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

UNITED STATES OF AMERICA **vs.** **ZACARIAS MOUSSAOUI,** **Defendant.** **ABC, INC., ASSOCIATED PRESS, THE HEARST CORPORATION, THE NEW YORK TIMES COMPANY, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, TRIBUNE COMPANY AND THE WASHINGTON POST,** **Movants-Intervenors.**	**Criminal No. 01-455-A**

MOVANTS-INTERVENORS' MOTION TO INTERVENE
FOR THE LIMITED PURPOSE OF BEING HEARD IN CONNECTION WITH ACCESS
TO CERTAIN PORTIONS OF THE RECORD AND MEMORANDUM IN SUPPORT

Come now Movants-Intervenors ABC, Inc., Associated Press, The Hearst Corporation, The New York Times Company, The Reporters Committee for Freedom of the Press, Tribune Company and The Washington Post (together, the "Media Intervenors") and, for their motion for leave to intervene in this proceeding for the limited purpose of being heard in connection with access to certain portions of the record, and for their memorandum in support thereof, respectfully state:

1. This is a criminal prosecution instituted by the United States against Zacarias Moussaoui in connection with the terrorist attacks on the United States on September 11, 2001.

The level of public interest in and concern with the substantial issues regarding national security and administration of justice presented by the case cannot be overstated.

2. ABC, Inc., alone or through its subsidiaries, owns and operates the ABC Television Network, the ABC Radio Network, 62 local radio stations and 10 television stations that regularly gather and report news to the public. It also produces and distributes news programming, including World News Tonight with Peter Jennings, 20/20 and Nightline.

3. The Associated Press, founded in 1848, is the world's oldest and largest newsgathering organization, providing content to more than 15,000 news outlets. Its multimedia services are distributed by satellite and the Internet to more than 120 nations.

4. The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces movies and other programming for television and is the majority owner of Hearst-Argyle Television, Inc., a publicly held company that owns and operates numerous television broadcast stations.

5. The New York Times Company publishes The New York Times, a national newspaper distributed throughout New York State and the world. Its weekday circulation is the third highest in the country at approximately 1.1 million, and its Sunday circulation is the largest at approximately 1.7 million. The Company also publishes sixteen other newspapers, including The Boston Globe, and owns and operates eight television stations and two radio stations.

6. Tribune Company, through its publishing, broadcasting, and interactive operations, publishes eleven market-leading newspapers, including the Baltimore Sun, the Chicago Tribune, the Los Angeles Times and Newsday, owns and operates twenty-four

television stations, and operates a network of local and national Web sites that ranks among the top twenty-five news and information networks in the United States.

7. The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

8. The Washington Post is a newspaper of general circulation in the metropolitan Washington, D.C. area that reports on matters of local, regional and national interest. It is owned by The Washington Post Company, which, through its subsidiaries, owns six network-affiliated television stations and numerous cable television systems and publishes a weekly magazine, *Newsweek*.

9. For the reasons set forth more fully in the memorandum accompanying the Media Intervenors' contemporaneous motion for access to certain portions of the record herein, they respectfully submit that the sealing in their entirety of certain portions of the record in this action does not strike the correct balance between the government's legitimate law enforcement/security interests and the public's First Amendment and common law rights of access to judicial records.

10. Intervention is the appropriate vehicle for news organizations and other members of the public to vindicate their 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 Publ'g 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). Indeed, on more than one occasion in this proceeding, this Court has recognized that news organizations and other members of the public may intervene for such purposes. *See*, *e.g.*, September 16, 2002 Order, Docket No. 525 ("movants, as news organizations, have the right to be heard on the issues raised in their substantive motion").

11. Because the premises for this motion are fully set forth herein, the Media Intervenors have not filed a separate memorandum.[1]

WHEREFORE, the Media Intervenors respectfully request that the Court enter an order granting their motion for leave to intervene for the limited purpose stated herein.

Dated: April ___, 2003

Respectfully submitted,

LEVINE SULLIVAN & KOCH, L.L.P.

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[1] Although not necessarily applicable to the instant motion, in compliance with Local Rule 7(D), counsel for the Media Intervenors has conferred with counsel for the United States and stand-by counsel for defendant, neither of which objects to this motion to intervene. Media Intervenors are not able to ascertain the position of the defendant with regard to this motion.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 3rd day of April 2003, I caused true and correct copies of the foregoing Motion to Intervene and Memorandum in Support to be served by the means indicated, upon the defendant *pro se* and counsel for the parties as follows:

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IN THE UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA **vs.** **ZACARIAS MOUSSAOUI,** **Defendant.** **ABC, INC., ASSOCIATED PRESS, THE HEARST CORPORATION, THE NEW YORK TIMES COMPANY, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, TRIBUNE COMPANY AND THE WASHINGTON POST,** **Movants-Intervenors.**	**Criminal No. 01-455-A**

MOVANTS-INTERVENORS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR ACCESS TO CERTAIN PORTIONS OF THE RECORD

ABC, Inc., Associated Press, The Hearst Corporation, The New York Times Company, The Reporters Committee for Freedom of the Press, Tribune Company and The Washington Post (together, the "Media Intervenors"), respectfully submit this memorandum of law in support of their motion for access to certain portions of the record herein.

INTRODUCTION

The Media Intervenors seek access to pleadings filed in this action that have been sealed without notice to the public and without an opportunity for the public to be heard in connection with their sealing. Specifically, the Media Intervenors move to unseal, and for the opportunity to be heard in connection with their Motion to unseal pleadings related to the ruling that is the subject of an appeal filed by the United States in connection with defendant's request for access to Ramzi Bin al-Shibh. Although it is unclear from the public docket how many pleadings relate to that issue, it is clear that several remain sealed. In addition, the Media Intervenors seek access to or a publicly filed judicial determination as to the propriety of the continued sealing of certain pleadings filed by defendant *pro se*. Finally, 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. The Media Intervenors seek access to these pleadings or a publicly filed judicial determination as to the appropriateness of their continued sealing as well.

BACKGROUND

By Order dated September 27, 2002, this Court granted the motion filed by some of these Media Intervenors requesting modification of the Court's August 29, 2002 Order that effectively had sealed defendant's *pro se* pleadings. Sept. 27, 2002 Order [Dk. No. 579]. Pursuant to the Court's September 27 Order, all of defendant's *pro se* pleadings are initially to be filed under seal. *Id.* at 3. The United States then has ten days to advise the Court in writing if the pleading should remain sealed or redacted. *Id.* If the United States does not so advise the Court, the pleading at issue is to be unsealed without redaction. *Id.* at 3-4. Since entry of that Order, defendant has filed forty-five pleadings, nineteen of which have been maintained under seal by order of the Court, fourteen of which have been unsealed, and twelve which have not been acted upon. *See* Dk. Nos. 632, 633, 672, 675, 689, 694, 706, 768, 772, 794, 796 and 803.

In addition, since entry of the September 27 Order, there have been sixty-three other documents initially filed under seal – fifty-four motions, responses, and memoranda, five transcripts and four other documents. All but four of them remain under seal, although no notice of the sealing or opportunity to be heard has been afforded to the public. Most important among these docket entries are pleadings related to defendant's request for access to Ramzi Bin al-Shibh. None of these pleadings have been unsealed or released in redacted form, nor was any notice given to the public before they were sealed. Indeed, for the most part, it is unclear from the docket which pleadings relate to the Bin al-Shibh issue and which relate to other matters.

The public has a keen interest in Ramzi Bin al-Shibh's relationship with defendant. Though still at large when Moussaoui was indicted, Mr. Bin al-Shibh was named as a "supporting conspirator." Indictment, Count 1 ¶ 14. Specifically, Mr. Bin al-Shibh is alleged to have been a member of a terrorist cell in Germany and, in that capacity, he is alleged to have wired $14,000 to Moussaoui. *Id.* Count 1, Overt Acts ¶¶ 15, 67. *See also* Statement of FBI Director Robert S. Mueller III at Justice Department News Conference Announcing Moussaoui Indictment, Dec. 11, 2001, *at* **http://usinfo.stategove/topical/pol/terror/0112114.htm** ("Moussaoui was linked to Ramzi Bin al-Shibh … who tried unsuccessfully to get into the United States on four separate occasions. . . . [A]t the time of Bin al-Shibh's last failed attempt to enter the United States, Moussaoui was contacting flight schools and making arrangements to have a legitimate presence in the United States.").

In September 2002, Mr. Bin al-Shibh was captured in Pakistan, an arrest that was publicly heralded as a triumph in the government's war on terrorism. *See* Remarks by President George W. Bush at Doug Forrester for Senate Event, Sept. 23, 2002, *at* **http://www.whitehouse.gov/news/releases/2002/09/20020923-3.html** ("He was going to be the 20th hijacker, Bin al-Shibh. He wanted to come here to kill. . . . You can't hide from our justice. We finally got him."). It was also widely reported that Mr. Bin al-Shibh's arrest had implications for the Moussaoui prosecution. *See*, *e.g.*, Dan Eggen & Tom Jackman, *Latest Capture Adds a New Wrinkle in Moussaoui Case; Both Sides in Va. Trial Want to Talk to 9/11 Suspect Binalshibh, but U.S. May Prefer to Limit Exposure*, Wash. Post, Sept. 17, 2002, at A15 (quoting defense counsel as stating that "[h]e's obviously a central witness" and that the defense "should have an opportunity to meet with the man [Bin al-Shibh] and pitch to him why he should talk"); Philip Shenon, *Court Papers*

Show Moussaoui Seeks Access to Captured Al Qaeda Members, N.Y. Times, Nov. 1, 2002, at A20 ("Federal law enforcement officials say the capture of Mr. bin al-Shibh has created a dilemma for prosecutors, since the Defense Department and Central Intelligence Agency have refused to make him and other Qaeda figures available for defense interviews").

In the months following Mr. Bin al-Shibh's capture, the public has followed the defendant's efforts to gain access to this alleged "supporting conspirator." *See* Defendant's Motion for "Admission" Tape of Brother Binalshibh, Oct. 16, 2002 [Dk. No. 613] ("The U.S. government has organized a complete black out on information about Binalshibh because they know that they must stop him speaking out about my non-participation in the operation 9/11.") (motion unsealed by Oct. 31, 2002 Order) [Dk. No. 651]; *see also* Defendant's Motion to Bring Brother Ramzi Binalshibh to the Open Court of Moussaoui, Sept. 19, 2002 [Dk. No. 537] ("Ramzi is my prime witness at trial.") (motion unsealed by March 21, 2003 Order). It has been reported that defendant's court-appointed attorneys have argued that, without some access to Bin al-Shibh, the defendant will be deprived of his Sixth Amendment right to seek out witnesses who might establish his innocence. *See, e.g.*, Philip Shenon & Eric Schmitt, *White House Weighs Letting Military Tribunal Try Moussaoui*, *Officials Say*, N.Y. Times, Nov. 10, 2002, at A17. In addition, it has been reported that this Court has granted Moussaoui's request for access to Mr. Bin al-Shibh and that that ruling is currently the subject of an appeal by the United States. *See, e.g.*, Curt Anderson, *Ashcroft Cites "Monumental Progress" In U.S. War On Terrorism,* Assoc. Press, Feb. 13, 2003; Cam Simpson, *Captures Reopen Tribunal Questions; Terrorism Suspects Seen As Candidates*, Chi. Trib., March 16, 2003, at C1.

The Media Intervenors have now moved to intervene for the purpose of vindicating the public's rights of access to the sealed pleadings related to Mr. Bin Al-Shibh, as well as to defendant's *pro se* filings, and other pleadings currently filed under seal.

ARGUMENT

I. THE FIRST AMENDMENT AND THE COMMON LAW AFFORD A PRESUMPTIVE RIGHT OF ACCESS TO THE PLEADINGS AT ISSUE

The First Amendment affords the public and press a presumptive right of access to criminal trials, and this right extends as well to the record, including pre-trial motions and related papers filed in such proceedings. 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 Ct., 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).

As the Media Intervenors have demonstrated previously, *see* Dk. No. 515, the First Amendment, as well as the common law, impose specific procedural requirements on a district court whenever it considers sealing a record or closing a courtroom:

> 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 secrecy.

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). Moreover, 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, 807 F.2d at 391-92.

Assuming that the constitutionally-mandated procedural prerequisites for closure or sealing are met, the public's First Amendment-based right of access to a judicial proceeding or the record it generates may be denied only where the 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). "Moreover, the court may not base its decision on conclusory assertions alone, but must make specific factual findings." *Id.* at 392; *see also Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000) (holding that failure, *inter alia*, to "identify any specific reasons or recite any factual findings justifying . . . decision to override the public's right of access" rendered invalid order sealing settlement agreement in civil action); *see also In re Time Inc.*, 182 F.3d 270 (4th Cir. 1999) (where media intervenors have moved for access to sealed documents, court is obliged to conduct *in camera* review of them and cannot order that they remain under seal without reviewing them); *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 500-02 (D.C. Cir. 1998)

(approving trial court's decision to proceed "by redacting documents" for release to public in case involving proceedings ancillary to grand jury investigation that were required, in part, to remain under seal).[2]

II. THE PRESUMPTIVE SEALING, SINCE 9/27/02, OF PLEADINGS NOT FILED BY DEFENDANT *PRO SE,* AND CERTAIN OF HIS *PRO SE* FILINGS, DOES NOT COMPORT WITH THE PROCEDURAL OR SUBSTANTIVE REQUIREMENTS OF THE FIRST AMENDMENT AND COMMON LAW

Since this Court's ruling on September 27, 2002, granting the Media Intervenor's motion for access to defendant's *pro se* pleadings, the Court has unsealed fourteen of those pleadings, maintained nineteen under seal, and not acted on the remaining twelve. *See* Dk. Nos. 632, 633, 672, 675, 689, 694, 706, 768, 772, 794, 796 and 803. Of the twelve *pro se* pleadings not yet acted upon, nine were filed by the defendant more than ten days ago. As the Court recognized in its September 27 Order, complete sealing did not "properly balance the defendant's right to seek appropriate judicial relief against the public's right to access records in criminal cases and the United States' legitimate concerns about the defendant's efforts to communicate with the outside world." Sept. 27, 2002 Order at 2 [Dk. No. 579]. Therefore, the Court adopted a procedure whereby the United States had ten days to advise the Court whether a pleading should remain sealed or should be unsealed with or without redactions. *Id.* at 3. If the United States did not so advise the Court, the pleading must be unsealed in its entirety, subject to the Court's own review of the pleading for language "which would not be tolerated from an attorney practicing in this

[2] By the same token, a common law presumption of access also attaches to the record in a criminal proceeding. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (recognizing common law right "to inspect and copy public records and documents, including judicial records") (footnote omitted); *In re Knight Publ'g Co.*, 743 F.2d 231 (4th Cir. 1984) (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). 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).

court." *Id.* at 3-4 & n.1. Given that more than ten days have passed since nine of the defendant's *pro se* pleadings were filed, and absent any indication on the public record that the government has objected to their unsealing, the Court should unseal these nine pleadings or, alternatively, enter a publicly-filed Order setting forth particularized findings that support their continued sealing.[3]

In addition, insofar as the public docket discloses, of the sixty-three documents initially filed under seal since September 27 that were not filed by defendant *pro se*, only four pleadings have been made available to the public. The remaining fifty-four motions, responses, and memoranda, five transcripts and four other documents remain sealed. The Media Intervenors are mindful that this criminal proceeding, by its nature, imposes extraordinary demands on the Court, the government, and the defense, and that it raises important national security issues. Likewise, the Media Intervenors recognize that the Court's obligation, and its motive in all of its rulings in this proceeding, is to afford the defendant a prompt and fair trial. There are, however, other compelling interests at stake as well. The continued preemptory sealing of nearly all pleadings filed in this Court, without notice to the public and an opportunity to be heard on their sealing, and without entry by the Court on the public record of findings justifying the complete sealing of specific pleadings, does not comport with controlling procedural and substantive precedent. As a result, it violates both the First Amendment and the common law.

[3] Recent events underscore the importance of the procedural requirements set forth in this Circuit's precedents and in the Court's September 27 Order. Indeed, it appears from the public record that there is a substantial basis to question the credibility of the government's assertions that certain of defendant's pleading must remain under seal. Specifically, the government initially argued that two of defendant's filings, Dk. Nos. 771 and 781, should be partially redacted and unsealed, but reversed itself after the Court noted that the government's recommendation appeared inconsistent with its previous insistence that Dk. Nos. 491 and 537 remain under seal. *See* March 19, 2003 Order [Dk. No. 791]. At that juncture, the government appears to have recommended to the Court that all four filings remain under seal in their entirety. *See* March 20, 2003 Order [Dk. No. 792]. Nevertheless, when asked by the Court to explain its reasoning, the government appears to have changed its position again and conceded that all four filings should be unsealed in redacted form. *See* March 21, 2003 Order [Dk. No. 793].

Indeed, so far as the public docket reveals, no motion to seal any of these sixty-three pleadings was filed or heard. Thus, the public has not had an opportunity to object and be heard as to their sealing. For this reason alone, regardless of the content of those pleadings, their continued sealing is facially invalid and must be modified after appropriate opportunity for the Media Intervenors and other interested members of the public to be heard. *E.g.*, *Rushford*, 846 F.2d at 253-54; *In re Time Inc.*, 182 F.3d at 271; *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"). Further, the docket entries must reasonably reflect the nature of the pleading at issue so that the Media Intervenors have a meaningful opportunity to voice objection on behalf of themselves and the public. *See 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).

In this regard, it bears emphasis that defendant's motion for access to Mr. Bin Al-Shibh, the court's ruling on that motion, and the United States' appeal of the ruling have been the subject of many news reports, examples of which have been cited *supra*. Plainly, there are legal issues raised by this motion and the appeal that can be shared with the public, even if it is deemed necessary to redact certain factual material. Although not wishing to make the Court's responsibilities in conducting these proceedings any more complicated than they already are, the Media Intervenors respectfully submit that it is error for the Court to seal those pleadings without considering the less drastic alternative of redaction. *See, e.g.*, *In re Knight Publ'g Co.*, 743 F.2d at 235. As for the other pleadings unrelated to Mr. Bin al-Shibh that remain sealed, the

presumption is that, where they can be released in redacted form, they should be. *Baltimore Sun v. Goetz*, 886 F.2d 60, 66 (4th Cir. 1989) (holding that district court should consider alternatives to sealing documents at issue in their entirety, a process that "ordinarily involves disclosing some of the documents or giving access to a redacted version.").

As the Court of Appeals has made clear, a trial court is required to review *each document* sought to be sealed and to determine as to *each* such document that the asserted compelling interest in secrecy outweighs the public's right of access to it. *Stone*, 855 F.2d at 181 (trial court must weigh competing interests "with respect to each document sealed"); *see also In re Time Inc*., 182 F.3d at 271-72 (where media intervenors have moved for access to sealed documents, court is obliged to conduct *in camera* review of them and cannot order that they remain under seal without reviewing them). Because the Court is constitutionally required to review each pleading before ordering that it be maintained under seal, the Media Intervenors respectfully submit that such additional burden as may be imposed on the Court by redacting those portions that raise genuine national security concerns is not excessive. Such a task flows naturally from the Court's constitutional obligation to weigh the conflicting interests that are implicated whenever a party seeks to seal a document that forms part of the record of a criminal proceeding. Indeed, in *In re State-Record Co.*, 917 F.2d 124, 129 (4th Cir. 1990), the Court of Appeals considered the trial court's contention that "it did not have the time or the resources to accurately and fairly accomplish [the] task" of "selectively edit[ing] public documents to excise potentially prejudicial and improper material." There, certain news organizations had sought relief from an order sealing the record in a criminal prosecution. The Court of Appeals observed that the trial court's rationale was insufficient to meet its obligation under *In re Charlotte Observer* and *In re Washington Post*: "We certainly sympathize with the case load of the district court and the many

demands upon its time, but without specific findings of fact we cannot adequately review closure orders." *Id.*

This Court has already created a procedure, pursuant to its September 27 Order, whereby the government, in the first instance, proposes specific redactions for the Court's consideration. As the party apparently seeking to seal the records, that burden quite properly rests on the government. *See Boone v. City of Suffolk*, 79 F. Supp. 2d 603, 606 (E.D. Va. 1999) (where, as here, "the right of access is grounded in the First Amendment, the burden, which falls on the one seeking confidentiality, is as rigorous as the burden for overcoming any other fundamental right"). There is no reason that this same procedure could not be applied to all of those pleadings filed since September 27, 2002 that remain sealed.

CONCLUSION

For the foregoing reasons, the Media Intervenors respectfully request that this Court enter an order granting their request for access and unsealing certain portions of the record herein, as follows:

(a) all those pleadings filed by defendant *pro se* since September 27, 2002, to the unsealing of which the United States did not object within ten days of their filing; and

(b) all those other pleadings filed since September 27, 2002, that remain sealed, unless the Court, on the government's motion or *sua sponte*, determines that compelling interests require that specific portions of said papers be placed under seal, in which case the Court will enter a written order in the public record identifying its findings and conclusions in this regard and placing in the public record those portions of the papers that are not properly subject to sealing.

Dated: April __, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 3rd day of April 2003, I caused true and correct copies of the foregoing Memorandum of Law in Support of Motion for Access to be served by the means indicated, upon the defendant *pro se* and counsel for the parties as follows:

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