

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID
 MUHAMMAD SALIH MUBARAK BIN
 ‘ATTASH, RAMZI BIN AL SHIBH, ALI
 ABDUL-AZIZ ALI, MUSTAFA AHMED
 ADAM AL HAWSAWI

AE400B(AAA)

Mr. al Baluchi’s Motion to Join
 Press Movants’ Motion to Unseal 30 October
 2015 Transcript of Public Proceedings

20 January 2016

1. **Timeliness**: This supplement is timely pursuant to the schedule ordered in AE400A.¹

2. **Relief Sought**: Mr. al Baluchi respectfully requests to join AE400 Press Movant’s Motion to Unseal 30 October 2015 Transcript of Public Proceedings, adopting and incorporating the facts and arguments while also supplementing the following arguments.

3. **Overview**: AE400 accurately describes the First Amendment issues raised by the government’s retroactive classification of facts which were aired publicly, without restriction, and directly to media observers. Mr. al Baluchi concurs with the arguments made in AE400, and would also advance the argument that the same facts constitute a clear violation of his Sixth Amendment right to a public trial.

4. **Law and Argument**

Mr. al Baluchi agrees with the First Amendment arguments offered in AE400, but would add that the defendant’s Sixth Amendment right to a public and open trial² is perhaps of even greater gravity than the public’s First Amendment interest in observing proceedings.³ This right

¹ Trial Conduct Order, Press Movants’ Motion to Unseal 30 October 2015 Transcript of Public Proceedings.

² As well as under R.M.C. 806(a): “Military Commissions shall be publicly held.”

³ See *Waller v. Georgia*, 467 U.S. 39,46 (1984) (“[T]here 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”). Mr. al Baluchi has advanced similar arguments in greater detail in AE013E Mr. al Baluchi’s Motion to Join and Adopt the American Civil Liberties Union Motion for Public Access to Proceedings and Records and AE014D Defense

is exceptionally broad – no showing of specific prejudice is required and “must necessarily be implied,”⁴ because open proceedings “enhance[] the quality and safeguards the integrity of the fact finding process, with benefits to both the defendant and to society as a whole.”⁵

On its face, the government’s suppression of transcripts is analyzed under the same test as closure of proceedings,⁶ and the government *must* therefore (1) advance an “overriding interest” that is likely to be prejudiced (2) with a scope no broader than necessary to protect that interest, and, (3) in the view of the court, there must be a lack of reasonable alternatives (4) with adequate findings to support that conclusion.⁷ Further, “the mere assertion of national security concerns by the Government is not sufficient reason to close a hearing or deny access to document,”⁸ and courts have in some instances rejected national security claims in favor of the defendant and the public’s right to public proceedings.⁹ This issue cannot and must not be settled by the government’s mere invocation of national security interests, especially when it did not raise its classified information privilege contemporaneously.

The government has yet to offer its justification for the redactions of the 30 October 2015 hearing, but it is difficult to foresee how what legitimate interest is advanced by a retroactive attempt to censor information weeks after the government willingly released it to numerous media outlets. Nor is it clear how retroactive redactions can, at this point, meet the *Press-*

Supplement to Defense Response to Government’s Motion for Order to Protect Unclassified Discovery Material Where Disclosure Would Be Detrimental to the Public Interest, incorporated here by reference.

⁴ *Id.* at 49 & 49, fn. 9.

⁵ *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982).

⁶ *See Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty.*, 464 U.S. 501 (1984).

⁷ *Id.* at 509-11.

⁸ *United States v. Moussaoui*, 65 Fed. Appx. 881, 887 (4th Cir. 2003).

⁹ *See, e.g., United States v. Rosen*, 487 F. Supp. 2d 703, (E.D.Va. 2007).

Enterprise test. The military commission should grant the motion and allow public access to the transcript of the 30 October 2015 proceedings.

5. **Request for Oral Argument:** The defense requests oral argument.

6. **Conference with Opposing Counsel:** The prosecution has stated that it does not oppose the motion for joinder; its position on the Press Movants' motion remains the same.

7. **Attachments:**

A. Certificate of Service

Very respectfully,

//s//
JAMES G. CONNELL, III
Detailed Learned Counsel

//s//
STERLING R. THOMAS
Lt Col, USAF
Detailed Military Defense Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 20th day of January, 2016, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//

JAMES G. CONNELL, III

Learned Counsel