

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

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

**MOTION TO UNSEAL EXPEDITED MOTION OF THE UNITED STATES FOR  
CLARIFICATION REGARDING THE APPLICABILITY OF THE PROTECTIVE  
ORDER FOR UNCLASSIFIED BUT SENSITIVE MATERIAL AND LOCAL  
CRIMINAL RULE 57 TO INFORMATION THAT MAY BE MADE PUBLIC IN  
CONGRESSIONAL PROCEEDINGS**

**COME NOW** Frank W. Dunham, Jr., Edward B. MacMahon, Jr., Gerald T. Zerkin, and  
Alan Yamamoto, standby counsel, and for their Motion to Unseal, state as follows:

The government gives only two reasons for sealing its motion. First, it says that the Protective Order (“Protective Order for Unclassified But Sensitive Material”) requires sealing because “attachments [to the motion] include draft testimony that refer to discovery materials” (Govt. Motion at 15). Second, it says that it should be sealed because “the committee have not yet made public the details or substance of their hearing schedule.” *Id.*

Neither reason is sufficient for sealing in their entirety the motion and its attachments as well as the defendant’s response.

1.       The Protective Order Does Not Require Sealing Of All Materials Related To The Motion

The Protective Order requires sealing of “any papers to be served upon the Court by either party which include discovery materials or refer to the contents of particularly sensitive materials.” There is no discovery material attached to the motion nor is there any reference in the motion to “particularly sensitive material.”

The only possible reason for sealing based on the Protective Order is that the draft remarks of the Director of the F.B.I. attached to the motion may contain particularly sensitive discovery material. We do not know whether it does or doesn't, but most of it appears to be information that does not fall into that category. It seems that instead of sealing everything, any particularly sensitive discovery material in the Mueller statement could simply be redacted because the government has shown in this case that it has an exceptional ability to redact.

2. Protecting Congress is No Basis to Seal Proceedings In A Criminal Case

First, as is painfully obvious, there is nothing in the Director's remarks that is not already in the public domain. Further, the materials referenced in Mueller's remarks have also apparently been provided to the Congress already without notice to the Court or the defense. If disclosure of these "protected" materials is the actual concern, they could simply be redacted from the draft of public remarks provided to the Court.

Second, no rule of law is cited and there is none of which we are aware, which allows for judicial sealing to protect the Congress from disclosing the schedule and substance of open hearings that the Congress itself is not protecting. Just yesterday, Ms. Pelosi was on "This Week with Sam Donaldson," a nationally televised ABC news program, telling the general public that the 9/11 hearings would be completed by the end of this year. (The link for that show is set forth herein. <http://abcnews.go.com/Sections/ThisWeek/>.) The government cannot request secrecy from this Court on behalf of the Congress while Congress simultaneously discusses the same issues on popular

television shows. Regardless, the specifics of the schedule could be redacted and the rest of this motion released.

3. Sealing Is Disfavored Under The Law

In sealing any matter, the Court must comply with the procedural requirements set forth by the United States Supreme Court and the Fourth Circuit. In *In re Knight Publishing Co.*, 743 F. 2d 231 (4th Cir. 1984), the Fourth Circuit held that a District Court could not seal records and proceedings in a criminal case without first giving the public notice and an opportunity to be heard. *In re Knight Publishing Co.* at 234, citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). This is because the public and press have a right, guaranteed by the First Amendment, to attend criminal trials, including access to pleadings and pre-trial hearings. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Though the right to public access to trials is not absolute, the presumption is in favor of openness because closed proceedings must be rare. *Press Enterprise v. Superior Court*, 464 U.S. 501 (1984).

“The presumption of openness may be overcome only by an overriding interest based upon findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. That interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.” *Id.* at 510. “Even with findings adequate to support closure, the trial court must consider alternatives before the court room can be closed constitutionally.” *In re Knight Publishing Co.* at 234, citing *Press Enterprises* at 511. See also, *In re Washington Post Co.*, 807 F. 2d 383 (4th Cir. 1986).

## CONCLUSION

Mr. Moussaoui has consistently claimed that he wants all of these proceedings open to the public. It was for that reason that he supported Court TV's motion to televise the trial. That Congress is enmeshed in a criminal leak investigation while the government continues to provide sensitive information to the same persons they suspect of leaking classified information is certainly embarrassing, that is no basis for the Court to seal these proceedings and exclude the public.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Unseal Expedited Motion of the United States for Clarification Regarding the Applicability of the Protective Order for Unclassified but Sensitive Material and Local Criminal Rule 57 to Information That May Be Made Public in Congressional Proceedings was served upon AUSA Robert A. Spencer, AUSA David Novak, and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314 via facsimile and by placing a copy BY HAND in the box designated for the United States Attorney's Office in the Clerk's Office of the U.S. District Court for the Eastern District of Virginia and via first class mail to Zacarias Moussaoui, c/o Alexandria Detention Center, 2001 Mill Road, Alexandria, VA 22314 this 26th day of August, 2002.

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/S/

Frank W. Dunham, Jr.