases reaching similar conclusions include Conway v. United States, 852 F.2d 187 (6th Cir.) (upholding Rule 53 and a local rule against media's First Amendment challenge), cert. denied, 488 U.S. 943 (1988); United States v. Edwards, 785 F.2d 1293 (5th Cir. 1986) (same); Kerley, 753 F.2d at 620-22 (upholding Rule 53 alone).[5]

IV. INTERVENOR ADVANCES NO SUBSTANTIAL REASON WHY A FIRST AMENDMENT RIGHT TO TELEVISE COURT PROCEEDINGS SHOULD BE RECOGNIZED BY THIS COURT.

As the discussion above demonstrates, in order to grant Court TV's motion, this Court must strike down a federal court rule and a local rule on constitutional grounds, notwithstanding a wealth of authority upholding their validity. Acknowledging this fact, Court TV nonetheless asks this court to "re-examine" the existing law. Memo. 4. None of its arguments, however, justifies the unprecedented result sought here.

First, notwithstanding the case law discussed above, Court TV contends that "[t]here is no principled constitutional distinction" (Memo. 2) between the public's right to attend court proceedings and its asserted right to watch such proceedings on television. Memo. 2, 10-14. In its view, the values that motivated the Supreme Court to recognize a public right of access to criminal trials in Richmond Newspapers require equally that such trials be televised. Memo. 13-14.

This argument misapprehends both the purposes served by open trials, and the potential problems that televised trials pose. In Richmond Newspapers, the Court identified several

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[5] While the court in Katzman v. Victoria's Secret Catalogue, 923 F. Supp. 580, 589 (S.D.N.Y. 1996), suggested that the press should have a "presumptive First Amendment right * * * to televise * * * court proceedings," the decision ultimately rested on the court's conclusion that the relevant local rule gave it discretion to televise civil proceedings. Id. at 584-86.

purposes served by open trials. To begin with, allowing members of the public to attend trials assures that the proceedings are fairly conducted, and discourages perjury and other misconduct, as well as decisions based on secret bias or partiality. 448 U.S. at 568. These purposes are achieved simply by opening the courtroom to a reasonable number of observers, including members of the press, who can publicize any irregularities in the court proceedings. Estes, 381 U.S. at 541-42. Accordingly, there is no reason to believe that televising the proceedings widely would enhance the benefits to the administration of justice obtained through open trials. Id. at 595 (Harlan, J., concurring) ("It is impossible to believe that the reliability of a trial as a method of finding facts and determining guilt or innocence increases in relation to the size of the crowd which is watching it.").

Open trials also contribute to the public's "perception of fairness," Richmond Newspapers, and thus have a "significant community therapeutic value." 448 U.S. at 570. As the Court noted in Richmond Newspapers, "[t]o work effectively, it is important that society's criminal process 'satisfy the appearance of justice,' Offutt v. United States, 348 U.S. 11, 14 (1954), and the appearance of justice can best be provided by allowing people to observe it." Id. at 571-72. Once again, this rationale does not require that every person observe a criminal trial. Indeed, in Richmond Newspapers itself, the Court noted that this function can be served by members of the press, who attend the trial on the public's behalf, and report what they have seen and heard. Id. at 572-73.

Finally, open trials are sometimes justified on the ground that they educate the public about the operation of the judicial system. It is arguably true that televised proceedings, by increasing the audience, increase the educational benefit of open trials. Estes, 381 U.S. at 589

(Harlan, J., concurring) ("[T]elevision is capable of performing an educational function by acquainting the public with the judicial process in action."); but see Sloviter, If Courts Are Open, Must Cameras Follow?, 26 Hofstra L. Rev. 873, 887 (1998) (arguing that most courtroom footage is merely used to illustrate news reports and provides little verbal information to viewers about news reports). But this justification, standing alone, does not warrant a constitutional requirement that television cameras be allowed at criminal trials. As the concurring opinions noted in Estes, arguments stemming from educational benefits of televised trials are "not arguments of constitutional proportions," 381 U.S. at 589 (Harlan, J., concurring); see id. at 575 (Warren, C.J., concurring) ("[T]he function of a trial is not to provide an educational experience.").

Moreover, even if televising criminal proceedings does marginally enhance the benefits already obtained by opening these proceedings to the public, it also poses significant problems for the administration of justice -- problems that Court TV either trivializes or ignores. The Estes opinion listed numerous potential pitfalls of televised proceedings, including: (1) the possibility that televising the proceedings will have "a direct bearing on [a juror's] vote as to guilt or innocence;" (2) the possibility that jurors will be "preoccupied with the telecasting rather than with the testimony;" (3) the possibility that jurors will be influenced by television broadcasts of the proceedings or subjected to commentary or criticism from members of the public; (4) the difficulty of obtaining an unbiased venire if a retrial is required in a case where the first trial was televised; (5) the negative effect of televising on the quality of testimony obtained from witnesses, who may be demoralized, frightened, cocky, or embarrassed, and who may be subjected to unwanted public attention after their testimony; (6) the possibility that the rule

requiring sequestration of witnesses will be frustrated; (7) the additional responsibilities that the presence of television place on the trial judge; (8) the possibility that the presence of television cameras will distract the judge from the trial of the accused; (9) the possibility that televising will distract the defendant from concentrating on the proceedings; and (10) the possibility that television will distract defense counsel who may be tempted to "play to the public audience." 381 U.S. at 545-50. Although other justifications have been offered for excluding television cameras from the courtroom, this list suffices to refute Intervenor's argument that there is no "principled constitutional distinction" between permitting open criminal trials and permitting televised criminal trials.[6]

Second, Court TV suggests that the case law rejecting a First Amendment right to televise criminal proceedings dates from "an earlier era without the technological advances that have since been made in recording and broadcasting criminal trials." Memo 2-3. Noting that today's television cameras are small, silent, and unobtrusive, Court TV contends that the existing case law rests on concerns that are "demonstrably of no moment" today. Id. at 16.

This argument is incorrect. The obtrusiveness of the required equipment has always been, at best, a minor part of the case against televising criminal proceedings. Indeed, while the Estes Court noted with concern the extensive equipment displayed at the defendant's pretrial hearing, 381 U.S., at 535, it went on to find a due process violation at his trial even though the equipment had by then been confined to a booth at the back of the courtroom painted to blend

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[6] The list is not offered to suggest that televised trials are necessarily unfair. Such a per se claim was rejected by the Chandler court. Instead, it is offered to demonstrate that there are significant reasons to distinguish, as a constitutional matter, between open trials and televised trials.

with the permanent structure of the room. Id. at 537; id. at 588 (Harlan, J., concurring) (noting that the "television * * * in this trial [was] relatively unobtrusive."). Moreover, the fair trial concerns regarding televised trials enumerated in Estes do not disappear when the cameras and microphones are hidden from view. As the Seventh Circuit has noted, "[t]hat cameras may be smaller, lighter and quieter is not a change having constitutional significance. It is still not unreasonable to conclude that cameras are qualitatively different from reporters notetaking and sketching." Kerley, 753 F.2d at 622.

Third, Court TV contends that "[s]tudy 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." Memo. 17; see id. at 3. This claim provides no basis for overturning existing precedent. First, as one commentator has noted, most studies involving cameras in the courts "rely exclusively on the subjective self-report responses of participants in the judicial process." Lassiter, TV or Not TV – That is the Question, 86 J. Crim. L. & Criminology 928, 966 (1996). "Since judges and jurors are supposed to be impartial, lawyers business-like, and witnesses truthful, it is possible that those who believed themselves compromised by the improper influence of television coverage might be disinclined to acknowledge their partiality." Id. at 966-67.

Moreover, the existing studies do not uniformly support the use of cameras in the courtroom. The Federal Judicial Center study, for example, contained some significant negative results. In particular, 46% of trial judges who participated in a pilot program televising civil trials believed that, at least to some extent, cameras make witnesses less willing to appear in court. See Federal Judicial Center, Electronic Media Coverage of Federal Civil Proceedings, 14

(1994). Likewise, 41% of these judges found, at least to some extent, that cameras distract witnesses, 64% reported that, at least to some extent, cameras make witnesses more nervous than they would otherwise be, 17% responded that, at least to some extent, cameras prompt people who see the coverage to try to influence juror-friends; 64% found that, at least to some extent, cameras cause attorneys to be more theatrical in their presentations; 9% reported that, at least to some extent, cameras cause judges to avoid unpopular decisions or positions; and 17% found that, at least to some extent, cameras disrupt courtroom proceedings." Id. Thus, assuming arguendo that the results of empirical studies have any relevance to the issues presented here, the existing evidence does not support Intervenor's claim that in-court television cameras have no ill effect on the administration of justice.

Fourth, Intervenor notes that the Senate has recently passed a bill (S. 1858) that would provide for closed circuit televising of the trial proceedings in this case to six cities with particular connections to the September 11 terrorist attacks. See 147 Cong. Rec. S13893-02, reprinted in 2001 WL 1639384 (reprinting text of bill) . This proposal would permit viewing only by "victims the court determines have a compelling interest in doing so and are otherwise unable to do so by reason of inconvenience and expense of traveling to the location of the trial." Id.; cf. 42 U.S.C. § 10606 (granting a "crime victim" the "right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial."). "No public broadcast or dissemination" of this closed circuit transmittal would be permitted. See 42 U.S.C. § 10608(c)(2).

Since this bill has not been enacted, it is premature to consider its effect on Court TV's

argument. Moreover, assuming arguendo that the bill becomes law, and that it is signed by the President, Congress's decision to provide a closed circuit broadcast for a narrow class of victims would not support the constitutional argument presented here. Intervenor appears to claim that the existence of this proposed legislation validates its claim that expanding access to this trial through television is in the public interest. Memo 12 n.2. This argument misses the mark entirely. The question presented here is not whether public policy supports allowing victims of the September 11 attacks – or anyone else – to watch these proceedings via television. Nor is it whether the televising of criminal court proceedings is, in general, a good or bad idea. Under Chandler, the resolution of such policy questions is reserved to individual legislatures and to judicial bodies (such as the Judicial Conference) that establish court rules. Instead, the question presented here is whether the First Amendment mandates that the broadcast media be allowed to televise virtually any criminal proceeding that it chooses.[7] In resolving that question, the fact that an individual legislative body may decide to permit televised court proceedings in certain cases and under certain circumstances has little bearing, and certainly does not justify a general constitutional right to televise. See Chandler, 449 U.S. at 590 (White, J., concurring) (noting that the Court's decision to permit states to experiment with televising criminal proceedings does not affect any state's right to forbid cameras in the courtroom).

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[7] Court TV contends that its "coverage of the trial in this case will be complete and responsible, not sensational." Memo 21; see id. at 6. Assuming arguendo that this is true, the constitutional right championed here would presumably be available to all members of the media, responsible or not. Likewise, while Court TV contends that it would voluntarily agree to certain restrictions on its broadcast, there is no reason to believe that any other members of the media who might assert their constitutional right to televise would abide by the same restrictions.

V. THERE ARE COMPELLING REASONS NOT TO TELEVISE THE PROCEEDINGS IN THIS CASE.

For the reasons addressed above, this Court should conclude that it lacks discretion under Fed. R. Crim. P. 53 and Local Rule 83.3 to televise these proceedings. These unambiguous court rules are not unconstitutional and therefore preclude the relief that Court TV seeks. To the extent that Court TV believes that these rules embody misguided public policy, its arguments should be directed to Congress and the Judicial Conference, not to this Court. Hastings, 695 F.2d at 1284 ("The matter is not one that should be fixed in constitutional concrete; rather, the issue is one that should be addressed to the appropriate rule-making authority.").

Moreover, since Court TV's request is governed by valid court rules, there is no occasion to balance the potential harms and benefits of televising these particular proceedings. The relevant balancing has already been done. For this reason, the final section of Court TV's brief, Memo. 19-23, which considers whether any "constitutionally sufficient grounds * * * support barring in-court cameras from pretrial and trial proceedings in this case" (Memo. 19) misses the mark. This discussion, which presumes the existence of a First Amendment right to televise criminal trials, addresses a question that is simply not presented here.

Nonetheless, we offer a few observations regarding Court TV's arguments in favor of televising these particular proceedings. Court TV suggests that the "high profile" of this case "militates in favor of the widest, most accurate dissemination of information available." Memo 19; see id. at 4 (arguing that existing case law should be distinguished based on "the extraordinary public interest and concern generated by the event of September 11, not just in the

United States, but throughout the world.").[8] In our view, the high profile of this case cuts the other way. Many of the concerns identified by the Estes Court simply increase as the size of the public's interest in the case grows. For example, as Justice Harlan noted in his concurring opinion, "[i]n the context of a trial of intense public interest, there is certainly a strong possibility that the timid or reluctant witness, for whom a court appearance even at its traditional best is a harrowing affair, will become more timid or reluctant when he finds that he will be appearing before a 'hidden audience' of unknown but large dimensions." 381 U.S. at 591 (Harlan, J., concurring).

The reluctant witness problem is especially acute here because the government may seek to present foreign witnesses. In prior prosecutions of Al Qaeda members, such witnesses have specifically expressed reluctance about testifying at televised proceedings. Granting Court TV's motion to disseminate these proceedings worldwide could therefore interfere with the prosecution's ability to obtain the presence of these foreign witnesses (who are not subject to U.S. subpoena power) at trial.[9]

We also note that televising these proceedings may assist Al Qaeda in identifying and

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[8] Intervenor suggests that televising the trial is needed to "promote confidence in the justice system." Memo. 23. In its view, "[c]onfidence 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." Id. As noted earlier, however, televised proceedings are not essential to protecting public confidence in the fairness of these proceedings. Instead, allowing a public trial, attended by members of the worldwide press, suffices to achieve this goal. See supra at 12-13.

[9] Court TV suggests that it will "visually obscure the image of any non-party witness during his or her testimony upon request by such person." Memo. 7. This possibility is not likely to assuage the fears of foreign witnesses who may be unfamiliar with such technology and thus are not likely to understand or trust in it.

targeting prosecution witnesses. The government has uncovered evidence that high level members of the organization were kept informed of developments in U.S. criminal trials involving Al Qaeda members. Accordingly, a worldwide broadcast of these proceedings might assist Al Qaeda in retaliating against the witnesses who testify against it. See Indictment 2 (alleging that "[t]hose suspected of collaborating against Al Qaeda were to be identified and killed.").

Finally, televising these proceedings would heighten the already substantial security concerns raised by this case. On September 6, 2000, Chief Judge Edward R. Becker of the Third Circuit testified before Congress on behalf of the Judicial Conference in opposition to a bill that would have allowed the televising of federal court proceedings. Among other concerns, Judge Becker noted that "[t]he presence of cameras in the courtroom is likely to heighten the level and the potential of threats to judges. * * * Additionally, all witnesses, jurors, and United States Marshal Service personnel may be put at risk because they would no longer have a lower public profile." Statement of Chief Judge Edward R. Becker on Behalf of the Judicial Conference of the United States, Senate Judiciary Subcommittee on Administrative Oversight and the Courts (September 6, 2000) at 10.[10]

Of particular relevance here, Judge Becker noted that "national and international camera coverage of trials in federal courthouses would place those buildings, and all in them at greater risk from terrorists, who tend to choose targets for destruction that will give their 'messages' the widest exposure." Id. at 10-11. Because the Al Qaeda organization has previously sought to

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[10] Excerpts of this testimony are published at 67 Def. Couns. J. 429 (2000) (available on Westlaw).

maximize the public exposure received by its terrorist attacks, Judge Becker's comments (made before September 11) underscore a particularly significant reason why the proceedings in this case should not be televised.

Conclusion

For the reasons addressed above, the United States respectfully suggests that the motion of Intervenor Court TV to televise the pretrial and trial proceedings in this case should be denied.

Respectfully submitted,

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Date: January 4, 2002

Certificate of Service

I certify that a true and correct copy of the foregoing Government's Opposition to Motion of Courtroom Television Network LLC for Leave to Record and Telecast Pretrial and Trial Proceedings was served by fax and U.S. mail, on January 4, 2002, on the counsel listed below:

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