

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

**Defense Motion**  
for Appropriate Relief

(Right to Public Trial)

11 July 2008

1. **Timeliness:** This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the Military Judge's 19 June 2008 scheduling order.

2. **Relief Requested:** The defense requests that the filings of the parties and rulings of the Commission be made publicly available within a reasonable time after the filings and/or rulings are made. The defense also requests that, subject to limitations under applicable protective orders to protect classified and/or other "protected information," it be allowed to communicate the substance of its filings (i.e., disseminate appropriately redacted copies) to the public at any time. The defense reserves the right to request further, additional relief (e.g., relief from various protective orders) based on undue interference with Mr. Khadr's right to a public trial as appropriate.

3. **Burdens of Proof and Persuasion:** As the moving party, the defense bears the burden of establishing any factual issues necessary to resolve the motion by a preponderance of the evidence. R.M.C. 905(c)(2)(A).

4. **Facts:**

a. Access to military commission proceedings at Guantanamo Bay is restricted due to the location of the proceedings in Cuba and the fact that access to the base is strictly controlled by the U.S. military. *See* R.M.C. 806(a) ("Access to military commissions may be constrained by location."); Regulation for Trial by Military Commissions (Regulation) 19-7 ("The convening authority shall coordinate travel and attendance of spectators.")

b. Pleadings filed by counsel for both parties have not been released to the public by the military commission or convening authority within a reasonable time after they are filed. For example, D025, Defense Motion to Compel Production of the Identities of Eyewitnesses was filed on 15 January 2008, but not publicly available until 15 April 2008. *See* <http://www.defenselink.mil/news/commissionsKhadr.html>. And D004, Defense Motion for a Fair Status Determination was filed on 1 November 2007, but as of 19 November 2007, nearly two weeks after the arraignment, was still not publicly available. Glaberson Decl. para. 5 (attachment A) (explaining that as of 19 Nov 07, the most recent release of information by the Office of Military Commissions in Mr. Khadr's case was on 24 April 2007). Filings are rarely released until after the hearing litigating the issues raised in the motions is conducted. *See* <http://www.defenselink.mil/news/commissionsKhadr.html>.

c. The Regulation for Trial by Military Commission (Regulation) protects, in part, the right of the accused to a public trial by preserving the right of defense counsel to

“communicate with news media representatives regarding cases and other matters related to military commissions.” See Regulation, Chap. 9-7. Notwithstanding this provision of the Regulation, the Chief Trial Judge has issued a “rule of court” purporting to limit the ability to of defense to release or otherwise disseminate the contents of defense motions and other filings, even when such materials contain no protected (i.e., classified, FOUO/LES, etc.) information. MCTJ Rule 3.9 The prosecution in this very case has used this as a tool to restrict the flow of information about defense motions, the practical (and almost certainly intended) effect of which is to make it impossible for representatives of the news media to follow and understand the proceedings of the Commission when in session.

d. Infringement of the accused’s right to a public trial in this case is further compounded by draconian (and duplicative) protective orders: Protective Order No. 1 restricts information about not only classified matters, but any document that is marked “For Official Use Only,” which constitutes almost *all* of the unclassified matters the defense has received in discovery. Protective Order No. 2 restricts information about “intelligence” personnel, even those such as “Sgt. C” who no longer serves in an intelligence-related billet (or the military at all). Protective Order No. 3 -- astoundingly -- protects the identities of *all* witnesses, even those who have made a second career of speaking publicly about the Khadr case and whose names are known by and routinely reported on by media organizations. Just last week, the Commission entered, at the demand of the prosecution, Protective Order No. 7, which governs information relating to detention facility SOPs. Largely redundant in light of previous protective orders mentioned above, by restricting the flow of information about *unclassified, unprotected* information concerning core issues of Mr. Khadr’s confinement and interrogation, Protective Order No. 7 literally *serves no other purpose* than to violate Mr. Khadr’s right to a public trial.

## 5. Argument:

### a. The Sixth Amendment Right to a Public Trial Applies to Guantanamo Bay Detainees

(1) In *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), the Supreme Court reversed the authority trial counsel has consistently relied upon for the proposition that the “Constitution does not apply to aliens held outside the United States, including those held at Guantanamo Bay, such as Khadr.” (See, e.g., Govt. Resp. to the Def. Mot. to Dismiss for Lack of Jurisdiction (Bill of Attainder), D013, 14 Dec 07, at para. 6(a)(i); Govt. Resp. to the Def. Mot. to Dismiss for Lack of Jurisdiction (Equal Protection), D014, 18 Jan 2008, at para. 6(a)(ix); Govt. Resp. to the Def. Mot. to Dismiss for Lack of Personal Jurisdiction (Child Soldier), D022, 25 Jan 08, at n2.)

i. The Court held that “questions of extraterritorial[] [application of the Constitution] turn on objective factors.” *Boumediene*, 128 S.Ct. at 2253. These factors include whether the application of constitutional mandates would cause “friction with the host government,” *id.* at 2261, the degree to which the federal government exercises plenary authority over the area, *id.*, and whether logistical or security difficulties would make the application of a particular constitutional provision “impracticable or anomalous,” such as if the area is “located in an active theater of war.” *Id.* at 2262.

ii. Weighing these factors in the context of the Guantanamo detainees, such as Khadr, the Court concluded, GTMO is “a territory that, while technically not part of the United States, is under the complete and total control of our Government.” *Id.* Like Puerto Rico, Guam and the other territories that have remained under the “complete jurisdiction and control” of the federal government since the conclusion of the Spanish American war, the federal government retains “de facto sovereignty over this territory.” *Id.* at 2253.

iii. Before applying a particular constitutional provision in the context of this military commission, therefore, the military judge must now make a two-part inquiry. First, does the constitutional provision generally govern unincorporated territories, such as GTMO, that are nevertheless “within the constant jurisdiction of the United States”? *Boumediene*, 128 S.Ct. at 2261. Second, as this is a military commission convened under Article I, does the constitutional provision generally govern military proceedings? *See Weiss v. United States*, 510 U.S. 163 (1994); *Middendorf v. Henry*, 425 U.S. 25 (1976) (“Dealing with areas of law peculiar to the military branches, the Court of Military Appeals’ judgments are normally entitled to great deference.”); *see also* MCA sec. 948b(c) (“The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under chapter 47 of this title (the Uniform Code of Military Justice)”).

A. In first resolving the question of extraterritorial application, the Supreme Court placed GTMO alongside its sister territories, over whom the United States obtained and has continued to exercise “de facto sovereignty” since the conclusion of the Spanish American War. *Boumediene*, 128 S.Ct. at 2253.

1. The Court held that as soon as the federal government sought to govern the unincorporated territories, its authority was subject to “those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments.” *Id.* at 2260 (citing *Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 44 (1890)). The Supreme Court never questioned that “the guaranties of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application” in the unincorporated territories. *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922).

2. Moreover, the Court recognized that “over time the ties between the United States and any of its unincorporated territories strengthen in ways that are of constitutional significance.” *Boumediene*, 128 S. Ct. at 2262. This analysis led the Court to draw an express analogy between the status of GTMO and Puerto Rico, where, of course, the provisions of the Bill of Rights are in full force and effect. Discussing the status of Puerto Rico, the Supreme Court has said that whatever factors may have cautioned against the application of the Constitution soon after Puerto Rico’s annexation, they provide no continuing basis “for questioning the application of the Fourth Amendment-or any other provision of the Bill of Rights.” *Id.* (quoting *Torres v. Puerto Rico*, 442 U.S. 465, 475-476 (1979) (Brennen, J., concurring)). Likewise, given the exercise of “de facto sovereignty” by the United States at GTMO, there is no legitimate basis on which to limit the application of the Bill of Rights or otherwise distinguish GTMO from territories such as Puerto Rico.

3. Accordingly, there is no longer any doubt that “‘all persons within the territory of the United States,’ including aliens unlawfully present, may invoke the Fifth and Sixth Amendments to challenge actions of the Federal Government.” *Plyer v. Doe*, 457 U.S. 202, 212 (1982) (citation omitted).

B. The right to a public trial has long been recognized as one of the more valuable rights inuring to the individual in a free society.” *United States v. Brown*, 22 C.M.R. 41, 45 (C.M.A. 1956). “[T]he right to a public trial . . . is part of our common law heritage.” *Id.* at 46. It could not be more fundamental. *See Richmond Newspapers v. Virginia*, 448 U.S. 555, 593 (1980) (Brennan, J., concurring) (“As a matter of law and virtually immemorial custom, public trials have been the essentially unwavering rule in ancestral England and in our own Nation.”); *see also Gannett Co. v. DePasquale*, 443 U.S. 368, 387 (1978); *In re Oliver*, 333 U.S. 257, 266 (1948). The right has been recognized within the context of the military justice system. *See United States v. Grunden*, 2 M.J. 116, 120 n.3 (1977) (“[T]he right to a public trial is indeed required in a court-martial.”); *Brown*, 22 C.M.R. at 45. And there is no valid consideration that would preclude its application to military commissions (or other proceedings) conducted at Guantanamo Bay. The government has no greater or lesser interest in protecting classified information in these proceedings than it would in any proceeding in the continental United States. Moreover, the accused in military commission proceedings possess a particularly acute interest in a public trial in light of Guantanamo Bay’s limited accessibility and remoteness from centers of regular civilian life. These considerations compel full application of the right to a public trial in these military commission proceedings, subject only to the limitations ordinarily permitted in connection with the need to protect properly classified information or other matters in trials by court-martial or in civilian criminal proceedings.

C. With respect to both the extraterritorial application of the constitutional public trial guarantee and its recognition within the military, there is no ambiguity. The constitutional protections of the Fifth and Sixth Amendment apply to safeguard the rights of an accused and of society to see the prompt resolution of criminal proceedings. The only question that remains is whether Mr. Khadr has been afforded a trial that survives constitutional scrutiny.

**b. Mr. Khadr’s Right to a Public Trial, as Guaranteed by the Sixth Amendment and Rules Governing this Commission, is Being Infringed**

(1) “In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial.” U.S. Const. amend. VI. In enacting the Military Commissions Act (MCA), Congress sought to protect this right. Section 949d(d)(1) mandates public access to military commission proceedings subject to two narrow exceptions.<sup>1</sup> 10 U.S.C. § 949d(d)(1); *see also* R.M.C. 806(a) (“[M]ilitary commissions shall be publicly held.”); Regulation 19-7(a) (“The sessions of military

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<sup>1</sup> Military commissions may be closed to the public 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).

commissions shall be public to the maximum extent practicable.”). This right includes pretrial hearings, and not just the trial itself. *See, e.g., Waller v. Georgia*, 467 U.S. 39 (1984) (finding Sixth Amendment right to public trial includes pretrial suppression hearings).

(2) While the right to a public trial right is fundamental, it is not absolute. For example, public access may be limited due to overcrowding in the courtroom, maintaining order in the courtroom, security concerns, the testimony of a child or other compelling reasons. *Brown*, 22 C.M.R. 46. But “closure of the court must be done ‘sparingly with the emphasis always toward a public trial.’” *United States v. Hershey*, 20 M.J. 433, 436 (1985) (“[E]ven when the interest sought to be protected is national security, the Government must demonstrate a compelling need to exclude the public.”). Accordingly, where public access must be restricted due to legitimate, overriding interests, measures should be implemented that allow the public freedom of access to the proceedings to the greatest extent possible. *Cf. See Richmond Newspapers*, 448 U.S. at 575 (plurality op.) (“Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted; as we have shown, recognition of this pervades the centuries-old history of open trials and the opinions of this Court.”).

(3) The Supreme Court has looked to case law addressing the press’s First Amendment right to attend criminal trials in assessing the meaning and scope of an accused’s Sixth Amendment right to a public trial. *See, e.g., Waller*, 467 U.S. at 44-46. In doing so, the Court reasoned that “there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public.” *Id.* at 46. The First Amendment right of access to criminal proceedings includes access to court records.<sup>2</sup> Under the reasoning of *Waller*, the Sixth Amendment right to a public trial necessarily includes the right to have the parties’ filings publicly available. Indeed, “[t]here is no reason to distinguish between pretrial proceedings and the documents filed in regard to them.” *Associated Press*, 705 F.2d at 1145. And it is not sufficient that access be given months or years into the future after the proceeding has concluded. Access to the documents must be contemporaneous with the proceeding.<sup>3</sup>

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<sup>2</sup> *See, e.g., Washington Post v. Robinson*, 935 F.2d 282, 287-88 (D.C. Cir. 1991) (holding that First Amendment right of access attaches to plea agreement); *Seattle Times Co. v. U.S. Dist. Court*, 845 F.2d 1513, 1515-17 (9th Cir. 1988) (documents relating to pretrial release hearing); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) (search warrant affidavits); *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988) (plea agreement); *In re Storer Commc'ns, Inc.*, 828 F.2d 330,336 (6th Cir. 1987) (motion to recuse judge); *In re New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (pre-trial suppression motion); *In re Washington Post Co.*, 807 F.2d 383, 389-90 (4th Cir. 1986) (plea and sentencing materials); *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (all pretrial filings).

<sup>3</sup> *See, e.g., Lugosch v. Pyramid Co. of Onodaga*, 435 F.3d 110, 126-27 (2d Cir. 2006) (“Our public access cases and those in other circuits emphasize the importance of immediate access when a right of access is found.”); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (access to court documents “should be immediate and contemporaneous”); *Republic of the Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 664

(4) Here, there is no question that vindication of Mr. Khadr’s right to a public trial requires, at a minimum, grant of the relief requested herein. In order for the public to have *any* meaningful sense of these proceedings or grasp of the issues being litigated, filings with, and rulings of, the Commission must be released within a reasonable period of time. Preferably, motions, responses, and replies would all be released before sessions of the Commission to enable interested members of the public, representatives of the media, and observers from various non-governmental organizations, to study the pleadings and follow the proceedings of the Commission. Barring this, at a minimum, the defense should be allowed to disseminate copies of its own pleadings, subject to the requirement to restrict dissemination of “protected” information (i.e., redact classified and/or FOUO matters). Assuming that protected information is removed, further restriction on the ability of defense counsel to communicate about the substance of issues before the Commission serves no other purpose than to unreasonably infringe upon Mr. Khadr’s right to a public trial.

(5) A showing of specific prejudice is not necessary to obtain relief for the denial of the right to a public trial. *United States v. Hershey*, 20 M.J. 433, 437 (1985). “[T]he remedy should be appropriate to the violation.” *Waller*, 467 U.S. at 50. Mr. Khadr’s right to a public trial is being infringed upon by the timing of the release, and in some cases, lack of release of filings. Therefore, the filings of the parties and rulings of the Commission must be made publicly available within a reasonable time – motions, responses and replies being published after the filings are made and before the hearing at which they will be litigated. Further, restrictions on the ability of the defense to disseminate appropriately-redacted copies of its own pleadings must be removed.

### c. Conclusion

Numerous restrictions that have been put in place to restrict the flow of information about these proceedings unduly burden Mr. Khadr’s right to a public trial. A public trial being an essential element of due process, *Boumediene* dispels any notion that the government possesses plenary authority to conduct Star Chamber-like proceedings at Guantanamo Bay, thus rendering these restrictions plainly unlawful. “[While] the right to a ‘public trial’ is explicitly guaranteed by the Sixth Amendment only for ‘criminal prosecutions,’ that provision is a reflection of the

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(3d Cir. 1991) (“[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.”); *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”); *Valley Broad. Co. v. Us. Dist. Ct.*, 798 F.2d 1289, 1292 (9th Cir. 1986) (noting that because the Press “seeks to obtain the tapes for contemporaneous broadcast when presumably they will pack the greatest punch, delay will prejudice its application in a way not correctable on appeal” (internal quotation marks omitted)); *n re Continental Illinois Secs. Litg.*, 732 F.2d 1302, 1310 (7th Cir. 1984) (“[T]he presumption of access [to court records] normally involves *contemporaneous* access.”); *In re Application o/National Broadcasting 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.”).

notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.' . . . [Due] process demands appropriate regard for the requirements of a public proceeding in cases of criminal contempt . . . as it does for all adjudications through the exercise of the judicial power, barring narrowly limited categories of exceptions. . . ." *Levine v. United States*, 362 U.S. 610, 616 (1960). Timely dissemination of information about the substance of the proceedings and removal of restrictions on the right of the defense to communicate with the public and media constitute necessary steps towards protecting Mr. Khadr's Constitutionally-protected right to a public trial. Based upon the foregoing, the Military Commission should grant the relief requested herein.

**6. Oral Argument:** The defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h), which provides that "Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions." Oral argument will allow for thorough consideration of the issues raised by this motion.

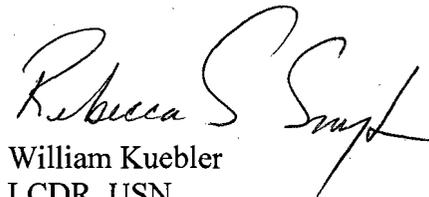
**7. Witnesses and Evidence:** The defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the prosecution's response raise issues requiring rebuttal testimony. The defense relies on attachment A as evidence in support of this motion.

**8. Certificate of Conference:** The defense has conferred with the prosecution regarding the requested relief. The prosecution's position on the requested relief is that "The Government defers to the Military Judge."

**9. Additional Information:** In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

**10. Attachment:**

A. Declaration of William Glaberson, 20 November 2007



William Kuebler  
LCDR, USN  
Detailed Defense Counsel

Rebecca S. Snyder  
Assistant Detailed Defense Counsel

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UNITED STATES OF AMERICA )

v. )

OMAR AHMED KHADR )  
a/k/a "Akhbar Farhad" )  
a/k/a/ "Akhbar Farnad" )  
a/k/a "Ahmed Muhammed Khali" )

DECLARATION OF WILLIAM  
GLABERSON  
In Support Of  
MOTION BY PRESS PETITIONERS  
FOR PUBLIC ACCESS TO  
PROCEEDINGS AND RECORDS

November 20, 2007

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I, WILLIAM GLABERSON, pursuant to 28 U.S.C. § 1746, do hereby declare:

1. I am a reporter for the *New York Times*, and I respectfully submit this declaration in support of the motion by the Press Petitioners for meaningful public access to the proceedings of this Military Commission.
2. In my work for the *New York Times*, I have reported on issues relating to the detention and prosecution of those held at the U.S. Naval Base in Guantanamo Bay, Cuba ("Guantanamo"), including the proceedings of various military commissions. I have reported on developments in the proceedings against Omar Ahmed Khadr, Salim Ahmed Hamdan, David M. Hicks, and Mohammed Jawad. My statements in this declaration are based on my own personal knowledge.
3. As described below, it is difficult for reporters to obtain timely access to developments in this case or in the other military commissions at Guantanamo generally. These limitations on access have hindered our ability to provide timely information to the public about positions being advanced by either the prosecutor or the defense through their written motions and correspondence with the tribunal, or about the arguments presented in sessions that are either conducted electronically, closed to the public or conducted in sessions where reporters are not present at the Guantanamo facilities.

## **ACCESS PROVIDED BY THE OFFICE OF MILITARY COMMISSIONS**

4. Since Congress passed the Military Commissions Act of 2006, military commissions have been convened to hear charges against three individuals: Omar Ahmed Khadr, Salim Ahmed Hamdan and David M. Hicks. Charges have been sworn against a fourth individual, Mohammed Jawad. The Office of Military Commissions (“OMC”) has provided the public and press only limited access to the records of these proceedings through a Department of Defense website. (The website may be viewed at <http://www.defenselink.mil/news/commissions.html>.)

5. The DOD website does not provide timely information and does not permit a reporter to follow or understand developments on a prosecution. For example, as of November 19, 2007, the most recent entry under “Commission Cases” for both Omar Ahmed Kadr and Salim Ahmed Hamdan is the referral of charges on 04/24/07 and 05/10/07 respectively. No subsequent activity appears on the DOD website in either case. (A true and correct copy of the entries on the DOD website for the Khadr and Hamdan commissions are attached hereto as Exhibit A.)

6. The DOD press office separately has released motions and rulings on occasion, but none of the motion activity is reflected on the website for the commission, and the motion papers submitted to this tribunal by the parties are not being made publicly available by OMC on a regular basis. (A true and correct copy of the Press Materials website is attached hereto as Exhibit B.)

## **LACK OF ACCESS TO THE FILINGS INVENTORY**

7. There is currently no publicly available inventory of motions and rulings filed with this tribunal. I understand that a non-classified “filings inventory” is

maintained for the use of the parties and the tribunal, setting forth all motions and other filings before the military judge. Neither this filings inventory nor any other docket of the proceedings is made publicly available during the pendency of the commission proceedings.

8. The DOD websites for materials related to the commissions are no substitute for access to the filings inventory. Information is not posted in a timely manner and it has been several weeks since any materials were added to these websites. For example, on October 17, 2007, Capt. Keith J. Allred, the military judge presiding over the *Hamdan* commission, granted in part and denied in part the prosecution's motion for reconsideration, but there is still no DOD announcement or publication of this ruling.

#### **LACK OF ACCESS TO MOTIONS AND RELATED FILINGS**

9. There currently is no place for the press or public to obtain copies of motions, requests for relief, and other material filed with the tribunal. At the military commission trial level, reporters are not advised of the presence of a court clerk or chambers staff available to provide copies of filings. As a result, requests for information by reporters are made to public affairs officials for the DOD, the OMC, or the Joint Task Force ("JTF"). These officials apparently have no authority to provide copies of filed material, and I have no way of knowing if my requests for documents ever reach judges.

10. Although counsel in the case are sometimes willing to provide a copy of filed motion papers to a reporter, reporters cannot know what materials exist and could be requested because of the absence of a public docket.

11. In June 2007, for example, the military judges in both the Kahdr and Hamdan proceedings concluded that they had no jurisdiction to proceed because neither

detainee had been held to be an unlawful enemy combatant. The press and public had no advance notice that this jurisdictional issue had even been raised and no ability to review the positions taken by the parties.

12. In the weeks leading up to the November 8, 2007 session in the Khadr proceeding both I and my attorney requested access to the pending motions and court rulings without any success. On October 12, 2007, I made such a request to Lt. Catheryne Pully, public affairs officer for OMC, both orally and by email. (A true and correct copy of my email to Lt. Pully is attached hereto as Exhibit C.) Lt. Pully told me that these materials were in the control of the military judge. This is the same response my attorney was separately given. I asked Lt. Pully that my request be forwarded to the judge, but received no response. On the eve of the hearing I wrote a new request explaining that I had received no response and requesting one. (A true and correct copy of this request is attached hereto as Exhibit D.) This second request has also gone unanswered.

13. During the session in the Khadr case on November 8, 2007, the military judge, Col. Peter E. Brownback III, indicated that the record would be made available once it is authenticated, but gave no time frame for this to occur. I have been told the record will not be authenticated until after the final verdict is rendered and sentencing has occurred. If this is so, the public will have no access to motions, and other filings until long after the case is over.

14. The now-concluded prosecution of Australian David Hicks before another military commission demonstrated how the lack of effective access makes it difficult for the press or public to follow developments before military commission. On March 26,

2007, the day before his trial was to begin, Hicks agreed to a plea arrangement and entered a guilty plea. On March 30, 2007, Hicks was sentenced to a term of additional confinement in Australia and precluded from any communication with the press during his continuing confinement. Only later, after Hicks was gone from Guantanamo, was a redacted copy of the Record of Trial of the *Hicks* commission posted to the DOD website. (A copy of this Record can be viewed at [http://www.defenselink.mil/news/Mar2007/US%20v%20David%20Hicks%20ROT%20\(Redacted\).pdf](http://www.defenselink.mil/news/Mar2007/US%20v%20David%20Hicks%20ROT%20(Redacted).pdf).)

15. Moreover, it was only at this late date that the public and press were provided access to the accusations of misconduct Hicks had leveled before trial against the prosecutor in charge of his case. Until then there was no way to learn from the tribunal that on March 19, 2007 Hicks had moved to disqualify the chief prosecutor, Col. Morris D. Davis. Because I was covering the Hicks prosecution, I learned at the time that such a motion had been made, but when I requested a copy of the motion from OMC public affairs officials, I was told that the motion was “private between the judge and the lawyers.”

16. The redacted version of the *Hicks* Record of Trial contains several other requests for relief, and objections by the parties and rulings by the military judge, Col. Ralph H. Kohlmann. (A true and correct copy of the Filings Inventory in Hicks, released after the conclusion of the proceedings, is annexed as Exhibit E.) None of these documents was publicly released during the pendency of the proceedings.

## **PROCEDURES THAT FURTHER RESTRICT ACCESS**

17. Beyond the absence of timely public access to written submissions and rulings, I understand that the parties and judges involved in the on-going military commissions communicate with one another via email correspondence that includes various applications and legal arguments by the parties and rulings by the judges. These emails are not made available to the public, except by chance. A few emails have become public only because they happened to be attached to briefs filed with the Court of Military Commission Review ("CMCR").

18. For example, on September 25, 2007 an order scheduling Khadr's arraignment and setting a timetable for the submission of evidence on the critical issue of Khadr's status as an Unlawful Enemy Combatant was issued by email, and two days later an email order was issued granting a defense motion for a continuance. (A true and correct copy of these email rulings are attached hereto as Exhibit F.) The press and public can not possibly have an informed understanding of developments in the proceedings before the military commissions without contemporaneous access to such developments in the case.

19. We know from the now released Record of Trial in *Hicks* that motions, objections and rulings were made by email in that case, too. For example, on March 20, 2007 the prosecution objected to the presence of the accused at a Rule 802 conference. On March 21, 2007, the judge resolved various scheduling rulings, and ordered that the accused not be present at the Rule 802 conference. Later that day, the defense objected to any Rule 802 conference outside the presence of the accused. (A true and correct copy of these emails is attached hereto as Exhibit G.) All of these issues were communicated and

resolved via email. None of the emails was made publicly available during the pendency of the commission proceedings.

20. The issues being raised and resolved by email are the very issues that civilian courts routinely handle through publicly filed motions. As far as I am aware, these rulings issued by email in the commissions are not reduced to a form made contemporaneously available to the public, so there is no way for a reporter to track developments in the case. Without access to such information a reporter can not fully understand the status of a proceeding, the issues being raised and the positions being taken by the parties.

#### **SESSIONS CONDUCTED IN PRIVATE**

21. Closed-door Rule 802 conferences are also apparently being used to litigate substantive issues, such as jurisdictional questions and the scope of protective orders. In many instances, it is difficult to follow what is occurring in an open session because there are so many mentions of previous closed-door discussions and previously exchanged motions, rulings and other material that are not made public.

22. In particular, it appears from the presentations in open commission sessions that arguments have previously been made during private conferences, which apparently have been used to address substantive issues broader than scheduling or other routine, administrative matters.

23. For example, during the November 8, 2007 public session arguments were made on whether there would be a hearing on the key jurisdictional issue of whether Khadr is an "unlawful" enemy combatant. It was evident from the session that the prosecution had made an earlier proffer of what evidence it might present, but few of the

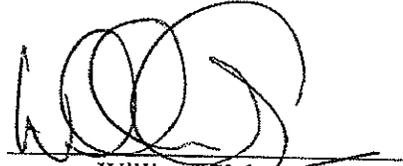
details of that proffer are known. The prosecutor was stopped from indicating the details about what evidence he was prepared to present in public session because of rulings that apparently had been made in the closed sessions. It is also known that on the eve of the November 8 hearing, in closed-door meetings, the prosecutors informed defense counsel of a witness with exculpatory information, but little has been disclosed about the nature of this information.

24. Finally, neither the transcripts of the open sessions nor written summaries of the Rule 802 conferences are publicly released in a timely fashion. It is my understanding that an oral or written summary of each Rule 802 conference is required to be entered into the record at the next commission session. While the judge delivers oral summaries, they are not adequately detailed to allow an observer to fully understand what transpired.

25. Transcripts are important for two reasons. First, conferences are held between the judge and the attorneys by phone or email, and reporters are not present. Second, at public hearings references are often made to matters resolved in non-public sessions. Without a transcript of what transpired it is often not possible to understand the comments or references made in the public session.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: New York, New York  
November 20, 2007



William Glaberson

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR  
a/k/a "Akhbar Farhad"  
a/k/a "Akhbar Farnad"  
a/k/a "Ahmed Muhammed Khali"

D-069

GOVERNMENT RESPONSE

To Defense Motion for Appropriate Relief  
(Public Trial)

25 July 2008

1. **Timeliness:** This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge's scheduling order of 19 June 2008.

2. **Relief Requested:** The Government respectfully submits that the Defense motion based on the Sixth Amendment's Public Trial Clause should be denied because (1) the accused is not entitled to the protection of the Sixth Amendment, and (2) even if the accused were entitled to such constitutional protection, the protective orders and other administrative procedures employed by this Commission with respect to the release of filings and rulings are reasonable accommodations of any public trial right the accused may possess. Accordingly, the Government respectfully requests that the Military Judge rule *both* that the Sixth Amendment's Public Trial Clause does not apply to the accused, *and* that, even if it does, the accused's rights have not been violated by this Commission's protective and other orders. Accordingly, the Government respectfully requests that the Defense Motion for Appropriate Relief be denied.

3. **Overview:**

a. An alien unlawful enemy combatant, such as the accused, who has been charged under the MCA, has no rights under the Public Trial Clause. The Supreme Court's holding in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), was narrow and limited to the extraterritorial reach of the Suspension Clause, U.S. Const. art I, § 9, cl. 2. That decision, like the Court's prior decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), was based on separation of power concerns and on the Court's concern with providing an appropriate vehicle for detainees to challenge their detention. Neither decision, however, concerned whether individuals could raise specific constitutional challenges in punitive matters, with respect to the Sixth Amendment or otherwise. With respect to such challenges, the Court's prior precedents in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), clearly refute any claim that the accused is entitled to the protections of the Sixth Amendment. The Defense Motion for Appropriate Relief should be denied.

b. Moreover, even if the Sixth Amendment's Public Trial Clause does apply to the accused in this case, the accused's treatment fully complies with the Constitution in general, and the Public Trial Clause in particular. The Supreme Court has held that in order to close a trial to the public consistent with the Public Trial Clause (1) the party seeking to close the hearing must advance an overriding interest that is likely to be

prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the trial court must consider reasonable alternatives to closing the proceeding; (4) and it must make findings adequate to support the closure. The restrictions at issue here—a delay in releasing pleadings and rulings—fall far short of closing trial. In any event, even analyzed under the above test, each of the restrictions challenged by the accused is reasonable and no broader than necessary to secure important governmental interests. The Defense Motion should be denied.

**4. Burden of Persuasion:** As the moving party, the accused bears the burden of persuasion on this motion. *See* Rule for Military Commissions (“RMC”) 905(c)(2)(A).

**5. Facts:**

a. Litigating military commissions presents unique security concerns not present in ordinary civilian trials. The accused’s trial will involve sensitive law enforcement information, as well as classified information. Moreover, the accused is confined on a military base in Guantanamo Bay, Cuba, during a time of war. That detention facility is responsible for detaining hundreds of other enemies of the United States, many of whom have been determined to be combatants who would return to the fight if released.

b. As part of this litigation, the Defense has received a significant amount of sensitive and classified information. Were this information to come into the possession either of detainees at Guantanamo Bay, or elsewhere, it could pose significant security risks to the United States and to those involved in gathering such information and safeguarding prisoners at Guantanamo.

c. In recognition of these significant security concerns, this Military Commission has entered numerous protective orders addressing security concerns raised by the Government. Such orders include a general one concerning sensitive and classified information, *see United States v. Khadr*, Protective Order #001, Protection of “For Official Use Only” “or “Law Enforcement Sensitive” Marked Information and Information with Classified Markings (9 Oct. 2007), as well as separate orders addressing discrete topics, which in some cases were partially addressed by Protective Order #001, such as the identities of intelligence personnel, *see United States v. Khadr*, Protective Order #002, Protection of Identities of Intelligence Personnel (12 Oct. 2007), the identities of witnesses, *see United States v. Khadr*, Protective Order #003, Protection of Identities of Witnesses (15 Oct. 2007), and procedures surrounding the operation of the detention facilities at Guantanamo Bay and elsewhere, *see United States v. Khadr*, Protective Order #7, Protection of Standard Operating Procedures for Detention Facilities at Joint Task Force—Guantanamo Bay and the Bagram Theatre Internment Facility (30 Jun. 2008). The Commission has also delayed the release of pleadings and rulings in order to provide time for the relevant security officers and Government agencies with law enforcement or intelligence equities to review the documents prior to release.

d. Moreover, because Guantanamo is both a military base, and specifically one housing hundreds of wartime enemies of the United States, access is restricted. That said, members of the press and of international human rights organizations have been

invited to attend all court proceedings in this case, and have in fact attended all or most such proceedings. Those spectators have written, reported, and blogged about the various events of each such proceeding, and have ensured that the accused's trial is well-publicized both in and outside the United States.<sup>1</sup>

## 6. Discussion:

### a. An alien unlawful enemy combatant, such as the accused, who has been charged under the MCA, has no rights under the Public Trial Clause of the Sixth Amendment.

i. The Public Trial Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial.” This right, however, does not extend to alien unlawful enemy combatants, such as the accused, who are detained at Guantanamo Bay, Cuba, to be tried for war crimes. *See Johnson v. Eisentrager*, 339 U.S. 763, 783-85 (1950).

ii. In *Boumediene*, the Supreme Court addressed a narrow question—whether the Suspension Clause of the Constitution, art. I, § 9, cl. 2, applies to alien enemy combatants detained at Guantanamo Bay, who are being held based solely upon the determination of a Combatant Status Review Tribunal. The Court concluded that uncharged enemy combatants at Guantanamo Bay must, after some period of time, be afforded the right to challenge their detention through habeas corpus. In reaching that conclusion, the Court considered both the historical reaches of the writ of habeas corpus, *see* 128 S. Ct. at 2244-51, and the “adequacy of the process” that the petitioners had received, *see id.* at 2262-74. The Court signaled no intention of extending the individual rights protections of the Constitution to alien enemy combatants tried by military commission.

iii. To the contrary, the Court emphasized that “[i]t bears repeating that our opinion does not address the content of the law that governs petitioners’ detention. That is a matter yet to be determined.” *Id.* at 2277. The Court emphasized that the petitioners in that case had been held for over six years without ever receiving a hearing before a judge, *see id.* at 2275, and the Court specifically contrasted the circumstances of the petitioners with the enemy combatants in *Quirin* and *Yamashita* who had received a trial before a military commission (albeit under procedures far more circumscribed than those applying here). The Court noted that it would be entirely appropriate for “habeas corpus review . . . to be more circumscribed”—if the court were in the posture of reviewing, not the detention of uncharged enemy combatants, but those who had held a hearing before a

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<sup>1</sup> The Government notes once again, *see United States v. Khadr*, D24 Government Response to the Defense’s Motion for a Continuance and Appropriate Relief from Terms of this Commission’s 28 November 2007 Schedule for Trial, at 2-4 (21 Feb. 2008), that notwithstanding the various protective orders of which the Defense now complains, lead Defense counsel has clearly not felt inhibited about publicizing his client’s case, both at home and abroad. *See, e.g.,* Michelle Shephard, *Campaign to Free Khadr Escalates*, *Toronto Star*, 7 Jan. 2008; *see also Khadr*, D24 Government Response, *supra*, at 2-4 (citing other examples of lead Defense counsel’s attempt to litigate this case in the media).

judgment of a military commission “involving enemy aliens tried for war crimes.” *See id.* at 2270-71.

iv. *Boumediene* thus was a decision concerning the separation of powers under the Constitution and the role that the courts may play, under the unique circumstances of detention at Guantanamo Bay, in providing for the judicial review of the detentions of individuals who had not received any adversarial hearing before a court or military commission. *See id.* at 2259 (“[T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers.”); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (plurality op.) (“[D]ue process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”). In considering whether the Suspension Clause would apply, *Boumediene* articulated a multi-factored test of which the first factor required consideration of “the detainees’ citizenship and status and the adequacy of the process through which status was determined.” *See id.* at 2237. In this case, there is no dispute that the accused is an alien, and he is being tried before a military commission established by an Act of Congress and with the panoply of rights secured by the MCA. If the accused chooses to contest his status an alien unlawful enemy combatant—something he has not done to-date before this Commission—the Commission will determine his status only after a full and fair adversarial hearing before the Military Judge.

v. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), a group of German nationals—who were captured in China by U.S. forces during World War II and imprisoned in a U.S. military base in Germany—sought habeas relief in federal court. Although the military base in Germany was controlled by the U.S. Army, *id.* at 766, the Supreme Court held that these prisoners, detained as enemies outside the United States, had no rights under the Fifth Amendment, *see id.* at 782-85. In so holding, the Court noted that to invest nonresident alien enemy combatants with rights under the Due Process Clause would potentially put them in “a more protected position than our own soldiers,” who are liable to trial in courts-martial, rather than in Article III civilian courts. *Id.* at 783. The Court easily rejected the argument that alien enemy combatants should have more rights than our servicemen and women, and held instead that the Fifth Amendment had no application to alien enemy combatants detained outside the territorial borders of the United States. *See id.* at 784-85 (“Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.”) (citation omitted).

vi. In *Boumediene*, the Supreme Court cited *Eisentrager* approvingly. *See, e.g.*, 128 S. Ct. at 2259 (“[T]he outlines of a framework for determining the reach of the Suspension Clause are suggested by the factors the Court relied upon in *Eisentrager*.”). The Supreme Court also “d[id] not question the Government’s position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over

Guantanamo Bay.” *Id.* at 2252. The Supreme Court in *Boumediene* expressly contrasted the petitioners in that case to the litigants in *Eisentrager*:

Applying this framework, we note at the onset that the status of these detainees is a matter of dispute. The petitioners, like those in *Eisentrager*, are not American citizens. But the petitioners in *Eisentrager* did not contest, it seems, the Court’s assertion that they were “enemy alien[s].” *Ibid.* In the instant cases, by contrast, the detainees deny they are enemy combatants. They have been afforded some process in CSRT proceedings to determine their status; but, unlike in *Eisentrager*, *supra*, at 766, there has been no trial by military commission for violations of the laws of war. The difference is not trivial. The records from the *Eisentrager* trials suggest that, well before the petitioners brought their case to this Court, there had been a rigorous adversarial process to test the legality of their detention. The *Eisentrager* petitioners were charged by a bill of particulars that made detailed factual allegations against them. To rebut the accusations, they were entitled to representation by counsel, allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution’s witnesses.

In comparison the procedural protections afforded to the detainees in the CSRT hearings are far more limited, and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review. . . .

*Id.* at 2259-60 (alteration in original) (citations omitted).

vii. Thus, in contrast to the *Eisentrager* petitioners who had received an adversarial trial and who were found not to enjoy constitutional protections, the *Boumediene* petitioners had not received a “trial by military commission for violations of the laws of war.” *Id.* at 2259. As the Supreme Court said, “The difference is not trivial.” *Id.* In reliance on such a distinction, the District Court in the recent habeas appeal of Salim Hamdan, which had sought to enjoin his then-imminent military commission, held that the differences between a robust trial by military commission under the MCA versus the much lower degree of process afforded the *Boumediene* petitioners made reliance on *Boumediene* largely inapposite with respect to military commission defendants:

Unlike the detainees in *Boumediene*, Hamdan has been informed of the charges against him and guaranteed the assistance of counsel. He has been afforded discovery. He will be able to call and cross-examine witnesses, to challenge the use of hearsay, and to introduce his own exculpatory evidence. He is entitled to the presumption of innocence. And, most importantly, if Hamdan is convicted, he will be able to raise each of his legal arguments before the D.C. Circuit, and, potentially, the Supreme Court.

*Hamdan v. Gates*, Civil Action No. 04-1519, Memorandum Order, at 12-13 (D.D.C. 18 July 2008) (denying motion for preliminary injunction of Hamdan’s military commission). Thus, *Boumediene* did not provide either Hamdan or Khadr with any rights under the Suspension Clause. It goes without saying that Khadr may not lay claim to any other rights referenced in the Constitution.

viii. Indeed, even if the Defense could claim an entitlement under *Boumediene* to rights under the Suspension Clause, the Supreme Court’s decision did not, in any terms, upset the well-established holdings that the Fifth Amendment and other individual rights principles of the Constitution do not apply to alien enemy combatants lacking any voluntary connection to the United States. The Supreme Court has recognized that the writ of habeas corpus historically has had an “extraordinary territorial ambit.” See *Rasul v. Bush*, 542 U.S. 466, 482 n.12 (2004). By contrast, the Court has made clear—in precedents that *Boumediene* did not question—that the individual rights provisions of the Constitution run only to aliens with a substantial connection to our country and not to alien enemy combatants detained abroad. See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); see also *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (finding “no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses”).

ix. Indeed, even when an alien is found within United States territory (as was the nonresident alien in *Verdugo-Urquidez*) the degree to which constitutional protections apply depends on whether the alien has developed substantial *voluntary* contacts with the United States. 494 U.S. at 271. The accused’s contacts with the United States, which consist solely of unlawfully waging war against the Nation and being detained in a U.S. military base, “is not the sort to indicate any substantial connection with our country.” *Id.*; see *Eisentrager*, 339 U.S. at 783 (finding “no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses”). As the *Eisentrager* Court explained, “[i]f [the Fifth] Amendment invests enemy aliens in unlawful hostile action against us with immunity from military trial, it puts them in a more protected position than our own soldiers” because “American citizens conscripted into the military service are thereby stripped of their Fifth Amendment rights and as members of the military establishment are subject to its discipline, including military trials for offenses against aliens or Americans.” *Id.*

x. *Boumediene*’s holding was premised on the unique role of habeas corpus in policing the separation of powers in our constitutional system, see *Boumediene*, 128 S. Ct. at 2259, and on a factual difference between *Eisentrager*’s petitioners and those in *Boumediene*: the former did not contest their *status* as enemy combatants; the latter did so contest their status and thus required a remedy in habeas. See *id.* Nothing in *Boumediene*, however, casts doubt on *Eisentrager*’s well-established (and subsequently applied) denial that the Constitution applies *in toto* to nonresident aliens. *Boumediene* certainly does not extend the Constitution’s individual-rights protections, contrary to *Eisentrager*, *Verdugo-Urquidez* and other cases, to alien unlawful enemy combatants before congressionally-constituted military commissions. To paraphrase the *Boumediene* Court itself, “if the [petitioner’s] reading of [*Boumediene*] were correct, the opinion

would have marked not only a change in, but a complete repudiation of” long-standing precedent. *Id.* at 2258. Because the Supreme Court did not disturb those holdings in *Boumediene*, they remain binding precedent before this Commission. As the Court explained in *Agostini v. Felton*, 521 U.S. 203 (1997), “if a precedent of this Court has direct application in a case, yet appears to rest on reason rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” *Id.* at 237-38 (quotation omitted); *see also Public Citizen v. U.S. Dist. Court for Dist. of Columbia*, 486 F.3d 1342, 1355 (D.C. Cir. 2007) (“The Supreme Court has repeatedly cautioned that ‘we should [not] conclude [that its] more recent cases have, by implication, overruled an earlier precedent.’”) (alteration in original) (quoting *Agostini*, 521 U.S. at 237). Thus, the recognition that *Boumediene* did not overrule those cases is sufficient in and of itself to deny the accused’s motion.

xi. Contrary to *Agostini*, the Defense would read *Boumediene* as, *sub silentio*, overruling the Court’s existing precedents and providing a multi-factored test for the analysis of other constitutional rights. It is clear, however, that the test enunciated by the Court to determine whether the Suspension Clause applied to the *Boumediene*-petitioners was specifically geared to measuring whether the Suspension Clause—and not any other constitutional provision—applies to those petitioners. *See id.* at 2237. That three-part test was clearly intended by the Court only to resolve the limited issue before it, and is inapposite to the question whether others portions of the Constitution apply to alien detainees at Guantanamo.

xii. Even so, under the functional analysis endorsed in *Boumediene* with respect to the Suspension Clause, enemy aliens abroad do not come within the protection of the Public Trial Clause. The Government has broad latitude when it operates in the international sphere, where the need to protect the national security and conduct our foreign relations is paramount. *See Haig v. Agee*, 453 U.S. 280, 292, 307-308 (1981); *see also Palestine Information Office v. Schultz*, 853 F.2d 932, 937 (D.C. Cir. 1988) (holding that, in applying constitutional scrutiny to challenged Executive action within the United States, court must give particular deference to political branches’ evaluation of our interests in the realm of foreign relations and selection of means to further those interests). In the international arena, distinctions based on alienage are commonplace in the conduct of foreign affairs. *See, e.g., DKT Memorial Fund, Inc. v. Agency for International Development*, 887 F.2d 275, 290-291 (D.C. Cir. 1989) (recognizing that the government speaks in the international sphere “not only with its words and its funds, but also with its associations”). Drawing a distinction between aliens abroad, on the one hand, and those who make up part of our political community, on the other hand, is a basic feature of sovereignty. *See Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982); *Foley v. Connelie*, 435 U.S. 291, 295-296 (1978); *cf. Mathews v. Diaz*, 426 U.S. 67, 80, 85 (1976) (recognizing that it is “a routine and normally legitimate part” of the business of the Federal Government to classify on the basis of alien status and to “take into account the character of the relationship between the alien and this country”). In this context, application of the Sixth Amendment to limit the political branches’ treatment of aliens abroad would improperly interfere with those branches’ implementation of our foreign policy and their ability to successfully prosecute a foreign war.

xiii. Under the functional analysis employed in *Boumediene* to determine the application of the Suspension Clause, it is clear that the Sixth Amendment public trial right should not apply in military commission proceedings of alien enemy combatants at Guantanamo. The “practical obstacles inherent” in application of the Public Trial Clause in this context, *see Boumediene*, 128 S. Ct. at 2237, are evident. These proceedings are wartime military commissions, that concern classified and other sensitive information to a degree that is virtually unheard of in civilian court. These differences were so profound that Congress, in the Military Commissions Act, enacted evidentiary procedures stricter than the Classified Information Procedures Act, 18 U.S.C. app. 3 (applicable in civilian courts) or the Military Rules of Evidence, including a national security privilege. *See, e.g., RMC 701(f); MCRE 505(e).*

xiv. The accused’s court proceedings are also being conducted on a military base in Guantanamo Bay, Cuba, where hundreds of other enemy combatants are detained. The logistical and security concerns at stake in holding such a trial there, and in having non-government personnel in attendance, are obvious. Likewise, these proceedings are far more likely than ordinary civilian trials to involve the potential disclosure of sensitive and classified information. It is clearly not possible to hold military commissions at Guantanamo Bay to the same standard as ordinary Article III tribunals at a downtown courthouse in the United States. Accordingly, it is impractical during a time of war to require a military commission at Guantanamo Bay, Cuba to be conducted on the same public trial terms as one conducted in an Article III court.

xv. Even as to U.S. citizens detained within the borders of the United States, to whom the Due Process Clause clearly applies, the Supreme Court has emphasized the need to take into account military exigencies, and to tailor otherwise applicable constitutional protections in order to “alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.” *Hamdi*, 542 U.S. at 533-534 (plurality op.). The Supreme Court has also recognized that military exigencies may justify tolling of applicable civil and criminal limitations periods, without regard to the Ex Post Facto Clause. *See Stogner v. California*, 539 U.S. 607, 620 (2003) (citing *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 503-05 (1870) (upholding tolling statute as valid exercise of Congress’s war powers). More directly on point—and highly persuasive for purposes of this case—the Supreme Court has recognized in the *Insular Cases* that not all constitutional trial rights apply even within U.S. sovereign territory where their application would be impracticable. *See, e.g., Balzac v. People of Porto Rico*, 258 U.S. 298, 311 (1922) (holding that jury trial right did not apply in sovereign U.S. territory of Puerto Rico, relying heavily on the practical difficulties of applying this right in a “distant ocean communit[y] of a different origin and language from those of” the continental United States); *Dorr v. United States*, 195 U.S. 138, 145 (1904) (noting that jury trial right was held not to apply in the Philippines on the basis that the territory was “wholly unfitted” for application of that constitutional provision and application of the right was, under the circumstances, both unnecessary and impracticable); *Ocampo v. United States*, 234 U.S. 91 (1914); *Hawaii v. Mankichi*, 190 U.S. 197 (1903). If practical considerations weighed against application of the jury trial right in Puerto Rico and the Philippines, then the even more significant practical impediments at issue in the context of this case surely preclude recognition of a Sixth Amendment public trial right on the

part of an alien enemy combatant being tried abroad for war crimes. And even if this Court were to hold that alien enemy combatants possess public trial rights during a war, any restrictions imposed on the Government should properly take into account the security concerns raised by trying a war criminal in the midst of a war.

xvi. Moreover, as the Court in *Ex parte Quirin*, 317 U.S. 1 (1942), explained, violations of the law of war do not constitute “crimes” or “criminal prosecutions” within the meaning of the Fifth and Sixth Amendments. *See id.* at 40 (“In the light of this long-continued and consistent interpretation we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.”). The Sixth Amendment provides in pertinent part that “[i]n all *criminal prosecutions, the accused shall enjoy the right to a . . . public trial.*” (Emphasis added.) Thus, the Amendment’s plain language makes clear that only an “accused” in a “criminal prosecution” has a right to a public trial under the Sixth Amendment. The Public Trial Clause is accordingly inapplicable, per *Quirin*, to this Military Commission.<sup>2</sup>

**b. Even if the accused were to possess constitutional rights under the Public Trial Clause, his detention fully complies with the Sixth Amendment.**

i. The accused claims that his detention violates the Sixth Amendment’s guarantee “[i]n all criminal prosecutions” of a “public trial.” However, the MCA guarantees a full and public trial. For example, section 949d(d) of the MCA provides that military commissions shall generally be open to the public, subject only to narrow exceptions to protect classified information or to ensure the physical safety of individuals. *See also* RMC 806(a) (“Except as otherwise provided in the M.C.A. and this Manual, military commissions shall be publicly held.”). The requirements of the MCA and Manual for Military Commissions, and the procedures adopted by this military commission, clearly refute the accused’s argument that he has been denied a public trial. *Cf. United States v. Lonetree*, 31 M.J. 849, 854 (N.M.C.M.R. 1990) (upholding partial closing of court-martial proceedings to protect classified evidence), *remanded on other grounds*, 35 M.J. 396, 414 (C.M.A. 1992).

ii. The Supreme Court has held that in order to close a trial to the public consistent with the Public Trial Clause (1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the trial court must consider reasonable alternatives to closing the proceeding; (4) and it must make findings adequate to support

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<sup>2</sup> Although courts-martial apparently have rejected application of *Quirin*’s “military exclusion” to the Public Trial Clause, *see United States v. Grunden*, 2 M.J. 116, 120 n.3 (C.M.A. 1977), Congress has expressly made such holdings not binding on this Commission. *See* 10 U.S.C. § 948b(c) (“The judicial construction and application of [the UCMJ] are not binding on military commissions established under [the MCA].”).

the closure. *Waller v. Georgia*, 467 U.S. 39, 48 (1984). That test is easily met here by the Commission’s protective and other orders.<sup>3</sup>

iii. With respect to the first factor, hearings involving the accused may be closed only under narrow circumstances. Under Rule for Military Commissions 806, the accused is entitled to a public trial. The “public” has been reasonably defined to include “representatives of the press, representatives of national and international organizations . . . and certain members of both the military and civilian communities.” RMC 806(a). The various reasons permitted in the Manual for Military Commissions for closing or limiting attendance at hearings clearly *do* advance overriding governmental interests that are otherwise likely to be prejudiced, *see Waller*, 467 U.S. at 48, such as limiting the number of spectators “to maintain the dignity and decorum of the proceedings,” RMC 806(b)(1)(A); “protecting information the disclosure of which could reasonably be expected to damage national security, including intelligence or law enforcement sources, methods, or activities,” RMC 806(b)(2)(A); “ensuring the physical safety of individuals,” RMC 806(b)(2)(B); and approving protective orders to prevent parties and witnesses from making prejudicial extrajudicial statements, RMC 806(d). In addition, although photography and broadcasting of the trial are prohibited, *see* RMC 806(c), representatives of the press are expressly permitted to attend, and in fact have been invited to attend all court proceedings. Moreover, it is worth noting that cameras are virtually never permitted in federal court, and to hold that they must be permitted in military commissions would suggest that federal district courts throughout the U.S. are violating

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<sup>3</sup> Although the accused cites numerous cases in support of his claim, many are First Amendment cases, not Sixth Amendment ones. To the extent any of these cases support his claim of a right to a public trial, such a First Amendment right belongs to the media or public, rather than to the accused (since the accused has advanced no argument that his trial constitutes expressive activity protected by the First Amendment). Accordingly, the accused has no standing to raise such First Amendment claims. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 n.2 (2004) (“We have adhered to the rule that a party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”) (internal quotation marks omitted); *County Court of Ulster County v. Allen*, 442 U.S. 140, 154-55 (1979); *see also United States v. Salerno*, 481 U.S. 739, 745 (1987).

Further, the equities implicated in the context of the First Amendment differ from those under the Sixth Amendment. For example, the accused cites cases such as *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006), and *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994), for the proposition that “[o]ur public access cases and those in other circuits emphasize the importance of immediate access where a right to access is found.” *Lugosch*, 435 F.3d at 126. However, the First Amendment interest of media organizations—even if they were applicable here—are based on an immediate need for a filing in order to disseminate the information to the public. Given that the accused has access to all the information in question, there is little risk of prejudice to him should there be a slight delay in releasing such documents to the public. (This of course assumes that Defense counsel intend to try this case in the courtroom, rather than in the media. In any event, despite Defense counsel’s numerous public statements and appearances, *see, e.g., Associated Press, Lawyers Call on Britain to Press Canada Over Young Guantanamo Detainee*, Int’l Herald Tribune, 20 Nov. 2007, Defense counsel is not a member of the media.) Moreover, the restrictions here, even *vis-à-vis* media organizations, are narrowly tailored to meet a compelling interest (i.e., national security, law enforcement equities, safety of witnesses), and therefore would easily meet strict scrutiny under the First Amendment, were that Amendment applicable to the instant question.

the Public Trial Clause of the Constitution every single day. To state that argument is to refute it.<sup>4</sup>

iv. The Defense claims that a number of the protective orders that have been entered are “draconian (and duplicative),” Def. Mot. at 2, and suggests that such orders violate any public trial right the accused may have. With respect to Protective Order #7, the Defense goes even further, alleging that “Protective Order No. 7 literally *serves no other purpose* than to violate Mr. Khadr’s right to a public trial,” *id.* (emphasis in original), as if the intent of this Commission is to deprive the accused of a fair trial. To the extent *Waller’s* four-factor test is applicable to the protective orders in this case, each of these restrictions is more than reasonable.

v. Protective Order #001 is a general protective order, intended only “to provide general guidance regarding the described documents and information.” *United States v. Khadr*, Protective Order #001, Protection of “For Official Use Only” “or “Law Enforcement Sensitive” Marked Information and Information with Classified Markings, at 1 (9 Oct. 2007). This order regulates the disclosure of certain law enforcement material and materials For Official Use Only (“FOUO”). The order also familiarizes the parties with the relevant rules governing the treatment of classified information. In addition, the order regulates the parties with respect to disclosing information learned from the Commission-process in books, articles, and speeches, and lays out a pre-authorization process for disclosure. The order also sets forth a procedure for obtaining exceptions to the order, and the order is of course subject to reconsideration by the Commission, *see* RMC 905(f).

vi. The other protective orders challenged by the accused clarify and amplify general Protective Order #001. Protective Order #002, for example, protects the identities of intelligence personnel, by permitting disclosure within the Defense team to those with “an official need to know,” but limiting disclosure in open court or in unsealed filings. *United States v. Khadr*, Protective Order #002, Protection of Identities of Intelligence Personnel, at 1 (12 Oct. 2007). Although some of this information may be classified or FOUO, and therefore within the scope of Protective Order #001, some of it

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<sup>4</sup> Other cases cited by the accused in support of his claim are inapposite. For example, in *United States v. Brown*, 22 C.M.R. 41 (C.M.A. 1956), *overruled on other grounds by United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977), the Court of Military Appeals set forth numerous categories with respect to which public access *could* be eliminated. *See Brown*, 22 C.M.R. at 46 (“The civilian courts have recognized that the right is subject to certain limitations and exceptions. Spectators having no immediate concern with the trial need not be admitted in such numbers as to overcrowd the courtroom or displace space needed for those who do have special concern with the trial, such as court officers, jurors, and the relatives and friends of the accused. Anyone whose conduct interferes in any way with the administration of justice may be removed. Where a child is a witness and cannot testify coherently before an audience, it is permissible for the court temporarily to exclude the public in order that competent testimony may be obtained. Youthful spectators may be excluded in cases where the evidence is likely to involve the recital of scandalous or indecent matters which would have demoralizing effect on immature minds.”) (citations omitted). Similarly, the Court of Military Appeals in *United States v. Hershey*, 20 M.J. 433 (C.M.A. 1985), conceded that the Sixth Amendment public trial right is flexible enough to accommodate national security concerns. *See id.* at 436.

may be outside Protective Order #001's scope. However, even if everything in Protective Order #002 was encompassed by Protective Order #001, that would still not violate any public trial right. Safeguarding identities of intelligence personnel is critical to our Nation, as well to the safety of the intelligence personnel who risk their safety and even lives to gather intelligence material. A bit of redundancy between protective orders is a small price to pay to safeguard the welfare of such individuals. Moreover, to the extent everything within Protective Order #002 comes within Protective Order #001, the accused would not be prejudiced by Protective Order #002, since it would go no further than Protective Order #001.

vii. Similarly, Protective Order #003 governs the protection of the identities of witnesses. That order expressly permits the disclosure of witness information to members of the Defense team with an official need to know. The order also sets a timetable for the Prosecutor to raise objections to particular witnesses being disclosed to the accused or public. Once again, this protective order permits the Defense to file a motion for an exception from the order. *See United States v. Khadr*, Protective Order #003, Protection of Identities of Witnesses (15 Oct. 2007). To the extent the Defense believes it should be permitted to disclose the name of a particular witness, the Defense can seek an exception to this order.

viii. Protective Order #7 governs Defense disclosure of Standard Operating Procedures for detention facilities at Guantanamo and Bagram. *See United States v. Khadr*, Protective Order #7, Protection of Standard Operating Procedures for Detention Facilities at Joint Task Force—Guantanamo Bay and the Bagram Theatre Internment Facility (30 Jun. 2008). Although some of this material may be covered by Protective Order #001, the purpose of Protective Order #7, like the other protective orders discussed above, is both to clarify and amplify the scope of general Protective Order #001. Given the strong security and intelligence equities implicated in each of these protective orders, and given the importance of this information to our Nation, it is wholly appropriate that Defense counsel be on full notice as to what disclosures are, and are not, permitted, and to flesh out the very general prohibitions of Protective Order #001. These protective orders are therefore not only constitutional, but eminently sensible.

ix. In addition, as discussed above, the Commission has delayed the release of pleadings and rulings in order to provide time for the relevant security officers and those with equities in sensitive or classified information to review the documents prior to release. Assessing what information is sensitive or classified, and what is not, is not always easy, and cannot be the exclusive province of the Defense or be improperly rushed. The current procedures permit the parties carefully to assess whether a filing should be released to the public, and provide an opportunity to avoid inadvertent disclosure of sensitive or classified information. *See also* Mil. Comm'n's Trial Judiciary R. Ct. 3.9. Such prophylactic procedures are essential to safeguarding our Nation's secrets and the safety of witnesses.<sup>5</sup>

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<sup>5</sup> The Defense claims that "[t]he prosecution in this very case has used this as a tool to restrict the flow of information about defense motions." Def. Mot. 2. Moreover, the Defense has impugned the

x. With respect to the second factor, that the closure must be no broader than necessary to protect that interest, the above restrictions are not intended to, and do not have the effect of, preventing the Defense from allowing the media and others to observe the pre-trial and trial proceedings. Pleadings and rulings are made available to the public, with a reasonable delay to accommodate the unique intelligence and law enforcement realities of wartime military commissions. The second factor is thus easily met as well.

xi. With respect to the third and fourth *Waller* factors, the Commission must consider reasonable alternatives to closing the proceeding. The protective orders in this case are reasonable accommodations to intelligence and law enforcement needs, as described above, and represent a reasonable balance of the various interests involved. Moreover, the protective orders expressly permit exceptions and can be modified by the Military Commission to adapt to any change in circumstances. The orders do not represent a complete news-blackout, as the Defense would have it, but rather a reasonable accommodation of the sensitive interests involved in this Commission. Similarly, with respect to the fourth factor, the Military Commission has heard extensive argument on the various protective orders and determined that the orders are necessary to protect classified and sensitive information.<sup>6</sup>

### c. Conclusion

i. Alien unlawful enemy combatants, such as the accused, held outside the sovereign borders of the United States who have no connection to the United States other than their confinement possess no rights under the Sixth Amendment. Moreover, even if the accused were to possess rights under the Public Trial Clause, the reasonable restrictions imposed upon the release of pleadings and rulings related to this trial, as well as other restrictions on the press and public's participation in this trial, are reasonable and narrowly tailored. Accordingly, the accused's public trial rights, to the extent he has any, have not been violated.

ii. The Government respectfully requests that the Military Judge rule *both* that the Public Trial Clause does not apply to the accused, *and* that, even if it does, the accused's rights have not been violated by this Commission's protective and other orders.

**7. Oral Argument:** In view of the authorities cited above, which directly, and conclusively, address the issues presented, the Government believes that the motion to

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motives of trial counsel, by claiming that "the practical (*and almost certainly intended*) effect of which is to make it impossible for representatives of the news media to follow and understand the proceedings of the Commission when in session." *Id.* (emphasis added). The Defense provides zero support for its claim that trial counsel's goal is to confuse the media, rather than to protect the Government's strong interest in FOUO, law enforcement, classified and other sensitive information. To be clear, the intended goal of the various protective orders is to ensure that classified and sensitive information is safeguarded. The goal is *not* to confuse the media. As to Defense counsel's baseless impugning of the motives of trial counsel, we leave it for the Military Judge to decide whether such accusations become an officer of this Commission.

<sup>6</sup> To the extent the Military Judge has not made specific written findings when issuing the orders, the Prosecution invites the Military Judge to do so if he believes it necessary.

dismiss should be readily denied. Should the Military Judge orders the parties to present oral argument, the Government is prepared to do so.

**8. Witnesses and Evidence:** All of the evidence and testimony necessary to deny this motion is already in the record.

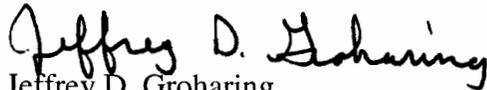
**9. Certificate of Conference:** Not applicable.

**10. Additional Information:** None.

**11. Attachments:**

- a. *Hamdan v. Gates*, Civil Action No. 04-1519, Memorandum Order (D.D.C. 18 July 2008).
- b. *United States v. Khadr*, D24 Government Response to the Defense's Motion for a Continuance and Appropriate Relief from Terms of this Commission's 28 November 2007 Schedule for Trial (21 Feb. 2008).
- c. Michelle Shephard, *Campaign to Free Khadr Escalates*, Toronto Star, 7 Jan. 2008.
- d. Associated Press, *Lawyers Call on Britain to Press Canada Over Young Guantanamo Detainee*, Int'l Herald Tribune, 20 Nov. 2007.

**12. Submitted by:**

  
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UNITED STATES OF AMERICA )  
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v. )  
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)  
OMAR AHMED KHADR )  
a/k/a "Akhbar Farhad" )  
a/k/a "Akhbar Farnad" )  
a/k/a "Ahmed Muhammed Khali" )

**ORDER**

**Defense Motion for  
Appropriate Relief  
D069**

(Right to Public Trial)

1. The Defense requests that the filings of the parties and rulings of the Commission be made publicly available within a reasonable time after the filings and/or rulings are made. The Defense more specifically requests that it be allowed to communicate the substance of its filings (i.e., disseminate appropriately redacted copies) to the public at any time irrespective of the Military Commissions Trial Judiciary Rules of Court (Rules of Court). Both parties submitted this motion on the briefs without benefit of oral argument.
2. The Rule of Court 3.9 addresses when pleadings by either party may be released to the public. These reasonable rules were issued under the authority of the Chief Trial Judge, Military Commissions Trial Judiciary. These rules help to ensure the sound administration of justice for all parties. There is nothing in these rules which prejudice the accused or others in any manner. The Commission is not aware of any matter in which the Commission has improperly withheld any filing or ruling or failed to facilitate the release of such materials under Rule of Curt 3.9.a. The Commission invites the parties' attention to Rule of Court 3.9.d.
3. The Defense's request to be exempt from the Rules of Court is denied.

So Ordered this 14<sup>th</sup> day of August 2008.

  
Patrick J. Parrish  
COL, JA  
Military Judge