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

1. The American Bar Association

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

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

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

c. I certify my good faith belief as a licensed attorney that the law in the attached brief is accurately stated, that I have read and verified the accuracy of all points of law cited in
the brief, and that I am not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

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

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2. The American Civil Liberties Union

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

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

b. I certify my good faith belief as a licensed attorney that the law in the attached brief is accurately stated, that I have read and verified the accuracy of all points of law cited
in the brief, and that I am not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

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

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3. Human Rights First

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

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

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

c. I certify my good faith belief as a licensed attorney that the law in the attached brief is accurately stated, that I have read and verified the accuracy of all points of law cited in
the brief, and that I am not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

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

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4. Human Rights Watch

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

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

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

c. I certify my good faith belief as a licensed attorney that the law in the attached brief is accurately stated, that I have read and verified the accuracy of all points of law cited in
the brief, and that I am not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

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

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

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

3. **Overview:** Protective Order 007, signed by the Military Judge on 18 December 2008, is overbroad and impermissibly restricts the right to a fair and public trial in violation of the Military Commissions Act of 2006 (“MCA”) and the Constitution of the United States. Consequently, the Military Judge should rescind PO 007. In effect, PO 007 creates a presumption that the proceedings in this case will be closed to the public and press. It expands
the definition of Classified Information to include “[a]ny document or information . . . referring to the Central Intelligence Agency, National Security Agency, Defense Intelligence Agency, Department of State, National Security Council, Federal Bureau of Investigation, or intelligence agencies of any foreign government . . . or information in the possession of such agency” as well as “any statements made by the accused.” PO 007 also considers as Classified previously disclosed information that is already in the public domain if confirmed or denied by someone with access to the classified information, thereby potentially making already disclosed information off limits. As a result, PO 007 diminishes the transparency and fairness of these proceedings by permitting the government to exercise virtually unlimited authority to exclude the press, public, and trial observers – including *Amici* – from the courtroom.


5. **Facts:**

   a. The Military Commission Act (“MCA”) provides for proceedings of the military commission to be open to the public. On 21 March 2002, Secretary of Defense Donald H. Rumsfeld issued Military Commissions Order No. 1, detailing the operational rules and regulations for the military commissions. The regulations similarly stated that military commission trials would be open to the public.
b. Beginning in May 2003, HRF, HRW and Amnesty International (“AI”)\(^1\) wrote separately to the Pentagon requesting access to the United States Naval Base at Guantanamo Bay, Cuba in order to observe the military commission proceedings. Each group followed up with its request in writing or by phone.

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

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

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

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

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

For example, observers watch the tribunal proceedings either via a closed-circuit video monitor or in a soundproof viewing room separated from the courtroom by a panel of glass. An audio feed is transmitted into the viewing room with a delay, permitting courtroom security officials to cut off the audio feed whenever the prisoners appear to be discussing protected information, such as the conditions of their detention or interrogations.

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

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

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

Protective Order 007 purports to forbid the disclosure of any information that is currently classified, as well as any information related in any way to classified information. Among other things, it forbids disclosure of: “any statements made by the accused” and “any . . . information . . . that refers to or relates to national security or intelligence matters . . . including but not limited to any subject referring to the
On 5 January 2009, the Military Judge directed that parties submit briefs addressing whether:

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

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

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

Contrary to the MCA and the First Amendment, there has been no finding by the Military Judge that the government’s national security concerns require a sweeping protective order that presumptively and categorically designates the defendants’ speech as Classified Information. Similarly, there has been no finding that these concerns require a protective order that presumptively classifies documents or information if they merely reference federal agencies such as the Central Intelligence Agency, National Security Agency, Defense Intelligence Agency, Department of State, National Security Council, Federal Bureau of Investigation, or intelligence agencies of any foreign government, or similar entity, or information in the possession of such agency[.]”
as the CIA, FBI, State Department, simply relate to national security or intelligence matters, or have already been in the public domain.

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


In adopting the MCA, Congress recognized the critical importance that these criminal proceedings be conducted in the open so the watching world would accept their validity. The MCA thus expressly mandates access by “the public” to all “proceedings” of any military commission, unless specifically delineated exceptions are found to apply. 10 U.S.C. § 949d(d)(1). The MCA permits a denial of access “only upon making a specific finding that such closure is necessary to – (A) protect information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities; or (B) ensure the physical safety of individuals.” 10 U.S.C. § 949d(d)(2) (emphasis added).

The Regulation for Trial by Military Commissions (“Reg. MC” or the “Regulation”) and the Manual for Military Commissions (“MMC”) containing the Rules for Military Commissions (“RMC”) also recognize and implement this statutory right of access. *See* Reg. MC 19-7(a)
The sessions of military commissions shall be public to the maximum extent practicable.” (emphasis added)); RMC 806(a) (“[M]ilitary commissions shall be publicly held.” (emphasis added))\(^2\). Rule 806(b)(2) authorizes a military judge to close a “session of a military commission” only for limited purposes and only after making “essential findings of fact, appended to the record of trial.” Similarly, Military Commission Order No. 1 (March 21, 2002) guarantees the accused “a trial open to the public” subject only to closure for the “protection of information classified or classifiable under reference” or the “physical safety of participants in the Commission proceedings.”

The MCA and its implementing regulations make clear that the public’s right of access extends beyond the “trial” to all aspects of the “proceeding” against an accused. The MCA at various times differentiates between “trial,” “pre-trial” and “post-trial” procedures, e.g. 10 U.S.C. § 949a(a), but extends the public right of access more broadly to all “proceedings.” Id. § 949d(d). Under the Regulation, the right of access applies “from the swearing of charges, until the completion of trial or disposition of the case without trial,” Reg. MC 19-2, and extends specifically to all “[i]nformation that has become part of the record of proceedings of the military commission in open session,” and “[t]he scheduling or result of any stage in the judicial process.” Reg. MC 19-4(a)(3)-(4). Motions, rulings, and summaries of Rule 802 conferences are all required to be part of the Record of Trial, and hence expressly subject to the right of access. The MMC reflects this same understanding. It empowers the military judge to “exercise

\(^2\) This Rule defines “public” to include “representative of the press, representative of national and international organizations, as determined by the Office of the Secretary of Defense, and certain members of both the military and civilian communities.” RMC 806(a). The Office of the Secretary of Defense has determined that Amici are national organizations that meet this standard.
reasonable control over the proceedings,” RMC 801(a)(3), and then identifies pre-trial motions as being among the “proceedings” a judge controls. See also RMC 908(b)(8)(A) (motions not affected by order on appeal “may be litigated, in the discretion of the military judge, at any point in the proceedings”).

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

Although the actual classification of materials and the policy determinations involved therein are not normal judicial functions, immunization from judicial review cannot be countenanced in situations where strong countervailing constitutional interests exist which merit judicial protection. . . . Before a trial judge can order the exclusion of the public on this basis, he must be satisfied from all the evidence and circumstances that there is a reasonable danger that presentation of these materials before the public will expose military matters which in the interest of national security should not be divulged. . . . [The trial judge must determine] that the material in question has been classified by the proper authorities in accordance with the appropriate regulations. . . . The trial judge’s determination that the prosecution has met its burden as to the nature of the materials does not complete his review in this preliminary hearing. He must further decide the scope of the exclusion of the public. The prosecution must delineate which witnesses will testify on classified matters, and what portion of each witness’ testimony will actually be devoted to this area. Clearly, unlike the instant case, any witness whose testimony does not contain references to classified material will testify in open court. The witness whose testimony is only partially concerned with this area should testify in open court on all other matters. For even assuming a valid underlying basis for the exclusion of the public, it is error of “constitutional magnitude” to exclude the public from all of a given witness’ testimony when only a portion is devoted to classified material.
These statutory and administrative provisions plainly establish the public right of access to proceedings of this tribunal. While not an absolute right, this statutory right can be overcome only upon specific judicial determination that information must be withheld for reasons of national security or personal safety. 10 U.S.C. § 949d(d)(2).

**B. The First Amendment Independently Protects the Public’s Right of Meaningful Access to Proceedings and Records of the Military Commissions.**

The First Amendment independently “protects the public and the press from abridgement of their rights of access to information about the operation of their government.” Richmond Newspapers, 448 U.S. at 584 (Stevens, J., concurring) (recognizing First Amendment right of public access to criminal trials); Globe Newspaper, 457 U.S. at 604-06 (same); Press-Enterprise I, 464 U.S. at 508-10, 513 (recognizing First Amendment right of public access to voir dire proceedings); Press-Enterprise II, 478 U.S. at 10 (same as to preliminary hearings in a criminal prosecution). The scope of this constitutional right was first defined by the U.S. Supreme Court in Richmond Newspapers, a case involving access to a criminal trial that the State of Virginia had conducted entirely in secret. A Virginia statute specifically granted the trial judge discretion to conduct a secret trial, but the Supreme Court held that the First Amendment created an affirmative, enforceable constitutional right of access to certain government proceedings, such as a criminal trial. The Court held this First Amendment right to be implicit in the guarantees of free speech and press, just as the right of association, right of privacy, right to travel and the right to be
presumed innocent are implicit in other provisions of the Bill of Rights. As the Court later put it in *Globe Newspaper Co. v. Superior Court*, the First Amendment right of access is based upon:

> the common understanding that a “major purpose of that Amendment was to protect free discussion of governmental affairs.” By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.

457 U.S. at 604 (citation omitted). *Richmond Newspapers* “unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment.” 448 U.S. at 583 (Stevens, J. concurring). Under *Richmond Newspapers* and its progeny, this right of access exists where government proceedings and information historically have been available to the public, and public access plays a “significant positive role” in the functioning of government. E.g., *Globe Newspaper*, 457 U.S. at 605-07; *Press-Enterprise II*, 478 U.S. at 8-9; *Washington Post*, 935 F.2d at 287-92.

Under the “experience” and “logic” analysis applied by the Supreme Court, the right of access “has special force” when it carries the “favorable judgment of experience,” but what is “crucial” in deciding where an access right exists “is whether access to a particular government process is important in terms of that very process.” *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring). See also *Globe Newspaper*, 457 U.S. at 605-06; *Press-Enterprise II*, 478 U.S. at 89;

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4 See *Richmond Newspapers*, 448 U.S. at 577 (Burger, J.) (the right of access is “assured by the amalgam of the First Amendment guarantees of speech and press” and their “affinity to the right of assembly”); *id.* at 585 (Brennan, J., concurring) (“[T]he First Amendment – of itself and as applied to the States through the Fourteenth Amendment – secures such a public right of access.”).
While this right has most frequently been asserted to compel access to judicial proceedings and documents, the right also applies to proceedings and information in the executive and legislative branches. E.g., Detroit Free Press v. Ashcroft, 303 F.3d 681, 695-96, 700 (6th Cir. 2002) (right of access to executive branch deportation proceedings); Whiteland Woods, L.P. v. Twp. Of West Whiteland, 193 F.3d 177, 181 (3d Cir. 1999) (municipal planning meeting); Cal-Almond, Inc. v. U.S. Dep’t of Agric., 960 F.2d 105, 108-10 (9th Cir. 1992) (agriculture department voters list); Soc’y of Prof’l Journalists v. Sec’y of Labor, 616 F. Supp. 569, 574-75 (D. Utah 1985) (administrative hearing), vacated as moot, 832 F.2d 1180 (10th Cir. 1987).

Historical Experience. Our country has a tradition of public access to adjudicative military tribunals. William Winthrop, known as the “Blackstone of Military Law” (Reid v. Covert, 354 U.S. 1, 19 n.38 (1957) (plurality opinion)), described a history of open proceedings that dates back centuries:

Originally, (under the Carlovingian Kings,) courts-martial . . . were held in the open air, and in the Code of Gustavus Adolphus . . . criminal cases before such courts were required to be tried “under the blue skies.” The modern practice has inherited a similar publicity. … [O]nce opened, the court-martial room … is, in general, continued open throughout the investigation, (except when the doors are closed for deliberation on interlocutory matters,) and also during the closing arguments of the counsel, or till the final clearing for judgment. While thus open the public is allowed to come and go much as in the civil courts.

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

This tradition of public access to courts-martial also runs through the history of military commissions specifically. Military commissions, after all, historically have “differed from the court-martial only in terms of jurisdiction.” David Glazier, Notes, Kangaroo Court or

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

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


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

- During the Civil War, for example, the members of the 1864 military commission of Lambdin P. Milligan and others retired from the room to deliberate in order “to avoid the inconvenience of dismissing the audience assembled to listen to the proceedings.” Winthrop, 289 (emphasis added and internal quotation marks omitted).

- The military commission established to try John Wilkes Booth’s co-conspirators in Lincoln’s assassination was opened to the public after reporters complained and General Ulysses S. Grant “led them to the White House to talk to the president.” See James Johnston, Swift and Terrible: A Military Tribunal Rushed to Convict After Lincoln’s Murder, Wash. Post, Dec. 9, 2001.


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6 The United States Court of Military Commission Review has recognized that Congress intended the procedures and practices of military commissions to “mirror” those of courts-martial, and that the procedures herein “are based upon the procedures for trial be general courts-martial.” United States v. Khadr, CMCR 07-001 at 23 & n.35 (Sept. 24, 2007) (quoting MCA §§ 949a(a) & 948b(c)).
The military commissions established by the United States at Dachau were, like the international tribunal at Nuremberg, open to the press and public, with “more than four hundred spectators crowd[ing] into the courtroom on” the opening day. See Joshua M. Greene, JUSTICE AT DACHAU: THE TRIALS OF AN AMERICAN PROSECUTOR 39 (2003); id. at 245 (noting that judge denied defense request to prohibit press from photographing the accused).

While a 1942 trial of Nazi saboteurs found in the United States was famously conducted in secret, that precedent shows how secrecy can be counterproductive in the long run. See Ex parte Quirin, 317 U.S. 1 (1942). It is now widely believed that the “real reason President Roosevelt authorized these military tribunals was to keep evidence of the FBI’s bungling of the case secret.”

Policies Advanced by Public Access. The logic prong of the Supreme Court’s test for access is readily met. In recognizing the constitutional right to attend criminal proceedings, the Supreme Court identified at least five distinct interests advanced by open adjudicatory proceedings, each of which applies to criminal proceedings in this forum as well: (1) ensuring that proper procedures are being followed; (2) discouraging perjury, misconduct of participants, and biased decisions; (3) providing an outlet for community hostility and emotion; (4) ensuring public confidence in a trial’s results through the appearance of fairness; and (5) inspiring confidence in government through public education regarding the methods followed and remedies granted by government. See Richmond Newspapers, 448 U.S. at 569-71.

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

The very same policy arguments that mandated the constitutional right of access to criminal trials in the civilian court system apply to criminal trials conducted by the Department of Defense. Any “adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny.” *Lugosch*, 435 F.3d at 124 (quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982)). Like other adjudicatory proceedings, military commissions are presided over by an impartial arbiter, judgment is based on a record created by the tribunal through an adversarial process that involves the presentation of evidence and the opportunity to cross-examine witnesses. In this setting, public access improves the performance of all involved, protects judges and prosecutors from claims of dishonesty, and provides a forum for the education of the public. *See* The Comm. On Commc’ns & Media Law of the Ass’n of the Bar of the City of New York, “*If it Walks, Talks and Squawks . . .*” *The First Amendment Right Of Access to Administrative Adjudications: A Position Paper*, 23 Cardozo Arts & Ent. L.J. 21, 25 (2005). As with other types of military tribunals, an open proceeding “reduces the chance of arbitrary or capricious decisions and enhances public confidence,” which would “quickly erode” if the proceedings are arbitrarily closed. *Scott*, 48 M.J. at 665 (citations and internal quotation marks omitted); *see also Anderson*, 46 M.J. at 731 (same).
Indeed, judges within the military justice system have long recognized that openness significantly assists the functioning of the adjudicative process. “A public trial is believed to effect a fair result by ensuring that all parties perform their functions more responsibly, encouraging witnesses to come forward, and discouraging perjury.” Hershey, 20 M.J. at 436. Even before the Supreme Court recognized the right of access to criminal proceedings in Richmond Newspapers, the Court of Military Appeals had identified the functional benefits of public proceedings: (1) improving the quality of testimony; (2) curbing abuses of authority; and (3) fostering greater public confidence in the proceedings. See Brown, 22 C.M.R. at 45-48. As explained by Professor Wigmore in his seminal treatise quoted in Brown, “[n]ot only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.” Wigmore, Evidence § 1834 (3d ed.), quoted in Brown, 22 C.M.R. at 45; see also United States v. Hood, 46 M.J. 728, 731 n.2 (A. Ct. Crim. App. 1996).

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

Secret hearings – though they be scrupulously fair in reality – are suspect by nature. Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court’s decision sealed from public view.


8 See also Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring):
For all the above reasons, as well as the unbroken chain of precedents issued by United States military tribunals since Brown, openness of adjudicative military bodies, including the military commissions, promotes the functioning of those bodies, thereby satisfying the logic prong of the Press Enterprise II analysis.

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

The presumption of openness that attaches to the proceedings of the military commissions can be overcome only by “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” Press-Enterprise Co. II, 464 U.S. at 510. If access is to be denied, judicial findings on the need for closure or sealing must be entered as written findings of fact, made with sufficient specificity to allow appellate review. Press-Enterprise II, 478 U.S. at 9-10, 14; ABC, Inc., 360 F.3d at 98; Hartford Courant, 380 F.3d at 96; In re Time, Inc., 182 F.3d 270, 271 (4th Cir. 1999); Matter of New York Times Co., 828 F.2d 110, 116 (2d Cir. 1987) (“Broad and general findings by the trial court, however, are not sufficient to justify closure.”). The adjudicatory tribunals of the military branches have applied this same standard. As explained in Hershey, “the party seeking closure must advance an overriding interest that is likely to be prejudiced [by openness]; the closure must be narrowly tailored to protect that interest; the trial court must consider reasonable

Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and open reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.
alternatives to closure; and it must make adequate findings supporting the closure to aid in review.” 20 M.J. at 436; see also Anderson, 46 M.J. at 729 (“[T]he military judge placed no justification on the record for her actions. Consequently, she abused her discretion in closing the court-martial.”); Scott, 48 M.J. at 665.

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

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

The MCA and the First Amendment mandate a right of access subject only to a specific finding by the Military Judge that information must be withheld for reasons of national security or personal safety. Protective Order 007 turns this presumption of openness on its head by impermissibly expanding the definition of Classified Information to encompass virtually all substantive statements, documents, and information related to this case. There have been no “specific findings” that the wholesale exclusion of the public from this information is necessary to protect national security or personal safety – as required by the MCA. 10 U.S.C. § 949d(d)(2). Nor were there specific factual findings that the exclusion reflects an overriding interest or was narrowly tailored – as required by the First Amendment. Press-Enterprise II, 478 U.S. at 9-10, 14. In short, the effect of PO 007 on the public, the press, and Amici Curiae is a presumption of exclusion from these proceedings.
Military Commission Rule for Evidence 505(b)(1) defines the term “classified information” as “… any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security, and any restricted data, as defined in 42 U.S.C. § 2014(y).” See also MCA, 10 U.S.C. § 948(4). Protective Order 007 dramatically expands this definition to include:

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

   Because the Commission proceedings are by definition “official,” every document or bit of information related to this case would presumably fall within the definition of “official use” / “protected information” and would therefore be Classified Information under PO 007 and inaccessible to *Amicus Curiae*. The government, however, “has no legitimate interest in censoring unclassified materials.” *McGehee v. Casey*, 718 F.2d 1137, 1141 (D.C. Cir. 1983); see also *Snepp v. United States*, 444 U.S. 507, 767 n.8 (1980). While the government may protect properly classified information, courts impose narrow protective orders to protect such information. *See generally United States v. Pappas*, 94 F.3d 795 (2d Cir. 1996); *Grunden*, 2 M.J. at 121 (“The blanket exclusion of the spectators from all or most of a trial . . . has not been
approved . . . nor could it be absent a compelling showing that such was necessary to prevent the
disclosure of classified information.”); Denver Post Corp., Army Misc. 2004 1215 at 3. The
government may classify only certain kinds of extraordinarily sensitive information, see Exec.
Order No. 13,292 § 1.4, 68 Fed. Reg. 15315, and it may not classify any information without
complying with stringent procedural requirements, see Exec. Order No. 13, 292 §§ 1.2-1.3, 68
Fed. Reg. 15315. A departure from this established procedure will undercut the ability of Amici
Curiae to effectively observe the Commission proceedings.

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

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

9 For example, the abuse of prisoners – and the use of illegal interrogation methods – are
expressly prohibited both by U.S. law, see 18 U.S.C. § 2340A (providing for prosecution of a
U.S. national or anyone present in the U.S. who, while outside the U.S., commits or attempts to
commit torture); 18 U.S.C. § 2441 (making it a criminal offense for U.S. military personnel and
U.S. nationals to commit grave breaches of Common Article 3 of the Geneva Convention), and
by international law, see Convention Against Torture and Other Cruel, Inhuman or Degrading
protective order that permits the suppression of allegations of illegality is overbroad on its face and violates the public right of access to these proceedings.

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

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

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Similarly unlawful are the practices of rendition to torture and secret detention. Rendition to torture contravenes the Foreign Affairs Reform and Restructuring Act, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (1998), which states that the United States “[shall] not . . . expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States,” and contravenes Article 3 of the Convention Against Torture, which includes a similar proscription. Secret detention is prohibited by both the Geneva Conventions, *see* Geneva Convention relative to the Treatment of Prisoners of War, *entry into force* October 21, 1950 (Third Geneva Convention), Articles 122 to 125; Geneva Convention relative to the Protection of Civilian Persons in Time of War, *entry into force* October 21, 1950 (Fourth Geneva Convention), Articles 136 to 141; and by the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

In light of these prohibitions, the Military Judge should make individualized findings of whether the documents or information covered by PO 007 contain evidence that U.S. personnel violated these laws. If so, this information should not enjoy protection.
governmental agencies, which appear to be prohibited under this Order. At no time has there been a suggestion from the prosecutors that the presence of the observers at these hearings posed any threat to national security or personal safety. Such specific instances of jeopardy caused by the open courtroom are precisely what the law requires the government to demonstrate to overcome the presumption of openness, and these past observation experiences strongly suggest, if not conclusively prove, that no such jeopardy exists. Paragraph 6(f) amounts to a *de facto* gag order on the accused and diminishes the transparency and fairness of the proceedings in violation of the MCA and the First Amendment. 10 U.S.C. § 949d(d)(2); *Press-Enterprise II*, 478 U.S. at 9-10, 14.

4. **Documents or information relating to national security or intelligence matters and governmental agencies, or in the possession of such agencies.** Paragraph 6(g) is overbroad. It prohibits the disclosure of “any document or information . . . that refers to or relates to national security or intelligence matters . . . including but not limited to any subject referring to the Central Intelligence Agency, National Security Agency, Defense Intelligence Agency, Department of State, National Security Council, Federal Bureau of Investigation, or intelligence agencies of any foreign government, or similar entity, or information in the possession of such agency[.]” Under a strict reading of this provision, *Amici* would not be allowed to hear the defense read a passage from the 9/11 Commission Report absent written authorization from the tribunal. In short, there is virtually no substantive aspect of these proceedings that would remain open to the public without the express authorization of the Military Judge. This aspect of PO 007 threatens to censor significant portions of these proceedings, effectively closing them to the public, the press, and *Amici Curiae* at the mention of a single government agency.
5. **Information in the public domain.** Paragraph 6(h) is also overbroad. Under this provision, documents or information already in the public domain can effectively become Classified Information: “While information in the public domain is ordinarily not classified, such information may be considered classified, and therefore subject to the provisions of MCRE 505 and this Order, if it is confirmed or denied by any person who has, or has had, access to classified information and that confirmation or denial tends to corroborate or tends to refute the information in question.” PO ¶ 6(h). *Amici Curiae* believe that section 6(h) prohibits the accused and their counsel from publicly referencing or responding to relevant information in the public domain, including print and electronic media published by *Amici*. Even if this paragraph does not completely prohibit such comments, *Amici* are concerned that the threat of serious criminal and administrative sanctions for any violation of PO 007 will unnecessarily chill public speech. *See* PO ¶¶ 15-16. Access to otherwise properly classified information should not be allowed to double as a *de facto* gag order.

D. **Requested Modifications to Protective Order 007.**

Given the expansive definition of Classified Information in PO 007, the Order appears to create a presumption of closed – or at least mute – proceedings. Under PO 007, *Amici Curiae* would be unable to continue as effective trial observers in this case. If, however, this tribunal upholds the right of public access and opts to continue making specific determinations about whether information must be withheld for reasons of national security or personal safety, then there is little reason to believe that closed proceedings are necessary. *Amici Curiae* therefore respectfully request that the Military Judge rescind PO 007. In the alternative, *Amici* request that the Military Judge modify PO 007 in a manner consistent with D-____ (“Rescission of Protective
Order 007") to ensure that the Order does not conflict with the MCA or the First Amendment as discussed above.

7. **Attachments:**

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

DATED this 14 day of January, 2009.

Respectfully submitted,

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Appendix A
INTEREST OF AMICUS CURIAE AMERICAN BAR ASSOCIATION

The American Bar Association ("ABA") is the leading national membership organization of the legal profession. The ABA’s membership of more than 400,000 spans all 50 states and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and law students.¹

The ABA’s mission is to serve “our profession and the public by defending liberty and delivering justice as the national representative of the legal profession.” Among the ABA’s goals is to “[a]dvance the Rule of Law” by “increase[ing] public understanding of and respect for the law, the legal process, and the role of the legal profession.”² As the voice of the legal profession, the ABA has a special interest and responsibility in protecting the rights guaranteed by the Constitution, safeguarding the integrity of our legal system, and ensuring the sanctity of the rule of law.

The ABA has sent a representative to observe Military Commission proceedings at Guantanamo Bay since August 2004 as one of the five original organizations invited by the Office of the Secretary of Defense. The ABA joins this brief because it believes that PO 007 is overbroad and impermissibly restricts the right to a fair and public trial in violation of the Military Commissions Act of 2006 and the Constitution of the United States.

¹ Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

Appendix B
INTEREST OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU was founded in 1920, largely in response to the curtailment of liberties that accompanied America’s entry into World War I, including the prosecution of political dissidents and the denial of basic due process rights for non-citizens. In the intervening eight decades, the ACLU has frequently appeared before the Supreme Court of the United States during other periods of national crisis when concerns about security have been used by the government as a justification to abridge individual rights. This case raises those issues once again. The military commission procedures call into question both our nation’s commitment to fair process, even for those accused of war crimes, and to the right of public access to criminal proceedings. The ACLU therefore has a significant interest in the proper resolution of this issue.
Appendix C
INTEREST OF AMICUS CURIAE HUMAN RIGHTS FIRST

Human Rights First is a non-profit, nonpartisan international human rights organization based in New York and Washington D.C. To maintain our independence, we accept no government funding.

Human Rights First was founded in 1978 as the Lawyers Committee for International Human Rights to promote laws and policies that advance universal rights and freedoms. We exist to protect and defend the dignity of each individual through respect for human rights and the rule of law.

We fight for equality and for freedom of thought, expression, and religion;
We support people who struggle to promote these principles within their own societies;
We work to hold accountable under the law those who violate these principles;
We strive to ensure the security of individuals and to protect against the arbitrary exercise of state power;
We confront human rights challenges with strategic responses that do not compromise our integrity; and
We are committed to building a global movement of people who share these principles.

Human Rights First believes that building respect for human rights and the rule of law will help ensure the dignity to which every individual is entitled and will stem tyranny, extremism, intolerance, and violence.

Human Rights First protects people at risk: refugees who flee persecution, victims of crimes against humanity or other mass human rights violations, victims of discrimination, those whose rights are eroded in the name of national security, and human rights advocates who are targeted for defending the rights of others. These groups are often the first victims of societal instability and breakdown; their treatment is a harbinger of wider-scale repression. Human Rights First works to prevent violations against these groups and to seek justice and accountability for violations against them.

Human Rights First is practical and effective. We advocate for change at the highest levels of national and international policymaking. We seek justice through the courts. We raise awareness and understanding through the media. We build coalitions among those with divergent views. And we mobilize people to act.

Human Rights First has consistently worked to close Guantanamo and to end the Military Commissions. Human Rights First has monitored nearly every military commission hearing and has published several reports related to the prosecution of terrorism cases, including Analysis of Proposed Rules for Military Commissions Trials; Tortured Justice: Using Coerced Evidence to Prosecute Terrorist Suspects; and In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts.
Appendix D
INTEREST OF AMICUS CURIAE HUMAN RIGHTS WATCH

Human Rights Watch (HRW) is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, HRW seeks to raise the cost of human rights abuse and build pressure upon offending governments and others to end abuses. Human Rights Watch’s terrorism and counterterrorism program documents abuses committed by terrorist groups and their supporters, and monitors counterterrorism laws, policies, and practices that infringe upon basic human rights. HRW has been observing the proceedings of the Guantanamo Bay military commissions since 2004.
Appendix E
STATEMENT OF AMNESTY INTERNATIONAL

1. While Amnesty International (AI) has not formally joined the amicus brief, the organisation supports the broadest possible access to criminal and other legal proceedings by trial observers, in no event to be less fulsome than that contemplated by international standards. Such openness is recognised as a key element of the fairness of proceedings by international law. While some international instruments recognise limited exceptions, such exceptions are strictly drawn and narrowly construed. Amnesty International, too, therefore calls for rescission of Protective Order 007, dated 18 December 2008, as the same substantive aspects that are highlighted in the joint brief render it inconsistent with international standards. Relevant standards are set out below.

2. Article 10 of the Universal Declaration of Human Rights (UDHR), adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, states:

   Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

3. Article 11(1) of the UDHR states:

   Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

4. Article 14(1) of the International Covenant on Civil and Political Rights, 1966 (ICCPR), ratified by the United States in June 1992, provides:

   All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the
opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

5. The strict limits on the concept of ‘national security’ as grounds for exclusion of the public from trials, under the ICCPR and other instruments, were explicated by international legal experts in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, annexed to the Report of the UN Special Rapporteur on Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/1996/39, 22 March 1996, include the following:

[Principle 1(d)]
No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the government.

[Principle 1.2]
Any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest.

[Principle 1.3]
To establish that a restriction on freedom of expression or information is necessary to protect a legitimate national security interest, a government must demonstrate that:

(a) the expression or information at issue poses a serious threat to a legitimate national security interest;
(b) the restriction imposed is the least restrictive means possible for protecting that interest; and
(c) the restriction is compatible with democratic principles.

[Principle 2]
(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.
In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

6. The right of individuals and associations to observe trials and to draw public attention to failures to respect human rights in that and other contexts, was specifically recognised and promoted by the United Nations General Assembly in adopting the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms in 1999 (resolution 53/144).

   a. Article 6 of the Declaration states:

   Everyone has the right, individually and in association with others:

   (a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems;

   (b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms;

   (c) To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters

   b. Article 9(3) of the Declaration further states in part:

   [E]veryone has the right, individually and in association with others, *inter alia*:

   ...

   ...
(b) To attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments;

c. Article 17 of the Declaration states:

In the exercise of the rights and freedoms referred to in the present Declaration, everyone, acting individually and in association with others, shall be subject only to such limitations as are in accordance with applicable international obligations and are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
Appendix F
1. This Protective Order is issued pursuant to the authority under the Military Commissions Act (MCA) (10 U.S.C. §948a, et seq.) and the Manual for Military Commissions (MMC), to include, but not limited to:
   a. Rules for Military Commissions (RMC) 701(f)(8) and (1)(2);
   b. Military Commission Rule of Evidence (MCRE) 505;
   c. Regulation for Trial by Military Commission (DoD Trial Reg), Sec. 1703.

2. The Commission has considered the following matters prior to issuing this order:
   c. Declaration by the Director, Central Intelligence Agency, dated 30 May 2008.

This order will be attached to the record at trial. The appellate exhibits referenced above will be sealed.

3. The Commission finds that this case involves information that has been classified in the interests of national security as set forth by MCRE 505(b)(1) and (2) as well as by Executive Order 12958, as amended. The storage, handling, and control of this information will require
special precautions mandated by statute, executive order, and regulation, and access to which requires appropriate security clearances and a need to know. The Commission further finds that this case involves “protected information” that is unclassified but which remains sensitive and should be protected from dissemination outside the defense.

4. The purpose of this Order is to establish procedures that must be followed by all defense counsel of record, defense paralegals, defense translators and all other persons assisting the Defense (hereinafter the “Defense”) as well as any other person who comes into possession of classified information and protected information as a result of their participation in this case.

5. The procedures set forth in this Protective Order, and MCRE 505 and 506, will apply to all stages in this case, including discovery and disclosure of classified information subject to modification by further Order. This Order does not abrogate Protective Order #3 – Protection of Classified Information at Arraignment and Other Pretrial Proceedings, nor revises any protections contained within any previous Protective Order issued in this case.

6. As used herein, the term Classified Information shall mean:

   a. Any document or information which has been classified by any Executive Branch agency in the interests of national security or pursuant to Executive Order 12958, its predecessors or as amended, as CONFIDENTIAL, SECRET or TOP SECRET, or additionally controlled as SENSITIVE COMPARTMENTED INFORMATION (SCI), or any information in such document;

   b. Any document or information which has been classified as “SECRET – Releasable to Sheikh Mohammed, Bin Attash, Binalshibh, Aziz Ali, Hawsawi.”

   c. Any document or information, regardless of physical form or characteristics, now or formerly in the possession of the Defense, private party or other person, which has been derived from United States government information that was classified, including any document or information that has subsequently been classified by the government pursuant to Executive Order 12958;
d. Any document or information that the Defense knows or reasonably should know, contains Classified Information; or

e. Any document or information as to which the Defense has been notified orally, or in writing, that such document or information contains Classified Information, or protected information, or implicates sources, methods or activities of the United States to acquire such information if those sources, methods and activities remain classified.

f. Presumptively Classified Information, including any statements made by the accused, and any verbal classified information known to the accused or Defense.

g. Any document or information, regardless of place of origin, and including documents classified by a foreign government, that could reasonably be believed to contain classified information, or that refers to or relates to national security or intelligence matters. Any document or information including but not limited to any subject referring to the Central Intelligence Agency, National Security Agency, Defense Intelligence Agency, Department of State, National Security Council, Federal Bureau of Investigation, or intelligence agencies of any foreign government, or similar entity, or information in the possession of such agency, shall be presumed to fall within the meaning of “classified national security information or document” unless and until the SSA or Prosecution advises otherwise in writing.

h. This provision shall not apply to documents or information which the Defense obtains from other than classified materials, or documents provided by the Prosecution with a marking to indicate that the document has been “declassified.” While information in the public domain is ordinarily not classified, such information may be considered classified, and therefore subject to the provisions of MCRE 505 and this Order, if it is confirmed or denied by any person who has, or has had, access to classified information and that confirmation or denial tends to corroborate or tends to refute the information in question. Any attempt by the Defense to have such information confirmed or denied at trial or in any public proceeding in this case shall be governed by MCRE 505 and all provisions of this Order.

i. The words “documents” and “information” shall include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, conforming copies and non-conforming copies (whether different from the original by reason of notation made on such copies or otherwise), handwritten notes, or any electronic storage on any electronic storage media or device of any documents or information or information acquired orally, including but not limited to papers, correspondence, memoranda, notes, letters, reports, summaries, photographs, maps, charts, graphs, inter-office communications, notations of any sort concerning conversations, meetings or other communications, bulletins, teletypes, telegrams, and telefascimilies, invoices, worksheets and drafts, alterations, modifications, changes and amendments of any kind to the foregoing; graphic or oral records or representations of any kind, including but not limited to photographs, charts, graphs, microfiche, microfilm, videotapes, sound recordings of any kind and motion pictures; electronic, mechanical or electric records of any kind, including but not limited to tapes, cassettes, disks, recordings, films, typewriter ribbons, word processing or other computer
tapes, disks, or thumb drives and all manner or electronic data processing storage; and
Classified Information acquired orally.

7. All Classified Documents and other matters and the Classified Information contained therein shall remain classified unless the documents bear a clear indication that they have been declassified by the agency or department that is the originator of the document or the information contained therein (hereinafter, the “Original Classification Authority”).

8. As used herein, the term Protected Information shall mean:

   a. Protected information that is unclassified but otherwise privileged, such as Law Enforcement sensitive (LES) information or information For Official Use Only (FOUO), which does not warrant a national security classification but nonetheless requires limitation in dissemination and/or disclosure.

9. The Prosecution will provide the classified discovery for each of the Accused to the Senior Security Advisor (SSA) on compact disks (CD’s) that are properly marked with the security classification level. The SSA will ensure that the material is delivered to each of the Accuseds’ respective Defense teams together with a copy of this Order and will verify that the person receiving the materials has the appropriate security clearances and has otherwise complied with this Order and Protective Order #3. The person receiving the materials on behalf of each Defense team will be responsible for ensuring that access to and storage of the CD’s is in accordance with this Order and Protective Order #3. Pending the establishment of storage facilities and procedures for the materials at the Accuseds’ detention facility, Defense counsel are responsible for the appropriate handling and storage of the classified material.

10. Any and all discovery materials are to be provided to the Defense, and used by the Defense, solely for the purpose of allowing the Accused to prepare their defenses and that none of the discovery materials produced by the Prosecution to the Defense shall be disseminated to, or discussed with the media or any other individual or entity outside the
defense team. This provision does not prohibit the media from obtaining copies of any items that become declassified public exhibits at any hearing, trial or other proceeding.

11. The Defense is prohibited from disclosing classified information or information they know or reasonably should know is classified to the Accused absent a specific Order from this Commission.

12. Persons subject to this Order are advised that all information to which they obtain access by this Order, or any previous protective order issued by the Commission, is now and will forever remain the property of the United States Government. The Defense shall return all materials that may have come into their possession for which they are responsible because of such access upon demand by the Prosecution or SSA.

13. The Defense shall comply with MCRE 505(g) prior to any disclosure of Classified Information during any proceeding in this case. The Defense is required to notify the Prosecution in writing of any intention to disclose, or cause the disclosure of, classified information in any manner at any stage of the proceedings. The Defense notice must be particularized and set forth the specific classified information sought to be disclosed. The Defense notice must be provided to the Prosecution with sufficient time for the Prosecution to respond and seek relief under MCRE 505(h) prior to the proceeding in which the disclosure is expected to occur.

14. Any pleading or other document filed or transmitted by the Defense, which the Defense knows or has reason to know contains Classified Information in whole or in part, believes may be classified in whole or in part, or implicates information, sources, methods or activities of the United States Government which the Defense knows or has reason to know contains Classified Information, or which concern or relate to national security or
intelligence matters (as defined in paragraph 6 above), shall be filed UNDER SEAL with the SSA in the case of a filing and shall be transmitted in an appropriate manner, commensurate with its classification status.

15. Any breach of this Protective Order may result in disciplinary action or other sanctions.

16. Persons subject to this Order are further admonished that they are obligated by law and regulation not to disclose any national security classified information in an unauthorized fashion and that any breach of this Order may result in the termination of their access to classified information. In addition, they are admonished that any unauthorized disclosure of classified information may constitute violations of the United States criminal laws, including without limitation, the provisions of 18 U.S.C. §§ 371, 641, 1001, 793, 794, 798, 952, and 1503; 50 U.S.C. §§ 421 (the Intelligence Identities Protection Act) and 783; and that a violation of this Order or any portion hereof may be chargeable as a contempt of this Commission.

17. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it warranted.

[Signature]
Stephen R. Henley
Colonel, U.S. Army
Military Judge