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

UNITED STATES OF AMERICA **vs.** **ZACARIAS MOUSSAOUI,** **Defendant.** **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,** **Movants-Intervenors.**	**Criminal No. 01-455-A**

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

Media Intervenors respectfully submit this memorandum in reply to the Response of the United States to Intervenors' Motion for Access to Certain Portions of the Record ("Government's Response"):

ARGUMENT

1. The government concedes and stand-by defense counsel agree that the following pleadings and motion papers should be unsealed, either in their entirety or after certain redactions that the government apparently by now has proposed to the Court: Docket Nos. 585, 607, 614, 620, 631, 633, 650, 657, 664, 668, 672, 673, 675, 676, 677, 679, 685, 686, 688, 689, 692, 694, 708 (not including attachments), 715, 724, 740, 741, 759, 768, 772, 773, 775, 776, 777, 780, 794, 796 and 803. *See* Government's Resp. at

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4-9; Standby Counsel's Reply in Support of Movants-Intervenors' Motion for Access to Certain Portions of the Record ("Standby Counsel's Reply") at 1. It therefore appears that each of these documents, or redacted versions of them, should be unsealed forthwith.

2. The government also has conceded, and stand-by defense counsel agrees, that Docket Nos. 608, 629 and 636 can be unsealed following consultation with a foreign government. Government's Resp. at 7; *see* Standby Counsel's Reply at 1. The government has apparently undertaken to make a further submission to the Court in this regard not later than May 5, 2003. Government's Resp. at 7. To the extent the government hereafter agrees that these documents should be unsealed, or the Court concludes that any redactions to them it proposes are consistent with the public's First Amendment and common law rights of access, then Media Intervenors' motion as to these documents will be mooted as well.

3. The government has represented that Docket Nos. 632 and 706 constitute, in their entirety, designations by stand-by defense counsel pursuant to the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3 § 5, of properly classified material that the defense intends to introduce in evidence at trial. *See* Government's Resp. at 5. Assuming this representation to be correct, Media Intervenors withdraw their motion for access as to these two documents.

4. There remain, however, more than 30 documents to the unsealing of which the government objects.[1] Media Intervenors, like the rest of the public, are not in a position to make factual arguments about the nature of these documents and their role in

[1] Specifically, Docket Nos. 580, 589, 601, 617, 628, 630, 637, 638, 661, 667, 681, 683, 700, 701, 710, 713, 717, 719, 720, 730, 734, 736, 738, 742, 743, 744, 755, 758, 760, 778, 787, 788, 795, 799 and 800.

this criminal proceeding. They rely upon the Court's informed judgment in this regard. A reply to some of the government's legal arguments concerning public access to these documents, however, is in order.

5. First, CIPA is the sole basis for the government's contention that the documents in question should remain under seal. Media Intervenors, however, question whether these documents are properly characterized as arising under CIPA in the first instance. Based upon the recently-filed, redacted public version of the government's opening brief on its interlocutory appeal to the Fourth Circuit, it appears that defendant filed in this Court a motion for writs of habeas corpus *ad testificandum* seeking to depose Ramzi Bin al-Shibh and two other witnesses. *See* Brief for Petitioners-Appellants ("Appellate Br.") at 5-6, 9, 69 n.30. So far as the public record reveals, no proceeding under sections 4, 5 or 6 of CIPA took place with respect to defendant's motion for access to Mr. Bin al-Shibh.[2] In the absence of such a proceeding, whatever limits CIPA may

[2] More specifically, properly closed proceedings appear to arise under CIPA in two situations. First, when the government does not wish to reveal classified information in documents to be made available to the defendant in discovery, it may move under section 4 of CIPA to delete the classified material or to substitute either a statement admitting relevant facts that the classified information would tend to prove or a summary of the information. *See* 18 U.S.C. app. 3 § 4. The request can be made *ex parte* and *in camera*. *Id.* Second, pursuant to section 5, the defendant is obliged to notify the government and the court if he "reasonably expects to disclose or cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving [his] criminal prosecution." 18 U.S.C. app. 3 § 5(a). Based on this notification, the government may move for a hearing under section 6(a) to make "all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding." 18 U.S.C. app. 3 § 6(a). Unlike a section 4 determination, a Section 6 hearing is not *ex parte* – the government must provide the defendant with notice of the classified information that is at issue. 18 U.S.C. app. 3 § 6(b)(1). It does not appear that either of these procedures was invoked with respect to the defendant's request to depose Mr. Bin al-Shibh. Indeed, it would make no logical sense for defendant to invoke section 5 given that he does not have access to classified information and neither does the witness he seeks to depose.

impose on public access, it does not appear that the government may properly invoke the statute as the basis for keeping at least those documents related to the defendant's request to depose Mr. Bin al-Shibh under seal.[3]

6. Even assuming, however, that some or all of the documents in dispute (whether related to the request to depose Mr. Bin al-Shibh or other matters) are properly characterized as arising out of a procedure authorized by CIPA, the government's sweeping contention that the statute entirely displaces the public's First Amendment and common law rights of access to all materials that are related in some fashion to proceedings implicating CIPA is simply mistaken. While sections 4, 5 and 6 of CIPA, when coupled with section 3, authorize district courts to receive certain materials and conduct certain proceedings *in camera* (and sometimes *ex parte*), the statute is quite specific about the materials and proceedings that can be so received and conducted. *See* 18 U.S.C. app. 3 § 3 (authorizing entry of protective order to prevent disclosure "of any classified information disclosed by the United States to any defendant"); § 4 (government's written statement supporting request for authorization to make substitutions for classified information may be received *ex parte* and placed under seal);

See Executive Order 12958, 60 F.R. 19825 (1995) (classified information is only that which is owned or controlled by the United States and has been designated as such). The Media Intervenors address *infra* the protective order authorized by section 3 of CIPA.

[3] Indeed, the government suggests as much when it invokes both CIPA and, in the alternative, the collateral order doctrine as the basis for the Fourth Circuit's jurisdiction over its interlocutory appeal. *See* Appellate Br. at 4. And, in the short portion of its appellate brief devoted to whether this Court erred in ordering the deposition of Mr. Bin al-Shibh without considering alternatives to access to classified information prescribed by CIPA, the government does not assert that CIPA governed or provided the basis for appeal. Rather, the government contends only that "CIPA provides the appropriate framework for analysis." *Id.* at 65; *see also id.* at 65 n.28 (quoting this Court as having found that "this case does [not] 'literally implicate' CIPA").

§ 5 (requiring defendant to give notice to government of intent to disclose classified information); § 6 (authorizing various specific proceedings to be conducted *in camera* and/or *ex parte*). Media Intervenors do not here contest the facial constitutionality of these provisions. Nor do Media Intervenors seek by their motion to unseal those portions of documents that *in fact* constitute materials properly filed with the Court under seal in satisfaction of one or more of the express requirements of CIPA. But nothing in CIPA or the case law interpreting it supports the contention that the public's rights of access never attach to any materials related to proceedings conducted pursuant to CIPA, or the contention that the Court must defer entirely to the government's own characterization of what is properly classified pursuant to CIPA.[4]

7. Indeed, so far as can be discerned from the public portion of the record, the documents in issue appear to implicate the type of pre-trial criminal proceedings to which the public's First Amendment and common law rights of access attach in the first instance. *See, e.g., In re Washington Post*, 807 F.2d 383, 389 (4th Cir. 1986) ("even if plea hearings and sentencing hearings are not considered a part of the trial itself, they are surely as much an integral part of a criminal prosecution as are preliminary probable-cause hearings, suppression hearings, or bail hearings, all of which have been held to be subject to the public's First Amendment right of access"); *see also, e.g., In re New York Times Co.*, 828 F.2d 110, 115-16 (2d Cir. 1987) (First Amendment right attaches to parties' papers on criminal defendant's motion related to Title III electronic surveillance);

[4] The government, for example, attempts to bring within the penumbra of CIPA four documents that, although concededly unclassified, purportedly are "closely related to the same subjects addressed in classified pleadings." Government's Resp. at 16-17. The Court has a particular obligation to scrutinize this sort of "boot-strapping" closely in light of the public's presumptive rights of access to the pre-trial record in this action.

In re Knight Publ'g Co., 743 F.2d 231, 235-36 (4th Cir. 1984) (common law right of access attaches to motion papers in criminal cases); *In re Time, Inc.*, 192 F.3d 270, 271 (4th Cir. 1999) (First Amendment right of access applies to documents filed with pre-trial motion to compel discovery in criminal prosecution).

8. Where the First Amendment right of access attaches, documents filed with the Court may be maintained under seal "only if (1) closure serves a compelling interest; (2) there is a 'substantial probability' that, in the absence of closure, that compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect that compelling interest." *In re Washington Post Co.*, 807 F.2d at 392 & 393 n.9. It may be, as the government argues, that it is substantially likely that public disclosure of the contents (or portions of them) of some or all of the documents in dispute would harm a sufficiently compelling government interest, and that no alternatives (such as public filing of a redacted version of the document) would adequately protect that interest. Where the government clearly is mistaken is in its contention that CIPA, without more, excuses the Court from undertaking this analysis with respect to each of the documents that remain in dispute.

9. Indeed, even if the documents in question are properly characterized as having been filed pursuant to CIPA, the Court of Appeals has already answered the government's contention in *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986). In that case, based solely on CIPA, the district court sealed certain documents, including affidavits proffered by the government to establish the national security interests at stake in the underlying criminal prosecution, and closed the proceedings in connection with them. *Id.* at 386. On appeal, the Court of Appeals confronted the question "whether the

procedural requirements and the substantive standards applied in evaluating the scope of [the public's First Amendment right of access] should differ when considerations of national security are at stake." *Id.* The Court of Appeals squarely answered that question in the negative:

> In [cases implicating national security interests], the government contends, the district court should have discretion to adapt its procedures to the specific circumstances, and may properly defer to the judgment of the executive branch. We disagree. While we recognize, and share, the government's concern that dangerous consequences may result from the inappropriate disclosure of classified information, we do not believe that adherence to the procedures outlined in *Knight Publishing* [743 F.2d at 234-35] would create an unacceptable risk of such disclosure.

Id. at 391. Accordingly, the Court of Appeals held that the procedural components of the public's access rights "are fully applicable in the context of closure motions based on threats to national security," *id.* at 392, including motions based on CIPA, *id.* at 393. Specifically, a court "may not simply assume that Congress has struck the correct constitutional balance" in enacting CIPA. *Id.* Rather, "when the constitutionality of a statute is challenged in federal court, that determination is ultimately the province of the courts and not of the legislative branch." *Id.* All that Media Intervenors seek by their present motion is for this Court to conform the conduct of the pretrial proceedings to the requirements of *Knight Publishing* by publicly applying the appropriate procedural and substantive standards to the record – in this case, to the documents identified *supra* at 2 n.1.

10. To the extent the government contends that *United States v. Ressam*, 221 F. Supp. 2d 1252 (W.D. Wash. 2002) stands for a contrary principle, its reliance on that decision is misplaced. *See* Government's Resp. at 13-14. There, a newspaper requested

that various pleadings be unsealed pursuant to the public's access rights. *Id.* at 1254-55. As the court noted, in response to that request, it had previously unsealed, with redactions of properly classified material, a variety of such pleadings. The particular subject of the reported decision was a request to unseal motions submitted by the government to the court *in camera* and *ex parte* pursuant to section 4 of CIPA, and the court's orders on those motions. *Id.* at 1254-55, 1258. It is hardly surprising that the court concluded that the public's rights of access do not attach to material *properly* submitted to it *in camera* and *ex parte* pursuant to section 4, and its holding expressly was limited to this specific circumstance. *Id.* at 1258, 1260-61. Here, as Media Intervenors have emphasized, they do not seek access to materials *properly* received *in camera* by this Court pursuant to section 4 (or any other section) of CIPA.[5] While Media Intervenors are, for obvious reasons, handicapped in making factual assertions about the nature of the sealed documents that remain in dispute on this motion, it does not appear that all of them were submitted to the Court for purposes of and in compliance with section 4 or other applicable sections of CIPA.

11. In addition, although the government cites the opinion of a panel of the Court of Appeals for the proposition that this Court must defer entirely to the

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[5] Moreover, the government's contentions notwithstanding, the district court in *Ressam* expressly *rejected* the notion that CIPA displaces the public's rights of access to all materials or proceedings related to the statute, holding, for example, that those rights *do* attach to orders regarding proceedings under section 4, which the court in *Ressam* made public, albeit sometimes in redacted form. 221 F. Supp. 2d at 1263. As the court in *Ressam* emphasized, "[i]t is important to make clear that the Court is not using Congress's enactment of CIPA to override the constitutional right of access," *id.* at 1259, and it noted that other courts had "rejected the use of CIPA itself as a grounds for closure of the criminal proceeding," *id.* at 1260-61. *Accord The Press and the Public's First Amendment Right of Access to Terrorism on Trial: A Position Paper*, 57 The Record of the Association of the Bar of New York City, Nos. 1-2, at 158-67 (Winter/Spring 2002) (collecting cases examining interplay between CIPA and the public's right of access).

government's designation of material as classified, *see* Government's Resp. at 13 (citing *United States v. Smith*, 750 F.2d 1215, 1217-18 (4th Cir. 1984)), the cited opinion was vacated by the Court of Appeals on *en banc* review, *United States v. Smith*, 780 F.2d 1102, 1104 (4th Cir. 1985), and the opinion of the *en banc* Court offers no support for the asserted proposition. Quite apart from the questionable propriety of relying on a vacated opinion, the government misses the mark in any event because *Smith* concerned only the district court's *in camera* and *ex parte* determination of the admissibility of certain purportedly classified material and did *not* involve the intersection of CIPA with the public's rights of access. *Id.* at 1103-04. Whatever may be the limitations on a district court's power to inquire into the basis for classification when the government moves under section 6 of CIPA to have certain evidence declared inadmissible, neither CIPA nor any principle requires this Court to defer entirely to the government's use of overbroad classification to prevent public disclosure of portions of this Court's own record.[6]

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[6] Indeed, it is the Court of Appeals' recent ruling in *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002), that is particularly instructive in this regard. There, despite emphasizing the extraordinary deference owed by the courts to decisions of the Legislative and Executive Branches concerning the conduct of military engagements, *id.* at 283-84, the Court of Appeals rejected the government's contention that the Judicial Branch is powerless to review war-related decisions by the Executive. In declining to "summarily embrac[e] a sweeping proposition -- namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so," the Court of Appeals held that judicial review of the Executive's decision, albeit deferential, was nevertheless both required and proper. *Id.*; *see also Hamdi v. Rumsfeld*, 316 F.3d 450, 464 (4th Cir. 2003) ("*Hamdi III*") ("[d]espite the clear allocation of war powers to the political branches, judicial deference to executive decisions made in the name of war is not unlimited"). Indeed, as the Court of Appeals observed in *Hamdi III*, deference owed the Executive does not prevent a court "from determining in the first instance whether the factual assertions set forth by the government would, if accurate, provide a legally valid basis" for the government's position, since to do otherwise would mean that the court was "deferring to a decision made without any inquiry into whether such deference is due." *Id.* at 472.

12. Thus, for example, the government apparently continues to contend that Ramzi Bin al-Shibh's name and the fact that he is in custody is information that properly is classified and therefore can be withheld from the public in connection with this proceeding. But, the *President of the United States* announced at a political rally that Mr. Bin al-Shibh had been taken into custody. *See* Remarks by President George W. Bush at Doug Forrester for Senate Event, Sept. 23, 2002, *at* http://www.whitehouse.gov/news/releases/2002/09/20020923-3.html. The government's continuing insistence that Mr. Bin al-Shibh's name and status as a captive be classified and therefore redacted from its briefs, despite the wide-spread publicity and high-level public confirmations of its accuracy, ventures into the terrain of the surreal. The government here exhibits the not-uncommon tendency to overreach in its classification of material, a propensity this Court already has remarked on with concern. 4/4/03 District Court Order at 1. Simply put, this Court is both capable of recognizing such over-classifications and entitled to decline to defer to them.

13. Regardless of the nature of the documents that remain in issue on this motion, the blanket protective order entered by this Court on January 22, 2002 in response to the government's motion pursuant to section 3 of CIPA does not relieve the Court of its constitutional obligation to review the documents to which the Media Intervenors *now* seek access and to determine whether continued sealing is merited. *See, e.g.*, *In re Time Inc.*, 182 F.3d at 271-72 (blanket protective order in criminal case sealing all documents that prosecution deemed confidential does not relieve court from obligation to conduct independent review of documents under seal in response to motion for access by media groups); *see also Rushford v. New Yorker Magazine, Inc.*, 846 F.2d

249, 253-54 (4th Cir. 1988) (requiring particularized findings warranting closure as to each specific document placed under seal); *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 500-02 (D.C. Cir. 1998) (approving trial court's decision to proceed "by redacting documents" for release to public in case involving proceedings ancillary to grand jury investigation that were required, in part, to remain under seal). Indeed, the protective order does not even purport to address the public's rights of access to materials, classified or otherwise, filed in this proceeding and therefore cannot be dispositive of them, as the government contends. Even had the Court intended the protective order to address, *sub silentio*, the public's access rights, it nevertheless would be inadequate because, as a *prospective* order, (i) it could not possibly contain findings that were "specific enough to enable the reviewing court to determine whether [sealing] was proper," *In re Washington Post Co.,* 807 F.3d at 391, nor (ii) could the Court, without specific documents in front of it, "state its reasons for rejecting alternatives to closure," *id.*

14. Moreover, the fact that some of the documents that remain at issue on this motion may contain *some* classified information does not justify their complete sealing. Rather, the Court must consider alternatives, including redaction, which would permit the public filing of those portions of documents that do not contain classified material. *Knight Publ'g*, 743 F.2d at 234-35. Indeed, the government's recent public release of a redacted version of its brief on appeal to the Fourth Circuit demonstrates that such redaction is practicable. Thus, the January 22, 2002 Order failed to comply with the procedural requirements under the First Amendment for the sealing of all the documents the government claims contain classified information.

CONCLUSION

At bottom, the Media Intervenors' request is simply this: That the Court examine, as it is otherwise required to do, each of the documents identified *supra* at 2 n.1, and determine, in a publicly filed order with the requisite findings, whether each such document is properly classified and under seal and, if not, or if not properly classified or sealed *in toto*, order the public release of the improperly sealed documents or portions thereof.

Dated: May 1, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of May 2003, I caused true and correct copies of the foregoing Movants-Intervenors' Reply Memorandum in Support of Motion for Access to be served by first class mail, postage prepaid, upon the defendant *pro se* and counsel for the parties as follows:

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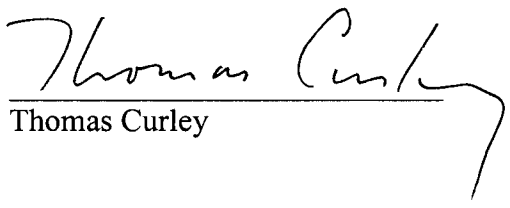

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