ORAL ARGUMENT NOT YET SCHEDULED

Case No. 19-1234

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PHILIP SUNDEL,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent.

On petition for review from a decision of the
Court of Military Commission Review

Brief of Petitioner

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

I. PARTIES AND *AMICI* APPEARING BELOW

The parties who appeared before the Court of Military Commission Review were:

1. Ibrahim Ahmed Mahmoud al Qosi, *Appellant*
2. United States of America, *Appellee*
3. Philip Sundel, Third Party

There were no amici.

II. RULINGS UNDER REVIEW

Petitioner seeks review, pursuant to 10 U.S.C. § 950g, of the final order of the United States Court of Military Commission Review issued on October 21, 2019, Case Number 17-001.

A copy of this order is located at pages 1-7 of Petitioner's Appendix.

III. RELATED CASES

Petitioner is unaware of any related cases.

Dated: April 27, 2020

/s/ Philip Sundel
PHILIP SUNDEL, #93460 (DC)

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GLOSSARY OF TERMS

App. .... Petitioner's Appendix

C.M.C.R. .... Court of Military Commission Review

Jurisdiction

The Court has jurisdiction over the Court of Military Commission Review's ("C.M.C.R.") final order denying Petitioner's non-party motion challenging closure of a military commission hearing, and Petitioner filed a timely petition for review in this Court. 10 U.S.C. § 950f.

Question Presented

> Did the military commission judge violate the First Amendment when he excluded Petitioner from a post-trial military commission hearing without finding that Petitioner's presence would present a substantial probability of harm to Respondent's compelling interest?

Standard of Review

An order closing proceedings is reviewed *de novo*. *See generally Press-Enterprise Co. v. Superior Court of California,* 464 U.S. 501, 509-513 (1984) (*Press-Enterprise I*); *United States v. Brice*, 649 F.3d 793, 796 (D.C. Cir. 2011) ("Where there is a *First Amendment* right of access to a judicial proceeding, the 'presumption [of access] can be overridden only if (1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest.'" (emphasis in original) (*quoting Washington Post v. Robinson*, 935 F.2d 282, 290 (D.C. Cir. 1991) (internal quotation marks omitted))).

Procedural History

On February 13, 2019, in furtherance of its review pursuant to 10 U.S.C. § 950f, the C.M.C.R. ordered that a military commission conduct a post-trial fact-finding hearing into the current status and location of Mr. Ibrahim Ahmed Mahmoud al Qosi, the military commission defendant. *Al Qosi v. United States*, Case No. 17-001, Order Denial of Third Party Petition (C.M.C.R. October 21, 2019) at *2 (App. 1) ("C.M.C.R. October 21 Order").

On June 12, 2019, over Petitioner's objection, the military commission judge conducting the hearing ordered a portion of it closed to the public on the ground that classified information would be introduced into evidence. *Id.* at *2. A closed session was held the next day. *Id.* at *3.

Petitioner is a civilian employee of the Department of Defense and a member of the Military Commissions Defense Organization. *Id.* at *1. Petitioner does not and has never represented Mr. al Qosi. *Id*. At all times relevant to this matter Petitioner has held an active security clearance (TOP SECRET/SCI[1]) adequate to allow access to the classified information disclosed during the closed hearing (SECRET). *Id.* at *6.

On August 12, 2019, after the record of the post-trial military commission was returned to the C.M.C.R., Petitioner appealed the closure order. *Id.* at *1.

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[1] Sensitive Compartmented Information.

The C.M.C.R., electing to treat Petitioner's appeal as a petition for a writ of mandamus, ruled against Petitioner on October 21, 2019. *Id.* Petitioner filed a motion for reconsideration on October 28, 2019, asking that the C.M.C.R. reconsider its October 21 order. *Al Qosi v. United States*, Case No. 17-001, Order Third Party Request for Reconsideration (C.M.C.R. December 27, 2019) (App. 10) ("C.M.C.R. Order December 27").

On November 4, 2019, the C.M.C.R. issued an order in which it "reconsidered . . . and voted to ratify and reaffirm" the October 21 order. *Al Qosi v. United States*, Case No. 17-001, Order Affirming Previous Orders (C.M.C.R. November 4, 2019) (App. 8) ("C.M.C.R. Order November 4"). It explained the order was necessary because two of the three judges on the panel that issued the October 21 order had not been properly assigned to the panel. *Id.* at *1-2.

On November 8, 2019, Petitioner filed a petition for review with this Court.

On December 27, 2019, the C.M.C.R. issued an order in which it purported to deny Petitioner's October 28 motion for reconsideration of C.M.C.R.'s October 21 order. C.M.C.R. Order December 27 at *4.

Summary of Argument

The public had a qualified First Amendment right of access to the post-trial military commission proceeding in question. While the government had a compelling interest in safeguarding the classified information that was going to be

introduced into evidence, the military commission was nevertheless required to find that Petitioner's exclusion was necessary to prevent a substantial probability of harm to that interest. Here, the government itself had previously determined that Petitioner, and other similarly situated members of the public, could be trusted to safeguard the classified information presented during the hearing, when it granted him a security clearance. The military commission judge, however, ordered a blanket closure of the hearing to all members of the public, not based upon a finding of a substantial probability of harm, but instead based upon the irrelevant, and incorrect, finding that Petitioner had not demonstrated a "need to know" the classified information.

Argument

THE MILITARY COMMISSION JUDGE MISAPPLIED THE LAW WHEN HE EXCLUDED PETITIONER FROM A PUBLIC HEARING SOLELY BECAUSE HE CONCLUDED THAT PETITIONER HAD NOT DEMONSTRATED A "NEED TO KNOW" THE CLASSIFIED EVIDENCE THAT WAS TO BE PRESENTED

I. The Court has jurisdiction over Petitioner's non-party appeal of a military commission judge's order to close the courtroom during an otherwise public post-trial fact-finding hearing.

A. The closure of the military commission hearing was a final collateral order.

The collateral order doctrine allows courts to formulate "a practical construction" of the finality requirement for appellate jurisdiction. *Will v. Hallock*,

546 U.S. 345, 349 (2005). Final decisions appropriate for review include those "that are conclusive, that resolve important questions completely separate from the merits, and that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action." *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 867 (1994).

While the collateral order doctrine was first recognized in the context of 28 U.S.C. § 1291 and its predecessor statutes, *Cobbledick v. United States*, 309 U.S. 323, 324 (1940), it has consistently provided a standard for the interpretation of other finality statutes. *Oglala Sioux Tribe v. United States NRC*, 896 F.3d 520, 528 (D.C. Cir. 2018) (Hobbs Act); *CalPortland Co. v. Fed. Mine Safety & Health Review Comm'n*, 839 F.3d 1153, 1159-60 (D.C. Cir. 2016) (Federal Mine Safety and Health Act); *M.A. Mortenson Co. v. United States*, 877 F.2d 50 (Fed. Cir. 1989) (Court of Claims); *Travelstead v. Derwinski*, 978 F.2d 1244, 1247-48 (Fed. Cir. 1992) (Court of Veterans Appeals). The Court suggested without deciding that the collateral order doctrine governs its construction of 10 U.S.C. § 950g. *Khadr v. United States*, 529 F.3d 1112, 1117 (D.C. Cir. 2008) (discussion of applicability of collateral order doctrine); *In re Nashiri*, 835 F.3d 110, 132 (D.C. Cir. 2016) (*citing Khadr*'s collateral order doctrine discussion). Relatedly, the Court has recognized the mandamus exception to § 950g's finality requirement. *In re Nashiri*, 791 F.3d 71, 76 (D.C. Cir. 2015).

The Court "has long allowed nonparties subject to a restrictive order to appeal that order under the collateral order doctrine." *In re Stone*, 940 F.3d 1332, 1340 (D.C. Cir. 2019). The order at issue here, which barred Petitioner and other similarly situated members of the public from an otherwise open military commission proceeding held at the Washington Navy Yard in Washington, D.C., qualifies. It is "separable from, and collateral to, the rights of the parties to the underlying proceeding," *Stone*, 940 F.3d at 1340 (*quoting In re Reporter's Committee for Freedom of the Press*, 773 F.2d 1325, 1330 (D.C. Cir. 1985)).

B. The C.M.C.R.'s denial of Petitioner's appeal was final.

All proceedings in the C.M.C.R. addressing Petitioner's challenge to the closure of the post-trial military commission hearing were final before Petitioner sought review by this Court. The C.M.C.R.'s rules of procedure rendered its October 21 order final before the petition for review was filed.

As a general rule, under the Hobbs Act and similar statutes governing judicial review of administrative actions, requests for reconsideration submitted to an agency are treated as making the challenged action non-final. *Clifton Power Corp. v FERC*, 294 F.3d 108, 110-11 (D.C. Cir. 2002). As a consequence, a petition for review of an agency action filed while a motion for reconsideration is still pending is incurably premature because the agency may reverse itself or reopen the matter pending before the Court. *Id*. The particular statutes and rules

governing the finality of C.M.C.R. decisions, however, make the general rule inapplicable here. *Cf. Stone v. INS*, 514 U.S. 386, 394 (1995) (finality not affected by motion to reconsider where statute directs motion be consolidated with judicial review).

The principal provision addressing reconsideration in the C.M.C.R., governing both finality of decisions and the reconsideration process, is Rule 20 of the C.M.C.R.'s Rules of Practice and Procedure. Rule 20(g) makes the decisions of the C.M.C.R. final upon service on the parties and further states that "The timely filing of a request for reconsideration does not stay the decision of the CMCR." Rule 20(h) then states that "Unless otherwise announced in an order granting reconsideration the order granting reconsideration vacates the decision being reconsidered." And Rule 20(a) provides that the C.M.C.R. has only 15 days during which to "enter an order announcing its intent to reconsider its decision," whether on its own or in response to a motion by a party.

Hence, if the C.M.C.R. has not announced its intent to reconsider a decision within fifteen days after its service, the window to reopen an otherwise final decision closes and any pending motion for reconsideration or other action that might affect finality is denied by default. *Cf. Ikossi v. Dep't of Navy*, 516 F.3d 1037, 1039 (D.C. Cir. 2008) (failure of agency to decide a claim within its statutory deadline entitles the claimant to treat the claim as denied and seek judicial

review); *GAF Corp. v. United States*, 818 F.2d 901, 918 (D.C. Cir.1987) (same).

This fifteen-day deadline makes sense when read in the context of 10 U.S.C. § 950(g). By statute, Petitioner was required to exhaust the C.M.C.R.'s appellate review prior to seeking this Court's review, § 950g(b), and had only twenty days after the C.M.C.R. denied Petitioner's challenge during which to file a petition for review in this Court. § 950g(c). Rule 20's automatic fifteen-day window also gives teeth to the otherwise very short five-day filing deadline the C.M.C.R.'s Rules impose on motions for reconsideration by a party.

Pursuant to Rule 8 of the C.M.C.R.'s Rules of Practice and Procedure, governing the computation of time, the fifteen-day clock for the C.M.C.R. to announce its intent to reconsider began to run October 22, the day after the order issued. The last day of the fifteen-day period was November 5. Here, during that window the C.M.C.R. neither entered an order announcing its intent to reconsider, nor took any other action with respect to Petitioner's motion for reconsideration.[2] Instead, after Rule 20's fifteen-day deadline expired without any further action by the C.M.C.R., Petitioner's then-pending motion for reconsideration was denied by default. The C.M.C.R.'s order expressly denying Petitioner's motion on December

[2] The C.M.C.R. did mention Petitioner's motion for reconsideration in its November 4 order, but only to state in a footnote that "This action does not affect the pending motion for reconsideration of the Court's order of October 21, 2019." C.M.C.R. Order November 4 at *2.

27, 2019, more than a month after Petitioner had petitioned this Court for review, was therefore without legal effect. As a consequence, Petitioner's petition in this Court was timely and this case is properly before this Court.

Although unacknowledged by the C.M.C.R. it appears that, in the alternative, Petitioner's motion for reconsideration was nullified by the C.M.C.R.'s November 4 order. As the C.M.C.R. recognized, the panel that issued the October 21 order was rendered inquorate when two of its three judges were improperly assigned to the panel. C.M.C.R. Order November 4 at *1-2. The C.M.C.R.'s October 21 order was therefore void. *Comer v. Murphy Oil USA*, 607 F. 3d 1049, 1054 (5th Cir. 2010) ("Absent a quorum, no court is authorized to transact judicial business. *See Nguyen v. United States*, 539 U.S. 69, 82 n.14, 123 S. Ct. 2130, 156 L. Ed. 2d 64 (2003) (*quoting Tobin v. Ramey*, 206 F.2d 505, 507 (5th Cir. 1953))."); *United States v. Elliot*, 15 M.J. 347, 349 (Ct. Mil. App. 1983) ("As Congress has unequivocally commanded that a panel of a Court of Military Review 'be composed of not less than three appellate military judges' . . . we hold that a panel cannot lawfully operate during a time when it has less than three members"). Petitioner's October 28 motion for reconsideration of the void October 21 order was not refiled after the C.M.C.R. issued its actual final order on November 4. Petitioner's timely-filed petition therefore arose from a final C.M.C.R. order, issued November 4, that was never subject to a motion for

reconsideration.

II. The June 13 military commission hearing should not have been closed to Petitioner and similarly situated members of the public.

A. The public had a right to attend the June 13 hearing.

The test for establishing whether the public has a First Amendment right of access to a judicial proceeding is “whether the place and process have historically been open to the press and general public,” and “whether public access plays a significant positive role in the functioning of the particular process in question.” *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) (*Press-Enterprise II*). “If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches.” *Id.* at 9.

Any proceeding that is “sufficiently like a trial” must be public, and where the established and widespread tradition in the United States is for a particular “type or kind” of proceeding to be public then it must be public in every jurisdiction. *El Vocero v. Puerto Rico*, 508 U.S. 147, 149-151 (1994) (internal citations omitted). Criminal trials, in particular, are presumptively open to the public. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605-06 (1992). And a judge-alone proceeding “makes the importance of public access to a . . . hearing even more significant.” *Press-Enterprise II*, 478 U.S. at 13.

The C.M.C.R. has recognized that the public’s right to attend judicial proceedings applies to the military commission appellate process. *Khadr v. United*

States, Case No. 13-005, Order Motion to Disqualify Clerk and Expedite Public Release of Documents (C.M.C.R. December 11, 2014) (App. 14). And the C.M.C.R.'s sister court, the then-Court of Military Appeals, long ago recognized that the public's "qualified constitutional right under the First Amendment to access criminal trials . . . extends to courts-martial" because "Public confidence in matters of military justice would quickly erode if courts-martial were arbitrarily closed to the public." *United States v. Travers*, 29 M.J. 61, 62 (Ct. Mil. App. 1987) (internal citations omitted).

The post-trial fact-finding hearing ordered by the C.M.C.R. in Mr. al Qosi's appeal, called a "*DuBay*" hearing,[3] is a judge-alone "trial-type procedure." *United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997). *DuBay* hearings include the right to counsel, discovery, compulsory process, application of the rules of evidence, and the right to call and cross-examine witnesses. *See generally United States v. Rodriguez*, 60 M.J. 239, 260 (C.A.A.F. 2004) (Effron, J., dissenting). A *DuBay* hearing, like a suppression hearing, "resembles a bench trial: witnesses are sworn

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[3] In court-martial and now military commission practice post-trial fact-finding hearings are known by the case name in which they were invented. *United States v. DuBay*, 37 C.M.R. 411 (Ct. Mil. App. 1967). Because "Congress intended [the reviewing courts] to act as factfinder in an appellate-review capacity and not in the first instance as a trial court," *United States v. Ginn*, 47 M.J. 236, 242 (C.A.A.F. 1997), it was necessary for the court to create "a procedure by which the [appellate courts] may expand the record of trial where appropriate through an evidentiary hearing." *United States v. Fagan*, 59 M.J. 238, 241 (C.A.A.F. 2004).

and testify, and of course counsel argue their positions. The outcome . . . depends on a resolution of factual matters." *Waller v. Georgia,* 467 U.S. 39, 47 (1984). In civilian jurisdictions such proceedings are "Normally . . . settled in a hearing before the trial judge." *DuBay*, 37 C.M.R. at 412 n.2.

A month prior to the hearing at issue here the Department of Defense and the Office of Military Commissions issued a public advisory announcing that the hearing would be held at the Washington Navy Yard. App. 23. The advisory went on to instruct "[m]edia desiring to attend this hearing" on the steps necessary to do so. *Id*. And for his part the presiding military commission judge recognized that the proceeding in question was an otherwise public trial session that he had ordered closed "to protect national security." App. 27; App. 25.

B. Petitioner, and similarly situated members of the public, are trusted to safeguard classified information.

Where the State attempts to deny the public its right of access to a proceeding, the presumption of access "can be overridden only if (1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest." *Washington Post*, 935 F.2d at 290 (internal quotations omitted). Here, Petitioner agrees that the existence of a compelling interest was established by the anticipated introduction into evidence of classified information. *United States v. Yunis*, 867 F.2d 617, 623

(D.C. Cir. 1989). There was, however, no evidence that *Petitioner's* presence at the hearing would create a substantial probability of harm to that interest.

"[T]here are no doubt circumstances where a judge could conclude that threats of improper communications [by members of the public] are concrete enough to warrant closing" a hearing to protect classified information. *Presley v. Georgia*, 558 U.S. 209, 215 (2010). Indeed, Petitioner does not dispute that this will normally be the situation when classified information is at issue. *See Dhiab v. Trump*, 852 F.3d 1087, 1097 (D.C. Cir. 2017) ("district court had no basis for ruling that publicly releasing the [testimony] could not be expected to cause" harm to national security). Where the government itself determines that members of the public *can* be trusted to safeguard classified information, however, the burden of justifying closure has not been carried. To the contrary, by definition such persons do not represent a substantial probability of harm.

At least twice in the last ten years, and throughout the period relevant to this petition, the government has deemed Petitioner eligible to access classified information when it granted him a TOP SECRET/SCI security clearance. That eligibility evidences the State's own assessment that allowing Petitioner, and

similarly situated members of the public,[4] to attend the hearing would not have presented a substantial probability of harm to the State's compelling interest.

The determination that Petitioner was entitled to a TOP SECRET/SCI security clearance–i.e. that the disclosure of classified information to Petitioner would not pose a risk of improper disclosure or other public danger–was made through a carefully regulated process. Executive Order No. 12968, 60 Fed. Reg. 40,245, 40,246 (Aug. 7, 1995). Eligibility for a security clearance is "based on judgments by appropriately trained adjudicative personnel." *Id.* at § 3.1(b). It is only allowed after "an appropriate investigation" demonstrates the candidate's

> personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information.

Id. Even then eligibility is not granted unless there is a determination that the "facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States," keeping in mind that "[a]ny doubt shall be resolved" against granting eligibility. *Id.* Finally,

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[4] In October 2017, the last date for which Petitioner was able to locate information, there were over 4 million United States Government employees and contractors deemed eligible for access to classified information. Fiscal Year 2017 Annual Report on Security Clearance Determinations (App. 28).

eligibility decisions are judicially unreviewable because the "predictive judgment" that is required "must be made by those with the necessary expertise in protecting classified information." *Dep't of Navy v. Egan*, 484 U.S. 518, 528-29 (1988).

The end result of that process for Petitioner has been the repeated determination that his eligibility for access to classified information is clearly consistent with the national security interests of the United States. Indeed, Petitioner has been deemed eligible to access information that is much more highly restricted than any entered into evidence at the June 13 hearing. *Cf. id.* at 527 ("Since World War I, the Executive Branch has engaged in efforts to protect national security information by means of a classification system graded according to sensitivity.")

After an individual is determined to be eligible for access to classified information a "Classified Information Nondisclosure Agreement," known as an "SF 312," binds the individual to certain obligations with respect to classified information. App. 41. This includes the express promise to never improperly disclose national security information. *Id.* at ¶ 3. Additionally, the individual acknowledges that improper disclosure

> may result in the termination of any security clearances I hold; removal from any position of special confidence and trust requiring such clearances; or termination of my employment or other relationships with the Departments or Agencies that granted my security clearance or clearances. In addition, I have been advised that

> any unauthorized disclosure of classified information by me may constitute a violation, or violations, of United States criminal laws, including the provisions of sections 641, 793, 794, 798, *952 and 1924, title 18, United States Code; *the provisions of section 783(b}, title 50, United States Code; and the provisions of the Intelligence Identities Protection Act of 1982.

Id. at ¶ 4. The SF 312 is documentation of the signatory's understanding that "the United States Government may seek any remedy available to it to enforce this Agreement including, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agreement." *Id*. at ¶ 6. Acceptance memorializes the signatory's recognition "that all classified information to which I have access or may obtain access by signing this Agreement is now and will remain the property of, or under the control of the United States Government unless and until otherwise determined by an authorized official or final ruling of a court of law." *Id*. at ¶ 7.

After extensive investigation and the exercise of specialized judgment Respondent formally determined that Petitioner, and similarly situated members of the public, can be trusted with access to classified information. Respondent required Petitioner to document his recognition of the legal obligations that trust places on him to safeguard any and all classified information of which he becomes aware. Respondent ensured Petitioner demonstrated his awareness of the criminal, civil, and administrative sanctions he faces for any improper disclosure of

classified information. In light of those facts, there was no support for a finding that Petitioner represented a substantial probability of harm to the compelling interest at issue in the June 13 hearing.

C. "Need to know," the military commission judge's only basis for closure, was irrelevant to the closure determination.

In excluding Petitioner, in particular, from the proceeding, the military commission judge wrongly based his closure order on the finding that there was "insufficient evidence of the intervenor's need to know as to any of the classified information in question."[5] App. 26.

A "need to know," however, is a term of art that refers to the administrative procedure whereby "an authorized holder of classified information" determines whether "a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function." Executive Order No. 12968, § 1-1(h). "Need to know" is, therefore, nothing more than a functional determination respecting whether it is in the *government's* interest that a particular individual receives classified information. The only question asked is whether another's performance of some service for the

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[5] The C.M.C.R. likewise found that Petitioner "did not present any information to the *DuBay* judge or to us indicating that he has a 'need to know' the classified information that was presented to the *DuBay* judge." C.M.C.R. October 21 Order at *6.

government requires that they be given access to specific classified information to perform that service.

The "need to know" determination takes no account of whether that other individual can be trusted with access to the information. *Stillman v. DOD*, 209 F. Supp. 2d 185, 196 n. 6 (D.D.C. 2002) (Executive Order "does not allow for consideration of risk to security to impact the need-to-know determination") *rev'd on other grounds Stillman v CIA*, 329 F.3d 546 (D.C. Cir. 2003). Said differently, a need to know determination is not a risk assessment.

Risk assessments, i.e. whether a particular individual can be trusted with access to classified information, is a separate process undertaken by the Executive Branch, described at §II.b. *infra*, that is distinct from and antecedent to any "need to know" determination. *Stillman*, 209 F. Supp. 2d at 195 ("A denial of access based on this [need to know] determination presents a very different question than a denial of access based on the predicted risk to national security caused by release of the information."), *rev'd on other grounds Stillman*, 329 F.3d at 546. The "need to know" determination, therefore, does not touch on, let alone answer, whether an individual represents a substantial risk of harm to the compelling interest of safeguarding classified information.

A public proceeding may be closed only upon a judicial finding that in the absence of closure there is a substantial probability that a compelling interest

would be harmed. The military commission judge misapplied the law in basing closure on his wholly irrelevant finding regarding Petitioner's "need to know." Because the constitutional standard was not met, Petitioner should not have been excluded from that hearing.

D. If "need to know" was relevant, then Petitioner had it.

Assuming that "need to know" was relevant to the closure analysis, the military commission judge was wrong to hold that Petitioner did not have a "need to know." The First Amendment right of access to public proceedings is synonymous with a "need to know" the contents of the proceedings.

The public's right to attend judicial proceedings is in part a right to hear the evidence presented at the hearing. *Cf. Richmond Newspapers v. Virginia,* 448 U.S. 555, 576 (1980) ("It is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a 'right of access,' or a 'right to gather information'") (internal citations omitted). Thus, where the First Amendment affords a member of the public the right to be present at a proceeding it by necessity affords them the right to hear the testimony presented.

When a public proceeding is nonetheless closed it is not due to a finding that the public does not have a "need to know" the information. Rather, public hearings are closed only when "closure is essential to preserve higher values." *Press-*

Enterprise I 464 U.S. at 510. Closure is allowed despite the public's right to the information to be presented, not because it has no right. Conversely, where the public has no right to the information at issue, no "need to know," there is no need to justify closure. *Cf. United States v. El-Sayegh*, 131 F.3d 158, 160-61 (D.C. Cir. 1997) (ending constitutional closure analysis after determination that public had no right of access to document in question).

Finally, where "need to know" is relevant to an issue before a court it must be a judicial determination. *Cf. Al Odah v. United States*, 559 F.3d 539, 547 (D.C. Cir. 2009) (*discussing Bismullah v. Gates*, 501 F.3d. 178 (D.C. Cir 2007)) (counsel in Detainee Treatment Act proceeding has presumptive "'need to know' all Government information concerning his client"); *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174, 180 (D.D.C. 2004) (defense counsel representing Guantanamo Bay detainees have a "'need to know' information both in their own cases and in related cases pending before this Court."); *In re Guantanamo Bay Litig.,* 577 F. Supp. 2d. 143 (D.D.C. 2008) (same); *In re Guantanamo Bay Detainee Continued Access to Counsel,* 892 F. Supp. 2d. 8 (D.D.C. 2012) (same).

To the extent any "need to know" was relevant to closure of the June 13 hearing the military commission judge misapplied the law in concluding Petitioner had not demonstrated a "need to know" the evidence to be presented at the hearing.

Conclusion

Once the decision is made to allow the use of national security evidence in a criminal proceeding the government's ability to control its public dissemination is subject to the same judicial determinations as applies to any effort to close a proceeding. The military commission judge here wrongly based his closure decision on a factor–"need to know"–that was irrelevant to the applicable substantial probability of harm standard. Contrary to his closure order, Petitioner and other similarly situated members of the public should have been allowed to attend the hearing. Petitioner asks that the Court vacate the military commission judge's closure order, and the C.M.C.R.'s denial of Petitioner's challenge of the closure order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32

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Dated: April 27, 2020

Respectfully submitted,

/s/ Philip Sundel
PHILIP SUNDEL, #93460 (DC)

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2020 a copy of the foregoing was filed electronically with the Court. Notice of this filing will be sent to all parties by operation of this Court's electronic filing system. Parties may access this filing through the Court's system.

Dated: April 27, 2020

Respectfully submitted,

/s/ Philip Sundel
PHILIP SUNDEL, #93460 (DC)

ADDENDUM OF RELEVANT STATUTORY AND REGULATORY PROVISIONS

Statutory Provisions

10 U.S.C. § 950f

(c) Cases to be reviewed. The Court shall, in accordance with procedures prescribed under regulations of the Secretary, review the record in each case that is referred to the Court by the convening authority under section 950c of this title with respect to any matter properly raised by the accused.

10 U.S.C. § 950g

(b) Exhaustion of other appeals. The United States Court of Appeals for the District of Columbia Circuit may not review a final judgment described in subsection (a) until all other appeals under this chapter have been waived or exhausted.

(c) Time for seeking review. A petition for review by the United States Court of Appeals for the District of Columbia Circuit must be filed in the Court of Appeals—

(1) not later than 20 days after the date on which written notice of the final decision of the United States Court of Military Commission Review is served on the parties; or

(2) if the accused submits, in the form prescribed by section 950c of this title, a written notice waiving the right of the accused to review by the United States Court of Military Commission Review, not later than 20 days after the date on which such notice is submitted.

28 U.S.C. § 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Regulatory Provisions

Executive Order 12968, Access to Classified Information

Section 1.1. *Definitions.*

(h) ''Need-to-know'' means a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function.

Sec. 3.1. *Standards.*

(b) Except as provided in sections 2.6 and 3.3 of this order, eligibility for access to classified information shall be granted only to employees who are United States citizens for whom an appropriate investigation has been completed and whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information. A determination of eligibility for access to such information is a discretionary security decision based on judgments by appropriately trained adjudicative personnel. Eligibility shall be granted only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of the national security.

C.M.C.R. Rule 8. COMPUTATION OF TIME

(a) **Weekends and holidays.** In computing any period of time prescribed or allowed by these rules, by order of the CMCR, or by any applicable order, instruction, regulation or statute, the day of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless i t is a Saturday, Sunday, or federal legal holiday.

C.M.C.R. Rule 20. RECONSIDERATION

(a) **General provisions.** The CMCR may, in its discretion and on its own motion, or on motion by one of the parties, enter an order announcing its intent to reconsider its decision in any case not later than fifteen days after service of such decision on the detailed appellate defense counsel, and on the government appellate counsel, whichever is later. . . .

(b) **Time limits.** The CMCR may, in its discretion, reconsider its decision in any case upon motion filed either:

(1) By detailed appellate defense counsel within five days after receipt by counsel of a decision or order, or

(2) By detailed appellate government counsel within five days after the decision or order is received by counsel.

(g) **Stay.** The timely filing of a request for reconsideration does not stay the decision of the CMCR.

(h) **Vacation.** Unless otherwise announced in an order granting reconsideration, the order granting reconsideration vacates the decision being reconsidered.