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.; HEARST CORP.; 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)

NOTICE OF MOTION FOR LEAVE TO INTERVENE FOR THE LIMITED PURPOSE OF BEING HEARD IN CONNECTION WITH THE GOVERNMENT'S PROPOSAL TO LIMIT PUBLIC ACCESS TO CERTAIN PORTIONS OF THE TRIAL PROCEEDINGS

PLEASE TAKE NOTICE that at 2:00 p.m. on Monday, April 16, 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.; Hearst Corp.; 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 Motion for Leave to Intervene for the Limited Purpose of Being Heard in Connection with the Government's Proposal to Limit Public Access to Certain Portions of the Trial Proceedings, filed and served herewith.

Dated: April 9, 2007

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ LLP

By: _____

Jay Ward Brown, Va. Bar No. 34355
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Counsel for Movant-Intervenors

CERTIFICATE OF SERVICE

I hereby certify that, on this 9th day of April, 2007, I directed that a true and correct copy of the foregoing Notice of Motion for Leave to Intervene be served by hand delivery on counsel, as follows:

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
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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.; HEARST CORP.; 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)

MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE FOR THE LIMITED PURPOSE OF BEING HEARD IN CONNECTION WITH THE GOVERNMENT'S PROPOSAL TO LIMIT PUBLIC ACCESS TO CERTAIN PORTIONS OF THE TRIAL PROCEEDINGS

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.; Hearst Corp.; 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"), and for their Motion for Leave to Intervene for the Limited Purpose of Being Heard in Connection with the Government's Proposal to Limit Public Access to Certain Portions of the Trial Proceedings, respectfully state as follows:

1. In the government's own words, it has asked the Court to enter an order imposing "limitation[s] on the information the public will receive" during the course of this unprecedented criminal trial. More specifically, insofar as revealed by the publicly available portions of the record, the government has asked the Court to endorse trial procedures under which only the Court, counsel, the defendants and the jurors would see and hear certain unspecified but purportedly "narrow" portions of the evidence – documentary, testamentary and in the form of audio recordings – that it intends to introduce in this case, for the asserted purpose of protecting national security. The government's proposal, however, begs several questions. For example, the government appears to represent in its submissions to the Court that it would provide to the press and public redacted transcripts of the secret portions of the record, including substitutions for the omitted material, but the government fails to represent in its proposal when or how those transcripts will be made available or what the nature of the substitutions will be. Nor does the government fully disclose the quantity of the evidence it seeks to withhold from public scrutiny. The answers to these questions may be determinative of whether the government's proposal is both constitutional and consistent with the common law as respects the public's rights of access to these proceedings and the record herein.

2. In an effort to obtain those answers, and to avoid burdening the Court with the present motion if at all possible, counsel for the Movant-Intervenors sought, via multiple voicemail messages and correspondence, to contact government counsel to inquire as to the

government's intentions in these regards. In a brief responsive telephone call, government counsel adamantly refused to discuss any aspect of its proposal, including the open questions regarding it, with counsel for the Movant-Intervenors. *See* 04/03/07 Letter from J. Brown to K. Di Gregory (attached hereto as Ex. A). In these circumstances, the Movant-Intervenors are constrained to file the present motion to intervene in order that the Court may hear their objections to and concerns regarding certain, specific aspects of the government's proposal to block public access to portions of the record, given the government's blanket refusal even to discuss them. Movant-Intervenors have set forth those objections and concerns in the memorandum attached hereto as Exhibit B and, by this motion, they seek leave to file that memorandum and to be heard on April 16 when the Court entertains argument from the parties on the government's proposal.

3. 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 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).

4. 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) (unpublished). 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, 846 F.2d at 253-54 (emphasis added) (citing and quoting *In re Knight Publ'g Co.*, 743 F.2d at 234-35); *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).[1] Moreover, it is absolutely clear in this Circuit that any order restricting public access to trial proceedings (or the record thereof) entered without an opportunity for interested

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[1] The Court of Appeals has expressly confirmed that these requirements apply even 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 383, 391-92 (4th Cir. 1986).

members of the public to be heard would be void on constitutional grounds. *See, e.g., In re Associated Press (Moussaoui)*, 172 Fed. Appx. at 4 (citing *In re S.C. Press Ass'n*, 946 F.2d 1037, 1039-40 (4th Cir. 1991)).

5. Because the premises for this motion to intervene are fully set forth herein, no separate memorandum of points and authorities in support of intervention has been submitted. As noted, however, a proposed memorandum addressing the government's proposal is attached hereto as Exhibit B.

WHEREFORE, the Movant-Intervenors respectfully request that the Court:

(a) grant their motion for leave to intervene for the limited purpose of being heard in connection with the government's proposal to limit public access to certain portions of the trial proceedings;

(b) order that their Memorandum of Points and Authorities Concerning the Government's Proposal to Limit Public Access to Certain Portions of the Trial Proceedings (attached hereto as Exhibit B) be filed in the record and docketed by the Clerk herein;

(c) grant them opportunity to be heard when the Court entertains argument from the parties on the government's proposal, currently scheduled for 2:00 p.m. on April 16, 2007; and

(d) grant such other and further relief as the Court deems proper and just.

Dated: April 9, 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 9th day of April 2007, I directed that a true and correct copy of the foregoing Motion and Memorandum in Support of Motion to Intervene, with Exhibits A and B, be served by hand delivery on counsel, as follows:

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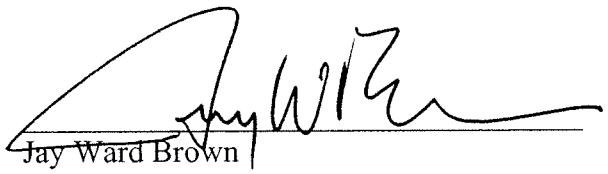

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April 3, 2007

VIA ELECTRONIC AND FIRST-CLASS MAIL

Kevin V. Di Gregory
W. Neil Hammerstrom, Jr.
Office of the United States Attorney
for the Eastern District of Virginia
2100 Jamieson Avenue
Alexandria, VA 22314

Re: *United States v. Rosen, et al.*, No. 1:05-cr-225 (E.D. Va.)

Dear Counsel:

As you know, we are counsel for the media coalition that has sought to intervene in the above-referenced action. This follows our efforts over the past few days to reach you and your colleagues by telephone and is further to our brief telephone conversation with you yesterday.

Our purpose in calling, as we indicated in the voicemail messages you received, was to request the opportunity to discuss with the government its proposals for the presentation of evidence during the trial of Steven Rosen and Keith Weissman as reflected in the government's recent filings. In particular, we wanted to confirm that we correctly understand some of the factual statements made by the government in its filings, and to discuss with you certain practical aspects of the government's proposal. It was our hope that, by talking through these issues, we might avert the need to call upon the Court to address these public access matters. Indeed, we have found in the past that such informal discussions often obviate any need for the press to move to intervene to vindicate its and the public's constitutional and common law access rights. Based on the representations made by the government in its recent filing in this case, we believe that such

a conversation likely would be productive and, at the very least, enable our clients to make a more informed determination about whether there is a need to renew their request to intervene.

Specifically, we had hoped you would confirm that, under the government's proposal, for every instance where you propose to redact or omit from the public record material that will be considered by the jury, there will be a publicly available substitution or summary of the specific redacted or omitted material. Furthermore, we had hoped that you would provide some practical assurances as to when and how, if the Court approves the government's proposal, the government would make available to the public and press such summarized or redacted versions of the audio and documentary evidence introduced during trial.

In your responsive telephone call yesterday, however, you firmly declined to have any substantive discussion with us, and expressed the view that there was "no reason" for the government to participate in a discussion with the media coalition we represent because the Court has already denied the coalition's motion to intervene.

We respectfully ask you to reconsider your position. As you are aware, Judge Ellis denied without prejudice our clients' prior motion to intervene, and he expressly invited the coalition to renew its motion if our clients believe public access rights are being adversely affected. Our clients wish to minimize burdens on the Court and the parties in addressing access matters, but they will not stand on the sidelines at a critical juncture relating to access to a significant espionage trial absent assurances that the government has tailored its requested procedures in a manner that will enable the press and public to exercise their First Amendment rights to the fullest extent possible. We had hoped that a substantive conversation with you regarding particulars of the government's proposal would either obviate entirely the need for the press to intervene, or substantially narrow the issues to be addressed by the Court.

If we have mischaracterized your position in any way, please advise us immediately. We will otherwise proceed accordingly. We appreciate your courtesy and cooperation in this matter.

Sincerely,

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

By _____
Jay Ward Brown
John B. O'Keefe

cc: Chuck Rosenberg, United States Attorney

B

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.; HEARST CORP.; 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, Intervenors.	No. 1:05-cr-225 (TSE)

INTERVENORS' MEMORANDUM OF POINTS AND AUTHORITIES CONCERNING THE GOVERNMENT'S PROPOSAL TO LIMIT PUBLIC ACCESS TO CERTAIN PORTIONS OF THE TRIAL PROCEEDINGS

The Reporters Committee for Freedom of the Press; ABC, Inc.; the American Society of Newspaper Editors; the Associated Press; Dow Jones & Company, Inc.; Hearst Corp.; 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 "Media Intervenors"), respectfully submit this memorandum of points and authorities in response to the government's request for Court-imposed "limitation[s] on the information the public will receive" during the course of the trial of these defendants. *See* Gov't [Redacted] Am. Mot. for Hearing Pursuant to CIPA Sec. 6 (Dkt. # 458) at 4. Media Intervenors attempted to but were rebuffed in their efforts to address directly with government counsel the issues raised below, and are now constrained to draw the Court's attention to several aspects of the government's proposal that may call its constitutionality into question.[1]

SUMMARY OF ARGUMENT

As all parties to this case appear to acknowledge, the Court cannot order the sort of restrictions on public access that the government seeks in this case – namely, denial of access to the evidence as it is presented to the jury – absent (1) proof of a compelling interest in secrecy that is sufficient to override countervailing interests in openness and (2) a further demonstration that any limitations on access will be no greater than necessary to safeguard that interest. Defendants have raised numerous objections to the adequacy of the government's showing in this regard, based principally on their Sixth Amendment trial rights and supported in part by facts that are omitted from the public record. These objections include the number of instances in

[1] The government and the defendants evidently disagree as to whether the Court should engage now in the analysis required by *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984), or whether that review should instead await resolution of issues that will be presented *in camera* pursuant to the Classified Information Procedures Act. *See* Gov't Response to Defs.' Mot. to Strike (Dkt. # 464) at 5; Defs.' Reply Mem. in Supp. of Mot. to Strike (Dkt. # 467) at 2. Without taking a position on this prudential issue of timing, Media Intervenors believe they are compelled to present their concerns now because the Court has indicated that it likely will take up defendants' public-trial arguments, to which the present submission relates, at the April 16 hearing.

which the government has proposed redacting evidence, and the character of the evidence to be redacted, including the contents of dozens of newspaper articles and other "public domain materials" that apparently have been found to be relevant to the prosecution. *See* Defs.' Redacted Mot. to Strike Gov't CIPA 6(c) Requests and to Strike Gov't Request to Close the Trial (Dkt. # 460) at 4-7, 16-38. Given their lack of access to the complete record, Media Intervenors are in no position to either challenge or endorse those assertions by defendants.

To the extent that defendants invoke the First Amendment access-rights jurisprudence of the Supreme Court and the Court of Appeals, however, Media Intervenors join fully in the observation that the Court, in some senses acting as surrogate for the public (including the press), is obligated to give close scrutiny to the government's proposals. Indeed, based on the publicly available information, it appears that the government's proposal to limit public access to portions of the evidence that will be shown to the jury (which is undeniably a closure of judicial proceedings and/or the record) is founded on an erroneous interpretation of the Classified Information Procedures Act ("CIPA"). Regardless of whether premised on CIPA, if approved without the imposition of additional requirements, the government's proposal will fail to satisfy the "narrow tailoring" requirement that the First Amendment imposes on all closure orders. *See Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984).

Media Intervenors are not asking the Court to order the government to publicly disclose information that would jeopardize national security. But if the government elects to present such information as evidence in an unprecedented and controversial prosecution of American citizens under the Espionage Act, the public has a constitutional right to see and hear that evidence as it is presented to the jury unless this Court first finds that the government has satisfied the constitutional prerequisites for closure articulated in *Press-Enterprise*. Should the Court find

that the government has met its burden under *Press-Enterprise* of establishing a compelling need for non-disclosure sufficient to override all competing rights and interests favoring disclosure, then the Court would still be required, at a minimum, to ensure that (1) the redactions are as small as possible, and (2) the public is *contemporaneously* provided with *reasonable* substitutions or summaries of the redacted material.

BACKGROUND

Defendants Steven Rosen and Keith Weissman are charged with violating the Espionage Act by 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. Their trial presently is set to commence on June 4, 2007.

On February 16, 2007, the government filed a "Motion for Hearing Pursuant to CIPA Section 6" (Dkt. # 426), the contents of which were initially sealed from public view. In response to that filing, on 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" (Dkt. # 442), which likewise was initially unavailable to members of the public. Thereafter, the Court entered an order "suspend[ing] the CIPA schedule pending resolution of defendants' motion opposing the government's proposed trial procedures." Order of Mar. 12, 2007 (Dkt. # 443). Following entry of that order, a coalition of news organizations, including most of those who are among the present Media Intervenors, moved for leave to intervene for purposes of being heard on any trial closure issues. At a hearing on March 15, 2007, the Court directed that the briefs filed by the parties be unsealed "to the maximum extent possible," 03/15/07 Hr'g Tr. at 14, ordered further briefing on the constitutionality of the government's

proposed trial procedures, and scheduled oral argument on the defendants' motion to strike the government's proposal for 2:00 p.m. on April 16, 2007. In light of those actions, the Court denied the media coalition's motion to intervene as moot and without prejudice, but invited the news organizations to "watch this carefully. And if you see something that you think is a closed trial, by all means you-all should do what you think is appropriate." *Id.* at 31.

Consistent with the Court's recommendation, Media Intervenors closely reviewed all of the motions and memoranda filed by the parties on the issue of public access to the trial testimony and exhibits. Defendants contend that the government seeks to seal a "vast" amount of the central evidence in the case (*i.e.*, "virtually every recording and document that allegedly discusses the [purported government secrets at issue] would be substantially redacted for public view"). *See* Defs.' Supplement to Mot. to Strike (Dkt. # 454) at 4. The government, in contrast, contends that its proposal involves "only a small fraction" of recorded conversations and some unspecified portion of classified documents relating to "certain of the most sensitive national security secrets," all of which will be played and shown to the jury largely without redaction. *See* Gov't Response to Defs.' Mot. to Strike (Dkt. # 464) at 3-5. The government further represents that its proposed use of the so-called "silent witness rule" – whereby testimony about certain classified matters would given by reference to coded "substitutions and summaries" that jurors could translate using a government-provided list – would affect only a small portion of the testimonial evidence, *i.e.*, only statements that would reveal "the most sensitive and potentially damaging information" at issue in the case. *See id.* at 3, 14. Throughout the papers that were publicly filed in connection with this issue, however, virtually all numerical references to the quantity of material actually implicated by the government's proposal have been redacted or otherwise intentionally omitted.

Furthermore, the government's responsive brief indicates that, under its proposal, "the public [would] receive a summary or substitution" describing the publicly redacted portion of any material that was presented to the jury. The government, however, did not elaborate on how or when the public or press would "receive" such substitutions, nor did it proffer examples of such substitutions or summaries or the principles that might guide their preparation.

All apart from the substantial constitutional and statutory questions raised by defendants regarding the facial validity of the government's proposal in the Sixth Amendment and CIPA contexts, the practical issues identified here by Media Intervenors go directly to whether the government's proposal, if adopted, would satisfy the stringent First Amendment requirements applicable to any closure order. Media Intervenors thus respectfully submit that, at whichever juncture the Court engages in what the parties have come to call the *Press-Enterprise* analysis, the Court is obliged to ensure that the considerations identified here are properly addressed.

ARGUMENT

I. CIPA DOES NOT AUTHORIZE THE CLOSURE REQUESTED BY THE GOVERNMENT

So far as the public record reveals, CIPA is the sole authority invoked by the government to support the requested limitations on public access to the evidence presented at trial. *See* Gov't [Redacted] Am. Mot. for Hearing Pursuant to CIPA Sec. 6 at 2 (citing 18 U.S.C. App. 3 § 6(c)). There is, however, nothing in the text, structure, or legislative history of CIPA from which to divine authority for a procedure whereby the jury will see and hear a set of evidence that is different from that which is presented to members of the public who attend the trial or that which is maintained in the public record of the Court's proceedings. Quite the contrary, as the Fourth Circuit has recognized, CIPA presupposes that testimony will be given and evidence will be presented in "open court." *United States v. Wilson*, 721 F.2d 967, 975 (4th Cir. 1983) (citing S.

Rep. No. 823, 96th Cong., 2d Sess., *reprinted in* 1980 U.S.C.C.A.N. 4294). Federal courts in this circuit, including the Court of Appeals itself, have repeatedly rejected government attempts to convert CIPA into a statute authorizing selective closure of court proceedings. *United States v. Moussaoui*, 65 Fed. Appx. 881, 887 (4th Cir. 2003) ("CIPA alone cannot justify the sealing of oral argument and pleadings.") (unpublished); *United States v. Pelton*, 696 F. Supp. 156, 157 (D. Md. 1986) (rejecting the government's assertion that "CIPA provides a statutory basis" for denying the press and public the ability to listen to tape recordings that are presented to the jury). Two decades after *Pelton*, the government still is unable to offer to this Court a coherent explanation for its novel reading of CIPA. To avoid repetition, suffice to say that Media Intervenors fully join defendants' opposition to the government's proposal insofar as the opposition challenges the suggestion that Congress, through CIPA, authorized federal courts to withhold from the public evidence that is presented to the jury. *See* Defs.' Redacted Mot. to Strike Gov't CIPA 6(c) Requests and to Strike Gov't Request to Close the Trial at 8-16. If this Court has such authority, it must derive from a source other than CIPA, and Media Intervenors respectfully suggest that *Press-Enterprise* and its progeny provide the appropriate rule of decision for public access to the record at trial.[2]

II. INSOFAR AS THE PUBLIC RECORD DISCLOSES, THE GOVERNMENT'S PROPOSAL TO LIMIT PUBLIC ACCESS TO THE EVIDENCE AT TRIAL FALLS SHORT OF CONSTITUTIONAL REQUIREMENTS

"There is no doubt that the First Amendment guarantees the public and the media the right to attend criminal trials," *In re Associated Press (Moussaoui)*, 172 Fed. Appx. 1, 3 (4th Cir.

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[2] It is self-evident that the CIPA statute cannot trump the requirements of the First Amendment with respect to public access to judicial proceedings and records. *See, e.g., In re Washington Post Co.*, 807 F.2d 383, 393 (4th Cir. 1986) (even if CIPA "purported to resolve the issues raised here, the district court would not be excused from making the appropriate constitutional inquiry"); *United States v. Poindexter*, 732 F. Supp. 165, 167 n.9 (D.D.C. 1990) ("CIPA obviously cannot override a constitutional right of access.").

2006) (unpublished), and this constitutionally rooted 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." *See Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (citing *Press-Enter. Co.*, 464 U.S. at 510). 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 383, 392 & 393 n.9 (4th Cir. 1986). At a minimum, by omission of certain practical considerations, the government's proposal appears to run afoul of these standards.

As other courts have observed in similar situations, the press is at a distinct "disadvantage in responding to the government's contentions" that disclosure of information would very likely harm compelling national interests because the press usually will not be privy to the representations made to the Court. This case is no different, as the public record reflects only a general assertion that "disclosure of the classified information at issue would cause identifiable damage to the United States' national security and foreign relations," *see* Gov't [Redacted] Am. Mot. for Hearing Pursuant to CIPA Sec. 6 at 1-2, with more specific assertions submitted to the Court in sealed *ex parte* affidavits. In fact, the press's disadvantage in this case may be even greater, given the extent to which redactions on the public record conceal details relating to the quantity of trial evidence that would be withheld from the public under the government's

proposal.[3] The record to date likewise fails to disclose the character or nature of the government's proposed public summaries and substitutions. Yet, both of these facts – the quantity of redactions and the quality of substitutions – bear on the issues of "narrow tailoring" and potential alternatives to closure.

Putting aside the question whether the government has been unnecessarily circumspect in its public filings, Media Intervenors do not doubt that there may be highly sensitive information contained in the evidence to be presented to the jury. Nor do Media Intervenors doubt that the Court will properly weigh the government's interest in preventing further public disclosure of that information against the various competing interests that may favor its disclosure.[4]

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[3] As the Court has recognized, any analysis of the constitutionality of the government's proposal should be "informed, ultimately, to some extent by the amount" of trial evidence that the government would withhold from the public through redactions, substitutions, summaries, and use of the "silent witness rule." *See* 03/15/07 Hr'g Tr. at 8. Faced with conflicting assertions from the defendants (who describe the government's proposal for redactions as involving "an unacceptably high – and unprecedented – percentage of the trial" evidence, Defs.' Redacted Mot. to Strike Gov't CIPA 6(c) Requests and to Strike Gov't Request to Close the Trial at 24) and the government (which suggests that the amount of information redacted is small, and that it simply proposes redacting the same limited pool of information numerous times, Gov't Response to Defs.' Mot. to Strike at 14-15), Media Intervenors regrettably are unable to assist the Court in this aspect of the analysis.

[4] Those interests, of course, are not limited to defendants' fair-trial rights. As the Supreme Court explained in *Press-Enterprise*:

> 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.

464 U.S. at 508 (emphasis in original). By contrast, closure of proceedings and records (whether in part or in full) inhibits the "crucial prophylactic aspects of the administration of justice" and leads to distrust of the judicial system – particularly where the outcome of the proceedings is unexpected – because the bases for decisions are hidden from public view. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980).

Nevertheless, even assuming that the Court concludes that the government has demonstrated, with respect to *each item* of evidence that it wishes to redact from the public record, that a compelling interest in avoiding public disclosure outweighs all other interests, and that the government is entitled to introduce that evidence in this prosecution while keeping it from the public, there remains the issue of whether the government's proposal is appropriately crafted to withhold from the public no more information than necessary, and for no longer than necessary, to protect the identified compelling interest.

In this regard, it is clear that the Court must review and approve the government's proposed substitution or summary of each redacted or omitted evidentiary item, and require the government to provide such substitution or summary at the time the unredacted evidence is presented to the jury. The Court cannot, consistent with the Constitution, delegate to the government the discretion to determine what substitutions are adequate to satisfy the public's right of access. *See, e.g., In re Washington Post Co.,* 807 F.2d at 391-92 (district court cannot abdicate to executive branch task of determining whether and to what extent secrecy is required in judicial proceedings, even in national security context, and court must provide statement of reasons with respect to any such secrecy it orders); *see also Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996) (in context of record in civil proceeding, observing that "District Court cannot abdicate its responsibility . . . to determine whether filings should be made available to the public"). Just as the Court must make that determination for itself with respect to whether government-proposed substitutions satisfy the defendant's rights to a fair trial, the Court also is obliged to make that determination for itself – again, if it is otherwise persuaded that the government's proposal is permissible in the first instance – with respect to whether proposed substitutions to be released to the public are sufficiently detailed to qualify as the

narrowest form of closure consistent with protecting the government's compelling interest in avoiding disclosure.

And that evaluative process necessarily must be completed prior to trial, not during or after it. As the Fourth Circuit recently emphasized, the public's First Amendment right is one of *contemporaneous* access to the evidence, which in this case would include any approved substitutions and summaries. *See In re Associated Press (Moussaoui)*, 172 Fed. Appx. at 6 (granting writ of mandamus and reversing district court's order that would have denied, until after completion of terrorism trial, public access to documentary exhibits admitted into evidence and published to jury). Significantly, the Court of Appeals in *Moussaoui* embraced the reasoning of the Second Circuit in *In re National Broadcasting Co. (Myers)*, in which that court concluded that "there is a significant public interest in [providing public access to judicial records] contemporaneously with [their] introduction . . . into evidence in the courtroom, when public attention is alerted to the ongoing trial." 635 F.2d 945, 952 (2d Cir. 1980). *See also United States v. Libby*, Misc. Case No. 07-0052 (D.D.C. Feb. 5, 2007) (ordering contemporaneous release to press of audio recordings of defendant's grand jury testimony).[5]

Finally, of course, it bears emphasis that the Court is obliged to make specific findings to support its conclusions in these regards, and to do so on the public record so that citizens,

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[5] Given the emphasis of both parties on the central role likely to be played at trial by evidence in the form of audio recordings, it appears appropriate to emphasize both the public's right to obtain copies of the recordings (redacted, if so ordered by the Court in this case after the *Press-Enterprise* analysis), and the right to obtain those copies contemporaneously. *See, e.g., Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) ("audio tapes enter the public domain once played and received into evidence" at trial and must be treated no differently than "the court reporter's transcript, the parties' briefs, and the judge's orders and opinions," all of which are available to public as soon as they are filed); *United States v. Poindexter*, 732 F. Supp. 170, 172 n.2 (D.D.C. 1990) (noting that court would "provide . . . copies to the interested news media" of videotaped testimony of President Ronald Reagan "after the videotape [had been] played at the trial" of former National Security Adviser).

including members of the press, may be assured that the principles of openness have been applied fully and appropriately even – or perhaps more correctly, especially – in this extraordinary criminal case. *E.g., Rushford*, 846 F.2d at 253-54 (quoting *In re Knight Publ'g Co.*, 743 F.2d 231, 234-35 (4th Cir. 1984)).

CONCLUSION

For the foregoing reasons, Media Intervenors respectfully urge the Court to (a) reject the government's argument that CIPA authorizes the forms of closure and sealing of the record it has proposed; (b) review the government's request to limit public access to portions of the proceedings and record at trial under the standard set forth in *Press-Enterprise* and its progeny; and (c) ensure that any redactions in the public record of this trial that the Court may permit are no more extensive than demonstrably necessary and that appropriate substitutions or summaries are provided to the public contemporaneously with presentation of the unredacted evidence to the jury.

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Respectfully submitted,

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