

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

UNITED STATES OF AMERICA,)
)
v.)
)
ZACARIAS MOUSSAOUI)
a/k/a "Shaquil,")
a/k/a "Abu Khalid)
al Sahrawi,")
)
Defendant.)

Criminal No. 01-455-A

**BRIEF OF INTERVENOR AIR LINE PILOTS ASSOCIATION, INT'L
IN SUPPORT OF ITS MOTION FOR RECONSIDERATION OF
ORDER PROVIDING FOR PUBLIC DISCLOSURE OF THE
COCKPIT VOICE RECORDER OF UNITED FLIGHT 93**

Intervenor Air Line Pilots Association, Int'l ("ALPA"), the union that represented the pilots of United Flight 93 and represents 62,000 other airline pilots, submits this brief in support of its motion for reconsideration of the Court's April 5, 2006 Order (Docket #1750). That Order provides for public disclosure of the cockpit voice recorder (CVR) of Flight 93 from September 11, 2001, unless "a family member of one of the Flight 93 victims" files an objection. ALPA respectfully requests that the Court seal the CVR after it is heard by the jury, and instead make only a transcript available to the public.

As we will show in Part I, a federal statute, 49 U.S.C. § 1154, specifically prohibits public release of CVR tapes. As the legislative history makes clear, Congress passed the applicable portion of that statute in response to the release of a CVR tape to the broadcast media in 1989. Congress drafted the statutory language "to prevent a repetition of this unfortunate occurrence" by "prohibit[ing] CVR tapes from being released to the public." H.R. Rep. No. 101-661, at 4 (1990). Contrary to the Court's assumption in its April 5, 2006 Order, Congress

designed this statute to do more than just protect National Transportation Safety Board (“NTSB”) investigations. Congress included in the statutory language a broad protection against release of CVR tapes that applies even in criminal proceedings such as this.

In Part II we will show that sealing the CVR would be consistent with the ruling of the United States Court of Appeals for the Fourth Circuit in In re Associated Press, No. 06-1301, 2006 WL 752044 (4th Cir. Mar. 22, 2006). That decision does not suggest that the First Amendment or common law rights of the press and public to access criminal trial exhibits may override a specific statutory command to withhold an exhibit from disclosure, such as that in 49 U.S.C. § 1154.

Finally, in Part III we will discuss the provision in the Court’s April 5, 2006 Order for family members of the Flight 93 victims to object to public disclosure of the CVR tape. The public docket in this case indicates that the government has filed objections under seal. (Docket #1773.) The possible injury to innocent third persons is a proper factor for the Court to consider in determining whether to release the CVR tape. In re National Broadcasting, 653 F.2d 609, 619-20 (D.C. Cir. 1981). Media broadcasts of the CVR tape would force the families of the victims to relive this horrific event and could even cause them psychological harm. The filing of objections by family members in itself is sufficient reason for the Court not to allow public disclosure of the CVR tape.

I. THE STATUTORY PROTECTION PROHIBITING PUBLIC DISCLOSURE OF THE CVR TAPE APPLIES HERE.

In the April 5, 2006 Order, the Court addressed one policy reason for sealing the CVR tape, but other policies apply here, as well. Citing a statement by government attorneys during a

sealed hearing,¹ the Order concludes “that the policy reasons for sealing such materials, that is, ‘to protect the National Traffic [sic] Safety Board (“NTSB”) against premature public speculation regarding the cause of any airline crash so it may “conduct a full and fair investigation”’ is not implicated in this sentencing proceeding.” ALPA agrees that the policies protecting an NTSB investigation of a particular event are not at issue in this proceeding. But Congress dealt with those policy concerns in 49 U.S.C. § 1114(c), not in § 1154, the provision applicable here.

In § 1114(c), Congress prohibits the NTSB from publicly disclosing a CVR recording or transcript during an investigation. In the same provision, Congress also directs the NTSB to make public the portions of the transcript relevant to an accident when the NTSB holds a public hearing or when it places “a majority of the other factual reports on the accident” in the public docket. This was intended to prevent early disclosure of transcripts, which would encourage premature speculation about the cause of an accident. However, § 1114(c) does not authorize the NTSB to disclose the CVR tape at any time.

Because § 1114(c) on its face applies only to NTSB actions, in 1990 Congress enacted § 1154 to prohibit public release of CVR tapes. As the legislative history of § 1154 makes clear,² the directives in § 1114(c) had proved insufficient to prevent the release of a CVR tape by a court to the broadcast media. Congress drafted § 1154, prohibiting release of CVR tapes to the public, “to prevent a repetition of this unfortunate occurrence.” H.R. Rep. No. 101-661, at 4.

¹ Intervenor ALPA did not receive notice of the sealed hearing and consequently was not present.

² The complete history of the CVR protective legislation is detailed in ALPA’s Brief in Opposition to Gannett Satellite Information Network, Inc.’s Request for Access to Cockpit Voice Recorder Tapes, pp. 3-11. (Docket #606.)

Section 1154 reflects a second set of policy reasons, apparently overlooked in the Court's April 5, 2006 Order, for sealing the CVR tape after it is heard by the jury in this proceeding. This provision balances the concern of pilots that the CVR represents an intrusive monitoring of their workplace with their predilection to embrace the CVR as an important accident investigation tool. Through the statutory protections for the CVR contained in § 1154, Congress mandated assurances to pilots that, even though the CVR had entered the cockpit, the CVR tapes would not be publicly disclosed. As Congress over the last 15 years has clarified its mandate with amendments to this provision, it has consistently expressed its intent to limit the public's intrusion into the cockpit by strictly confining the use of CVR tapes to accident investigation and prohibiting public disclosure. Misuse of the CVR by disclosure to the media will cause pilots in the future to be more guarded in their cockpit conversations and potentially deprive accident investigators of valuable information regarding conditions prior to an event. Pilots could likewise become reluctant to participate in other voluntary safety programs and could resist modernization of the CVR. (See attached Declaration of Captain Duane E. Woerth.)

The reluctance of pilots to participate in such voluntary safety programs and a "chilled" cockpit environment would adversely impact flight safety to the detriment of the traveling public. The potential harm to future accident investigations and voluntary safety programs far outweighs whatever purported benefit might arise from satisfying the curious by publicly disclosing the CVR tape from Flight 93. ALPA respectfully submits that both the federal statute and the policy concerns recognized by Congress in its legislative history would be violated by the public release of the CVR tape from Flight 93.

II. SEALING THE CVR IS CONSISTENT WITH FOURTH CIRCUIT PRECEDENT.

In the April 5, 2006 Order, the Court also found “that the recent decision of the Fourth Circuit, In re: Associated Press, No. 06-1301 (4th Cir. Mar. 22, 2006), supports public access to the evidence in this proceeding.” However, Associated Press is readily distinguishable because there is no evidence that any of the documentary exhibits subject to that ruling were covered by a federal protective statute like § 1154, which prohibits the public disclosure of CVR tapes.

In Associated Press, the Fourth Circuit cited United States v. Myers, 635 F.2d 945, 952 (2d. Cir. 1980), for the proposition that once evidence has become known to members of the public through their attendance at court, “it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction.” 2006 WL 752044, at *4. The Fourth Circuit went on to hold that this Court’s concerns about juror taint and administrative difficulties were insufficient to overcome the First Amendment and common law rights of the press and public to access documentary exhibits fully published to the jury and those physically in attendance in the courtroom. Id.

Nowhere, however, does the Fourth Circuit’s Associated Press decision suggest that the First Amendment or common law rights of the press and public to access criminal trial exhibits may override a specific statutory command to withhold an exhibit from disclosure, such as that in 49 U.S.C. § 1154. As the Fourth Circuit has elsewhere recently noted, “the presumption of access ... can be rebutted if countervailing interests heavily outweigh the public interests in access.” Virginia Department of State Police v. The Washington Post, et al., 386 F.3d 567, 575 (4th Cir. 2004) cert. denied, 125 S. Ct. 1706 (2005) (citing Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988)). When Congress has recognized such a countervailing

interest by enacting a specific statutory scheme directing the only acceptable manner and method in which the judiciary may disclose a specific category of documentary evidence, the statutory scheme must prevail over the public's general right of access. In Part I above, ALPA has shown that, in § 1154, Congress expressly has enacted such a statutory scheme with respect to the judicial use of the CVR.

In the April 5, 2006 Order, the Court ruled that the jury may hear the CVR tape, and ALPA does not contest that ruling. In addition, under the unique circumstances of this case and for the limited purpose of this Motion for Reconsideration, ALPA does not assert that the public at large should not know what is on the CVR tape from Flight 93. ALPA does contend, however, that the Court should limit the public's access to the Flight 93 CVR with a ruling that would allow the CVR tape to be played in open court but not recorded and that would provide for the release of a full transcript of the CVR tape.³ Releasing the CVR tape itself to the public will result in its repeated airing by the media, which will serve no purpose other than sensationalism, while undercutting the delicate statutory balance Congress has struck in enacting and amending § 1154.

The public's right of access, identified by the Fourth Circuit in Associated Press, would be more than satisfied by the airing of the Flight 93 CVR tape to the jury in open court and the release of a comprehensive transcript. Such disclosures would adequately balance the public's right to access "judicial records" filed in connection with criminal proceedings with the express statutory command of Congress in § 1154 prohibiting the public airing of CVR tapes.

³ It is ALPA's understanding that the government has already prepared a comprehensive transcript of the Flight 93 CVR tape.

III. OBJECTIONS BY FAMILY MEMBERS PROVIDE SUFFICIENT REASON NOT TO RELEASE THE CVR TAPE.

In the April 5, 2006 Order, the Court recognized “that family members of the flight crew or passengers on Flight 93 may object to the voices of their loved ones being publicly revealed in this manner.” Consequently, the Court made the Order regarding the release of the CVR tape conditional upon the absence of such objections, ruling that “the evidence will be made publicly available” within a designated time period “unless the Court receives a written objection from a family member of one of the Flight 93 victims by 5:00 p.m. Tuesday, April 11, 2006.” The public docket in this case indicates that on Monday, April 10, 2006, the government filed objections under seal (Docket #1773), apparently from family members of Flight 93 victims. These objections alone provide sufficient reason for the Court not to disclose the CVR tape to the public.

Courts in other criminal proceedings have validated the Court’s concern about the anguish that family members of Flight 93 victims would suffer from public release of the CVR tape. For example, in National Broadcasting, the United States Court of Appeals for the District of Columbia Circuit held: “Possible injury to innocent third persons is certainly a factor that may properly be taken into account by the district courts in passing upon applications to copy and inspect judicial records.” 653 F.2d at 619 (citing United States v. Hubbard, 650 F.2d 293, 323-24 (D.C. Cir. 1980), and In re Application of KSTP Television for Video Tapes in the Case of United States of America v. Ming Sen Shiue, 504 F. Supp. 360, 363 (D. Minn. 1980)). The D.C. Circuit noted that, in the Minnesota case, the district judge had denied the television station’s application for release of video tapes that had been played to the jury in open court on

the ground “that releasing the tapes would not advance the public interest . . . but would rather serve the improper purpose of supporting sensationalism.” 653 F.2d at 620.

Moreover, in a criminal proceeding where a CVR tape had been played in open court, a federal district court also denied media requests for access to the CVR tape. United States v. Calloway, No. 94-20112 (W.D. Tenn. filed Aug. 31, 1995).⁴ Calloway involved an attack in the cockpit on three Federal Express flight crew members, whose struggles with their assailant were recorded on the CVR tape. In that case, the court released a written transcript of the CVR tape after it was played in open court but, after receiving objections to the release of the CVR tape itself from interested parties, including the three victims, the court exercised its “discretion to deny access to evidence where the court finds that, based upon the relevant facts and circumstances, justice so requires.” Id. at 5. The court found that “[r]elease of the tape itself [would] infringe upon the privacy of the victims to a much greater degree than has the written transcript of the tape.” Id. at 6. Considering that factor “in light of the very slight incremental gain in public knowledge which would result from release of the tape,” the court “conclude[d] that release of the tape [wa]s not justified.” Id. ALPA respectfully submits that the same reasoning applies here and requests that the Court honor the objections filed by family members of the Flight 93 victims.

⁴ See attachment 6 of Brief of Intervenor Air Line Pilots Association, International In Opposition To Gannett Satellite Information Network, Inc.’s Request For Access To Cockpit Voice Recorder Tapes (Docket #606).

IV. DISCLOSURE OF THE FLIGHT 93 CVR TAPE SHOULD BE STAYED PENDING APPEAL.

In the event this Court, upon reconsideration, is still inclined to release the CVR tape to the public, ALPA respectfully requests that this Court stay the release of the CVR tape until after the conclusion of the sentencing phase proceedings so that the opportunity for an appeal from that ruling may be taken. Such a stay will have no negative effect whatsoever on the right of the defendant in this case to a fair trial. Rather, any impact of such a stay would be entirely limited to the collateral issues and the duties imposed upon this Court by the Associated Press ruling. More than four and one-half years have passed since the tragedy of September 11, 2001. If this Court stays the release of the CVR tape pending appeal, the public will not be prejudiced.

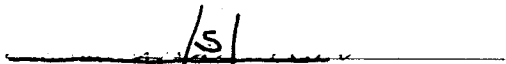
CONCLUSION

The express statutory scheme set forth in 49 U.S.C. § 1154 prohibiting release of the CVR tape is not in conflict with the Fourth Circuit's Associated Press opinion and other precedent. Important countervailing government interests dictate that the federal statute precludes public disclosure of the CVR tape in this case. The public's right to know would be adequately served by the playing of the CVR tape to the jury. In the event that the Court is nonetheless inclined to order disclosure of the CVR tape, ALPA respectfully requests that the Court stay its ruling to allow a reasonable opportunity for additional judicial review. Any right the press has to copy and further disseminate the actual CVR audio recording of Flight 93 will

not be prejudiced by reasonable delay to allow appropriate judicial review of the applicability of 49 U.S.C. § 1154 to that recording.

Respectfully submitted,

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