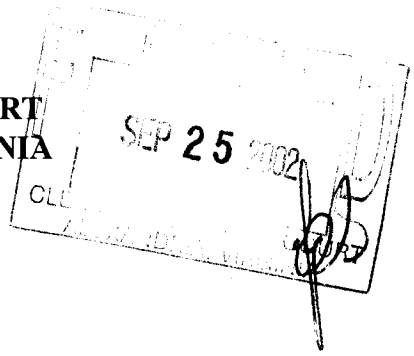

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA **vs.** **ZACARIAS MOUSSAOUI,** **Defendant.** **TRIBUNE COMPANY, ABC, INC., ASSOCIATED PRESS, CABLE NEWS NETWORK LP, LLLP, CBS BROADCASTING INC., THE WASHINGTON POST, USA TODAY AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,** **Movants-Intervenors.**	**Criminal No. 01-455-A**

MOVANTS-INTERVENORS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR ACCESS TO CERTAIN PORTIONS OF THE RECORD

Tribune Company, ABC, Inc., the Associated Press, Cable News Network LP, LLLP, CBS Broadcasting Inc., The Washington Post, USA Today, and The Reporters Committee for Freedom of the Press (together, the "Media Intervenors") respectfully reply to the Response of the United States to Intervenors' Motion for Access to Certain Portions of the Record ("Response" or "Resp.") as follows:

A. The August 29 Order Is Procedurally Infirm

As Media Intervenors established in their moving papers, the Order dated August 29, 2002 presumptively sealing certain of the defendant's pleadings is facially invalid under the First

Amendment because the procedures prescribed by the Supreme Court and the Court of Appeals for sealing records were not employed in connection with its entry. *See* Media Intervenors' Memorandum of Law in Support of Their Motion for Access to Certain Portions of the Record ("Opening Memorandum" or "Mem.") at 5-6, 9. The government has not taken issue with the Media Intervenors' position in this regard.

B. The First Amendment Right Of Access Attaches To Defendant's Pleadings

The government concedes that (i) pursuant to the First Amendment, the public and press enjoy a presumptive right of access to papers filed with the Court in connection with a criminal proceeding that can only be overcome by a "'compelling government interest'" to the contrary, and (ii) even then, the remedy must be "'narrowly tailored'" to protect that overriding interest. *See* Resp. at 2, 5 (citations omitted). The government nevertheless argues that all or virtually all of the defendant's papers "lack . . . even tangential relevance" to matters before the Court for decision and that, because they therefore do not constitute papers filed "'in connection with'" the criminal proceedings against him, no right of access attaches to them in the first instance. *Id.* at 3-4 (citation omitted). More specifically, the government proposes that the Court apply the Supreme Court's "experience and logic" test, *see, e.g., Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 9 (1986), to each *specific* filing made by the defendant in this case and determine, on a document-by-document basis, whether a presumption of access under the First Amendment attaches to each such document. Resp. at 4. In that regard, the government further argues that "there is no historical tradition of access to documents filed with a Court that contain threats, racial slurs, calls to action, attempts to communicate messages to someone other than the court, or other irrelevant or inappropriate language." And, the government adds, being irrelevant, public access to such pleadings would serve no purpose under the logic prong of the test. *Id.*

The government, however, offers no authority for the proposition that the "experience and logic" test is to be performed separately with respect to each document filed by a party to a criminal proceeding. Indeed, Media Intervenors are unaware of any court that has ever so held. To the contrary, the relevant inquiry is whether experience and logic dictate that the public properly enjoys a presumptive right of access to the *type* of proceeding at issue and, if so, the burden then shifts to the party seeking to seal records filed with the court in the course of that proceeding to demonstrate that the presumption has been overcome with respect to a particular portion of that judicial record. *See, e.g., In re Washington Post Co.*, 807 F.2d 383, 388, 390 (4th Cir. 1986) ("first question" is whether right of access "extends to the *type* of proceeding or materials to which access is sought" and, if so, court then turns to whether particular documents nevertheless may properly be sealed) (emphasis added).[1] In this regard, as the Court of Appeals repeatedly has held, the public's presumptive right of access attaches to virtually all stages of criminal proceedings, both pre-trial and trial. *See, e.g., In re Time Inc.*, 182 F.3d 270, 271 (4th Cir. 1999) (noting that Court of Appeals has held that right attaches to, *inter alia*, not only trial and trial record itself, but also documents filed regarding plea and sentencing hearings, proceedings and documents regarding change of venue, dismissal of indictments, transfer, and discovery, and various other pretrial matters) (citations omitted). Accordingly, there is no

[1] The determination whether a document accepted for filing is deemed part of the "judicial record" in the first instance cannot properly turn on whether its content is offensive or otherwise objectionable since such a criterion cannot be squared with the First Amendment. *See, e.g., In re Providence Journal Co.*, 293 F.3d 1, 12 (1st Cir. 2002) (holding that risk, *inter alia*, that overzealous counsel might "attempt[] to gain an 'unfair tactical advantage' by improperly influencing public" through inappropriate statements in memoranda of law if permitted to file them in public record in high-profile criminal prosecution failed to "justify the constitutional intrusion that results from the [trial court's] practice of treating legal memoranda as presumptively nonpublic").

legitimate question that, as a threshold matter, the public's presumptive right of access attaches to the pretrial motions filed in this proceeding by the defendant. Whether that presumption can be overcome with respect to particular pleadings -- not whether it attaches in the first instance -- is the question properly placed before the Court by the present motion.

Turning to that question, even accepting that much chaff can be found in the defendant's pleadings, they concededly contain grist as well: The Court itself so observed at the hearing on the government's motion to seal. 08/29/02 Tr. at 36:12 (noting that Court has granted some of defendant's motions on their merits). Assuming that the public's right of access to some portions of the pleadings can be overcome, such a conclusion does not render it permissible to seal them in their entirety.

C. The Court Is Required To Make Specific Findings With Respect To Sealing Each Pleading Accepted For Filing And Only Where The Government Makes The Necessary Showing May Portions Be Sealed

The government effectively concedes that, if the public's right of access attaches to the defendant's pleadings, the Court is required to review each of them and make an individualized determination whether means less restrictive than sealing the entire filing would preserve any asserted overriding interest. *See* Resp. at 7. While the government overstates the scope of the Media Intervenors' concession concerning the government's asserted interest, *id.* at 5-6, suffice to say that, for purposes of this motion, Media Intervenors concede that the government has a compelling interest in preventing the defendant from communicating to the public information that poses a substantial risk of injury or death. In this regard, the government advances what has come to be called its "mosaic intelligence" theory, *i.e.* the proposition that, while individual "bits and pieces" of information in the defendant's pleadings may seem innocuous, to an enemy like al Qaeda that may possess a larger view of the circumstances, these bits and pieces could help to fill

in a complete picture of our government's law enforcement or intelligence operations. *See* Resp. at 6. The government's assertion that the Sixth Circuit "accepted" this theory in *Detroit Free Press v. Ashcroft*, __ F.3d __, 2002 WL 1972919 (6th Cir. Aug. 26, 2002), *see* Resp. at 6, is puzzling inasmuch as that court expressly *rejected* the government's argument:

> While the risk of "mosaic intelligence" may exist, we do not believe speculation should form the basis for such a drastic restriction of the public's First Amendment rights. *See Press-Enter. [Co. v. Superior Court]*, 478 U.S. [1,] 13 [1986] ("Since a qualified First Amendment right of access attaches . . . , the proceedings cannot be closed unless *specific, on the record findings are made* demonstrating that closure is *essential to preserve higher values* and is narrowly tailored to serve that interest.").

Id. at *26 (alterations in original). Indeed, the Sixth Circuit went on to observe that

> there seems to be no limit to the Government's argument. The Government could use its "mosaic intelligence" argument as a justification to close any public hearing completely and categorically, including criminal proceedings. The Government could operate in virtual secrecy in all matters dealing, even remotely, with "national security," resulting in a wholesale suspension of First Amendment rights. . . . This, we simply may not countenance. A government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the Framers of our Constitution.

Id. at *27.[2]

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[2] The government's reliance on *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972), in support of the same contention, Resp. at 6, is equally puzzling. There, in upholding a CIA employment agreement requiring submission of manuscripts to the Agency for review prior to publication, the Court of Appeals, acknowledging the risk that disclosure of isolated pieces of information could assist those in possession of other items of information, held that such a risk justified enforcement of the prepublication review provision only "provided the CIA acts promptly . . . and withholds approval of publication *only* of information which is classified and which has not been placed in the public domain by prior disclosure." 466 F.2d at 1318 (emphasis added). Media Intervenors seek no more from the Department of Justice under the law governing this case: A prompt determination, upon a proper showing by the government, that information in the defendant's pleadings poses, as provided in the applicable SAMs, a "substantial risk" of "death or serious bodily injury," 28 C.F.R. § 501.3(a), in which case the portions containing that information may be sealed.

The First Circuit similarly has explained that "the public's (and the media's) right to know can[not] be frustrated by the mere invocation of a threat to the [compelling interest asserted by the government]." *In re Providence Journal Co.*, 293 F.3d at 13. Rather, "restrictions on access to presumptively public judicial documents should be imposed only if a *substantial likelihood* exists that the [compelling interest asserted by the government] will otherwise be prejudiced." *Id.* (emphasis added) (citing *Press-Enter.*, 478 U.S. at 14); *see also, e.g., In re Washington Post Co.*, 807 F.2d at 392 & n.9 (record may be sealed "only if . . . there is a 'substantial probability' that, in the absence of closure, th[e] compelling interest would be harmed"). "[T]his inquiry requires specific findings; the First Amendment right of public access is too precious to be foreclosed by conclusory assertions or unsupported speculation." *In re Providence Journal Co.*, 293 F.3d at 13 (citing, *inter alia*, *In re Washington Post Co.*, 807 F.2d at 392-93 & n.9).[3] This *constitutional* determination must, of necessity, be made by a judicial officer, not by the Clerk, as the government suggests. Resp. at 7, 10. *See, e.g.,* Fed. R. Civ. P. 5(e) ("[t]he clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices"); *id.* 1991 Advisory Comm. Notes (decision whether to file or reject pleading "is not a suitable role for the office of the clerk" and "enforcement of these rules and of the local rules is a role for a judicial officer"); *In re McBryde*, 120 F.3d 519, 521 (5th Cir. 1997) ("power to dismiss a pleading rests exclusively with this court, not with the Clerk"); *see also United States v.*

[3] Given that the defendant has been in custody for over a year and held incommunicado for some ten months, the supposition that his pleadings convey "terrorist information" as that term is used in the SAMs -- the only information that the SAMs are intended to prevent the defendant from disseminating -- appears, at the least, to be attenuated. *See* Memorandum for Benigno G. Reyna re Origination of Special Administrative Measures Pursuant to 28 C.F.R. § 501.3 for Federal pre-Trial Detainee Zacarias Moussaoui ¶ 1.c.

Amodeo, 44 F.3d 141, 147 (2d Cir. 1995) ("While we think that it is proper for a district court, after weighing competing interests, to edit and redact a judicial document in order to allow access to appropriate portions of the document, we consider it improper for the district court to delegate its authority to do so" to a non-judicial officer; rather "the district court should make its own redactions, supported by specific findings, after a careful review of all claims for and against access").[4]

D. Redaction Is The Appropriate Remedy

The government continues to assert that the Court properly can reject the more narrow alternative of redaction in favor of a broad, presumptive sealing order because it would "waste resources" to engage in the process of redaction. Resp. at 7-8. While Media Intervenors have no desire to add to the Court's burden in this proceeding, as a matter of constitutional obligation, the Court must employ the less drastic alternative of redaction except where review of an individual document reveals that redaction is impracticable. *See* Mem. at 11-12 (citing Fourth Circuit authorities). As the First Circuit recently explained in the context of granting a news organization's petition for a writ of mandamus in another high-profile criminal proceeding during which the trial judge had rejected a proposal involving redaction because it "would squander scarce judicial resources":

> [W]e think that the district court's refusal to consider redaction on a document-by-document basis is insupportable. Courts have an obligation to consider all reasonable alternatives to foreclosing the

[4] The Court's August 29 Order similarly could be read to delegate to the Clerk the obligation to determine whether the defendant's pleadings contain certain types of content deemed to be inappropriate and to maintain under seal those pleadings that do. *See* 08/29/02 Order at 4. It is difficult to discern, from the only examples to date of orders related to unsealing pleadings filed after August 29, whether the Court intends to make that determination itself on an ongoing basis. *See* 09/17/02 Order (docket no. 529); 09/18/02 Order (docket no. 533); 09/23/02 Order (docket no. 546).

> constitutional right of access. Redaction constitutes a time-tested means of minimizing any intrusion on that right. [¶] Here, moreover, our ability to assess whether the district court was justified in refusing to redact the 11 documents that remain sealed is hampered by a lack of specific findings. The court did say, generally, that "in those rare cases where counsel find it necessary to refer to grand jury matters or other matters not properly disclosable, those references are almost invariably dispersed throughout the memoranda and inextricably intertwined with the references to applicable legal authority." But the First Amendment requires consideration of the feasibility of redaction on a document-by-document basis, and the court's blanket characterization falls well short of this benchmark.

In re Providence Journal Co., 293 F.3d at 7, 15 (citations omitted); *see also, e.g., Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 513 (1984) (lower court's "failure to articulate findings with the requisite specificity" and "failure to consider alternatives to closure and to total suppression of the transcript" required vacation of sealing order and remand with instructions that "[t]he trial judge should seal only such parts of the transcript as necessary to preserve the anonymity of the individuals sought to be protected"); *In re Baltimore Sun Co.*, 886 F.2d 60, 66 (4th Cir. 1989) (court "must consider alternatives to sealing the documents[,] . . . [which] ordinarily involves disclosing some of the documents or giving access to a redacted version"); *Methodist Hosps., Inc. v. Sullivan*, 91 F.3d 1026, 1032 (7th Cir. 1996) ("in order to afford access to information in which the public is legitimately interested . . . . [t]he district court should not have denied defendants' motion to unseal"; rather, court "should have ordered defendants to redact the confidential information and then should have placed the remainder of the document in the public record"); *United States v. Amodeo*, 44 F.3d at 147 ("it is proper for a district court, after weighing competing interests, to edit and redact a judicial document in order to allow access to appropriate portions of the document"); *In re New York Times Co.*, 828 F.2d 110, 116

(2d Cir. 1987) (rejecting "wholesale sealing" of papers partly because "limited redaction [might] be appropriate").[5]

Media Intervenors recognize that the government and the Court both bear enormous responsibility and significant burden in connection with the prosecution and trial of this defendant, and that their goal throughout these proceedings has been to ensure that he receives a fair trial without compromising the legitimate national security and law enforcement interests of the United States. It does, however, bear emphasis that there are other interests at stake in this proceeding, and the public's *constitutional* right of access to the record in this case is one of them. The task of determining on a document-by-document basis what portion of the defendant's pleadings properly may be concealed from public view is a duty that flows ineluctably from the Court's obligation to reconcile the competing interests at stake. Neither the fact that the defendant is subject to SAMs nor that he has been authorized to proceed *pro se* properly operates to extinguish the public's constitutional right of access or to excuse the Court from the task of fashioning any necessary limitation on that right as narrowly as possible.

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[5] The parade of administrative horribles cited by the government, Resp. at 9, is unlikely to arise, not least because the Court is entitled to and does impose page limits on documents filed by represented and *pro se* parties and is likewise entitled to limit the number of pleadings and motions filed. Thus, the Court has a ready means to control any effort by the defendant to hobble the prosecution by flooding the Court with pointless pleadings. In addition, the Court is entitled to delegate to a Magistrate Judge the task of reviewing the defendant's pleadings for this purpose in the first instance. In this regard, Media Intervenors note that the government's suggestion that the Clerk be authorized not only to refuse to file defendant's pleadings, but be ordered to provide copies of them to the government and stand-by counsel who might then draw the content of those pleadings to the attention of the Court if warranted, Resp. at 10 n.4, would impermissibly create an unofficial record hidden from public view. *See, e.g., In re Providence Journal. Co.*, 293 F.3d at 12-14. Either defendant's papers are accepted for filing, in which case they are presumptively public absent document-specific findings by a judicial officer that sealing is necessary to protect a compelling interest, or they are not accepted for filing and should play no role in adjudication of matters before the Court.

CONCLUSION

For the foregoing reasons and those set forth in their Opening Memorandum, the Media Intervenors respectfully request that this Court modify its August 29 Order, as described with particularity in their Motion for Access and Opening Memorandum.[6]

Dated: September 25, 2002

Respectfully submitted,

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[6] The government requests that it be given thirty days to make recommendations regarding redactions with respect to each pleading filed by defendant *pro se*, Resp. at 7 n.3, without any particularized showing of need for such an extraordinary delay. A more reasonable compromise would be for the defendant's pleadings to be unsealed within five business days of filing unless, with respect to specific pleadings that the government in good faith believes it cannot properly review within five days, the government within the initial five-day period files with the Court on the public record a notice that up to ten additional business days will be required, whereupon the government automatically would be entitled to the ten-day extension (*i.e.*, a total of three weeks) without further action by the Court. *See, e.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) (noting that government-imposed delay on publication substantially interferes with ability of news media to fulfill their "traditional function of bringing news to the public promptly").

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CERTIFICATE OF SERVICE

I hereby certify that, on this 25th day of September 2002, I caused true and correct copies of the foregoing Reply Memorandum of Law to be served, by the means indicated, upon counsel and the defendant as follows:

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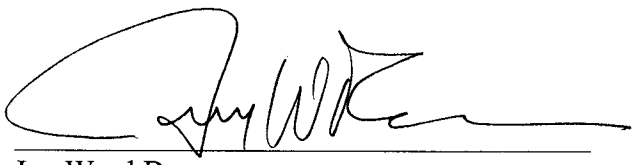

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