UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIBEL EDMONDS, Appellant, v. UNITED STATES DEPARTMENT OF JUSTICE, *et al.*, Appellees.	**No. 04-5286**

EMERGENCY MOTION TO OPEN ORAL ARGUMENT

This morning the Clerk's office informed counsel that tomorrow's argument in this appeal will be closed to everyone except counsel of record and the appellant. Appellant hereby moves that the argument be open to the public.[1]

Like district court proceedings, appellate arguments are historically and presumptively open to the public as a matter of law. Federal circuits have rejected efforts to close them. For example, in *In re Grand Jury Proceedings*, 983 F.2d 74 (7th Cir. 1992), the court denied motions to seal arguments in two cases, one involving grand jury material and the other involving medical records. The court explained:

> What happens in the halls of government is presumptively open to public scrutiny. Judges deliberate in private but issue pubic 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; this requires rigorous justification.

Id. at 75. In denying a government motion to close appellate argument in a case

[1] Government counsel has authorized us to state that the government will take no position on this motion until it has had an opportunity to review the motion.

involving a subpoena in an ongoing criminal investigation, the Sixth Circuit echoed the Seventh:

> 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.

Doe v. United States, 253 F.3d 256, 262 (6th Cir. 2001) (citations omitted).

The requirement of public appellate argument does not evaporate because an appeal involves national security information. When the United States asked the Supreme Court to close just *part* of the oral argument in the Pentagon Papers case—a case that involved classified information of the greatest sensitivity—that motion was denied. *New York Times Co. v. United States,* 403 U.S. 944 (1971). Likewise, in an appeal in the ongoing prosecution of Zacarias Moussaoui, an alleged conspirator in the September 11 terrorist plot, the Fourth Circuit soundly rejected the government's argument that appellate argument be held in camera:

> There can be no question that the First Amendment guarantees a right of access by the public to oral arguments in the appellate proceedings of this court. Such hearings have historically been open to the public, and the very considerations that counsel in favor of openness of criminal trial support a similar degree of openness in appellate proceedings.

United States v. Moussaoui, 65 Fed. Appx. 881, 890 (4th Cir. 2003).[2]

This Court has routinely held public oral arguments in cases involving classified or other secret information. For example, in *In re United States,* 872 F.2d 472 (D.C. Cir. 1989), this Court's argument was open to the public, even though classified information

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[2] The Fourth Circuit closed a portion of the argument in the *Moussaoui* case. *Id.* We recognize that a portion of the argument might have to be closed in this case if the Court wishes to question government counsel about the material that was filed under seal in the district court.

was so central to the case that Judge (now Chief Judge) Ginsburg felt it necessary to seal several pages of his separate opinion. Similarly, this Court's December 8, 2004, oral argument in *In re Grand Jury Subpoena, Judith Miller,* 397 F.3d 964 (D.C. Cir. 2005)—a case in which secret grand jury material was so central that Judge Tatel felt it necessary seal a portion of his concurring opinion—was open to the public in its entirety.

This Court's action closing the appellate argument in this case also fails to conform to the procedural requirements necessary to close court proceedings. Before a particular proceeding may be closed, "representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'" *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 609 n.25 (1982) (quoting *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 401 (Powell, J., concurring)), and after that opportunity, the court must make "specific, on record findings . . . demonstrating that closure is essential to preserve higher values and is narrowly tailored to preserve that interest." *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501, 510 (1984) (citations omitted). A court also must consider alternatives to closure which would adequately protect the interests that the court seeks to protect. *See, e.g., ABC, Inc. v. Stewart,* 360 F.3d 90, 104-06 (2d Cir. 2004) (district court erred by failing to consider less restrictive alternatives to closing *voir dire*, including concealing the identity of prospective jurors or conducting only potentially damaging or embarrassing questioning *in camera*); *United States v. Moussaoui, supra,* 65 Fed. Appx. at 890 (closing only necessary portions of appellate argument in that highly sensitive case).

Even assuming that there could ever be a case in which appellate argument had to be closed *in toto*, this case does not remotely justify such closure. Here, the government

has not even moved for a closed oral argument. Indeed, the government did not even file a sealed version of its appellate brief—the entire briefing is on the public record. Moreover, the attorney who will be arguing this appeal for the appellant does not have a security clearance, so classified information cannot be discussed during any portion of the argument at which appellant's counsel is present. Given these facts—particularly the last one—there is no plausible reason why members of the public and the press cannot also be present.

For these reasons, the oral argument in this appeal should be open to the public.

Respectfully submitted,

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April 20, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Emergency Motion to Open Oral Argument was served upon Douglas Letter, Esq., U.S. Department of Justice, by fax at 202-307-2551, by e-mail at douglas.letter@usdoj.gov, and by first-class mail at Civil Division, Room 7260, U.S. Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, this 20th day of April, 2005.

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Arthur B. Spitzer