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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**

MEMORANDUM OF *AMICI CURIAE* RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, CABLE NEWS NETWORK LP, LLLP, AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF COURTROOM TELEVISION NETWORK'S MOTION FOR LEAVE TO RECORD AND TELECAST PRETRIAL AND TRIAL PROCEEDINGS

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3

STATEMENT OF INTEREST OF *AMICI*

The Radio-Television News Directors Association is a professional association devoted to electronic journalism. Its more than 3000 members include local and network news executives, educators, students, and others in the radio, television, cable and other electronic media worldwide.

Cable News Network LP, LLLP ("CNN") is an AOL Time Warner company. CNN is the world's largest news organization with over a dozen television and radio news networks and websites, as well as several news programming services, provided to affiliates domestically and worldwide. CNN employs more than 4,000 news professionals, who gather news throughout the world

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

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Amici curiae respectfully submit this memorandum in support of Courtroom Television Network LLC's ("Court TV") motion to record and telecast pretrial and trial proceedings in this matter. To the extent that 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 prohibit audio-visual coverage of this case, the rules violate the United States Constitution.

Preliminary Statement

On September 11, 2001, terrorist hijackers massacred thousands of Americans by slamming commercial jetliners into the towers of the World Trade Center as well as the Pentagon, and causing the violent crash of a fourth plane into the Pennsylvania countryside. The

attacks changed New York City's skyline, not to mention the political and emotional landscape of the entire United States, and, indeed, the world. The attacks also served to demonstrate the importance the electronic media plays in individuals' daily lives. Many Americans watched the second plane hit the south tower of the World Trade Center and witnessed the horrific and indelible images of both towers collapsing in real time. According to a Pew Internet & American Life Project poll, *81 percent* of Americans got most of their information on the attacks from television. Pew Internet & American Life Project, *How Americans Used the Internet After the Terror Attack* (Sept. 15, 2001) at www.pewinternet.org/reports. The electronic media connected Americans as a national community—first in shock, then in mourning and resolve.

In the aftermath of the attacks, President Bush pledged, "those who killed thousands of Americans and citizens from over 80 other nations will be brought to justice." President George W. Bush, Remarks to the Warsaw Conference on Combating (Nov. 6, 2001). Justice must not only be done; it must be perceived as being done, not only by American citizens, but also, in this unique case, citizens around the globe. Just as Americans were able to witness first-hand the unprecedented attacks on their homeland via television, radio, and the Internet, so too should they be able to witness the trial of a man alleged to have conspired and consorted with those who killed thousands of innocent victims on September 11.

Zacarias Moussaoui currently is the only person facing U.S. charges in the September 11 terrorist attacks. This is a criminal case of exceptional importance and of both national and international interest. His trial will "engross the nation this year. . . . . If he's found guilty, he will stand in for 19 others. If he's not, he will be a victim of a nation's frustrated search for resolution." Libby Copeland, *A Glimpse At A Symbol of a Changed World*, Washington Post, Jan. 3, 2002, at C1. But Moussaoui's trial will be conducted in an Alexandria courtroom with a

restricted number of public seats. The press seats will be even more limited. For the millions of United States citizens whose lives were personally touched by the events of September 11 but are unable physically or financially to attend, there is only one opportunity to observe the events first-hand. Without a determination that the *per se* ban on all cameras in federal criminal trials is unconstitutional, that singular opportunity will be irretrievably lost. Moreover, a decision to permit audio-visual coverage of this trial would provide an unparalleled vehicle through which to demonstrate to our citizenry and to the world that our courts are courts of justice, not of vengeance. As Moussaoui himself recognizes in his Memorandum of Points and Authorities in support of Court TV's motion, "the American criminal justice system will be on display for the entire world as the trial of this action proceeds," and televising the trial would "add an additional layer of protection to see these proceedings are fairly conducted."

Permitting audio-visual coverage of this trial is justified both as a matter of law and as a matter of public policy. Our country has an historical commitment to public access to judicial proceedings. Over the last quarter century, the United States Supreme Court has expanded substantially the constitutional right of access to adapt to technological and societal changes. Given those changes, our history of conducting public trials before "*as many people as chuse to attend*," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 568-69 (1980) (quoting 1 Journal of the Continental Congress, 1774-1789 at 107 (1904)), and the constitutional restrictions on government's ability to arbitrarily discriminate between different members of the media, a blanket prohibition on audio-visual coverage is inconsistent with the First Amendment. In this modern age, when most Americans rely on the electronic media as their primary source of information and where advances in technology have eliminated any unique problems associated

with electronic coverage, there simply is no principled basis upon which to bar the electronic media from covering the nation's courts using the tools of their trade.

I. THE HISTORY OF OPEN JUDICIAL PROCEEDINGS IN THIS COUNTRY FAVORS PERMITTING AUDIO-VISUAL COVERAGE

"Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted; as we have shown, recognition of this pervades the centuries-old history of open trials." *Richmond Newspapers*, 448 U.S. at 575. As Court TV's Memorandum sets forth, the law is clear that the right of a "public" trial belongs not only to the accused, but to the public and press as well. *See id.* at 572-573. Beginning with *Richmond Newspapers*, the Supreme Court recognized a federal constitutional right of access of the public and the press to attend judicial proceedings in a quartet of cases in the 1980s. In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), the Court strengthened its holding in *Richmond Newspapers* by clarifying that closure is permissible only in the limited circumstances where denial of such access is justified by a "compelling governmental interest" and such closure order is "narrowly tailored to serve that interest." In *Press-Enter. Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press Enterprise II*"), the Court held that even preliminary proceedings in criminal cases are subject to the right of access, and quoted from its earlier decision in *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501 (1984) ("*Press Enterprise I*"), holding that the presumption of openness "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 510.

As the Government itself concedes, the values served by open court proceedings are well-established. First, review in the forum of public opinion serves to protect the accused from

secret inquisitional techniques and unjust persecution by public officials. Public access also discourages perjury and misconduct. Further, open trials serve to educate the public about the operation of the judicial system. Where justice has been done, public awareness "serves to instill a sense of public trust in our judicial process by assuring the innocent and impressing the guilty with the power of the law." *Westchester Rockland Newspapers v. Leggett*, 48 N.Y.2d 430, 437 (1979). The importance of furthering that interest in the context of judicial proceedings arising from the terrorist attacks of September 11 is plain, not only from a domestic, but also a global perspective.

Imposition of an anachronistic, blanket ban on electronic media coverage of federal criminal trials is antithetical to the values of open judicial proceedings. Courtrooms are, by nature, platforms for public observation of trials. A trial courtroom is a public place where the people have a right to be present, and "where their presence historically has been thought to enhance the integrity and quality of what takes place." *Richmond Newspapers,* 448 U.S. at 578. Contary to the Government's assertion, the purposes of open trials are not fully served—in this day and age—by "opening the courtroom to a reasonable number of observers, including the press, who can publicize any irregularities in the court proceedings." Such a limited view of the First Amendment's right to attend court proceedings is misplaced—to the contrary, *maximum* public access is the accepted ideal. If the larger public is prohibited from observing the arguments and evidence presented in the courtroom as well as the Court's rulings in the course of the Moussauoi trial, the legitimacy of any verdict may well be diminished. As the Supreme Court has stated, "[p]eople in an open society do not demand infallibility from their institutions, but it [will be] difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572.

II. PUBLIC TRIALS MEAN TELEVISED TRIALS

Today, advances in technology enable the press to better fulfill its role as surrogate for the public by enabling all Americans to exercise their constitutional right to observe trials first-hand. As Judge Nancy Gertner so aptly stated in testimony before Congress concerning legislation that would permit cameras in federal courtrooms, "public proceedings in the twenty-first century necessarily mean *televised* proceedings." Statement of Honorable Nancy Gertner, U.S.D.C. Massachusetts, Before Senate Judiciary Subcommittee on Administrative Oversight and the Courts (September 6, 2000) at 1 (emphasis added).

It cannot seriously be disputed that the gavel-to-gavel coverage proposed by Court TV, which would allow for complete and direct observation of the demeanor, tone, credibility and contentiousness, and perhaps even the competency and veracity, of the trial participants, better serves the interest of public trials and the fundamental role of the press as public surrogate than does limiting access to the filtered reports that would otherwise be provided by the print and electronic media. Relegating, as would the Government, citizens to read about a trial from a printed transcript or from a newspaper account, ignores the reality of that interest. By nature, the electronic media is uniquely suited to ensure that the maximum number of citizens have meaningful access to this trial.

In practice, what goes on in a courtroom can only be effectively reported if the court permits journalists to use the best technology for doing so. Only the electronic media can serve the function of bringing interested members of the public not privileged to attend in the courtroom to see and hear this trial as it occurs. In *Cable News Network v. American Broadcasting Cos.*, 518 F. Supp. 1238 (N.D. Ga. 1981), for example, the court recognized a constitutional right of the television media to be included in the White House pool coverage, holding that a total exclusion of television coverage of White House press conferences, while

newspaper reporters were permitted to attend those conferences, violates the Constitution. Noting the distinctiveness of audio-visual coverage, the court stated:

> [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. Many citizens likely rely on television as their sole source of news. Further, visual impressions can and sometimes do add a material dimension to one's impression of particular news events. Television film coverage of the news provides a comprehensive visual element and an immediacy, or simultaneous aspect, not found in print media. Finally, the importance of conveying the fullest information possible increases as the importance of the particular news event or news setting increases.

Id. at 1245.

The Court in *Richmond Newspapers* recognized that modern society prevents most people from physically attending trials, and specifically addressed the need for access by the media to serve as "surrogates for the public," noting with approval the practice of providing media representatives with "special seating and priority on entry so that they may report what people in attendance have seen and heard." 448 U.S. at 572-73 (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976)). The Government, however, interprets *Richmond Newspapers* as requiring nothing more than permitting a limited number of persons, including members of the press, to attend a trial.

But when the use of audio-visual coverage represents, as it does so forcefully here, the only means by which all but a handful of the public may exercise the right of access secured to them by the Constitution, a blanket ban on such use represents something different from a refusal to accord privileged status to the institutional press. It represents instead the denial of a constitutional right belonging to viewers and an abridgment of every interested citizen's right to see and hear the trial as it takes place. Any claim that the public's right of access may be limited

to its mere physical presence in the courtroom impermissibly trivializes the constitutional access guarantee by reducing it to a protection of places rather than of people. This interpretation would produce a constitutional anomaly by restricting the benefit of public access values to only those few individuals capable of attending a trial in person, and would permit manipulation of the right of access through the purposeful selection of a courtroom with extremely limited seating in which to conduct the trial.

Admittedly, the electronic media will be no foreign element in coverage of this high-profile trial. But by prohibiting audio-visual coverage of the courtroom proceedings, most of what viewers will see will originate from the courthouse steps and not from where it matters most—inside the courtroom. Particularly given the importance of this trial, second-hand summaries and headlines about the trial are but shallow reflections of the real events. This court should not limit Americans to the filtered reports of a select number of reporters—such a prohibition does not meaningfully serve the fundamental goal of an "informed public capable of conducting its affairs." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 392 (1969).

Simultaneous audio-visual coverage of a trial improves the media's overall ability to accurately report on the proceedings, thus enhancing its ability to serve as a true surrogate for the public. The gavel-to-gavel coverage proposed by Court TV not only would expand the potential audience by allowing all interested and able citizens to watch the proceedings, but also by giving a greater pool of reporters instantaneous access to them. In-court events, including quotations, could be verified by simply playing back an audio or video tape. Visually-oriented information that is critical to a complete and accurate portrayal of the proceedings, including the atmosphere of the courtroom and the demeanor, gestures, and emotions of the trial participants, would be readily available to all.

Certainly, the nature of the Moussaoui trial carries tremendous public importance. The details of the trial will present information crucial to continuing public judgments—judgments that American citizens and, in this case, citizens around the world, must make for themselves. It is not enough for the public merely to learn, through second-hand, subjective, after-the-fact interpretations, what took place in the courtroom; rather, the public must have direct and unmediated access to the proceedings that provide the bases for the decisions and judgments of the trial participants. Audio-visual coverage would afford the pubic access to complete and objective information. Moreover, because of the public scrutiny and media attention that will be given to the pre-trial and trial proceedings in this case, audio-visual coverage would provide a highly unique, and perhaps unprecedented opportunity to educate a huge domestic and international audience about "how our courts administer justice, and the essential roles the judge, jury, prosecutors and defense counsel play." *Estes v. Texas*, 381 U.S. 532, 589 (1965). Authorizing audio-visual coverage can only vindicate Justice Holmes's ancient admonition that "[i]t is desirable that the trial of causes should take place under the public eye . . . that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884).

III. *ESTES* POSES NO BAR TO THE PRESUMPTIVE FIRST AMENDMENT RIGHT TO TELEVISE THESE PROCEEDINGS

When the United States Supreme Court was first called upon to evaluate the effect of televised proceedings on a criminal defendant's right to a fair trial, the presence of television cameras in the courtroom was still considered a novel concept. Many assumed that the presence of television cameras in the courts was intrinsically harmful. In 1965, the Court in *Estes* considered the claim of criminal defendant Billie Sol Estes that the televising of pretrial and trial

proceedings in 1962 had interfered with his ability to receive a fair trial on swindling charges. The trial judge at his discretion had allowed television coverage under a Texas rule.

The majority of the Justices in *Estes* refused to adopt a *per se* rule that camera coverage is inherently unconstitutional as a violation of the defendant's Sixth Amendment rights. Based upon the particularly chaotic circumstances of the case, however, the Court held in a 5-4 decision that Estes' fair trial rights had been violated and reversed his conviction.

At issue in *Estes* were twelve cameramen "roaming at will throughout the courtroom," a tangle of cable and wires snaked across the courtroom, three microphones on the judge's desk and photographers snapping his picture from behind—in short, considerable disruption. *See id.* at 553. But as Justice Harlan recognized over thirty-five years ago:

> [T]he day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause.

Id. at 595-96.

Obviously, television was soon to become "commonplace." By the time the Court decided *Chandler v. Florida*, 449 U.S. 560 (1981), twenty-eight states had adopted rules permitting televised coverage of at least some court proceedings, and twelve more were experimenting with such coverage. A unanimous Court in *Chandler* held that televised criminal proceedings do not inherently interfere with a criminal defendant's constitutional right to a fair trial, and that there was no empirical evidence to support such a claim. *Id.* at 570-74. Thus, the Court said, the Constitution does not prohibit electronic coverage of criminal trials, absent a showing of actual prejudice. The *Chandler* Court limited *Estes* to its facts, and to those cases

"utterly corrupted by press coverage." *Id.* at 573 n.8. Justices Stewart and White wrote concurring opinions in which they set forth their respective beliefs that *Estes* should be expressly overruled. *Id.* at 583-86 (Stewart, J., concurring); *id.* at 586-89 (White, J., concurring). In light of the Court's later decision in *Chandler*, *Estes* is hardly authoritative.

Indeed, while the Government relies heavily on *Estes* in asserting that there is no First Amendment right to televise criminal trials, Justice Stewart, writing for the four dissenting judges, not only pointed out that this conclusion was purely *dicta*, but also took strong exception to it:

> While no First Amendment claim is made in this case, there are intimations in this opinion filed by my Brethren in the majority which strike me as disturbingly alien to the First and Fourteenth Amendments' guarantees against federal or state interference with the free communication of information and ideas. The suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms. And the proposition that non participants in a trial might get the "wrong impression" from unfettered reporting and commentary contains an invitation to censorship which I cannot accept. Where there is no disruption of the "essential requirement of the fair and orderly administration of justice," "[f]reedom of discussion should be given the widest range."

Estes, 381 U.S. at 614-15 (Stewart, J., concurring) (citations omitted).

It has now been thirty years since the United States Supreme Court held that the Federal Constitution does not prohibit electronic coverage of trials. During that time, the electronic media has covered hundreds—if not thousands—of judicial proceedings across the country. Yet, it appears that there has not been a single case since 1981 where the presence of a courtroom camera has resulted in a verdict being overturned, or where a camera was found to have had any

effect whatsoever on the ultimate result. As the Supreme Court noted in *Chandler*, the remarkable technological breakthroughs that have taken place over the last few decades have eliminated many of the problems with electronic coverage that existed during the *Estes* era. As discussed in Section V, *infra*, the speculative concerns raised in *Estes* about the potential impact on trial participants also have been repeatedly refuted by empirical studies and experiences across the nation. Thus, such objections "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." *Katzman v. Victoria's Secret Catalogue*, 923 F.Supp 580, 588-89 (S.D.N.Y. 1996).

IV. THE *PER SE* PROHIBITION ON AUDIO-VISUAL COVERAGE UNCONSTITUTIONALLY DISCRIMINATES BETWEEN THE PRINT AND ELECTRONIC MEDIA

To prohibit audio-visual coverage of this trial is to deny equal access to electronic journalists covering these proceedings. Such clear discrimination against the electronic media, by preventing them from using the tools relevant to their trade to report the proceedings, is unfair and constitutionally suspect. All restraints on the electronic media must be "narrowly tailored to further a substantial government interest . . . in light of the particular circumstances of each case." *FCC v. League of Women Voters*, 468 U.S. 364, 380-381 (1984).

In recent years, the Supreme Court and other courts have repeatedly held that differential treatment of different media is impermissible under the First Amendment absent a compelling showing that such coverage would inherently have a unique, adverse effect on the pursuit of justice. In *Cable News Network*, for example, a Georgia court held that discriminatory treatment of television media in coverage of the White House is unconstitutional. 518 F. Supp. at 1245. Similarly, in the context of the right of press access to the courtroom, there can no longer be a meaningful distinction between the print press and the electronic media.

As discussed above, the Supreme Court has long recognized that the physical space limitations of a particular courtroom and geographic and other limitations on the public's ability to personally attend judicial proceedings validate the media's claim that it acts as a surrogate for the public in providing access to those proceedings. While both print and electronic media fulfill that important surrogate role, only television has the ability to provide the public with a close visual and aural approximation of actually witnessing a trial without physical attendance. As Justice Stewart has observed, the Constitution requires sensitivity to the "critical role played by the press in American society . . . and to the special needs of the press in performing it effectively." *Houchins v. KQED, Inc.,* 438 U.S. 1, 17 (1978) (Stewart, J., concurring). With regard to prison access he noted, "[I]f a television reporter is to convey the jail's sights and sounds to those who cannot personally visit the place, he must use cameras and sound equipment . . . . if [the terms of access] impede effective reporting without sufficient justification, [they are] unreasonable as applied to journalists who are there to convey to the general public what the visitors see." *Id.*

Indeed, video is our society's common language. Eliminating audio-visual coverage will significantly impact the content of the information conveyed about this important trial, resulting in impermissible content-based discrimination. As the First Circuit observed in a related context: "[a] court may not selectively exclude news media from access to information otherwise made available for public dissemination . . . [I]t allows the government to influence the type of substantive media coverage that public events will receive. Such a practice is unquestionably at odds with the First Amendment." *Katzman*, 923 F. Supp at 588 (quoting *Anderson v. Cryovac, Inc.,* 805 F.2d 1, 9 (1st Cir. 1986)).

The direct effect of Federal Rule 53 and Local Rule 83.3 is to deny members of the electronic news media their right and ability to cover the trial on the same terms and conditions as print journalists by excluding their technology from the courtroom, while imposing no such restriction on the print media. The rule is impermissible because it is not narrowly tailored to serve a compelling government interest. By banning audio-visual coverage, but not in-court note-taking, sketching of trial participants, or other journalistic practices conventionally performed by the print media, the rule completely prohibits the reporting of visual images, but not reporting based on the written word. It "blacks out" an entire form of protected speech, and does so in a manner that is unnecessary to the preservation of courtroom procedure or decorum. Any concerns over disruption to the proceeding may be controlled by the conditions of coverage. Accordingly, the *per se* ban on electronic media coverage cannot be sustained as a narrowly tailored means to further the interest in maintaining courtroom decorum. *See League of Women Voters*, 468 U.S. at 380-81.

V. AUDIO-VISUAL COVERAGE OF THE PROCEEDINGS IN THIS CASE WOULD HAVE NO DETRIMENTAL EFFECT SUFFICIENT TO OVERCOME THE PRESUMPTION OF OPENNESS

While audio-visual coverage of the Moussaoui trial would allow citizens to see their judicial system at work, it would have no adverse effect on the proceedings sufficient to overcome a presumption of openness. The blanket ban on audio-visual coverage of federal criminal trials was driven by those concerns articulated in *Estes*—the use of bright lights, excessive heat, discordant noises and sudden movements that would distract witnesses and interfere with proceedings. But unlike the rudimentary technology of yesteryear, cameras now function in the courtroom without disruption or distraction. Improvements in technology have rendered cameras no more, and probably less, conspicuous than the newspaper reporter with pencil and notebook and the courtroom artist with crayon and sketchpad.

Indeed, any suggestion that the presence of a silent, unobtrusive television camera in the courtroom during the proceedings would adversely impact the proceedings is not borne out by empirical evidence. In-court cameras have become a permanent fixture in most states over the last three decades. As evidenced in the attached survey, all 50 states now permit some type of audio-visual coverage of courtroom proceedings. *See* Cameras in the Court: A State-By-State Guide, attached hereto as Exhibit A. The results of numerous state studies of experiments with audio-visual coverage have been conclusive: a silent, unobtrusive in-court camera can provide the public with more and better information about and insight into the functioning of the courts and does not "impede the fair administration of justice, does not compromise the dignity of the court, and does not impair the orderly conduct of judicial proceedings." *Katzman*, 923 F. Supp. at 585.

In the hundreds of thousands of judicial proceedings across the country covered by the electronic media since 1981, to the best of our knowledge there has not been a single case where the presence of a courtroom camera has resulted in a verdict being overturned, or where a camera was found to have any effect whatsoever on the ultimate result. Indeed, the majority of studies have concluded that cameras do not only not harm the process, they enhance it. As one New York study found, "reporting on court proceedings, both by newspaper and broadcast reporters, frequently is more accurate and comprehensive when cameras are present." *Report of the New York State Committee on Audio-Visual Coverage of Court Proceedings* (May 1994) at 91*; see also Federal Judicial Center, Electronic Media Coverage of Courtroom Proceedings: Effects on Witnesses and Jurors, Supplemental Report of the Federal Judicial Center to the Judicial Conference Committee on Court Administration and Case Management* (1994); *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); *Report of the California State Task Force to the Judicial Council on California Rule 980* (1996).

The Government, however, would trivialize the results of "study after study" as providing "no basis for overturning existing precedent." To the contrary, as Court TV's Memorandum asserts, the results of these studies provide ample support of the proposition that the day alluded to by Justice Harlan in *Estes*, when television could be safely admitted to our courtrooms because "all reasonable likelihood that its use in courtrooms may disparage the judicial process" has dissipated, 381 U.S. at 595-96, has come. Indeed, the studies cited herein and by Court TV demonstrate that concerns about electronic coverage associated with the orderly administration of justice have become increasingly irrelevant, and that "freedom of discussion," as suggested by Justice Stewart, "should be given the widest range." *Id.* at 614-615.

Neither should the Court weigh against the presumption of openness the question of "sound bites," an objection frequently raised as concerns electronic media coverage of judicial proceedings. As the Florida Supreme Court has stated, "newsworthy 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." *In re Petition of Post-Newsweek Stations,* 370 So. 2d 764, 776 (Fla. 1979). This Court should not exercise its discretion to deny audio-visual coverage solely because of anyone's dissatisfaction with the content of out-of-court reporting on other occasions. To suggest, as have some critics of the electronic media, that a blanket ban on audio-visual coverage federal judicial proceedings is justified on these grounds is no different than to suggest that a blanket ban on newspaper reporting is similarly permissible. Such a notion is clearly at odds with the First Amendment. Generalized concerns about snippets of coverage—

whether print or broadcast—represent nothing more than an infringement on editorial discretion and disagreement with the newsworthy content of various trial aspects. Such concerns are moot here in any event, where Court TV and C-SPAN propose gavel-to-gavel coverage.

The unique properties of modern technology and experience with cameras in state courts confirm beyond reasonable dispute the ability of audio-visual coverage to transmit unobtrusively and preserve forever the events of this momentous trial. Given the technological capability to reach the broadcast audience, the public's pervasive interest in hearing the parties' evidence, and the unequivocal conclusion of numerous experiments that controlled audio-visual coverage furthers the public interest, this court should find the *per se* ban unconstitutional, and not relegate history to second-hand reports of the adversarial test of critically important legal, political, and social issues inherent in Moussaoui's trial. Indeed, great benefits will be attained by permitting cameras into the area in which the most orderly presentation of evidence takes place. If anything, the presence of a camera would enhance the process by allowing newscasts to include audio and/or video footage of what actually happened at trial. Neither vague notions of judicial discretion nor generalized objections made by parties, witnesses or attorneys should be allowed to bar coverage, no more than they could justify closure to the press and public generally. *See Press Enterprise II*, 478 U.S. at 15.

VI. AS A MATTER OF POLICY, ELECTRONIC COVERAGE FURTHERS THE PUBLIC INTEREST

As the Supreme Court has recognized, one of the primary purposes of the First Amendment is to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged." *Red Lion*, 395 U.S. at 390. It is here that the value of allowing electronic coverage

of court proceedings is most obvious: such coverage not only provides the public with information that is vital to the public's role in a functioning democracy, but also helps ensure that the information disseminated is more complete and accurate.

In recent years, state and federal courts and legislatures have recognized this fundamental tenet. In introducing S.986, a bill that would permit cameras in all federal courtrooms at the discretion of the presiding judge, Senator Charles Schumer (D-NY) stated, "[t]he best way to maintain confidence and a better understanding of the judicial system, where the federal judiciary holds tremendous power, is to let the sunshine in by opening up the courtroom to public scrutiny through broadcasting." *Grassley, Schumer: Televise Federal Trials* (June 5, 2001) at www.senate.gov/~schumer/SchumerWebsite/pressroom/press_releases/PR00594.html. The Senate Judiciary Committee recently passed the bill, and similar legislation is pending in the House.

As stated above, all fifty states now permit some type of audio-visual coverage in their courtrooms. For years, Mississippi and South Dakota resisted allowing cameras in the courtroom, holding out as other states shifted their rules. But in April of last year, Mississippi reversed course, setting up a webcast of the court's hearings and allowing journalists to plug into the court's video feed to record hearings. Court of Appeals Judge David A. Chandler said, "I have heard that the video provided the audience with a sense of sitting in the courtroom during the oral arguments. I believe the cameras provided the audience with this benefit, without distracting the lawyers or judges." Mississippi Center for Freedom of Information, *FOI Spotlight* (Fall 2001) at www.mcfoi.org/fall2001.htm. In July, South Dakota followed suit, when the state Supreme Court adopted a policy allowing television and still photographers to record its proceedings.

In September 1990, the Judicial Conference of the United States implemented a three-year pilot program that permitted electronic media coverage in civil proceedings in six federal district courts and two circuit courts. The Federal evaluation revealed, among other things, that federal judges who experimented with allowing electronic coverage developed a favorable review of it and concluded that little or no negative impact resulted from having cameras in the courtroom. The Second and Ninth acted to permit such coverage permanently. When Napster attorneys and record industry players faced off before the Ninth Circuit in the fall of 2000, for example, cameras were there—C-SPAN simply completed a one page application carried on the Ninth Circuit's website. One year ago, the U.S. Court of Appeals for the D.C. Circuit allowed media organizations to air live audio of oral arguments in *United States v. Microsoft Corporation.*

A recent high profile criminal trial is also illustrative of the increasing trend toward permitting electronic coverage of judicial proceedings. The trial of Amadou Diallo in Albany, New York two years ago demonstrated unequivocally the important role television coverage can play in educating the public about the judicial process. Judge Joseph P. Teresi's watershed ruling declaring a constitutional right to televise criminal trials, *see People v. Boss*, 701 N.Y.S.2d 891 (N.Y. Sup. Ct. 2000), opened the door to the type of coverage being proposed by Court TV in the Moussaoui case. The Diallo trial coverage exemplifies how television can provide the public with a unique window on an important and controversial trial without compromising the integrity of the proceedings. By all accounts, there was no sign of the courtroom grandstanding that opponents of cameras in courts often cite. Any attempts by the prosecution and defense to speak to the public at large occurred outside the courtroom, as they would have with or without a camera inside the courtroom. Most importantly, the public was allowed to witness first-hand the

proceedings in this highly-charged trial and arrive at their own conclusions. Indeed, the decision to allow camera coverage of this trial probably averted more violent protests from those unhappy with the acquittal of the four police officers charged with killing Diallo, because, as a *New York Times* editorial shortly after release of Judge Teresi's decision pointed out, it "allowed the public to understand the legal complexities of the officers' claims of self-defense."

Equally compelling was the audio-visual coverage of the legal proceedings concerning the presidential election dispute in the fall of 2000. Given Florida state rules that permit cameras in the courtroom, the nation was able to watch and listen live as the Florida courts, including the state's Supreme Court, heard arguments in President Bush's bid to throw out hand-counted ballots that former Vice President Al Gore hoped would help him win the presidency.

In response to a requests from numerous media organizations, including *amici*, to allow television coverage of the December 1, 2000 oral arguments before the United States Supreme Court in the Presidential election, Chief Justice Rehnquist wrote, "The Court recognizes the intense public interest in the case and for that reason today has decided to release a copy of the audiotape of the argument promptly after the conclusion of the argument." Letter from Chief Justice Rehnquist to Barbara Cochran, RTNDA (Nov. 28, 2000). Radio stations played the tapes in their entirety; their television counterparts played long excerpts, supplemented with the familiar artists' sketches. Later, Chief Justice Rehnquist told a Court TV reporter that he was very pleased with the reception that the playing of the court's audio tapes had gotten. Court TV, *Court TV's Fred Graham Discusses the Supreme Court's Election Decision* (Dec. 22, 2000) at *www.courttv.com/news/decision_2000/122200_graham_ctv.html*. People who before the election couldn't have named one justice now could name all nine, as well as each justice's

political leanings. As divisive as this electoral contest was, the openness of the courtrooms produced the common understanding necessary for the wounds to begin to heal.

The profound social, political and legal issues involved in the trial of Moussaoui are obvious. Without television coverage of these historic proceedings, the public will be forced once again to depend on second hand accounts filtered by the perceptions of reporters. As Judge Teresi stated, "the quest for justice in any case must be accomplished under the eyes of the public" and, as he recognized, the electronic media has become an increasingly important surrogate for the public in recent decades. *Boss*, 701 N.Y.S.2d at 895.

Finally, *amici* note that, as a matter of policy, the proposal to allow for a closed-circuit broadcast of this trial recently passed by the Senate (S.1858) would be insufficient to vindicate the right of the public and press under the First Amendment. While, in introducing the legislation, Senator George Allen (R-Va) correctly recognized that a wider audience than can sit in the public gallery of the courtroom is entitled to observe this trial, limiting viewing to broadcasts in six cities and to "victims the court determines have a compelling interest in doing so and are otherwise unable to do so," would, as a practical matter, be unwieldy or even completely unmanageable. Certainly, it is difficult if not impossible to define who is a "victim" of the September 11 attacks. Millions of people in New York and Washington alone probably have direct connections to persons killed in the attacks. In a larger sense, the basic law of terrorism is that even the smallest threat can ripple out to touch those a thousand miles away. Many Americans have experienced shock and denial, suffered emotional trauma, and/or lost their sense of confidence and security as a result of the terrorist attacks. Some have sent their sons and daughters, husbands and wives, fathers and mothers off to war. In essence, most of us have been in one form or another "victims" of these unexpected, horrific, and overwhelming events.

At the very least, the proposal would result in an unnecessary drain on government resources. To permit Court TV to record and telecast these proceedings to an unlimited audience would be the wiser course.

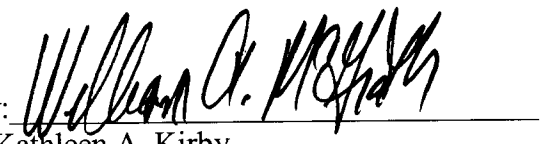
CONCLUSION

Courts belong to the people. Citizens have a right to know exactly what goes on in their courts, and all Americans should be able to get that information through whatever medium best affords them that right. It is time to provide unlimited seating to the workings of justice in the United States by permitting audio-visual coverage of federal judicial proceedings. By allowing the public to witness first-hand the Moussaoui proceedings, proceedings in which the American justice system is, arguably, itself standing trial before the world, this Court will have seized an important opportunity to demystify the judicial process and to demonstrate the importance of and inherent fairness of public trials. For the foregoing reasons, *amici curiae* respectfully request 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: January 7, 2002

Respectfully submitted,

WILEY REIN & FIELDING LLP

By: 

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CERTIFICATE OF SERVICE

I hereby certify that, on this 7th day of January 2002, I served true and correct copies of the foregoing Memorandum Of *Amici Curiae* Radio-Television News Directors Association, Cable News Network LP, LLLP, and The Reporters Committee for Freedom of the Press In Support Of Courtroom Television Network's 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:

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