UNITED STATES OF AMERICA v. KHALID SHEIK MOHAMMED WALID MUHAMMAD SALIH MUBAREK BIN 'ATTASH RAMZI BINALSHIBH MUSTAFA AHMED ADAM AL-HAWSAWI ALI ABDUL AZIZ ALI a/k/a "Ammar al-Baluchi"	)	**MOTION BY PETITIONER AMERICAN CIVIL LIBERTIES UNION** FOR PUBLIC ACCESS TO PROCEEDINGS AND RECORDS December 5, 2008

1. Timing.

There is no established timeframe in the Rules of Court for the filing of this motion.

2. Relief Sought.

The American Civil Liberties Union and the American Civil Liberties Union Foundation (collectively the "ACLU"), respectfully request that this Military Commission grant the public meaningful access to the proceedings before the Military Commission in the prosecution of Khalid Sheik Mohammed, Walid Muhammad Salih Mubarek Bin 'Attash, Ramzi Binalshibh, Mustafa Ahmed Adam Al-Hawsawi, and Ali Abdul Aziz Ali (a/k/a "Ammar al-Baluchi"), as required by the Constitution and the Military Commissions Act. Specifically, the ACLU, on behalf of itself and its members, challenges those portions of the governing protective orders that permit the suppression of any and all statements made by the defendants about their mistreatment in United States custody. The ACLU requests that: (1) in all future proceedings, the government not be permitted to exclude trial observers from hearing those portions of proceedings in which the defendants relate their allegations of abuse in U.S. custody; and (2) with respect to all prior

proceedings, this Military Commission order the release of unredacted transcripts that include those portions in which the audio was turned off.

3. Overview.

The procedures governing public access to this trial by military commission are extraordinary and unprecedented, permitting the government to exercise virtually unlimited authority to exclude the public from these critical proceedings. First, because the proceedings are being conducted on a secure naval base, only observers approved and invited by the Department of Defense may attend. Second, even those approved observers may be effectively excluded from the proceedings at the press of a button. Third, the protective order that governs whether that button will be pressed is unprecedented in scope: every utterance of the defendants is deemed presumptively classified, for the improper purpose of preventing disclosure of the detainees' allegations of abuse in U.S. custody.

The Constitution and the Military Commissions Act prohibit such a wholesale approach to excluding the public from judicial proceedings.

4. Burden of Proof.

A party advocating restriction on the public right of access bears the burden of showing that access poses a direct threat to an overriding governmental interest. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 15 (1986) ("*Press-Enterprise II*"); *Lugosch v. Pyramid Co. of Onodaga*, 435 F.3d 110, 123-24 (2d Cir. 2006); *ABC, Inc. v. Stewart*, 360 F.3d 90, 106 (2d Cir. 2004); *Washington Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991).

5. Statement of Facts.

On June 5, 2008, five men accused of involvement in the September 11th attacks were arraigned before this Military Commission on charges of murder, conspiracy, and other terrorism offenses. During that proceeding, and in all subsequent proceedings in this matter, media and representatives of non-governmental organizations have been permitted to observe the tribunal either via closed-circuit video monitor or in a soundproof viewing room separated from the courtroom by a panel of glass. An audio feed is transmitted into the viewing room with a 20-second delay, permitting courtroom security officials to cut off the audio feed whenever the prisoners appear to be describing the conditions of their detention and interrogation.

6. Legal Basis for Relief Requested.

A right of access to the proceedings of this tribunal is expressly granted by the Military Commissions Act and independently mandated by the Constitution of the United States. The ACLU recognizes the potential for national security issues and questions of personal safety that may arise in the conduct of criminal prosecutions in a military tribunal, but there have been no findings that these concerns require a sweeping protective order that categorically designates the defendants' speech as classified. The discussion that follows explains the statutory and constitutional grounds for the access sought by the ACLU, and the narrow relief it now requests.[1]

A. The Military Commissions Act of 2006 and its Implementing Regulations Require Meaningful Public Access to the Proceedings.

[1] Third-parties seeking access to court proceedings and documents have standing to bring such requests. *Pansy v. Borough of Stroudburg*, 23 F.3d 772, 777 (3d Cir. 1994) ("We have routinely found, as have other courts, that third parties have standing to challenge . . . orders in an effort to obtain access to information or judicial proceedings[.]"); *see also Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 (1978) ("The interest necessary to support the issuance of a writ compelling access [to judicial records] has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies[.]"). Moreover, given the ACLU's status as a "national organization" as recognized by the Office of the Secretary of Defense, Rules for Military Commissions 806(a), the ACLU has standing to assert its rights under statutory and constitutional law for access to the proceedings.

In adopting the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600 (2006), Congress recognized the critical importance that these criminal proceedings be conducted in the open so the watching world would accept their validity. The MCA thus expressly mandates access by "the public" to all "proceedings" of any military commission, unless specifically delineated exceptions are found to apply. 10 U.S.C. § 949d(d)(l). The MCA permits a denial of access "*only* upon making a *specific finding* that such closure *is necessary* to – (A) protect information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities; or (B) ensure the physical safety of individuals." 10 U.S.C. § 949d(d)(2) (emphasis added).

The statutory right of access is recognized and implemented in both the Regulation for Trial by Military Commissions ("Reg. MC" or the "Regulation") and the Manual for Military Commissions ("Manual") containing the Rules for Military Commissions ("RMC"). *See* Reg. MC 19-7(a) ("The sessions of military commissions *shall* be public to the maximum extent practicable." (emphasis added)); RMC 806(a) ("[M]ilitary commissions *shall* be publicly held." (emphasis added)).[2] Rule 806(b)(2) authorizes a military judge to close a "session of a military commission" only for limited purposes and only after making "essential findings of fact, appended to the record of trial."

The MCA and its implementing regulations make clear that the public's right of access extends beyond the "trial" to all aspects of the "proceeding" against an accused. The MCA at various times differentiates between "trial," "pre-trial" and "post-trial" procedures, *e.g.* 10 U.S.C. § 949a(a), but extends the public right of access more broadly to all "proceedings."

[2] This Rule defines "public" to include "representative of the press, representative of national and international organizations, as determined by the Office of the Secretary of Defense, and certain members of both the military and civilian communities." RMC 806(a). The Office of the Secretary of Defense has determined that the ACLU is a national organization that meets the standard.

Id. § 949d(d). Under the Regulation, the right of access applies "from the swearing of charges, until the completion of trial or disposition of the case without trial," Reg. MC 19-2, and extends specifically to all "[i]nformation that has become part of the record of proceedings of the military commission in open session," and "[t]he scheduling or result of any stage in the judicial process." Reg. MC 19-4(a)(3)-(4). Motions, rulings, and summaries of Rule 802 conferences are all required to be part of the Record of Trial, and hence expressly subject to the right of access. The Manual reflects this same understanding. It empowers the military judge to "exercise reasonable control over the proceedings," RMC 801(a)(3), and then identifies pre-trial motions as being among the "proceedings" a judge controls. *See also* RMC 908(b)(8)(A) (motions not affected by order on appeal "may be litigated, in the discretion of the military judge, at any point in the proceedings").[3]

---

[3] When the presentation of classified evidence is anticipated and the government desires closure, the "Government may submit at the request of the military judge (or make available for review) the classified information and an affidavit *ex parte* for examination by the military judge only" laying out why the government is entitled to closure. RMC 505. In addition, RMC 505 requires both the government and defense to advise the tribunal of whether they will be presenting classified evidence. When closure to protect classified evidence is anticipated, the "discussion" appended to RMC 806 and RMC 505 approvingly cite the process used by military courts as stated in *United States v. Grunden*, 2 M.J. 116, 122-23 (C.M.A. 1977), to address the public's right of access:

> 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. . . . [The trial judge must determine] that the material in question has been classified by the proper authorities in accordance with the appropriate regulations. . . . The trial judge's determination that the prosecution has met its burden as to the nature of the materials does not complete his review in this preliminary hearing. He must further decide the scope of the exclusion of the public. 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, unlike the instant case, 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" to exclude the public from all of a given witness' testimony when only a portion is devoted to classified material.

These statutory and administrative provisions plainly establish the public right of access to proceedings of this tribunal. While not an absolute right, this statutory right can be overcome only upon specific judicial determination that information must be withheld for reasons of national security or personal safety. 10 U.S.C. § 949d(d)(2).

B. The First Amendment Independently Protects the Public's Right of Meaningful Access to Proceedings and Records of Adjudicative Military Tribunals.

a. The First Amendment Right of Access Extends to Military Commissions.

The First Amendment independently "protects the public and the press from abridgement of their rights of access to information about the operation of their government." *Richmond Newspapers*, 448 U.S. at 584 (Stevens, J., concurring) (recognizing First Amendment right of public access to criminal trials); *Globe Newspaper*, 457 U.S. at 604-06 (same); *Press-Enterprise I*, 464 U.S. at 508-10, 513 (recognizing First Amendment right of public access to *voir dire* proceedings); *Press- Enterprise II*, 478 U.S. at 10 (same as to preliminary hearings in a criminal prosecution). The scope of this constitutional right was first defined by the U.S. Supreme Court in *Richmond Newspapers*, a case involving access to a criminal trial that the State of Virginia had conducted entirely in secret. A Virginia statute specifically granted the trial judge discretion to conduct a secret trial, but the Supreme Court held that the First Amendment created an affirmative, enforceable constitutional right of access to certain government proceedings, such as a criminal trial.

The Court held this First Amendment right to be implicit in the guarantees of free speech and press, just as the right of association, right of privacy, right to travel and the right to be presumed innocent are implicit in other provisions of the Bill of Rights.[4] As the Court

[4] *See Richmond Newspapers*, 448 U.S. at 577 (Burger, J.) (the right of access is "assured by the amalgam of the First Amendment guarantees of speech and press" and their "affinity to the right of

later put it in *Globe Newspaper Co. v. Superior Court*, the First Amendment right of access is based upon

> the common understanding that a "major purpose of that Amendment was to protect free discussion of governmental 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.

457 U.S. at 604 (citation omitted). *Richmond Newspapers* "unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment." 448 U.S. at 583 (Stevens, J. concurring). Under *Richmond Newspapers* and its progeny, this right of access exists where government proceedings and information historically have been available to the public, and public access plays a "significant positive role" in the functioning of government. *E.g.*, *Globe Newspaper*, 457 U.S. at 605-07; *Press-Enterprise II*, 478 U.S. at 8-9; *Washington Post*, 935 F.2d at 287-92. Under the "experience" and "logic" analysis applied by the Supreme Court, the right of access "has special force" when it carries the "favorable judgment of experience," but what is "crucial" in deciding where an access right exists "is whether access to a particular government process is important in terms of that very process." *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring). *See also Globe Newspaper*, 457 U.S. at 605-06; *Press-Enterprise II*, 478 U.S. at 89; *United States v. Simone*, 14 F.3d 833, 837 (3d Cir. 1994); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1173 (3d Cir. 1986).

While this right has most frequently been asserted to compel access to judicial proceedings and documents, the right also applies to proceedings and information in the executive and legislative branches. *E.g.*, *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695-96,

---

assembly"); *id.* at 585 (Brennan, J., concurring) ("[T]he First Amendment – of itself and as applied to the States through the Fourteenth Amendment – secures such a public right of access.").

700 (6th Cir. 2002) (right of access to executive branch deportation proceedings); *Whiteland Woods, L.P. v. Twp. Of West Whiteland*, 193 F.3d 177, 181 (3d Cir. 1999) (municipal planning meeting); *Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 960 F.2d 105, 108-10 (9th Cir. 1992) (agriculture department voters list); *Soc'y of Prof'l Journalists v. Sec'y of Labor*, 616 F. Supp. 569, 574-75 (D. Utah 1985) (administrative hearing), *vacated as moot*, 832 F.2d 1180 (10th Cir. 1987).

Under the same experience and logic tests, a First Amendment right of public access attaches to proceedings of adjudicative military tribunals, including military commissions. *See, e.g.*, *United States v. Anderson*, 46 M.J. 728, 729 (A. Ct. Crim. App. 1997) (per curiam) (absent adequate justification clearly set forth on the record, "trials in the United States military justice system are to be open to the public"); *see also ABC, Inc. v. Powell*, 47 M.J. 363, 366 (C.A.A.F. 1997) (First Amendment right of public access applies to investigations under Art. 32); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (First Amendment right of public access extends 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. Story*, 35 M.J. 677, 677 (A. Ct. Crim, App. 1992) (per curiam) (same).

Historical Experience.[5] Our country has a tradition of public access to adjudicative military tribunals. 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 on military

[5] While history and policy are interrelated in the Supreme Court's definition of the right of access, the absence of historical evidence would not defeat the right. In *Press Enterprise II*, the Court noted that the First Amendment right attached to pretrial proceedings even when such proceedings had "no historical counterpart," but the "importance of the . . . proceeding" was clear. 478 U.S. at 10 n.3. *See also United States v. Criden*, 675 F.2d 550, 555 (3d Cir. 1982) (right of access applies to pretrial proceedings even where public had no common law right to attend); *United States v. Chagra*, 701 F.2d 354, 363 (5th Cir. 1983) (lack of historic record of access to bail proceedings does not bar recognition of a First Amendment right of access).

law a history of open proceedings 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. With us, when once opened, the court-martial room though at any stage of the trial it may be permanently closed at the discretion of the court – is, in general, continued open throughout the investigation, (except when the doors are closed for deliberation on interlocutory matters,) and also during the closing arguments of the counsel, or till the final clearing for judgment. While thus open the public is allowed to come and go much as in the civil courts.

William Winthrop, MILITARY LAW AND PRECEDENTS 161-62 (rev. 2d ed. 1920) ("Winthrop"). Based on this long tradition of access, military courts recognized the right to public access to trials even before the Supreme Court recognized the First Amendment right of public access to criminal proceedings in *Richmond Newspapers*. *United States v. Brown*, 22 C.M.R. 41, 48 (C.M.A. 1956), *overruled, in part, on other grounds by Grunden*, 2 M.J. at 116.

This tradition of public access to courts-martial also runs through the history of military commissions specifically. Military commissions, after all, historically have "differed from the court-martial only in terms of jurisdiction." David Glazier, Notes, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 Va. L. Rev. 2005, 2092 (2003). As the Supreme Court explained:

> [T]he procedures governing trials by military commission historically have been the same as those governing courts-martial. . . . The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter. *See* Winthrop 831. Exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections. That history explains why the military commission's procedures typically have been the ones used by courts-martial.

Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2788, 2792 (2006).[6]

---

[6] The United States Court of Military Commission Review has recognized that Congress intended the procedures and practices of military commissions to "mirror" those of courts-martial, and that the

While there have been some exceptions, military commissions throughout our nation's history have been conducted publicly:

- During the Civil War, for example, the 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, 289 (emphasis added and internal quotation marks omitted).

- 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 General Ulysses S. Grant "led them to the White House to talk to the president." *See* James Johnston, *Swift and Terrible: A Military Tribunal Rushed to Convict After Lincoln's Murder*, Wash. Post, Dec. 9, 2001.[7]

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

- The military commissions established by the U.S. at Dachau were, like the international tribunal at Nuremberg, open to the press and public, with "more than four hundred spectators crowd[ing] into the courtroom on" the opening day. *See* Joshua M. Greene, JUSTICE AT DACHAU: THE TRIALS OF AN AMERICAN PROSECUTOR 39 (2003); *id.* at 245 (noting that judge denied defense request to prohibit press from photographing the accused).

While a 1942 trial of Nazi saboteurs found in the United States was famously conducted in secret, that precedent shows how secrecy can be counterproductive in the long run. *See Ex parte Quirin*, 317 U.S. 1 (1942). It is now widely believed that the "real reason President Roosevelt

---

procedures herein "are based upon the procedures for trial bc general courts-martial." *United States v. Khadr*, CMCR 07-001 at 23 & n.35 (Sept. 24, 2007) (quotiug MCA §§ 949a(a) & 948b(c)).

[7] The openness of these Civil War era commissions is particularly significant in light of the rampant suppression of the freedom of the press and "gross violations of the First Amendment" that otherwise occurred during the Civil War era. *See* William H. Rehnquist, ALL THE LAWS BUT ONE 221 (1998) ("Rehnquist").

authorized these military tribunals was to keep evidence of the FBI's bungling of the case secret."[8]

Despite this episode, the historical trend in both the civilian and military justice systems has been towards increasing sensitivity to civil liberties. *See, e.g.*, *Weiss v. United States*, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring) ("Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history[.]").[9] Chief Justice Rehnquist also noted the "'generally ameliorative trend' in civil liberties during wartime." Jack Goldsmith, Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 Const. Comment. 261, 286 (2002) (quoting Rehnquist, 219-221). In light of this trend, as one scholar put it: "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, 89 Va. L. Rev. at 2093.

Policies Advanced by Public Access. The logic prong of the Supreme Court's test for access is readily met. In recognizing the constitutional right to attend criminal proceedings, the

---

[8] 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 Neal Katyal, Visiting Professor, Yale Law School, and Professor of Law, Georgetown University), *available at* http://www.yale.edu/lawweb/avalon/sept_11/katyal_001.htm (last visited June 19, 2008).

[9] The U.S. State Department repeatedly has criticized the use of secret military tribunals by other countries. *See* Press Release, Human Rights Watch, *Fact Sheet: Past U.S. Criticism of Military Tribunals* (Nov. 28, 2001), *available at* http://www.hrw.org/press/2001/11/tribunals1128.htm (last visited June 19, 2008). For example, the State Department has criticized Burma, "where trials are not open to the public and military authorities dictate the verdicts"; China, where trials are often conducted in secret; Kyrgyzstan, where "[o]pposition leaders have been tried in closed military courts"; Peru, where secret military trials have been held, including the 1996 prosecution of Lori Berenson; Russia, where Edmond Pope's "trial took place behind closed doors"; Sudan, where military trials are sometimes secret and brief; and Turkey, where the State Security Courts hold closed hearings. *Id.*

Supreme Court identified at least five distinct interests advanced by open adjudicatory proceedings each of which applies to criminal proceedings in this forum as well: (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 by government. *See Richmond Newspapers*, 448 U.S. at 569-71.

Concurring in *Richmond Newspapers*, Justice Brennan explained the crucial structural role that public access plays in the proper functioning of our nation's criminal justice system: "Open trials are bulwarks of our free and democratic government: public access to court proceedings is one of the numerous 'checks and balances' of our system, because 'contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.'" *Id.* at 592 (Brennan, J., concurring) (quoting *In re Oliver*, 333 U.S. 257, 271 (1948)).

The very same policy arguments that mandated the constitutional right of access to criminal trials in the civilian court system apply to criminal trials conducted by the Department of Defense. Any "adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny." *Lugosch*, 435 F.3d at 124 (quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982)). Like other adjudicatory proceedings, military commissions are presided over by an impartial arbiter, judgment is based on a record created by the tribunal through an adversarial process that involves the presentation of evidence and the opportunity to cross-examine witnesses. In this setting, public access improves the performance of all involved, protects judges and prosecutors from claims of dishonesty, and provides a forum

for the education of the public. *See* The Comm. On Commc'ns & Media Law of the Ass'n of the Bar of the City of New York, *"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). Just as with other types of military tribunals, an open proceeding "reduces the chance of arbitrary or capricious decisions and enhances public confidence," which would "quickly erode" if proceedings are arbitrarily closed. *Scott*, 48 M.J. at 665 (citations and internal quotation marks omitted); *see also Anderson*, 46 M.J. at 731 (same).

Indeed, judges within the military justice system have long recognized that openness significantly assists the functioning of the adjudicative process. "A public trial is believed to effect a fair result by ensuring that all parties perform their functions more responsibly, encouraging witnesses to come forward, and discouraging perjury." *Hershey*, 20 M.J. at 436. Even before the Supreme Court recognized the right of access to criminal proceedings in *Richmond Newspapers*, the Court of Military Appeals had identified the functional benefits of public proceedings: (1) improving the quality of testimony; (2) curbing abuses of authority; and (3) fostering greater public confidence in the proceedings. *See Brown*, 22 C.M.R. at 45-48. As explained by Professor Wigmore in his seminal treatise quoted in *Brown*, "[n]ot only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy." Wigmore, Evidence § 1834 (3d ed.), *quoted in Brown*, 22 C.M.R. at 45; *see also United States v. Hood*, 46 M.J. 728, 731 n.2 (A. Ct. Crim. App. 1996).

The vital role that openness plays in ensuring public respect for the results produced by an adjudicative process is perhaps best demonstrated by considering the converse:

> Secret hearings – though they be scrupulously fair in reality – are suspect by nature. Public confidence cannot long be maintained where important judicial decisions are made

> behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view.

Gannett Co. v. DePasquale, 443 U.S. 368, 429 (1979) (Blackmun, J., concurring in part and dissenting in part).[10] Greater public access will also be in line with the Supreme Court's recent ruling that Guantánamo Bay is subject to the strictures of the Constitution. *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008) ("We hold that Art. I, §9, c. 2, of the Constitution has full effect at Guantanamo Bay."); *id.* at 2259 ("Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another."); *see also id.* at 2277 ("Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury.").

For all the reasons cited in *Brown*, and in the unbroken chain of precedents issued by United States military tribunals since *Brown*, openness of adjudicative military bodies, including the military commissions, promotes the functioning of those bodies, thereby satisfying the logic prong of the *Press Enterprise II* analysis.

b. Once the Presumption of Openness Attaches it Can Only Be Overcome by An Overriding Interest That is Narrowly Tailored.

The presumption of openness that attaches to the proceedings of the military commissions can be overcome only by "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-*

---

[10] *See also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring): Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and open 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.

Enterprise Co. II, 464 U.S. at 510. If access is to be denied, judicial findings on the need for closure or sealing must be entered as written findings of fact, made with sufficient specificity to allow appellate review. *Press-Enterprise II*, 478 U.S. at 9-10, 14; *ABC, Inc.*, 360 F.3d at 98; *Hartford Courant*, 380 F.3d at 96; *In re Time, Inc.*, 182 F.3d 270, 271 (4th Cir. 1999); *Matter of New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987) ("Broad and general findings by the trial court, however, are not sufficient to justify closure."). The adjudicatory tribunals of the military branches have applied this same standard. As explained in *Hershey*, "the party seeking closure must advance an overriding interest that is likely to be prejudiced [by openness]; the closure must be narrowly tailored to protect that interest; the trial court must consider reasonable alternatives to closure; and it must make adequate findings supporting the closure to aid in review." 20 M.J. at 436; *see also Anderson*, 46 M.J. at 729 ("[T]he military judge placed no justification on the record for her actions. Consequently, she abused her discretion in closing the court-martial."); *Scott*, 48 M.J. at 665.

C. The Public Right of Access is Improperly Infringed by Procedures Currently Being Followed by This Tribunal.

The procedures utilized during pre-trial proceedings before this Military Commission, and the overbroad protective order that authorizes those procedures, do not comport with the requirements of the MCA and the First Amendment. There have been no "specific findings" that the wholesale exclusion of the public from any mention of the defendants' treatment in U.S. custody is "necessary to" protect national security or personal safety as required by the MCA. 10 U.S.C. § 949d(d)(2). Nor were there specific factual findings entered on the record that the closures were necessitated by an overriding interest that was narrowly tailored as required by the First Amendment. *Press-Enterprise II*, 478 U.S. at 9-10, 14.

The "government has no legitimate interest in censoring unclassified materials." *McGehee v. Casey*, 718 F.2d 1137, 1141 (D.C. Cir. 1983); *see also Snepp v. United States*, 444 U.S. 507, 767 n.8 (1980). And while the government may protect properly classified information, courts impose narrow protective orders to protect such information. *See generally United States v. Pappas*, 94 F.3d 795 (2d Cir. 1996); *Grunden*, 2 M.J. at 121 ("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."); *Denver Post Corp.*, Army Misc. 2004 1215 at 3. The government may classify only certain kinds of extraordinarily sensitive information, *see* Exec. Order No. 13,292 § 1.4, 68 Fed. Reg. 15315, and it may not classify *any* information without complying with stringent procedural requirements, *see* Exec. Order No. 13, 292 §§ 1.2-1.3, 68 Fed. Reg. 15315.

In the next section, petitioners set forth in detail the numerous reasons why the government has failed to establish that suppression of the defendants' allegations of mistreatment serves any national security interest, let alone a compelling one.

D. There is no Legitimate Basis for the Categorical Suppression of Defendants' Allegations of Abuse and Mistreatment

1. The Defendants' Allegations of Abuse are Already Public

A *New York Times* article published on July 11, 2008 describes a report prepared by the International Committee of the Red Cross (ICRC) after its representatives were permitted to meet at Guantanamo with fourteen former CIA detainees, including the five defendants in this case. The article reports that one of the fourteen, Abu Zubaydah, alleged to ICRC representatives that he had been "confined in a box so small he said he had to double up his limbs in the fetal position"; had been "slammed against the walls"; and had been waterboarded at least ten times in a single week by his American captors. Scott Shane, *Book Cites Secret Red*

Cross Report of C.I.A. Torture of Qaeda Captives, N.Y. Times, July 11, 2008. Khalid Sheikh Mohammed "told the Red Cross that he had been kept naked for more than a month and claimed that he had been kept alternately in suffocating heat and in a painfully cold room." *Id.* (quotations omitted). The article continues:

> The [ICRC] report says the prisoners considered the "most excruciating" of the methods being shackled to the ceiling and being forced to stand for as long as eight hours. Eleven of the 14 prisoners reported prolonged sleep deprivation . . . including "bright lights and eardrum-shattering sounds 24 hours a day."

Id.

Now that these allegations have been published, the government cannot plausibly contend that their repetition in this proceeding would cause harm to national security. Indeed, these most recent allegations of mistreatment in U.S. custody join a vast and growing body of public information about the government's detention and interrogation operations. Some of that information is comprised of official government confirmations, including CIA Director Michael Hayden's Senate testimony that three detainees, including defendant Khalid Shiekh Mohammed, were subjected to "waterboarding."[11] Some of the information derives from unconfirmed allegations, like the *Times* article about the ICRC report, and the allegations contained in numerous civil lawsuits filed by detainees released from CIA or Department of Defense custody.[12] From those and other sources, it has now been widely reported that detainees in CIA and Department of Defense custody have been subjected to waterboarding; sensory deprivation; sleep deprivation; beatings; forced grooming; exploitation of phobias; stress positions; sexual humiliation; extreme isolation; and numerous other coercive techniques.

---

[11] *Hearing of the Senate Select Committee on Intelligence* (Feb. 5, 2008) (testimony of General Michal Hayden) at 24.

[12] *See, e.g.,* First Amended Complaint, *Mohamed v. Jeppesen*, No. 07-cv-02798 (N.D. Ca. Aug. 1, 2007), ¶¶ 157-185, available at http://www.aclu.org/pdfs/safefree/mohamed_v_jeppesen_1stamendedcomplaint.pdf.

This information is well known. Detailed descriptions of these techniques have been widely publicized. Foreign terrorists surely are on notice that, should they be captured by or turned over to the CIA or Department of Defense, these or similar methods may well be employed against them. Permitting the defendants in this case to repeat those allegations would require no official confirmation from the government; would reveal no information that is not already public; and would cause no harm to national security.

The government's continued suppression of allegations that have already been widely publicized is undermined by an additional contradiction: government officials have routinely responded to allegations of mistreatment by Guantanamo detainees by insisting that Al Qaeda recruits have been trained to lie, as confirmed by a document called the Manchester Manual.[13] Former Secretary of Defense Rumsfeld, for example, responded to a question about human rights violations at Guantanamo with ridicule: the detainees, he explained, were doing "exactly what they were trained to tell people in the Manchester document: Tell them you're tortured! Tell them it's terrible! Tell them this! Tell them that! That's what they do."[14] The government will be hard-pressed to assert a compelling interest in the suppression of allegations that it has insisted, on numerous occasions, are lies and propaganda.

In sum, given the vast amount of information that is already public concerning coercive interrogation techniques, the government cannot meet its burden of demonstrating that the public must be excluded from hearing *any* allegations of abuse from the defendants. Indeed, the categorical suppression of detainee allegations concerning coercive interrogation methods –

---

[13] The manual, allegedly discovered by British police in the home of an Al Qaeda member, has been translated into English and posted online by the United States Department of Justice, and is available at http://www.usdoj.gov/ag/manualpart1_1.pdf.

[14] Secretary Rumsfeld Remarks at Council on Foreign Relations, Feb. 17, 2006, available at http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=965.

irrespective of whether those methods have already been widely publicized, and irrespective of their truth – is the very antithesis of the narrow tailoring required by the First Amendment.

2. The Government has no Legitimate Interest in Concealing Interrogation Methods that are Proscribed by Law.

The government's rationale for continued suppression of the defendants' allegations of abuse and mistreatment in CIA custody is that publication of that information would reveal classified interrogation methods and would permit the nation's enemies to train to resist them. Yet the government can have no legitimate interest, let a lone a compelling one, in preserving its ability to employ tactics that are prohibited by law. Thus, a protective order that permits the suppression of allegations of illegality is overbroad on its face.

The abuse of prisoners – and the use of illegal interrogation methods – are expressly prohibited both by U.S. law, *see* 18 U.S.C. § 2340A (providing for prosecution of a U.S. national or anyone present in the U.S. who, while outside the U.S., commits or attempts to commit torture); 18 U.S.C. § 2441 (making it a criminal offense for U.S. military personnel and U.S. nationals to commit grave breaches of Common Article 3 of the Geneva Convention), and by international law, *see* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51(1984), *entry into force* June 26, 1987. The CIA is not exempt from these laws. To the contrary, only last year Congress rejected a proposal that would have exempted the CIA from the proscription against CID treatment. Instead of exempting the CIA, Congress enacted the McCain Amendment to the National Defense Authorization Act of Fiscal Year 2006, which Sen. Carl Levin discussed in the following terms:

> With the enactment of this amendment, the United States will put itself on record as rejecting any effort to claim that these words have one meaning as they apply to the Department of Defense and another meaning as they

> apply to the CIA . . .Despite repeated efforts by administration officials and their allies in the House of Representatives to amend this language, the conference report does not allow the President to . . . immunize individuals who engage in such actions from either criminal prosecution or civil suit.

See 109 Cong. Rec. S14257 (statement of Sen. Carl Levin).[15] As enacted, the McCain Amendment (later incorporated into the Detainee Treatment Act of 2005) unequivocally affirmed: "No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment." Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, § 1003 (2005).

Similarly unlawful are the practices of extraordinary rendition and secret detention. Extraordinary rendition contravenes the Foreign Affairs Reform and Restructuring Act, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (1998), which states that the United States "[shall] not . . . expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States," and contravenes Article 3 of the Convention Against Torture, which includes a similar proscription. Secret detention is prohibited by both the Geneva Conventions, *see* Geneva Convention relative to the Treatment of Prisoners of War, *entry into force* October 21, 1950 (Third Geneva Convention), Articles 122 to 125; Geneva Convention relative to the Protection of Civilian Persons in Time of War, *entry into force* October 21, 1950 (Fourth Geneva Convention),

---

[15] *See also* "McCain, Bush Agree on Torture Ban: House Armed Services Chairman Threatens to Block Deal," CNN.com, Dec. 15, 2005 ("After months of opposition the White House agreed to. . . Sen. John McCain's call to ban torture"); Associated Press, "Bush Accepts Sen. McCain's Torture Policy: President Now Agrees With Pact Banning Cruelty Against Terror Suspects," msnbc.com, Dec. 15, 2005 ("President Bush reversed course on Thursday and accepted Sen. John McCain's call for a law banning cruel, inhumane and degrading treatment of foreign suspects in the war on terror.)

Articles 136 to 141; and by the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

Even if it were true that the disclosure of information about the abuse of prisoners might enable suspects to resist illegal interrogation methods in the future, the CIA has no justifiable interest in preserving the effectiveness of interrogation and detention methods that it is prohibited from using in the first place. To be clear, this motion does not seek official disclosure of *any* interrogation methods, legal or otherwise, but only the lifting of a gag on the *unconfirmed* allegations of the defendants. In any event, the government does not have any legitimate interest in preserving the effectiveness of interrogation and detention methods that it is not authorized to use in the first place.

E. This Motion Should be Resolved Expeditiously.

Given the statutory and constitutional access rights pertaining to this tribunal, the ACLU respectfully submits that it should be granted timely access to unredacted transcripts of all prior proceedings held before the Military Commission in this matter.[16] The possibility that this

[16] The public's constitutional right to attend judicial proceedings guarantees a concomitant right to obtain the transcript of those proceedings. *See, e.g., Press Enterprise I*, 464 U.S. at 512-13 (holding that judge's order denying access to a transcript of the *voir dire* was a violation of the First Amendment right to attend judicial proceedings); *United States v. Brooklier*, 685 F.2d 1162, 1172 (9th Cir. 1982) (same with respect to transcript of suppression hearing; "the denial of the motion to release the transcripts was itself a denial of the right of access protected by the first amendment."); *Denver Post Corp. v. United States*, Army Misc. 2004 1215 at 6 (A. Ct. Crim. App. Feb. 23, 2005) (after determining that an Article 32 proceeding was improperly closed, requiring the timely release of transcript of proceeding). The most effective remedy to address the error that has occurred is to make the transcripts of the arraignment proceeding available. *Press-Enterprise I*, 464 U.S. at 512 ("When limited closure is ordered the constitutional values sought to be protected by holding open proceedings may be satisfied by later making a transcript of the closed proceedings available within a reasonable time."). Even if this tribunal did not err in making certain portions of the arraignment proceeding unavailable contemporaneously, the ACLU is still entitled to properly redacted transcripts of the proceedings. *See United States v. Edwards*, 823 F.2d 111, 113 (5th Cir. 1987) (holding that while there was no First Amendment violation in closing the proceeding there was a First Amendment requirement that the properly redacted transcript of the proceeding be released); *see United States v. Moussaoui*, 65 Fed. Appx. 881, 887 (4th Cir. 2003). In

information may be disclosed months – or years – in the future, after the conclusion of the proceeding, is insufficient. The right of access conveys a right of *contemporaneous access*. *See, e.g.*, *Lugosch*, 435 F.3d at 126-27 ("Our public access cases and those in other circuits emphasize the importance of *immediate access* when a right of access is found." (emphasis added)); *Grove Fresh Distribs., Inc.*, 24 F.3d at 897 (access to court documents "should be immediate and contemporaneous"); *Republic of the Philippines*, 949 F.2d at 664 ("[T]he public interest encompasses the public's ability to make a *contemporaneous* review of the basis of an important decision of the district court." (emphasis added)); *Washington Post*, 935 F.2d at 287 (recognizing "the critical importance of contemporaneous access . . . to the public's role as overseer of the criminal justice process"); *Continental Illinois Sees. Litig.*, 732 F.2d at 1310 ("[T]he presumption of access [to court records] normally involves contemporaneous access."); *In re Application of National Broad. Co.*, 635 F.2d 945, 952 (2d Cir. 1980) ("[T]here is significant public interest in affording [opportunity to scrutinize evidence] contemporaneously . . . when public attention is alerted to the ongoing trial.").[17]

Release of unredacted transcripts, though compelled by law, does not relieve this tribunal of its obligation to ensure that improper closures do not occur in future proceedings. *See, e.g.*, *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1072 (3d Cir. 1984) ("[A] district court . . . must

---

addition, the ACLU has a common law right of access to the unredacted transcripts. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978); *see also United States v. Graham*, 257 F.3d 143, 152-53 (2d Cir. 2001) (common law right of access to transcript of proceeding); *Smith v. U.S. Dist. Ct.*, 956 F.2d 647, 650 (7th Cir. 1992) (same). As with the First Amendment right of public access, even if the proceeding was properly closed, under the common law right of public access the ACLU still has a right to the properly redacted transcript. *United States v. Smith*, 787 F.2d 111, 114-115 (3d Cir. 1986) (noting that despite lawful closure, "the public interest . . . is not diminished" in any evidentiary or substantive rulings made there, and therefore the "public interest in observation and comment must be effectuated in next best possible manner . . . through the common law right of access" to transcripts).

[17] Courts have repeatedly upheld claims of an access right to pre-trial proceedings and court filings over the objections of a defendant that jury prejudice may result. *E.g.*, *Associated Press*, 705 F.2d at 1147 (delay of release of filed documents for 48 hours violates right of access); *Brooklier*, 685 F.2d at 1172-73 (holding that delay in release of transcript of closed suppression hearing until end of trial violated right of access to attend judicial proceedings).

not relax the standard necessary to close a proceeding simply because a transcript of that closed proceeding can be made available at a later date."). The suggestion that a complete record may ultimately be provided is simply no answer to the public's right of contemporaneous access to military commission proceedings.[18]

Therefore, because of the time-sensitive nature of access to these proceedings, this Military Commission should expeditiously grant the relief sought in this Motion. Until the unredacted transcripts are received, and until the closure practices challenged herein are rescinded, "each passing day may constitute a separate and cognizable infringement of the First Amendment." *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1979) (Blackmun, J., in chambers) (quoting *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1319, 1329 (1975) (Blackmun, J., in chambers)); *Lugosch*, 435 F.3d at 126-27 ("loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" (internal quotation marks omitted)).

7. Oral Argument.

The ACLU requests oral argument.

WHEREFORE, the ACLU respectfully requests this honorable tribunal to grant its Motion forthwith and to order public access to the unredacted transcripts of the prior proceedings before this Military Commission. The ACLU also respectfully requests that the Military Commission enter an Order clarifying that all proceedings herein shall be open to the public and

[18] The Rules of Court recognizes the military judge's "*sole* authority to determine whether or not any given matter shall be released," RC 3.9c (citing RMC 801; Reg. MC 19-5, 19-6) (emphasis added), and establishes a procedure for the judge to forward suitable portions of the record to Office for Military Commissions ("OMC") "for appropriate redaction, coordination with the Assistant Secretary of Defense for Public Affairs, and release to the general public." RC 3.9b.

press unless specific findings are entered on the record that satisfy the statutory and constitutional standards for denying such public access.

Dated: December 5, 2008

Respectfully submitted,

Ben Wizner
Jameel Jaffer
Lori Danielle Tully
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 519-7814
Fax: (212) 549-2583
Attorneys for Petitioners