

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

FILED

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CLERK U.S. DISTRICT COURT  
ALEXANDRIA, VIRGINIA

UNITED STATES OF AMERICA )  
 )  
 v. )  
 )  
 ZACARIAS MOUSSAOUI )

Criminal No. 01-455-A

**STANDBY COUNSEL’S REPLY IN SUPPORT OF MOVANTS-INTERVENORS’  
MOTION FOR ACCESS TO CERTAIN PORTIONS OF THE RECORD**

Movants-Intervenors ABC, Inc., Associated Press, The Hearst Corporation, The New York Times Company, The Reporters Committee for Freedom of the Press, Tribune Company and The Washington Post (“Media Intervenors”) have moved to intervene for the purpose of gaining broader access to sealed portions of the record in this case. Media Intervenors complain generally that the extensive sealing fails to strike a proper balance between the government’s legitimate law enforcement/security interests and the public’s First Amendment and common law rights of access to judicial records and they propose a means by which this balance might be struck.

Standby counsel concur with the position of the Media Intervenors. The same imbalance that they say constitutes a First Amendment violation also violates Mr. Moussaoui’s rights under the Sixth Amendment. The Sixth Amendment confers upon a defendant the right to a public trial. See U.S. Const. amend. VI (“[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial... .”) The Supreme Court has recognized that this right is for the benefit of the accused and is an important mechanism for the accused’s protection within the judicial system. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 419 (1979) (internal quotations omitted) (citations omitted) (“The right to a public trial, the Court stated, has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecutions. The knowledge that every

criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.”) In particular, courts have noted that a public trial “assures the accused a fair trial and ‘discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or partiality.’” *United States v. Doe*, 63 F.3d 121, 126 (2nd Cir. 1995) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980)). This same rationale applies in the pretrial context as well. See *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1 (1986) (finding public access to voir dire examinations of potential jurors covered by guarantee of open public proceedings in criminal trials under First Amendment); *United States v. Cojab*, 996 F.2d 1404, 1407 (2nd Cir. 1993) (finding qualified right of public access to pretrial proceedings, holding “[t]his right of access is the rule, and it is a rare and exceptional case where it does not apply.”); *Rovinsky v. McKaskle*, 722 F.2d 197, 201 (5th Cir. 1984) (using both First and Sixth Amendment analysis to find that denial of public access to pretrial motions in limine violated defendant’s Sixth Amendment right to public trial).

Standby counsel recognize, perhaps even more so than the Media Intervenors, that this “criminal proceeding, by its nature, imposes extraordinary demands on the Court ... and ... raises important national security issues.” (Media Intervenors Mem. at p. 9). But there must be a better way to open up these proceedings so that they can be accurately followed by the public through some means other than selective government leaks, some of which come from the very top of the government (see, e.g. the public statement by the President reported at page 3 of the Media Intervenors’ Memorandum). Not only the public, but Mr. Moussaoui as well, is entitled to have this case viewed publicly through the reporting of a free and independent press.

This Court has already stated that it “is disturbed by the extent to which the United States intelligence officials have classified the pleadings, orders and memorandum opinions in this case.”

(Order, April 4, 2003). Indeed, it has expressed “skepticism of the government’s ability to prosecute this case in open court in light of the shroud of secrecy under which [the government] seeks to proceed.” *Id.* Prosecution of this case, of course, does not begin at the time of some future trial. Prosecution began when the indictment was returned and all proceedings and pleadings since that time would ordinarily be public with minor exception for good cause shown. Since September 27, 2002, secrecy has been the rule rather than the exception, nullifying not only the public’s First Amendment rights to a public trial, but also Mr. Moussaoui’s Sixth Amendment right to the same.<sup>1</sup> Even the entirety of appellate briefs have been classified. The Media Intervenors, and therefore the public, cannot know, for example, except by speculation, about the novel constitutional propositions being advanced by the government. These legal issues, which are of significant public interest, and should be litigated in the open. However, the government’s security concerns to date have forced these issues to be totally hidden from public view.

Whether the relief requested by the Media Intervenors would restore proper balance between what is open and what is closed in this case of national significance is difficult to predict in advance. What can be said, however, is that without the requested relief, the constitutional concerns expressed herein by standby counsel and in the papers of Media Intervenors will continue to take a serious beating.

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<sup>1</sup> The fact that the excessive secrecy in this case in many instances not only hides information from the public, but also from Mr. Moussaoui who is trying to represent himself, as is his right, raises additional and more serious issues under the Fifth and Sixth Amendments not addressed by the Movant Intervenors.

## CONCLUSION

For the reasons set forth herein, standby counsel respectfully urge this Court to grant the motion of the Media Intervenors.

Respectfully submitted,

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By Counsel

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