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**

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

The Associated Press, Cable News Network LP, LLLP, The Hearst Corporation, The New York Times Company, NBC Universal, Inc., WP Company LLC d/b/a "The Washington Post", USA Today and The Reporters Committee for Freedom of the Press (together, the "Media Intervenors") respectfully submit this memorandum in support of their motion for access to certain portions of the record in this proceeding.

BACKGROUND

As the Court is well aware, Zacarias Moussaoui pleaded guilty on April 22, 2005 to six counts of conspiracy in connection with terrorist attacks on the United States on September 11, 2001. The government now seeks to impose the death penalty on him. The sentencing trial in this matter is scheduled to begin on March 6, 2006 and the parties and the Court are engaged in final preparations for that trial. *See* Docket No. 1374. It has been widely reported that trial could last for up to three months.

On February 14, 2006, without notice to or opportunity for interested members of the public to be heard, the Court *sua sponte* issued two Orders prohibiting public access to certain portions of the record at trial. During a pre-trial proceeding, the Court orally directed that all transcripts of bench conferences during trial are to be kept completely under seal until after the trial is completed. *See* 02/14/06 Hearing Transcript at 15-16 (the "Bench Conference Order"). In a written Order issued earlier the same day, the Court directed that "none of the exhibits entered into evidence will be made available for public review until the trial proceedings are completed, at which time requests for these materials will be considered." Docket No. 1539 (the "Trial Exhibit Order") at 3.[1]

ARGUMENT

This criminal proceeding, by its nature, concededly imposes special demands on the Court, the government, and the defense. The Media Intervenors likewise recognize that the Court's obligation, and its principal motive in all of its rulings in this proceeding, is to afford the

[1] Media Intervenors are mindful that the Court indicated in the Trial Exhibit Order that it would not entertain any request for reconsideration of that ruling. Earnestly believing, however, that both Orders present errors of constitutional dimension, the Media Intervenors here respectfully point out what they believe to be the procedural and substantive infirmities common to the two Orders.

defendant a fair trial. There are, however, other compelling interests at stake, including the public's constitutional and common law rights of access to the record of the trial. Neither the Bench Conference Order nor the Trial Exhibit Order comport with controlling procedural and substantive law governing the sealing of the record in a criminal case. The interests that the Court has identified in these orders, however, can be reconciled with the public's rights of access.

I. THE FIRST AMENDMENT REQUIRES THE COURT TO PROVIDE NOTICE AND AN OPPORTUNITY TO BE HEARD *BEFORE* ORDERING THE SEALING OF PORTIONS OF THE RECORD

The two Orders, which seal transcripts of bench conferences and exhibits admitted in evidence, are facially invalid because they do not comport with the constitutional requirement that the public be given notice and opportunity to be heard before such an order is entered. As our Court of Appeals has expressly directed, whenever a district court considers sealing a record:

> First, the district court must give the public adequate notice that the sealing of documents may be ordered.
>
> Second, the district court must provide interested persons "an opportunity to object to the request *before* the court ma[kes] its decision."
>
> Third, if the district court decides to close a hearing or seal documents, "it must state its reasons on the record, supported by specific findings."
>
> Finally, the court must state its reasons for rejecting alternatives to closure.

Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253-54 (4th Cir. 1988) (emphasis added) (alterations in original) (citing and quoting *In re Knight Publ'g Co.*, 743 F.2d 231, 234-35 (4th Cir. 1984)); *accord In re Charlotte Observer*, 882 F.2d 850 (4th Cir. 1989); *Stone v. Univ. of Md.*

Med. Sys. Corp., 855 F.2d 178 (4th Cir. 1988); *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986).[2]

In this case, however, the Court entered both the Bench Conference Order and the Trial Exhibit Order *sua sponte* without notice to the public or opportunity for interested members of the public to be heard. For this reason alone, the Orders are facially invalid and should be revisited by the Court after hearing from the Media Intervenors and other interested members of the public who seek to be heard. *See, e.g.*, *In re Washington Post Co.*, 807 F.2d at 390 (requiring "adequate notice that the closure of a hearing or the sealing of documents may be ordered . . . 'so as to give the public and press an opportunity to intervene and present their objections to the court'") (citation omitted); *Rushford*, 846 F.2d at 253-54; *In re Time Inc.*, 182 F.3d 270, 271 (4th Cir. 1999); *see also In re Knight Publ'g Co.*, 743 F.2d at 235 ("district court's error was in giving too little weight to the presumption favoring access and making its decision to seal the documents without benefit of [media petitioner's] arguments for access").

[2] The Court of Appeals has expressly rejected an argument by the government that these requirements should not apply in situations where it asserts that national security interests are at stake:

> [T]roubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, we are equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present. History teaches us how easily the spectre of a threat to "national security" may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse.

In re Washington Post Co., 807 F.2d at 391-92.

II. THE FIRST AMENDMENT AND THE COMMON LAW AFFORD THE PUBLIC A RIGHT OF *CONTEMPORANEOUS* ACCESS TO THE JUDICIAL RECORDS AT ISSUE THAT IS NOT OVERCOME IN THESE CIRCUMSTANCES

Turning to the substantive standards that govern orders to seal the particular portions of the record here at issue, our Court of Appeals has made clear that the public's First Amendment-based right of access to a judicial proceeding or the record it generates may be denied only where the district court finds "a compelling government interest" in secrecy and where the remedy afforded is "narrowly tailored to serve that interest." *Rushford*, 846 F.2d at 253 (citations omitted). Put differently, access to judicial proceedings and the record therein may be prohibited consistent with the First Amendment "only if (1) closure [or sealing] serves a compelling interest; (2) there is a 'substantial probability' that, in the absence of closure [or sealing], that compelling interest would be harmed; and (3) there are no alternatives to closure [or sealing] that would adequately protect that compelling interest." *In re Washington Post Co.*, 807 F.2d at 392, 393 n.9 (applying standards for closing courtroom to sealing of record).[3]

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

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[3] As the Supreme Court has explained:

> The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Press Enter. Co. v. Superior Court, 464 U.S. 501, 508 (1984). Closed proceedings and records, in contrast, inhibit the "crucial prophylactic aspects of the administration of justice" and lead to distrust of the judicial system if, for example, the outcome is unexpected and the reasons for it are hidden from public view. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980).

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 either the bench conference transcripts or the exhibits admitted in evidence.

A. Denying Public Access To All Transcripts Of All Bench Conferences Until The End Of Trial Is Neither Necessary Nor Narrowly Tailored

The public's rights of access attach to transcripts of bench conferences and sidebar proceedings that initially occur out of public earshot. *See, e.g.*, *United States v. Smith*, 787 F.2d 111, 114-15 (3d Cir. 1986); *In re Capital Cities/ABC, Inc.*, 913 F.2d 89, 94 (3d Cir. 1990); *United States v. King*, 911 F. Supp. 113, 118-20 (S.D.N.Y. 1995), *aff'd on other grounds*, 140

F.3d 76 (2d Cir. 1998).[4] In *Smith*, for example, a media intervenor sought access to, *inter alia*, the transcript of a sidebar conference during which the court had sustained an evidentiary objection. 787 F.2d at 112-13. The Third Circuit noted that, while the public and the press could be excluded from the sidebar itself, "public interest in the ruling is not diminished." *Id.* at 114. A transcript of what transpired must be made available to the public at some point, that court of appeals observed, "so that the purposes of open trials can be satisfied." *Id.* Although declining to decide exactly when such a transcript must be made public, the court held that, because there was no "contemporaneous observation" of the sidebar, "the public interest in observation and comment must be effectuated in the next best possible manner." *Id.* at 114-15 (affirming district court's order to release transcript).

Indeed, our Court of Appeals has instructed more generally that even a "minimal delay" in making judicial records public "unduly minimizes, if it does not entirely overlook, the value of 'openness' itself, a value which is threatened whenever *immediate* access to ongoing proceedings is denied, whatever provision is made for later public disclosure." *In re Charlotte Observer*, 882 F.2d at 856 (emphasis added); *see also id.* (it is a "misapprehension and undervaluation of the core first amendment value at stake" to even briefly postpone public access to judicial records). This is all the more so, where, as in the case of the Bench Conference Order at issue here, access is prohibited until after a trial has concluded. *See In re Application and Affidavit for a Search Warrant*, 807 F.2d 324, 331 (4th Cir. 1991) (rejecting suggestion to withhold judicial record from public inspection until after trial is over).

[4] Some earlier decisions had suggested that protection of the privacy of bench conferences was within the trial court's discretion. *See In re Tribune Co.*, 784 F.2d 1518, 1521 (11th Cir. 1986); *United States v. Gurney*, 558 F.2d 1202, 1210 (5th Cir. 1977).

To be sure, the public's common law right of access can be overcome if "countervailing interests heavily outweigh the public interests in access." *Rushford*, 846 F.2d at 253. And there may be legitimate reasons – such as the protection of material the public release of which would threaten the national security – why some transcripts of bench conferences, or portions of them, properly could be withheld from the public during the course of this trial. But a blanket sealing order, entered without reference to the particulars of the specific transcripts at issue, cannot overcome the public's common law right of access, much less meet the more stringent requirements for overcoming the public's First Amendment-based right of access. Indeed, the Bench Conference Order fails to cite any evidence tending to establish that there is a "substantial probability" that public access to the transcripts in question would harm any sufficiently weighty countervailing interest, whether the defendant's right to a fair trial, the government's right to protect classified material, or otherwise. *See, e.g.*, *In re Washington Post Co.*, 807 F.2d at 392, 393 n.9. And, certainly, the Bench Conference Order does not address alternatives that could – and would – ameliorate any perceived threats to countervailing interests without wholly preempting the public's access rights. In short, the Bench Conference Order is silent on precisely the points on which the Court of Appeals has required district courts to make express findings based on specific evidence before entering such an order. *See id.*[5]

Without conceding that the right to "contemporaneous" access means less than the term implies, in the particular circumstances of this case, the Media Intervenors propose that a way to balance the competing interests at stake has already been identified and employed by this Court

[5] Even those district courts that have entered orders sealing transcripts of bench conferences have done so only after consideration of the relevant factors. *See In re Washington Post Co.*, 576 F. Supp. 76, 79-80 (D.D.C. 1983) (in light of short duration of trial, sealing bench conference transcripts until after verdict found to be "the least restrictive alternative"); *In re Daily News*, 787 F. Supp. 319, 326-27 (E.D.N.Y. 1992) (sealing transcripts of bench conferences where they did not address any substantive or evidentiary issues).

in this case in similar circumstances. In particular, in connection with the then-*pro se* defendant's pleadings, the Court implemented a mechanism whereby all of his pleadings were initially filed under seal for a limited period and, unless on motion or otherwise the Court entered an order that the documents be maintained under seal prior to the expiration of that period, the pleadings automatically were placed in the public record. *See* Docket No. 579. Media Intervenors are unaware of any reason why this mechanism would not serve equally well with respect to transcripts of bench conferences during trial: Bench conference transcripts would initially be sealed for a brief period from the date a transcript is delivered to the parties and, unless a party timely and properly moves to maintain under seal all or some portion of a bench conference transcript, it would automatically be released into the public record at the end of the initial sealing period. This would minimize burden on the parties and Court, while honoring the public's right of access to material that, at least in some instances, can be expected to go to the heart of the public's perception of the fair administration of justice in this case. If the "public interest in observation and comment" on trial proceedings is to be "effectuated in the next best possible manner," *Smith*, 787 F.2d at 114-15, such a mechanism is both appropriately narrower and affords far more contemporaneous access than the blanket sealing of all such transcripts until after completion of the trial.

B. Denial Of All Public Access To All Exhibits Received In Evidence Is Likewise Neither Necessary Nor Narrowly Tailored

The Trial Exhibit Order suffers from the same infirmities as the Bench Conference Order. Our Court of Appeals and other courts have recognized that a "First Amendment right of access applies to a criminal trial, including documents submitted in the course of a trial." *In re Time Inc.*, 182 F.3d at 271; *see also United States v. Peters*, 754 F.2d 753, 763 (7th Cir. 1985). The common law right of access, including the right to make copies, similarly extends to trial

exhibits. *See, e.g.*, *Valley Broad. Co. v. District Court*, 798 F.2d 1289, 1293-94 (9th Cir. 1986) (recognizing "strong presumption in favor of copying access" to trial exhibits); *United States v. Criden*, 648 F.2d 814, 823 (3d Cir. 1981); *United States v. Myers*, 635 F.2d 945, 952 (2d Cir. 1980); *In re American Broad. Cos.*, 537 F. Supp. 1168, 1170 (D.D.C. 1982).

Vindication of this right requires that the public be provided *contemporaneous* access to trial exhibits, except in the "most compelling circumstances." *United States v. Myers*, 635 F.2d at 952 (affirming district court's order permitting media intervenors to copy videotapes admitted into evidence at the end of every day or half-day of trial); *see also In re Charlotte Observer*, 882 F.2d at 856 (even minimal delay in making judicial records public compromises right of access, regardless of whether subsequent public disclosure is made); *In re Application & Affidavit for a Search Warrant*, 807 F.2d at 331 (same). Indeed, with respect to trial exhibits in particular, "there is a significant public interest in affording that opportunity [for public access] contemporaneous with the introduction of [an exhibit] into evidence in the courtroom, when public attention is alerted to the ongoing trial" and the interests served by public access are most likely to be effectuated. *United States v. Myers*, 635 F.2d at 952; *see also United States v. Sampson*, 297 F. Supp. 2d 342, 346 (D. Mass. 2003) (broadcast, during trial, of recordings admitted into evidence "may make the jury's eventual verdict more understandable, and therefore more legitimate, to the public").

As a result, courts routinely afford contemporaneous access to criminal trial exhibits. *See, e.g.*, *Valley Broad. Co.*, 798 F.2d at 1297 (granting media access to exhibits on day received in evidence); *United States v. Pelton*, 696 F. Supp. 156, 160 (D. Md. 1986) (ordering government to provide copies of transcripts "on the day the tapes are played to the jury"); *United States v. Hernandez*, 124 F. Supp. 2d 698, 706 (S.D. Fla. 2000) (ordering parties to furnish copy of each

exhibit to media at end of each day of trial); *United States v. Abegg*, 21 Media L. Rep. (BNA) 1442, 1444 (S.D. Fla. 1993) (ordering parties to make copies of videotapes "available at the proceeding in which they are offered so that those copies can be released to [the media intervenor] immediately after the tapes are introduced in evidence"); *United States v. Torres*, 602 F. Supp. 1458, 1460 (N.D. Ill. 1985) (granting media intervenor's motion for order permitting them to copy "all the audio and videotapes admitted in evidence, promptly after such tapes are presented to the jury . . . but in no event later than the conclusion of the half-day court session at which the tapes are played"); *United States v. Mouzin*, 559 F. Supp. 463, 468 (C.D. Cal. 1983) (granting media intervenor's application to copy video and audio tapes during trial).

The right of access that will attach to exhibits received in evidence at the sentencing trial is not overcome in this case. By delaying public access to the exhibits until, at a minimum, the completion of a months-long trial, the Trial Exhibit Order effectively seals them for at least that period.[6] However, only "the most extraordinary circumstances" can overcome the right of contemporaneous access to evidence that has been introduced at trial. *United States v. Myers*, 635 F.2d at 952. In *In re Nat'l Broad. Co.*, the court noted five factors that a district court should weigh when considering whether to grant an application for access to trial exhibits:

1. It "weighs heavily in favor of the application" for access if the exhibits are "admitted into evidence." 653 F.2d at 614. "The general rule is that '(a) trial is a public event,' and '(w)hat transpires in the court room is public property.'" *Id.* (footnote and citation omitted). Here, the order in question expressly applies to exhibits after their receipt in evidence.

[6] The Order does not provide that the exhibits will be unsealed even after trial, instead only directing that requests for the exhibits "will be considered" at that time. *See* Trial Exhibit Order at 3. But this, too, is contrary to the right of access: The burden is properly placed on those seeking to keep documents under seal to justify such a sealing order, not on the public to obtain access to materials presumptively open to inspection by all. *See, e.g.*, *Rushford*, 846 F.2d at 253; *Boone v. City of Suffolk*, 79 F. Supp. 2d 603, 606 (E.D. Va. 1999).

2. Whether the exhibits will be "seen and heard by those members of the press and public who attended the trial. Our cases have recognized that such previous access is a factor which lends support to subsequent access." *Id.* (footnote omitted); *see also, e.g.*, *United States v. Myers*, 635 F.2d at 952. While it appears that not all of each exhibit will necessarily be read or displayed in open court, it appears that portions of each exhibit will be, or that the exhibit will be the subject of testimony in open court.

3. Whether the exhibits contain only admissible evidence, are introduced for the purpose of proving the matter at issue, and are relied on by the jury. *See In re Nat'l Broad. Co*., 653 F.2d at 614. In such circumstances, "releasing [the exhibits] will promote the integrity of the judicial process, for such will open at least part of the proceedings to those members of the public who could not attend the trial." *Id.*; *see also, e.g.*, *United States v. Criden*, 648 F.2d at 822 ("the value of public supervision and inspection of courtroom proceedings, and the public's interest in learning of important matters . . . favor broad dissemination of the actual evidence introduced in judicial proceedings" and such values "can be fully vindicated only if the opportunity for personal observation is extended to persons other than those few who can manage to attend the trial in person"). The order in question expressly applies to exhibits, the entire contents of which will be made available to the jury at the latest during its deliberations.

4. "[T]he nature of the trial itself is a factor which provides strong support for the application" for access, particularly when the case "involves issues of major public importance." *In re Nat'l Broad. Co.*, 653 F.2d at 614; *see also F.T.C. v. Standard Fin. Mgmt Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) ("The appropriateness of making court files accessible is accentuated in cases where the government is a party: in such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch."). This factor plainly weighs heavily in favor of access here.

5. Where the exhibits "are fully encompassed by the presumption in favor of access to judicial records." *In re Nat'l Broad. Co.*, 653 F.2d at 614. Exhibits introduced in open court and admitted in evidence in this proceeding are presumptively available to the public as judicial records, as the above-cited authorities make plain.

Moreover, the reasons provided by the Court do not justify overriding the public's right of *contemporaneous* access to the trial exhibits. When copying of trial exhibits would not risk impairing the integrity of the evidence, "only the most compelling circumstances should prevent contemporaneous public access to it." *United States v. Myers*, 635 F.2d at 952; *see also Valley*

Broad. Co., 798 F.2d at 1293-94 (recognizing a "strong presumption" in favor of contemporaneous access to trial exhibits). In these and other cases, courts have considered rationales similar to those articulated in the Trial Exhibit Order, and held that the presumptive right to access was not overcome.

The concern that publication of the exhibits "could improperly taint the jury" has been rejected in circumstances similar to these. In high-profile cases such as this one, courts routinely instruct jurors not to read, watch, or listen to any media coverage of the trial. In the absence of any actual evidence to the contrary, courts are to rely on the presumption that jurors will obey this instruction in determining whether they will be exposed to media coverage. In *United States v. Myers*, for example, the media intervenors sought contemporaneous access to audio and videotapes introduced as evidence in one of the ABSCAM public corruption trials. Affirming the trial court's decision to release copies of the tapes at the end of every court session at which these exhibits were introduced into evidence, the Second Circuit rejected the defendant's assertion that providing access to the recordings at the end of every day or half-day of trial threatened the defendant's right to a fair trial. "The jury had already seen and heard the tapes, and [the district court judge] was entitled to rely on the jury's observance of his admonition to avoid exposure to reports of the trial in the news media." *United States v. Myers*, 635 F.2d at 953; *accord United States v. Mouzin*, 559 F. Supp. at 467. Moreover, the right of contemporaneous public access cannot be overcome by a "purely conjectural" concern that jurors might disobey the court and watch or read news reports about the trial. *Valley Broad. Co.*, 798 F.2d at 1297 (mere "speculat[ion] that jurors might not only violate their oaths but be incrementally prejudiced by the tapes themselves" is not sufficient to overcome the right of access); *see also United States v. Sampson*, 297 F. Supp. 2d at 347 (no evidence that jurors who

had been instructed not to read, watch, or listen to anything about the case in the media are disobeying instruction). Indeed, "confidence that jurors will obey instructions of the court is an underpinning of our criminal justice system." *United States v. Mouzin*, 559 F. Supp. at 467.

Even if jurors are exposed to news coverage of the trial that mentions or describes the exhibits, it does not necessarily follow that they will be "tainted" or otherwise affected. This is not a case involving evidence suppressed by the Court—in these circumstances, what is at issue is material admitted in evidence and jurors will either have already seen it or will see it during deliberations. *See United States v. Myers*, 635 F.2d at 953; *United States v. Sampson*, 297 F. Supp. 2d at 347. As a result, there is no reason to believe that exposure to any such media coverage would pose "a significant risk to a fair trial." *United States v. Myers*, 635 F.2d at 953. Furthermore, whether the exhibits are public or not does not control whether a juror will be tainted by viewing news coverage of the trial. A "curious juror who disobeys his oath by watching a televised report on the trial will be contaminated whether or not the report airs footage from the tapes in evidence." *Valley Broad. Co.*, 798 F.2d at 1297. Moreover, the Court presumably will instruct the jury – regardless of whether any of them have been exposed to news coverage of the trial – that only their own assessment of the evidence is controlling. Even if exposure to "commentary" on the exhibits occurred, therefore, it "would not necessarily pose a significant risk to a fair trial." *United States v. Mouzin*, 559 F. Supp. at 467. In short, there is no reason to believe – and certainly no evidence to support a finding sufficient to override the First Amendment right of access – that providing the public contemporaneous access to the exhibits threatens due process rights. The Trial Exhibit Order simply does not address these factors, and does not cite any evidence to support the stated conclusions.

Nor are the administrative concerns identified in the Trial Exhibit Order sufficient to sustain it. The Media Intervenors recognize that this proceeding imposes heavy demands on the Court, the government, and the defense. Nevertheless, the administrative burden of allowing access and opportunity to copy trial exhibits repeatedly has been rejected as insufficient to overcome the right of contemporaneous public access. *See, e.g.*, *Valley Broad. Co.*, 798 F.2d at 1295 (district court "should have given little, if any, weight to its administrative burdens in this case"); *United States v. Myers*, 635 F.2d at 945 ("When physical evidence is in a form that permits inspection and copying without any significant risk of impairing the integrity of the evidence or interfering with the orderly conduct of the trial, only the most compelling circumstances should prevent contemporaneous public access to it.") (footnote omitted). At a minimum, the Trial Exhibit Order does not reflect any basis for concluding that a blanket denial of access to each and every trial exhibit is justified on grounds of administrative convenience.

Other courts in similar circumstances have established procedures that accommodate the competing interests, maximizing public access to exhibits while minimizing as much as practicable the administrative burden. For example, some courts have arranged for copies to be made by the court itself, or have given the media access to the exhibits and allowed them to make copies. *See United States v. Sampson*, 297 F. Supp. 2d at 348 (ordering court staff to make copies); *Valley Broad. Co. v. District Court*, 798 F.2d at 1297 (granting media access to exhibits on the day they are received in evidence). Many, however, have ordered the parties to make the exhibits available to the media at the end of each day or session of trial. For example, in *United States v. Hernandez*, the court required each party to provide to the press a single reproduction of each documentary exhibit, which the press could copy at its own expense, and to make all non-documentary evidence available for viewing, photographing, or videotaping. 124 F. Supp. 2d at

706; s*ee also United States v. Pelton*, 696 F. Supp. at 160 (ordering government to provide copies of transcripts, with classified information redacted); *United States v. Abegg*, 21 Media L. Rep. (BNA) at 1444 (ordering parties to make copies of videotapes available).

In this case, in the absence of specific evidentiary findings sufficient to overcome the public's First Amendment right of access (which would require a finding that there is a "serious probability" of harm to a compelling interest unless public access to the exhibits is prohibited and that *no other less restrictive means* would ameliorate that harm), the Media Intervenors submit that the appropriate course under controlling law is to require that, preferably at the lunch break and at end of the day, but at a minimum at the end of each trial day, the parties provide to a news media "pool" representative a single copy of each documentary exhibit admitted into evidence (either by physically handing the exhibits to the representative, by delivering them to a designated location, or by disseminating them electronically). The "pool" representative will be responsible for arranging for copies for other interested members of the public and press. The media will be responsible for all copying expenses. Arrangements for access to non-documentary exhibits can be addressed if and when the need for access arises. This process will avoid burdening the courtroom deputy, and will eliminate the risk that any original exhibits are compromised. As for exhibits that contain classified information, or are declassified only for the limited purpose of being discussed in court, the party that introduces the exhibit should provide a single redacted copy. Concededly, the parties will bear some slight additional administrative burden, but it is entirely appropriate for a party seeking to introduce evidence that must be kept under seal to bear that burden. *See* n.6 *supra*.

At bottom, the serious issues raised in the Court's two orders deserve serious attention, but those issues can properly be addressed without the blanket prohibition on public access those orders now impose.

CONCLUSION

For the foregoing reasons, the Media Intervenors respectfully request that this Court enter an order governing public access to transcripts of bench conferences and exhibits received in evidence during trial in accordance with the foregoing.

Dated: February 17, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of February 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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