

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

ABD AL RAHIM HUSSAYN  
MUHAMMAD AL NASHIRI

**AE372 (PRESS) (AL-NASHIRI)**

**PRESS MOVANTS' OBJECTION  
TO CLOSURE OF TESTIMONY  
TAKEN FROM THE ACCUSED**

19 January 2017

1. **Timeliness.** This motion is timely filed pursuant to the Military Commissions Trial Judiciary Rules of Court ("RC"), Rule 3.7, and the Regulation for Trial by Military Commission ("RTMC"), Regulation 19-3(c).<sup>1</sup>
2. **Relief Requested.** Movants respectfully request that any testimony from the Accused be taken in open session to the full extent required by the First Amendment to the United States Constitution. *See Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1, 15 (1986) ("*Press-Enterprise I*"); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). In particular, Movants seek to ensure their access to testimony by Mr. al-Nashiri in connection with AE359, the pending defense motion for an order requiring the Accused to be housed at the Expeditionary Legal Complex during hearings in this case.
3. **Overview.** This motion is made pursuant to Regulations 19-3(c) & (d) of the RTMC by The Miami Herald, ABC, Inc., Associated Press, Bloomberg L.P., CBS Broadcasting Inc., Chicago Tribune Company, LLC, Dow Jones & Company, Inc., First Look Media Works, Inc., Hearst Corporation, Inc., Los Angeles Times Communications LLC, The McClatchy Company,

---

<sup>1</sup> The qualifications of the undersigned are annexed hereto as Attachments A-B.

NBCUniversal Media, LLC, The New York Times Company, Reuters America LLC (Reuters), and WP Company LLC (d/b/a The Washington Post) (collectively, the “Press Movants”). Press Movants seek to enforce their constitutional right of access to the proceedings of this Commission. *United States v. Abd al Rahim Hussayn Muhammad al Nashiri* (“*al-Nashiri*”), AE127A/AE128B/AE159A at 2 (citing *Press-Enterprise II*, 478 U.S. at 1); *United States v. Khalid Shaikh Mohammad* (1) (“*KSM* (1)”), D-104. Pursuant to that constitutional right, the press and public “must be given an opportunity to be heard” before a Commission proceeding is closed. *See, e.g., Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 609 n.25 (1982) (citation omitted); AE127A/AE128B/AE159A at 3; RTMC, Regulation 19-3(c).<sup>2</sup> The Commission may only properly close a proceeding upon a factual record establishing that there exists a substantial probability of harm to a compelling governmental interest if testimony is taken in public session. *E.g., Press-Enterprise II*, 478 U.S. at 13-14.

4. **Burden of Proof.** The party seeking to limit the constitutional access right and close a Commission proceeding bears the burden of proof and must present facts sufficient to justify an abridgement of the access right. *Id.*; *see also, KSM*, AE400L at 4 (noting that the Government must meet “the requirements to withhold the information at issue from the public”).

5. **Statement of Facts.** On 7 September 2016, counsel for Mr. al-Nashiri filed a motion requesting an order permitting “that he remain in the holding area in the ELC during the nights” when the Commission is in session. AE359 at 1. Mr. al-Nashiri argues that transport from

---

<sup>2</sup> A number of news and public advocacy organizations have previously been heard on requests for access to the records and proceedings of the Commissions, including in this proceeding. *See, e.g.,* AE159 (15 May 2013); AE127 (1 Oct. 2012); AE093B (12 July 2012); AE065 (5 Apr. 2012); *United States v. Khalid Shaikh Mohammad* (2) (“*KSM*”), AE459 (17 Oct. 2016); *id.*, AE400 (8 Jan. 2016); *id.*, AE083 (3 Oct. 2012); *id.*, AE081 (1 Oct. 2012); *id.*, AE013F (16 May 2012); *id.*, AE013A (2 May 2012).

Camp 7 to the ELC is untenable because it makes him “dizzy and ill to the point of vomiting.” *Id.* at 2. If he takes medicine to prevent that nausea, he asserts that he has “difficulty staying awake and concentrating” at the hearings. *Id.* Moreover, once he returns to Camp 7, “it is difficult for him to reflect on the day’s events and prepare for the next day.” *Id.* If he were to be housed at the ELC during proceedings, however, he asserts that these problems would be avoided. *Id.* at 1-2. Mr. al-Nashiri requested oral argument and an evidentiary hearing on his motion, “closed, if necessary.” *Id.* at 4.

The Government opposed the motion. AE359A at 1-2. According to the Government, the defense motion “asks the Commission to overturn [Commander, JTF-GTMO] policies and order the Commander, JTF-GTMO, to set aside his operational decisions, redirect resources from detention facilities . . . , and otherwise ignore established policies that enable the Commander to effectively manage the detention facilities.” *Id.* at 4-5. Moreover, the Government asserts, it does so despite the policies being “reasonably related to a legitimate government interest.” *Id.* at 5-6. The Government similarly opposed Mr. al-Nashiri’s request for an evidentiary hearing and for oral argument. *Id.* at 9. Specifically, the Government argued that Mr. al-Nashiri’s failure to “offer even a scintilla of evidence” relating to his motion, should preclude his request for “an evidentiary hearing where he can rummage through the security protocols of the JTF.” *Id.*

Shortly after the Government filed its opposition, the defense, on 4 October 2016, additionally “requested two witnesses to testify in support of AE359,” including Commander, JTF-GTMO, or his designee responsible for ELC security and the Senior Medical Officer responsible for Mr. al-Nashiri’s medical care. AE359B at 2-4. The Government opposed that motion as well based on its previous arguments. AE359C. On 15 November 2016, this

Commission granted the 4 October motion and ordered that the Government produce the Commander or his designee and the SMO. AE359E.

On 22 November 2016, counsel for Mr. al-Nashiri filed a notice in accordance with 10 U.S.C. § 949p-5 and Military Rules of Evidence, Rule 505(g) that it intended to present evidence in a hearing on AE359 that the Government might believe is classified. AE359F. Those topics included (1) “the number of troops available to guard the detainees at GTMO,” (2) “the number of troops assigned to the ELC,” (3) “the number of troops available to guard the ELC during the evening if Mr. Al-Nashiri remains at the ELC,” (4) “the physical setting at the ELC and the difficulty of escape,” (5) “the availability of food for the accused at the ELC,” (6) “the procedures used to bring food to Camp Seven,” (7) “the general nature of the road between Camp Seven and the ELC- i.e. flat, hilly, number of curves, etc.,” and (8) “the method of transportation of the accused between the ELC and Camp Seven.” *Id.* at 1-2. Thereafter, on 29 November 2016, the Commission issued a docketing order docketing AE359 for the December 2016 hearing. AE366.

In an 11 December 2016 Rule 802 conference, the Commission discussed with counsel for the parties “hearing the unclassified testimony in AE359” for the two Government personnel the defense sought to examine. 12 Dec. Tr. 7162:20-22. The Commission also noted the need to hold a 505(h) hearing on the remaining testimony concerning AE359. *Id.* at 7163:22-7164:2. On 13 December, the Commission held that 505(h) hearing. 13 Dec. Tr. 7414:10-11.

The next day, the Commission issued its ruling on the 505(h) hearing. AE359G. In that ruling, the Commission explained that the defense had filed its notice because “it reasonably expects to disclose, or cause the disclosure of, classified information in connection with testimony and oral argument pursuant to AE359.” *Id.* at 1. The Commission found that the

information listed above and in AE359F was “relevant for a fair determination of the issues” in AE359. *Id.* It further concluded that such information was classified and that there was “a compelling government interest in preventing public disclosure of th[at] information.” *Id.* at 2. Notably, the Commission found that limited closure was appropriate “[o]nly [for] the portion of proceedings *directly pertaining to the classified information identified by the Defense.*” *Id.* (emphasis added). It added: “Closure of *a portion of the proceedings* will protect the classified information at issue by preventing disclosure” to those “who do not hold the requisite security clearance.” *Id.* (emphasis added).

The outlines of that ruling have also been discussed publicly by the parties. During testimony by the SMO regarding medical records, chief prosecutor BG Mark Martins stated that “in the 505(h) proceeding in which we mapped out use, relevance and admissibility, the government’s understanding was that the [public] testimony . . . would be general testimony of the witness that truly would not start bearing upon manning, procedures, different aspects of the running of the facility.” 15 Dec. Tr. 7637:4-9. In response, the Commission explained that “[w]e are in an unclassified session and all she is asking about in her last question is: Do you keep medical records? We know that. We had an unclassified session yesterday where medical records were discussed in front of the world.” *Id.* at 7637:18-22. The Commission reminded BG Martins that he has “said frequently in public these should be as open as possible.” *Id.* at 7638:4-5. BG Martins acknowledged his statements but asserted that the line of questioning should be done in closed session. *Id.* at 7640:14-21. In response, counsel for Mr. al-Nashiri, Mr. Richard Kammen, expressed his confusion. “We are just like really lost here, because we thought we mapped out” the classified topics at the 505(h) hearing. *Id.* at 7641:10-12. The Commission agreed, explaining that the 505(h) ruling was that “most of this would be public.” *Id.* at 7641:13,

15-16. Ultimately, the Commission and the parties agreed to discuss the dispute in the 16 December 806 hearing. *Id.* at 7643:9-10.

The parties then turned to a discussion regarding whether Mr. al-Nashiri would testify on AE359. According to Mr. Kammen, “[w]e had left it open as to whether Mr. al-Nashiri would testify. We need to consult with him, if we could take a short recess. . . . Because when we came in this morning, it was our thinking he would testify briefly.” *Id.* at 7650:11-16. But in light of BG Martins’ objections to the SMO’s testimony, Mr. Kammen explained, “Now, that raises a host of issues given where we are, because I thought that any testimony he would give would be sufficiently general that it would be unclassified, but I am less confident of that now.” *Id.* at 7650:18-21. The Commission then had the following exchange with counsel:

MJ [Col SPATH]: . . . I’m not going to guess what your client would testify to. But if I were to guess, I would assume it would be generally responding to questions about conditions that he is concerned about leading to the motion that’s unclassified that we are dealing with, and the medications around that. Am I reasonably within that?

LDC [MR. KAMMEN]: That, as well as very general description—and I’m talking general to the point of meaningless in our view—essentially what he would try to articulate for the court is he is—he would be giving up a lot of comfort to stay here for three or four days, and so—

MJ [Col SPATH]: Conditions where he is versus conditions here.

LDC [MR. KAMMEN]: Yes. And so that bears, because it’s important to him to be here.

MJ [Col SPATH]: I understand.

LDC [MR. KAMMEN]: And he really wants the court to understand how important it is, and part of that is how difficult it is, you know, given everything, and he is willing to give up the comforts, such as they are, to make sure he can be here. And that would be generally.

MJ [Col SPATH]: We will do a 505 hearing this afternoon. General Martins, so given that, I assume you have concerns about many of those areas?

CP [BG MARTINS]: Not necessarily, Your Honor. I mean, we haven't received, as I understand it, a 505(g) notice from counsel.

\*\*\*

LDC [MR. KAMMEN]: I just want to say this. We did consult. And the problem here: This is Guantanamo. The ball keeps moving. You can never pin these folks down about what is classified. We had an understanding earlier this week. All of a sudden, it changed. That is Guantanamo on steroids, and that infects everything.

MJ [Col SPATH]: Even I'm flummoxed at the moment, and I thought I had a good understanding based on our discussions yesterday. So yes, I am going to give you some time, just with the understanding that it could be a combination of either some public, some in an 806, all in an 806. But I understand the information you want to get to me is part of your burden to support the motion that is before the court in an unclassified version.

*Id.* at 7651:4-7653:17.

Upon being alerted of the potential for Mr. al-Nashiri to give unclassified testimony in closed session, the *Miami Herald* immediately objected to closure through an email sent by counsel to Mr. Kammen, BG Martins, and other Office of the Military Commission personnel. The email objected "to the taking of testimony from Mr. al-Nashiri in a closed session without hearing from the press, and without factual findings explaining why a closed session is essential, specifically demonstrating a substantial probability of harm to a compelling interest if the testimony is taken in public." The undersigned is informed that the Commission was notified of this objection during the 505(h) hearing on 13 December, and agreed to afford the press an opportunity to be heard on the issue.

6. **Legal Basis for Relief Requested.** "Articulated judicial policy is to encourage media and public access to all Commission proceedings." *KSM*, AE081A at 3; *see also*, RC, Rule 6-1 ("the Military Judge will ensure all Commission proceedings are as open and transparent as possible."). For precisely that reason, this Commission has previously stated that "most of th[e

testimony on AE359] would be public,” *see* 15 Dec. Tr. 7641:13, 15-16, and further ruled that only testimony “directly pertaining to the *classified* information” would be held in closed session, AE359F at 2 (emphasis added).

Because the Government has provided no reason to deviate from Commission policy and the Commission’s past ruling allowing only limited closure for classified material, and because the Government has not carried its heavy burden to overcome Press Movants’ constitutional right of access to the hearing on AE359, this motion should be granted and the testimony of Mr. al-Nashiri should be taken in open session.

### I.

#### **THE GOVERNMENT CANNOT OVERCOME THE PUBLIC’S QUALIFIED RIGHT OF ACCESS TO THE ACCUSED’S TESTIMONY**

The First Amendment “protects the public and the press from abridgment 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). It has long been recognized that, under our Constitution, a “trial is a public event” and “[w]hat transpires in the court room is public property.” *Craig v. Harney*, 331 U.S. 367, 374 (1947); *see also, United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976) (“Any attempt to maintain secrecy . . . would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access.” (citation omitted)), *reversed on other grounds*, 435 U.S. 589 (1978). Thus, while the Military Commissions Act itself mandates public commissions, 10 U.S.C. § 949d(c)(2); *see also* Rules for Military Commissions (“RMC”), Rule 806(a), the First Amendment independently extends an affirmative, enforceable right of public access to the proceedings of this Commission.

The public interest in monitoring criminal prosecutions generally and these military proceedings in particular is equally well established. As Chief Justice Burger observed, “[P]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.” *Richmond Newspapers*, 448 U.S. at 572. Indeed, “[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.” *Id.* at 569 (citation omitted); *see also, e.g., United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008) (“[t]ransparency is pivotal to public perception of the judiciary’s legitimacy and independence.”).

Congress itself has articulated the importance of transparency in these proceedings. 10 U.S.C. § 949d(c)(2) (requiring “specific finding[s]” by the Commission before closing proceedings). It did so for good reason: “public scrutiny reduces the chance of arbitrary and capricious decisions and enhances public confidence in the . . . process.” *Manual for Courts-Martial*, Rule 806(b)(2), discussion; *see also, United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (observing that “public confidence in matters of military justice would quickly erode if courts-martial were arbitrarily closed to the public”). Openness also “ensure[s] that testimony is subjected to public scrutiny and is thus more likely to be truthful or to be exposed as fraudulent.” *United States v. Anderson*, 46 M.J. 728, 729 (A. Ct. Crim. App. 1997). As explained by Chief Judge Hogan of the U.S. District Court for the District of Columbia, public access to proceedings concerning Guantanamo Bay has “critical importance and relevance” because it serves to “enlighten the citizenry and improve perceptions of the proceedings’ fairness.” *In re Guantanamo Bay Detainee Litig.* (“*In re Detainee Lit.*”), 624 F. Supp. 2d 27, 37 (D.D.C. 2009).

The crucial role that public access plays in ensuring respect for the results produced by the Commissions is perhaps best illustrated 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) (citation omitted); *see also*, *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring) (“[s]ecrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges.”); *Boumediene v. Bush*, 553 U.S. 723, 785 (2008) (noting the “considerable risk of error” in findings of fact resulting from “closed and accusatorial” hearings). For this reason, military proceedings like this one have traditionally been held before the public “in the open air, and . . . under the blue skies.” Col. William Winthrop, *Military Law and Precedents*, 161-162 (2d ed. 1920) (emphases omitted; dating public courts-martial to the seventh century).

While the constitutional access right is a qualified right, not an absolute right, a proceeding subject to the First Amendment right may be closed only if the party seeking closure can satisfy a rigorous four-part test. AE127A/AE128B/AE159A at 2 (recognizing that “the controlling legal authority and the test for closure [is] set forth in *Press-Enterprise II*”). Before any portion of a proceeding may be closed, the Commission must make factual findings that:

1. **There is a “substantial probability” of prejudice to a compelling interest.** *See, e.g., Press-Enterprise II*, 478 U.S. at 13-14; *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501, 509-10 (1984); *Richmond Newspapers*, 448 U.S. at 580-81.
2. **There is no alternative to closure that will adequately protect the threatened interest.** *See Press-Enterprise II*, 478 U.S. at 13-14; *see also, Presley v. Georgia*, 558 U.S. 209, 214-15 (2010) (*per curiam*) (“Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials” and “to consider alternatives to closure even when they are not offered by the parties.”); *In re The Herald Co.*, 734 F.2d 93, 100 (2d Cir. 1984) (A “trial judge must consider alternatives and reach a reasoned conclusion that closure is a preferable course to follow to safeguard the interests at issue.”).

3. **Any restriction on access will effectively protect against the threatened harm.** *See Press-Enterprise II*, 478 U.S. at 14 (the party seeking secrecy must demonstrate “that closure would prevent” the harm sought to be avoided); *Wash. Post v. Robinson*, 935 F.2d 282, 291-92 (D.C. Cir. 1991) (disclosure could not pose any additional threat in light of already publicized information); *In re The Herald Co.*, 734 F.2d at 101 (closure order cannot stand if “the information sought to be kept confidential has already been given sufficient public exposure”).
4. **Any restriction on access is “narrowly tailored.”** *See Press-Enterprise II*, 478 U.S. at 13-14 (citation omitted); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (even “legitimate and substantial” governmental interests “cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”); *Robinson*, 935 F.2d at 287 (“Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is . . . narrowly tailored to serve that interest.” (citation omitted)); *United States v. Grunden*, 2 M.J. 116, 120, 123 n.18 (C.M.A. 1977) (“In excising the public from the trial, the trial judge employed an ax in place of the constitutionally required scalpel.”).

As an element of the supreme law of the land, this access right necessarily supersedes any contrary law, rule or regulation and applies fully to these proceedings—as this Commission has already held. AE127A/AE128B/AE159A at 2 (recognizing that “criminal trials are ‘presumptively open’ *see Richmond Newspapers*”); *see also, KSM*, AE331 at 1 (“guarantee[ing]” the “utmost transparency”); *KSM* (1), D-104 (“The [constitutional] right of access to judicial proceedings applies to . . . Military Commission documents.”).

The Government does not dispute that the constitutional access right applies and this test controls public access to Commission proceedings. *See Response of Respondent, Miami Herald, et al. v. United States*, Case No. 13-002 (U.S.C.M.C.R. 7 Mar. 2013) at 1, 9 (Government noting that “the Commission can only close the proceedings after it makes appropriate findings, consistent with . . . Supreme Court precedent” (citing, *inter alia, Press-Enterprise II*, 478 U.S. 1)); *see also, KSM*, AE400L at 5 n.21 (Commission noting that “neither party [*i.e.*, the Government and press movants] questions the applicability of the asserted [access] rights to these proceedings”). As BG Martins has underscored for years, “[p]ublic confidence in these

proceedings requires them to be as transparent as possible.” J. Sutton, *Guantanamo court holds closed session to discuss secret evidence*, Reuters (July 18, 2012); C. Valery, *9/11 mastermind, co-plotters to be arraigned*, AFP (May 4, 2012) (BG Martins noting that “[i]t’s key to have transparency”); *see also KSM*, AE014F at 1 (Government noting the “strong interest in ensuring public access to these historic proceedings and . . . the important and vital role that the news media plays within our society”).

Although the Government has not made public its reasons for seeking to close the unclassified testimony of Mr. al-Nashiri on AE359, in light of the foregoing, closure of that testimony would be improper.

**A. The Government Cannot Identify A “Substantial Probability” Of Prejudice To A Compelling Interest.**

As a threshold matter, Press Movants understand that the testimony to be presented by Mr. al-Nashiri on AE359 is unclassified. 15 Dec. Tr. 7650:18-21 (Mr. al-Nashiri’s counsel noting his belief that the testimony would be “sufficiently general that it would be unclassified”). This apparently will include testimony relating to the conditions regarding his transport to the ELC and his nausea around the transport, including a “very general description” about why “he would be giving up a lot of comfort to stay [at the ELC] for three or four days.” *Id.* at 7651:4-7653:17. The Commission has already found that such testimony may be taken in open session and the Government provides no reason to deviate from that holding. AE359F.

Apparently, the Government is concerned that the unclassified testimony may relate to classified information and on this basis seeks closure. *Cf.* Statement of Jay Connell at 1:08:49-1:09:20, *Post Commissions Press Conference for KSM December 5-9* (11 Dec. 2016) (summarizing the Government’s position in *KSM*: “the question was whether unclassified argument about an unclassified pleading should be allowed in open court or whether it casts

some sort of shadow . . . that might reflect on some classified issue”), <https://www.dvidshub.net/video/502729/post-commissions-press-conference-us-v-ksm-et-al-december-5-9>. Under similar circumstances one court has labeled this argument “deeply troubling” and, if accepted, it would dramatically increase the use of closed hearings. *Dhiab v. Obama*, 70 F. Supp. 3d 465, 467 (D.D.C. 2014). The effort to close testimony on unclassified matters should be squarely rejected.<sup>3</sup>

The Commission must scrutinize on a case-by-case basis the Government’s reasons for seeking closure of testimony that would otherwise occur in an open courtroom. *In re Wash. Post Co.*, 807 F.2d at 392-93; *Dhiab*, 70 F. Supp. 3d at 468 (rejecting Government’s motion to close completely detainee-related hearing based on Government’s argument that “public information is inextricably intertwined with classified and protected information”); *cf. Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) (“[s]imply saying ‘military secret,’ ‘national security’ or ‘terrorist threat’ or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the privilege”). As stressed in *United States v. Rosen*, “trial judges must make their own judgment about whether the government’s asserted interest in partially closing [a] trial is compelling or overriding,” and in doing so, “a generalized assertion of ‘national security interests,’ . . . is not alone sufficient to overcome the presumption in favor

---

<sup>3</sup> Press Movants do not now challenge the decision to take classified testimony on AE359 in closed session. However, they do not waive and to the contrary expressly preserve their position that classification does not automatically justify closing a proceeding. To take testimony on classified information in closed session, the Government is still properly required to make a factual showing sufficient to satisfy the requirements of *Press-Enterprise II*. See, e.g., *In re Wash. Post Co.*, 807 F.2d 383, 392-93 (4th Cir. 1986) (vacating district court opinion improperly closing plea hearing in terrorism prosecution based on Government assertions of classification without conducting First Amendment analysis); see also, *KSM*, 17 Oct. 2012 Tr. 672:19-21 (“MJ [COL POHL]: The mere fact it is classified is not sufficient showing by government to close the proceeding. ATC [MS. BALTES]: Right.”).

of open trials.” 487 F. Supp. 2d 703, 717 (E.D. Va. 2007); *see also, United States v. Pelton*, 696 F. Supp. 156, 159 (D. Md. 1986) (noting that a court “must begin with a presumption against closure” even in an espionage case).

That is precisely the exercise this Commission engaged in when it ruled on Mr. al-Nashiri’s 505(g) notice. AE359G at 2. Rather than take all testimony in closed session, the Commission expressly limited closure to *classified* testimony. *Id.* (allowing testimony to be taken in closed session only to the extent it “directly pertain[ed] to the classified information identified by the Defense”). This “narrowly tailored” approach permits closure only as to “*a portion of the proceedings*” on AE359 and only to protect against the disclosure of “classified information.” *Id.* (emphasis added). The Government’s subsequent attempt to seal everything up conflicts with this determination and with the First Amendment.

Courts in other detainee proceedings have squarely rejected the Government’s dangerous contention that unclassified testimony should be taken in closed session because it might indirectly relate to classified matters. In *Dhiab*, for example, the district court refused to hold a closed session for the testimony of a witness who “lack[ed] any security clearance at all” simply because his testimony might relate to protected information. 70 F. Supp. 3d at 467; *see also, In re Detainee Lit.*, 624 F. Supp. 2d at 32-33 (rejecting as a “sparse, generic assertion” the Government’s warning that “disclosing the unclassified returns could ‘pose a threat to the security of the United States’”). Indeed, to accept the Government’s position is to concede that all testimony before this Commission could properly be closed to the public. That is not the law under the MCA, this Commission’s rules, or the First Amendment. 10 U.S.C. § 949d(c)(2); RMC, Rule 806(a); *Press-Enterprise II*, 478 U.S. at 15.

**B. The Government Cannot Demonstrate That Excluding The Public Would Effectively Protect Against The Threatened Harm.**

The Government's request to close is misdirected for the further reason that closing the hearing on AE359 would not protect against any potential harm because information likely to be provided in testimony from Mr. al-Nashiri has already been made public by the Government in other contexts.

The Government cannot establish a substantial likelihood of harm to a compelling interest if the information at issue is already widely known. *Robinson*, 935 F.2d at 291-92 (disclosure could not pose any additional threat in light of already publicized information); *CBS v. U.S. Dist. Ct.*, 765 F.2d 823, 825 (9th Cir. 1985) (finding alleged harms not compelling where much of the information to be sealed "might easily be surmised from what is already in the public record"). Where "the information sought to be kept confidential has already been given sufficient public exposure," closure is improper because sealing not would prevent the harm alleged. *In re The Herald Co.*, 734 F.2d at 101.

Even broadly construing Mr. al-Nashiri's testimony as potentially relating to handling and transport procedures, closure would still be improper because the Government has previously allowed public testimony on precisely these kinds of topics. Government witnesses in *KSM* have publicly testified as to transport and manning procedures without objection from the Government. That testimony included discussions of Camp 7 procedures on the use of guards, manning, the process of restraining and moving a detainee from one place to another, and forced cell extractions. *See, e.g., KSM*, AE400L at 3 (describing testimony by an anonymous SSG regarding Camp 7 procedures during which "no party raised any objection to testimony based on classification or other sensitivity"); *see also id.*, AE400C, Attachment B (transcript of same); *id.*,

AE400, Attachment A (real-time reporting of same by Carol Rosenberg).<sup>4</sup> This Commission has properly expressed doubts as to the propriety of sealing when this kind of information has been previously disclosed. 15 Dec. Tr. 7637:18-22 (noting in response to Government objection to public testimony as to medical records that “[w]e had an unclassified session yesterday where medical records were discussed in front of the world”). Permitting Mr. al-Nashiri to testify in public session would pose no threat when compared to what has already been released, and closure would be improper under *Press-Enterprise II* for this reason as well.

**C. The Government Cannot Demonstrate That Closure Of Mr. al-Nashiri’s Testimony Is Narrowly Tailored.**

Even when a proper basis for closure is established, any restriction on public access must be narrowly tailored. *See, e.g., Globe Newspaper Co.*, 457 U.S. at 606-07; *N.Y. Civ. Liberties Union v. NYC Transit Auth.*, 684 F.3d 286, 304 (2d Cir. 2012). This means that testimony must remain public to the greatest extent possible while still protecting information the court itself has determined may properly remain confidential. *United States v. Yazzie*, 743 F.3d 1278, 1289 (9th Cir. 2014) (finding closure narrowly tailored because the court “closed the courtroom only when the child victims took the stand” and “all [other] portions of the trial . . . were public”).

To the extent the Commission concludes that some portion of testimony may properly be taken in a closed session, the parties should be required to bifurcate their questioning in order to minimize the extent of any closure. In this proceeding, the courtroom at a minimum should

---

<sup>4</sup> After that public testimony, the Government made substantial *ex post* redactions to the Unofficial/Unauthenticated Transcript, which press movants there challenged. *KSM*, AE400; *see also id.*, AE400C. The Government later limited the degree of its redactions and the Commission found those limited redactions permissible, holding that “Government has exercised due diligence in seeking to correct the spillage.” *Id.*, AE400L at 12. In doing so, however, it recognized that “classified information” relating to “manning and operational information” was disclosed by a Government witness without objection from the Government during a public hearing. *Id.* at 2-3, 11-12.

remain open for all testimony concerning material that is unclassified and unrelated to classified information or that is unclassified and related only to previously disclosed classified material. *See supra* n.4. In other words, even if the Commission were to determine that portions of the unclassified testimony sufficiently implicate non-public, classified matters and on that basis closes the courtroom during Mr. al-Nashiri's testimony, there is no proper basis to restrict public access to the balance of the unclassified testimony. *Dhiab*, 70 F. Supp. 3d at 467 (adopting bifurcated proceeding to vindicate public's right of access while also protecting information the disclosure of which was substantially likely to cause harm to a compelling interest).

Courts regularly require attorneys to organize the structure of their questioning of a witness so that any matters that must be addressed in a closed courtroom are taken up at one time, while the public is allowed to observe the remainder. *See, e.g., United States v. Moussaoui*, 65 F. App'x 881, 891 (4th Cir. 2003) (ordering bifurcated appellate oral argument and requiring release of redacted transcript of sealed portion "as soon as is practicable"); *Dhiab*, 70 F. Supp. 3d at 467 ("[T]he hearing can be bifurcated into open and closed sessions to accommodate the Government's [national security] concerns."); *Grunden*, 2 M.J. at 123-24 ("bifurcated presentation of a given witness' [classified and unclassified] testimony is *the most satisfactory resolution* of the competing needs for secrecy by the government, and for a public trial." (emphasis added)); *Denver Post Corp. v. United States*, 2005 WL 6519929, at \*4 (A. Ct. Crim. App. Feb. 23, 2005) ("an appropriate bifurcated process must be employed to ensure that public access is protected" while also protecting classified information). Both defense and Government counsel are highly experienced litigators with security clearances. They regularly structure their questioning of witnesses so as to avoid delving into potentially classified matters. There is no reason that they cannot also do the same for Mr. al-Nashiri's testimony on AE359.

Moreover, public access to all testimony in this proceeding is on a 40-second audio and video delay, making it possible easily to enforce any limitation on public access required by the Commission. At the very least, Mr. al-Nashiri should be permitted to testify in public as to unclassified matters, subject only to the “electronic sealing” of testimony inadvertently disclosing information the Commission has determined may properly be sealed.

**D. Release Of Transcripts After The Fact Is Not A Substitute For Public Access.**

A transcript is not an adequate substitute for public access because “information, concerning demeanor, non-verbal responses, and the like, is necessarily lost in the translation of a live proceeding to a cold transcript.” *United States v. Antar*, 38 F.3d 1348, 1359-60 n.13 (3d Cir. 1994). As the Court of Appeals for the Second Circuit has underscored: “[O]ne cannot transcribe an anguished look or a nervous tic. The ability to see and to hear a proceeding as it unfolds is a vital component of the First Amendment right of access—not, as the government describes, an incremental benefit.” *ABC v. Stewart*, 360 F.3d 90, 99 (2d Cir. 2004); *see also Detroit Free Press v. Ashcroft*, 303 F.3d 681, 710-11 (6th Cir. 2002) (explaining that “no subsequent measures [after closure] can cure this loss, because the information contained in the appeal or transcripts will be stale, and there is no assurance that they will completely detail the proceedings”); *United States v. Alcantara*, 396 F.3d 189, 201 (2d Cir. 2005) (rejecting argument that taking a guilty plea in the robing room “does not implicate First Amendment concerns because the transcript . . . was not sealed and was available to the public”); *Soc’y of Prof’l Journalists v. Sec’y of Labor*, 616 F. Supp. 569, 578 (D. Utah 1985) (“Much of what makes good

news is lost in the difference between a one-dimensional transcript and an opportunity to see and hear testimony as it unfolds.”).<sup>5</sup>

Restricting the access right to a redacted transcript is particularly inappropriate here, because only a small portion of the hearing (if any portion) is likely to involve classified information. The court security officer employing the forty second delay on the audio feed can adequately protect any classified information from disclosure in open session. However, to the extent that the Commission does determine to permit testimony to be taken in closed session, a redacted transcript should promptly be made available. Any truly classified information should be easily identifiable and readily separated from the testimony the public has a right to know.

7. **Oral Argument.** Press Movants are prepared to argue this motion if oral argument would be useful to the Commission, but otherwise rest on this submission.
8. **Certificate of Conference.** On 17 January 2017, Press Movants attempted to confer by email with counsel for the parties. Mr. al-Nashiri’s counsel responded that he does not oppose the requested relief; counsel for the Government has not responded as of the filing of this motion, but previously opposed taking testimony from Mr. al-Nashiri on AE 359 in open session.
9. **Attachments.**
  - A. Notice of Appearance of David A. Schulz, dated 19 January 2017.
  - B. Notice of Appearance of Matthew L. Schafer, dated 19 January 2017.

---

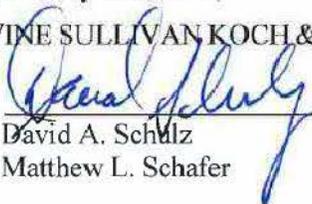
<sup>5</sup> The release of a redacted transcript is an inappropriate substitute for public access for a related but independent reason: The access right is one of *contemporaneous* access, and the release of a redacted transcript in a timeframe to be determined by the Government does not satisfy it. See *Richmond Newspapers*, 448 U.S. at 592 (Brennan, J., concurring) (“contemporaneous review in the forum of public opinion is an effective restraint on the possible abuse of judicial power” (citations omitted)); *Robinson*, 935 F.2d at 287 (same); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 127 (2d Cir. 2006) (“the public interest encompasses the public’s ability to make a contemporaneous review of the basis of an important decision of the district court” (citation omitted)).

C. Certificate of Service, dated 19 January 2017.

Dated: 19 January 2017

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, LLP

By: 

David A. Schulz

Matthew L. Schafer

321 West 44th Street, Suite 1000

New York, NY 10036

Phone: (212) 850-6100

Fax: (212) 850-6299

[dschulz@lkslaw.com](mailto:dschulz@lkslaw.com)

[mschafer@lkslaw.com](mailto:mschafer@lkslaw.com)

*Counsel for Press Movants*

# Attachment A

Filed with TJ  
19 January 2017

Appellate Exhibit 372 (PRESS) (Al-Nashiri)  
Page 21 of 28

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

---

UNITED STATES OF AMERICA

v.

ABD AL RAHIM HUSSAYN  
MUHAMMAD AL NASHIRI

**AE372 (PRESS) (AL-NASHIRI)**

**CIVILIAN COUNSEL NOTICE OF  
APPEARANCE**

19 January 2017

---

Pursuant to procedures of court/instruction for counsel, I, DAVID A. SCHULZ, hereby provide notice to the Military Judge of my appearance on behalf of The Miami Herald, ABC, Inc., Associated Press, Bloomberg L.P., CBS Broadcasting Inc., Chicago Tribune Company, LLC, Dow Jones & Company, Inc., First Look Media Works, Inc., Hearst Corporation, Inc., Los Angeles Times Communications LLC, The McClatchy Company, NBCUniversal Media, LLC, The New York Times Company, Reuters America LLC (Reuters), and WP Company LLC (d/b/a The Washington Post) (collectively, the "Press Movants"). My office address, phone numbers, and email address are:

321 West 44th Street, Suite 1000  
New York, NY 10036  
Phone: (212) 850-6100  
Fax: (212) 850-6299  
dschulz@lskslaw.com

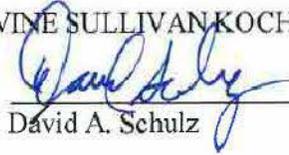
I am an active member in good standing licensed to practice in the following jurisdictions: New York, the District of Columbia, the U.S. Supreme Court, the U.S. Courts for Appeals for the Second, Third, Fourth, Ninth, Tenth, and District of Columbia Circuits, and the U.S. District Courts for the District of Columbia and the Southern, Eastern, Western, and Northern Districts of New York.

Dated: 19 January 2017

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, LLP

By:

  
\_\_\_\_\_  
David A. Schulz

321 West 44th Street, Suite 1000

New York, NY 10036

Phone: (212) 850-6100

Fax: (212) 850-6299

dschulz@lkslaw.com

*Counsel for Press Movants*

# Attachment B

Filed with TJ  
19 January 2017

Appellate Exhibit 372 (PRESS) (Al-Nashiri)  
Page 24 of 28

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

ABD AL RAHIM HUSSAYN  
MUHAMMAD AL NASHIRI

**AE372 (PRESS) (AL-NASHIRI)**

**CIVILIAN COUNSEL NOTICE OF  
APPEARANCE**

19 January 2017

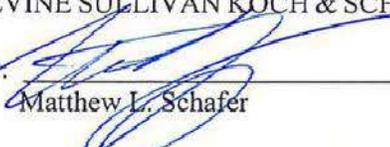
Pursuant to procedures of court/instruction for counsel, I, MATTHEW L. SCHAFER, hereby provide notice to the Military Judge of my appearance on behalf of The Miami Herald, ABC, Inc., Associated Press, Bloomberg L.P., CBS Broadcasting Inc., Chicago Tribune Company, LLC, Dow Jones & Company, Inc., First Look Media Works, Inc., Hearst Corporation, Inc., Los Angeles Times Communications LLC, The McClatchy Company, NBCUniversal Media, LLC, The New York Times Company, Reuters America LLC (Reuters), and WP Company LLC (d/b/a The Washington Post) (collectively, the "Press Movants"). My office address, phone numbers, and email address are:

321 West 44th Street, Suite 1000  
New York, NY 10036  
Phone: (212) 850-6100  
Fax: (212) 850-6299  
mschafer@lskslaw.com

I am an active member in good standing licensed to practice in the following jurisdictions: New York, Maryland, the District of Columbia, the U.S. Courts of Appeals for the Ninth and District of Columbia Circuits, and the U.S. District Courts for the District of Columbia, the District of Maryland, and the Southern and Eastern Districts of New York.

Dated: 19 January 2017

Respectfully submitted,  
LEVINE SULLIVAN KOCH & SCHULZ, LLP

By:   
Matthew L. Schafer

321 West 44th Street, Suite 1000  
New York, NY 10036  
Phone: (212) 850-6100  
Fax: (212) 850-6299  
mschafer@lskslaw.com

*Counsel for Press Movants*

# Attachment C

Filed with TJ  
19 January 2017

Appellate Exhibit 372 (PRESS) (Al-Nashiri)  
Page 27 of 28

**CERTIFICATE OF SERVICE**

I certify that on the 19th day of January 2017, I caused **AE372 (PRESS) (AL-NASHIRI) PRESS MOVANTS' OBJECTION TO CLOSURE OF TESTIMONY TAKEN FROM THE ACCUSED** to be filed with the Office of Military Commissions Trial Judiciary and served on lead counsel via e-mail.



---

Matthew Schafer, Esq.