No. _____

IN THE
COURT OF MILITARY COMMISSION REVIEW

IN RE THE MIAMI HERALD, ABC, INC., ASSOCIATED PRESS, BLOOMBERG NEWS, CBS BROADCASTING, INC., FOX NEWS NETWORK, THE MCCLATCHY COMPANY, NATIONAL PUBLIC RADIO, THE NEW YORK TIMES, THE NEW YORKER, REUTERS, TRIBUNE COMPANY, DOW JONES & COMPANY, INC., AND THE WASHINGTON POST,

Petitioners,

FROM THE UNITED STATES MILITARY COMMISSIONS
TRIAL JUDICIARY, GUANTANAMO BAY

PETITION FOR A WRIT OF MANDAMUS

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PRELIMINARY STATEMENT

This petition for a writ of mandamus seeks to enforce the public's constitutional right of access to the proceedings and records of the military commissions at Guantanamo Bay. It is filed on behalf of 14 news organizations (the "Press Petitioners") whose reporters regularly cover the commission's proceedings, including the prosecution in this case of five individuals accused of plotting the attacks of September 11, 2001. Press Petitioners seek to enforce the constitutional limitation on the commission's authority to bar the public from the discussions of "classified" information during this prosecution, where no compelling need for secrecy has been demonstrated and where the classified information is already known to the public.

As set forth below, the protective order entered in this case unlawfully abridges the First Amendment right of access by automatically excluding the press and public from all evidence and argument concerning "classified" information, without any judicial determination that disclosure of specific information would harm national security or threaten personal safety, and without any assessment of whether the information is already public. This constitutional violation is compounded by the protective order's improper definition of "classified information" to include the thoughts and memories of the defendants, thereby censoring from the public any evidence defendants may offer about their post-capture treatment and questioning.

In rejecting Press Petitioner's objections, the commission failed even to address the constitutional issues presented. The protective order it entered conceals information the public has a constitutional right to know, defeats democratic oversight of the commissions, and undermines public confidence that justice is being done. The protective order should be vacated and the commission directed to comply with the constitutional standard governing public access.

STATEMENT OF THE ISSUES PRESENTED

Does the protective order entered in this case violate access rights guaranteed to the public and press under the First Amendment to the United States Constitution by:

1. Requiring all proceedings in a criminal prosecution automatically to be closed, and all motion papers and records to be sealed, whenever any "classified" information is discussed, without an assessment of whether disclosure of the information would pose a substantial probability of harm to the national security or personal safety?

2. Requiring sealing and closure for all classified information, even when that information is already publicly known and the exclusion of the public does nothing to protect national security or personal safety?

3. Declaring defendants' personal thoughts and memories of their post-capture treatment to be "classified," and therefore subject to automatic censorship?

STATEMENT OF FACTS

A. The Underlying Criminal Prosecution

In this case, five defendants stand accused before a military commission of planning, orchestrating and committing the most deadly acts of international terrorism in our Nation's history—the September 11, 2001 attacks that killed 2,976 people (the "9-11 Prosecution"). Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarek Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi (collectively, "defendants") are charged with conspiracy, attacking civilians, murder in violation of the law of war, and other crimes. Referred Charges Dated 4/4/2012. The Government seeks the death penalty. *Id.* at 3, 6, 9, 12, 15.

The defendants were captured at various times in 2002 and 2003 and have been held in U.S. custody continuously since their capture. By the Government's admission, they have been subjected to "enhanced interrogation techniques" in a program the Central Intelligence Agency ("CIA") designed for "high-value detainees" ("HVDs"). AE013 at 5 ¶5(e-f), 6 ¶5(h-i). Defendants' treatment while in U.S. custody is a matter of significant public controversy and concern. *See, e.g.,* AE007B at 1 (Commission finding of significant public interest "due to the serious nature of the crimes alleged and the historic nature of military commissions"). Defendants apparently intend to make their treatment a centerpiece of their defense. *See, e.g.*, May 5, 2012 Unofficial/Unauthenticated Transcript at 174-75 ("May 5 Tr.") **(**defense counsel states that "the issue of enhanced interrogation techniques or torture" is important "for purposes of a dismissal motion, for purposes of mitigation"); Oct. 17, 2012 Unofficial/Unauthenticated Transcript ("Oct. 17 Tr.") at 803 (defense counsel urging that post-capture information is relevant to both "the guilt/innocence portion of this trial and to the sentencing issue of this trial").

B. The Government's Request for Secrecy

On April 26, 2012, the Government filed a motion for an order "to protect against disclosure of national security information." AE013. It asked the Commission, among other things, to seal from public disclosure all references to classified information in any motion papers, transcripts and related records, and to exclude the public from Commission proceedings any time classified information is discussed. *Id.* In support of this request, the Government submitted, under seal, declarations from the CIA, Department of Defense ("DoD") and Federal Bureau of Investigation ("FBI") that it characterized as demonstrating that "the substance of the classified information in this case deals with the sources, methods, and activities by which the United States defends against international terrorist organizations." AE013 at 1.

The Government's proposed order contained a definition of "classified information" subject to its restrictions that was so broad it included defendants' own thoughts and memories. In the Government's view, "[b]ecause the Accused were detained and interrogated in the CIA program, they were *exposed* to classified sources, methods and activities" so that "*any and all statements by the Accused are presumptively classified*." AE013 at 6 ¶5g (emphasis added). The Government conceded that some information about defendants' treatment is public, including officially-acknowledged descriptions of various "enhanced interrogation techniques" used by the CIA. *Id.* ¶5i. The Government urged, however, that other information had not been "officially acknowledged," and therefore "remains classified:"

> This classified information includes allegations involving (i) the location of [CIA] detention facilities, (ii) the identity of any cooperating foreign governments, (iii) the identity of personnel involved in the capture, detention, transfer, or interrogation of detainees, (iv) interrogation techniques as applied to specific detainees, and (v) conditions of confinement [REDACTED].

Id. ¶5j. The Government asserted that disclosure of this information "would be detrimental to national security," and sought to censor from the proceedings all "statements by the Accused" because of their past "exposure" to classified information. *Id.*, Attachment E ¶7d(vi).[1]

C. Opposition by Press Petitioners

On May 16, 2012, Press Petitioners filed an opposition to the proposed protective order (AE013F), as they are authorized to do by 2011 Regulation for Trial by Military Commission, 17-1 and 19-3 and Rule of Court 3(5)(c). Written objections had also been filed by the American Civil Liberties Union ("ACLU"), on behalf of itself and its members. AE013A.

[1] In response to objections by defense counsel that the proposed order was overly broad, the Government later modified its proposal to require defense counsel only to treat as "classified" information obtained from their clients that they "know or have a reason to know is classified, including information that relates to specific aspects of the CIA RDI program that remain classified." AE013L at 7.

Press Petitioners objected to the proposed protective order, *inter alia*, on the grounds that automatic sealing of records and closure of proceedings whenever any "classified" information is discussed would violate the public's First Amendment right of access in multiple respects. Petitioners demonstrated that Commission proceedings were subject to the access right, and that right may not lawfully be abridged on a blanket basis for all "classified" information without an independent judicial assessment of the need for secrecy of specific information.

Press Petitioners further demonstrated that the Government could not make the constitutionally-required showing of harm with respect to information about the treatment of defendants that is already public. Even if such information is considered "classified," statements by defendants concerning their own treatment, involving techniques and practices that are publicly known, cannot constitute a sufficiently compelling threat to our national security to justify a denial of the public's constitutional right to know what transpires in these capital cases.

D. The Overbroad Protective Order Entered by the Commission

The Commission heard oral argument on October 16-17, 2012. During argument, the Government conceded that the public has a First Amendment right of access to the 9-11 Prosecution. *See* October 17, 2012 Hearing Transcript Oct. 17 Tr. at 678, 694.[2] It also recognized that the existence of this right means that proceedings can be closed only where a strict four part test is met. As the Prosecution acknowledged (*id.* at 678):

> [Rule 806 from the Manual for Military Commissions] incorporates the four-part test the Supreme Court showed in *Press Enterprise* . . .. The four factors are whether there's a substantial probability of prejudice to a compelling interest, whether there is no alternative to adequately protecting the information, whether

[2] The motions, briefs, hearing transcripts, commission ruling and protective order referenced herein are posted on the public website maintained by the Office of Military Commissions, *available at* http://www.mc.mil/CASES/MilitaryCommissions.aspx.

> the restriction that is sought would be effective and whether it's narrowly tailored.

Nevertheless, in a Ruling dated December 6, 2012 (AE013O), the trial judge rejected without comment the constitutional standard that all parties agreed should apply, and entered a blanket protective order requiring the automatic sealing and closure of all "classified" information. While modifying certain provisions of the proposed order to address logistical concerns of defense counsel, Judge Pohl entered a protective order (AE013P) that (a) bars all parties from disclosing in their filings or courtroom statements any "classified information or any information that tends to reveal classified information," (b) requires all pleadings containing "classified information" to be filed under seal, and (c) requires Commission proceedings automatically to be closed to the public (by cutting-off of the delayed audio and video feed to the public gallery) any time "classified information" of any nature is disclosed in court. *Id.* ¶¶7, 8. The order defines "classified information" subject to secrecy to include not only information classified by an agency under Executive Order 13526, but also "verbal and non-verbal classified information known to an accused or the Defense." *Id.* ¶2g(3).

In entering this order, Judge Pohl indicated that the sealed *ex parte* declarations submitted by the Government demonstrated that information about intelligence sources and methods is "properly classified" and "subject to protection in connection with this military commission." AE013O at p.5,¶6. In so doing, Judge Pohl did not make any findings of fact about the need for secrecy of any specific information. Nor did he identify any legal authority for the Order's purported classification of the thoughts and memories of the individual defendants, none of whom has a security clearance or has ever been authorized to receive classified information. The Ruling equally failed to identify the legal standard Judge Pohl found the Government to have

met to justify automatically closing the courtroom any time a defendant or his lawyer discusses a defendant's post-capture treatment.

STATEMENT OF THE RELIEF SOUGHT

Press Petitioners seek a writ of mandamus (1) vacating so much of the Protective Order in this case that (a) authorizes the automatic closure of proceedings and sealing of records when any classified information is disclosed, without any judicial determination of a compelling need for secrecy, (b) closes proceedings and seals records concerning information that is publicly known and (c) censors from the proceedings the thoughts and memories of defendants concerning their post-capture treatment; and (2) directing the Commission that it may close a proceeding or seal a record only upon findings that disclosure of specific, non-public information poses a substantial probability of harm to national security or personal safety.

STATEMENT OF REASONS WHY THE WRIT SHOULD ISSUE

I.
PETITIONERS' CONSTITUTIONAL OBJECTIONS TO THE ORDER ARE PROPERLY BEFORE THIS COURT

A. This Court Has Jurisdiction To Grant The Requested Writ

The Military Commissions Act of 2009 ("MCA") empowers this Court, *inter alia*, to decide interlocutory appeals by the United States from any order authorizing disclosure of classified information, or refusing to issue a protective order to prevent disclosure of classified information. 10 U.S.C. §§ 950c(a), 950d(a). Under the All Writs Act, this Court and all other "courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). *See Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999) ("military appellate courts are among those empowered to issue extraordinary writs under the [All Writs] Act."). Because the Court has

jurisdiction under the MCA to decide any disagreement by the United States with the scope of protection afforded to classified information by a commission, it has jurisdiction under the All Writs Act to issue the requested writ in aid of that MCA jurisdiction. *See La Buy v. Howes Leather Co.*, 352 U.S. 249, 255 (1957) (because court of appeals could at some stage of antitrust proceedings entertain appeals, it has power "to issue writs of mandamus reaching them"); *Denver Post Corp. v. United States*, Army Misc. 20041215, 2005 WL 6519929, at *1 (A. Ct. Crim. App. Feb 23, 2005) (resolving legality of closure order "under our all writs authority").[3]

The Court of Military Appeals "has never wavered from the century-old declaration by the Supreme Court that "a superior judicial tribunal can require 'inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do.'" *Dettinger*, 7 M.J. at 218 (alterations omitted) (quoting *Virginia v. Rives*, 100 U.S. 313, 323 (1879)). This Court unquestionably possesses jurisdiction to ensure that the military commission properly protects the public's constitutional access rights, and is duty-bound to exercise that jurisdiction.

B. Mandamus is the Proper Method of Review and Form of Relief

The MCA expressly adopts the procedures and rules applied in courts-martial under chapter 47 of the Uniform Code of Military Justice ("U.C.M.J."), with only limited exception.

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[3] *See also United States v. Denedo*, 556 U.S. 904, 914 (2009) (appellate military court has jurisdiction to entertain petitions for a writ of error *coram nobis* derived "from the earlier jurisdiction it exercised to hear and determine the validity of the conviction on direct review"); *Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969) (because the All Writs Act makes "'explicit the right to exercise powers implied from the creation'" of a court, there can be no "doubt as to the power of the Court of Military Appeals to issue an emergency writ of habeas corpus in cases, like the present one, which may ultimately be reviewed by that court") (citation omitted); *Dettinger v. United States*, 7 M.J. 216, 218 (C.M.A. 1979) ("action on a court-martial matter at the trial level that is not subject to appellate review can, nonetheless, be challenged in an appellate forum by a proceeding for extraordinary relief"). *Cf.* Suppl. Brief for U.S. Gov't, *Ctr. for Const'l Rights v. United States*, USCA Misc. Dkt. No. 12-8027/AR (C.A.A.F.), at 16 (acknowledging propriety of extraordinary writ review at the CCA or CAAF of a military judge's decision to close the courtroom or seal a document), *available at* http://ccrjustice.org/files/Center%20for%20Constitutional%20Rights%20v.%20US%20and%20Colonel%20Denise%20Lind%20%28USCA%20Misc.%20Dkt.%20No.%2012-8027%29%20-%20Gov%20Supplemental%20Brief%20on%20Specified%20Issues%20%281%29.pdf.

See 10 U.S.C. §§ 948b(c); 949a(a); Rules for Military Commissions ("R.M.C.") 102(b). The U.C.M.J., in turn, requires military tribunals to "apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." 10 U.S.C. § 836(a); *see United States v. Hamdan*, 801 F. Supp. 2d 1247, 1262, 1316 n.171 (C.M.C.R. 2011) (en banc per curiam) (Hamdan enjoys "benefits similar to the rights received at courts-martial, in U.S. District Courts, and before international tribunals sponsored by the United Nations"), *rev'd on other grounds*, 696 F.3d 1238 (D.C. Cir. 2012).

Denials of access by district courts are routinely reviewed by Courts of Appeals under their All Writs Act authority. "Indeed, the great majority of cases involving challenges to closure and similar orders have been reviewed pursuant to some sort of extraordinary writ." *United States v. Chagra*, 701 F.2d 354, 360 n.14 (5th Cir. 1983).[4] Likewise, military appellate tribunals under the U.C.M.J. regularly use mandamus authority to enforce the public's right of access to criminal proceedings. *See, e.g.*, *ABC, Inc. v. Powell*, 47 M.J. 363, 364 (C.A.A.F. 1997) (granting mandamus to open Article 32 proceedings to public); *Denver Post Corp.*, 2005 WL 6519929, at *1-2 (same); *cf. In re Halabi*, Misc. Dkt. 2003-07 (A.F. Ct. Crim. App. Sept. 16, 2003) (mandamus authorized when accused challenges closure for national security reasons).

Because Congress intended the procedures of military commissions to "mirror" courts-martial practice "to the maximum extent practicable," *United States v. Khadr*, 717 F. Supp. 2d

[4] *See, e.g.*, *In re McClatchy Newspapers, Inc.*, 288 F.3d 369, 373 (9th Cir. 2002) (mandamus proper to challenge sealing order); *In re Providence Journal Co.*, 293 F.3d 1, 9 (1st Cir. 2002) (same); *Baltimore Sun Co.v. Goetz*, 886 F.2d 60, 63 (4th Cir. 1989) (mandamus "the preferred method of review of orders restricting press activity related to criminal proceedings") (citation omitted); *CBS Inc. v. Young*, 522 F.2d 234, 237 (6th Cir. 1975) (per curiam) (mandamus proper method for news organization to challenge gag order in criminal case); *cf. Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 504-05 (1984) ("*Press Enterprise I*") (reversing denial of writ to compel lower court to release transcript and vacate order closing voir dire); *Ex parte Uppercu*, 239 U.S. 435, 441 (1915) (Holmes, J.) (mandamus to grant petitioner access to sealed filings).

1215, 1236 & n.35 (C.M.C.R. 2007), the established practice of enforcing public access rights in courts-martial through the writ of mandamus should be followed here. This Court should thus suspend the application of its Rule 21(b) to petitions that seek writs to enforce the public's constitutional right of access, and should entertain this Petition.

C. Petitioners Have No Other Means for Relief and Will be Irreparably Harmed

Press Petitioners satisfy the factors typically governing issuance of mandamus: (1) there is "no other adequate means to attain the [desired] relief"; (2) "the writ is appropriate under the circumstances" because it is needed to avoid irreparable harm; and (3) as discussed in Sections II and III below, Petitioners' legal right to relief "is clear and indisputable." *See Cheney v. District Court*, 542 U.S. 367, 380-81 (2004) (internal marks and citations omitted); *Belize Social Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 729-730 (D.C. Cir. 2012).[5]

As a threshold matter, mandamus is proper because Petitioners have no other adequate means to protect their constitutional access rights. The MCA and its implementing regulations mandate public access to the commissions, and provide mechanisms for the public to challenge denials of access at the Commission level,[6] but they provide no mechanism for an appeal by a non-party whose access rights are abridged. *Cf.* 10 U.S.C. § 950d (authorizing limited

[5] Various formulations of the showing required for mandamus relief have been articulated. Under A.C.C.A. Rule 20.1 a petition in a court-martial proceeding must show that the writ will be in aid of the court's appellate jurisdiction, exceptional circumstances warrant the exercise of the court's discretionary powers, and adequate relief cannot be obtained in any other form or from any other court. In *Nat'l Ass'n of Criminal Defense Lawyers, Inc. v. DOJ*, 182 F.3d 981, 986 (D.C. Cir. 1999), the D.C. Circuit Court of Appeals applied a five-factor test: "(1) whether the party seeking the writ has any other adequate means, such as a direct appeal, to attain the desired relief; (2) whether that party will be harmed in a way not correctable on appeal; (3) whether the district court clearly erred or abused its discretion; (4) whether the district court's order is an oft-repeated error; and (5) whether the district court's order raises important and novel problems or issues of law." However the standard for relief is formulated, it is met here.

[6] *See* 10 U.S.C. § 949d(c)(2); Regulation for Trial by Military Commission ("Reg.") 19-3(c), (d) ("members of the public, including news media representatives (or their counsel)," may challenge "whether material presented at trial, at a hearing or in a filing, ruling, order or transcript, may be released to the public or is not appropriately designated as 'protected'").

interlocutory appeals only by the government); R.M.C. 908; Reg. 25-5; Reg. 20-8. Mandamus is appropriate in this situation because Petitioners have no other available remedy. *See*, *e.g.*, *In re McClatchy Newspapers, Inc*., 288 F.3d at 373 (mandamus proper because newspaper "is not a party" and "has no other avenue of relief"); *cf. Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 384-85 (1987) (Brennan, J., concurring) (mandamus should be available where effective review by later appeal is difficult).

Mandamus is proper for the further reason that Petitioners are irreparably harmed by delay in review of their asserted rights. "[I]t is well established that the first amendment protects not only the content of speech but also its timeliness." *Hirschkop v. Snead*, 594 F.2d 356, 373 (4th Cir. 1979); *see also Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 560-61 (1976) ("[d]elays imposed by governmental authority" are inconsistent with the press' "function of bringing news to the public promptly"). The D.C. Circuit underscored this point in reviewing an order that prohibited litigants from disclosing discovery material in a civil suit against the CIA:

> It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances. The [Supreme Court] has thus stressed the necessity of immediate appellate review of court issued restraints. The duration of a trial is intolerably long when measured by this First Amendment clock. Appeal is therefore a clearly inadequate remedy for plaintiffs. If they were forced to wait for appellate review until a final disposition of their case by the district court, their First Amendment rights to timely expression would be irretrievably lost.

In re Halkin, 598 F.2d 176, 199 (D.C. Cir. 1979) (internal marks and citations omitted), *overruled on other grounds by Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984).

It is thus widely recognized that the First Amendment right of access to judicial proceedings and records is a right of *contemporaneous* access. *E.g., Wash. Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991) (noting "critical importance of *contemporaneous* access" to

court records); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 127 (2d Cir. 2006) ("'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury'") (citation omitted); *United States v. Simone*, 14 F.3d 833, 842 (3d Cir. 1994) (ten-day delay in release of transcript of closed hearing violates right of contemporaneous access); *Associated Press v. District Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) (48 hour delay of release of filed documents violates access right); *United States v. Brooklier*, 685 F.2d 1162, 1172-73 (9th Cir. 1982) (delay in release of transcript of closed suppression hearing until end of trial violates access right). A delay in review of the protective order here would constitute its own violation, inflicting irreparable injury that is not correctable on appeal. "'[E]ach passing day may constitute a separate and cognizable infringement of the First Amendment.'" *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers) (citation omitted).

In short, Petitioners have "no other adequate means to attain the [desired] relief" and, "without immediate review, the press will face a serious injury to an important first amendment right." *Oregonian Publ'g Co. v. District Court*, 920 F.2d 1462, 1465 (9th Cir. 1990). Mandamus review is also proper because the constitutional questions "are likely to recur and to evade effective resolution," and "an immediate adjudication of the matter will clarify matters" in other commission proceedings. *In re Providence Journal Co.*, 293 F.3d at 11 (advisory mandamus to review district court practice of denying public access to briefs).

II.
THE GOVERNMENT DOES NOT CONTEST THAT THE CONSTITUTIONAL ACCESS RIGHT APPLIES TO COMMISSION PROCEEDINGS

The First Amendment to the United States Constitution "protects the public and the press from abridgement of their rights of access to information about the operation of their government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 584 (1980) (Stevens, J.,

concurring) (recognizing First Amendment right of public access to criminal trials); *Press-Enterprise I*, 464 U.S. at 508 (recognizing First Amendment right of public access to *voir dire* proceedings). Thus, while the MCA itself mandates public commissions, 10 U.S.C. § 949d(c)(2), *see also* R.M.C. 806(a), the First Amendment independently extends an affirmative, enforceable right of public access to the proceedings and records of military commissions.

The scope of the constitutional access right was first defined by the Supreme Court in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), a case involving access to a criminal trial. A Virginia statute granted the trial judge discretion to conduct a secret trial, but the Supreme Court held that the First Amendment created an affirmative constitutional right of access to government proceedings that trumped the state statute. The Court found this right to be implicit in the First Amendment's guarantees of free speech and press, just as the right of privacy, right to be presumed innocent, and other rights are implicit in various provisions of the Bill of Rights. *See Id.* at 577. The First Amendment right of access is based upon

> the common understanding that a "major purpose of that Amendment was to protect the free discussion of government affairs." By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.

Globe Newspaper Co. v. Superior Court,, 457 U.S. 596, 604 (1982) (citations omitted). The First Amendment right applies not only to proceedings that determine the merits of a dispute, but to all "related proceedings and records." *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.* ("*NYCTA*"), 684 F.3d 286, 298 (2d Cir. 2012); *see also Lugosch*, 435 F.3d at 124 (right extends to documents submitted on substantive motion); *In re N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (right extends to documents submitted in connection with open proceedings).

A. The Access Right Extends to Military Commissions

The Supreme Court uses a two-prong "history and policy" analysis to determine where the right of access applies. The constitutional right exists where government proceedings traditionally have been open to the public (history prong), and public access plays a "significant positive role" in the functioning of the proceeding (policy prong). *E.g., Globe Newspaper*, 457 U.S. at 605-07; *Press-Enterprise Co. v. Superior Court,* 478 U.S.1, 8-9 (1986) ("*Press-Enterprise II*"). Under this analysis, the access right has repeatedly been held to apply to both investigatory proceedings before military tribunals and courts martials. *E.g., Powell*, 47 M.J. at 365 (Air Force Article 32 investigation); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (courts-martial proceeding). It equally applies to the proceedings and records of military commissions. After all, commissions historically "differed from the court-martial only in terms of jurisdiction," not procedure. David W. Glazier, Notes, Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission, 89 Va. L. Rev. 2005, 2092 (2003) ("Glazier"); *see Hamdan v. Rumsfeld*, 548 U.S. 557, 590-91 (2006) (commissions developed where courts martial lacked jurisdiction).

No lengthy "history and policy" analysis is required here, because all parties agree that the public's First Amendment access right applies to commission proceedings, and the trial judge made no finding to the contrary. *See, e.g.,* Oct. 17 Tr. at 694 (Government agreeing that the First Amendment closure standards in *Press Enterprise* apply).[7] But even a cursory review of history and policy confirms that the constitutional access right extends to military commissions.

[7] Like any member of the public, the press has standing to assert the constitutional access right. *See*, *e.g.*, *Globe Newspaper Co.,* 457 U.S. at 609 n.25 ("representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion'") (citation omitted); *Powell*, 47 M.J. at 365 (press has standing to complain if access is denied); *Denver Post Corp.,* 2005 WL 6519929, at *2 (noting "obvious" error in closing proceedings before allowing newspaper's counsel to address the issue).

Historical experience. William Winthrop, known as the "Blackstone of Military Law" (*Reid v. Covert,* 354 U.S. 1, 19, n.38 (1957) (plurality opinion)), described in his classic opus a history of open military tribunals that dates back centuries:

> Originally, (under the Carlovingian Kings,) courts-martial . . . were held *in the open air*, and in the Code of Gustavus Adolphus . . . criminal cases before such courts were required to be tried "*under the blue skies*." The modern practice has inherited a similar publicity.

William Winthrop, Military Law and Precedents 161-62 (rev. 2d ed. 1920) ("Winthrop"). The same tradition of public access runs through the history of military commissions.[8] With rare exception,[9] history reveals proceedings of U.S. military commissions conducted in public:

- During the Civil War, members of the 1864 military commission of Lambdin P. Milligan and others retired from the room to deliberate in order "to avoid the inconvenience of dismissing *the audience assembled to listen to the proceedings*." Winthrop at 289 (internal marks omitted,emphasis added).

- The military commission established to try John Wilkes Booth's co-conspirators in Lincoln's assassination was opened to the public after reporters complained and Gen. Ulysses S. Grant "led them to the White House to talk to the president." *See* James H. Johnston, Swift and Terrible: A Military Tribunal Rushed to Convict After Lincoln's Murder, Wash. Post, Dec. 9, 2001, at F1.

- The military commission that tried General Tomoyuki Yamashita in 1945 was open to the press and public. *See* Ass'n of Bar of City of N.Y., The Press and the Public's First Amendment Right of Access to Terrorism on Trial: A Position Paper, 22 Cardozo Arts & Ent. L.J. 767, 790 (2005).

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[8] Although the instant commissions are of recent vintage, the history of access to their predecessors is pertinent. *United States v. El-Sayegh*, 131 F.3d 158, 161 (D.C. Cir. 1997) (a new procedure substituted for an older one is presumptively "evaluated by the tradition of access to the older procedure").

[9] A 1942 trial of Nazi saboteurs was conducted in secret, but that precedent underscores how secrecy is counterproductive in the long run. It is now widely believed that the "real reason President Roosevelt authorized these military tribunals was to keep evidence of the FBI's bungling of the case secret." Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism, Hearings Before the Senate Comm. On the Judiciary, 107th Cong. 377 (Nov. 28, 2001) (statement of N. Katyal, Visiting Professor, Yale Law School, and Professor, Georgetown University), *available at* http://www.judiciary.senate.gov/hearings/testimony.cfm?id=4f1e0899533f7680e78d03281fdabd2c&wit_id=4f1e0899533f7680e78d03281fdabd2c-0-0 (last visited Jan. 23, 2013).

The weight of experience across centuries supports the recognition of a public right of access to prosecutions before military commissions.

Policies advanced by public access. Public access also plays a significant positive role in the functioning of military commissions. In *Richmond Newspapers* the Supreme Court identified at least five distinct interests that are advanced by open proceedings in criminal prosecutions: (1) ensuring that proper procedures are being followed; (2) discouraging perjury, misconduct of participants, and biased decisions; (3) providing an outlet for community hostility and emotion; (4) ensuring public confidence in a trial's results through the appearance of fairness; and (5) inspiring confidence in government through public education regarding the methods followed and remedies granted. *See id.,* 448 U.S. at 569-73. Each of these applies equally to prosecutions by military commissions.

Just as in civilian courts, public access to the proceedings and records of military tribunals improves the performance of all involved, protects judges and prosecutors from claims of dishonesty, and provides a forum for educating the public and an outlet for public hostility. *See* Ass'n of Bar of City of N.Y., If it Walks, Talks and Squawks . . . The First Amendment Right of Access to Administrative Adjudications: A Position Paper, 23 Cardozo Arts & Ent. L.J. 21, 25 (2005). Even before *Richmond Newspapers,* the Court of Military Appeals required public proceedings in military tribunals because they improve the quality of testimony; curb abuses of authority; and foster greater public confidence in the proceedings. *See United States v. Brown*, 22 C.M.R. 41, 45-48 (C.M.A. 1956), *overruled, in part, on other grounds by United States v. Grunden*, 2 M.J. 116, 120 n.3 (C.M.A. 1977). Since *Richmond Newspapers,* military courts have repeatedly recognized—in a range of contexts—that the constitutional access right applies fully to their proceedings. *See, e.g.*, *Powell*, 47 M.J. 363 (First Amendment access right

applies to investigations under Article 32); *Travers*, 25 M.J. at 62 (First Amendment access right applies to courts-martial); *United States v. Hershey*, 20 M.J. 433, 436, 438 n.6 (C.M.A. 1985) (same); *United States v. Scott*, 48 M.J. 663, 665 (A. Ct. Crim. App. 1998) (same); *United States v. Anderson*, 46 M.J. 728, 729 (A. Ct. Crim. App. 1997) (per curiam) (absent "justification clearly set forth on the record, trials in the United States military justice system are to be open to the public"); *United States v. Story*, 35 M.J. 677, 677-78 (A. Ct. Crim. App. 1992) (per curiam).

Openness is particularly important in these proceedings given the world-wide interest:

> Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.

Nebraska Press Ass'n, 427 U.S. at 587 (Brennan, J., concurring); *see also, Gannett Co. v. DePasquale*, 443 U.S. 368, 429 (1979) (Blackmun, J., concurring in part) ("Secret hearings – though they be scrupulously fair in reality – are suspect by nature."); *Scott*, 48 M.J. at 665 (public confidence can "'quickly erode'" when proceedings are closed). As one commentator has cautioned: "Conducting military commission trials today that fall short of both their historic purposes and contemporary standards of justice is likely to stain the reputation of both the American military and the American justice system as a whole." Glazier at 2093.

B. Strict Standards Govern the Constitutional Access Right

While this constitutional access right is a qualified right, not an absolute right, a proceeding or record subject to the First Amendment right may be closed *only* if the party seeking to seal can satisfy a rigorous test. Different verbal formulations have been used by various courts to define the showing that must be made, but the governing standard applied by the Supreme Court encompasses four distinct factors:

1. **There must be a substantial probability of prejudice to a compelling interest.** Anyone seeking to restrict the access right must demonstrate a substantial probability that openness will cause harm to a compelling governmental interest. *See*, *e.g.*, *Richmond Newspapers, Inc.*, 448 U.S. at 580-81; *Press-Enterprise I*, 464 U.S. at 510; *Press-Enterprise II*, 478 U.S. at 13-14. In *Press-Enterprise II* the Court specifically held that a "reasonable likelihood" standard is not sufficiently protective of the access right, and directed that a "substantial probability" standard must be applied. 478 U.S. at 14-15.

2. **There must be no alternative to adequately protect the threatened interest.** Anyone seeking to defeat access must further demonstrate that there is nothing short of a limitation on the constitutional access right that can adequately protect the threatened interest. *Press-Enterprise II*, 478 U.S. at 13-14; *See Presley v. Georgia*, 130 S. Ct. 721, 724-25 (2010) (per curiam) ("Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials [and] to consider alternatives to closure even when they are not offered by the parties."); *Robinson*, 935 F.2d at 290; *In re The Herald Co.*, 734 F.2d 93, 100 (2d Cir. 1984) (A "trial judge must consider alternatives and reach a reasoned conclusion that closure is a preferable course to follow to safeguard the interests at issue.").

3. **Any restriction on access must be effective.** Any order limiting access must be effective in protecting the threatened interest for which the limitation is imposed. As articulated in *Press-Enterprise II*, 478 U.S. at 14, the party seeking secrecy must demonstrate "that closure would prevent" the harm sought to be avoided. *See Robinson*, 935 F.2d at 291-92 (disclosure could not pose any additional threat in light of already publicized information); *In re The Herald Co.*, 734 F.2d at 101 (closure order cannot stand if "the information sought to be kept confidential has already been given sufficient public exposure"); *cf. Grunden*, 2 M.J. at 123 n.18 ("the 'public' nature of the material [would] establish a separate ground prohibiting exclusion of the public").[10]

4. **Any restriction on access must be narrowly tailored.** Even "legitimate and substantial" governmental interests "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479, 488 (1960). Any limitation imposed on public access thus must be no broader than necessary to protect the threatened interest. *See, e.g., Press-Enterprise II*, 478 U.S. at 13-14; *Lugosch*, 435 F.3d at 124; *Robinson*, 935 F.2d at 287; *cf. Grunden*, 2 M.J. at 120 ("In excising the public from the trial, the trial judge employed an ax in place of the constitutionally required scalpel.").

[10] *Cf. United States v. Hubbard*, 650 F.2d 293, 318, 322 (D.C. Cir. 1981) ("Previous access is a factor which may weigh in favor of subsequent access. . . . One possible reason for unsealing is that the documents were already made public through other means.").

These same standards apply to the military commissions at Guantanamo, as the Prosecution has agreed. Oct. 17 Tr. at 678-79. *See also, e.g.,* R.M.C. 806(b)(2) (proceedings "shall be open to the public unless (1) there is a substantial probability that an overriding interest will be prejudiced if the proceedings remain open; (2) closure is no broader than necessary to protect the overriding interest; (3) reasonable alternatives to closure were considered and found inadequate; and (4) the military judge makes case-specific findings on the record justifying closure.").

Commission proceedings may not be closed without findings that the constitutional standards are met. No such findings were made here.

III.
THE COMMISSION'S ORDER VIOLATES THE PUBLIC'S FIRST AMENDMENT ACCESS RIGHT

The Commission's protective order violates the constitutional access right in several respects, specifically by: (1) automatically denying the public access to all "classified information" in every circumstance; (2) closing proceedings and sealing records that contain information already known to the public; and (3) declaring defendants' own thoughts and memories to be "classified" and thus censored from public disclosure. Each of these aspects of the protective order constitutes a violation of Petitioners' constitutional rights.

A. The Order Impermissibly Excludes the Public From Any "Classified" Information, With No Independent Assessment of the Need for Secrecy

As an element of the supreme law of the land, the constitutional access right necessarily supersedes any contrary law, rule or regulation, including Executive Order 13526. *E.g.*, *In re N.Y. Times*, 828 F.2d at 115 ("obviously, a statute cannot override a constitutional right"). The constitutional standards protecting public access must be satisfied before a proceeding subject to the access right can be closed or its records sealed, even when the government seeks to protect "classified" information.

National security concerns can constitute a compelling ground for closure, but a trial judge must independently determine whether the constitutional standard has been met with respect to specific classified information. If the government exceeds its classification authority, for example, by classifying information to conceal unlawful behavior or prevent embarrassment, a court unquestionably has authority to determine whether the fact of classification justifies an abridgment of others' First Amendment rights. *See, e.g.*, *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139-140 (1951) (Attorney General exceeded authority conferred by executive order; injunctive relief granted). *ACLU v. Office of Dir. Nat'l Intelligence*, No. 10 Civ. 4419 (RJS), 2011 WL 5563520, at *5-6, 12 (S.D.N.Y. Nov. 15, 2011) (classification to "conceal violations of law, inefficiency, or administrative error, or to prevent embarrassment" is improper) (internal marks and citations omitted). This same principle requires a judge independently to assess whether disclosure of classified information during a trial would pose a sufficient security threat to justify limiting the public's right of access.

1. The commission failed adequately to weigh the need for secrecy. In agreeing to close all proceedings and seal all records discussing any classified information, Judge Pohl failed to recognize his constitutional obligation to determine if a compelling need actually requires specific information to be kept secret. Under settled law, the government cannot close a criminal proceeding—particularly one seeking the death penalty—simply by observing that "classified" information will be discussed. Rather, it must make a factual showing that a compelling need requires the information to be kept from the public. *See, e.g., In re Wash. Post*, 807 F.2d 383, 391-92 (4th Cir. 1986); *Grunden*, 2 M.J. at 121.

In the Pentagon Papers case, Justice Black underscored the importance of an independent judicial assessment of security concerns where First Amendment rights are at stake:

> The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.

N.Y. Times Co. v. United States, 403 U.S. 713, 719 (1971) (Black, J., concurring). *Accord Union Oil Co. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) ("disputes about claims of national security are litigated in the open."); *United States v. Progressive, Inc.*, 467 F. Supp. 990, 995 (W.D. Wis. 1979) (scrutinizing basis for government claim that publication of a magazine article would "increase thermonuclear proliferation" and "irreparably impair the national security"). For this reason, when the government seeks to abridge First Amendment rights to protect "classified" information, judges must make their own determination that the government has good reason for claiming a security risk. *See N.Y. Times*, 403 U.S. at 714 (refusing to grant a prior restraint against publication of classified information). Otherwise, as Judge Tatel has cautioned, an "uncritical deference" to "vague, poorly explained arguments for withholding broad categories of information" can quickly eviscerate "the principles of openness in government." *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 937 (D.C. Cir. 2003) (Tatel, J., dissenting).

Courts thus regularly look behind claims that national security justifies secrecy where First Amendment rights are at stake. In a challenge to the CIA's removal of classified information from a book manuscript, for example, the D.C. Circuit articulated a standard to apply when the need to protect classified information competes with First Amendment rights:

> While we believe courts in securing such determinations should defer to CIA judgment as to the harmful results of publication, they must nevertheless satisfy themselves from the record, in camera or otherwise, that the CIA in fact had good reason to classify, and therefore censor, the materials at issue. . . .
>
> [W]hile the CIA's tasks include the protection of the national security and the maintenance of the secrecy of sensitive information, the judiciary's tasks include the protection of

> individual rights. Considering that speech concerning public affairs is more than self-expression; it is the essence of self-government, and that the line between information threatening to foreign policy and matters of legitimate public concern is often very fine, courts must assure themselves that the reasons for classification are rational and plausible ones.

McGehee v. Casey, 718 F.2d 1137, 1148-50 (D.C. Cir. 1983) (internal marks and citations omitted); *see also*, *Stillman v. CIA*, 319 F.3d 546, 548-49 (D.C. Cir. 2003) (courts have duty to review classification claim used to censor former CIA employee); *Berntsen v. CIA*, 618 F. Supp. 2d 27, 29-30 (D.D.C. 2009) (same); *Wilson v. CIA*, 586 F.3d 171, 185 (2d Cir. 2009) (deferential review of classification used to censor manuscript "does not equate to no review").

The Court of Military Appeals applied a similar standard in weighing a claimed need to protect security against a defendant's Sixth Amendment public trial right:

> Although the actual classification of materials and the policy determinations involved therein are not normal judicial functions, immunization from judicial review cannot be countenanced in situations where strong countervailing constitutional interests exist which merit judicial protection. Before a trial judge can order the exclusion of the public on this basis, he must be satisfied from all the evidence and circumstances that there is a reasonable danger that presentation of these materials before the public will expose military matters which in the interest of national security should not be divulged.

Grunden, 2 M.J. at 122 (citations omitted). Put differently, "even when the interest sought to be protected is national security, the Government must demonstrate a compelling need to exclude the public," *Hershey*, 20 M.J. at 436, as the Government itself acknowledged here. Oct. 17 Tr. at 672-73 (that classified information is involved does not mean "an automatic closure").

Case law in federal courts under the Classified Information Procedures Act, 18 U.S.C., App. 3 (2000) ("CIPA"), from which the MCA's provisions for classified information are derived, confirms that the fact of classification does not automatically trump the constitutional access right. CIPA neither purports to – nor could it – override the requirements of the First

Amendment with respect to public access to a criminal prosecution. *E.g.*, *United States v. Rosen*, 487 F. Supp. 2d 703, 710, 716-17 (E.D. Va. 2007) (a statute cannot defeat a constitutional right and "government's *ipse dixit* that information is damaging to national security is not sufficient to close the courtroom doors"). As the Fourth Circuit aptly noted in applying CIPA procedures:

> the mere assertion of national security concerns by the Government is not sufficient reason to close a hearing or deny access to documents. Rather, [courts] must independently determine whether, and to what extent, the proceedings and documents must be kept under seal.

United States v. Moussaoui, 65 F. App'x 881, 887 (4th Cir. 2003) (unpublished) (citations omitted). To seal classified information even where CIPA is involved, the government must still make "a sufficient showing that disclosure of the information sought would impair identified national interests in substantial ways," and the court must conduct an "independent review" to determine that closure is "narrowly tailored to protect national security." *United States v. Aref*, 533 F.3d 72, 82-83 (2d Cir. 2008); *In re Wash. Post*, 807 F.2d at 393 (district court not excused under CIPA "from making the appropriate constitutional inquiry"); *United States v. Poindexter*, 732 F. Supp. 165, 167 n.9 (D.D.C. 1990) ("CIPA obviously cannot override a constitutional right of access"); *United States v. Pelton*, 696 F. Supp. 156, 159 (D. Md. 1986) (same). [11]

The Fourth Circuit has also forcefully explained the importance of a separate judicial determination of the need to close a criminal prosecution to protect classified information:

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[11] Even in resolving *statutory* access rights under the Freedom of Information Act (FOIA), courts recognize that deference to the government's assertion of a national security concern "is not equivalent to acquiescence," and that government declarations invoking national security "must provide a basis for the FOIA requester to contest, and the court to decide, the validity of the withholding." *Coldiron v. Dep't of Justice*, 310 F. Supp. 2d 44, 49 (D.D.C. 2004) (internal quotations omitted). *See also, e.g.*, *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987) (a district court is "required to conduct a de novo review of the classification decision, with the burden on the agency claiming the exemption"); *ACLU v. Dep't of State*, 878 F. Supp. 2d 215, 2012 WL 2989833, at *4-5 (D.D.C. July 23, 2012) (same); *Ctr. for Int'l Envtl.l Law v. Office of U.S. Trade Rep.*, 845 F. Supp. 2d 252, 256-7, 259-60 (D.D.C. 2012) (rejecting agency assertions of harm from disclosure of classified information).

> [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 decision-making responsibility to the executive branch whenever national security concerns are present. History teaches us how easily the spectre of a threat to "national security" may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse.

In re Wash. Post, 807 F.2d at 391-92.

In finding that information concerning intelligence sources and methods is "properly classified by the executive branch" (AE013O at 5 ¶6), the commission failed to make the requisite constitutional inquiry. Its Ruling fails to explain how disclosure of specific facts would "impair identified national interests in substantial ways," as the First Amendment requires.

The improper subjugation of the public access right to the classification decisions of executive agencies was dramatized in recent hearings. On January 28, 2013, the public audio and video feed of a pre-trial proceeding was suddenly cut off, closing the proceeding to the public while a defense lawyer referred to the caption of a publicly-filed motion: "080 Joint Defense Motion to Preserve Evidence of any Existing Detention Facility." Jan. 29, 2013 Unofficial/ Unauthenticated Tr. at 1470. Neither the judge nor the court security officer in the court room had cut off the feed to exclude the public. The next day, counsel for the Government advised Judge Pohl that outside agencies also had the ability to cut the courtroom feed to the public to protect information they had classified: "OCA, original classification authority, reviews closed-circuit feed of the proceedings to conduct a classification review to ensure that classified information is not inadvertently disclosed." *Id.* at 1485. While Judge Pohl insisted this should not happen again, the episode underscores the more fundamental problem that the

protective order authorizes proceedings automatically to be closed when any classified information is discussed. The First Amendment requires a judicial assessment of the basis to believe that the release of specific information would threaten national security; the protective order in this case requires no such thing.

2. The commission failed to apply the controlling constitutional standards. Where the First Amendment access right applies, the basis for closure must be explained in specific, on the record, findings with sufficient detail to be reviewed on appeal. *See Press-Enterprise II*, 478 U.S. at 13-14; *In re The Herald Co.*, 734 F.2d at 100; *Associated Press,* 705 F.2d at 1147.[12] The Ruling failed to do so.

Moreover, by allowing all classified information automatically to be sealed (AE013P at 15 ¶8(2)(a)), the protective order applies the wrong standard. Information can be classified under Executive Order 13526 if it "reasonably could be expected to cause damage to the national security" (*id.,* §1.2(a)). Although this classification standard corresponds to the MCA, it is a low and broad standard that, as the Government acknowledges, is insufficient to defeat the First Amendment access right. In *Press-Enterprise II*, the Supreme Court specifically rejected a "reasonable likelihood" of harm standard for closing proceedings, holding that the Constitution instead requires a finding of a "substantial probability" of harm before proceedings in a criminal prosecution may be conducted in secret. 478 U.S. at 14-15. *See, e.g., In re Wash. Post Co.*, 807 F.2d at 392-93 (requiring "substantial probability" of harm to national security to close a hearing); *Robinson*, 935 F.2d at 290-92 (requiring "substantial probability" of harm to

[12] Both the MCA and the R.M.C. similarly require specific findings before a proceeding may be closed. *See* 10 U.S.C. § 949d(c)(2) (requiring "specific finding" that closure is "necessary" to protect information "which could reasonably be expected to cause damage to the national security" or to "ensure physical safety of individuals"); Rules for Military Commissions 806(a), (b)(2) (proceedings may be closed only upon making a specific finding as required by § 949d(c)(2)).

defendant to seal a plea agreement); *Oregonian Publ'g Co.,* 920 F.2d at 1466 (same); *United States v. Antar*, 38 F.3d 1348, 1359-60 (3d. Cir. 1994) (requiring "substantial probability" of harm to jurors to seal voir dire transcript). The protective order violates the Constitution by allowing a denial of public access under the very standard the Supreme Court found insufficient.

3. The commission improperly imposed secrecy on a blanket basis. The protective order further errs by adopting a *per se* presumption of harm flowing inevitably from any classified information in all circumstances. In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), the Supreme Court struck down a Massachusetts statute that similarly imposed a *per se* closure of the public from criminal trials during the testimony of a minor victim of a sex crime. *Id*. at 610-11. Even though the interest of protecting minors is a compelling one, the Supreme Court struck down the automatic exclusion, holding that a case-by-case review and findings of a demonstrated need for closure are required by the First Amendment. *Id.* at 607-08; *see also*, *Florida Star v. B.J.F.*, 491 U.S. 524, 539-40 (1989) ("categorical prohibitions" on access are not allowed by the First Amendment).

This principle barring automatic secrecy for categories of information should be applied with particular force to the Government's blanket request here to close all proceedings involving any "classified" information. The fact that a piece of information is classified does not inevitably establish a probability of harm to national security from its mention in a criminal trial. Many studies have concluded that a great deal of information whose disclosure would be entirely harmless is nonetheless "classified" in government files—indeed, it has been estimated that as much as 50% of classified information is not properly classified. *See* Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing: Hearing Before the Subcomm. on National Security, Emerging Threats, and International Relations of the Comm. on Government

Reform, 108th Cong. 263 at 82-83 (2004) (statement of J. William Leonard, Director, Information Security Oversight Office, National Archives and Records Administration).[13] The problem is not new. As a former Solicitor General once put it:

> It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another.

Erwin Griswold, Secrets Not Worth Keeping, Wash. Post, Feb. 15, 1989, at A25.

This concern is compounded for information about the treatment of the defendants in this case, where the potential to use the classification system to facilitate selective disclosures that sway public opinion is very real. This legitimate concern is only heightened by disclosures such as those in the recent book by the former CIA deputy director responsible for developing and implementing the controversial program for interrogating detainees. "Hard Measures" by Jose Rodriguez, Jr. provides extensive details about the CIA's specific interrogation techniques—how they were used, when they were used, in what order they were used—and even details specific facts about the interrogation of one of the defendants in this case.[14] These disclosures are made, by the author's admission, to convince the public that the techniques were rarely used, safe and humane – and that "[n]o one enjoyed doing it." *Id.* at 67, 65-66, 68-69, 70. Authorizing such

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[13] *See also* Pub. L. 111-258, § 2, 124 Stat. 2648 (Oct. 7, 2010) codified at 6 U.S.C. § 124m & 50 U.S.C. § 135d (the Reducing Over-Classification Act) (congressional finding that "the over-classification of information . . . needlessly limits stakeholder and public access to information."); Senate Report of the Commission on Protecting and Reducing Government Secrecy, 103rd Cong., 1997, S. Doc. 105-2, at xxi (GPO 1997) ("The classification system . . . is used too often to deny the public an understanding of the policymaking process, rather than for the necessary protection of intelligence activities and other highly sensitive matters."), *available at* http://www.access.gpo.gov/congress/commissions/secrecy/index.html.

[14] *See, e.g.,* Jose A. Rodriguez, Jr., Hard Measures (2012) ("Rodriguez") at 55-57 (detailing the creation of "black sites"); 65-70 (detailing interrogation techniques and their order of use); 70 (noting that defendant Muhammad counted the seconds off with the fingers of his hand while being waterboarded); 88-96 (detailing the interrogation of defendant Muhammad).

selective disclosures, while barring defendants from testifying about this very same conduct during their defense, itself raises significant First Amendment concerns.

The concerns raised by over-classification and selective disclosure must be addressed, in the context of a criminal trial, through independent review by the trial judge. The First Amendment requires a judge presiding at a public trial to determine through factual findings that a compelling need demands specific information to be kept from the public. It does not allow this responsibility to be abdicated simply because an agency has classified information.

B. The Order Impermissibly Censors Discussion of Public Information

The protective order is overbroad for the further reason that its blanket closure of all classified information means that proceedings will be closed and records sealed, even when they discuss facts that are publicly known. No credible risk to national security arises from the presentation in open court of information that is already known, whether classified or not.

The circumstances of these defendants' treatment while in custody has been the subject of significant attention worldwide and raises issues of profound public interest. Detailed information about the CIA interrogation program has already been disclosed, including in documents released by the United States Government and available online.[15] The protective order nonetheless seals records and closes proceedings if they discuss such information as the

[15] *See, e.g.,* Dep't of Justice Memorandum Re: Application of Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005), at 8, *available at* http://bit.ly/Iltguh (detailing authorized interrogation techniques and treatment of specific detainees); CIA Office of the Inspector General, Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003) (May 7, 2004), ¶¶ 95, 99-100, *available at* http://wapo.st/3JNHM ("IG Report"). [declassified August 24, 2009] (detailing unauthorized interrogation techniques and the treatment of specific detainees); Dep't of Justice, Inspector General Review of FBI Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan and Iraq (May 20, 2008), Part 5 at 182, *available at* http://www.aclu.org/files/pdfs/safefree/OIG_052008_158_207.pdf (describing interrogation techniques); CIA, Background Paper on CIA's Combined Use of Interrogation Techniques (Dec. 30, 2009), at 4-17, *available at* http://bit.ly/3YJp0 (summarizing detention conditions and describing each of the interrogation techniques actually applied).

location of CIA detention facilities or identity of cooperating governments, interrogation techniques used on defendants, and conditions of their confinement.[16] But even limited Internet research confirms that a great deal of this information is publicly available.

For example, concerning the locations of prisons and cooperating governments:.

- The International Committee of the Red Cross ("ICRC") has reported that all five of the defendants in this case were arrested by Pakistani national police/security forces and initially transferred to Afghanistan. ICRC Report on the Treatment of Fourteen High Value Detainees in CIA Custody (Feb. 2007), at 5, *available at* http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf ("ICRC Report"). The 9-11 Commission also identified Pakistan as playing a leading role in the capture of defendant Mohammad. 9-11 Commission Final Report (July 22, 2004), at 385, *available at*http://govinfo.library.unt.edu/911/report/911Report.pdf.

- An extensive report by the Council of Europe concludes that the first HVDs were transferred to Poland in early 2003. *See* Memorandum from D. Marty, Switzerland Rapporteur to the Council of Europe, Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: 2d Report (June 8, 2007), *available at* http://bbc.in/JMRLRM. A UN report discloses that defendants Mohamed, bin al-Shibh, and bin Attash were held in the Polish village of Stare Kiejkut between 2003 and 2005, and Ramzi Binalshibh was at one point flown to Thailand. *See* U.N. Human Rights Council, Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism (May 20, 2010), ¶¶ 108, 114, U.N. Doc.A/HRC/13/42, *available at* http://bit.ly/cziSQc.

- "Among the prisoners on board a flight from Poland to Bucharest in September 2003, according to former CIA officials, were [Khalid Sheikh] Mohammed and Walid bin Attash . . . . Later, other senior al-Qaeda suspect[] Ramzi Binalshibh . . . w[as] also moved to Romania. . . .The prison [in Romania] was part of a network of so-called 'black sites' that included prisons in Poland, Lithuania, Thailand and Morocco operated by the CIA." A. Spillius, CIA Used Romania Building as Prison for Khalid Sheikh Mohammed, Telegraph (Dec. 8, 2011), *available at* http://tgr.ph/u18pgx. A Lithuanian government official and a former U.S. intelligence officer also disclosed that one of the CIA's secret European prisons was inside a riding academy outside Vilnius, Lithuania. Matthew Cole & Brian Ross, Exclusive: CIA Secret 'Torture' Prison Found at Fancy Horseback Riding Academy, ABC News (Nov. 8, 2009), *available at* http://abcn.ws/IiByQk.

[16] The order also bars disclosure of the specific identities of personnel involved in the capture, detention, transfer, or interrogation of detainees. Press Petitioners do not contest the redaction of these identities from records of the 9-11 Prosecution.

- It is widely reported that the CIA had two videotapes and an audio tape of the interrogation Ramzi Binalshibh by the Moroccan intelligence service. *See e.g.*, Siobhan Gorman, CIA Interrogation Tapes of 9/11 Planner Are Found, Wall St. Journal (Aug. 17, 2010), *available at* http://online.wsj.com/article/SB10001424052748704554104575435272683060714.html?KEYWORDS=Binalshibh+interrogation.

There is no proper basis to exclude the public from commission proceedings if defendants testify about these same public facts.

Similarly, the trial judge made no factual findings of a compelling need to prevent the public from hearing defendants' allegations about their treatment while in custody, allegations that have also been widely reported already—by the ICRC, in the CIA-authorized book by the former director of its interrogation program, and elsewhere. The ICRC Report is replete with detailed accounts of the alleged treatment of three of the defendants in their own words. For example, defendant Mohammed gave the ICRC the following description of his treatment:

- "*I would be strapped to a special bed, which can be rotated into a vertical position. A cloth would be placed over my face. Water was then poured onto the cloth by one of the guards so that I could not breathe. This obviously could only be done for one or two minutes at a time. The cloth was then removed and the bed was put into a vertical position. The whole process was then repeated during about 1 hour.*"… As during other forms of ill-treatment he was always kept naked during the suffocation. Female interrogators were also present during this form of ill-treatment, again increasing the humiliation aspect. ICRC Report at 9-10.

- "[H]e was shackled in the prolonged stress standing position for one month." *Id.* at 11.

- "[A] *thick plastic collar would be placed around my neck so that it could then be held at the two ends by a guard who would use it to slam me repeatedly against the wall.*" *Id.* at 12.

- [O]n a daily basis during the first month of interrogation…"[I]*f I was perceived not to be cooperating I would be placed against a wall and subjected to punches and slaps in the body, head and face.*" *Id*. at 13.

- One of his interrogators stated that the green light had been received from Washington to give him a "hard time" and that, although they would not let him die, he would be brought to the "verge of death and back again." *Id.* at 17.

- A drink of Ensure was provided once every four hours. If he refused to drink then his mouth was forced open by a guard and the Ensure was poured down his throat. After about one month solid food began to be provided twice a day. *Id.* at 18.

Similarly detailed accounts are provided in the ICRC Report concerning two other defendants, Mr. Bin Attash[17] and Mr. Ramzi Binalshib.[18] *See also* Rodriguez at 65-70 (accounts of the interrogation techniques in CIA-approved book).

There is no lawful basis to close proceedings or seal records that address such information already in the public domain. *See, e.g., In re Charlotte Observer*, 882 F.2d 850, 853-55 (4th Cir. 1989) ("[w]here closure is wholly inefficacious to prevent a perceived harm, that alone suffices to make it constitutionally impermissible"); *In re N.Y. Times*, 828 F.2d at 116 (sealing papers not proper where much of the information "has already been publicized"); *CBS v. District Court*, 765 F.2d 823, 825 (9th Cir. 1985) (substantial probability of prejudice cannot exist when "most of the information the government seeks to keep confidential concerns matters that might easily be surmised from what is already in the public record").

Moreover, in light of the large amount of publicly available and officially acknowledged information, it is impossible to understand what serious risk to national security could be created

[17] Mr. Bin Attash told ICRC he was shackled in the standing stress position for two weeks and made to wear a garment that resembled a diaper (ICRC Report. at 11), slammed against walls by use of a collar looped around his neck (*id.* at 12), subjected to slaps to the face and punches to the body *(id.* at 13), kept naked for two weeks in Afghanistan, followed by one month of being clothed (*id.* at 14), made to lie on a plastic sheet that would then be lifted at the edges while cold water was poured onto his body and he was then kept enveloped within the sheet for several minutes, and he was doused every day during the month of July 2003 with cold water from a hosepipe (*id.* at 16), when not kept in the prolonged stress standing position, was held in ankle shackles kept attached by a one meter long chain to a pin fixed in the corner of the room (*id.* at 16-17), was fed only Ensure and water for a two week period (*id.* at 18), and was kept for approximately two and a half years without any exercise apart from a one month period (*id.* at 20).

[18] Mr. Ramzi Binalshib told the ICRC he was shackled in the stress standing position for two to three days (*id.* at 11), splashed with cold water from a hose (ICRC Report. at 16), restrained on a bed, unable to move for a month while being subjected to cold air-conditioning (*id.*), was shaved over his entire head and face, in a manner that deliberately left some spots and spaces to make him look and feel undignified and abused (*id.* at 17), and deprived of solid food for three to four weeks, provided only with Ensure and water (*id.* at 18).

by allowing testimony about these same facts to be taken in open court. To the contrary, shielding from public view all evidence on these topics will only *undermine* the legitimacy and credibility of military commissions. *Travers*, 25 M.J. at 62 ("public confidence in matters of military justice would quickly erode if courts-martial were arbitrarily closed to the public.")

C. The Order Impermissibly Censors the Thoughts and Memories of Defendants

The Government has no authority under Executive Order No. 13526 to classify defendants' own thoughts and memories of their post-capture treatment as the "definitions" in the protective order purport to do. The physical treatment of detainees is not "information" within the meaning of the Executive Order, and the Government does not own, possess or control the defendants' thoughts and memories in any event. There is thus no proper basis to classify the information pursuant to express terms of Executive Order No. 13526 § 1.1(a)(2), 75 Fed. Reg. 707.[19]

Moreover, the Government made a knowing and voluntary decision to "expose" its classified interrogation techniques to a number of detainees, several of whom have publicly provided accounts of the CIA's actions. *See, e.g.,* Dana Priest, Wrongful Imprisonment: Anatomy of a CIA Mistake; German Citizen Released After Months in 'Rendition', Wash. Post, Dec. 4, 2005 (describing post-release statements by Guantanamo detainee Mamdouh Habib that he earlier had been burned by cigarettes, given electric shocks and beaten by Egyptian captors); ICRC Report at 9-18 (three of the defendants in this case detailing their interrogations). By releasing classified information to detainees who did not ask to obtain it, owed no duty of loyalty to the United States, and had no security clearance to receive it, the Government waived any

[19] Before the military commission, the ACLU spelled out in greater detail the lack of any legal basis for the government to "classify" the thoughts and memories of the defendants, and we incorporate by reference those arguments. *See* AEO13A at 17-31.

right to impose secrecy obligations on the disclosure of that information by the detainees themselves.[20] *See, e.g. State of N.D. ex rel. Olson v. Andrus*, 581 F.2d 177, 182 (8th Cir. 1978) ("The selective disclosure exhibited by the government in this action is offensive to the purposes underlying the FOIA and intolerable as a matter of policy."); *Shell Oil Co. v. IRS*, 772 F. Supp. 202, 209 (D.Del. 1991) ("Where an authorized disclosure is voluntarily made to a non-federal party, whether or not that disclosure is denominated 'confidential,"' the government waives any claim that the information is exempt from disclosure under the deliberative process privilege."); *Lawyers Committee for Human Rights v. IRS*, 721 F. Supp. 552, 569 (S.D.N.Y. 1989) (State Department "would not logically have discussed such information with the press unless it was sure that a 'leak' would not breach national security. Thus, State's refusal to release these documents on the grounds that it could breach national security is undercut by its own prior actions").

Even if the protective order could categorically close proceedings and seal records to protect classified information, it cannot properly define the thoughts and memories of the defendants as "classified" and prevent them from being disclosed to the public.

[20] Under the Executive Order, the Government may only provide access to classified information to individuals who need-to-know the information, sign an approved nondisclosure agreement and have been determined to be eligible to obtain the information. Executive Order No. 13526 § 4.1. The Government acknowledges that the defendants did not have the proper "security clearance" to obtain classified information. AE013D at 11.

CONCLUSION

For the foregoing reasons, the requested writ of mandamus should issue forthwith.

Dated: February 14, 2013

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APPENDIX

Not Reported in M.J., 2005 WL 6519929 (Army Ct.Crim.App.)
Only the Westlaw citation is currently available.
This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.
U.S. Army Court of Criminal Appeals.

The DENVER POST CORPORATION, Petitioner
v.
The UNITED STATES of America and Captain Robert Ayers, Respondents.

ARMY MISC 20041215
23 Feb. 2005.

For Petitioner: Matthew S. Freedus, Esquire; Eugene R. Fidell, Esquire; Thomas B. Kelley, Esquire, Steven D. Zansberg, Esquire (on brief).

For Respondents: Lieutenant Colonel Michael E. Mulligan, JA; Captain Jeffrey L. Phillips, JA, Lieutenant Colonel Mark L. Johnson, JA, Colonel Steven T. Salata, JA (on brief).

Amicus curiae on behalf of Petitioner: Lucy A. Dalglish, Esquire; Gregg P. Leslie, Esquire; Kimberley Keyes, Esquire (on brief)—For the Reporters Committee for Freedom of the Press.

Before CHAPMAN, CLEVENGER, and STOCKEL, Appellate Military Judges.

MEMORANDUM OPINION ON PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF WRITS OF MANDAMUS AND PROHIBITION AND APPLICATION FOR STAY OF PROCEEDINGS

CLEVENGER, Judge:

***1** On 2 December 2004, at Fort Carson, Colorado, a joint proceeding pursuant to Article 32, Uniform Code of Military Justice, 10 U.S.C. § 832, commenced in the cases of *United States v. Williams, United States v. Sommer,* and *United States v. Loper.* The soldiers in question are charged with offenses relating to the death of an Iraqi national citizen who was in their custody in Iraq. On the day before the hearing, the government published a press release announcing the date of the proceedings and informing that, "[i]t is anticipated that a significant portion of the Article 32 investigation will be closed to the press and public due to the security classification of the evidence."[1] The Petitioner, The Denver Post Corporation, went to the hearing and requested that the proceedings be open to the public and press representatives. The Petitioner specifically noted that the necessity for any closure of a portion of the proceedings had to be determined in accordance with applicable legal standards.

After convening the hearing in an open forum and following some routine preliminary matters, the Respondent, Captain Robert Ayers, who is the appointed Article 32 Investigating Officer (IO), closed the proceedings excluding the public and press and heard testimony from a security specialist. The security specialist testified about the classified nature of the sources, methods, and intelligence activities that may be related to the factual allegations in the charges under investigation by the Respondent. The security specialist opined that the Respondent should close the evidence taking proceedings to the public because classified information would invariably need to be addressed in both testimony and documents and that the classified matters were "inextricably" involved in the matter under investigation. Following the security specialist's testimony, Respondent, while still in closed session, announced that he would close the entire investigation but that he would first give Petitioner's representative an opportunity to address the matter on the record. Thereafter, the proceedings were closed to the public for all the evidence taking sessions until stayed by our order of 3 December 2004, pursuant to Petitioner's motion.

We now hold that Respondent's decision to completely close the evidence taking proceedings was unlawful and we order appropriate relief.[2] Our resolution of this matter, under our all writs authority pursuant to 28 U.S.C. § 1651(a), is appropriate for multiple reasons. Primarily, Respondent's decision to close the proceedings is clearly erroneous and amounts to a usurpation of authority. Further, our decision will resolve recurrent issues that will inevitably appear in future cases, thus it will prevent a waste of time and energy in those proceedings. Finally, awaiting relief in the ordinary course of appellate review would be an inadequate remedy to preserve the public interest which is at issue in this matter. *United States v. LaBella,* 15 M.J. 228 (C.M.A.1983); *Dew v. United States,* 48 M.J. 639 (Army Ct.Crim.App.1998).

LAW

***2** This court's authority to act on the merits of this petition is clear. *ABC, Inc. v. Powell,* 47 M.J. 363, 364 (C.A.A.F.1997). In *Powell,* our superior court authoritatively addressed this issue and said that "absent 'cause shown that outweighs the value of openness,' the military accused is ... entitled to a public Article 32

investigative hearing." *Powell,* 47 M.J. at 365. Further, "when an accused is entitled to a public hearing, the press enjoys the same right and has standing to complain if access is denied." *Id.* (citations omitted).

"But the right to a public hearing is not absolute." *Id.* "[T]he determination [of what, if any, portions of an Article 32 proceeding are to be closed to the public] must be made on a case-by-case, witness-by-witness, and circumstance-by circumstance basis." *Id.* (citations omitted). In *United States v. Grunden,* 2 M.J. 116 (C.M.A.1977), our superior court gave valuable, practicable guidance in the context of excluding the public and press from court-martial trial proceedings. Where such necessary exclusions have been properly ordered, "the exclusion of the public was narrowly and carefully drawn. The blanket exclusion of the spectators from all or most of a trial ... has not been approved ... nor could it be absent a compelling showing that such was necessary to prevent the disclosure of classified information." *Grunden,* 2 M.J. at 121 (footnote omitted). Here, Respondent should have applied the guidance set out in *Grunden.*

DISCUSSION

Initially, we note that Respondent decided to close the proceedings even before Petitioner's counsel was allowed to address the matter on the record. The procedural error is obvious on its face. We take this opportunity to remind appointing authorities for Article 32 investigating officers of the policy guidance in favor of more senior and experienced officers to perform this investigative function. In most cases, the need for legal training in the background of an IO can be readily supplied by an impartial legal advisor. However, what may be more critically needed in an investigation is the value of training and experience in more relevant matters, such as aviation, ordnance, engineering, or classified intelligence information practices.

But, here, even if Respondent's later substantive decision to close the proceedings is examined as if that decision had been made objectively and not predetermined before hearing from Petitioner's representative as noted above, it still fails to pass muster.

The last witness called on 3 December 2004, before our stay was ordered, denied any substantive knowledge of what was going on at the physical location where the homicide was alleged to have occurred. The witness who testified before the last witness also testified without touching on the substance of classified matters. The witness immediately preceding these two witnesses was called to testify over a nonsecure telephone line, *i.e.,* a telephone line over which classified material could not be discussed. Again, on its face, that testimony could not have been classified and Respondent could not possibly have expected that testimony to be classified. Obviously, Respondent should have taken that testimony in open session. Furthermore, in our judgment, a significant portion, if not all, of the military pathologist's testimony was not within the scope of the classified matters sought to be protected by the security specialist and Respondent.

***3** In fairness, we should note that in a few instances, the witnesses' testimony could be fairly characterized as so inextricably linked to classified matters as to make it all properly received in a closed session. But that should have been the exception, not the rule. The rule of law requires that the IO engage in the necessary analysis as to each witness' expected testimony and to understand in advance how and why it could touch on a classified matter before excluding the public. *See Grunden,* 2 M.J. at 121–22. The IO can require counsel for both sides to disclose the subjects of their questions for a witness in advance in a closed session.[3] Any newly discovered lines of inquiry can be again addressed in a closed session if necessary. Witnesses can be cautioned not to give answers that reveal classified matters and, if in doubt, before answering, to ask for a closed session or to have the answer written out for the record and sealed to prevent public disclosure. A security specialist should be present during the session and prepared to cut off any inquiry or response that strays toward disclosure of classified information when testimony is given in open session. We again note, in fairness to the obviously inexperienced IO, that where, as here, the defense counsel have willingly gone along with the government's desire to close the proceedings, doubtless to facilitate the broadest possible discovery of matters, classified or not, to be used at any trial in defense of their clients, the IO alone is left to act impartially to safeguard the integrity of the military justice system by only authorizing the most limited necessary degree of closure.

In summary, Respondent failed to narrowly tailor the appropriate remedy to protect classified matters from being revealed. His ruling that "the Government interests [in protecting classified information from public disclosure] outweigh the interests of having the members of the public present at this hearing" only addressed half the government's "heavy burden" as established in *Grunden. Grunden,* 2 M.J. at 122–23. The IO continued to say, "I find [it] difficult if not impossible to separate the classified information from the non-classified information, it would be tough to redact portions of classified information from non-classified information." This may be true for several witnesses who dealt directly and solely with the investigative and initial reporting of

the events under review. But a review of the transcript clearly shows that much of the testimony did not touch on the matters the security specialist identified as classified.[4] The counsel were fully aware of the classified issues potentially addressed by their questions. Most of the witnesses showed distinct consciousness of the potentially restricted scope of their testimony and displayed their personal knowledge with care not to inappropriately disclose classified information.

As our superior court noted in *Grunden:*

> ***4** The prosecution must delineate which witnesses will testify on classified matters, and what portion of each witness' testimony will actually be devoted to this area. Clearly, ... any witness whose testimony does not contain references to classified material will testify in open court. The witness whose testimony is only partially concerned with this area should testify in open court on all other matters. For even assuming a valid underlying basis for the exclusion of the public, it is error of 'constitutional magnitude' [footnote omitted] to exclude the public from all of a given witness' testimony when only a portion is devoted to classified material. The remaining portion of his testimony will be presented to the [IO] in closed session. This bifurcated presentation of a given witness' testimony is the most satisfactory resolution of the competing needs for secrecy by the government, and [the need for a public proceeding] by the accused. [footnote omitted].

Grunden, 2 M.J. at 123.

REMEDY

Accordingly, our 3 December 2004 stay is lifted. We hereby issue our writ of mandamus to Respondent directing that any future Article 32 proceedings in these three soldiers' cases may only be closed after consideration of the specific substance of the testimony of individual witnesses expected by the parties and a factual determination that all of the expected testimony of such a witness will reveal classified information. Otherwise, an appropriate bifurcated process must be employed to ensure that public access is protected. We also hereby order the Respondent, before the proceedings begin again, to promptly obtain a line-by-line review of the existing 285–page classified transcript of the proceedings thus far held and, after having the classified information properly redacted, to release the unclassified transcript to Petitioner and to treat the transcript of any further closed sessions of the proceedings similarly. We recognize that if the Respondent carefully follows the guidance and law in only closing the necessary portions of the future evidence taking proceedings, a redacted transcript will likely contain almost no substantive information but we make the order to ensure full, future compliance in this matter. We note that this order is made solely as a corrective remedy in lieu of requiring a rehearing of these witnesses in this matter. It is not generally an acceptable substitute for determining and allowing proper public access to similar proceedings in the future. While we have found a prejudicial legal error in the "blanket" exclusion decision of the Respondent, we do not conclude that his decision was made arbitrarily. Respondent's decision was made too quickly, it was ill-considered, overbroad, and clearly erroneous. But, the decision was predicated on the basis of sworn testimony received in closed session, a sketchy consideration of the applicable legal standards, and a legitimate concern to protect against the disclosure of classified information. Accordingly, we deny Petitioner's request for a writ of prohibition. The Article 32 proceedings may be continued, and if appropriately determined, continued at least in part in closed session in compliance with our orders and guidance expressed herein.

Senior Judge CHAPMAN and Judge STOCKEL concur.

Footnotes

1 In response to this public notice, Petitioner submitted a written request to the Respondent that the proceedings be open "unless and until the requisite factual findings justifying limited closure are entered on the public record."

2 We held an *ex parte* conference with Respondent's counsel and directed the Respondent to provide the court with a copy of the classified transcript and the classified Criminal Investigation Division Command report of investigation. Respondent complied and those classified materials are now sealed as a portion of the record in this matter. Although we reviewed those classified materials in the process of making our decision in this matter, no part of this decision is classified.

3 We note with approval that the appointing authority did issue a protective order in the form of a Memorandum of Understanding concerning the obligation of each accused soldier and the individual civilian defense counsel who participated in the proceedings not to disclose classified information. *See* Rule for Court–Martial [hereinafter R.C.M.] 405(g); *see also* R.C.M. 701(g)(2) and Military Rule of Evidence 505(g).

4 At pages 252–253 of the classified transcript, the security specialist drew an important distinction between what is substantively classified as a topic and how taking evidence about a topic could potentially, but not automatically, lead to revealing classified information. The Respondent and participating parties are encouraged to consider and understand that distinction.

End of Document

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re	)	**Misc. Dkt. 2003-07**
	)	
	)	
	)	**ORDER**
Senior Airman (E-4)	)	
AHMAD I. AL HALABI	)	
Petitioner	)	**Panel 3**

Before

PRATT, BRESLIN, and GRANT
Appellate Military Judges

On 15 September 2003, the petitioner filed a petition for extraordinary relief in the form of a writ of mandamus. The petitioner asks this Court to quash a blanket order excluding the public from all parts of the investigation conducted under Article 32, UCMJ, 10 U.S.C. § 832, and that this Court order the convening authority and investigating officer to close the investigation only when necessary to protect classified material. Further, the petitioner seeks an immediate stay of the investigation until this Court rules upon this petition.

As a court created by Congress under Article 66(c), UCMJ, 10 U.S.C. § 866(c), this Court has the authority to issue extraordinary writs under the All Writs Act, 28 U.S.C. § 1651. *See Noyd v. Bond*, 395 U.S. 683, 695, n.7 (1969). Our superior court holds that military appellate courts may exercise this authority over cases that may potentially reach the appellate court. *Dettinger v. United States*, 7 M.J. 216, 220 (C.M.A. 1979).

The petitioner states that he was charged with violating Articles 92, 104, 106a, 107 and 134, UCMJ, 10 U.S.C. § 892, 904, 906a, 907, 934, and that the formal investigation of the charges was ordered to commence on 15 September 2003. He further indicates that the convening authority, exercising his authority under Rule for Courts-Martial (R.C.M.) 405(h)(3), ordered that the investigation proceedings be closed to spectators. The convening authority's order states, in pertinent part:

> Considering the language of M.R.E. 505 and applying its intent and reasoning to this Article 32 Investigation, I am directing that all portions of this Article 32 Investigation be closed to all members of the public other

> than the investigating officer, the Article 32 witnesses, involved attorneys, necessary Security Forces personnel, and SrA Halabi. I am doing this by my authority as the commander who directed the Article 32 investigation and because virtually all of the evidence presented during this Article 32 Investigation can compromise current on-going investigations that are of concern to national security.

The Constitution of the United States gives to Congress the authority to regulate the armed forces. U.S. CONST. art. I, § 8, cl. 14. In the UCMJ, Congress delegated to the President the authority to prescribe pre-trial, trial and post-trial procedures for courts-martial. Article 36(a), UCMJ, 10 U.S.C. § 836(a). Pursuant to this delegation, the President promulgated the Rules for Courts-Martial. R.C.M. 405(h)(3) provides, "Access by spectators to all or part of the proceeding may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer." The Discussion to the rule provides, "Closure may encourage complete testimony by an embarrassed or timid witness." The Discussion also indicates, "Ordinarily the proceedings of a pretrial investigation should be open to spectators." Similarly, Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 4.1.2 (2 Nov 99), states,

> Article 32 investigations should ordinarily be open to the public. Because the public has an interest in attending Article 32 investigations, all efforts to keep the investigation open to the public should be explored before closing the investigation. Access by spectators to all or part of the proceeding may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer (IO) when the interests of justice outweigh the public's interest in access. See R.C.M. 405(h)(3). For example, it may be necessary to close an investigation to encourage complete testimony of a timid or embarrassed witness, to protect the privacy of an individual or to ensure an accused's due process rights are protected. Make every effort to close only those portions of the investigation that are clearly justified and keep the remaining portions of the investigation open. If the hearing is closed, the commander or IO ordering it closed should provide specific, articulable reasons, in writing, for closure. These reasons should be attached to the IO's report of investigation.

In *ABC, Inc. v. Powell*, 47 M.J. 363 (1997), our superior court ruled that, "absent 'cause shown that outweighs the value of openness,' the military accused is likewise entitled to a public Article 32 investigative hearing." *ABC, Inc.*, 47 M.J. at 365 (citing *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 509 (1984)). Of course, "the right to a public hearing is not absolute." *Id.* (citing *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985), *cert. denied*, 474 U.S. 1002 (1986); *United States v. Grunden*, 2 M.J. 116, 120 (C.M.A. 1977); *United States v. Brown*, 22

C.M.R. 41, 46 (C.M.A. 1956)). As the Court in *ABC, Inc.* explained, "Every case that involves limiting access to the public must be decided on its own merits. Furthermore, the scope of closure must be tailored to achieve the stated purposes and should be 'reasoned,' not 'reflexive.'" *Id.* (citing *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996)).

In this case, it appears the convening authority ordered the proceedings closed to all spectators because most, but not all, of the evidence involved matters of concern to national security. We find this analysis to be insufficient under the criteria established by *ABC, Inc.*, 47 M.J. at 365. Rather, the determination of whether closure is necessary "must be made on a case-by-case, witness-by-witness, and circumstance-by-circumstance basis." *Id.* For these reasons we grant the petitioner's request for a writ of mandamus, in part, and direct that the Article 32, UCMJ, proceedings not be closed pursuant to this blanket order.

It is important to clarify that we do not hold that the Article 32, UCMJ, investigation may not be closed in whole or in part, provided that the determination is made on the appropriate "case-by-case, witness-by-witness, and circumstance-by-circumstance basis." *Id.* Upon proper inquiry and review of the interests of the government, the petitioner, and the public, the investigating officer may conclude that the interests of justice require closing all or part of the proceedings. Further, we do not hold that the proceedings may only be closed for the purpose of protecting classified information. The convening authority or the investigating officer may determine whether the interests of justice outweigh the public's interest in access. *See ABC, Inc.*, 47 M.J. at 365 (rejecting the argument that protecting a witness from embarrassment would not qualify as a basis for closing a pretrial hearing); *Hershey*, 20 M.J. at 436 (may be permissible to exclude spectators to protect a child of tender years); *Brown*, 22 C.M.R. at 46; *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 219 (3d Cir. 2002) (national security interests may be considered as factors in closing a hearing, and are traditionally given considerable deference), *cert. denied*, 123 S. Ct. 2215 (2003).

Accordingly, it is by this Court, this 16th day of September 2003,

ORDERED:

The convening authority and the investigating officer may not exclude all spectators from the Article 32, UCMJ, investigation proceedings under the existing blanket order. The convening authority or the investigating officer may exclude persons from all or any part of the Article 32, UCMJ, investigation proceedings only after careful, detailed, analysis and based upon specific, articulable reasons, in writing (sealed if necessary). The scope of any closure must be tailored to achieve the required purposes.

FOR THE COURT

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was emailed on the 14th day of February, 2013 to the following:

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