

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

**UNITED STATES OF AMERICA**

**vs.**

**ZACARIAS MOUSSAOUI,**

**Defendant.**

**THE ASSOCIATED PRESS,  
CABLE NEWS NETWORK LP, LLLP,  
THE HEARST CORPORATION,  
NBC UNIVERSAL, INC.,  
THE NEW YORK TIMES COMPANY,  
WP COMPANY LLC d/b/a  
“THE WASHINGTON POST”,  
USA TODAY and THE REPORTERS  
COMMITTEE FOR FREEDOM OF THE  
PRESS,**

**Movants-**

**Intervenors.**

**Criminal No. 01-455-A**

**MOTION FOR ACCESS TO CERTAIN PORTIONS OF THE RECORD**

Come now Movants-Intervenors the Associated Press, Cable News Network LP, LLLP, The Hearst Corporation, NBC Universal, Inc., The New York Times Company, WP Company LLC d/b/a “The Washington Post”, USA Today and The Reporters Committee for Freedom of the Press (together, the “Media Intervenors”) and, for their motion for access to certain portions of the record, respectfully state:

1. 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 United States government is now seeking to impose the death penalty on Mr. Moussaoui. The sentencing trial in this matter currently is scheduled to begin on March 6, 2006. *See* Docket No. 1374. Trial is expected to last as long as three months.

2. 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.

3. The First Amendment and the common law each guarantee the public a right of access to criminal trials and the record of a criminal prosecution—including transcripts of trial proceedings and documents admitted in evidence. While the public’s rights of access are not absolute, they can be overcome only in extremely limited circumstances, and only upon specific factual findings by the Court. The First Amendment-based right of access, for example, 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.

4. The Media Intervenors recognize that the Court faces a delicate and sometimes difficult task in balancing the interests of the defendant in a fair trial, the government in security, the Court in maintaining the propriety of these proceedings, and the public in having the fullest access possible to the record in the upcoming trial. Nevertheless, for the reasons more fully set forth in the accompanying memorandum, the Media Intervenors respectfully submit that the Court's oral Order on February 14, 2006, which directs that all portions of all transcripts of sidebar conferences during the trial be sealed until after the conclusion of the trial, *see* 02/14/06 Hearing Transcript at 15-16, fails to fully account for the standards governing limitations on the right of access and should be modified. For similar reasons, the Court's February 14 written Order denying all public access to all exhibits admitted in evidence until the conclusion of the entire trial, Docket No. 1539, is both procedurally and substantively at odds with controlling law.

5. Specifically, in neither instance did the public and press have notice of the Court's intention to consider such restrictions on their rights of access, nor did they have any opportunity to be heard on these issues. As a consequence, both orders are procedurally infirm under controlling authority. Furthermore, the orders do not appear to have taken into account the public's interest in and qualified right to *contemporaneous* access to the specific portions of the record at issue, while overlooking available alternatives and less restrictive means of achieving the concededly legitimate ends identified by the Court in its orders. The orders as they currently stand are substantively infirm under both the First Amendment and the common law.

6. Media Intervenors believe that both orders can be reconciled with controlling authority and with the interests identified by the Court. In the case of the sidebar transcripts, for example, the mechanism previously adopted by the Court in this case for dealing with the then-

*pro se* defendant's filings – pursuant to which sidebar transcripts initially would be sealed for a limited period from the date transcripts are delivered to the parties and, unless a party timely and properly moves to maintain under seal some portion of a sidebar transcript, it would automatically be released into the public record at the end of the initial sealing period – would minimize burden on the parties and Court, while maximizing public access to material properly in the public record. Indeed, this mechanism appeared to work well at earlier stages of this case. With respect to exhibits admitted in evidence, similar mechanisms exist that would meet the Court's concerns without impairing the public's rights of access, as more fully explained in the accompanying memorandum.

WHEREFORE, the Media Intervenors respectfully request that the Court enter an order modifying its oral and written orders of February 14, 2006 governing public access to transcripts of sidebar conferences and exhibits admitted in evidence during trial in this action, as such proposed modifications are more specifically described in the accompanying memorandum.<sup>1</sup>

Dated: February 17, 2006

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

By: /s/ Jay Ward Brown  
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<sup>1</sup> Counsel for the Movant-Intervenors has conferred with counsel for the United States and counsel for the defendant to ascertain whether they will consent to this motion. Counsel for the defendant has advised that defendant opposes the relief sought in this motion. At this time, counsel for the Movant-Intervenors does not know what position the United States will take.

ATTORNEYS FOR MOVANTS-INTERVENORS

**CERTIFICATE OF SERVICE**

I hereby certify that, on this 17th day of February 2006, I caused true and correct copies of the foregoing 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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