MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL RAHIM HUSSAYN MUHAMMED AL NASHIRI**	**AE 734** **Third Party Motion to Modify Protective Order AE 720C** **3 November 2026**

1. Relief Sought.

a. Overview and Standing. The National Institute of Military Justice (NIMJ) and The New York Times Company (the Times) submit this Third-Party Filing under R.C. 3.7.4.6 seeking relief from one legal wrong: AE 720C's prior restraint of their reporting and publication of commission panel members' identities even when that information is obtained via independent lawful means.

(1) Counsel are qualified as attorneys admitted to practice law. Brenner Fissell is a member of the District of Columbia bar (No. 1026866). David McCraw is a member of the New York State bar (No. 2529865).

b. Both organizations have standing to challenge the order. NIMJ is a nongovernmental organization that sends observers to military commissions; its claim rests on the restriction of its own observation and communication through those representatives, as well as its online publications (CAAFlog and Global Military Justice Reform). The Times asserts its own newsgathering, publication, and

editorial rights through its reporters and editors. AE 720C applies to both organizations on its face.

c. NIMJ and the Times seek vacatur of paragraph 3 of AE 720C, which prohibits the publication of identifying information even if it is obtained through lawful means wholly independent of the confidential court proceedings. Alternatively, Movants request modification of paragraph 3's prohibitions so that they do not prohibit such reporting.

2. Timeliness. This motion is timely as a third party filing under R.C. 3.7.4.6, as it is not filed pursuant to any briefing schedule and is not subject to any deadlines. This motion challenges an ongoing restraint entered on 7 October 2026.

3. Summary and Issue Presented.

a. The Commission has promulgated a prior restraint on speech without undertaking the analysis required before such an imposition. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976).

b. Under the *Nebraska Press* analysis, the Commission has the power to protect the anonymity of the panel members, but it does not have the power to prevent the public and the press from reporting on their identities when the information is learned through lawful means. *See United States v. Brown*, 250 F.3d 907, 914 (5th Cir. 2001).

4. Burden of Proof. The Government must meet a "heavy burden…showing justification for [a] prior restraint." *Nebraska Press Ass'n*, 427 U.S. at 558.

5. Facts.

a. On 7 October 2026, the Commission issued AE 720C. Paragraph 2 states that panel members continue military duties, including duties in areas exposing them to harm, and

therefore requires redaction and nondisclosure of prospective members' names, units, and duty stations. AE 720C ¶¶ 1–2.

b. Paragraph 3 provides that panel members' identities will not be reported or otherwise disclosed in any way without the military judge's prior approval. Paragraph 5 expressly includes press organizations, NGO representatives, and all other spectators. Paragraphs 6–7 require notice to attendees and threaten disciplinary action or other sanctions. Id. ¶¶ 3–7.

c. The order identifies no particularized threat, evidentiary basis, or time limit for its effect. It makes no distinction between reporting on facts learned during confidential court proceedings and those learned through public investigation and other such lawful means.

d. NIMJ regularly sends observers to commission proceedings, including planned observations of future proceedings in this case. Observers prepare reports, and at times publish blog posts about their observations in NIMJ's online publications, CAAFlog and Global Military Justice Reform.

e. The Times publishes a newspaper. Its reporter, Carol Rosenberg, regularly attends commission proceedings.

6. Law and Argument.

a. **Movants Have Standing**

(1) R.C. 3.3.1.9 defines a Third-Party Filing as a filing by an entity other than the prosecution, defense, or amicus that establishes standing and seeks particular relief. R.C. 3.7.4.6 expressly authorizes its consideration.

(2) The order expressly regulates the people through whom Movants observe and publish. With the concrete facts in Attachments B and C, the injury is present self-censorship or an imminent forced choice between protected expression and

threatened sanctions; the order causes that injury, and the requested modification redresses it. *Center for Biological Diversity v. U.S. Department of the Interior*, 144 F.4th 296, 304 (D.C. Cir. 2025). A speaker need not violate a rule and suffer punishment before challenging a credible threat of enforcement. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159–65 (2014); *Chamber of Commerce of the United States v. FEC*, 69 F.3d 600, 603–04 (D.C. Cir. 1995).

b. **The Protective Order Imposes an Unconstitutional Prior Restraint**

(1) AE 720C imposes a textbook "prior restraint"—it is a "judicial orde[r] forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993).

(2) "Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n*, 427 U.S. at 559. "A prior restraint…by definition has an immediate and irreversible sanction," *id.*, and "[t]he damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events," *id.*, as is true here. Moreover, "[t]ruthful reports of public judicial proceedings have been afforded special protection against subsequent punishment." *Id.*

(3) Because of all this, (1) prior restraints must be "justified by a sufficiently serious risk of prejudice to an ongoing judicial proceeding"; (2) such a risk cannot adequately be addressed by "less restrictive alternatives"; and (3) must be "narrowly tailored [to] effectively addres[s] the potential prejudice." *United States v. Trump*, 88 F.4th 990, 1007 (D.C. Cir. 2023); *In re Sealed Case*, 77 F.4th 815, 830 (D.C. Cir. 2023) (characterizing test as one of strict scrutiny).

(4) A protective order requiring jury anonymity, if justified by a compelling need, would present less of a First Amendment concern. *See, e.g., United States v. Edmond*, 52 F.3d 1080, 1090 (D.C. Cir. 1995) (citing cases). But the commission has gone far beyond that: it has prohibited reporting on panel members' identities even when they are learned through independent lawful means. This fails the prior restraint test.

(5) First, the commission has not demonstrated a serious risk of prejudice to the proceedings. Its sole factual justification is that military members continue performing their assigned duties, including service in areas presenting a threat of harm. AE 720C ¶ 2. That general observation does not explain why identifying any particular member would increase that danger, much less why every member's identity and likeness must be suppressed. The Order identifies no threatened intimidation, attempted interference, or other circumstances demonstrating the necessity of a publication restraint. Its additional invocation of "privacy" likewise supplies no explanation of a sufficiently serious risk to the proceeding. *Id.* The offense for which the accused is being tried in this case was committed 26 years ago, and there is no evidence of any continued threat to panel members stemming from that offense.

(6) Second, the protective order makes no attempt to consider less restrictive alternatives to prior restraint. It does not explain why orders restricting disclosure of information obtained through official channels, ordering panel anonymity, or a sequestration of the panel, are not alternatives to restrictions on speech by observers and press.

(7) Third, the order is not narrowly tailored. It has no exceptions or expiration date, nor does it make any distinction between information that is already public, or could be obtained by independent lawful investigation, and that which is not. Accordingly, it

does not "maximize the amount of protected speech allowed." *Trump*, 88 F.4th at 1019.

(8) Federal courts encountering similar orders routinely invalidate them as violations of the First Amendment. *See, e.g., United States v. Brown*, 250 F.3d 907, 918 (5th Cir. 2001) (trial court order prohibiting media from "circumvent[ing]" juror anonymity protections held unconstitutional because it covered "independent investigation" outside of confidential court proceedings); *United States v. Quattrone*, 402 F.3d 304, 312 (2d Cir. 2005) (protective order unconstitutional because juror names were read in open court and were therefore public knowledge); *see also Cap. Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1307 (1983) (Brennan, J., in chambers) (staying order permanently restraining publication of names and addresses of jurors because it "was entered without a hearing, and without findings of fact that would justify it").

(9) There are policy reasons that weigh in favor of robust reporting on juror identity. These include, among others, the exposure of potential "juror bias or confusion," assurance to the public that the jury is not drawn from "a narrow social group," as well as the deterrence of "intentional misrepresentation at voir dire." *In re Globe Newspaper Co.*, 920 F.2d 88, 94 (1st Cir. 1990). *See United States v. Blagojevich*, 612 F.3d 558, 561 (7th Cir. 2010) (describing incident in which public reporting on jurors in criminal trial of former governor "revealed that several had lied on their questionnaires and had disqualifying convictions or otherwise might have been subject to challenge for cause").

7. Conclusion. AE 720C is an unconstitutional prior restraint. NIMJ and The Times move that the order be amended as described in the proposed order.

8. Oral Argument. The Movants do not request oral argument.

9. Supporting Evidence.

a. Witnesses. Franklin Rosenblatt, President of NIMJ, can testify to NIMJ's observer program, specific attendance, intended reporting, source of information, and effect of AE 720C. Carol Rosenberg, Reporter for the Times, can testify to the Times' coverage, credentials, intended publication, editorial decisions, and the order's effect. Their proposed testimony appears in Attachments B and C.

(1) Contact information for witnesses: Franklin Rosenblatt – president@nimj.org

Carol Rosenberg – carol.rosenberg@nytimes.com

b. Documentary Evidence. Attachments B and C are the executed declarations.

10. Certificate of Conference.

a. The Movants have conferred with the Defense and Government concerning this motion via e-mail communication on 3 November 2026. The Government opposes this motion, while the Defense takes no position on it.

11. List of Attachments.

a. Attachment A - Certificate of Service, dated 3 Nov. 2026.

b. Attachment B - Declaration of Franklin Rosenblatt for NIMJ, dated 3 Nov. 2026.

c. Attachment C - Declaration of Carol Rosenberg for The New York Times Company, dated 3 Nov. 2026.

d. Attachment D - Proposed Order

Respectfully submitted,

//s//
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ATTACHMENT A

ATTACHMENT A
CERTIFICATE OF SERVICE

I certify that on 3 November 2026, I filed the attached AE 734, Third Party Motion to Modify Protective Order AE 720C with the Chief Clerk, Trial Judiciary and to all parties of record.

//s//
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ATTACHMENT B

ATTACHMENT B

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI	AE 734 Third Party Motion to Modify Protective Order AE 720C 3 Nov. 2026

DECLARATION OF FRANKLIN ROSENBLATT
FOR NIMJ

1. I am Franklin Rosenblatt, President of the National Institute of Military Justice (NIMJ). I am authorized to submit this declaration in support of NIMJ's third-party motion challenging AE 720C in United States v. Al Nashiri. I know these facts through personal responsibilities, observations, and identified records.

2. NIMJ is a nongovernmental organization that sends observers to military commissions and disseminates their reporting through online blogs, including CAAFlog and Global Military Justice Reform. Its observers act for NIMJ through selection, instructions, supervision, and reporting arrangements that result in publication in said blogs.

3. For this case, NIMJ has designated Jake Weintraub, a 3L at Villanova law school, who has confirmed plans to attend a forthcoming session at NSGB in December 2026.

4. Because of AE 720C, NIMJ imminently must choose between permitting its observer to report on any identifying information obtained from lawful independent sources and compliance with the protective order. This affects NIMJ's own receipt, preparation, and dissemination of observer reports. NIMJ reasonably fears enforcement because of the sanctions in the order.

5. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on 3 Nov. 2026 at Jackson, MS.

/s/
Franklin Rosenblatt
President, NIMJ

ATTACHMENT C

ATTACHMENT C

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI**	AE 734 **Third Party Motion to Modify Protective Order AE 720C** **3 November 2026**

DECLARATION OF CAROL ROSENBERG

I, Carol Rosenberg, under penalty of perjury, declare as follows:

1. I am a reporter for *The New York Times*, and I have covered the military commissions at Guantanamo Bay, Cuba since their inception. I joined *The Times* in March 2019. Before that, I worked as a foreign correspondent and military affairs reporter for *The Miami Herald* from 1990 to 2019.

2. Both in my current position and in my previous job with *The Miami Herald*, I have reported extensively on the military commissions, including hearings, testimony, negotiations and both contested and uncontested trials for every military commission initiated at Guantanamo Bay, including those subsequently abandoned. Survivors and relatives of the victims of the USS Cole and September 11 attacks have told me that my reports are the most consistently reliable source of information on the military commission proceedings.

3. I have covered nearly every pretrial hearing in the case against Abd al Rahim al Nashiri since arraignment in 2011. This reporting has included the extensive litigation that suppressed the defendant's 2007 "clean team" interviews, tumult on the defense team and higher

court litigation over a previous military judge's ethical conflicts, which resulted in more than two years of his decisions being vacated.

4. News organizations have periodically litigated access questions in the military commissions cases, beginning in October 2012 with AE65 in this case (including AE127 & AE372).

5. I have previously interviewed a panel president and published his name in *The Times*. See Foreman Says Military Jury Was Disgusted by C.I.A. Torture, *The New York Times,* Nov. 6, 2021. It is in the public's interest when jurors speak to reporters after a verdict. It leads to greater understanding of the outcome by a variety of interested parties, including the attorneys and, most importantly, the victims. I have been told that the panel's recommendation to the Convening Authority for clemency in the military commission of United States of America v Majid Shoukat Khan figured in a prosecution decision to pursue pretrial agreements in the Sept. 11 case. See The 9/11 Trial: Why Are Plea Bargain Talks Underway?, *The New York Times,* March 20, 2022.

6. Naming the subject of an interview serves to enhance the public trust in what the individual is saying. *The Times* also believes that identifying sources is crucial for maintaining trust with the readers. Separately, such reporting from Guantanamo Bay sheds light on the historic proceedings that are mostly inaccessible to the public.

7. It has been a mission of *The Times* to keep the public informed about these cases and the court that was created in the aftermath of the attacks of Sept. 11, 2001. In recent years we have devoted unparalleled time, resources and attention to them, both for the historical record and for the people who have a keen interest in the outcome of the proceedings.

8. With the court protections in place it is unlikely that a panel member's name would come to light. But circumstances are unpredictable and, if information is obtained independently of the proceedings, the First Amendment gives a responsible press the authority to decide what newsworthy information to publish.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

DATE: _____3 November 2026_____ _____/s/_____
Carol Rosenberg

ATTACHMENT D

ATTACHMENT D

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI	AE 734 **Order on Third Party Motion to Modify Protective Order AE 720C**

[Date of Order]

1. The third-party motion of the National Institute of Military Justice and The New York Times Company is accepted under RC 3.7.4.6 and GRANTED IN PART as follows.

2. Paragraph 3 of AE 720C, Protective Order, dated 7 October 2026, is VACATED effective immediately.

3. Paragraphs 4–7 of AE 720C shall not be construed or enforced to continue the restrictions vacated by this Order. No disciplinary action or other sanction may be imposed under AE 720C for violation of its vacated paragraph 3.

So ORDERED on [date].

Col. Matthew Fitzgerald

Military Commissions Trial Judiciary

DRAFT ORDER / NIMJ AND NYT / 03/11/26