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THE PRESS AND GUANTANAMO BAY

MICHELLE LINDO McCLUER & ALLEN DICKERSON*

In a widely-reported development, four journalists were expelled from the United States naval installation at Guantanamo Bay, Cuba, in March 2010.¹ The reporters had purportedly run afoul of Department of Defense (DOD) rules concerning access to the military commission being held on base that week.² Specifically, they had published the name of a former U.S. interrogator who appeared as a defense witness for Omar Khadr, a Canadian national being tried before the commission for the killing of an American soldier in Afghanistan.³ That interrogator, Joshua Claus, had already been identified numerous times in the international press.⁴ Nonetheless, certain DOD officials had insisted that Mr. Claus be referred to only as “Interrogator No. 1.”

The quartet allegedly violated the “Media Policy and Ground Rules” all journalists must sign before entering Cuba.⁵ Three of the journalists—The Miami Herald’s Carol Rosenberg, The Toronto Star’s Michelle Shephard, and Canwest’s Steven Edwards—had their bans lifted after signing letters

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1 Jeremy W. Peters, *News Media Seek Loosening of the Pentagon’s Rules at Guantanamo*, N.Y. TIMES (July 21, 2010), <http://query.nytimes.com/gst/fullpage.html?res=9902E1DD1F3EF932A15754C0A9669D8B63&sec=&spon=&pagewanted=2>. See also Spencer Ackerman, *Pentagon Bans Four Journalists From Guantanamo Bay for Reporting Interrogator #1’s Name*, WASHINGTON INDEPENDENT (May 6, 2010), <http://washingtonindependent.com/84200/pentagon-bans-four-journalists-from-guantanamo-bay-for-reporting-interrogator-1s-name>.

2 See generally DEP’T OF DEF., MEDIA POLICY AND GROUND RULES FOR NAVAL STATION GUANTANAMO BAY, CUBA (GTMO) (2010) [hereinafter DOD Media Policy], available at www.defense.gov/news/d20100910groundrules.pdf (describing what can be photographed, who can be sketched, and how the media can travel to Guantanamo as of March 10, 2010). See also JTF-GTMO Media Ground Rules Guantanamo Bay NAS, Cuba as of October 2007, http://media.miamiherald.com/smedia/2008/04/01/08/jtfgroundrules.source.prod_affiliate.56.pdf (This version of the rules is more accurate for our purposes. The version from September 2010 corrects some of the issues from the March 2010 banning problem).

3 Peters, *supra* note 1, at 1.

4 See, e.g., *Khadr Interrogator Convicted in Prisoner’s Torture Death*, TORONTO STAR (March 14, 2008), <http://www.thestar.com/news/article/346304>.

5 Peters, *supra* note 1, at 1.

stating that they understood the reason for their expulsions.⁶ Paul Koring of *The Globe and Mail* in Toronto refused to sign such a statement, but later regained access to the base for the completion of Khadr's commission in Fall 2010.⁷

The expulsions raise important questions of law, as the exclusion and regulation of press coverage of the commissions illustrate the conflict of two important national interests. On one hand lies the need to safeguard classified information and protect the lives of American intelligence sources. On the other hand, there is a need for an adequately-informed democratic debate concerning a major issue of American domestic and foreign policy. Both interests are vital, and a compromise must be found. Press access to the Guantanamo military commissions therefore provides a case study for considering the broader issue of the First Amendment's application to coverage of military proceedings when they concern classified or sensitive information.

I. THE FIRST AMENDMENT AND CRIMINAL LAW: THE EXAMPLE OF COURTS-MARTIAL

Government attempts to enjoin publication of particular information—prior restraint—are presumptively unconstitutional.⁸ This presumption attaches even in cases where the government asserts national security concerns.⁹ Indeed, among the seminal cases of First Amendment jurisprudence, one—*New York Times Co. v. United States*¹⁰—dealt specifically with an attempt by the government to prevent publication of classified documents detailing American strategy in the Vietnam War.¹¹ In many ways, the roots of First Amendment jurisprudence lie in the enduring conflict between protecting the nation and maintaining a fully informed electorate.¹² The challenges posed by this century's military commissions are not unique.

In the context of civilian trials, the press may “print with impunity” whatever it observes at an open hearing.¹³ The very limited exceptions to this general rule—the press may be enjoined from publishing information obtained in violation of the attorney-client privilege,¹⁴ as well as infor-

6 *Id.* at 2.

7 Author McCluer personally witnessed Koring at Guantanamo Bay for the completion of the Khadr trial.

8 *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976).

9 *See New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

10 *Id.*

11 *Id.* (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”) (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

12 John F. Kennedy, President of the United States, speech at Vanderbilt University 90th Anniversary Convocation (May 18, 1963) available at <http://www.jfklibrary.org/Research/Ready-Reference/JFK-Speeches/Remarks-in-Nashville-at-the-90th-Anniversary-Convocation-of-Vanderbilt-University-May-18-1963.aspx> (“The ignorance of one voter in a democracy impairs the security of all.”).

13 *Okla. Publ'g Co. v. Dist. Ct. of Okla. Cty.*, 430 U.S. 308, 311 (1977).

14 *See United States v. Noriega*, 917 F.2d 1543 (11th Cir. 1990) (upholding temporary restraining order preventing CNN from publishing recordings of telephone calls made from prison between Noriega and his attorney); *State-Record v. State*, 504 S.E.2d 592 (S.C. 1998) (upholding temporary restraining order preventing publication of videotape containing privileged communication between an accused and his attorney).

mation obtained through discovery where the publisher itself is a party¹⁵—tend to support its validity and scope.

While the press may generally print whatever it learns at an open hearing, judges do have the power to legitimately close otherwise public hearings to safeguard vital public interests. But such closings run counter to the press and public's First Amendment rights of access to criminal trials.¹⁶ There is no question that such a right exists for trials and certain other proceedings, at least in the federal courts.¹⁷ For novel situations, *Richmond Newspapers*¹⁸ establishes a two-part test to determine whether the media enjoys a First Amendment right to attend criminal trials. First, under the “experience prong,” a court must determine whether such proceedings have historically been open to the public.¹⁹ Second, under the “logic prong,” the court must decide whether public access to the proceedings plays a significant role in the functioning of the judicial system.²⁰ Probable cause hearings meet this test because of their centrality to the criminal justice system; because many criminal cases are disposed of at this stage, probable cause hearings often provide the only opportunity for public scrutiny.²¹ The Supreme Court has identified a similar public interest in suppression hearings, as they often deal with issues of government misconduct.²²

On the other hand, proceedings may be closed under the *Richmond Newspapers*' experience/logic test in certain circumstances, including those involving the protection of national security. The Third Circuit has ruled that the test allows for closed deportation proceedings to vindicate certain national security interests.²³ That case, *North Jersey Media Group*, is particularly relevant since it occurred in the context of removal proceedings—administrative procedures conducted before an Article III court.²⁴ Nonetheless, the court chose to apply the experience/logic test of *Richmond Newspapers*, despite suggestions from the government that it not do so.²⁵

North Jersey Media Group arose out of the many deportations that occurred following the attacks of September 11, 2001, when the Department of Justice closed the deportation proceedings of

15 See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (holding that a protective order prohibiting dissemination of information gathered through discovery did not violate petitioner's First amendment rights).

16 See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 558–81 (1980). While such a First Amendment right exists in the context of both civilian and military courts, it is entwined with an accused's Sixth Amendment right to a public trial. The rights, however, are distinct. See *Globe Newspaper Co. v. Super. Ct. for Norfolk Cnty.*, 457 U.S. 596, 601 (1982); *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997).

17 See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (Press-Enterprise I) (upholding public access to jury selection proceedings); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (Press-Enterprise II) (upholding public access to pre-trial probable cause hearings).

18 448 U.S. 555 (1980).

19 *Id.* at 564–69.

20 *Id.* at 569–573; see also *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 149 (1993); Press-Enterprise II at 8; *Globe Newspaper Co.*, 457 U.S. at 604–07; *United States v. Criden*, 675 F.2d 550, 556 (3d Cir. 1982).

21 Press-Enterprise II at 12.

22 *Waller v. Georgia*, 467 U.S. 39, 45–46 (1984).

23 *N. Jersey Media Group v. Ashcroft*, 308 F.3d 198, 202 (3d Cir. 2002).

24 *Id.* at 200.

25 *Id.* at 207–08.

“special interest” individuals.²⁶ The Third Circuit found that these deportation proceedings failed both prongs of the *Richmond Newspapers* test. After reviewing the history of public access to administrative procedures, the court found that such hearings lacked the unbroken history of openness inherent in Article III criminal trials.²⁷ Moreover, under the “logic” prong, the court considered the government’s arguments supporting the closed hearings, specifically highlighting the dangerous possibility that terrorist groups could discover intelligence sourcing and methods, weaknesses in U.S. border protection, and information regarding the identity of compromised terrorist cells.²⁸ The government claimed that immigration judges did not have the expertise to balance these concerns on an individual basis, and that a blanket closing of the relevant proceedings was, consequently, logical.²⁹ The court agreed, stating that the dangers enumerated by the government outweighed the advantages of openness.³⁰ The Third Circuit declined to apply the First Amendment to removal proceedings, which remained closed. The Sixth Circuit, meanwhile, conducted similar analysis and ruled differently, emphasizing that “[o]pen proceedings, with a vigorous and scrutinizing press, serve to ensure the durability of our democracy.”³¹

A. Application of the First Amendment

Once public First Amendment rights attach to a proceeding, the test for constitutionally closing such a trial or hearing parallels the application of strict scrutiny in this and other contexts.³² A judge may not close a criminal trial absent a compelling interest, articulated on the record, finding that alternative actions short of closing the courtroom would prove insufficient to protect that interest.³³ The rule applies to the closure of part or all of a proceeding, a decision that must also be narrowly tailored to the affected interest.³⁴ For instance, the court could close only the parts of the trial that actually deal with the sensitive or classified evidence.³⁵

The law is similar in the context of courts-martial under the Uniform Code of Military Justice (UCMJ), specifically when an individual seeks to shield part of a court-martial from the public.³⁶ In this area, military appellate courts have held that the First Amendment grants the public a right to attend and observe courts-martial, and the same principles of compelling interest and narrowly-

26 *Id.* at 202–03.

27 *Id.* at 213.

28 *Id.* at 218–19.

29 *Id.* at 219.

30 *Id.* at 220.

31 *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 711 (6th Cir. 2002).

32 *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989) (applying strict scrutiny to freedom of speech); *Buckley v. Valeo*, 424 U.S. 1 (1976) (applying strict scrutiny to campaign finance); *Lemon v. Kurtzman*, 430 U.S. 602 (1971) (applying strict scrutiny test to the Establishment Clause).

33 *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980).

34 *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607–10 (1982).

35 *See Richmond Newspapers*, 448 U.S. at 598 n. 24 (“[N]ational security concerns about confidentiality may sometimes warrant closures during sensitive portions of trial proceedings, such as testimony about state secrets.”).

36 10 U.S.C. § 801 *et. seq.* (2010).

tailored policy apply.³⁷ Examples of such a compelling interest naturally include the protection of classified information,³⁸ which is the only “closeable” interest specifically contemplated by the Rules for Courts-Martial.³⁹

Of particular importance in the context of this article, the appellate courts have recognized that the press itself has standing within the court-martial system to legally enforce its First Amendment prerogatives.⁴⁰ The simultaneous presence of an accused’s Sixth Amendment right to a public trial further complicates the situation, providing an additional constitutional argument against the closure of proceedings. For instance, in *ABC, Inc. v. Powell*, the Court of Appeals for the Armed Forces found that an accused has a Sixth Amendment right to a public Article 32 investigation.⁴¹ Moreover, the court held that when the defendant has the right to a public proceeding, the press has a First Amendment right to attend.⁴² This distinction is important, as the amendments vindicate different interests.

As the above cases demonstrate, the case law generally deals with issues of judicial practice, that is, where a presiding judge orders the closing of a hearing or trial. In the context of the military commissions, two additional wrinkles present themselves. The first is that of access to Guantanamo Bay itself—an open hearing is useless if the government restricts the press’ ability to observe proceedings. The second issue concerns the role of public affairs officers and other non-jurists in determining issues of access.

B. The Problem of Access

As has been suggested in the context of courts-martial, simply moving a trial to a remote location may sometimes protect classified information by limiting the ease with which the press and public may attend.⁴³ The mere fact that the military commissions are held on a naval base at Guantanamo Bay, Cuba—an isolated slice of land surrounded by ocean to the south and a hostile regime legally inaccessible to Americans just over the hills to the north—imposes significant limits on the ability of members of the press to be physically present for the hearings held there.

At least one federal court has considered the right of the press to access Guantanamo Bay itself.

37 See, e.g., *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987); *United States v. Scott*, 48 M.J. 663, 666 (Army Ct. Crim. App. 1998); M.R.E. 505.

38 *United States v. Grunden*, 2 M.J. 116, 123 (C.M.A. 1977).

39 See Manual for Courts-Martial, United States, R.C.M. 806(b) (2008).

40 An Article 32 investigation is comparable to a civilian court preliminary hearing. *ABC, Inc.*, 47 M.J. at 365 (“[W]hen an accused is entitled to a public hearing, the press enjoys the same right and has standing to complain if access is denied”) (citing *Globe Newspaper Co. v. Superior Court of the County of Norfolk*, 457 U.S. 596 (1982)).

41 *Id.* (“[A]bsent ‘cause shown that outweighs the value of openness,’ the military accused is likewise entitled to a public Article 32 investigative hearing.”) (citing *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 509 (1984)).

42 *Id.*

43 See Maj. Joshua E. Kastenberg, *Analyzing the Constitutional Tensions and Applicability of Military Rule of Evidence 505 in Courts-Martial over United States Service Members: Secrecy in the Shadow of Longtree*, 55 A.F. L. REV. 233, 266 (2004) (“In essence, there is no lawful prohibition against moving a court-martial to Diego Garcia, Guantanamo, or Adak.”).

In *Getty Images*, media organizations sought an injunction that would have required the DOD to treat such groups equally when assigning the limited slots allotted for the flights to Guantanamo and seats in the courtroom to cover the military commissions.⁴⁴ The district court did not consider the public's right to access criminal proceedings under the First Amendment.⁴⁵ Instead, it noted that "access [to Guantanamo Bay] is necessarily limited by the logistical support and resources that the military can provide," and voiced a "reluctan[ce] to interfere significantly in the military's conduct of its affairs."⁴⁶ Consequently, the court chose not to "elaborate on the precise parameters of equal access standards and procedures that may be required by the Constitution."⁴⁷ The court declined to issue an injunction, but did note that "the First and Fifth Amendments seem to require, at a minimum, that before determining which media organizations receive the limited access available, the DOD must not only have some criteria to guide its determinations, but must have a reasonable way of assessing whether the criteria are met."⁴⁸

Getty Images suggests that DOD rules limiting access to military bases that host military commissions impact some constitutional rights, in that they implicitly restrict press access to those proceedings. While the judicial branch has historically shown deference to military matters,⁴⁹ courts would likely find unconstitutional a rule absolutely prohibiting press access to Guantanamo. By implication, and as noted by the D.C. District Court, the DOD is required to put in place rules that allow some level of reasonable access by fairly-selected journalists.⁵⁰

II. THE UNITED STATES MILITARY COMMISSIONS

Much has been written about the origins, strengths, and weaknesses of the tribunals currently sitting at Guantanamo Bay, both in terms of their transparency and their ability to deal with national security issues.⁵¹ This article will revisit the founding documents of those courts only to the extent necessary to draw parallels between their foundations, rules, and procedures, those of civilian courts

44 *Getty Images News Servs. Corp. v. Dep't of Def.*, 193 F. Supp. 2d 112, 113–14 (D.D.C. 2002).

45 *See id.* at 122 ("No persuasive judicial precedent . . . has been cited, and in light of the unique military context present here, the Court does not believe that the Constitution requires the establishment of a press pool at Guantanamo Bay.").

46 *Id.* at 120–21.

47 *Id.* at 122.

48 *Id.* at 121.

49 *See, e.g.*, *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (noting that courts "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest"); *Boumediene v. Bush*, 553 U.S. 723, 832 (2008) (stating, as regards foreign and military affairs, "perhaps in no other area has the Court accorded Congress greater deference" (*citing Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981))).

50 *See* 193 F. Supp. 2d at 121 ("[T]he First and Fifth Amendments seem to require, at a minimum, that . . . [the] DOD must not only have some criteria to guide its determinations, but must have a reasonable way of assessing whether the criteria are met.").

51 *See e.g.* William Glaberson, *U.S. May Revive Guantanamo Military Courts*, N.Y. TIMES (May 1, 2009), http://www.nytimes.com/2009/05/02/us/politics/02gitmo.html?_r=2; LOUIS FISHER, CONG. RESEARCH SERV., *MILITARY TRIBUNALS: HISTORICAL PATTERNS AND LESSONS* (2004); ABA Task Force on Terrorism and the Law, *Report and Recommendations on Military Commissions* (2002).

(notably the federal district courts), and the system of courts-martial regulated by the UCMJ.

A. General Background

The Military Commissions Act of 2009 (MCA) currently governs the trials of detainees at Guantanamo Bay.⁵² The Act explicitly authorizes military judges to close commission proceedings to the public, but “only upon making a specific finding that such closure is necessary to . . . protect information the disclosure of which could reasonably be expected to cause damage to the national security . . . [or to] ensure the physical safety of individuals.”⁵³ In the strict scrutiny language explained above, § 949d(c)(2) of the MCA sets out the “state interests” deemed compelling enough by Congress to require derogation from the default open proceeding requirement.

The Act, however, suggests that the UCMJ serves as the model for interpreting commission rules by explicitly noting that “the judicial construction and application of [the UCMJ]” are instructive in analyzing the Act, although it cautions that such judicial analysis is “not of its own force binding on military commissions.”⁵⁴ Further, recognizing the special nature of the commissions, the Act provides that the Secretary of Defense has some authority to “make such exceptions in the applicability of the procedures and rules of evidence otherwise applicable in general courts-martial as may be required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need consistent with [the Military Commissions Act].”⁵⁵ The Secretary’s designee, then-Deputy Secretary of Defense Gordon England, issued the Regulation for Trial by Military Commission on April 27, 2007, pursuant to that authority.⁵⁶ As to trial closure, however, the Regulation contributes no further guidance, except for a requirement that the findings required to support the trial judge’s decision be “appended to the record of trial.”⁵⁷ This provides little direction, aside from a reiteration that actual findings of fact must be made by a judge seeking to close proceedings.

The final authoritative interpretation of the Act is the Manual for Military Commissions (MMC), issued by the DOD in April 2010.⁵⁸ Rule for Military Commission 806, contained in the MMC, is helpfully entitled “Public trial.”⁵⁹ In discussing the laws governing closure, the Manual notes that “the military judge may take other lesser measures . . . to protect information and ensure the physical

52 10 U.S.C. 47a (2010). *See also* Military Commissions Act of 2009, Pub. L. 111-84, 123 Stat. 2574 (2009) (codified as amended at 10 U.S.C. 47a (2010)).

53 10 U.S.C. 47a (2010) at § 949d(c)(2).

54 § 948b(c).

55 § 949(a)(b)(1).

56 OFFICE OF THE MILITARY COMMISSIONS, DEP’T OF DEF., REGULATION FOR TRIAL BY MILITARY COMMISSIONS (2007), http://www.au.af.mil/au/awc/awcgate/law/reg_for_trial_by_commission.pdf. [hereinafter RTMC].

57 *Id.* at 110 (§ 18-3: Procedures Concerning Spectators).

58 DEP’T OF DEF., MANUAL FOR MILITARY COMMISSIONS (2010), http://www.defense.gov/news/2010_Manual_for_Military_Commissions.pdf [hereinafter MMC].

59 *Id.* at II-73 (“Except as otherwise provided in chapter 47A of title 10, United States Code, and this Manual, military commissions shall be publicly held. For purposes of this rule, ‘public’ includes representatives of the press . . .”).

safety of individuals.”⁶⁰ The MMC specifically suggests the use of delayed broadcast technologies.⁶¹ Moreover, it makes clear that the standard of review a military judge uses when considering classified material pursuant to a decision to close the proceeding is not *de novo*.⁶² Rather, the judge is to defer to the classifying authority after verifying that governing regulations were followed.⁶³

The Discussion section of Rule 806 also notes that “there may be other sources of authority to close the hearing, such as Mil. Comm. R. Evid. 412, or the authority of a military judge to close a hearing in ‘unusual circumstances’ warranting an *ex parte* session.”⁶⁴ But, neither of those sources of authority would appear to provide useful guidance to a military judge seeking to protect sensitive, albeit unclassified, information from general dissemination. Military Commission Rule of Evidence 412 governs admission of evidence concerning nonconsensual sexual offenses.⁶⁵ It requires a closed hearing when the military judge considers certain evidence generally covered by that Rule’s prohibition on evidence concerning an alleged victim’s sexual behavior or predisposition. *United States v. Kaspers* addressed the right of an accused to an *ex parte* hearing, at which the accused intended to argue the need for an expert witness at government expense.⁶⁶ The court held that such hearings were generally offered only in “unusual circumstances,” which were not present in that case.⁶⁷

Military commissions are subject to the jurisdiction of their own appellate panel, decisions of which may be appealed to the U.S. Court of Appeals for the District of Columbia and, ultimately, to the Supreme Court.⁶⁸ But, at present, there is little binding precedent constraining the manner in which military judges preside over these trials. Most obviously, the United States Court of Military Commission Review has yet to issue a ruling regarding press access and the limits of judicial discretion. Also, as detailed above, the regulations promulgated by the DOD provide relatively minimal guidance. Given the dearth of other rules governing the commission judges’ proper role in granting or limiting media access to the trials, the Military Commissions Act’s suggestion that the case law of courts-martial should guide interpretation of the Act is particularly apt.

III. RECOMMENDATIONS: PROVIDING ACCESS WHILE SAFEGUARDING SENSITIVE INFORMATION

A. Appellate Review and the Writ of Mandamus

As mentioned above, the military justice system has allowed media organizations to directly sue for access to courts-martial. In at least one seminal case, *ABC Inc.*, the Court of Appeals for the

60 *Id.* at II-74 (discussion to R. 806(b)(2)(C)); *see also* 10 U.S.C. § 949d(c).

61 MMC, *supra* note 58, at II-74.

62 *Id.*

63 *Id.* (“The review is to verify the existence of a legal basis for the agency official’s determination that information is classified and that no summary of such information can be provided consistent with national security.”).

64 *Id.* (citing *United States v. Kaspers*, 47 M.J. 176 (C.A.A.F. 1997)).

65 *Id.* at III-16 (“Mil. Comm. R. Evid. 412: Nonconsensual sexual offenses; relevance of victim’s behavior or sexual predisposition”).

66 *See Kaspers*, 47 M.J. at 177.

67 *Id.* at 180 (citing *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986)).

68 *See* 10 U.S.C. § 950(a)–(g) (2006).

Armed Forces (CAAF) ordered a pre-trial hearing opened to the press after several media companies filed for a writ of mandamus directly to CAAF.⁶⁹ The court did not rely on any provision of the UCMJ in finding jurisdiction over the matter, and rejected an argument that the media organizations should have first raised the issue before the Army Court of Criminal Appeals.⁷⁰ Rather, the court relied on 28 U.S.C. § 1651(a), which provides that “[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”⁷¹

Notably, this provision does not specify which courts “established by Act of Congress” may issue a writ of mandamus. If the CAAF or a service Court of Criminal Appeals, all of which are Article I courts established by the UCMJ (as opposed to Article III courts established by the Judiciary Act), may invoke § 1651, it appears that the Court for Military Commission Review (CMCR) may do so as well. Consequently, one approach to creating a body of relevant case law would be for press organizations to file petitions for writs of mandamus in appropriate cases, either to the CMCR or the D.C. Circuit, challenging a military judge’s closure orders. While this approach has the advantage of having been successful in the UCMJ context, and presents the possibility of potentially creating a body of guiding law for military commission judges, there may be practical barriers to filing and appearing before a part-time tribunal like the CMCR.

B. The Military Judge: Discretion and Enforcement

As previously noted, the military judge has authority to close hearings either to safeguard protected information or to prevent physical harm to an individual. Yet, military judges have surprisingly little guidance in implementing this responsibility. Consequently, at present, the first rulings on closing proceedings to the press will be made, almost in a vacuum, by military trial judges.

The military judges sitting at Guantanamo Bay are, by law, active-duty military judges in the various military services.⁷² That is, they have served as trial judges in courts-martial, and do so simultaneously with their commission duties. They are informed by their experience as military lawyers and their deep knowledge of, and familiarity with, the court-martial system. For instance, one of the authors was present for a military commission hearing in the Noor Uthman Muhammed case. At that hearing, the commission judge, Navy Captain Moira Modzelewski, explicitly noted her own practice as a court-martial judge in helping the defense counsel gain access to prosecution FBI witnesses. Whereas pre-hearing interviews of prosecution witnesses by the defense is strictly voluntary in the civilian federal courts, such meetings are a routine (albeit not required) practice of courts-martial.

Of course, there are a number of differences between the court-martial and the military com-

69 47 M.J. 363, 366 (C.A.A.F. 1997).

70 *Id.* at 364.

71 *See id.*; 28 U.S.C. § 1651(a) (2006).

72 10 U.S.C. § 948j(b) (2006) (“A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court, or a member of the bar of the highest court of a State, and who is certified to be qualified for duty under section 826 of this title (article 26 of the Uniform Code of Military Justice) as a military judge of general courts-martial by the Judge Advocate General of the armed force of which such military judge is a member.”).

mission systems. Most obviously, the case law concerning public access to courts-martial is likely inapplicable to military commissions, at least in practice. While one may generally be admitted to a military base to observe a court-martial, access to Guantanamo Bay is by invitation only.⁷³ Similarly, the anticipated increased need for classified information in the commission trials, as opposed to the rare introduction of classified evidence in a court-martial, heightens the risk of inadvertent disclosure. This creates a major difficulty for military judges. They are required by regulations, and arguably by the Constitution, to provide the greatest possible access to commission proceedings. But, by making the proceedings more transparent, they increase the risk that a party, counsel, or witness will reference classified or operationally-sensitive information in open court.

Court orders prohibiting the re-publication of such classified information present one possible solution to this dilemma—a reasonable remedy since the people present in the military commission courtrooms are both limited in number and screened for access. But, such an order must be enforceable to be effective, and it is unclear whether a military judge’s contempt powers under the MCA are up to that task. Specifically, it is unclear if a military commission judge has jurisdiction to hold a reporter in contempt for violating any protective order. In this context, the commissions’ jurisdiction is limited: “A military commission may punish for contempt any person who uses any menacing word, sign or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of \$1,000, or both.”⁷⁴ The 2010 Manual for Military Commissions explicitly includes civilians in this provision, with the Convening Authority being informed and tasked with “taking necessary action.”⁷⁵ But the jurisdiction of the Convening Authority over a civilian, especially one whose only contact with the proceedings is as an observer, is nebulous, as the commissions’ jurisdiction is limited to alien unprivileged enemy belligerents.⁷⁶ Nothing in the 2009 MCA suggests expanded jurisdiction for the Convening Authority himself.

Judges in courts-martial have stronger contempt powers. Beyond the powers noted above, they may also sanction any witness who refuses to appear in court.⁷⁷ The contempt order may be certified to a civilian U.S. Attorney’s office and enforced by federal marshals in federal district court.⁷⁸ The district court judge—who generally enjoys unquestioned jurisdiction—could then fine or imprison the subject of a contempt order. But, current law explicitly denies military commission judges this authority.⁷⁹ The National Defense Authorization Act for 2011 includes an amendment to the contempt powers of a military judge that significantly increases a military judge’s authority in this

73 See, e.g., DOD Media Policy, *supra* note 2.

74 MMC, *supra* note 58, at II-14 (Rule 201(c)).

75 See *id.* at II-78 (Rule 809(e) and Discussion (differentiating between proper punishment and notification for a civilian versus military person after they are charged with contempt)).

76 10 U.S.C. § 948(c) (2006).

77 10 U.S.C. § 847(a), 848 (2011) .

78 § 847(b)–(c).

79 MMC, *supra* note 58, at II-77 (Commentary to Rule 809).

area.⁸⁰ Under the newly expanded language, a military judge's contempt power currently extends to any person who "willfully disobeys the [court's] lawful writ, process, order, rule, decree, or command"⁸¹ Such power is especially needed in the military commission context to instill confidence in military judges that any required protective orders will be obeyed or enforced. But, again, the legislation explicitly exempts the current incarnation of military commissions.⁸² In short, the scope and enforceability of a court-martial judge's contempt powers are far more robust than in a military commission context.

Thus, military judges have distinctly different scopes of contempt authority, depending on whether they are presiding over courts-martial or over military commissions. In the latter case, a prudent judge cannot be certain he or she can adequately enforce an order protecting inadvertently released classified information. Consequently, there is an obvious temptation to err on the side of caution, closing proceedings when there is even a remote chance that classified information will be discussed, and generally limiting the portions of commission proceedings open to the press. This is not a certainty, but the calculus is plain, as is the risk of overly-secretive proceedings. Congress could easily eliminate this risk by trusting military judges with the same powers they enjoy when they preside over courts-martial.

C. The Role of the Pentagon Public Affairs Office

While lawyers traditionally look to the courts for guidance, the institution with the most direct influence on this particular issue is not judicial. In the case of press access to the commissions at Guantanamo Bay, that institution is the DOD Office of Public Affairs, often working through its subordinate arm, the Office of Military Commissions-Public Affairs (OMC-PA).

As already noted, the four reporters expelled from Guantanamo Bay in May 2010 were not barred for violating a court order or anything else directly related to the judicial conduct of the military commissions.⁸³ Indeed, the military judge presiding over that commission hearing did not implement the ban. Rather, the reporters ran afoul of the "Media Policy and Ground Rules" they had signed as a prerequisite to securing permission to travel to Cuba.⁸⁴ That document is drafted and promulgated by public affairs professionals attached to the military commissions, not by the commission judges themselves.

Indeed, public affairs officers' influence over journalists' access to Guantanamo Bay, as well as the scope of their reporting, is best illustrated by the results of the May 2010 expulsions. The journalists had been expelled for naming a witness whose identity was already in the public record, infor-

80 National Defense Authorization Act for Fiscal Year 2011, P.L. 111-383 542(b), 124 STAT. 4218 (2011), *available at* http://www.law.cornell.edu/uscode/html/uscode10/usc_sec_10_00000848----000-.html.

81 *Id.*

82 *Id.*

83 Peters, *supra* note 1, at 1.

84 *Id.*

mation that the journalists gained from sources outside the military commissions.⁸⁵ Under new rules promulgated in September 2010, publishing that exact kind of information is no longer a violation of the Ground Rules.⁸⁶ This change in policy, along with others contained in the revised document, was not the direct result of litigation; in fact, no judge ruled on the expulsions. Rather, the Pentagon revised the ground rules at the sole discretion of the public affairs officials in the Office of the Secretary of Defense, after media representatives and their attorneys met with DOD officials.

That development suggests that questions of press access should be centralized and rigorously considered by senior-level DOD personnel. To that end, one of the most helpful aspects of the new rules is that they now contain appeals provisions, something not available under the previous system. Disagreements concerning whether photographs and video compromise Guantanamo Bay security may be appealed to the Commander of the Group Task Force with responsibility for the commission sites, who must then decide the issue within 24 hours.⁸⁷ Moreover, reporters are explicitly permitted to challenge the designation of particular information as protected. They may do so by appealing to the military judge, to whom the public affairs officials will defer. Members of the press also can opt to appeal to the Joint Task Force Commander, depending on which of those two authorities made the initial designation.⁸⁸ Moreover, if public affairs officials believe a violation of the ground rules has occurred, media members may appeal to the Principal Assistant Secretary of Defense for Public Affairs.⁸⁹

In short, the public affairs officials and other military members who are assigned on an ever-changing basis to escort the media exert enormous practical control over press access to Guantanamo Bay and commission proceedings.⁹⁰ The transition to a more flexible relationship between the Pentagon public affairs office and the press is welcome, and the appeals procedures in place under the revised Ground Rules should help establish a body of guidelines to assist lower-level officials and, ultimately, facilitate the maximum public access consistent with protecting national security. But the Ground Rules cannot replace the powers of a military judge to control his or her courtroom and the protective orders issued therein, a point that is explicitly conceded by the Ground Rules themselves.⁹¹

85 Kevin Baron, *Pentagon Drops Controversial Ban on GTMO Reporters*, STARS AND STRIPES (July 13, 2010), <http://www.stripes.com/blogs/stripes-central/stripes-central-1.8040/pentagon-drops-controversial-ban-on-gtmo-reporters-1.110927>

86 See DOD Media Policy, *supra* note 2, at 4 (“[A reporter] will not be considered in violation of these ground rules for re-publishing what otherwise would be considered Protected Information, where that information was legitimately obtained in the course of newsgathering independent of any receipt of information while at GTMO [Guantanamo Bay], or while transiting to or from GTMO on transportation provided by DOD (or other U.S. government entities).”)

87 *Id.* at 6 (Rule E(6)).

88 *Id.* at 10–11 (Rule J(1)–(2)).

89 *Id.* at 11 (Rule J(3)).

90 Carol Rosenberg, *Commentary: For Reporters, the Rules at Guantanamo Change Daily*, McCLATCHY NEWSPAPERS (July 26, 2010), <http://www.mcclatchydc.com/2010/07/26/98146/commentary-for-reporters-the-rules.html>

91 See DOD Media Policy, *supra* note 2 at 11 (Rule J(4)) (“Nothing in this section is intended to interfere with a military judge’s authority within his or her courtroom.”).

D. The Role of Congress

At the end of the day, writs of mandamus and appeals to public affairs officials are stop-gap measures that do not solve the larger First Amendment issues. One concrete suggestion for solving the dilemma would have Congress enshrine greater press access in the statutory law governing the commissions themselves, without negatively affecting national security interests. Such a revision has already been suggested above: Provide substantial, enforceable contempt powers for military judges assigned to the commissions. But other solutions should also be considered.

Obvious alternatives include the following: requiring a greater number of courtroom slots for reporters; establishing explicit statutory standing for individual reporters to challenge the closing of proceedings before the military judge as the individual most familiar with his or her own closure decision; and, providing explicit statutory authority for the CMCR to review closure orders on an interlocutory basis. A model for such appeals could be the practice of the United States Supreme Court in capital cases, where an individual member of the Court may hear appeals (such as requests for stays of execution) and can issue rulings on the subject.⁹²

Working out the parameters of the media's right to cover these historic commissions is a pressing concern, particularly given the small fraction of the American public—and even the small proportion of victims and family members—who will ever get the opportunity to attend the commissions in person. The urgency is all the more acute now, given that the military commissions are moving full speed ahead in trying the most high-profile and complex terror cases since the attacks a decade ago.⁹³

IV. CONCLUSION

In recent months, the Office of Military Commissions has exhibited a renewed commitment to transparency in the commission proceedings by revamping its website⁹⁴ and providing remote viewing locations for victims, family members, and the press—but not the general public—to watch commission hearings.⁹⁵ Certainly, such increased access is a welcome development, but it likely means that the tension between the rights in conflict described in this article will not find judicial or legislative resolution any time soon.

92 United States Supreme Court Rules 22 and 23.

93 See *9/11 Suspects Charged Again at Gitmo*, NBC News (May 31, 2011), available at <http://www.nbcnewyork.com/news/politicshalid-Sheikh-Mohammed-911-Suspects-Guantanamo-122878234.html>; Dwyer Arce, *WikiLeaks Releases Classified Guantanamo Documents*, JURIST (April 25, 2011), <http://jurist.org/paperchase/2011/04/wikileaks-releases-classified-guantanamo-documents.php>; Carol Rosenberg, *Pentagon Seeks Death for Accused USS Cole Bomber*, MIAMI HERALD (April 20, 2011), <http://www.miamiherald.com/2011/04/20/2177510/pentagon-seeks-death-for-accused.html>

94 Charles “Cully” Stimson, *Military Commissions Just Became More Transparent*, available at <http://blog.heritage.org/2011/09/28/military-commissions-just-became-more-transparent/> (last visited November 6, 2011).

95 Carol Rosenberg, *Prosecutors propose wider public viewing of Guantánamo terror trial*, MIAMI HERALD (November 5, 2011), <http://www.miamiherald.com/2011/11/05/v-print/2488542/prosecutors-propose-wider-public.html#ixzz1cyEPnpQs>