IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MAJID KHAN, Petitioner, v. ROBERT M. GATES, Respondent.	)	Case No. 07-1324

MOTION OF THE NEW YORK TIMES COMPANY, THE ASSOCIATED PRESS AND USA TODAY TO UNSEAL

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The public interest in this case could not be greater. In this appeal Majid Khan challenges the determination of a military tribunal that he is properly being held by the United States at Guantanamo Bay, Cuba as an "enemy combatant." A long-time resident of Baltimore, Khan vigorously protests this determination, asserting that it is based on unreliable evidence obtained through illegal acts of torture committed by the United States government (the "Government").

In motions and supporting declarations now before the Court, Khan makes his case that he was subjected "to an aggressive CIA detention and interrogation program notable for its elaborate planning and ruthless application of torture."[1] Khan contends that his "torture was decidedly not a mistake, an isolated occurrence, or even the work of 'rogue' CIA officials or government contractors," but rather part of a "sophisticated, refined program of torture operating with impunity outside the boundaries of any domestic or international law."[2] And, Khan asserts, U.S. intelligence officials have repeatedly lied about his "imprisonment and torture in CIA custody."[3]

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1 Khan's Motion for Preservation of Torture evidence, dated November. 29, 2007 (the "Preservation Motion") at 3-4.

2 *Id.* at 4.

3 Khan's Reply Memorandum in Further Support of Torture Motions, dated January. 4, 2008 ("Khan Reply") at 6.

While these broad outlines of Khan's allegations are known to the public, every fact and detail presented by Khan in support of his accusations is under seal. The Government has removed the facts from the public record pursuant to a stipulated protective order that permits it unilaterally to redact any information it considers "classified" or otherwise "protected" out of concern for "significant government interests." As a result, it is impossible for the public to fully assess the validity of Khan's claims or to know if justice is being done.

The New York Times Company, The Associated Press and USA Today (collectively "Press Applicants") respectfully move this Court, pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Rules 27 and 47.1 of the Local Rules, to unseal the withheld portions of the motions and declarations filed by Khan.[4] The public has a qualified right to inspect and copy Khan's court filings that the Government can overcome only by demonstrating a compelling interest in secrecy, and any restriction on access must be both narrow and effective. The wholesale redaction of Khan's first-hand account of his treatment is neither.

The Government claims a need to prevent the enemy from knowing about secret detention facilities and interrogation techniques used by the CIA, but its broad invocation of secrecy in this case serves no such purpose. Extensive

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[4] Circuit Rule 47.1(c) provides that "[a] party or any other interested person may move at any time to unseal any portion of the record in this court, including confidential briefs or appendices filed under this rule."

information about the CIA's "black sites" and "aggressive interrogation" techniques is already well known—including specific details about the facility in Afghanistan where Khan was held and the nature of interrogation techniques used at this facility. The blanket secrecy imposed on Khan's court filings appears only to prevent the public from evaluating either the credibility of Khan's claims or the fairness of this proceeding. It prohibits discussion of vital public issues and renders democratic oversight of the institutions of government impossible, without any apparent benefit to the interest advanced to justify secrecy in the first place.

In such circumstances, both the First Amendment and the common law prohibit the wholesale sealing of information submitted by Khan to support his torture accusation. "The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic." *New York Times v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring).

BACKGROUND

A. Khan's Allegations Against The Government

Khan is a United States resident and Pakistani citizen. He immigrated to the United States in 1996 as a teenager, settled in the Baltimore area with his family, and was granted asylum and residency status in 1998. Khan alleges that he was abducted by the CIA on March 5, 2003 and remains in U.S. custody to this day.

Until September 2006, Khan says he was subjected to torture and other forms of illegal coercion at a secret CIA jail overseas. (*See* Preservation Mot. at 2-4.)

In September 2006 Khan was publicly transferred to Guantanamo to await prosecution by a military tribunal. Khan was declared to be an "enemy combatant" in August 2007 by a Combatant Status Review Tribunal ("CSRT") convened to review his case. (*Id.* at 3.) In this appeal, Khan seeks review of the CSRT's determination, claiming it was improperly based upon unreliable evidence obtained through torture and other cruel, inhuman and degrading treatment.[5] The Government has withheld Khan's evidence of his alleged torture from the public record of his CSRT as well as from the record of this appeal.

The circumstances of the prisoners held at Guantanamo, including Khan's case in particular, have generated significant public concern within this country and around the world.[6] The use of "enhanced interrogation" methods—admitted by the CIA—are the subject of widespread debate concerning both their legality and their efficacy. Even military officers have questioned whether torture

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[5] Khan had previously filed a petition for a writ of habeas corpus in the U.S. District Court for the District of Columbia on September 29, 2006. *See Khan v. Bush*, No. 06-1690 (RBW) (D.D.C.).

[6] *See, e.g.*, David McFadden, *US Court Grants Motion on Gitmo Suspect*, ASSOCIATED PRESS, Dec. 12, 2007; William Glaberson, *U.S. nears charging 6 in Sept. 11 case*, INT'L HERALD TRIB. (France), Feb. 10, 2008; Scott Shane, *Detainee's Lawyers Rebut C.I.A. on Tapes*, N.Y. TIMES, Jan. 19, 2008; Joan Biskupic, *Court to decide detainees' rights*, USA TODAY, Nov. 26, 2007.

produces accurate information and have raised concerns about what its use by the CIA would mean for our own prisoners of war.[7]

There is also ongoing controversy over the propriety of procedures being used to identify "enemy combatants" and to prosecute detainees in military tribunals.[8] Khan's challenge to these procedures has heightened public interest in knowing that this appeal is being handled properly and seeing that justice is done.[9]

B. The Government's Actions To Block Public Access

The Government has taken extraordinary measures to keep from the public any statements from Khan about his detention and treatment. In a declaration of a CIA information officer filed in Khan's *habeas* litigation, the Government urged that "the classified national security information likely to arise in this case is different and more sensitive than any previous cases involving detainees at Guantanamo Bay."[10] The CIA emphasized that specifics of its detention program remain classified, notwithstanding public acknowledgement of the program's

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7 *See, e.g.*, Dan Froomkin, *A General Demands Accountability*, WASH. POST, Oct. 15, 2007.

8 *E.g.*, R. Tuttle, *Rigged Trials at Gitmo*, THE NATION, Feb. 20, 2008 (available at www.thenation.com/doc/20080303/tuttle, last visited 3/3/08); P. Spiegel and D. Savage, *Stubborn doubts on 9/11 trials*, L.A. TIMES, Feb. 12, 2008.

9 *See, e.g.*, Carol Rosenberg, *Filing: Gitmo detainee 'tortured' Lawyers for a Guantánamo...*, MIAMI HERALD, Dec. 9, 2007; *Ex-Md. resident writes from Guantanamo about CIA torture*, BALT. SUN, Jan. 22, 2008, at 8A.

10 Declaration of Marilyn Dorn ("Dorn Decl."), sworn to October 26, 2006, filed in *Khan v. Bush*, No. 06-CV-1690 (D.D.C.) at ¶ 6 (annexed as Exhibit A to the Affidavit of Chad Bowman, sworn to March 5, 2008 ("Bowman Aff.")).

existence, and identified this classified information as including "where the detainees had been held, the details of their confinement, the employment of alternative interrogation methods, and other operational details." (Dorn Decl., ¶ 8.) Because Khan was detained in this classified CIA program, the Government has taken the position that Khan's knowledge of his own treatment is itself classified. (*Id.*, ¶ 10.) The Government's rationale is that permitting Khan to disclose the details of his interrogations "'would permit terrorist organizations to adapt their training to counter the tactics the C.I.A. can employ in interrogations'"[11]—an argument that presumes that Khan will never be released.

In this appeal, the parties filed and the Court entered at the outset a stipulated protective order permitting "classified information" to be sealed. The order requires Khan to submit all his court filings under seal, and then allows the Government to determine whether they contain classified information before they are made public. All classified information is redacted by the Government and remains sealed. (*See* Interim Protective Order, entered October 12, 2007, at 13-14.) The order also permits the Government, upon application to the Court, to redact unclassified information it wants to protect, and all such unclassified information "must be maintained under seal unless and until the court determines

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[11] David Johnston and Neil A. Lewis, *U.S. Is Quietly Preparing Evidence Against Top Qaeda Detainees*, N.Y. TIMES, Jan. 12, 2007 at A16.

the information should not be designated 'protected.'" (*Id.* at 12.) The Government thus has the unilateral ability to censor Khan's court filings.

C. The Court Records Sought By The Press Applicants

Through this motion the Press Applicants seek unredacted copies of all papers supporting two motions that are now before the Court: Khan's motion to preserve "all documents and information relating to [his] tortures, cruel, inhuman, degrading treatment, and other unlawful coercion," and Khan's motion to declare that the interrogation methods used against him constitute "torture."[12] Now fully briefed, these motions have been referred to the merits panel for resolution, and remain pending. (*See* Per Curiam Order, entered February 14, 2008.)

In support of these motions, Khan submitted two declarations of counsel. One is described as setting forth "in detail" the facts of Khan's "secret detention and interrogation;[13] the other provides further details of the secret detention program" and interrogation techniques applied against other individuals.[14] On January 7, 2008 Khan also filed a reply memorandum in further support of his motions. That memorandum accuses "unnamed intelligence officials" of lying

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[12] On December 11, 2007 the Court entered an interim order requiring the preservation of evidence pending a resolution of Khan's motion. (Per Curiam Order, entered December 11, 2007.)

[13] The Declaration of Gitanjali S. Guitierrez is identified as "Exhibit 1" to Khan's motion to declare interrogation methods to constitute torture.

[14] The Declaration of J. Wells Dixon is identified as "Exhibit 2" to Khan's motion filed with the Court.

about Khan's "imprisonment and torture" (Kahn Reply at 6), and repeats Khan's claim that the facts submitted in his motions and declarations amount to illegal and unconstitutional torture, "so severe as to 'shock the conscience.'" (*Id.* at 18.)

Each key fact presented to the Court in support of these claims—every detail about Khan's detention and interrogation—has been sealed from the public by the Government. The public versions of Khan's motions have been heavily redacted, including pages of material that are deleted entirely, and his attorneys' declarations have been withheld in their entirety.

In opposing Khan's motions, the Government claims that his allegations of torture are false, but simultaneously asserts that his evidence must nonetheless be sealed to protect national security. (*See* Opposition to Petitioner's Motions for Preservation Order and For Declaratory Judgment at 1 n.1.) As Chief Justice Burger famously observed, however, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). Indeed, the public interest in observing this case is magnified by the Government's consistent public position that torture has never been used. Yet, without the sealed facts, the public has no way to evaluate the credibility or the import of Khan's allegations, to assess the fairness of his treatment by the courts, or to exercise democratic control over the institutions of government.

ARGUMENT

SEALING KHAN'S FILINGS DOES NOT SERVE A COMPELLING INTEREST AND IS NOT NARROWLY TAILORED

A. The Public Has A Qualified Right Of Access To Khan's Motion Papers

Both the First Amendment and the common law afford the press and public a qualified right of access to inspect the motions and declarations filed by Khan. As this Court observed in *Washington Post Co. v. Robinson*, 935 F.2d 282 (D.C. Cir. 1991) ("*Robinson*"), "[t]he first amendment guarantees the press and the public a general right to court proceedings and court documents unless there are compelling reasons demonstrating why it cannot be observed." *Id.* at 287. *See also Lugosch v. Pyramid Co.*, 435 F.3d 110, 120 (2d Cir. 2006) (recognizing first amendment right of access to motions); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (same); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986) (First Amendment right to documents filed for plea hearings).

The public's right to inspect court documents is equally enshrined in the common law. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) ("the courts of this country recognize a general right to inspect and copy . . . judicial records and documents"); *In re Nat'l Broad. Co.*, 653 F.2d 609, 612 (D.C. Cir. 1981) ("existence of the common law right to inspect and copy judicial records is

indisputable"); *Lugosch*, 435 F.3d at 120 (same). The common law access right "is not some arcane relic of ancient English law," but rather "is fundamental to a democratic state." *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978).

These rights of access to judicial records exist to ensure that courts "have a measure of accountability" and to promote "confidence in the administration of justice"—a goal that cannot be accomplished "without access to testimony and documents that are used in the performance of Article III functions." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995); *accord United States v. Hubbard*, 650 F.2d 293, 314-15 (D.C. Cir. 1981). 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:

> Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view.

Gannett Co. v. DePasquale, 443 U.S. 368, 429 (1979) (Blackmun, J., concurring in part and dissenting in part).

The right of access also protects more generally "the citizen's desire to keep a watchful eye on the workings of public agencies." *Nixon*, 435 U.S. at 597-598.

It promotes "an informed and enlightened public opinion," *Mitchell*, 551 F.2d at 1258, which is "the most potent of all restraints upon misgovernment," *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936). Access to information is particularly important concerning our national defense and our international actions, where "the absence of the governmental checks and balances present in other areas of our national life" makes an informed citizenry "the only effective restraint upon executive policy and power." *New York Times*, 403 U.S. at 728 (Stewart, J., concurring).

While not every document filed with a court falls within the right of access, Kahn's motion papers seeking affirmative relief from this Court plainly do. "[W]hat makes a document a judicial record and subjects it to the common law right of access is the role it plays in the adjudicatory process." *United States v. El-Sayegh*, 131 F.3d 158, 163 (D.C. Cir. 1997). Access to substantive motions is protected because such motions are relevant and useful to the performance of the judicial function, and they often substitute for argument in open court that would itself be subject to a First Amendment right of access. *E.g. Johnson v. Greater Se. Cmty. Hosp. Corp.*, 951 F.2d 1268, 1278 (D.C. Cir. 1991) (common law right applied to summary judgment motion); *Lugosch*, 435 F.3d at 120-21 (common law and First Amendment rights of access applied to summary judgment motion); *Bank of Am. Nat'l Trust & Savs. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 343-

44 (3d Cir. 1986) (common law right of applied to motions filed with the court); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252-53 (4th Cir. 1988) (common law right applied to summary judgment motion). *In re Continental Ill. Secs. Litig.*, 732 F.2d 1302, 1308-09 (7th Cir. 1984) (common law and First Amendment right of access applied to documents submitted in support of motions).

Khan's motions to preserve evidence and to declare his treatment to be torture ask the Court to make important legal and factual determinations that may ultimately resolve the merits of this appeal. Whether evaluated as a First Amendment or common law right, his motions are subject to a right of access.

B. The Government Bears A Heavy Burden To Seal Records Filed by Khan

A party seeking to restrict access right bears the burden of justifying any limitation. Where, as here,

> the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.

Robinson, 935 F.2d at 287; *see Johnson*, 951 F.2d at 1277-78 (same); *Lugosch*, 435 F.3d at 123-24 (same). Because a restriction on access must be "no broader than is necessary to protect those specific interests identified as in need of protection," *Johnson*, 951 F.2d at 1278, any order limiting access must also be effective in actually protecting the interest for which sealing is ordered. *See Press-*

Enterprise Co. v. Superior Court, 478 U.S. 1, 14 (1986) (party seeking secrecy must demonstrate "that closure would prevent" harm sought to be avoided); *In re The Herald Co.*, 734 F.2d 93, 101 (2d Cir. 1984) (closure impermissible if information "has already been given sufficient public exposure").

This Court has previously articulated six factors to assist in the judicial sealing determination:

> (1) the need for public access to the documents at issue; (2) the extent to which the public had access to the documents prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced.

Johnson, 951 F.2d at 1277 n.14 (citing *Hubbard*, 650 F.2d at 317-22).[15] These standards are to be carefully applied because, as the Seventh Circuit has cautioned:

> Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires a compelling justification.

Union Oil Co. of Cal. v. Leavell, 220 F.3d 562, 568 (7th Cir. 2000). Thus, when a party seeks to restrict the right of access, it is the duty of the court to make factual

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[15] These factors were developed in considering the scope of the common law right of access. Some courts have held that a higher standard is required where the First Amendment right also applies. *See generally*, *Lugosch*, 435 F.3d at 121-125 (and cases cited therein).

findings demonstrating that any restriction of the right is necessary, narrow and effective. *E.g.*, *Robinson*, 935 F.2d at 289.

Nor are these standards vitiated when the Government seeks to seal information because it has been "classified" by the Executive Branch. Were the Government to exceed its classification authority and seek to seal statements in order to conceal unlawful behavior or prevent embarrassment, the judiciary unquestionably would have the authority to review the Government's action and determine whether it is lawful.[16] *See, e.g.*, *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139-140 (1951) (Attorney General exceeded authority conferred by executive order; injunctive relief granted). Indeed, the authority of the courts to review classification decisions has been recognized in a number of circumstances. *See, e.g.*, *Krikorian v. Dep't of State*, 984 F.2d 461, 466-67 (D.C. Cir. 1993) (court has the authority in FOIA case to review *in camera* the propriety of a claimed national security exemption); *Goldberg v. U.S. Dep't of State*, 818

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[16] For example, the CIA Director has acknowledged the use of "waterboarding," but says it has only been used on three occasions, not including Khan. *See infra* note 22. The public sections of Khan's motions nonetheless analyze the legality of waterboarding and "other 'evolved' forms of torture," (Reply at 14), and discuss the acknowledged destruction of video tapes of waterboarding as a basis for needing a preservation order. (*Id.* at 4-5.) If sealed portions of Khan's motions assert that he too was subjected to waterboarding—and the Press Applicants have no way to know—a Government effort to conceal from the public the scope of its use of this admitted practice would not be a legitimate basis for sealing such information.

F.2d 71, 76-77 (D.C. Cir. 1987) (same); *Stillman v. CIA*, 319 F.3d 546, 548-49 (D.C. Cir. 2003) (courts have independent duty to review classification claim used to censor former CIA employee); *McGehee v. Casey*, 718 F.2d 1137, 1147-48 (D.C. Cir. 1983) (same).

While national security unquestionably can constitute a "compelling interest" sufficient to require sealing judicial records, "[t]he word security is a broad, vague generality." *New York Times*, 403 U.S. at 719 (Black, J., concurring.) This Court must make its own determination that a good faith basis exists for the Government's claim of national security risk, and that the requested limitation on access is no broader than necessary to effectively protect against the risk. Otherwise, as Judge Tatel has warned, an "uncritical deference" to "vague, poorly explained arguments for withholding broad categories of information" can quickly eviscerate "the principles of openness in government." *Center for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 937 (D.C. Cir. 2003) (Tatel, J., dissenting).

C. No Proper Basis Exists For Sealing Khan's Depictions of His Own Treatment

On the public record, there is no reason that the sealing of every detail about Khan's detention and treatment is warranted. Such sweeping closure does not satisfy the *Hubbard* factors and, given the information already known, is neither narrowly tailored nor effective in protecting against the risk of educating terrorists

about the CIA's detention system or interrogation techniques. The *Hubbard* factors applied to the facts of this preceding strongly support the disclosure of the sealed information:

The need for public access. The sealed information concerns the actions of government officials in responding to terrorist attacks on this country. The public has a compelling interest in knowing whether that response is violating international law or constitutional rights as Khan contends. Because the government has "nearly unlimited authority" concerning national defense, "the press and the public serve as perhaps the only check on abusive government practices." *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 704 (6th Cir. 2002).

The extent of prior access to the documents. While Khan's specific motion papers have not previously been public, much of the information the Government has sealed is apparently widely known. Publicly available information discloses, for example, the location of some secret CIA detention facilities, including the facility where Khan is alleged to have been held in Afghanistan. *See generally* Bowman Aff., Ex. B at pp. 9-11 (compilation of publicly available information concerning CIA detention facilities). Khaled El-Masri, a released CIA detainee, in an unsealed declaration submitted in Khan's *habeas* proceeding, describes both the

facility where Khan was held and aspects of his detention.[17] Testimony from other detainees has been compiled by international organizations and provides additional public detail about the locations and facilities of the CIA prisons.[18]

Extensive information is also known about the methods used by the CIA and other U.S. interrogators. These include "slaps to the head; hours held naked in a frigid cell; days and nights without sleep while battered by thundering rock music; long periods manacled in stress positions; or the ultimate, waterboarding."[19] Descriptions of such interrogation techniques have been provided by both former prisoners and former interrogators. For example, former CIA officer John Kiriakou has described "enhanced techniques" including an "attention shake,"

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17 Bowman Aff., Ex C. The declaration has been widely reported. *E.g.*, Jane Mayer, *The Black Sites*, NEW YORKER, Aug. 13, 2007 (available at www.newyorker.com, last visited 3/3/08); Carol D. Leonnig and Eric Rich, *U.S. Seeks Silence on CIA Prisons*, WASH. POST, Nov. 4, 2006 at A1.

18 *See, e.g.*, Center for Human Rights and Global Justice, *Surviving the Darkness: Testimony from the U.S. 'Black Sites'* (New York: NYU School of Law, 2007) (available at www.chrgj.org. (last visited 3/3/08, follow link for "Full Report" under "CHRGJ Releases Unprecedented Testimony about CIA 'Black Sites'")) ("CHRGJ Report").

19 Scott Shane, David Johnston and James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1 (reporting on Justice Department memorandum reviewing "harrowing pressure tactics" used by interrogators); *see also* Curt Anderson, *Jose Padilla Is Sentenced to 17 Years*, ASSOCIATED PRESS, Jan. 22, 2008 (reporting allegations that Padilla "was forced to stand in painful stress positions, given LSD or other drugs as 'truth serum,' deprived of sleep and even a mattress for extended periods and subjected to loud noises, extreme heat and cold and noxious odors").

"open-handed belly slap[s]," and "waterboarding."[20] Former detainee Mohamed Farag Ahmad Bashmilah has provided detailed testimony about his treatment by the CIA, including severe beatings, extreme isolation, being forced to wear a diaper for fifteen days, and being subjected to "[e]xcruciatingly loud western rap and Arabic music . . . twenty-four hours a day, seven days a week" for a month.[21] The director of the CIA has publicly acknowledged the use of waterboarding.[22]

Some public information even exists about the treatment Khan has received. El-Masri has described the type of interrogation techniques used in facility where Khan was detained. *See* Bowman Aff., Ex. C, ¶¶ 40-50. Khan's father has provided testimony describing aspects of Khan's treatment reported by Khan to his family. *See id.*, Ex. D at 12-15. Under these circumstances, sealing the same information in the Court's records would appear to provide no effective protection to any compelling national security interest.

The identity of the party objecting to disclosure. Weight should be given to the fact that the request for sealing comes from the Government. In weighing this

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[20] *See* ABC News Interview with John Kiriakou at 15-16, 20-22 (transcript available at http://abcnews.go.com/Blotter/Story?id=3978231&page=5; video available at http://abcnews.go.com/Video/playerIndex?id=3980294, last visited 3/3/08).

[21] *See*, CHRGJ Report, *supra*, note 18, at 6-31; *see also* Bowman Aff., Ex. B at pp. 11-12 (compiling examples).

[22] *See, e.g.*, Aamer Madhani, *U.S. confirms waterboarding use*, CHI. TRIB., Feb. 6, 2008 at 16 (CIA Director Hayden confirmed Khalid Shaikh Mohammed, Abu Zubaydah and Abd al-Rashim al-Nashiri subjected to waterboarding).

factor, however, it is important to bear in mind that the "dominant purpose of the first amendment was to prohibit the wide spread practice of governmental suppression of embarrassing information." *New York Times*, 403 U.S. 723-24 (Douglas, J. concurring). Sealing is not proper if the court determines its purpose is to avoid embarrassment rather than to protect national security.

The strength of the interests favoring sealing. As noted, the Press Applicants do not dispute that a legitimate national security need is a compelling state interest and, if other factors support sealing, would justify a narrowly tailored sealing of court records.

Possibility of prejudice to those opposing sealing. To the extent that the needs of national security are being applied in an overly broad manner to censor information that is disturbing or embarrassing to the Government, the public's legitimate interest in knowing "what the government is up to" is severely prejudiced. "Secrecy in government is fundamentally un-democratic," *New York Times*, 403 U.S. at 724, and this consideration carries special force here because the government has consistently denied that the United States uses torture.[23]

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[23] *See, e.g.*, Siobhan Gorman, *Guantanamo Detainee Denies Al-Qaida Link, Alleges Torture*, BALT. SUN, May 16, 2007 at 1A (Defense Dept. contends "Khan has been treated humanely while in Department . . . custody"); *Carter says U.S. tortures prisoners*, CNN.com, (available at www.cnn.com/2007/POLITICS/10/10/carter.torture, last visited 3/3/08) ("Bush [has] defended the techniques used, saying, 'This government does not torture people.'").

The purposes for which the documents were filed with the court. The final *Hubbard* factor also weighs significantly in favor of public disclosures. In this proceeding Kahn claims that the CSRT determination that he is an enemy combatant must be thrown out because it was based upon evidence obtained through torture. The pending motions were filed to preserve torture evidence and obtain a judicial determination on the central fact of this case: whether Kahn was subjected to torture by the CIA. Such substantive motions should not be sealed absent "the most compelling reasons." *Lugosch*, 435 F.3d at 121.

In short, the *Hubbard* factors compel the conclusion that the Government's wholesale sealing of the facts presented in support of Khan's motions cannot stand. The complete removal of Khan's facts from the court record is overly broad, ineffective in protecting a compelling interest, and improper.

CONCLUSION

For each and all the foregoing reasons, the redacted and withheld portion of Khan's motion papers should be unsealed.

Respectfully submitted,

Dated March 6, 2008

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IN THE UNITED STATES COURT OF APPEALS
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CORPORATE DISCLOSURE STATEMENT
OF PRESS APPLICANTS PURSUANT TO RULE 26.1

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rules 26.1 and 28(a)(1)(A) of the D.C. Circuit Local Rules, The Associated Press, The New York Times Company and USA Today (collectively "Press Applicants") provide the following disclosures.

The Associated Press is the world's largest news gathering organization. AP gathers and distributes news of local, national and international importance to its member newspapers and broadcast stations across the United States and throughout the world. AP is a New York not-for-profit membership corporation. It has no parents, subsidiaries or affiliates that have any outstanding securities in the hands of the public.

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USA TODAY is the nation's largest-selling daily newspaper, with a circulation of approximately 2.3 million. USATODAY.com is one of the top newspaper sites on the Internet. USA TODAY's parent company – Gannett Co., Inc. – is the nation's largest newspaper publisher with 85 dailies, a combined daily paid circulation of approximately 7.2 million and nearly a 1,000 non-dailies. Gannett also operates 23 TV stations which reach more than 20 million households, and its U.S. websites attract nearly 26 million unique visitors each month. USA TODAY is an unincorporated division of Gannett Satellite Information Network, Inc., a wholly-owned subsidiary of Gannett Co., Inc. Gannett Co., Inc. is publicly traded, has no parent corporation, and no publicly held company owns 10% or more of its stock.

The parties to this action are Petitioner Majid Khan; Rabia Khan, as Next Friend of Petitioner; and Respondent Robert M. Gates, Secretary of Defense. Press Applicants are not aware of any *amici* appearing in this court or any other interested parties.

Dated: March 6, 2008

Respectfully submitted,
LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 6, 2008, I directed that a true and correct copy of the foregoing Motion of The New York Times Company, The Associated Press and USA Today to Unseal, supporting declaration and exhibits thereto, and corporate disclosure be served, pursuant to Fed. R. App. P. 25(c)(1)(C), by Federal Express, as follows:

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