EYES TIED SHUT: LITIGATING FOR ACCESS UNDER CIPA IN THE GOVERNMENT'S "WAR ON TERROR"

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INTRODUCTION

The government's "War on Terror" has largely been a secret war.[1] This is true not only on the so-called battlefield, but in the courtroom as well. Numerous proceedings against alleged terrorists and those alleged to have violated anti-terrorism laws have been conducted either in partial or complete secrecy.[2] In these cases, the government often invokes provisions of federal regulations and statutes – such as the Special Administrative Measures[3] and the Classified Information Procedure Act (CIPA)[4] – that restrict the type and quantity of information available to the public during the pre-trial and trial proceedings of those charged with acts of terror against the United States. While the First Amendment requires that all criminal trials be open to the press and public absent compelling and clearly articulated reasons requiring closure,[5] the government's attempt to restrict access to these proceedings threat-

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1. *See, e.g.,* David Rogers, *CIA Commits to Huge Covert Investment,* WALL ST. J., Oct. 5, 2001, at A3 (reporting that between $700 million and $800 million has been secretly allocated to the CIA for anti-terrorism efforts).

2. *See, e.g.,* North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) (holding that newspapers did not have a First Amendment right of access to deportation proceedings that Attorney General determined presented significant national security concerns), *cert. denied*, 123 S. Ct 2215 (2003); Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002) (reversing district court order granting alleged "enemy combatant" access to counsel because of court's failure to give proper weight to national security concerns), *cert. granted*, 124 S. Ct. 981 (2004).

3. 28 C.F.R. § 501 (2003).

4. 18 U.S.C. app. 3, §§ 1-16 (2003).

5. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 & n.17 (1980) (holding that press and public possess First Amendment right to observe criminal tri-

ens the carefully articulated justifications underlying this right.[6] As the Supreme Court concluded in *Globe Newspaper Co.*, in overturning an order closing a trial involving a sexual offense alleged to have been committed against a minor victim:

> [T]he right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. . . . And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process — an essential component in our structure of self-government.[7]

In light of the extraordinary nature of the events of September 11 and its aftermath, and the extraordinary interest both in the United States and throughout the world in the response of our government to those events, the right of the public to observe and to scrutinize the workings of our judicial system should not be sacrificed to amorphous "national security" concerns.

This article recounts the experience of the attorneys representing approximately a dozen media clients seeking access to documents, pleadings, and the courtroom in the federal criminal case against Zaccarias Moussaoui.[8] In the *Moussaoui* case, the government sought – and continues to seek – to conduct the proceedings

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als); *see also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (right to attend testimony at criminal trial of minor victim of sexual offense).

6. "Openness . . . enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984). Closed proceedings, 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*, 448 U.S. at 571.

7. 457 U.S. at 606 (footnote omitted).

8. Along with Lee Levine, Jay Brown, and Thomas Curley, I represented ABC, Inc., Associated Press, Cable News Network LP, LLLP, CBS Broadcasting Inc., The Hearst Corporation, National Broadcasting Company, Inc., The New York Times Company, The Reporters Committee for Freedom of the Press, The Star Tribune Company, Tribune Company, and The Washington Post in the Fourth Circuit, and many of those same companies in related proceedings in the district court in *United States v. Moussaoui*. I will occasionally refer to these clients as "the media." The views expressed in

in unprecedented secrecy, with very limited access by the public or press. The attempt to gain access to the matters I write about here was often frustrating, sometimes Kafkaesque. Given no notice that particular proceedings were taking place, and with little information as to what facts or legal arguments documents contained, it was extremely difficult to craft arguments to counter the government's "national security" mantra. Fortunately, the United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit recognized the threat to American constitutional values, and has allowed significant access to papers and proceedings in the case. Because the case is ongoing at the time of this writing, however, it is not clear whether it will represent a victory for the media and the First Amendment, or a triumph in the government's secret war.

This article describes two disputes between the media and the government over access. Part I describes the dispute over access to Moussaoui's *pro se* filings. Although the district court initially granted the government's motion to seal all papers filed by Moussaoui, the court reversed ground when the media argued that the court had failed to comply with all the procedures required under the First Amendment and relevant Fourth Circuit precedent before documents may be sealed. It took a second access motion, however, for the government to concede that many of the *pro se* filings should be unsealed. Part II describes the media's efforts to unseal briefs and to open the courtroom in the government's appeal of the district court's order directing the government to produce a witness – widely reported to be Ramzi bin al-Shibh – for a deposition pursuant to Rule 15 of the Federal Rules of Criminal Procedure. The Fourth Circuit initially granted the United States' motion to seal the substantive record on appeal, to close oral argument to the public, and to seal the government's certificate of confidentiality and motion to seal oral argument.[9] In both their

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this article are my own, however, and do not necessarily reflect those of the other lawyers involved in the case or any of the clients.

9. By its express terms, the March 21 Order at issue "grant[ed] the certificate of confidentiality," "seal[ed] the joint appendix," and closed the courtroom to the public for oral argument. Pursuant to this Order, most other substantive portions of the record likewise were filed under seal. At the time the media first moved to intervene, the papers that were under seal included, *inter alia*, the entirety of the parties' briefs on the

procedural genesis and effective scope, the Fourth Circuit's orders, which were entered without notice or opportunity for the public to be heard, were virtually unprecedented.[10]

As in the district court, the arguments the media made in their motion seeking access to the sealed documents on appeal and to attend the oral argument convinced the Fourth Circuit to reverse ground. The court rejected the government's argument that CIPA gave federal prosecutors broad, unfettered discretion to impose secrecy on national security grounds. Ultimately, the court held that it lacked jurisdiction to hear the appeal of the order directing Ramzi bin al-Shibh to be deposed because the order was non-final. The government made a motion for rehearing *en banc,* which was denied in a seven to five vote. Part II concludes with a critique of the arguments of the dissenting judges that the Classified Information Procedures Act provided a valid basis for appellate jurisdiction.[11]

I. The Battle for Access to Moussaoui's Pro Se Filings

In May, 2002, approximately six months after he had been indicted, Zaccarias Moussaoui dismissed his court appointed attorneys and chose to proceed *pro se*.[12] Although the district court appointed Frank Dunham, of the Eastern District of Virginia Public Defender's office, as his "stand-by" counsel, Moussaoui took the lead in his own defense. Soon thereafter, he began to file a series

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merits (as well as the government's separately filed "Table of Authorities"), various appendices, the government's certificate of confidentiality and motion to seal argument, and even the government's motion to seal the latter. Doc. No. 3754127-1 at 1 in United States v. Moussaoui, 333 F.3d 509 (March 21, 2003) (Order); Doc. No. 3755646-1 at 1 in *Moussaoui*, 333 F.3d 509 (March 24, 2003) (Order). All the pleadings in the *Moussaoui* case are available on line at http://notablecases.vaed.uscourts.gov/1:01-cr-00455/DocketSheet.html, last visited November 21, 2003. [Hereinafter indicated by "Doc. No."].

10. Indeed, as the media argued, even the *Pentagon Papers* case and the hydrogen bomb plans case were litigated in public. *See* New York Times Co. v. United States, 403 U.S. 713 (1971); United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wisc. 1979). *See also* discussion *infra* note 62.

11. The article does not consider the other bases for appellate jurisdiction advanced by the government, most notably the "collateral order" doctrine.

12. Subsequently, by order dated November 14, 2003, the district court vacated its prior order permitting Moussaoui to proceed *pro se*, and ordered that standby counsel be appointed counsel of record. Doc. No. 1120 in United States v. Moussaoui, 01-CR-455 (E.D. Va. 2002).

of rambling and sometimes offensive legal pleadings.[13] In a letter to the court dated August 22, 2002, originally filed under seal, the government contended that "defendant is writing pleadings for the purpose of either (1) sending messages to conspirators or sympathizers, or (2) making public political statements" and the government requested that defendant's future filings be "presumptively sealed" unless the government and/or the court agreed otherwise.[14] As authority for its request, the government invoked the Special Administrative Measures imposed on Moussaoui's pre-trial confinement that sharply limited his communication with the outside world.[15] By permitting defendant to file his pleadings publicly, the government argued, "the purpose of the SAM is gutted."[16]

On August 29, 2002, without public notice and in a proceeding closed to the public, the district court addressed the government's August 22nd letter. Indicating that it was treating the letter as a motion to seal the pleadings, the court advised the defendant that all of his pleadings would be kept sealed "unless [he] tone[s] down the rhetoric," and "confine[s] them to proper, lawyer-like rhetoric."[17] In an order dated the same day memorializing its bench ruling, the district court explained that Moussaoui's *pro se* pleadings "continue to contain extensive inappropriate rhetoric" and are "replete with irrelevant, inflammatory and insulting rhetoric."[18] The court further found that the record "supports the United States' concern that the defendant . . . is attempting to use the court as a vehicle through which to communicate with the outside world in violation of the Special Administrative Measures governing the conditions of his confinement."[19] Consequently, the court granted the

13. Defendant's pleadings included his 8/1/02 motion "for a 1st Class Ticket on 747-400 Out of the United States Now" and his 8/12/02 motion "to Keep Mad, Out of Control Standby Hord of Blood Sucker, Out of Halal, Pure Pro Se Land." Doc. No.'s 383, 407 in United States v. Moussaoui, 01-CR-455 (E.D. Va. 2002).

14. Doc. No. 464 at 1 & 3 in *Moussaoui*, 01-CR-455 (E.D. Va. 2002) (August 22, 2002 letter from R. Spencer to Hon. L. Brinkema).

15. *Id.* at 1; *see* 28 C.F.R. § 501.3 (2003).

16. Doc. No. 464 at 1 in *Moussaoui*, 01-CR-455 (E.D. Va. 2002) (August 22, 2002 letter from R. Spencer, Esq. to Hon. L. Brinkema).

17. Doc. No. 466 in *Moussaoui*, 01-CR-455 (E.D. Va. 2002) (August 29, 2002 Tr. 34:15-17, 35:1-3).

18. Doc. No. 465 at 2-3 in *Moussaoui*, 01-CR-455 (E.D. Va. 2002) (August 29, 2002 Order).

19. *Id.* at 3.

government's motion to seal Moussaoui's pleadings and ordered, *inter alia*, "that any future pleadings filed by the defendant, *pro se*, containing threats, racial slurs, calls to action, or other irrelevant and inappropriate language" be filed and kept under seal.[20] The practical effect of the August 29th order was to presumptively seal everything Moussaoui filed in the district court.

On behalf of the media, we filed a motion in the district court challenging the August 29 order and seeking access to the pleadings and documents that had been filed *pro se* by Moussaoui and placed under seal by the court.[21] We argued that the district court's order, entered without public notice or comment, and without consideration of the strong First Amendment and common law arguments against complete sealing, was seriously flawed. Fourth Circuit case law requires a district court to follow specific procedural requirements before it seals a record or closes a courtroom. Despite its conservative reputation, the Fourth Circuit tilts heavily in favor of the press and public in access matters. For example, in *In re Time Inc.*[22], the Fourth Circuit reversed a district court order denying a motion by various news organizations to unseal exhibits that Julie Hiatt Steele had filed under seal in several pre-trial motions in her defense against charges of obstruction of justice filed by the Office of Independent Counsel in connection with its investigation of President Clinton. The court held that "[a] First Amendment right of access applies to a criminal trial, including documents submitted in the course of a trial."[23] The Fourth Circuit emphasized that this right imposes certain obligations on a trial court:

> [A] court must assess whether sealing documents is "'necessitated by a compelling government interest, and . . . narrowly tailored to serve that interest.'" In making this

20. *Id.* at 4.

21. We had been involved in the *Moussaoui* case since we were retained by Court TV to assist in its ultimately unsuccessful efforts to televise the pre-trial and trial proceedings. Cameras are prohibited in federal criminal trials by both Rule 53 of the Federal Rules of Criminal Procedure and Local Rule 83.3 of the Eastern District of Virginia. Court TV argued that this *per se* ban was unconstitutional. The district court, however, denied Court TV's motion, finding it had no discretion to disregard the prohibition against photographing federal court proceedings, and that the ban was not unconstitutional. United States v. Moussaoui, 205 F.R.D. 183, 184 (E.D. Va. 2002).

22. 182 F.3d 270 (4th Cir. 1999).

23. *Id.* at 271.

> assessment, a district court . . . must (1) provide public notice that the sealing of documents may be ordered, (2) provide interested persons an opportunity to object before sealing is ordered, (3) state the reasons, supported with specific findings, for its decision if it decides to seal documents, and (4) state why it rejected alternatives to sealing.[24]

Moreover, in *In re Washington Post,* the court expressly rejected the government's argument that the procedural requirements for sealing should not apply when 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.[25]

We emphasized the weight of this case law in our arguments to the district court, pointing out that the court never even gave the public notice that it was considering sealing all of Moussaoui's pleadings, let alone an opportunity to be heard. The government contended that Moussaoui's *pro se* filings were not documents filed "in connection with" the underlying criminal case because the pleadings had no rational relationship to the case and because the

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24. *Id.* On remand in *Steele*, the district court unsealed various of the exhibits at issue, ordering that only certain portions of individual exhibits be redacted for specified reasons. *See* Doc. No. 177 in United States v. Steele, 99-CR-9 (E.D. Va. May 11, 1999) (Order); *see also, e.g.,* 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).

25. In re Washington Post Co., 807 F.2d 383, 391-92 (4th Cir. 1986).

purpose of the pleadings was to convey messages to the outside world.[26] Within a month, the district court modified its August 29th order. On September 27, 2002, the court held that all of defendant's *pro se* pleadings would initially be filed under seal. The United States would then have ten days to advise the court in writing if the pleading should remain sealed or redacted. If the United States did not so advise the court, the pleading at issue would be unsealed without redaction.[27]

Unfortunately, the district court order was not self-executing. Within a few months, some of our clients began to complain that many of Moussaoui's *pro se* pleadings that were supposed to be unsealed in the district court remained sealed. There were also numerous other pleadings that remained sealed with no indication of the nature of those pleadings and no public notice of their sealing. Consequently, our clients filed a second motion in the district court seeking access to the *pro se* pleadings.

The government responded almost immediately to the motion by conceding that many of Moussaoui's *pro se* pleadings should be unsealed. Shortly thereafter, the government also conceded that additional pleadings in the district court could be released either in their entirety or in redacted form. At about the same time, the district court expressed its own frustration regarding "the extent to which the United States' intelligence officials have classified the pleadings, orders and memorandum opinions in this case."[28] Indeed, it did seem that virtually everything filed in the *Moussaoui* case was sealed in a kind of knee-jerk concern for national security. The fact that, with a little legal prodding, the government could unseal documents that had been sealed when filed, raised questions as to why they had been sealed in the first place.

The government's concessions in the district court regarding Moussaoui's *pro se* filings, however, would soon become a footnote

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26. In the alternative, the government argued that Moussaoui's *pro se* pleadings that contained irrelevant, scandalous, or immaterial matter should be returned to him unfiled by the clerk of the court. Doc. No. 464 at 1 & 2 in United States v. Moussaoui, 01-CR-455 (E.D. Va. 2002) (August 22, 2002 letter from R. Spencer to Hon. L. Brinkema).

27. United States v. Moussaoui, 31 Media L. Rep. 1574 (E.D. Va. 2002).

28. Doc. No. 822 at 1 in *Moussaoui*, 01-CR-455 (E.D. Va. 2002) (April, 4 2003 Order).

in a larger battle to keep his more substantive motions out of the public record.

II. The Battle for Access to Documents and Oral Arugment in the Appeal of Moussaoui's Motion to Depose Ramzi bin al-Shibh

A. Background

In September 2002, Ramzi bin al-Shibh was captured in Pakistan, an arrest heralded as a triumph in the government's war on terrorism.[29] Though still at large when Moussaoui was indicted, Mr. bin al-Shibh was named as a "supporting conspirator."[30] Specifically, Mr. bin al-Shibh is alleged to have been a member of a terrorist cell in Germany and to have wired $14,000 to Moussaoui.[31] Mr. bin al-Shibh's arrest plainly had implications for the Moussaoui prosecution.[32] In the months following Mr. bin al-Shibh's capture, Moussaoui made several attempts to gain access to him.[33] Mous-

29. *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.").

30. Doc. No. 1 at ¶ 14 in *Moussaoui*, 01-CR-455 (E.D. Va. 2002).

31. *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://www.usdoj.gov/ag/speeches/2001/agcrisisremarks12_11.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.").

32. *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").

33. *See* Doc. No. 613 in United States v. Moussaoui, 01-CR-455 (E.D. Va. 2002) (Defendant's Motion for "Admission" Tape of Brother Bin al-Shibh, October 16, 2002) ("The U.S. government has organize [sic] 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."); *see also* Doc. No. 537 in United States v. Mous-

saoui's court-appointed "standby" counsel also filed a motion seeking pretrial access to Mr. bin al-Shibh and a writ of *habeas corpus ad testificandum*.[34] On January 31, 2003, the district court granted Moussaoui's motion for access to Mr. bin al-Shibh.[35] The papers in support and in opposition to the motion and the court's order, however, remained sealed. In addition, the district court's docket was virtually silent about the issue, and did not even mention Mr. bin al-Shibh by name. Consequently, most of what we knew about Moussaoui's efforts to depose bin al-Shibh, we learned from our clients and the vigorous efforts of their reporters. In March 2003, the United States appealed the district court order granting Moussaoui access to bin al-Shibh.[36] The government filed its initial brief under seal, and by orders dated March 21, 2003 and March 24, 2003 the Fourth Circuit granted the government's motion to seal the substantive record in the appeal, to close oral argument to the public, and to seal the government's certificate of confidentiality and motion to seal oral argument.[37]

In sum, all of the documents concerning Mr. bin al-Shibh, in both the district court and the Fourth Circuit, were sealed and oral argument was to be closed to the public. Thus, we did not know any of the government's substantive arguments on either the appeal or in support of its motion to seal. We did not know, for example, the jurisdictional basis for the appeal. In federal court, most orders are not appealable until final.[38] Was the United States claiming that the district court's order was a collateral order appealable under the collateral order doctrine?[39] Was it claiming some

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saoui, 01-CR-455 (E.D. Va. 2002) (Defendant's Motion to Bring Brother Ramzi Bin al-Shibh to the Open Court of Moussaoui, September 19, 2002) ("Ramzi is my prime witness at trial.").

34. United States v. Moussaoui, 333 F.3d 509, 513 (4th Cir. 2003).

35. *Id. See also* Doc. No. 732 in *Moussaoui*, 01-CR-455 (E.D. Va. 2002).

36. We subsequently learned that the district court had ordered that the government produce Ramzi bin al-Shibh for a pre-trial deposition pursuant to Rule 15 of the Federal Rules of Criminal procedure. *Moussaoui,* 333 F.3d at 513.

37. Doc. No. 3754127-1 at 1 in *Moussaoui*, 333 F.3d 509 (March 21, 2003) (Order); Doc. No. 3755646-1 at 1 in *Moussaoui*, 333 F.3d 509 (March 24, 2003) (Order).

38. 28 U.S.C. § 1291 (2003) (providing that the courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States").

39. Under the "collateral order" doctrine, a non-final ruling of the district court may, nevertheless, be immediately appealed if it "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of

other special basis for jurisdiction? We knew only that the government had appealed a district court order granting Moussaoui access to an alleged co-conspirator, widely believed to be Ramzi bin al-Shibh.

We had one tantalizing clue to the argument advanced by the government to seal all briefs and the oral argument on appeal. In its March 21 order, the Fourth Circuit granted the government's certificate of confidentiality and sealed the joint appendix and oral argument. The sole basis for the order cited in the public record was the Fourth Circuit's notation that "the argument is sealed pursuant to the provisions of the Classified Information Procedures Act."[40] In its March 24 order sealing the government's motion to seal its certificate of confidentiality – i.e. sealing its motion to seal – the Fourth Circuit was silent.

We got our second clue when I called the Assistant United States Attorney to get his consent to our motion to intervene in the Fourth Circuit for the purposes of making our access motion.[41] As it turns out, one of the lead prosecutors – Robert Spencer – was my college roommate. Spencer told me, however, that the government would not consent to our motion to intervene because this was a "CIPA matter" and, according to Spencer, our motion was completely meritless.[42]

B. CIPA

The Classified Information Procedures Act was enacted in 1980 to combat "graymail, a practice whereby a criminal defendant threatens to reveal classified information during the course of his trial in the hope of forcing the government to drop the criminal charge against him."[43] CIPA provides a mechanism for trial courts

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the action, and [is] effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

40. Doc. No. 3754127-1 at 1 in United States v. Moussaoui, 333 F.3d 509 (March 21, 2003).

41. Fourth Circuit Local Rule 27(a) requires a party seeking leave to intervene to confer with counsel for the parties.

42. Spencer subsequently relented, and consented to our motion to intervene, although he did not consent to our access motion.

43. United States v. Smith, 780 F.2d 1102, 1105 (4th Cir. 1985) (footnote omitted); *see also* S. Rep. No. 96-823, at 3, *reprinted in* 1980 U.S.C.C.A.N. 4294, 4296-97 (noting that problem of graymail is not "limited to instances of unscrupulous or

to rule on the admissibility of classified information in advance of trial.[44] Typically, cases arise under CIPA in two situations. First, when the government does not want to reveal classified information in documents to be made available to the defendant in discovery, it may move the court under Section 4 of CIPA to delete the classified material or to substitute either a statement admitting relevant facts that the classified information would tend to prove or a summary of the information.[45] The request is made *ex parte* and *in camera*.[46] The second way CIPA can be invoked is under Sections 5 and 6 of the statute. Under Section 5, the defendant is obliged to inform the court if he "reasonably expects to disclose or cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving [his] criminal prosecution."[47] Based on this notification, the government may move for a hearing under Section 6(a) to make "any determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding."[48] Once the court has made such a ruling, the government may take an interlocutory appeal of that ruling.[49] Unlike a Section 4 determination, a Section 6 hearing is not *ex parte* – the government must provide the defendant with notice of the classified information that is at issue.[50]

We were puzzled by the government's insistence that the entire appeal was governed by CIPA. Although we were unable to review most of the pleadings in the district court, there did not appear to have been a CIPA proceeding which formed the basis for the gov-

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questionable conduct by defendants since wholly proper defense attempts to obtain or disclose classified information may present the government with the same 'disclose or dismiss' dilemma").

44. *In re Washington Post Co.*, 807 F.2d at 393; *see also, e.g.*, S. Rep. No. 96-823, at 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4294, 4294 (CIPA's purpose is to provide "pretrial procedures that will permit the trial judge to rule on questions of admissibility involving classified information before introduction of the evidence in open court").

45. 18 U.S.C. App. 3 § 4 (2003).

46. *Id.*

47. *Id.* § 5(a).

48. *Id.* § 6(a).

49. *Id.* § 7(a).

50. *Id.* § 6(b)(1).

ernment's appeal as required by the statute.[51] Of course, we could have been wrong, especially given the paucity of information on the district court's public docket, but it appeared that the district court's January 31 order arose from Moussaoui's own *pro se* motions as well as related motions filed by his stand-by counsel, not from any CIPA proceeding initiated by the government.

In addition, Moussaoui did not have access to classified information that he might threaten to disclose at trial. Unlike the typical defendant in a CIPA matter, such as former Admiral John D. Poindexter,[52] Moussaoui was not a former CIA or NSA official with access to classified information. Indeed, Moussaoui's stand-by attorneys have argued that Moussaoui's due process rights have been violated because he is unable to review classified information with his attorneys and thus is unable to adequately prepare his defense.[53] Moreover, any information that Moussaoui might elicit from bin al-Shibh would not be classified. Rather, information becomes classified only when the appropriate classifying authority designates it as such.[54]

Finally, CIPA could not have provided the statutory basis for sealing all documents and denying access to the courtroom in the Fourth Circuit. Pursuant to section 9 of CIPA, the Chief Justice of the United States may "prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States district courts, courts of appeals, or Supreme Court."[55] These procedures contemplate

51. *See* 18 U.S.C. App. 3 § 6(a) (providing for learning to determine use at trial of classified information).

52. *See, e.g.*, United States v. Poindexter, 732 F. Supp. 165 (D.D.C. 1990) (denying, on national security grounds, motion of media intervenors for access to deposition of former President Ronald Reagan in trial of former National Security advisor where deposition would include classified information because former President Reagan, "by definition and practice, is the repository of the nation's most vital secrets.").

53. *See, e.g.*, Doc. No. 166 at 8-11 in *Moussaoui*, 01-CR-455 (E.D. Va. 2002). (Memorandum by Zacarias Moussaoui in support of Motion for Access by Defendant to Classified and Sensitive Discovery and Relief from Special Administrative Measures Concerning Confinement).

54. *See* Exec. Order No. 12958, 60 Fed. Reg. 19825 (April 17, 1995) (classified information is only that which is owned or controlled by the United States and has been designated as such).

55. 18 U.S.C. App. 3 § 9.

that certain appellate hearings may in held *in camera*.[56] The procedures, however, expressly define the limited portion of the appellate record that falls within their ambit: "any description of, or reference to, classified information *contained in* papers filed in an appeal, pursuant to Section 7 of the Act."[57] The procedures thus expressly distinguish between classified information contained in appellate papers and the papers themselves.

The media never contended at any point in the *Moussaoui* proceedings that they were entitled to view properly classified materials. But it seemed apparent there were many sealed documents in both the district court and the Fourth Circuit containing information that was not classified, or that could easily be redacted. It was difficult to imagine, for example, why the *legal arguments* in favor of prohibiting public access both to the record and to the courtroom should be secret. Indeed, it had already been reported that "federal prosecutors [were] citing a World War II-era Supreme Court decision as part of their effort to overturn a judge's ruling that Moussaoui's lawyers [could] interview Ramzi Binalshibh."[58] The legal basis for the government's appeal did not seem a matter of national security.

Finally, even if CIPA did govern the issues on appeal, CIPA plainly did not mandate complete secrecy of all papers and proceedings. As a preliminary matter, the Fourth Circuit had held that the mere invocation of national security did not automatically negate the First Amendment and common law rights to media access nor did it authorize courts to ignore the procedural requirements designed to protect those rights. In *In re Washington Post Co.*, the district court sealed certain documents pursuant to CIPA, including affidavits proffered by the government to establish the national se-

56. *See Security Procedures Established Pursuant to Pub. L. 96-456, 94 Stat 2025, by the Chief Justice of the United States for the Protection of Classified Information* § 3 ("[a]ny *in camera* proceeding — including a[n] . . . appellate hearing — concerning the use, relevance, or admissibility of classified information, shall be held in secure quarters"), *reprinted following* 18 U.S.C. app. 3 § 9 (2003).

57. 18 U.S.C. § 7(a)(5) (emphasis added).

58. Jerry Markon, *U.S. Tries to Block Access to Witness for Terror Trial*, WASH. POST, April 2, 2003, at A7 ("According to people familiar with them, the government briefs use mostly national security arguments, saying that those issues outweigh the importance Binalshibh might have to Moussaoui's defense. One case prosecutors cite is *Johnson v. Eisentrager* . . . . ").

curity interests at stake in the underlying criminal prosecution, and closed the proceedings in connection with them.[59] On appeal, the Fourth Circuit considered "whether the procedural requirements and the substantive standards applied in evaluating the scope of [the public's First Amendment right of access] should differ when considerations of national security are at stake."[60] The court squarely answered that question in the negative:

> In [cases implicating national security interests], the government contends, the district court should have discretion to adapt its procedures to the specific circumstances, and may properly defer to the judgment of the executive branch. We disagree. While we recognize, and share, the government's concern that dangerous consequences may result from the inappropriate disclosure of classified information, we do not believe that adherence to the procedures outlined in *Knight Publishing* would create an unacceptable risk of such disclosure.[61]

Accordingly, the Fourth Circuit held that the procedural components of the public's access rights "are fully applicable in the context of closure motions based on threats to national security," including motions based on CIPA.[62]

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59. 807 F.2d at 386.

60. *Id.*

61. 807 F.2d at 391. Under the rules set forth in *Knight Publishing,* the district court must: (1) give the public adequate notice that the sealing of documents may be ordered; (2) provide interested persons "an opportunity to object to the request *before* the court ma[kes] its decision; (3) if the district court decides to close a hearing or seal documents, "it must state its reasons on the record, supported by specific findings;" and (4) the court must state its reasons for rejecting alternatives to closure. In re Knight Publ'g Co., 743 F.2d 231, 234-35 (4th Cir. 1984).

62. 807 F.2d at 392. As more than one appellate court has observed, the invocation by the government of national security or analogous interests does not justify blind acquiescence in requests for wholesale sealing or closure. In refusing to seal appellate proceedings in a trade secret matter, for example, the Seventh Circuit noted:

> Even disputes about claims of national security are litigated in the open. Briefs in the *Pentagon Papers* case, and the hydrogen bomb plans case, were available to the press, although sealed appendices discussed in detail the documents for which protection was sought.

Union Oil Co. v. Leavell, 220 F.3d 562, 567 (7th Cir. 2000) (citing New York Times Co. v. United States, 403 U.S. 713 (1971)); United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wisc. 1979)).

In addition, courts routinely resolve the interplay between CIPA and the public's right of access without resort to blanket sealing and wholesale closure of proceedings, even when classified material is involved. In *United States v. Pelton*, for example, the district court examined the legislative history of CIPA and concluded that "[t]here is nothing in [it] to suggest that the government may close all or part of a public trial."[63] Indeed, the district court in that case expressly rejected the government's assertion that CIPA provided an exception to the "otherwise strong presumption in favor of openness in all matters in a criminal trial."[64] Similarly, in *United States v. Poindexter,* [65] while holding that the deposition of former President Reagan would be held *in camera* "because top secret and other extremely sensitive information will pervade the deposition,"[66] the court based its ruling on traditional access jurisprudence – not CIPA – and noted that "CIPA obviously cannot override a constitutional right of access."[67] Indeed, the court held that a redacted transcript of the deposition would be made available to the public as soon as sensitive material was edited out, and noted that the issue was "not whether, but when, the press will have access to President Reagan's testimony."[68]

Finally, in *United States v. Ressam,* the court again rejected the government's blanket contention that CIPA materials "remain beyond the scope of the public's First Amendment right of access" and that CIPA and its implementing regulations "greatly restrict the judicial branch's authority to disclose classified information."[69]

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63. 696 F. Supp. 156, 157 (D. Md. 1986).

64. *Id.* at 158. Although the court in *Pelton* ultimately declined to allow contemporaneous, live access by the news media intervenors to the portion of the trial proceedings in which the evidentiary material at issue containing classified information was introduced in evidence, it ordered that a transcript of the tape recordings in question be made public after properly classified material was redacted. *Id.* at 159. And, the district court noted that the tapes in question were estimated to have a combined length of five minutes, meaning that the press and public would be excluded from the proceedings only briefly: "Were the government seeking to close significant periods of the trial," the district court cautioned, "the balance struck . . . might well be different." *Id.* at 159-60.

65. 732 F. Supp. 165.

66. *Id.* at 167.

67. *Id.* at 167 n.9.

68. *Id.* at 169.

69. 221 F. Supp. 2d 1252, 1256 (W.D. Wash. 2002).

While the court recognized that the public had no "'tradition of access' to documents that are submitted as part of an *ex parte, in camera* hearing to determine whether certain information in the Government's possession is discoverable,"[70] it nevertheless held that CIPA "cannot negate the public's First Amendment right of access to criminal trials or closely related pretrial proceedings."[71]

The Sixth Circuit recently explained the strong policy reasons for open judicial proceedings when it denied a motion to close oral arguments in a case in which the government asserted that disclosure of information would compromise an ongoing criminal investigation:

> While we deliberate in private, we recognize the fundamental importance of "issuing public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification." To the extent the government believes that it must reveal sensitive information to the court as part of its argument, it can "submit arguments in writing under seal in lieu of the in camera oral argument."[72]

Despite all of the case law favoring open judicial proceedings, there seemed little doubt that in the typical CIPA case – i.e., one in which the defendant has access to classified information and the government seeks a court ruling on whether he may use it at trial – the public's right of access to the CIPA materials themselves is extremely limited. As the *Ressam* court held, the public's right of access does not attach to material properly submitted to the court *in camera* and *ex parte* pursuant to section 4 of CIPA.[73] Thus, the crucial issue for the media in both the district court and the Fourth Circuit in *Moussaoui* was whether CIPA had been properly invoked,

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70. *Id.* at 1258.

71. 221 F. Supp. 2d at 1260.

72. Doe v. United States, 253 F.3d 256, 262 (6th Cir. 2001) (citations omitted); *see also In re United States*, 872 F.2d 472 (D.C. Cir. 1989) (appeal implicating national security conducted through public briefs and judicial opinions, although parts of one opinion were redacted to protect confidences).

73. 221 F. Supp. 2d at 1258, 1261.

or whether the government was trying to shoehorn its arguments to fit the CIPA mold in order to seek immediate review of the district court's order.

Beyond the substantive argument, it appeared obvious the Fourth Circuit ignored its own precedent and the requirements of the First Amendment and common law when it sealed all pleadings on appeal and closed the courtroom for oral argument.[74] No notice had been given; no hearing was conducted; no reasons had been articulated; and the court appeared not to have considered any alternatives to complete closure. At a minimum, we hoped to convince the appellate court to articulate its reasons for closing the courtroom and sealing all pleadings.

Three days after the media filed its opening brief in the Fourth Circuit, the court released an unclassified, redacted version of the government's seventy-two page brief on the merits of its appeal. The brief confirmed our suspicions about the true nature of the proceedings in the district court. There had been no CIPA hearing. Thus, CIPA could not provide the jurisdictional basis for the government's appeal of the order granting Moussaoui access to Ramzi bin al-Shibh. The government asserted that the Fourth Circuit had jurisdiction over its appeal "under section 7 of the Classified Information Procedures Act."[75] "*Alternatively*," the brief continued, "the Court has jurisdiction under 28 U.S.C. § 1291 and the collateral order doctrine."[76] Obviously, if a CIPA hearing had been conducted in the district court and the government were now appealing from it, the government would not need an "alternative" basis for jurisdiction; section 7 of CIPA would provide for immediate appellate review of the district court's order.[77] In addition, in

74. *See, e.g., Knight Publ'g Co.*, 743 F.2d at 234-35 (Before sealing, the court must: 1) give public adequate notice that sealing may be ordered; 2) provide interested persons "an opportunity to object to the request *before* the court ma[kes] its decision;" 3) "state its reasons on the record [for sealing], supported by specific findings;" 4) state its reasons for rejecting alternatives to closure.); *see* discussion *supra* note 61 and accompanying text.

75. Brief for Appellant at 4, United States v. Moussaoui, 333 F.3d 509 (4th Cir. 2003) (No. 03-4162).

76. *Id.* (emphasis added).

77. Section 7 of CIPA provides for an interlocutory appeal "from a decision or order of a district court in a criminal case authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a

the short portion of its brief devoted to whether the district court erred in ordering the deposition of Mr. bin al-Shibh without considering alternatives to his testimony as required by CIPA, the government did not assert that CIPA governed or provided the basis for appeal. Rather, the government contended only that "CIPA *provides the appropriate framework for analysis*."[78] Thus, the government's brief implicitly conceded that CIPA did not govern the access issues on appeal.

Nevertheless, in its response to the media's access motion, the government essentially argued that its appeal and all related pleadings were "CIPA proceedings." Though that phrase was not defined anywhere in the statute, the government obviously sought to invoke the statute both to justify its immediate appeal of the district court's order and to argue that there was no tradition of access to hearings conducted pursuant to CIPA. In response, the media argued that there was no basis in CIPA or in the case law for reversing the presumption in favor of public access to oral argument and the record on appeal.[79] Indeed, the fact that the government's brief on the merits had now been released, albeit in redacted form, undermined the government's argument that everything associated with the issues on appeal were somehow cloaked with talismanic immunity under CIPA. Further, with access to the partially redacted brief, it seemed clear that the appeal was not properly characterized as arising under CIPA in the first instance. We now knew the procedural posture in which the case came to the Fourth Circuit: by writ

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protective order sought by the United States to prevent the disclosure of classified information." 18 U.S.C. § 7.

78. Brief for Appellant at 65, United States v. Moussaoui, 333 F.3d 509 (emphasis added). In a footnote, the government quoted the district court as having found that "this case does [not] 'literally implicate' CIPA". *Id.* at 65 n.8. Given that the district court's order was sealed, this was our first indication of the basis for the district court's decision.

79. The media also argued, relying on *In re Washington Post Co.*, 807 F.2d 383, that the Fourth Circuit was required to examine the government's arguments in favor of closure, and to adhere to the procedural components of the public's access rights; i.e, notice, a hearing, the articulation of its reasons should it order closure, as well as the consideration of alternatives to closure. *See* discussion text accompanying note 82. In addition, relying on *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002), the media contended that CIPA does not divest a court of the power to review the Executive's classification decisions, at least where those decisions collide with the public's constitutional and common law rights of access to the judicial branch's own proceedings and records.

of habeas corpus.[80] As far as the government's brief on the merits, and the public record revealed, no proceeding under sections 4, 5 or 6 of CIPA took place with respect to defendant's motion for access to Mr. bin al-Shibh. Thus, as we argued in our reply papers, in the absence of such a proceeding, the government could not invoke section 7 of CIPA as the basis for its appeal. Its entire argument, built on the premise that the public had no tradition of access to CIPA proceedings, collapsed when that premise failed.

C. The Access Motion

On May 13, 2003, the Fourth Circuit granted, in large part, the media's access motion. The court wrote:

> The value of openness in judicial proceedings can hardly be overestimated. "The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification."[81]

The Fourth Circuit rejected the government's sweeping contention that CIPA justified sealing of the oral argument and documents on appeal.[82] "We disagree with the Government's contention that because this appeal is related to CIPA, all of the materials and the oral argument must be held under seal. As [the media] Intervenors note, CIPA alone cannot justify the sealing of oral argument and pleadings."[83] In a footnote, the Fourth Circuit noted "that throughout its opposition to Intervenors' motion, the Government has phrased its arguments as though every document filed with this court contains classified information. This is not correct, and we decline the Government's implicit invitation to gloss

80. *Moussaoui,* 333 F.3d at 513.

81. United States v. Moussaoui, 65 Fed. Appx. 881, 885 (4th Cir. 2003) (quoting Union Oil Co. v. Leavell, 220 F.3d 562, 568 (7th Cir. 2000)).

82. *Id.* On May 16, the district court similarly rejected the government's argument that CIPA justified maintaining completely under seal the filings to which the media sought access, and ordered the government to immediate advise the court whether certain pleadings could be unsealed. Doc. No. 929 at 2 in *Moussaoui*, 01-CR-455 (E.D. Va. 2002) (May 16, 2003 Order). Shortly thereafter, many of these pleadings were released either in their entirety, or in redacted form.

83. 65 Fed. App. at 886-87.

over the significant differences in the kinds of materials that have been presented to us."[84] Even in the absence of CIPA, the court held, "the mere assertion of national security concerns by the Government is not sufficient reason to close a hearing or deny access to documents."[85] The court correctly found that it "must independently determine whether, and to what extent, the proceedings and documents must be kept under seal."[86]

Examining each pleading in turn, the Fourth Circuit held that: 1) Moussaoui's *pro se* pleadings would remain sealed initially, but then be released following the procedure established in the district court; 2) the government's briefs on appeal would be released in redacted form, and "we will carefully compare the redacted version of each brief to the unredacted version to ensure that the redactions of unclassified material are no greater than necessary;" 3) the government must identify those materials in its appendices that are classified and unclassified, and as to the latter, present its arguments as to why they should remain sealed.[87] In that regard, the court held that "[t]his argument shall account for the fact that sealing an entire document is inappropriate when selective redaction will adequately protect the interests involved."[88]

The Fourth Circuit also ordered the unsealing of the sealed certificate of confidentiality, the motion to seal oral argument, and the motion to seal the certificate of confidentiality.[89] The government sought to seal these documents, the Fourth Circuit noted, because placing them in the public file would "reveal the substance of the district court order presently being appealed."[90] The government's argument was remarkable because it presumed that even disclosing the contents of the district court order – let alone the reasons for it – would somehow compromise national security. If this argument had prevailed, it would have made it impossible for the public to challenge the sealing or closure of any judicial pro-

84. *Id.* at 887 n.4.

85. *Id.* at 887 (citing *In re Washington Post Co.,* 807 F.2d at 391-92).

86. *Id.* The Fourth Circuit declined, however, "to review, and perhaps reject, classification decisions made by the executive branch." *Id.* at n.5.

87. *Id.* at 888.

88. 65 Fed. App. at 888.

89. *Id.* at 889-90.

90. *Id.* at 890.

ceedings that the government, in its sole discretion, determined should be closed. Of course that was exactly what the government intended in the *Moussaoui* case, a position that the Fourth Circuit squarely rejected. Finally, the Fourth Circuit rejected the government's contention that even if the appeal were authorized by section 7 of CIPA, that section mandated that the oral argument be held in a closed courtroom.[91] Noting that oral arguments in appellate proceedings have historically been open to the public, the Fourth Circuit ordered that the oral argument on the merits of the government's appeal be bifurcated, with arguments on issues involving the discussion of classified information taking place in closed session.[92] The court further ordered that a redacted transcript of the sealed hearing be made available as soon as practicable after oral argument.[93]

The Fourth Circuit's rejection of the government's sweeping attempt under CIPA to seal the papers and courtroom in its appeal of the district court's order did not bode well for the merits of the government's appeal. The Fourth Circuit exhibited little sympathy with the government's attempt to use CIPA to impose total secrecy. A little more than a month later, on June 23, 2003, the appeal was dismissed.[94]

D. The Appeal of the District Court Order

Rather than addressing the substantive issues in the government's appeal of the district court order permitting Moussaoui to depose Ramzi bin al-Shibh, the court held that it lacked jurisdiction "because the order of the district court is not yet an appealable one."[95] The Fourth Circuit rejected all three bases the government

91. *Id.* Anticipating its ultimate ruling on the merits, the Fourth Circuit also noted that "it is not at all clear that this appeal arises from CIPA." *Id.*

92. *Id.* The Fourth Circuit held that three issues would be discussed during the public portion of the oral argument: "Whether this court has jurisdiction over the appeal; Whether separation of powers concerns mandate reversal of the district court's order; Whether compulsory process reaches an enemy combatant overseas." *Id.*

93. 65 Fed. App. at 890.

94. Chief Judge Wilkins wrote the opinion for the panel, in which Judges Williams and Gregory joined. 333 F.3d at 511. The court's order on the access motion was unsigned, but was entered at the direction of Chief Judge Wilkins with the concurrences of Judges Widener and Niemeyer. *See* 65 Fed. Appx. at 891.

95. United States v. Moussaoui, 333 F.3d 509, 512 (4th Cir. 2003).

put forward for appellate jurisdiction: CIPA, the collateral order doctrine, and mandamus. "Ultimately," the court stated, "the order of the district court is a discovery order like any other, and must be treated the same for jurisdictional purposes," regardless of the "substantial national security concerns" raised by the case.[96] Most significantly, the Fourth Circuit rejected the government's contention that the order of the district court directing the deposition of Ramzi bin al-Shibh was, pursuant to section 6 of CIPA, "'a decision or order . . . authorizing the disclosure of classified information,' from which it may take an immediate appeal."[97]

> CIPA § 6, to which the Government points, is concerned with the disclosure of classified information to the defendant or his attorneys. [citation omitted]. It is true, of course, that the district court issued the testimonial writ based in part on its assessment that the enemy combatant witness' testimony would likely be helpful to Moussaoui's defense. But, neither this conclusion, nor the fact that the purpose of the deposition is to preserve the enemy combatant witness' testimony for potential use at trial, is sufficient to establish the applicability of CIPA. At its core, the order of the district court concerned only the question of whether Moussaoui and standby counsel would be granted access to the enemy combatant witness (and if so, what form of access), not whether any particular statement of this witness would be admitted at trial. The district court was thus correct to conclude that CIPA applies here by analogy. Because CIPA is not directly applicable, § 7 does not authorize an interlocutory appeal. [citation omitted].[98]

Thus, the Fourth Circuit decided it was without jurisdiction to hear the appeal until the government suffered some actual harm, such as dismissal of the indictment or some other sanction if it refused to make Ramzi bin al-Shibh available for a deposition.[99]

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96. *Id.* at 516.

97. *Id.* at 514 (alteration in original).

98. *Id.* at 514-15.

99. *Moussaoui*, 333 F.3d at 515 ("The order of the district court will not become final unless and until the Government refuses to comply and the district court imposes a sanction."). At the time of this writing, the government has taken the position that it cannot comply with the district court's ruling ordering the deposition of Ramzi bin al-

The government then filed a motion for rehearing *en banc,* which was denied on July 14, 2003. Seven judges voted to deny rehearing, while five judges dissented. Chief Judge Wilkins, the author of the panel decision, wrote an opinion concurring in the denial of a rehearing *en banc* which Judge Niemeyer joined. Judge Widener wrote a dissenting opinion, as did Judge Luttig. Judge Wilkinson also wrote a dissenting opinion in which Judge Niemeyer joined.

Although the conflicting opinions purported to address a simple matter of appellate jurisdiction, at issue were contrasting views of the deference owed to the Executive Branch in matters of national security. As Judge Luttig wrote:

> I believe my colleagues have gravely underestimated the effect that their respective orders and decisions have already had, and now will continue to have, on the Nation's intelligence gathering during this critical period of our history, as we wage war against terrorism and its sponsors around the globe.[100]

In response, Chief Judge Wilkins wrote:

> Siding with the Government in all cases where national security concerns are assailed would entail surrender of the judicial branch and abandonment of our sworn commitment to uphold the rule of law.
>
> There is a better way, which is indeed the only correct way. We can, as we have done here, apply settled principles governing the appealability of discovery orders in a consistent manner. This will allow the executive branch to anticipate the likely resolution of legal issues, which will in turn ensure that the executive branch retains the burden and the authority to decide how best to protect national security. Because the panel has followed this

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Shibh. The court has sanctioned the government by foreclosing it from offering any evidence at trial that Moussaoui had any involvement in or knowledge of the attacks of September 11, 2001, and from seeking the death penalty. United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. 2003). The government has appealed this sanction.

100. 336 F.3d at 286 (Luttig, J., dissenting).

> path, a majority of the members of this court has correctly decided to deny rehearing en banc.[101]

Essentially, the conflict between the judges resulted from differing interpretations of the scope of CIPA.[102] Chief Judge Wilkins, noting that section 7 of CIPA "creates an exception to the general prohibition on interlocutory appeals and therefore must be narrowly construed," stated that section 7 authorizes interlocutory appeals "only of orders entered pursuant to the provisions of CIPA, of which § 7 is part."[103] Thus, he would find a right to appeal only when the lower court order arose under some other section of CIPA – most relevantly, section 6,[104] which governs the use of classified information at trial or in pre-trial proceedings.[105] But, as he noted, "no issue regarding the admission of the deposition testimony at trial is yet presented, because it is not known what the witness might say during the deposition, if he agrees to speak at all."[106] In other words, until there was an actual ruling under CIPA regarding what use could be made of testimony at trial, an appellate court should not step into the void and offer what, in effect, would be an advisory opinion.

Both Judges Wilkinson and Luttig took issue with this narrow reading of the applicability of section 7 of CIPA.[107] They argued that the language of section 7(a) itself was quite broad, providing that appellate jurisdiction will lie over "a decision or order of a district court in a criminal case authorizing disclosure of classified information."[108] As Judge Wilkinson noted, the statute itself was silent as to whether only orders entered pursuant to section 6 (or

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101. *Id.* at 282 (Wilkins, C.J.).

102. Judge Luttig also differed with the majority over whether the district court's ruling was appealable under the collateral order doctrine. This aspect of the Fourth's Circuit's decision is beyond the scope of this article, and will not be discussed here.

103. 336 F.3d at 280.

104. As the district court held, section 6 of CIPA was applicable only *by analogy*. *Moussaoui,* 333 F.3d at 515.

105. 336 F.3d at 280-81.

106. *Id.* at 281.

107. Judge Widener also appeared to take issue with this ruling, but his short dissent contends only that the testimony of Ramzi bin Al-Shibh will undoubtedly reveal an enormity of classified information and, therefore, "Section 7 of the Classified Information Procedure Act provides that the orders of the district court in question be subject to appeal." *Id.* at 282 (Widener, J., dissenting).

108. 18 U.S.C. § 7(a).

some other section) of CIPA were appealable under section 7.[109] Judge Luttig stated, "had Congress wished to circumscribe section 7(a) so as to provide appellate jurisdiction only over such orders, it could easily have done so."[110] Both dissenting judges were of the opinion that the broad language of section 7 authorized an immediate appeal of any district court order that had the effect of disclosing classified information.

Both dissenting judges also took issue with the panel's decision that "granting access" to the source of the classified information – i.e., Ramzi bin al-Shibh – was not the same as "disclosing" classified information.[111] Both judges assumed that the witness possessed information that will be or has been designated classified, even before he actually testified. Both judges also assumed that the "disclosure" of this information to Moussaoui, at a deposition, was the type of disclosure with which CIPA is concerned.[112]

In the panel decision, Judge Wilkins acknowledged that section 7 "authorizes the government to take an interlocutory appeal from an order of the district court that authorizes the disclosure of classified information to the defendant."[113] Judge Wilkins also acknowledged that "there is no question that most or all of what the enemy combatant witness says during a deposition will be deemed classified by the government . . . ."[114] Nevertheless, under the panel's narrow reading of the scope of section 7, because the witness had not yet testified and the district court had not issued any order "governed by one of the provisions of CIPA," the order was

109. 336 F.3d at 284 (Wilkinson, J., dissenting); *see also* 336 F.2d at 288 (Luttig, J., dissenting) ("Section 7(a)'s authorization of immediate appeal is not limited to orders that, by their terms, are entered pursuant to CIPA or even to orders that are authorized by CIPA").

110. *Id.* (Luttig, J., dissenting).

111. *See id.* at 284 (Wilkinson, J., dissenting); 287 (Luttig, J., dissenting).

112. *See e.g., id.* at 289 (Luttig, J., dissenting) (citing United States v. Clegg, 740 F.2d 16 (9th Cir. 1984) for the proposition that "'CIPA is as concerned with controlling disclosures to the defendant as it is with controlling disclosures to the public'").

113. *Id.* at 280 (Wilkins, C.J.).

114. 336 F.3d at 280. A narrow reading of CIPA, however, would not require a court to guess at what might or might not be designated classified. On this basis alone, an appellate court could decline to exercise jurisdiction under section 7 of CIPA. As Judge Wilkins noted "no issue regarding the admission of the deposition testimony at trial is yet presented, because it is not yet known what the witness might say during the deposition, if he agrees to speak at all." *Id.* at 281.

not appealable.[115] Further, because CIPA creates an exception to the rule prohibiting interlocutory appeals, it would be more reasonable to narrowly construe it to permit interlocutory appeals only when authorized by some other section of CIPA.[116] Thus, as between finding sweeping authority under any provision of CIPA for an interlocutory appeal or finding it only as specifically provided for under CIPA, the majority wisely chose the more narrow course.

In effect, the dissenting judges would read CIPA as broadly as the government attempted to, both in its appeal on the merits and in its opposition to the media's access motion. Without making the fine distinctions that the statute requires, both the government and the dissenters would wield CIPA as a blunderbuss, giving the Executive Branch the power not only to designate testimony as confidential before it is even given, but to then decide how and whether the public should have access to the information. Judge Widener contended that the panel decision "pushes the government to make [a] draconian choice . . . about whether to divulge confidential information or instead to risk sanctions by refusing disclosure."[117] Judges Widener and Luttig, however, would permit the government to seek an advisory ruling on any decision involving classified information by a trial court that the government did not like while the accused, presumably, sits in prison waiting for his trial to commence. Given the real harm to the accused, and the limited scope of interlocutory review in most circumstances, requiring the government to show actual harm in order to seek an immediate appeal seems a reasonable requirement.

The dissenters' argument that section 7 of CIPA authorizes an immediate interlocutory appeal of the district court's order ignores the specific purpose of the statute, which is to provide the government with a practical mechanism to deal with the problem of "graymail" by permitting trial courts to make evidentiary rulings concerning the admissibility of classified information in advance of actual trial.[118] If, and when, the trial court rules against the govern-

115. *Id.* at 280.

116. *Id.*

117. *Id.* at 285.

118. *In re Washington Post Co.*, 807 F.2d at 393; *see also,* S. Rep. No. 96-823, at 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4294, 4294 (CIPA's purpose is to provide "pretrial procedures that will permit the trial judge to rule on questions of admissibility

ment on the use of the classified information, that order is appealable under section 7.[119] To transform this very specific – and limited – provision of CIPA into a sword rather than a shield, which both the government and the dissenters would do, is to create a far more sweeping provision than was intended by Congress. Indeed, the teaching of the *Pelton*[120] and *Ressam*[121] cases, and to a certain extent the *Poindexter*[122] case, is that CIPA does not apply to the threatened disclosure of all classified information, but only to that information specifically put at issue by the statute. These cases, and the panel decision in the *Moussaoui* case, re-affirm that CIPA is a narrow statute drafted to deal with a very specific procedural problem. It was *not* intended to give the government extra-judicial powers in its prosecution of terrorism cases after September 11.

Conclusion

Fortunately, by a narrow vote, the Fourth Circuit resisted the temptation to turn CIPA into a new procedural weapon in the government's "war on terror." Nevertheless, as the *Moussaoui* case and other terrorism cases are prosecuted, there is a continuing danger that well-meaning but misguided judges will transform a limited procedural device into a sweeping authorization for secrecy that will injure the rights of both criminal defendants and the public.

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involving classified information before introduction of the evidence in open court"). *See* discussion *supra* note 44 and accompanying text.

119. 18 U.S.C. § 7(a).

120. 696 F. Supp. 156.

121. 221 F. Supp. 2d 1252.

122. 732 F. Supp. 165.