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

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSSAOUI,	)	
	)	
Defendant,	)	
	)	
ABC, Inc., *et al.*,	)	
	)	
Intervenors.	)	

RESPONSE OF THE UNITED STATES TO INTERVENORS'
MOTION FOR ACCESS TO CERTAIN PORTIONS OF THE RECORD

The United States respectfully submits this response to the media intervenors' motion for access to certain portions of the record. The motion seeks access to two classes of documents: (1) pleadings filed by the defendant *pro se* since September 27, 2002, that the government did not object to unsealing within ten days of filing; and (2) all other pleadings filed since September 27, 2002, that remain sealed. The motion should be granted in part and denied in part.

A. The First Amendment and Common Law Qualified Right of Access

Contrary to the representations of the media intervenors, in this Circuit there is no First Amendment right of access to the entire record in a criminal case. Intervenors' Mem. at 5. While the common law presumption in favor of access attaches to all "judicial records and documents," *see Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978), the First Amendment's heightened guarantee of access has been extended only to particular judicial records and documents, *see Stone v. University of Maryland*, 855 F.2d 178, 180-81 (4th Cir. 1988) (recognizing First Amendment

considerations have been applied to documents filed regarding summary judgment, plea hearings, and sentencing hearings). For example, in *Seattle Times v. Rhinehart*, 467 U.S. 20, 37 (1984), the Supreme Court held that the First Amendment does not prevent a court from entering a protective order limiting disclosure of information obtained in pretrial discovery. As the Fourth Circuit has noted, the First Amendment right of access has been applied to some pre-trial proceedings in criminal cases, including "preliminary hearings to determine whether there is probable cause to go to trial" and "hearings concerning the suppression of evidence" and the documents and pleadings associated with such hearings. *In re Washington Post*, 807 F.2d 383, 388-89, 390 (4th Cir. 1986). This case does not involve those types of "dispositive" pre-trial motions.

Because the First Amendment and the common law provide different levels of protection, it is necessary for this Court to determine the source of the public's right of access before the intervenors' claim to a particular document may be evaluated. *Id.*; *see also Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988). Under the common law, a court may seal judicial documents if competing interests outweigh the public's common law right of access. *Nixon*, 435 U.S. at 598-99, 602-03; *In re Knight Publishing Co.*, 743 F.2d 231, 235 (4th Cir. 1984). "The party seeking to overcome the presumption [of access] bears the burden of showing *some significant interest* that outweighs the presumption." *Rushford*, 846 F.2d at 253 (emphasis added). This Court's balancing of those interests is reviewable only for an abuse of discretion. *Nixon*, 435 U.S. at 599; *Stone*, 855 F.2d at 180. Unlike the common law right, the First Amendment guarantee of access attaches only if: (1) "the place and process have historically been open to the press and general public"; and (2) "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-9 (1986) ("*Press-*

Enterprise II"); *see also Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989). The First Amendment guarantee of access, however, provides much greater protection than the common law right because "it must be shown that the denial [of access] is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982); *see also Stone*, 855 F.2d at 180. The media intervenors have not cited, and the government is not aware of, any case in which a court has concluded that a First Amendment right of access applies to most of the pleadings to which the media intervenors seek access.

As the Fourth Circuit has explained, regardless of whether the asserted right of access is grounded in the First Amendment or the common law, "the district court must give the public adequate notice that the closure of a hearing or the sealing of documents may be ordered" by docketing such motions "reasonably in advance of their disposition so as to give the public and press an opportunity to intervene and present their objections to the court." *In re Washington Post Co.*, 807 F.3d 383, 390 (4th Cir. 1986). "Second, the district court must provide interested persons 'an opportunity to object to the request before the court ma[kes] its decision.'" *Id.* (quoting *In re Knight Publishing*, 743 F.2d 231, 235 (4th Cir. 1984)). "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'" that are "specific enough to enable the reviewing court to determine whether closure was proper." *Id.* at 391 (quoting *Knight Publishing*, 743 F.2d at 234). "In addition, the court must state its reasons for rejecting alternatives to closure." *Id.* "[I]f the court concludes that a denial of public access is warranted, the court may file its statement of the reasons for its decision under seal." *Id.*

B. Defendant's *Pro Se* Pleadings

The media intervenors identified twelve pleadings by docket number that they believe should be unsealed: 632, 633, 672, 675, 689, 694, 706, 768, 772, 794, 796 and 803. It does not appear that the media intervenors raise a procedural challenge to the sealing of these pleadings pursuant to this Court's September 27, 2002 order. As a result of that order and the litigation that led to it, the media intervenors have had notice that the defendant's *pro se* pleadings would be filed under seal, and they have had an opportunity to object to the sealing of those pleadings.[1] Instead, the intervenors argue that certain pleadings subject to that order should not have remained sealed, redacted copies should have been released, or an order should have been entered explaining why the pleading must remain under seal after the expiration of the 10-day review period provided for in the Court's order. The listed pleadings fall into different categories and are addressed individually below.

1. Three Listed Pleadings Have Been Unsealed

As to three of those pleadings – 794, 796 and 803 – the ten days provided for review of the defendant's *pro se* pleadings in this Court's September 27, 2002 order had not yet expired when the media intervenors filed their motion. All three pleadings have since been unsealed, and thus the media intervenors' motion is moot as to those pleadings.

2. Two Listed Pleadings Were Filed by the Defendant *Ex Parte*

Two of the pleadings sought by the media intervenors – 689 and 768 – were filed *ex parte*, apparently by the *pro se* defendant, and the government does not have copies of those pleadings. The United States joins standby counsel (No. 831) in requesting the unsealing of docket numbers

[1] This is particularly true in this case because the court created an Internet site for the docket of this case that identifies all documents filed under seal on the day they are filed.

689 and 768. Any classified information or documents and any particularly sensitive discovery material, of course, should be redacted before release. Additionally, the United States should be provided with copies of the documents before release to review and propose appropriate redactions consistent with this Court's September 27, 2002 Order.

3. Two Listed Pleadings are not *Pro Se* and are Classified

The media also seeks access to listed pleadings that are neither *pro se* nor subject to this Court's September 27, 2002 order, contrary to the media intervenors' representations. Docket numbers 632 and 706 are the defendant's fourth and fifth supplemental CIPA Section 5 designations, and they are classified. Section 5 of CIPA, the Classified Information Procedures Act, requires a defendant to notify the United States and the court if the defendant reasonably expects to disclose or cause the disclosure of classified information in connection a pre-trial proceeding or at trial. 18 U.S.C. app. III, § 5. Such notice "shall include a brief description of the classified information." *Id.* For the reasons set out in detail below, media access to classified documents is not permissible under this Court's protective order and CIPA, and access is not required under the First Amendment or the common law right of access in the circumstances of this case. Accordingly, the motion should be denied with respect to these classified documents.

4. The Other Five Listed Pleadings Should Be Unsealed with Redactions

The government has reviewed the pleadings assigned docket numbers 633, 672, 675, 694 and 772. It does not appear that these pleadings have remained sealed on motion of the United States. In any event, the government believes that all five pleadings may be unsealed with appropriate redactions. The proposed redactions will be submitted to the Court pursuant to the September 27, 2002 Order no later than noon on April 23, 2003. Additionally, the government

believes that certain orders relating to those motions – orders to which the media intervenors have not sought access – should be unsealed. Specifically, the orders assigned docket numbers 673, 676, 773 and 777 should be unsealed. The government also agrees that its response to No. 773, which was assigned docket number 775 and which the media intervenors identified as a pleading to which they sought access in the attached Exhibit A, should now be unsealed.

C. Other Motions, Responses, Memoranda, Transcripts and Documents Filed Under Seal

The media intervenors also seek access to all other sealed pleadings filed since September 27, 2002, that remain sealed or, in the alternative, a "written order in the public record" in which this Court identifies its findings and conclusions that support the court's decision to keep those documents under seal. Mem. at 12. Although the media intervenors did not specify the documents to which their motion related, they have since provided the government with a portion of the docket sheet marked to identify those documents (attached as Exhibit A). The list of documents to which the media intervenors seek access includes both classified and unclassified documents that fall into a wide variety of categories. The various documents are addressed, where possible, as groups of related documents below.

1. Documents Not Under Seal

The media intervenors identified the documents assigned docket numbers 740 and 741 as documents to which they have been denied access. *See* Ex. A. This Court, however, ordered those documents unsealed the day they were filed, and they are available on the Court's public website. The motion as to these two documents, therefore, is moot.

2. Unclassified Pleadings Regarding Court-Ordered Trial Depositions

Fifteen unclassified pleadings relate to court-ordered depositions to preserve testimony for use at trial and standby counsel's attempt to subpoena the CIA for information that they argued was relevant to those depositions. The government believes that ten of those pleadings could be unsealed immediately and that three additional pleadings should be unsealed after consultation with a foreign government. Specifically, the government does not oppose the unsealing of the pleadings assigned docket numbers 614, 620, 631, 657, 664, 679, 692, 759, 776, and 780.

The remaining pleadings that relate to this subject and to which the intervenors' now seek access – Nos. 608, 629, 630, 636 and 760 – should not be unsealed at this time. Nonetheless, the United States believes that the pleadings assigned docket numbers 608, 629, and 636 could be unsealed in the near future after consultation with a foreign government. Premature release without consultation will directly impact the foreign relations of the United States and jeopardize the ability of the United States to work with other nations in its investigation and pursuit of *al Qaeda* operatives outside of the United States. For the reasons stated in more detail below, assuming without conceding that there is a First Amendment right to these documents, maintaining the foreign relations and protecting the national security on the United States are plainly compelling government interests, and sealing these three documents for a limited period to permit consultation with a foreign government is narrowly tailored to serve that interest. The United States will move to unseal these documents or provide the Court with an *ex parte* and under seal progress report regarding these documents on or before May 5, 2003.

As set forth in the public docket, the pleadings assigned docket numbers 630 and 636 are both *ex parte* documents filed by the United States under seal. Even assuming the existence of a

First Amendment right of access to documents relating to pre-trial discovery in a criminal case (which, as explained below, does not in fact exist),[2] maintaining No. 630 and No. 760 under seal serves a compelling government interest and is narrowly tailored. Specifically, the documents disclose confidential, sensitive details regarding the foreign relations of the United States. The contents of the documents, if made public, could damage not only the relations between the United States and another country but would threaten the ability of the United States government to secure the assistance of their counterparts in other countries in the global war on terrorism. These facts are obvious from the face of the documents themselves. Redaction of these documents would not be sufficient to adequately serve what even the intervenors would concede is a compelling governmental interest because the entire documents relate only to the single, sensitive subjects. Retaining under seal five documents out of fifteen – and three of those for a limited additional period of time – to serve a compelling government interest is, by any definition, "narrowly tailored" to serve that interest, and thus sealing the documents is permissible under either the First Amendment or the qualified right of public access to judicial records.

3. *Ex Parte* Filings by Standby Counsel

Several of the pleadings to which the media intervenors seek access are not documents to which the United States has had access. Specifically, the United States agrees with standby counsel (No. 831) that the pleadings assigned docket numbers 607, 668, 677, 685, and 686 should be unsealed. Any classified information or documents and any particularly sensitive discovery material,

[2] While a common-law right of public access to judicial records exists, the First Amendment right of access provides a stronger presumption in favor of access than the common-law right. *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988). Accordingly, if denial of public access is consistent with the First Amendment, there is no need to analyze the issues separately under the common law.

of course, should be redacted before release.

4. The Government's Response to a Discovery Request by the *Pro Se* Defendant

The pleading assigned docket number 650 is the government's response to the *pro se* defendant's request for a copy of a video tape recording of a report broadcast on a foreign television station. The response was filed under seal because the defendant's motion (No. 613) at the time was under seal. This Court has unsealed the motion, and thus the government's response should also be unsealed.

5. Classified Documents for Which an Unclassified, Redacted Version Exists

Four of the documents to which the media intervenors seek access – Nos. 585, 688, 715, and 724 – are classified, but unclassified, redacted versions of the documents have been prepared. The government does not oppose release of the unclassified, redacted versions of those pleadings, although No. 715 requires certain additional redactions before it can be released. The government will submit proposed redacted copies of these documents to the Court for its consideration. For the reasons stated in detail below, the underlying classified documents should remain sealed.

6. Classified Documents and Information

Many of the other pleadings to which the media intervenors seek access involve classified documents or information. These documents are properly sealed, whether the purported right of access to them is derived from the First Amendment or the common law. Moreover, this Court satisfied the procedural requirements for sealing these documents when it adopted, on the government's motion, the CIPA protective order in place in this matter.

a. The Procedural Requirements Regarding Sealing

As explained above, this Court must first give adequate public notice that the sealing of

documents may be ordered and then provide interested persons with the opportunity to object to the sealing. *Rushford*, 846 F.2d at 253-54. If the court decides to seal documents, it must state its reasons on the record and make specific findings in support of its decision to seal and to reject alternatives to sealing. *Id.* at 254.

Although the media intervenors state that "it appears from the docket that numerous other pleadings remain sealed, *without notice and an opportunity for the press and public to be heard as to their sealing*," Mem. at 2 (emphasis added), it is clear that this claim does not relate to the classified documents to which they now seek access. On January 18, 2002 – more than fifteen months ago – the United States sought a protective order pursuant to, *inter alia*, Section 3 of the Classified Information Procedures Act. On page one of the motion for a protective order, which was not filed under seal, the government stated that its purpose was to prevent the unauthorized disclosure of classified information. The government stated that it anticipates that a significant amount of classified material may be discoverable in this case and that review of those materials would require Top Secret security clearances. Motion at 9. The designation Top Secret is, by definition, applied only to information "the unauthorized disclosure of which reasonably expected to cause *exceptionally grave damage* to the national security that the original classification authority is able to describe." *Id.* at 9-10 n.4 (quoting Executive Order 12958 § 1.3(a)(1), 60 F.R. 19825 (1995) (emphasis added)). The designation Secret is applied to information "the unauthorized disclosure of which reasonably could be expected to cause *serious damage* to the national security that the original classification authority is able to identify or describe." *Id.* (quoting Executive Order 12958 § 1.3(a)(2) (emphasis added). The motion also detailed the nature of the terrorist organization *al Qaeda*, its efforts to avoid the detection and capture of its members, and the continuing

investigation of *al Qaeda*. *Id.* at 2-8. Accordingly, the government asked the court to issue a protective order providing for the filing of classified documents with this Court under seal.

This Court entered the proposed protective order on January 22, 2002, finding that "this case will involve classified national security information, the storage, handling and control of which requires special security precautions, and access to which requires a security clearance and a "need to know." Order at 1-2. The order recognized that all classified documents – such as the pleadings the media intervenors seek access to – remain classified unless they bear a clear indication that they have been declassified by the original classifying authority. *Id.* at 4. The order limits access to classified documents and materials to individuals with the necessary security clearance and a need to know the specific classified information to which he or she seeks access. *Id.* at 6. The order further provided that "any pleading or other document filed by the defense shall be filed under seal with the Court through the Court Security Officer," who, in consultation with the appropriate government agencies, determines "whether the pleading or document contains classified information." *Id.* at 9. If it does, then the document is marked with the appropriate classification markings and maintained under seal. *Id.* at 9-10. If it does not, then the document or pleading is immediately unsealed and "placed in the public record." *Id.* at 10. Similarly, "[a]ny pleading or other document filed by the government containing classified information shall be filed under seal . . . ." *Id.* Finally, the Court advised persons subject to the order that the "direct or indirect unauthorized disclosure, retention, or negligent handling of classified documents or information could cause serious damage, and in some cases exceptionally grave damage, to the national security of the United States or may be used to the advantage of a foreign nation against the interests of the United States." *Id.* at 15.

The government's motion for a protective order and the protective order satisfy the requirements of Fourth Circuit case law regarding the sealing of documents. The claim that "no motion to seal any of these . . . pleadings was filed or heard" and thus "their continued sealing is facially invalid," Mem. at 10, is without any legal or factual basis as applied to the classified documents sought by the media intervenors. Moreover, the media intervenors did not then and do not now challenge the protective order regarding classified information, nor have they challenged the constitutionality of CIPA, which expressly provides for filing classified documents under seal and closed pre-trial hearings with respect to criminal cases involving classified information. These failures are alone a sufficient reason to deny the motion for access with respect to classified documents because the motion for access is, with respect to those documents, based on wholly inaccurate assumptions. But even if the media intervenors had objected to the protective order, this Court would properly have entered the order because this case "involves special circumstances warranting particular control over the flow of classified information" in order to protect the national security, *United States v. Bin Laden*, 58 F. Supp. 2d 113, 121 (S.D.N.Y. 1999), a compelling interest that the protective order is narrowly tailored to serve.

b. The Sealing of Classified Documents Pursuant to the Classified Information Procedures Act is Narrowly Tailored to Serve the Government's Compelling Interest in Preventing the Disclosure of Classified Information

Access to classified documents is restricted under federal law and protected from premature disclosure in a judicial proceeding under CIPA. Specifically, the classified documents that the media intervenors seek access to are the pleadings assigned docket numbers 580, 589, 601, 617, 628, 637, 661, 667, 681, 683, 700, 701, 710, 717, 719, 720, 730, 734, 736, 738, 742, 743, 744, 755, 758, 778,

787, and 788, and they should remain under seal.

CIPA "ensures that questions of admissibility will be resolved under controlled circumstances calculated to protect against premature and unnecessary disclosure of classified information." *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1364 (11th Cir. 1994). Under the security procedures established by the Chief Justice of the United States for the protection of classified information, pleadings relating to classified information must be stored in "a safe or safe-type steel container with built-in, dial-type, three position, changeable combinations which conform to the General Services Administration standards for security containers." Access to the classified documents in this case is limited to people with a "need to know" and the requisite security clearance. January 22, 2002 Protective Order ¶¶ 11, 13.

Neither the defendant nor this Court is authorized to disclose classified information *before trial* over the objection of the United States, 18 U.S.C. app. III, §§ 3, 5, 6 (CIPA), and whether to designate information as classified is a matter committed to the executive branch, *United States v. Smith*, 750 F.2d 1215, 1217-18 (4th Cir. 1984), *rev'd on other grounds on reh'g*, 780 F.2d 1102 (4th Cir. 1985) (*en banc*). Even if this Court determines that the defendant has the right to introduce classified information at trial over the objection of the United States, the Attorney General can object to and, thereby, prevent release of the classified information. CIPA § 6(e)(1). The defendant's remedy is not disclosure of the classified information but dismissal of the indictment or other measures provided by Section 6(e)(2). *United States v. Fernandez*, 913 F.2d 148, 162-64 (4th Cir. 1990).

With respect to the media's access to classified information, there simply is no First Amendment right of access to classified documents or classified pleadings. *United States v. Ressam*,

221 F. Supp. 2d 1252, 1258-62 (W.D. Wash. 2002). Indeed, in a criminal case that involves no classified information, few, if any, of the filings at issue would even have been filed. In other words, the pre-trial proceedings governed by CIPA have no historical basis, and thus there is not tradition of open CIPA proceedings. To the contrary, Congress struck the balance against openness in a CIPA proceeding when created CIPA proceedings, deciding that open proceedings under CIPA would not serve any important interest and that such proceedings are necessary to protect the government from the problem of "graymail." As the Fourth Circuit has explained, "CIPA was enacted by Congress in an effort to combat the growing problem of graymail, a practice whereby a criminal defendant threatens to reveal classified information during the course of his trial in the hope of forcing the government to drop the criminal charge against him." *United States v. Smith*, 780 F.2d 1102, 1105 (4th Cir. 1985). Public access to CIPA pleadings and hearings obviously could not play "a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8-9 (1986). In other words, nothing in the First Amendment case law cited by the intervenors requires this Court to allow the media access to classified information well in advance of trial, thereby completely undermining the purpose of CIPA and the government's ability to try international terrorists in public trials in civilian courts. No right of access attaches to CIPA or other classified pleadings under the First Amendment.

Media access to the classified documents and pleadings is also barred by this Court's January 22, 2002 Protective Order, which the media intervenors have not challenged. The media intervenors do not have – nor will they likely ever have – either the requisite security clearance to review classified information or a "need to know," as required by the protective order in accordance with federal law. Additionally, the media intervenors have not challenged the classification decisions

of the executive branch in their motion,[3] and thus those decisions must be presumed to be correct. Indeed, "[t]here is a presumption of regularity in the performance by a public official of his public duty." *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975).

In seeking access to these classified documents, the media intervenors place a great deal of reliance on their assumption that the documents to which they seek access "have been the subject of many news reports." Mem. at 10. In addition to the common wisdom that you cannot believe everything you read in an newspaper, federal law provides that "[c]lassified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information." Executive Order 12958 § 1.2(c). There is a significant qualitative difference between unsubstantiated statements by anonymous sources in a newspaper, which may as easily be disinformation as information, and the actual release of classified documents to the media. "Rumors and speculations circulate and sometimes get into print. It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so." *Alfred A. Knopf, Inc.*, 509 F.2d at 1370; *see also Fitzgibbon v. Central Intelligence Agency*, 911 F.2d 755, 765-66 (D.C. Cir.1990); also *Simmons v. Department of Justice*, 796 F.2d 709, 712 (4th Cir.1986); *Afshar v. Department of State*, 702 F.2d 1125, 1130 (D.C. Cir.1983) ("Official acknowledgment by an authoritative source might well be new information that could cause damage to national security"). Even if accurate, the newspaper stories relied upon by the media intervenors do not figure

[3] In any event, a challenge to classification decisions should be addressed in the first instance to the classification authority through a request under the Freedom of Information Act, 5 U.S.C. § 552. *See*, *e.g.*, *Public Citizen v. Department of State*, 11 F.3d 198, 199 (D.C. Cir. 1993); *Lindsey v. National Security Agency*, 1990 WL 148422 at **1 (4th Cir. Nov. 6, 1990); *see also* Executive Order 12958.

into this Court's right-of-access analysis under Fourth Circuit and Supreme Court case law at all.

Finally, even access to documents to which the press has a First Amendment right of access may be denied if "'necessitated by a compelling government interest, and . . . narrowly tailored to serve that interest.'" *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (*Press-Enterprise I*) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). Preventing the release of classified material is plainly a compelling government interest. "The federal government's 'compelling interest' in controlling access to national security information has been long recognized by the Supreme Court." *Department of Navy v. Egan*, 484 U.S. 518, 525-27 (1988) (discussing history of government classification of information). By definition, documents classified Secret or Top Secret are documents that, if disclosed to unauthorized recipients, reasonably could be expected to cause serious, or even exceptionally grave, damage to the national security. Executive Order 12958 § 1.3(a). Sealing classified documents or those portions of documents that are classified is narrowly tailored to serve that interest. Indeed, this court has made specific findings based on *ex parte* under seal filings by the government with respect to the core classified documents at issue in the media intervenors' motion. *See*, *e.g.*, No. 601 at 36, 51. The fact that those findings are in a classified document that is under seal is irrelevant because the Fourth Circuit has expressly approved the filing under seal of a statement of reasons for keeping documents under seal. *In re Washington Post*, 807 F.2d at 391. Accordingly, the motion for access should be denied with respect to the classified pleadings in this case.

7. Unclassified Documents Closely Related to Classified Documents

Certain pleadings to which the media intervenors seek access are unclassified but closely related to the same subjects addressed in classified pleadings. Specifically, the pleadings assigned

docket numbers 638, 713, 799 and 800 all relate to pre-trial discovery matters to which no First Amendment right of access attaches. Moreover, those documents relate to the same subject matter as several classified documents, and the Court is well aware of the significant interests regarding these matters that clearly outweigh the qualified common law right of access to such documents. If the Court requires more information regarding those interests in order to state its reasons for maintaining the documents under seal, the government, at this Court's direction, will provide an *ex parte* and under seal pleading on the subject of those pleadings.

8. Other Miscellaneous Pleadings

The pleading assigned docket number 708 relates to a unique request by standby counsel to which no possible First Amendment right of access could attach. Nonetheless, the government does not object to the unsealing of the *pleading only*. The attachments should remain sealed for obvious reasons, including the safety of the defendant and the security of the facility in which he is residing. These interests outweigh the qualified common law right of access, and thus this Court should exercise its discretion to maintain the attachments only under seal.

The pleading assigned docket number 795 is an *ex parte* filing by the government that should remain under seal. The pleading, which was filed *ex parte* by the United States, relates to a pre-trial matter and implicates the national security and foreign relations of the United States. Additionally, the document sets out a great deal of the evidence that the government intends to introduce against the defendant at trial, and release would be inconsistent with the defendant's fair trial rights and this Court's Local Rule 57. Accordingly, no First Amendment right of access attaches to this document, and the standard for sealing the document under the qualified public right of access is satisfied. While the Court must consider redaction, the government respectfully submits that any redaction

process would produce a redacted document that is utterly meaningless. Accordingly, the document should remain under seal.

D. Conclusion

As Judge Wilkinson of the Fourth Circuit has observed:

> Intelligence gathering is critical to the formation of sound policy, and becomes more so every year with the refinement of technology and the growing threat of terrorism. . . . Confidential diplomatic exchanges are the essence of international relations.
>
> None of these activities can go forward without secrecy. When the identities of our intelligence agents are known, they may be killed. When our electronic surveillance capabilities are revealed, countermeasures can be taken to circumvent them. When other nations fear that confidences exchanged at the bargaining table will only become embarrassments in the press, our diplomats are left helpless. When terrorists are advised of our intelligence, they can avoid apprehension and escape retribution.

United States v. Morison, 844 F.2d 1057, 1081-82 (4th Cir. 1988) (Wilkinson, J., concurring).

There can be no doubt that the government's pursuit of *al Qaeda* and its operatives implicates national security interests of the highest order. The United States has carefully reviewed the pleadings to which the media intervenors seek access and where, consistent with national security, pleadings may be unsealed, the United States has supported the media intervenors' motion. But where other substantial or compelling interests outweigh the media's right of access, the government opposes the motion. For the reasons stated, the media intervenors' motion should be granted in part and denied in part.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of April 2003, a copy of the foregoing pleading was provided to the defendant via delivery to the U. S. Marshals Service and to counsel listed below:

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