MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **KHALID SHEIKH MOHAMMED,** **WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH,** **RAMZI BIN AL SHIBH,** **ALI ABDUL-AZIZ ALI,** **MUSTAFA AHMED ADAM AL HAWSAWI** 14 January 2009	***AMICI CURIAE* BRIEF OPPOSING PROTECTIVE ORDER 007** **By** **THE AMERICAN BAR ASSOCIATION,** **THE AMERICAN CIVIL LIBERTIES UNION,** **HUMAN RIGHTS FIRST, and** **HUMAN RIGHTS WATCH** **As** ***AMICI CURIAE***

Form 7-1 and Statements of the Interests of *Amici Curiae*

---

1. The American Bar Association

My name is Neal R. Sonnett. I certify that I am licensed to practice law in the State of Florida. I further certify:

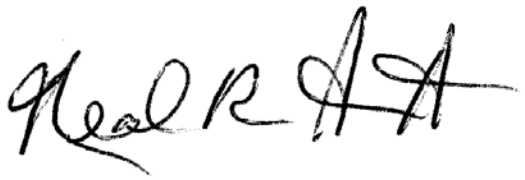
a. I am not a party to any Commission case in any capacity, I do not have an attorney-client relationship with any person whose case has been referred to a Military Commission, I am not currently nor I am seeking to be *habeas* counsel for any such person, and I am not currently nor am I seeking to be next-friend for such person.

b. I further state the submission is only to be considered for its value as an *amicus* brief and not for any other purpose to include as a brief on behalf of any specific party to any Commission proceeding.

c. I certify my good faith belief as a licensed attorney that the law in the attached brief is accurately stated, that I have read and verified the accuracy of all points of law cited in

the brief, and that I am not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

Issues presented, Facts, Law and Argument are in the body of the appended brief. A statement of the interests of the ABA is attached hereto as Appendix A.



Neal R. Sonnett
Chair, Task Force on Treatment of Enemy Combatants
American Bar Association
Two South Biscayne Boulevard, Suite 2600
Miami, Florida 33131-1804
nrs@sonnett.com
Tel: (305) 358-2000
Fax: (888) 277-0333

2. The American Civil Liberties Union

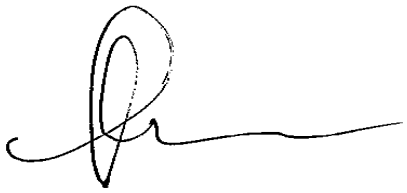
My name is Jameel Jaffer. I certify that I am licensed to practice law in the State of New York. I further certify:

a. On 8 December 2008, the American Civil Liberties Union ("ACLU") filed a motion with this Commission as an intervenor seeking similar relief with respect to a related issue. The instant submission is only to be considered for its value as an *amicus* brief and not for any other purpose to include as a brief on behalf of any specific party to any Commission proceeding.

b. I certify my good faith belief as a licensed attorney that the law in the attached brief is accurately stated, that I have read and verified the accuracy of all points of law cited

in the brief, and that I am not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

Issues presented, Facts, Law and Argument are in the body of the appended brief. A statement of the interests of the ACLU is attached hereto as Appendix B.



Jameel Jaffer
Director, National Security Project
American Civil Liberties Union Foundation
125 Broad St.
New York, NY 10004
jjaffer@aclu.org
Tel: (212) 519-7814
Fax: (212) 549-2583

3. Human Rights First

My name is Deborah Colson. I certify that I am licensed to practice law in the State of New York. I further certify:

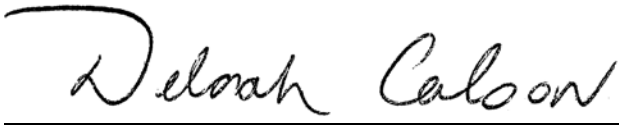
a. I am not a party to any Commission case in any capacity, I do not have an attorney-client relationship with any person whose case has been referred to a Military Commission, I am not currently nor I am seeking to be *habeas* counsel for any such person, and I am not currently nor am I seeking to be next-friend for such person.

b. I further state the submission is only to be considered for its value as an *amicus* brief and not for any other purpose to include as a brief on behalf of any specific party to any Commission proceeding.

c. I certify my good faith belief as a licensed attorney that the law in the attached brief is accurately stated, that I have read and verified the accuracy of all points of law cited in

the brief, and that I am not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

Issues presented, Facts, Law and Argument are in the body of the appended brief. A statement of the interests of Human Rights First is attached hereto as Appendix C.



Deborah Colson
Interim Director - Law & Security
Human Rights First
333 7th Avenue, 13th Floor
New York, NY 10001
ColsonD@HumanRightsFirst.org
Tel: (212) 845-5247
Fax: (212) 845-5299

4. Human Rights Watch

My name is Jennifer Daskal. I certify that I am licensed to practice law in the State of New York and the District of Columbia. I further certify:

a. I am not a party to any Commission case in any capacity, I do not have an attorney-client relationship with any person whose case has been referred to a Military Commission, I am not currently nor I am seeking to be *habeas* counsel for any such person, and I am not currently nor am I seeking to be next-friend for such person.

b. I further state the submission is only to be considered for its value as an *amicus* brief and not for any other purpose to include as a brief on behalf of any specific party to any Commission proceeding.

c. I certify my good faith belief as a licensed attorney that the law in the attached brief is accurately stated, that I have read and verified the accuracy of all points of law cited in

the brief, and that I am not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

Issues presented, Facts, Law and Argument are in the body of the appended brief. A statement of the interests of the ABA is attached hereto as Appendix D.

Jennifer Daskal
Human Rights Watch
1630 Connecticut Avenue NW
Washington, DC 20008
daskalj@hrw.org
Tel: (202) 612-4349

---

1. Timeliness: This is an amicus brief, filed on behalf of the American Bar Association ("ABA"), the American Civil Liberties Union ("ACLU"), Human Rights First ("HRF"), and Human Rights Watch ("HRW"). It is timely filed pursuant to the Military Judge's 5 January 2009 direction that any amicus briefs regarding Protective Order 007 be received by 14 January 2009.

2. Relief Sought: *Amici Curiae* respectfully request that the Commission rescind Protective Order 007 ("PO 007" herein), dated 18 December 2008, or in the alternative, modify PO 007 in accordance with D-___ ("Rescission of Protective Order 007").

3. Overview: Protective Order 007, signed by the Military Judge on 18 December 2008, is overbroad and impermissibly restricts the right to a fair and public trial in violation of the Military Commissions Act of 2006 ("MCA") and the Constitution of the United States. Consequently, the Military Judge should rescind PO 007. In effect, PO 007 creates a presumption that the proceedings in this case will be closed to the public and press. It expands

the definition of Classified Information to include "[a]ny document or information … referring to the Central Intelligence Agency, National Security Agency, Defense Intelligence Agency, Department of State, National Security Council, Federal Bureau of Investigation, or intelligence agencies of any foreign government . . . or information in the possession of such agency" as well as "any statements made by the accused." PO 007 also considers as Classified previously disclosed information that is already in the public domain if confirmed or denied by someone with access to the classified information, thereby potentially making already disclosed information off limits. As a result, PO 007 diminishes the transparency and fairness of these proceedings by permitting the government to exercise virtually unlimited authority to exclude the press, public, and trial observers – including *Amici* – from the courtroom.

4. <u>Burden and Standard of Proof</u>: A party advocating restrictions 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. <u>Facts</u>:

a. The Military Commission Act ("MCA") provides for proceedings of the military commission to be open to the public. On 21 March 2002, Secretary of Defense Donald H. Rumsfeld issued Military Commissions Order No. 1, detailing the operational rules and regulations for the military commissions. The regulations similarly stated that military commission trials would be open to the public.

b. Beginning in May 2003, HRF, HRW and Amnesty International ("AI") [1] wrote separately to the Pentagon requesting access to the United States Naval Base at Guantanamo Bay, Cuba in order to observe the military commission proceedings. Each group followed up with its request in writing or by phone.

c. The Department of Defense did not respond to the requests for more than 6 months. By letter dated 7 January 2004, the Department denied AI's request for access. An identical denial letter dated 11 February 2004 was issued to HRW. HRF did not receive a response.

d. On 20 February 2004, HRF, HRW, and AI sent a joint letter to Secretary Donald H. Rumsfeld again requesting authorization to observe the Commission proceedings.

e. In August 2004, the government reversed its position, and General John D. Altenburg, Jr., the Appointing Authority for Military Commissions, invited the four *Amici Curiae* and AI to send representatives to observe the Commission proceedings at Guantanamo Bay.

---

[1] Amnesty International has not formally joined this amicus brief. However, the organization supports the broadest possible access to criminal and other legal proceedings by trial observers, in no event to be less fulsome than that contemplated by international standards. Such openness is recognized as a key element of the fairness of proceedings by international law, and the right of individuals and associations to observe trials and to draw public attention to failures to respect human rights in that and other contexts has been specifically recognized by the United Nations General Assembly. While some international instruments recognize limited exceptions to openness, such exceptions are strictly drawn and narrowly construed. Amnesty International, too, therefore calls for rescission of Protective Order 007, dated 18 December 2008, as the same substantive aspects that are highlighted in this brief render it inconsistent with international standards. Relevant international standards are attached hereto in Appendix E.

f. Since that time, *Amici Curiae* have consistently sent representatives to observe military commission hearings and trials at Guantanamo Bay.

g. Many, if not all, of those hearings and trials have involved protected information, and measures have been taken to permit observation without disclosure of such information.

h. For example, observers watch the tribunal proceedings either via a 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 delay, permitting courtroom security officials to cut off the audio feed whenever the prisoners appear to be discussing protected information, such as the conditions of their detention or interrogations.

i. Observers have been permitted to attend past proceedings involving the five men accused of involvement in the September 11th attacks. During these proceedings, observers have been permitted to hear statements made by the defendants.

j. On 18 December 2008, the Military Judge signed PO 007.

k. On 9 January 2009, the Military Judge ordered the Assistant Secretary of Defense for Public Affairs to publically release PO 007. Attached hereto as Appendix F is a copy of PO 007.

l. Protective Order 007 purports to forbid the disclosure of any information that is currently classified, as well as any information related in any way to classified information. Among other things, it forbids disclosure of: "any statements made by the accused" and "any . . . information . . . that refers to or relates to national security or intelligence matters . . . including but not limited to any subject referring to the

Central Intelligence Agency, National Security Agency, Defense Intelligence Agency, Department of State, National Security Council, Federal Bureau of Investigation, or intelligence agencies of any foreign government, or similar entity, or information in the possession of such agency[.]"

m. On 5 January 2009, the Military Judge directed that parties submit briefs addressing whether:

a. Protective Order 007 expands the definition of "classified information" and the scope of protective orders generally beyond that provided for in the MCA and other applicable legal authority; and

b. Modifications to Protective Order 007 should be made to ensure that it does not conflict with the legal authority cited above.

6. Discussion: A right of access to the proceedings of this tribunal is expressly granted by the Military Commissions Act ("MCA") and independently mandated by the Constitution of the United States. The right of access helps ensure that the trial is fair, is perceived as fair, and helps to provide closure to affected victims. Its embodiment in the MCA demonstrates the importance that Congress placed on this right. Any compromise of that right must be strictly limited to that which is necessary for national security and personal safety, and the government bears the burden of proof of demonstrating that the limitation is necessary and narrowly tailored.

Contrary to the MCA and the First Amendment, there has been no finding by the Military Judge that the government's national security concerns require a sweeping protective order that presumptively and categorically designates the defendants' speech as Classified Information. Similarly, there has been no finding that these concerns require a protective order that presumptively classifies documents or information if they merely reference federal agencies such

as the CIA, FBI, State Department, simply relate to national security or intelligence matters, or have already been in the public domain.

The discussion that follows explains the statutory and constitutional grounds for the continued right of access sought by *Amici Curiae*. Section A establishes that the MCA expressly grants a right of access to the proceedings of this tribunal. Section B demonstrates that the First Amendment independently protects the public's right of access to these proceedings. Section C discusses how the expansive definition of "Classified Information" in PO 007 violates the right of access found in the MCA and the First Amendment. Finally, Section D requests modifications to PO 007 consistent with D-___ ("Rescission of Protective Order 007") to ensure that the Order does not conflict with the MCA or constitutional law.

A. The Military Commissions Act of 2006 and the Implementing Regulations Grant a Statutory Right of Access to the Commission Proceedings.

In adopting the MCA, 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 Regulation for Trial by Military Commissions ("Reg. MC" or the "Regulation") and the Manual for Military Commissions ("MMC") containing the Rules for Military Commissions ("RMC") also recognize and implement this statutory right of access. *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." Similarly, Military Commission Order No. 1 (March 21, 2002) guarantees the accused "a trial open to the public" subject only to closure for the "protection of information classified or classifiable under reference" or the "physical safety of participants in the Commission proceedings."

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." *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 MMC reflects this same understanding. It empowers the military judge to "exercise

---

[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 *Amici* are national organizations that meet this standard.

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. 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 when closure to protect classified evidence is anticipated:

> 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 the 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 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;

---

[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 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.").

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, 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 (l0th 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 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. … [O]nce opened, the court-martial room … 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*

---

[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).

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]

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.

- 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).

---

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

- The military commissions established by the United States 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 authorized these military tribunals was to keep evidence of the FBI's bungling of the case secret."[7]

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 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.

---

[7] 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).

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). 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 the 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).[8]

---

[8] *See also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring):

For all the above reasons, as well as 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.

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-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

---

> 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.

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 Expansive Definition of "Classified Information" in Protective Order 007 Violates the Right of Access Mandated by the MCA and the First Amendment.

Protective Order 007 does more than protect documents and information lawfully classified under M.C.R.E. 505(b) or Executive Order 12958 from public dissemination. It deprives *Amicus Curiae* of access to traditionally public, unclassified aspects of a criminal trial, including statements made by the accused as well as a significant amount of information relating to the charges against them. *Amici Curiae* believe that under PO 007, most, if not all of the proceedings in this case will be off-limits to trial observers, diminishing the transparency and fairness of the Commissions process in violation of the MCA and the First Amendment.

The MCA and the First Amendment mandate a right of access subject only to a *specific finding* by the Military Judge that information must be withheld for reasons of national security or personal safety. Protective Order 007 turns this presumption of openness on its head by impermissibly expanding the definition of Classified Information to encompass virtually all substantive statements, documents, and information related to this case. There have been no "specific findings" that the wholesale exclusion of the public from this information 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 that the exclusion reflects an overriding interest or was narrowly tailored – as required by the First Amendment. *Press-Enterprise II*, 478 U.S. at 9-10, 14. In short, the effect of PO 007 on the public, the press, and *Amici Curiae* is a presumption of exclusion from these proceedings.

Military Commission Rule for Evidence 505(b)(1) defines the term "classified information" as "… any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security, and any restricted data, as defined in 42 U.S.C. § 2014(y)." *See also* MCA, 10 U.S.C. § 948(4). Protective Order 007 dramatically expands this definition to include:

1. "Protected information." This term does not appear in Executive Order 12958, as amended, and is entirely foreign to the context of classified information. Protective Order 007 defines "protected information" as "information that is unclassified but otherwise privileged, such as Law Enforcement sensitive (LES) information or information For Official Use Only (FOUO), which does not warrant a national security classification but nonetheless requires limitation in dissemination and/or disclosure." PO ¶ 8. The Order states that any documents or information containing "protected information" shall be considered Classified Information. PO ¶ 6(e).

Because the Commission proceedings are by definition "official," every document or bit of information related to this case would presumably fall within the definition of "official use" / "protected information" and would therefore be Classified Information under PO 007 and inaccessible to *Amicus Curiae*. The government, however, "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). 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. A departure from this established procedure will undercut the ability of *Amici Curiae* to effectively observe the Commission proceedings.

2. Sources and methods. Paragraph 6(e) also defines Classified Information to capture "[a]ny document or information … [that] implicates sources, methods or activities of the United States to acquire [Classified or protected] information if those sources, methods and activities remain classified." Although a "method" or technique may be properly classified, when the government employs a classified method against a person who does not possess the requisite security clearance and has no obligation of non-disclosure, there is no basis for preventing that person from disclosing his experience in court. Prohibiting the accused from openly describing his exposure to otherwise classified sources and methods deprives the accused of a full and fair defense.

Moreover, if the use of a particular method is illegal, or was intentionally used in an unauthorized or illegal manner, the government can have no legitimate interest, let alone a compelling one, in preserving its ability to employ tactics that are prohibited by law.[9] Thus, a

[9] For example, 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

protective order that permits the suppression of allegations of illegality is overbroad on its face and violates the public right of access to these proceedings.

3. Statements made by the accused. Paragraph 6(f) "presumptively" classifies "any statements made by the accused, and any verbal classified information known to the accused or Defense." PO ¶ 6(f). There is no such thing as "presumptive classification" in the MCA, its implementing regulations, or Executive Order 12958, as amended. Classification requires an affirmative act by a proper Classification Authority. Protective Order 007 effectively upends the classification process, shielding anything the accused might say during the course of these proceedings from the public unless affirmatively declassified.

Once again, there have been no "specific findings" that the wholesale withholding from the public of "any statements made by the accused" is necessary to protect national security or personal safety. On the contrary, *Amici* have sent observers to several hearings in this case. At those hearings, the observers heard defendants speak and heard numerous references to

---

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.

Similarly unlawful are the practices of rendition to torture and secret detention. Rendition to torture 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), 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.

In light of these prohibitions, the Military Judge should make individualized findings of whether the documents or information covered by PO 007 contain evidence that U.S. personnel violated these laws. If so, this information should not enjoy protection.

governmental agencies, which appear to be prohibited under this Order. At no time has there been a suggestion from the prosecutors that the presence of the observers at these hearings posed any threat to national security or personal safety. Such specific instances of jeopardy caused by the open courtroom are precisely what the law requires the government to demonstrate to overcome the presumption of openness, and these past observation experiences strongly suggest, if not conclusively prove, that no such jeopardy exists. Paragraph 6(f) amounts to a *de facto* gag order on the accused and diminishes the transparency and fairness of the proceedings in violation of the MCA and the First Amendment. 10 U.S.C. § 949d(d)(2); *Press-Enterprise II*, 478 U.S. at 9-10, 14.

4. Documents or information relating to national security or intelligence matters and governmental agencies, or in the possession of such agencies. Paragraph 6(g) is overbroad. It prohibits the disclosure of "any document or information . . . that refers to or relates to national security or intelligence matters . . . including but not limited to any subject referring to the Central Intelligence Agency, National Security Agency, Defense Intelligence Agency, Department of State, National Security Council, Federal Bureau of Investigation, or intelligence agencies of any foreign government, or similar entity, or information in the possession of such agency[.]" Under a strict reading of this provision, *Amici* would not be allowed to hear the defense read a passage from the 9/11 Commission Report absent written authorization from the tribunal. In short, there is virtually no substantive aspect of these proceedings that would remain open to the public without the express authorization of the Military Judge. This aspect of PO 007 threatens to censor significant portions of these proceedings, effectively closing them to the public, the press, and *Amici Curiae* at the mention of a single government agency.

5. Information in the public domain. Paragraph 6(h) is also overbroad. Under this provision, documents or information already in the public domain can effectively become Classified Information: "While information in the public domain is ordinarily not classified, such information may be considered classified, and therefore subject to the provisions of MCRE 505 and this Order, if it is confirmed or denied by any person who has, or has had, access to classified information and that confirmation or denial tends to corroborate or tends to refute the information in question." PO ¶ 6(h). *Amici Curiae* believe that section 6(h) prohibits the accused and their counsel from publicly referencing or responding to relevant information in the public domain, including print and electronic media published by *Amici*. Even if this paragraph does not completely prohibit such comments, *Amici* are concerned that the threat of serious criminal and administrative sanctions for any violation of PO 007 will unnecessarily chill public speech. *See* PO ¶¶ 15-16. Access to otherwise properly classified information should not be allowed to double as a *de facto* gag order.

D. Requested Modifications to Protective Order 007.

Given the expansive definition of Classified Information in PO 007, the Order appears to create a presumption of closed – or at least mute – proceedings. Under PO 007, *Amici Curiae* would be unable to continue as effective trial observers in this case. If, however, this tribunal upholds the right of public access and opts to continue making specific determinations about whether information must be withheld for reasons of national security or personal safety, then there is little reason to believe that closed proceedings are necessary. *Amici Curiae* therefore respectfully request that the Military Judge rescind PO 007. In the alternative, *Amici* request that the Military Judge modify PO 007 in a manner consistent with D-___ ("Rescission of Protective

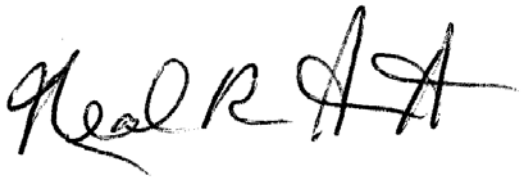
Order 007") to ensure that the Order does not conflict with the MCA or the First Amendment as discussed above.

7. <u>Attachments</u>:

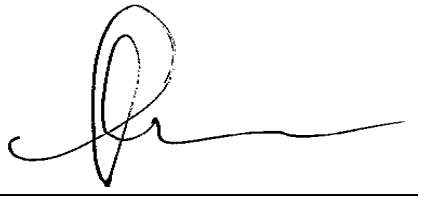
A. Interest of Amicus Curiae American Bar Association
B. Interest of Amicus Curiae American Civil Liberties Union
C. Interest of Amicus Curiae Human Rights First
D. Interest of Amicus Curiae Human Rights Watch
E. Statement of Amnesty International
F. Protective Order 007

DATED this 14 day of January, 2009.

Respectfully submitted,



Neal R. Sonnett
Chair, Task Force on Treatment of Enemy Combatants
American Bar Association
Two South Biscayne Boulevard, Suite 2600
Miami, Florida 33131-1804
nrs@sonnett.com
Tel: (305) 358-2000
Fax: (888) 277-0333



Jameel Jaffer
Director, National Security Project
American Civil Liberties Union Foundation
125 Broad St.
New York, NY 10004

jjaffer@aclu.org
Tel: (212) 519-7814
Fax: (212) 549-2583

Deborah Colson
Interim Director – Law & Security Program
Human Rights First
333 7th Avenue, 13th Floor
New York, N.Y. 10001
ColsonD@humanrightsfirst.org
Tel: (212) 845-5247
Fax: (212) 845-5299

Jennifer Daskal
Human Rights Watch
1630 Connecticut Avenue NW
Washington, DC 20008
daskalj@hrw.org
Tel: (202) 612-4349