



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: March 24, 2008) Decided: July 2, 2008)

Docket Nos. 07-0981-cr(L), 07-1101-cr(CON), 07-1125-cr(CON)

-----X
UNITED STATES OF AMERICA,

Appellee,

- v. -

YASSIN MUHIDDIN AREF, MOHAMMED MOSHARREF HOSSAIN,

Defendants-Appellants.

NEW YORK CIVIL LIBERTIES UNION,

Proposed-Intervenor-Appellant.

-----X
Before: JACOBS, Chief Judge, McLAUGHLIN, Circuit Judge, and
SAND, District Judge.¹

The defendants were convicted after a jury trial in the Northern District of New York (McAvoy, J.). The district court denied a motion of the New York Civil Liberties Union (the "NYCLU") to intervene in the case for the purpose of asserting a First Amendment right to discovery of certain documents sealed by court order. The defendants and the NYCLU now appeal.

¹ The Honorable Leonard B. Sand, United States District Court for the Southern District of New York, sitting by designation.



1 In an accompanying summary order, we reject most of the
2 numerous challenges to the district court's rulings. In this
3 opinion, we hold that: (1) pursuant to section 4 of the
4 Classified Information Procedures Act, 18 U.S.C. app. 3 § 4, a
5 criminal defendant is entitled to discovery of relevant
6 classified evidence that is helpful to his defense, a decision
7 within the district court's discretion that may be made without
8 the defendant's or his lawyer's participation; (2) we review
9 denials of motions to intervene in criminal cases for abuse of
10 discretion and find no such abuse here; and (3) district courts
11 ordinarily should refrain from entirely (as opposed to
12 selectively) sealing court orders and documents filed by the
13 parties, but the district court did not err in doing so here.

14 AFFIRMED.

15 WILLIAM C. PERICAK, Assistant
16 United States Attorney (Elizabeth
17 C. Coombe, Brenda K. Sannes,
18 Assistant United States Attorneys,
19 of counsel), for Glenn T. Suddaby,
20 United States Attorney for the
21 Northern District of New York,
22 Albany, NY.

23
24 TERENCE L. KINDLON (Kathy Manley,
25 on the brief), Kindlon and Shanks,
26 P.C., Albany, NY, for Defendant-
27 Appellant Yassin Muhiddin Aref.

28
29 KEVIN A. LUIBRAND, Albany, NY, for
30 Defendant-Appellant Mohammed
31 Mosharref Hossain.

32
33 COREY STOUGHTON (Arthur Eisenberg,
34 Christopher Dunn, on the brief),



1 New York Civil Liberties Union,
2 New York, NY, for Proposed-
3 Intervenor-Appellant.

4
5 Melissa Goodman, American Civil
6 Liberties Union, and Corey
7 Stoughton, New York Civil Liberties
8 Union (Jameel Jaffer, American
9 Civil Liberties Union; Arthur
10 Eisenberg, Christopher Dunn, New
11 York Civil Liberties Union, on the
12 brief), for Amici Curiae American
13 Civil Liberties Union and the New
14 York Civil Liberties Union.

15
16 Peter Karanjia, Davis Wright
17 Tremaine LLP (Christopher Robinson,
18 David Wright Tremaine LLP, on the
19 brief; David E. McGraw, The New
20 York Times Company, of counsel),
21 New York, NY, for Amici Curiae
22 Advance Publications, Inc., The
23 Associated Press, Daily News L.P.,
24 Gannett Co., Inc., The Hearst
25 Corporation, NBC Universal, Inc.,
26 The New York Newspaper Publishers
27 Association, The New York Times
28 Company, Newsweek, Inc., North
29 Jersey Media Group, The Reporters
30 Committee for Freedom of the Press,
31 Reuters America LLC, U.S. News and
32 World Report, L.P., and The
33 Washington Post, in support of
34 Proposed-Intervenor-Appellant.

35
36 McLAUGHLIN, Circuit Judge:

37 Both defendants were convicted on charges arising out of a
38 sting operation. The jury found that they conspired to conceal
39 the source of what a cooperator represented to be proceeds from
40 the sale of a surface-to-air missile. According to the
41 cooperator, the missile was to be used by terrorists against a
42 target in New York City. Before trial, the Government sought,



1 pursuant to the Classified Information Procedures Act ("CIPA"),
2 18 U.S.C. app. 3, two protective orders restricting discovery of
3 certain classified information that, arguably, would have been
4 otherwise discoverable. The district court granted the motions
5 in part and denied the rest.

6 Based on an article in The New York Times (suggesting the
7 defendants might have been subject to warrantless surveillance),
8 Aref also moved to discover evidence resulting from any
9 warrantless surveillance and to suppress any illegally obtained
10 evidence or to dismiss the indictment. Both the Government's
11 responses to the motion and the district court's order denying
12 the motion were sealed because they contained classified
13 information. The district court also denied motions by the New
14 York Civil Liberties Union (the "NYCLU") to intervene and to get
15 public access to those sealed documents.

16 The defendants appeal their convictions. The NYCLU appeals
17 the denial of its motions to intervene and to get public access
18 to the sealed documents. Because most of the appellants'
19 challenges are governed by settled law, we address them in an
20 accompanying summary order. We now resolve two issues of first
21 impression: (1) the standard for determining what relevant
22 classified information a criminal defendant is entitled to
23 receive during discovery, and (2) the propriety of and the
24 standard of review for denials of motions to intervene in



1 criminal cases. We also hold that the district court did not err
2 in sealing certain documents containing classified information,
3 but we urge district courts to avoid sealing documents in their
4 entirety unless necessary to serve a compelling governmental
5 interest such as national security.

6 **BACKGROUND**

7 In a thirty-count indictment, both defendants were charged
8 with conspiracy and attempt to commit money laundering and to
9 provide material support to a designated terrorist organization.
10 Aref was also charged with making false statements to federal
11 officers.

12 The Government alleged that the defendants agreed to work
13 with a cooperator in a scheme to conceal the source of \$50,000.
14 The cooperator told the defendants that the money came from the
15 sale of a surface-to-air missile to a designated terrorist group
16 called Jaish-e-Mohammed. The missile was to be fired at a target
17 in New York City. A jury found Hossain guilty on all twenty-
18 seven counts against him. Aref was convicted on ten counts and
19 acquitted on the others. We address the defendants' challenges
20 to the evidence against them in the accompanying summary order,
21 and we recount only those facts relevant to the district court's
22 handling of classified information.

23 During pretrial discovery, the Government sought protective
24 orders pursuant to CIPA section 4, 18 U.S.C. app. 3 § 4, and



1 Federal Rule of Criminal Procedure 16(d)(1). The orders would
2 permit it to withhold classified information that might otherwise
3 have been discoverable. The district court held a series of ex
4 parte, in camera conferences with the Government relating to the
5 classified information. The court also held an ex parte, in
6 camera conference with defense counsel to assist the court in
7 deciding what information would be helpful to the defense.

8 On January 20, 2006, Aref moved to: (1) suppress all
9 evidence against him as the fruit of illegal electronic
10 surveillance, (2) dismiss the indictment, and (3) direct the
11 Government to admit or deny illegal electronic surveillance
12 against him and to provide all documentation of intercepted
13 communications. Aref based this motion on an article in The New
14 York Times, stating that "different officials agree that the
15 [National Security Agency's] domestic operations played a role in
16 the arrest" of Aref and Hossain.

17 On March 10, 2006, the Government filed an ex parte
18 Opposition to Aref's motion (the "March 10, 2006 Opposition"),
19 which the Court reviewed in camera. That same day, the district
20 court denied the motion in an order sealed from the public and
21 the defendants (the "March 10, 2006 Order"), in which it made
22 certain findings under seal. It also issued a brief public order
23 stating that it had denied the motion.



1 A week later, the district court issued two sealed orders
2 granting in part and denying in part the Government's motions for
3 protective orders. Later that month, the defendants asked for
4 the district court's three sealed orders-the March 10, 2006 Order
5 and the two orders resolving the Government's motions for
6 protective orders. The district court denied that request, and
7 Aref sought a writ of mandamus from this Court ordering: (1) the
8 district court to vacate the sealed orders and to provide Aref
9 with unredacted versions of the Government's filings, (2) the
10 Government to disclose any warrantless surveillance of Aref's
11 communications, and (3) the district court to suppress all
12 evidence against him as derived from illegal warrantless
13 surveillance and to dismiss the indictment. See Aref v. United
14 States, 452 F.3d 202, 205 (2d Cir. 2006) (per curiam). The NYCLU
15 moved to intervene to gain access to all sealed orders of the
16 district court. We dismissed in part and denied in part Aref's
17 petition and denied the NYCLU's intervention motion. See id. at
18 207.

19 On March 28, 2006, the district court issued a Decision and
20 Order finding that both the Government's March 10 Opposition and
21 the court's March 10, 2006 Order should be sealed because "the
22 Government's interest in protecting the national security and
23 preventing the dissemination of classified information outweighs
24 the defendants' and/or the public's right of access to these



1 materials." The district court reasoned that the March 10, 2006
2 Opposition and Order "were so limited in scope and so
3 interrelated with classified information, [that] the filing of
4 redacted materials . . . that did not divulge classified
5 information would be impossible."

6 On July 6, 2006, the NYCLU moved to intervene to secure
7 public access to as much of the March 10, 2006 Opposition and
8 Order "as [could] be made public without compromising
9 legitimately classified national security information." The
10 NYCLU also moved for public access to those documents.

11 Despite its earlier sealing decision, the district court,
12 in response to the NYCLU's motion, instructed the Government to
13 file publicly as much of its March 10, 2006 Opposition as it
14 could without jeopardizing national security. The Government
15 publicly filed a redacted version of that document disclosing
16 only a few unclassified paragraphs describing Aref's motion; and
17 it provided the name and position of the official whose
18 declaration was submitted to support the March 10, 2006
19 Opposition.

20 On February 22, 2007, the district court denied the NYCLU's
21 motions to intervene and for public access, reaffirming its view
22 that "there could be no public access" to the March 10, 2006
23 Opposition and Order "without compromising classified national
24 security information." Because "the issue raised in the NYCLU's



1 application was, in essence, decided before the [motion to
2 intervene] was made and was based upon the standard advocated for
3 by the NYCLU," the district court denied the NYCLU's motion to
4 intervene.

5 The defendants and the NYCLU now appeal.

6 **DISCUSSION**

7 The defendants argue that the district court improperly
8 denied them access to classified information during discovery.
9 The NYCLU maintains that the district court erred in denying its
10 motions to intervene and for public access. We reject these
11 arguments.

12 **I. CIPA**

13 CIPA establishes procedures for handling classified
14 information in criminal cases.² The statute was meant to
15 "protect[] and restrict[] the discovery of classified information
16 in a way that does not impair the defendant's right to a fair
17 trial." United States v. O'Hara, 301 F.3d 563, 568 (7th Cir.
18 2002).

19 CIPA section 4 sets out procedures for "[d]iscovery of
20 classified information by defendants":

² CIPA defines "classified information" as "information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security." 18 U.S.C. app. 3 § 1(a).



1 The [district] court, upon a sufficient showing, may
2 authorize the United States to delete specified items
3 of classified information from documents to be made
4 available to the defendant through discovery under the
5 Federal Rules of Criminal Procedure, to substitute a
6 summary of the information for such classified
7 documents, or to substitute a statement admitting
8 relevant facts that the classified information would
9 tend to prove. The court may permit the United States
10 to make a request for such authorization in the form of
11 a written statement to be inspected by the court alone.
12

13 18 U.S.C. app. 3 § 4.

14 This provision clarifies district courts' power under
15 Federal Rule of Criminal Procedure 16(d) (1) to issue protective
16 orders denying or restricting discovery for good cause. S. Rep.
17 No. 96-823, at 6 (1980), as reprinted in 1980 U.S.C.C.A.N. 4294,
18 4299-4300. The Advisory Committee notes to Rule 16 make clear
19 that "good cause" includes "the protection of information vital
20 to the national security." Fed. R. Crim. P. 16 advisory
21 committee's note to 1966 amendment.

22 It is important to understand that CIPA section 4
23 presupposes a governmental privilege against disclosing
24 classified information. It does not itself create a privilege.
25 United States v. Mejia, 448 F.3d 436, 455 & n.15 (D.C. Cir.
26 2006); see also H.R. Rep. No. 96-831, pt. 1, at 27 (1980) (noting
27 that CIPA "is not intended to affect the discovery rights of a
28 defendant"). Although Rule 16(d) (1) authorizes district courts
29 to restrict discovery of evidence in the interest of national
30 security, it leaves the relevant privilege undefined.



1 The most likely source for the protection of classified
2 information lies in the common-law privilege against disclosure
3 of state secrets. See Zuckerbraun v. Gen. Dynamics Corp., 935
4 F.2d 544, 546 (2d Cir. 1991). That venerable evidentiary
5 privilege "allows the government to withhold information from
6 discovery when disclosure would be inimical to national
7 security." Id. It would appear that classified information at
8 issue in CIPA cases fits comfortably within the state-secrets
9 privilege. Compare id. with Classified National Security
10 Information, Exec. Order No. 13,292, § 1.2, 68 Fed. Reg. 15315,
11 15315-16 (Mar. 25, 2003) (recognizing three levels of classified
12 national security information, all of which require the
13 classifying officer to determine that disclosure reasonably could
14 be expected to damage national security).

15 We are not unaware that the House of Representatives Select
16 Committee on Intelligence stated categorically in its report on
17 CIPA that "the common law state secrets privilege is not
18 applicable in the criminal arena." H.R. Rep. 96-831, pt. 1, at
19 15 n.12. That statement simply sweeps too broadly.

20 The Committee relied on three cases for this remarkable
21 proposition: Reynolds v. United States, 345 U.S. 1 (1953),
22 United States v. Coplon, 185 F.2d 629 (2d Cir. 1950), and United
23 States v. Andolschek, 142 F.2d 503 (2d Cir. 1944). See H.R. Rep.



1 96-831, pt.1, at 15 n.12. A close reading of these cases does
2 not support the Committee's conclusion.

3 In Reynolds, the Supreme Court held that a court in a civil
4 case may deny evidence to plaintiffs if "there is a reasonable
5 danger that compulsion of the evidence will expose military
6 matters which, in the interest of national security, should not
7 be divulged." 345 U.S. at 10. In contrast, the Court explained
8 that in criminal cases such as Andolschek, the Government was not
9 permitted to "undertake prosecution and then invoke its
10 governmental privileges to deprive the accused of anything which
11 might be material to his defense." Id. at 12 & n.27. Similarly,
12 we acknowledged in Coplon that the Government possesses a
13 privilege against disclosing "state secrets," but held that the
14 privilege could not prevent the defendant from receiving evidence
15 to which he has a constitutional right. See 185 F.2d at 638.
16 These cases, therefore, do not hold that the Government cannot
17 claim the state-secrets privilege in criminal cases. Instead,
18 they recognize the privilege, but conclude that it must give way
19 under some circumstances to a criminal defendant's right to
20 present a meaningful defense.

21 Accordingly, we hold that the applicable privilege here is
22 the state-secrets privilege. See United States v. Klimavicius-
23 Viloria, 144 F.3d 1249, 1261 (9th Cir. 1998) (holding that state-
24 secrets privilege applies in CIPA cases). That said, Reynolds,



1 Andolschek, and Coplon make clear that the privilege can be
2 overcome when the evidence at issue is material to the defense.
3 See Reynolds, 345 U.S. at 12 & n.27. This standard is consistent
4 with Roviaro v. United States, 353 U.S. 53 (1957), where the
5 Supreme Court held in a criminal case that the Government's
6 privilege to withhold the identity of a confidential informant
7 "must give way" when the information "is relevant and helpful to
8 the defense of an accused, or is essential to a fair
9 determination of a cause." Id. at 60-61. Indeed, we have
10 interpreted "relevant and helpful" under Roviaro to mean
11 "material to the defense." United States v. Saa, 859 F.2d 1067,
12 1073 (2d Cir. 1988). We have also noted that the government-
13 informant privilege at issue in Roviaro and the state-secrets
14 privilege are part of "the same doctrine." Coplon, 185 F.2d at
15 638.

16 We therefore adopt the Roviaro standard for determining when
17 the Government's privilege must give way in a CIPA case. Other
18 circuits agree. See Klimavicius-Viloria, 144 F.3d at 1261;
19 United States v. Varca, 896 F.2d 900, 905 (5th Cir. 1990); United
20 States v. Yunis, 867 F.2d 617, 623 (D.C. Cir. 1989); United
21 States v. Smith, 780 F.2d 1102, 1107-10 (4th Cir. 1985) (en
22 banc); United States v. Pringle, 751 F.2d 419, 427-28 (1st Cir.
23 1984).



1 Applying this standard, the district court must first decide
2 whether the classified information the Government possesses is
3 discoverable. If it is, the district court must then determine
4 whether the state-secrets privilege applies because: (1) there is
5 "a reasonable danger that compulsion of the evidence will expose
6 . . . matters which, in the interest of national security, should
7 not be divulged," and (2) the privilege is "lodged by the head of
8 the department which has control over the matter, after actual
9 personal consideration by that officer." Reynolds, 345 U.S. at
10 8, 10 (footnote omitted).

11 If the evidence is discoverable but the information is
12 privileged, the court must next decide whether the information is
13 helpful or material to the defense, i.e., useful "to counter the
14 government's case or to bolster a defense." United States v.
15 Stevens, 985 F.2d 1175, 1180 (2d Cir. 1993) (interpreting
16 materiality standard under Federal Rule of Criminal Procedure
17 16(a)(1)). To be helpful or material to the defense, evidence
18 need not rise to the level that would trigger the Government's
19 obligation under Brady v. Maryland, 373 U.S. 83 (1963), to
20 disclose exculpatory information. See id. at 87. "[I]nformation
21 can be helpful without being 'favorable' in the Brady sense."
22 Mejia, 448 F.3d at 457.

23 The district court's decision to issue a protective order
24 under CIPA section 4 and Federal Rule of Criminal Procedure



1 16(d) (1) is reviewed for abuse of discretion. See United States
2 v. Delia, 944 F.2d 1010, 1018 (2d Cir. 1991). Whether evidence
3 is "helpful" or "material to the defense" is also within the
4 district court's discretion. See DiBlasio v. Keane, 932 F.2d
5 1038, 1042 (2d Cir. 1991).

6 We find no abuse of discretion here. For purposes of this
7 opinion, we assume without deciding that the classified
8 information the Government presented to the district court was
9 discoverable. We have carefully reviewed the classified
10 information and the Government's sealed submissions and agree
11 with the district court that the Government has established a
12 reasonable danger that disclosure would jeopardize national
13 security. See Reynolds, 345 U.S. at 10.

14 The Government failed, however, to invoke the privilege
15 through the "head of the department which has control over the
16 matter, after actual personal consideration by that officer." Id.
17 at 8. This is not necessarily fatal. We have previously excused
18 the Government's failure to comply with this formality where
19 involvement of the department head would have been "of little or
20 no benefit" because disclosure of classified information was
21 prohibited by law. See Clift v. United States, 597 F.2d 826,
22 828-29 (2d Cir. 1979) (Friendly, J.) (internal quotation marks
23 omitted). We similarly excuse the failure to involve the
24 department head here. It would "be of little or no benefit" for
25 us to remand for the purpose of having the department head agree



1 that disclosure of the classified information would pose a risk
 2 to national security here. Based on our holding today, however,
 3 we trust that this issue will not arise in future CIPA cases.

4 Finally, we agree that the district court did not deny the
 5 defendants any helpful evidence. Indeed, we commend the district
 6 court for its thorough scrutiny of the classified information.

7 We also reject Aref's contention that the district court
 8 improperly held ex parte hearings with the Government when
 9 evaluating the classified material. Both CIPA section 4 and Rule
 10 16(d)(1) authorize ex parte submissions. See 18 U.S.C. app. 3 §
 11 4; Fed. R. Crim. P. 16(d)(1). "In a case involving classified
 12 documents, . . . ex parte, in camera hearings in which government
 13 counsel participates to the exclusion of defense counsel are part
 14 of the process that the district court may use in order to decide
 15 the relevancy of the information." Klimavicius-Viloria, 144 F.3d
 16 at 1261. When the "government is seeking to withhold classified
 17 information from the defendant, an adversary hearing with defense
 18 knowledge would defeat the very purpose of the discovery rules."
 19 H.R. Rep. 96-831, pt. 1, at 27 n.22.

20 **II. Motion to Intervene**

21 This Court has not yet established the standard by which we
 22 review a district court's denial of a motion to intervene in a
 23 criminal case. Indeed, we have implied, but not squarely held,
 24 that such a motion is appropriate to assert the public's First
 25 Amendment right of access to criminal proceedings. We now hold



1 that: (1) such a motion is proper, and (2) the applicable
2 standard of review is abuse of discretion.

3 The Federal Rules of Criminal Procedure make no reference to
4 a motion to intervene in a criminal case. United States v.
5 Kollintzas, 501 F.3d 796, 800 (7th Cir. 2007). However, such
6 motions are common in this Circuit to assert the public's First
7 Amendment right of access to criminal proceedings. See, e.g.,
8 ABC, Inc. v. Stewart, 360 F.3d 90, 97 (2d Cir. 2004); United
9 States v. Suarez, 880 F.2d 626, 628 (2d Cir. 1989); In re N.Y.
10 Times Co., 828 F.2d 110, 113 (2d Cir. 1987); In re Herald Co.,
11 734 F.2d 93, 96 (2d Cir. 1984). Federal courts have authority to
12 "formulate procedural rules not specifically required by the
13 Constitution or the Congress" to "implement a remedy for
14 violation of recognized rights." United States v. Hasting, 461
15 U.S. 499, 505 (1983). Because "vindication of [the] right [of
16 public access] requires some meaningful opportunity for protest
17 by persons other than the initial litigants," In re Herald Co.,
18 734 F.2d at 102, we now invoke this authority to hold that a
19 motion to intervene to assert the public's First Amendment right
20 of access to criminal proceedings is proper. Cf. In re
21 Associated Press, 162 F.3d 503, 507 (7th Cir. 1998) (approving
22 motion to intervene as an "appropriate procedural mechanism" to
23 assert right of access).



1 In civil cases, this Court reviews denials of motions to
2 intervene for abuse of discretion. See DSI Assocs. LLC v. United
3 States, 496 F.3d 175, 182-83 (2d Cir. 2007). We see no reason to
4 apply a different standard of review here. The district court
5 denied the NYCLU's motion to intervene after fully considering
6 the issue that the NYCLU raised, engaging in the same legal
7 analysis that the NYCLU urged, and ultimately rejecting the
8 argument on the merits. Under the circumstances, there was no
9 abuse of discretion.

10 **III. Public Access to Sealed Documents**

11 The NYCLU and amici argue that the district court erred by
12 sealing in its entirety the March 10, 2006 Order and sealing
13 nearly all of the March 10, 2006 Opposition. We disagree.

14 "[I]t is well established that the public and the press have
15 a qualified First Amendment right to attend judicial proceedings
16 and to access certain judicial documents." Lugosch v. Pyramid
17 Co. of Onondaga, 435 F.3d 110, 120 (2d Cir. 2006) (internal
18 quotation marks omitted). The parties appear to agree that a
19 First Amendment right of access attached to the district court's
20 March 10, 2006 Order, but disagree as to whether the March 10,
21 2006 Opposition was the sort of judicial document to which the
22 public has a right of access. We need not settle this dispute.
23 Even assuming a right to the documents, the district court did
24 not err in denying public access to them.



1 Documents to which the public has a qualified right of
2 access may be sealed only if "specific, on the record findings
3 are made demonstrating that closure is essential to preserve
4 higher values and is narrowly tailored to serve that interest."
5 Press-Enter. Co. v. Super. Ct., 478 U.S. 1, 13-14 (1986)
6 (internal quotation marks omitted). The district court found
7 that sealing the March 10, 2006 Opposition and Order met this
8 standard because the Executive classified the documents for
9 national-security purposes. The NYLCU and amici argue that the
10 district court's findings were insufficient because the court:
11 (1) erroneously ruled that it lacked the power to review the
12 Government's invocation of the security classifications; (2)
13 failed to make specific findings on the record to support the
14 conclusion that "higher values" justified sealing; and (3)
15 improperly deferred to the Government's view of what could and
16 could not be disclosed to the public.

17 First, we do not decide whether the district court erred in
18 ruling that it lacked power to review security classifications
19 because any such error was harmless. See Fed. R. Crim. P. 52(a).
20 We have reviewed the sealed record and conclude that the
21 Government established the classification levels employed (e.g.,
22 "Confidential," "Secret," and "Top Secret") were properly invoked
23 pursuant to Executive Order.



1 Second, the NYCLU contends that the district court's public
2 findings were perfunctory recitations of the applicable legal
3 standard, and that the district court thus failed to support
4 sealing the documents with specific, on-the-record findings. See
5 In re N.Y. Times Co., 828 F.2d at 116 ("Broad and general
6 findings by the trial court . . . are not sufficient to justify
7 closure."). However, we have held that while the findings must
8 be made on the record for our review, "such findings may be
9 entered under seal, if appropriate." Id. The district court
10 made sufficiently specific findings under seal that justified
11 denying public access to the documents. Moreover, based on our
12 own in camera review of the Government's submission to the
13 district court, we conclude that the Government supported the
14 need to keep the Opposition and Order sealed through a
15 declaration or declarations from persons whose position and
16 responsibility support an inference of personal knowledge; that
17 the district court was made aware of particular facts and
18 circumstances germane to the issues in this case; and that the
19 Government made a sufficient showing that disclosure of the
20 information sought would impair identified national interests in
21 substantial ways. Therefore, the district court's ruling as to
22 higher values was supported by specific findings based on record
23 evidence.



1 Third, while it is the responsibility of the district court
2 to ensure that sealing documents to which the public has a First
3 Amendment right is no broader than necessary, see Press-Enter.
4 Co., 478 U.S. at 13-14, our independent review of the sealed
5 documents satisfies us that closure here was narrowly tailored to
6 protect national security. Thus, any error the district court
7 might have committed in deferring to the Government as to whether
8 more of the March 10, 2006 Opposition could be made public was
9 harmless.

10 Although we affirm the district court in this case, we
11 reinforce the requirement that district courts avoid sealing
12 judicial documents in their entirety unless necessary.
13 Transparency is pivotal to public perception of the judiciary's
14 legitimacy and independence. "The political branches of
15 government claim legitimacy by election, judges by reason. Any
16 step that withdraws an element of the judicial process from
17 public view makes the ensuing decision look more like fiat and
18 requires rigorous justification." Hicklin Eng'g, L.C. v.
19 Bartell, 439 F.3d 346, 348 (7th Cir. 2006). Because the
20 Constitution grants the judiciary "neither force nor will, but
21 merely judgment," The Federalist No. 78 (Alexander Hamilton),
22 courts must impede scrutiny of the exercise of that judgment only
23 in the rarest of circumstances. This is especially so when a
24 judicial decision accedes to the requests of a coordinate branch,



1 lest ignorance of the basis for the decision cause the public to
2 doubt that "complete independence of the courts of justice
3 [which] is peculiarly essential in a limited Constitution." Id.

4 We recognize, however, that transparency must at times yield
5 to more compelling interests. "It is obvious and unarguable that
6 no governmental interest is more compelling than the security of
7 the Nation." Haig v. Agee, 453 U.S. 280, 307 (1981) (internal
8 quotation marks omitted). Given the legitimate national-security
9 concerns at play here and the nature of the underlying documents
10 at issue, we believe the district court acted appropriately in
11 sealing the March 10, 2006 Opposition and Order.

12 **CONCLUSION**

13 For the foregoing reasons, and for those stated in the
14 accompanying summary order, we: (1) AFFIRM Aref's and Hossain's
15 convictions, and (2) AFFIRM denial of the NYCLU's motions to
16 intervene and for public access.