

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

UNITED STATES OF AMERICA)

vs.)

ZACARIAS MOUSSAOUI,)

Defendant.)

ALL PLAINTIFFS NAMED IN)
21 MC 97, 21 MC 101, AND 03 CV)
9849)

Movants-)
Intervenors.)

Criminal No. 01-455-A

**MEMORANDUM IN SUPPORT OF MOTION FOR ACCESS TO CERTAIN PORTIONS
OF THE RECORD**

The 9/11 Families Moving to Intervene ("Movants") respectfully submit this memorandum in support of their motion for access to certain portions of the record in this proceeding. There exists no other group of individuals for whom the events of September 11, 2001, are forever etched in their minds than those who were, themselves, injured or whose loved ones were murdered on that day.

STATEMENT OF FACTS

In this criminal prosecution, Zacarias Moussaoui has pleaded guilty to charges involving conspiracy to commit acts of terrorism, to commit aircraft piracy, to destroy aircraft, to use airplanes as weapons of mass destruction, to murder government employees, and to destroy property, all in connection with the terrorist attacks on the United States on September 11, 2001.

The events of September 11, which form the basis of the charges against

Moussaoui, have generated intense public interest and concern – not just in the United States, but also throughout the world. These proceedings, and the record herein, implicate not just the fundamental fairness of the American judicial system as it relates to the defendant, but also profound issues of national policy and the administration’s war on terrorism.

Though the proceedings in this matter are indeed significant for all of America, their import to the victims of the terrorist attacks is tremendous, particularly in light of the seriousness of the revelations made before this Court regarding the TSA and aviation defense counsel in the civil cases. In the civil litigation arising from the events of September 11, 2001, Movants have alleged, inter alia, that the aviation defendants’ negligence was a cause of the attacks. The defendants include the airport authorities, the airlines and the security companies charged under law with aviation security, including the screening of passengers. The evidence supplied by the government to the Moussaoui defense lawyers in this case is highly relevant to the claims which have been asserted by the Movants in the civil litigation. The evidence illustrates the vast amount of information available to the aviation industry regarding the risk of terrorist attacks and is relevant to the duties owed by the industry to their passengers and to those injured on the ground.

Movants’ numerous attempts at simply obtaining access to these documents for use in the civil litigation have been met with unreasonable opposition by the TSA, unacceptable collusion between the TSA and the attorneys representing the airline defendants. As this Court noted on March 21, 2006, in discussing the actions of Carla Martin in the Moussaoui trial, “I have an image now of a person who perhaps out of overzealousness or whatever the motivation or *loyalty to the aviation industry* in trying to protect her clients from civil liability, for whatever motivation, was way across the line in what is appropriate behavior for an attorney, let alone a

government attorney.” Moussaoui Trial Transcript, March 21, 2006 (“Transcript”), at p. 13. The Court went on to note that there “would appear to be is Ms. Martin may have been wearing two hats in the matter; that is, if she’s defending – or assisting in the defense of some FAA people in a civil case and then assisting you with discovery in a criminal case...” *Id* at p. 43. The chain of emails between Carla Martin and others including descriptions of discussions with her friends Jeffrey Ellis and Christopher Christianson ordered to be released by this Court on March 13, 2006, further illustrated the lengths the TSA is going to in an effort to prevent the Movants from obtaining access to these documents.

Despite the fact that the “acid test” for determining whether in fact something is SSI or not is simply whether the disclosure would result in “ongoing jeopardy to the safety” of air travel, *See* Transcript at pp. 31, 26, the TSA has sought to prevent the discovery of all documents by declaring everything SSI a fact which even Assistant U.S. Attorney Mr. Novak pointed out when he said “we were basically told, look, the whole item is SSI,” Transcript at p. 37. The TSA’s direction to Mr. Novak and the prosecution lawyers is directly contrary to a specific direction from Congress to identify paragraph-by-paragraph what is SSI. *See* Conference Report 109-241 at 37 (Conference Report to accompany H.R. 2360, “Making Appropriations for the Department of Homeland Security for the Fiscal Year Ending September 30, 2006, and for other purposes.”) In that report, Congress specifically directed the TSA to ensure that classified and SSI documents were clearly identified in a paragraph-by-paragraph manner, which paragraphs contain classified information and which do not. “This is consistent with actions taken by other federal agencies.” The unreasonableness of the TSA’s position was summed up further when Mr. Novak went on to note on that same day in Court “some of this stuff from back in 1995, 1996, ’97, ’98, the one about KSM, the one that you said had to go in the fact that it had his

picture and his name and all that type of stuff, there can't be a threat to ongoing airline security..." Transcript at p. 37.

There exists no other group of individuals for whom the events of that day are forever etched in their minds than those who were, themselves, injured or whose loved ones were murdered on that day.

ARGUMENT

I. **An Order Should be Entered Granting 911 Movants-Intervenors Immediate and Identical Access to All Documentary Evidence Ordered to be Released to the Media-Intervenors Pursuant to the Fourth Circuit's Order dated March 23, 2006.**

As this Circuit has acknowledged, the First Amendment and the common law each guarantee the public a right of access to judicial records filed in connection with criminal proceedings – including transcripts of trial proceedings and documents admitted in evidence. See *In Re: Associated Press, et. al.*, 2006 WL 752044 (4th Cir. 2006), citing *In re Time Inc.*, 182 F.3d 270, 271 (4th Cir. 1999). On March 22, 2006, in its opinion granting a similar request brought by the Media Intervenors in this same case, the Fourth Circuit noted that “It is undisputed that there is a right of access to judicial records filed in connection with criminal proceedings.” *In re: Associated Press, et. al.*, 2006 WL 752044 at *2.

While the public's rights of access are not absolute, they can be limited only “by a compelling interest in preserving the fairness of the trial, provided the restriction on access is narrowly tailored.” *Id* at *3, citing *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 13-14 (1986) and only upon specific factual findings by the Court. The First Amendment-based right of access may be denied only where there is a “substantial probability” that an equally compelling interest would be harmed by such access and there are *no* alternative measures that would adequately protect the competing interest—and even then, any limitation on

the right of access must be narrowly drawn to avoid any unnecessary interference with the public's right to information about a criminal prosecution.

By the same token, a common law right of access also attaches to the record in a criminal proceeding. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) (recognizing common law right "to inspect and copy public records and documents, including judicial records") (footnote omitted); *In re Knight Publ'g Co.*, 743 F.2d at 235 (recognizing common law right of access to pre-trial motions in criminal proceedings); *In re Nat'l Broad. Co.*, 653 F.2d 609, 612-13 (D.C. Cir. 1981) (public's "common law right to inspect and copy judicial records is indisputable" and both "'precious'" and "'fundamental'") (citations and footnotes omitted).

While the public's common law right of access is not absolute, the right to inspect and copy may be denied

only if the district court, after considering 'the relevant facts and circumstances of the particular case', and after 'weighing the interests advanced by the parties in light of the public interest and the duty of the courts', concludes that 'justice so requires'. The court's discretion must 'clearly be informed by this country's strong tradition of access to judicial proceedings'. In balancing the competing interests, the court must also give appropriate weight and consideration to the 'presumption however gauged in favor of public access to judicial records.'

Id. at 613 (footnotes and citations omitted). Indeed, the Court of Appeals has observed that the common law presumption of access can be rebutted only "if countervailing interests *heavily* outweigh the public interests in access." *Rushford*, 846 F.2d at 253 (emphasis added). "The party seeking to overcome the presumption bears the burden of showing some *significant* interest that outweighs the presumption." *Id.* (emphasis added).

Neither test for abrogating the public's rights of access is satisfied here with respect to this category of documents. For the reasons stated by the Fourth Circuit in *In Re: Associated*

Press, et. al., an order should be entered granting the Movants access to these documents identical to the access granted to the Media-Intervenors regarding this category of documents.

II. An Order Should be Entered Granting 911 Movants-Intervenors Access to Any and All Documentary Exhibits Which Have Been Admitted Into Evidence but Which Have Not Yet Been Fully Published to the Jury.

With respect to any and all documentary exhibits which have been admitted into evidence but which have not yet been fully published to the jury, the Fourth Circuit affirmed this Court's February 14, 2006, Order holding that those documents should not be turned over to Media-Intervenors at this time due to the fact that the "administrative burdens, to the court and to the parties, associated with requiring piecemeal access to partially admitted exhibits justify a refusal to provide access to admitted exhibits until they have been fully published to the jury." *Id* at *3. As this Court correctly noted in its Order dated February 14, 2006, before the jury begins its deliberations "the admitted exhibits are sent into the jury room."

Once a document has been introduced into evidence and turned over to the jury it becomes a public document, the 911 Plaintiffs-Intervenors should be provided with access to copies of those documents at a time no later than the day after the documentary exhibits have been sent into the jury room and jury deliberations have begun or within forty-eight (48) hours after the return of the jury's verdict whichever procedure creates the lesser administrative burden.

III. An Order Should be Entered Granting 911 Movants-Intervenors Access to any documentary evidence provided by the Government to attorneys representing Defendant Moussaoui as well as any documentary evidence introduced into evidence but not turned over the jury either in whole or in part.

During the course of the Moussaoui trial, Defendant Moussaoui's attorneys have been given access to documents that the attorneys representing the 911 Movants-Intervenors have not been given access to date. Attorneys representing Defendant Moussaoui – the man who

confessed to playing an important role in the September 11, 2001, attacks which killed or injured the family members of the 911 Plaintiffs-Intervenors – should not be given a greater level of access to documentary evidence relating to those attacks than the attorneys representing victims, and family members of victims, who were brutally murdered and injured in those horrific attacks on that day. Providing greater access to documentary evidence to Moussaoui’s attorneys than to the attorneys representing the victims directly contravenes both state and federal statutes.

Many states, including the Commonwealth of Virginia, have specifically expressed their intention to provide victims of crimes with certain rights. For example, the Commonwealth of Virginia’s Victims’ Rights’ Statute provides in relevant part that.

“During the trial of every criminal case and in all court proceedings attendant to trial, whether before, during or after trial, including any proceedings occurring after an appeal by the defendant or the Commonwealth, at which attendance by the defendant is permitted, whether in a circuit or district court, any victim as defined in § 19.2-11.01 may remain in the courtroom and shall not be excluded unless the court determines, in its discretion, the presence of the victim would impair the conduct of a fair trial.

VA Stat. § 19.2-265.01.

So too, the federal government has expressed a similar intent when it enacted the federal statute regarding Crime Victim’s Rights, 18 U.S.C. § 3771, which provides in relevant part that crime victims have rights including, but not limited to, “the right to reasonable, accurate, and timely notice of any public court proceeding...involving the crime,” 18 U.S.C. § 3771(a)(2); “the reasonable right to confer with the attorney for the Government in the case,” 18 U.S.C. § 3771(a)(5); “the right to full and timely restitution as provided in law,” 18 U.S.C. § 3771(a)(6); and “*the right to be treated with fairness and with respect for the victim’s dignity and privacy.*” 18 U.S.C. § 3771(a)(8) (emphasis added). These rights can be asserted by either the crime victim or the crime victim’s legal representative “in the district court in which a defendant is

being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred.” 18 U.S.C. § 3771(d)(1),(3).

In fact, the statute goes so far as to explicitly state that “A person accused of the crime may not obtain any form of relief under this chapter.” 18 U.S.C. § 3771(a)(1). The attorneys representing the Movants should be given the same level of access to documents relating to the events of 9/11 for which Defendant Moussaoui is on trial that Moussaoui’s attorneys have been afforded. To permit the lawyers for admitted 9/11 terrorist and conspirator with those who injured and killed the victims on 9/11 to have the benefit of the documents but to prevent the victims and their representatives from using the documents in a lawful manner is not in accord with the notion of treating the victims fairly and with respect. There is simply no compelling reason that the government should be able to use the information to prepare and prosecute one terrorist, allow the terrorist’s lawyers to use the information to benefit the terrorist, but still foreclose the victims themselves from using the very same information to (1) gain a better understanding of what happened on 9/11 to allow their loved ones to die, and to (2) proceed in their Congressionally approved federal cause of action. Failing to provide them access similar to what Mr. Moussaoui has been afforded through his attorneys, treats the victims of Mr. Moussaoui with less respect than one who has admitted to conspiracy in the worst atrocity to have been inflicted on our nation.

CONCLUSION

For the foregoing reasons, the 911 Movants-Intervenors respectfully request that this Court enter an order governing access to documents in accordance with the foregoing.

Dated: March 30, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of March 2006, I caused true and correct copies of the foregoing Memorandum in Support of Motion for Access to Certain Portions of the Record to be served by the means indicated, upon counsel for the parties as follows :

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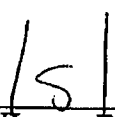
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