[NOT SCHEDULED FOR ORAL ARGUMENT]

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

REPLY BRIEF IN SUPPORT OF MOTION TO UNSEAL COURT RECORDS

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PRELIMINARY STATEMENT

From its very first sentence, the Government's Opposition seeks to portray this access application by three news organizations as a shameful insistence upon the release of information that will impose "exceptionally grave damage to the nation's security." (Opp. 1.) The motion for access seeks no such relief. It expressly concedes that national security is a compelling interest that can warrant the sealing of court records. (Mot. 19.) Press Applicants seek rather a judicial determination of whether any such national security interest actually justifies sealing *every* fact advanced in this lawsuit by an alleged victim of torture, as the Government contends.

By recasting the issue presented, the Opposition fails to come to terms with the primary concern advanced by the motion to unseal: that the Government's censoring of the Court's records may do nothing to protect national security, while undeniably preventing the public from evaluating either the fairness of Khan's treatment or the actions of its government. If no legitimate need exists, secrecy is defeating democratic control over our political institutions for no proper reason.

The Opposition exaggerates the relief being sought apparently to distract attention from two rather extraordinary legal contentions that lie at the heart of the Government's position: First, that the public has no constitutional right of access whatsoever to "civil" litigation (Opp. 4), a theory that has flatly been rejected by

every other Court of Appeals to have addressed it. Second, that Congress has abrogated the public's common law right of access when "classified" information is involved (Opp. 10-11), so that no court has any role to play in reviewing the unilateral decision of the Executive to keep secret the judicial records upon which Article III powers are exercised. Neither contention withstands scrutiny.

ARGUMENT

I. The First Amendment Access Right Extends To Khan's Motions

The Opposition asserts that, "[i]n this Circuit, the qualified First Amendment right of access to judicial proceedings applies only to criminal proceedings and does not extend to civil proceedings like this case." (Opp. 4.) This contention is incorrect on several levels.

1. This Circuit has not rejected the right of access to civil proceedings, and the Government improperly relies on *dicta* from a Freedom of Information Act (FOIA) case in advancing this incorrect claim.[1] Nor is the Government correct to suggest that the Supreme Court holds this "narrower view" of the access right. (Opp. 4.) While the four access cases it has decided all involved criminal cases,

[1] The Government relies upon *Center for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003), which held that the First Amendment access right does not extend to *non-judicial* documents, noting only in *dicta* that the Supreme Court cases addressing the right of access all arose in the criminal context. *Flynt v. Rumsfeld*, 355 F.3d 697 (D.C. Cir. 2004), also cited, rejected a First Amendment right to be "embedded" with military units on the field of battle. Neither case decided the right of access to civil proceedings.

nothing in the Supreme Court's holdings or rationale limits the right to criminal proceedings. To the contrary, in addressing the right to attend a criminal trial in *Richmond Newspapers v. Virginia*, the plurality opinion by Justice Burger went out of its way to disapprove this very limitation:

> [W]hether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.

448 U.S. 555, 580 n. 17 (1980); *see also*, *id.* at 599 (constitutional right extends to trials, "civil as well as criminal") (Stewart, J. concurring).

2. To limit the access right to criminal proceedings would miss the point of the Court's First Amendment analysis altogether. The Court's "experience and logic" approach looks at whether a type of judicial proceeding or record has "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, 9 (1986) ("*Press-Enterprise II*"). Civil proceedings plainly satisfy this test. Civil lawsuits have a history of openness that parallels precisely that of criminal proceedings. *See Richmond Newspapers*, 448 U.S. at 580. Similarly, each of the policy reasons the Supreme Court identified for protecting access to criminal proceedings applies fully to civil cases. *See, e.g. Press-Enterprise II*, 478 U.S. at 12-14; *Richmond Newspapers*, 448 U.S. at 569-572. The contention that the same access standard

does not apply in civil lawsuits is so plainly incorrect that it has been rejected by every Circuit to have addressed it.[2]

3. The Government asserts that a different analysis is required for classified information, where access would "not play[] a significant positive role in the functioning of the particular process" but rather would "severely impair" the public good. (Opp. 7.) This improperly conflates two issues—whether the right *exists* and whether it is *overcome* in a specific case. To determine the existence of the right, the proper question is whether the *type* of court record at issue is subject to the right of access, and motion papers seeking substantive judicial relief plainly are. *E.g.*, *Lugosch v. Pyramid Co.*, 435 F.3d 110, 124 (2d Cir. 2006); *Rushford*, 846 F.2d at 253; *Publicker Indus. Inc.*, 733 F.2d at 1061; *In re Cont'l Ill. Sec. Litig.*, 732 F.2d at 1308.[3] The impact of releasing specific information is relevant only to the distinct assessment of whether the right is overcome. (Mot. 15-20.)

[2] *See, e.g.*, *Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1067-71 (3d Cir. 1984); *Westmoreland v. CBS*, 752 F.2d 16, 23 (2d Cir. 1984); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178-79 (6th Cir.1983).

[3] *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1335-36 (D.C. Cir. 1985), found no First Amendment right of contemporaneous access to exhibits admitted into evidence during the course of a civil trial. Relying on "sparse" authority suggesting no historic right to "pre-judgment records in civil cases," and decided before the Supreme Court ruled in *Press-Enterprise II* that the access right extends to pre-trial proceedings, even this decision recognized an historic right of access to "appeal" records such as the records of this Court. 773 F.2d at 1333-34.

4. The Government is equally misdirected in arguing the lack of any "tradition of public access" under the new Detainee Treatment Act and that access "contributes nothing to the DTA process." (Opp. 5, 7.) The DTA created no new procedures by which *this* Court is to consider Khan's appeal. The relevant focus is not on the subject matter of a specific proceeding, but whether the type of proceeding—here an appeal to a three judge court—historically has been open and benefits from public access. *See Press-Enterprise II*, 478 U.S. at 10 (analyzing the procedures used in pre-trial hearings without regard to the substance of those hearings). The true relevance of the DTA is that it authorizes a direct appeal as a substitute for habeas corpus proceedings, which are themselves subject to the right of access.[4] *E.g., Osband v. Ayers*, 2007 WL 3096113, at *2 (E.D. Cal. Oct. 22, 2007). So even if the DTA had created new procedures, a "new procedure that substituted for an older one" is judged by the "tradition of access" to the older procedure. *United States v. El-Sayegh*, 131 F.3d 158, 161 (D.C. Cir. 1997). *See also Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983) (constitutional access right must extend to proceedings "which pertain to the release or incarceration of prisoners and the conditions of their confinement").

[4] The suggestion that anything in *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) supports a lack of historic openness for all "proceedings that relate to aliens who are not in the United States" is baseless. (Opp. 6.) That case addressed deportation proceedings conducted by the Executive Branch, not judicial proceedings in Article III courts, and makes no such indefensible claim.

5. Given the DTA's purpose to substitute for habeas proceedings, it is not even accurate to characterize this appeal as a "civil" matter. Habeas proceedings challenging the basis for confinement are not "civil actions." *Blair-Bey v. Quick*, 151 F.3d 1036, 1039 (D.C. Cir. 1998) (citing cases).

II. The Common Law Access Right Extends to Khan's Motions

1. The Government argues that the common law access right has been overruled by "a broad Congressional policy against unauthorized disclosure of classified information." (Opp. 11.) It has not. For Congress to abrogate a common law right a statute "must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993). The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et. seq.*, and various criminal statutes relied upon by the Government say nothing about access to court records.[5] Far from advancing the Government's position, the provisions of FOIA undercut its premise that the common law right must be abrogated because no court can review an Executive Branch decision to classify. FOIA expressly instructs the federal judiciary to engage in "*de novo*" review of all agency refusals to disclose

[5] When Congress did address the conflict between classification and court access, it made clear its opposite understanding—that the use of classified information in a courtroom does not automatically defeat public access. The Classified Information Procedures Act, 18 U.S.C. App. 3 §§ 1-16, requires the Executive either to declassify evidence needed in a criminal trial or to prepare alternative evidence that can be publicly disclosed, so that a court need not conduct the balancing that otherwise would be required to limit the public's access rights.

information, including expressly claims based on national security. 5 U.S.C. § 552 (a)(4)(B). In FOIA, Congress "insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security." *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978).[6]

2. The Government alternatively argues without elaboration that the common law right does not exist because "the filings have not been determined to be relevant" and their release "is not essential to the functioning of the judicial process." (Opp. 10.) Substantive motions "submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings" become subject to the presumptive right of access. *See Lugosch*, 435 F.3d at 122 (citing cases). This right attaches to motion papers regardless of the significance ultimately accorded to specific facts or claims advanced in them. *See*, *supra*, p. 4.

III. The Government Fails To Justify Total Sealing of Khan's Allegations

1. Ignoring the governing *Hubbard* standards (Mot. 15-20), the Government argues that the Court must seal "classified" information and may not second-guess the CIA's "assessment of harm to intelligence sources." (Opp. 13.)

[6] The alternative suggestion that FOIA provides the *only* mechanism to review classification is also incorrect. (Opp. 11-12.) FOIA was never intended to restrict access rights to court records. *Brown & Williamson*, 710 F.2d at 1177. *El-Sayegh* pointed the parties to FOIA because they sought information solely to evaluate the performance of the Department of Justice. 131 F.3d at 163. Court records are sought here to determine, *inter alia*, if justice is done *in this case*.

The Government's own authorities fail to support this broad proposition, and this Court repeatedly has made clear that courts can properly review an agency's classification decision when it is necessary to do so in exercising Article III power. For example, *Stillman v. CIA*, 319 F.3d 546, 548-49 (D.C. Cir. 2003), held that a district court had erred in reaching a constitutional issue presented by the CIA's classification of information needed by the plaintiff's lawyer without first determining whether that classification itself was proper. In *McGehee v. Casey*, 718 F.2d 1137, 1146-47 (D.C. Cir. 1983), the Court denied a constitutional challenge to a contractual obligation of a former CIA agent to seek agency review of a proposed manuscript, in part, because the CIA's decision to classify information was itself subject to judicial review. *See also* Mot. 14-15.

2. The Government alternatively argues that its classification determinations must be given great deference. (Opp. 12.) Its own authorities describe the proper standard of review. This Court should give "substantial weight to agency statements," but only "so long as they are plausible and not called into question by contrary evidence or evidence of agency bad faith." *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 837 (D.C. Cir. 2001); *see also Northrop v. McDonnell Douglas Corp.*, 751 F.2d 395, 402 (D.C. Cir. 1984) (deference "does not mean unquestioning acceptance of every claim [of harm]").

3. Because the Government seeks to override public access rights by classifying judicial records, the Court must first determine if a compelling need for secrecy exists and then assure that any secrecy imposed is no broader than necessary. (Mot. 12.) The Government asserts a compelling national security need to withhold (1) the locations of secret CIA jails, (2) the identities of cooperating governments, and (3) intelligence-gathering techniques (Opp. 14), but this claim is plainly too broad if it results in sealing allegations of facts contained in Khan's motions that are already known to the public. (Mot. 16-18.)[7]

The Government counters that great harm would still occur if Khan were viewed as confirming unofficial speculation because he is "in a position to provide accurate and detailed information." (Hilton Dec. ¶ 24.) This concern might plausibly support sealing the first two categories of information the Government seeks to protect for foreign relations reasons, but has no meaningful application to Khan's allegations of torture. As to these facts the Government advances a single reason for secrecy: Khan's depiction of interrogation techniques is "likely to degrade the programs' effectiveness" because terrorists could "more effectively train to resist such techniques." (Hilton Dec. ¶¶ 18, 21.) This justification is

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[7] Two additional reports document the CIA's actions and discuss Khan specifically. *See* Amnesty Int'l, *USA: A Case to Answer* 22-23, 29-35 (March 14, 2008), h ttp://www.amnesty.org/en/library/info/AMR51/013/2008/en; Human Rights Watch, *Ghost Prisoner, Two Years in Secret CIA Detention* 6-12 (February 2007), http://hrw.org/reports/2007/us0207).

completely untenable as a basis to withhold Khan's claims about interrogation techniques already being widely discussed, whether officially confirmed or not. What committed terrorist would not train to resist a reported technique just because its use is not officially confirmed? Moreover, many interrogation techniques have been described publicly by former detainees, former interrogators and others with at least as much credibility as Khan, including the Director of the CIA. (Mot. 16-18 & n. 16.) Concealing similar descriptions presented to the Court by Khan can do nothing to prevent terrorist training, but undeniably prohibits the public from evaluating the credibility of Khan's claims, the fairness of this proceeding, and the actions of government. Such secrecy creates unnecessary suspicion and prevents informed democratic decision-making, to no proper purpose.

CONCLUSION

For each of the foregoing reasons, the Court should release those sealed portions of Khan's motion papers for which no compelling need for secrecy exists.

Dated April 7, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 7, 2008, I directed that a true and correct copy of the foregoing Reply Brief in Support of Motion to Unseal Court Records, pursuant to Fed. R. App. P. 25(c)(1)(C), by Federal Express, as follows:

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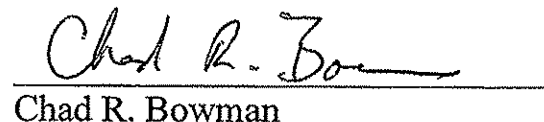

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