

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

[illegible]

**STANDBY COUNSEL’S REPLY TO THE GOVERNMENT’S RESPONSE
TO 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”) moved to intervene for the purpose of gaining broader access to sealed portions of the record in this case. Standby counsel filed a motion in support of the Media Intervenors Motion. The Government subsequently responded to the Media Intervenors Motion and apparently was provided with a list of documents, in addition to the ones listed by the Media Intervenors in their original motion, that the Media Intervenors sought access to. Standby counsel now submit this reply to clarify its earlier position in support of the Intervenors Motion.

Discussion

The Intervenor's Motion sought access to fifty-nine pleadings filed under seal since September 27, 2001, specifically moving to unseal and be heard on the motion

as it relates to the ruling that is the subject of an appeal filed by the United States. The Intervenor's Motion also listed twelve documents which were identified as Mr. Moussaoui's *pro se* pleadings which "had not been acted upon" and to which the Intervenor requested access to or a publically filed judicial determination as to the propriety of the continued sealing of. In fact, two of these documents are classified filings not made by Mr. Moussaoui, another two of the documents were made *ex parte* by Mr. Moussaoui, and three of them have now been unsealed. At the time standby counsel's motion in support was filed, they had not been provided with a list of documents substantiating the fifty-nine documents sought by Intervenor. Standby counsel did not specifically respond to the substance of any particular pleading listed by the Intervenor, nor did standby counsel seek clarification from the Intervenor about what documents constituted the fifty-nine pleadings which remain sealed and about which they were complaining. Standby counsel's motion supported the Intervenor's Motion and noted that the Defendant also has a Sixth Amendment right effected by the continued sealing of documents. The Government apparently read standby counsel's response as supporting the unsealing of both classified documents and *ex parte* filings by Mr. Moussaoui. (See Gov. Response at 4, stating it joins standby counsel's motion in support of unsealing Mr. Moussaoui's *ex parte* filings 689 and 768.) This was not and is not standby counsel's position.

Docket numbers 689 and 768 were both filed *ex parte* by Mr. Moussaoui and discuss defense strategy and should therefore not be unsealed. Standby counsel do not support the unsealing of *ex parte* documents filed by either Mr. Moussaoui *pro se* or by standby counsel that discuss defense strategy. There is no public right to access this information. *See e.g. United States v. McVeigh*, 119 F.3d 806, 814 (10th Cir. 1997) (holding the district court properly balanced First Amendment interests against the defendants' right to a fair trial in redacting the severance motions because defendant had to discuss candidly his trial strategy and the strengths and weaknesses of his respective case).

Standby counsel have filed the following docket numbers *ex parte* and request that they remain sealed as they discuss defense strategy or relate to general administrative matters that are not within the public's interest: 607, 668, 677, 685, 686, 760, and attachment A to 620.

In addition to those *ex parte* filings, standby counsel object to the unsealing of 633 which is a filing by Mr. Moussaoui discussing defense strategy.

CONCLUSION

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

Respectfully submitted,

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By Standby Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Standby Counsel's Reply to the Government's Response to Intervenor's Motion for Access to Certain Portions of the Record was served upon AUSA Robert A. Spencer, AUSA David Novak and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, 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 UPON APPROVAL FROM THE COURT SECURITY OFFICER via first class mail to Zacarias Moussaoui, c/o Alexandria Detention Center, 2001 Mill Road, Alexandria, VA 22314, and via FACSIMILE on Jay Ward Brown, Esquire, LEVINE SULLIVAN & KOCH, L.L.P., 1050 Seventeenth Street, N.W., Suite 800, Washington, D.C. 20036, fax (202)861-9888, and via this 5th day of May, 2003.

_____/S/
Frank W. Dunham, Jr.