IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA **vs.** **STEVEN J. ROSEN,** **KEITH WEISSMAN,** **Defendants.** **REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; ABC, INC.; AMERICAN SOCIETY OF NEWSPAPER EDITORS; THE ASSOCIATED PRESS; DOW JONES & COMPANY, INC.; NEWSPAPER ASSOCIATION OF AMERICA; THE NEWSPAPER GUILD, COMMUNICATIONS WORKERS OF AMERICA; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; REUTERS AMERICA LLC; SOCIETY OF PROFESSIONAL JOURNALISTS; TIME INC.; AND THE WASHINGTON POST,** **Movant-Intervenors.**	**No. 1:05-cr-225 (TSE)**

EMERGENCY MOTION FOR LEAVE TO INTERVENE WITH RESPECT TO PROPOSED CLOSURES OF TRIAL PROCEEDINGS AND RECORD

Come now as Movant-Intervenors the Reporters Committee for Freedom of the Press; ABC, Inc.; the American Society of Newspaper Editors; the Associated Press; Dow Jones & Company, Inc.; the Newspaper Association of America; the Newspaper Guild, Communications Workers of America; the Radio-Television News Directors Association; Reuters America LLC; the Society of Professional Journalists; Time Inc.; and The Washington Post and, for their

motion for leave to intervene in this criminal proceeding for the limited purpose of being heard in connection with the government's apparent request to close the trial, and any other pending or future motion seeking to restrict public and press access to the trial proceedings or the record thereof, respectfully state:

1. This is a criminal prosecution under the Espionage Act of two individuals, former lobbyists for the American Israel Public Affairs Committee ("AIPAC"), who allegedly conspired to transmit information relating to the national defense to individuals not authorized to receive it, under circumstances where there was reason to believe the information could be used to the injury of the United States or to the advantage of a foreign nation. Trial in this action is set to commence on June 4, 2007. There is intense public interest in these proceedings, in part because of the defendants' association with AIPAC and the unusual factual circumstances that gave rise to their indictment, and because the case involves an unprecedented application of the Espionage Act that may test the reach of the statute as a tool to prosecute recipients of national security leaks who subsequently disclose to others what they have learned.

2. Each of the Movant-Intervenors has an interest in these proceedings that arises out of the news coverage provided by their employees and/or members regarding this case in particular and national-security prosecutions more generally. Those employees and members expect to provide the public with regular news reports regarding this prosecution through their respective broadcasting, print and Internet properties.

3. On December 14, 2006, the Court issued a modified scheduling order that set a Classified Information Procedures Act ("CIPA") hearing for 11:00 a.m. on March 15, 2007. (Dkt. # 392.) On February 16, 2007, the government filed a "Motion for Hearing Pursuant to CIPA Section 6," the contents of which are sealed from public view. (Dkt. # 426.) Apparently

in response to that motion, on Friday, March 9, 2007, defendants filed an "Under Seal and In Camera Motion to Strike the Government's CIPA 6(c) Requests and to Strike the Government's Request to Close the Trial," which likewise is unavailable to members of the public. (Dkt. # 442.) Defendants' motion – docketed by the Clerk on Monday, March 12, 2007 – provided the first notice to non-parties that there was a request before the Court to restrict public access to the trial. Later on March 12, the Court entered an order that granted defendants' motion to suspend the CIPA schedule pending resolution of defendants' motion opposing the government's proposed trial procedures and specified that the March 15 hearing would address defendants' challenge to the government's proposed trial procedures. (Dkt. # 443.) That order did not indicate whether the hearing would be open to members of the press and the public.

4. Prior to Monday, March 12, 2007, there was no indication on the public docket that this hearing would address matters beyond the scope of CIPA.

5. Intervention is the appropriate vehicle for the news media and other members of the public to vindicate their constitutionally protected access rights in the context of criminal proceedings. A news organization moving to intervene in these circumstances must be afforded a prompt and full hearing on such a motion. Denying intervention and a meaningful opportunity for the press and the public to be heard would render any closure of the proceedings constitutionally invalid.

WHEREFORE, and for the reasons more fully set forth in the accompanying memorandum of points and authorities, the Movant-Intervenors respectfully request that the Court consider and grant their motion to intervene on an expedited basis and make such accommodations to the schedule in this action as are necessary to afford the Movant-Intervenors a reasonable opportunity to review the substance of the government's request and the

defendants' opposition thereto (and any other pending or future motion seeking to restrict public and press access to the trial proceedings or the record thereof) and to provide briefing and argument to the Court on the closure and/or sealing issues presented therein.

Dated: March 13, 2007

Respectfully submitted,

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

By: John B. O'Keefe

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Counsel for Movant-Intervenors

CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of March, 2007, I directed that a true and correct copy of the foregoing Emergency Motion for Leave to Intervene with Respect to Proposed Closures of Trial Proceedings and Record be served by hand delivery on counsel, as follows:

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA **vs.** **STEVEN J. ROSEN,** **KEITH WEISSMAN,** **Defendants.** **REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; ABC, INC.; AMERICAN SOCIETY OF NEWSPAPER EDITORS; THE ASSOCIATED PRESS; DOW JONES & COMPANY, INC.; NEWSPAPER ASSOCIATION OF AMERICA; THE NEWSPAPER GUILD, COMMUNICATIONS WORKERS OF AMERICA; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; REUTERS AMERICA LLC; SOCIETY OF PROFESSIONAL JOURNALISTS; TIME INC.; AND THE WASHINGTON POST,** **Movant-Intervenors.**	**No. 1:05-cr-225 (TSE)**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EMERGENCY MOTION TO INTERVENE WITH RESPECT TO PROPOSED CLOSURES OF TRIAL PROCEEDINGS AND RECORD

The Reporters Committee for Freedom of the Press; ABC, Inc.; the American Society of Newspaper Editors; the Associated Press; Dow Jones & Company, Inc.; the Newspaper Association of America; the Newspaper Guild, Communications Workers of America; the Radio-Television News Directors Association; Reuters America LLC; the Society of Professional Journalists; Time Inc.; and The Washington Post (collectively the "Movant-

Intervenors") submit this memorandum in support of their motion to intervene for the limited purpose of being heard in connection with the government's apparent request to close the upcoming trial in this matter, and any other pending or future motion seeking to restrict public and press access to the trial proceedings or the record thereof. In accordance with governing constitutional precedent, the Movant-Intervenors respectfully request that the Court afford the press and other interested members of the public a full and fair opportunity to respond to what appears from the Court's docket to be a request by the government – filed under seal – to conduct some or all of this Espionage Act prosecution in secret. Given that the Court has scheduled a hearing for Thursday, March 15, 2007, to consider defendants' opposition to the government's sealed proposal and that, prior to March 12, 2007, there was no indication on the public docket that this hearing would address matters beyond the scope of the Classified Information Procedures Act ("CIPA"), the Movant-Intervenors further request that their motion to intervene be given expedited consideration and that the Court make appropriate accommodations to permit briefing and argument by the intervening parties on the substance of the government's apparent request for closure and/or sealing.

BACKGROUND

Messrs. Rosen and Weissman stand accused of violating the Espionage Act by, according to the allegations of the indictment, conspiring to transmit information relating to the national defense to individuals not authorized to receive it under circumstances where there was reason to believe the information could be used to the injury of the United States or to the advantage of a foreign nation. This Court needs no reminder of the seriousness of these charges or, for that matter, of the broad and substantial public interest in these proceedings. Whenever the government charges a citizen with espionage, there will of course be heightened attention paid to

the prosecution. In this case, the interest is especially intense because of the defendants' former occupations as lobbyists for the American Israel Public Affairs Committee ("AIPAC") and because of the unusual factual circumstances that gave rise to their indictment. As the Court itself has recognized, this case involves an unprecedented application of the Espionage Act, *see* Mem. Op. of Aug. 9, 2006, at 12 (Dk. # 337) (noting that the Court was aware of "no prosecutions for the oral retransmission of information relating to the national defense" under the modern version of the Espionage Act), and it therefore may test the reach of the statute as a tool to prosecute recipients of national security leaks who subsequently disclose to others what they have learned.

On December 14, 2006, the Court issued a modified scheduling order that set a "CIPA [hearing]" for 11:00 a.m. on March 15, 2007. (Dkt. # 392.) On February 16, 2007, the government filed a "Motion for Hearing Pursuant to CIPA Section 6," the contents of which are sealed from public view. (Dkt. # 426.) Apparently in response to that filing, on Friday, March 9, 2007, defendants filed an "Under Seal and In Camera Motion to Strike the Government's CIPA 6(c) Requests and to Strike the Government's Request to Close the Trial," which likewise is unavailable to members of the public. (Dkt. # 442.) Defendants' motion – docketed by the Clerk on Monday, March 12, 2007 – provided the first notice to non-parties that there was a request before the Court to restrict public access to the trial, which presently is set to commence on June 4, 2007. Thereafter, the Court entered an order granting "defendants' motion to suspend the CIPA schedule pending resolution of defendants' motion opposing the government's proposed trial procedures" and specifying that "the hearing now scheduled for March 15-16 will first address defendants' challenge to the government's proposed trial proceedings." Order of

Mar. 12, 2007 (Dkt. # 443). The order did not indicate whether this hearing would be open to members of the press and the public.

ARGUMENT

Intervention is the appropriate vehicle for the news media and other members of the public to vindicate their constitutionally protected access rights in the context of criminal proceedings. *See, e.g.*, *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986); *In re Knight Publishing Co.*, 743 F.2d 231 (4th Cir. 1984). As the Supreme Court and the Court of Appeals both have emphasized, a news organization moving to intervene in these circumstances *must* be afforded a prompt and full hearing on such a motion. *See, e.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (media and public "'must be given an opportunity to be heard'" on questions relating to access) (citation omitted); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253-54 (4th Cir. 1988) (same).

Denying intervention and a meaningful opportunity for the press and the public to object under these circumstances would "render[] a closure of proceedings invalid." *In re Associated Press ("Moussaoui")*, 172 Fed. Appx. 1, 4 (4th Cir. 2006). With that in mind, the Court of Appeals has provided express directions for district courts to follow when they are presented with requests for the sealing of proceedings or the records thereof:

> First, the district court must give the public adequate notice that the [closure or sealing] 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) (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).

Furthermore, the Court of Appeals has expressly rejected the government's argument that these requirements should not apply in situations where the government 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.

Because the government's apparent "Request to Close the Trial" has not been made on the public record, the Movant-Intervenors are unable to address the substance of the motion at this time. Suffice it to say, though, "[t]here is no doubt that the First Amendment guarantees the public and the media the right to attend criminal trials," *Moussaoui*, 172 Fed. Appx. at 3, and this constitutionally protected right of access may not be abridged unless, after a full and open hearing on the matter, the district court finds "a compelling government interest" in secrecy and concludes that 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).

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) (emphasis in original). 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). Moreover, it is absolutely clear in this Circuit that any order restricting public access to trial proceedings (or the record thereof) entered without adequate notice and an opportunity for interested members of the public to be heard would be void on constitutional grounds. *See, e.g.*, *Moussaoui*, 172 Fed. Appx. at 4 (citing *In re S.C. Press Ass'n*, 946 F.2d 1037, 1039-40 (4th Cir. 1991)).

CONCLUSION

For the foregoing reasons, the Movant-Intervenors respectfully request that the Court consider their motion to intervene on an expedited basis, grant that motion, and make such accommodations to the schedule in this action as are necessary to afford the Movant-Intervenors a reasonable opportunity to review the substance of the government's request and the defendants' opposition thereto (and any other pending or future motion seeking to restrict public and press access to the trial proceedings or the record thereof) and to provide briefing and argument to the Court on the closure and/or sealing issues presented therein.

Dated: March 13, 2007

Respectfully submitted,

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

By: _____

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Counsel for Movant-Intervenors

CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of March, 2007, I directed that a true and correct copy of the foregoing Memorandum of Points and Authorities in Support of Emergency Motion to Intervene with Respect to Proposed Closures of Trial Proceedings and Record be served by hand delivery on counsel, as follows:

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NOTICE OF EMERGENCY MOTION FOR LEAVE TO INTERVENE

PLEASE TAKE NOTICE that at 11:00 a.m. on Thursday, March 15, 2007, or as soon thereafter as counsel may be heard, at the United States Courthouse, 401 Courthouse Square, Alexandria, Virginia, Movant-Intervenors the Reporters Committee for Freedom of the Press; ABC, Inc.; the American Society of Newspaper Editors; the Associated Press; Dow Jones & Company, Inc.; the Newspaper Association of America; the Newspaper Guild, Communications Workers of America; the Radio-Television News Directors Association; Reuters America LLC;

the Society of Professional Journalists; Time Inc.; and The Washington Post will bring on for hearing their Emergency Motion for Leave to Intervene, filed and served herewith.

Dated: March 13, 2007

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ LLP

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Counsel for Movant-Intervenors

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LOCAL CRIMINAL RULE 12.4 FINANCIAL DISCLOSURE STATEMENTS BY MOVANT-INTERVENORS

The undersigned counsel for the Movant-Intervenors certifies that, to the best of his knowledge and belief, the information below is accurate. These representations are made pursuant to Local Criminal Rule 12.4 in order that judges of this Court may determine the need for recusal.

The following Movant-Intervenors have no publicly held stock and have no parents or related corporate entities with publicly held stock: the Reporters Committee for Freedom of the Press; the American Society of Newspaper Editors; the Associated Press; the Newspaper Association of America; the Newspaper Guild, Communications Workers of America; the Radio-Television News Directors Association; and the Society of Professional Journalists.

The remaining Movant-Intervenors make the following disclosures:

ABC, Inc. is an indirect, wholly owned subsidiary of The Walt Disney Company, a publicly traded company.

Dow Jones & Company, Inc. is a publicly traded company.

Reuters America LLC is an indirect, wholly owned subsidiary of Reuters Group PLC, a publicly traded company.

Time Inc. is an indirect, wholly-owned subsidiary of Time Warner Inc., a publicly traded company.

WP Company LLC d/b/a The Washington Post is a wholly owned subsidiary of The Washington Post Company, a publicly traded company. Berkshire Hathaway, Inc., a publicly held company, has a 10% or greater ownership interest in The Washington Post Company.

Dated: March 13, 2007

Respectfully submitted,

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

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Counsel for Movant-Intervenors

CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of March, 2007, I directed that a true and correct copy of the foregoing Local Criminal Rule 12.4 Financial Disclosure Statements by Movant-Intervenors be served by hand delivery on counsel, as follows:

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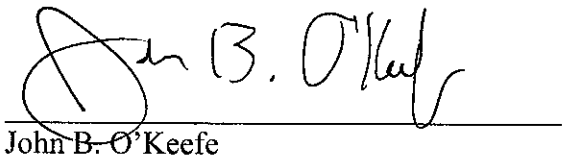

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