Military Commissions Trial Judiciary
Guantanamo Bay, Cuba

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI , MUSTAFA AHMED ADAM AL-HAWSAWI	**Motion of the American Civil Liberties Union** for Public Access to Proceedings and Records **May 2, 2012**

1. Timeliness. There is no established timeframe for the filing of this motion in the Rules of Court ("RC") or the 2011 Regulation for Trial by Military Commission ("Regulation").

2. Relief Sought. The American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the "ACLU"), respectfully request that this Military Commission grant the public meaningful access to the proceedings against Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam Al-Hawsawi, as required by the Constitution and the Military Commissions Act. Specifically, the ACLU, on behalf of itself and its members, challenges the portions of the U.S. government's proposed protective order that would permit the government to suppress defendants' statements about their detention and treatment, including torture and other abuse, in U.S. custody. The ACLU requests that this Commission deny the government's request: (1) to prevent the public, press, and trial observers from hearing the defendants' statements concerning their personal knowledge of their detention and treatment in U.S. custody; and (2) for a 40-second delay

in the audio feed of the commission proceedings to the public, press and trial observers. If the Commission grants the government's request for a 40-second audio delay, the ACLU alternatively requests that the Commission order the public release of unredacted transcripts containing the defendants' statements on an expedited basis to minimize the infringement on the public's right of contemporaneous access to the proceedings.

3. Overview. Both the Constitution and the Military Commissions Act of 2009 ("MCA") recognize the public's presumptive right of access to all proceedings and records of this historic military commission. That right of access may only be overcome if there is a countervailing interest of "transcendent" importance, a standard that the government's extraordinary and draconian proposed restrictions cannot meet. The government asks this Commission to suppress as presumptively classified the defendants' every utterance concerning their personal knowledge of their detention and abuse in CIA custody. It also asks the Commission to suppress as classified the defendants' personal knowledge of their detention and treatment by the Department of Defense. Based on these improper classification claims, the government seeks a 40-second time delay for the audio feed of these proceedings. That delay renders the proceedings presumptively closed by withholding from the public, media, and observers, at the press of a button, any access to detainees' personal accounts of their detention and mistreatment.

In order to adjudicate whether the government's proposed restrictions on the public's right to hear defendants' statements satisfies the First Amendment's strict scrutiny standard, this court must determine whether the government may properly classify defendants' statements. The government cannot. It has no legal authority to classify defendants' statements containing their personal knowledge of the detention and

treatment, including torture, to which they were subjected in U.S. custody—information that defendants acquired by virtue of the government forcing it upon them. In addition, the President of the United States has banned the illegal CIA interrogation techniques to which the defendants were subjected and closed the secret facilities at which they were held. The government's suppression of defendants' statements about techniques and detention that are banned and prohibited by law—and that, accordingly, cannot be legitimately employed in the future—is not justified by the government's interest in protecting legitimate methods, and thus fails strict scrutiny as well. Finally, it is the very antithesis of the narrow tailoring required by the First Amendment for the government to categorically gag defendants when copious details about the CIA's use of torture and coercive techniques, including on the defendants, have been disclosed publicly in official government documents and other reports and press accounts.

The eyes of the world are on this Military Commission, and the public has a substantial interest in and concern about the fairness and transparency of these proceedings. This Commission should reject—and not become complicit with—the government's improper proposals to suppress the defendants' personal accounts of government misconduct.

4. Burden of Proof. As the party advocating restrictions on the public's right of access to these proceedings, the government bears the burden of meeting the First Amendment's strict scrutiny test by showing that public access poses a direct threat to an overriding governmental interest. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 15 (1986) ("*Press-Enterprise II*"); *Lugosch v. Pyramid Co. of Onodaga*, 435 F.3d 110,

123–24 (2d Cir. 2006); *ABC, Inc. v. Stewart*, 360 F.3d 90, 106 (2d Cir. 2004); *Wash. Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991).

5. Statement of Facts. On May 5, 2012, five men accused of involvement in the September 11th attacks will be arraigned before this Military Commission on capital charges of murder, conspiracy, and other terrorism offenses. This Commission has recognized that "due to the serious nature of the crimes alleged and the historic nature of military commissions, there is significant public interest in the Commission proceedings." Order, Government Mot. for Public Access to Open Proceedings of this Military Commission, Apr. 26, 2012 (AE 007B) at 1.

On April 26, 2011, the government filed with this Commission a Motion to Protect Against Disclosure of National Security Information (AE 013). That motion has not yet been made public, but the ACLU expects that it or another government motion to be filed and/or made public on or before May 5 will apply to the May 5 arraignment and all other proceedings, and is or will be similar in sum and substance to the government's motion for a protective order in *United States v. Al-Nashiri*, filed on October 28, 2011 as AE 013 in that case ("Gov't Al-Nashiri Mot.").

Based on the government's filing in the *Al-Nashiri* Commission and the positions it has taken in its previous prosecution of these defendants,[1] the government has asked or

[1] On June 4, 2008, the day before defendants' first arraignment, the government requested (AE 032B) and the Commission judge granted (AE 032A) a protective order "treating" defendants' statements as presumptively classified based on the judge's finding that the defendants had "been exposed to information that the U.S. government continues to protect as properly classified." AE 032A ¶¶ 24, 26. The protective order permitted a 20-second audio feed delay. ¶¶ 27–37. At the arraignment, the audio feed was cut off and the arraignment transcript redacted when defendant Binalshibh began to discuss his detention at CIA black sites and conditions at Guantanamo, and when defendant Mohammad mentioned waterboarding and "actions" taken against him in 2005 (when he was in CIA custody). A full list of redactions of the defendants' statements at the 2008 arraignment is available at http://www.mc.mil/CASES/MilitaryCommissions.aspx.

will ask this Commission to issue a protective order accepting the government's claim that any statements made by the defendants concerning their "exposure" to the Central Intelligence Agency's ("CIA") detention and interrogation program are presumptively classified and must be kept from the public. The government has also asked or will ask the Commission to accept its assertion that defendants' statements concerning their personal knowledge and experience of their imprisonment and treatment in Department of Defense ("DOD") custody are classified and must be suppressed. Based on these claims, the government has requested or will request that the Commission order a 40-second delay in the audio feed the government makes available to the public, media, and representatives of non-governmental organizations who observe the tribunal either via closed-circuit video or in a soundproof viewing room separated from the courtroom by a panel of sound-proof glass. The 40-second delay will permit a courtroom security official to cut off the audio feed whenever the defendants describe their detention and interrogation in U.S. custody.

The ACLU files this motion constrained by the lack of a public government filing that it can timely challenge before the May 5 arraignment and, therefore, the ACLU's legal arguments are based on the government's motion for a protective order in the *Al-Nashiri* case and filings in the previous Commission prosecution of these defendants. The ACLU reserves the right to supplement its motion once the government's motion for a protective order in this prosecution is made public.

6. Legal Basis for Relief Requested. The public's right of access to the proceedings of this tribunal is mandated by the Constitution of the United States and expressly granted by the MCA. The government has no legitimate basis under the First Amendment or the

MCA to limit that access by presumptively and categorically designating the defendants' speech, based on their personal knowledge of the government's detention and interrogation regime, as classified. The ACLU has standing to seek access to these court proceedings under the Constitution and regulations promulgated by the Department of Defense pursuant to the MCA.[2]

A. The First Amendment Protects the Public's Right of Meaningful Access to Proceedings and Records of Adjudicative Military Tribunals.

1. The First Amendment Right of Access Extends to Military Commissions.

The First Amendment "protects the public and the press from abridgement of their rights of access to information about the operation of their government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 584 (1980) (Stevens, J., concurring) (recognizing First Amendment right of public access to criminal trials); *Globe Newspaper*, 457 U.S. at 604–06 (same); *Press-Enterprise I*, 464 U.S. at 508−10, 513 (recognizing First Amendment right of public access to *voir dire* proceedings); *Press-Enterprise II*, 478 U.S. at 10 (same as to preliminary hearings in a criminal prosecution). The scope of this constitutional right was first defined by the U.S. Supreme Court in *Richmond Newspapers*, a case involving access to a criminal trial that the State of Virginia had conducted entirely in secret. Although a Virginia statute specifically granted the trial judge discretion to conduct a secret trial, the Supreme Court held that the First

[2] *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) ("[R]epresentatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'"); *Phoenix Newspapers, Inc. v. U.S. Dist. Court*, 156 F.3d 940, 949 (9th Cir. 1998) (requiring court to "provide sufficient notice to the public and press to afford them the opportunity to object or offer alternatives. If objections are made, a hearing on the objections must be held as soon as possible."); *see also Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597–98 (1978). Moreover, the ACLU has been recognized as a "national organization" by the Office of the Secretary of Defense under the Rules for Military Commissions 806(a), and has standing to assert its rights under statutory and constitutional law for access to the proceedings. The 2011 Regulation for Trial by Military Commission specifically permits a third party, like the ACLU, to challenge whether information presented in these proceedings "may be released to the public." Regulation 19-3(c) and (d).

Amendment created an affirmative, enforceable constitutional right of access to certain government proceedings, such as a criminal trial.[3]

The public's right of access exists where government proceedings and information historically have been available to the public, and public access plays a "significant positive role" in the functioning of government. *E.g.*, *Globe Newspaper*, 457 U.S. at 605–07; *Press-Enterprise II*, 478 U.S. at 8–9; *Wash. Post*, 935 F.2d at 287–92. Under the "experience" and "logic" analysis applied by the Supreme Court, the right of access "has special force" when it carries the "favorable judgment of experience," but what is "crucial" in deciding where an access right exists "is whether access to a particular government process is important in terms of that very process." *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring); *see also Globe Newspaper*, 457 U.S. at 605–06; *Press-Enterprise II*, 478 U.S. at 89; *United States v. Simone*, 14 F.3d 833, 837 (3d Cir. 1994); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1173 (3d Cir. 1986).[4]

Based upon the same experience and logic tests, a First Amendment right of public access also attaches to proceedings of adjudicative military tribunals, including military commissions. *See, e.g.*, *United States v. Anderson*, 46 M.J. 728, 729 (A. Ct. Crim. App. 1997) (per curiam) (absent adequate justification clearly set forth on the record, "trials in the United States military justice system are to be open to the public");

[3] *See Richmond Newspapers*, 448 U.S. at 577 (Burger, J.) (the right of access is "assured by the amalgam of the First Amendment guarantees of speech and press" and their "affinity to the right of assembly"); *id.* at 585 (Brennan, J., concurring) (First Amendment secures "a public right of access.").

[4] While this right has most frequently been asserted to compel access to judicial proceedings and documents, the right also applies to proceedings and information in the executive and legislative branches. *E.g.*, *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695–96, 700 (6th Cir. 2002) (right of access to executive branch deportation proceedings); *Soc*'y *of Prof'l Journalists v. Sec'y of Labor*, 616 F. Supp. 569, 574–75 (D. Utah 1985) (administrative hearing), *vacated as moot*, 832 F.2d 1180 (10th Cir. 1987).

see also ABC, Inc. v. Powell, 47 M.J. 363, 366 (C.A.A.F. 1997) (First Amendment right of public access applies to investigations under Art. 32); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (First Amendment right of public access extends to courts-martial); *United States v. Hershey*, 20 M.J. 433, 436 & 438 n.6 (C.M.A. 1985) (same); *United States v. Scott*, 48 M.J. 663, 665 (A. Ct. Crim. App. 1998) (same); *United States v. Story*, 35 M.J. 677, 677 (A. Ct. Crim. App. 1992) (per curiam) (same).

Historical Experience. Our nation has a well-established tradition of public access to adjudicative military tribunals. William Winthrop, the "Blackstone of Military Law" (*Reid v. Covert*, 354 U.S. 1, 19 n.38 (1957) (plurality opinion)), described in his classic military law opus a history of open proceedings that dates back centuries. William Winthrop, *Military Law and Precedents* 161–62 (rev. 2d ed. 1920) ("Winthrop") ("Originally, (under the Carlovingian Kings,) courts-martial . . . were *held in the open air*, and in the Code of Gustavus Adolphus . . . criminal cases before such courts were required to be tried '*under the blue skies.*' The modern practice has inherited a similar publicity."). Based on this long tradition of access, military courts recognized the right to public access to trials even before the Supreme Court recognized the First Amendment right of public access to criminal proceedings in *Richmond Newspapers. United States v. Brown*, 22 C.M.R. 41, 48 (C.M.A. 1956), *overruled, in part, on other grounds by United States v. Grunden*, 2 M.J. 116, 116 (C.M.A. 1977); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 617, 623 (2006) ("[T]he procedures governing trials by military commission historically have been the same as those governing courts-martial.").

History's lesson is clear: almost without exception, the thousands of military commissions held during wartime in our nation's history have been conducted publicly.

Ex. A (Decl. of David Glazier ¶ 4, Apr. 30, 2011) ("Evidence of the openness of military commissions can be found in the publicly available descriptions of virtually every historically significant military commission trial, including those of Lambden Milligan [sic], John Y. Beall, and the Lincoln assassination conspirators in the Civil War; the Dakota Sioux and Modoc Indian trials, and scores of war crimes trials in the aftermath of World War II."). It is also clear that secrecy in military commissions is the exception, one that history judges harshly:

> The one well-known historical anomaly, a closed military commission trial, took place in the *Quirin* case. That case concerned eight Nazi saboteurs who crossed the Atlantic in German U-boats [and landed in the United States]. . . . Some commentators have noted it may have been closed to avoid embarrassment to the U.S. government over its perceived incompetence in preventing the landings and the subsequent interagency bungling . . . . What is clear, however, is that the secrecy of the proceeding contributed to what is widely acknowledged as the tarnished legacy of that case.

Id. ¶ 5.[5]

Policies Advanced by Public Access. The logic prong of the Supreme Court's test for public access is unquestionably met here because of the "historic nature" of the proceedings against the defendants and the public's interest in the fairness and transparency of these proceedings. There is also substantial public and press interest in the circumstances of the defendants' capture and the legality of their detention and interrogation in U.S. custody. *See Richmond Newspapers*, 448 U.S. at 569–71 (the interests advanced by open adjudicatory criminal proceedings include (1) ensuring that

---

[5] It is now widely believed that the "real reason President Roosevelt authorized these military tribunals [in *Quirin*] was to keep evidence of the FBI's bungling of the case secret." *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm. on the Judiciary*, 107th Cong. 377 (2001) (statement of Neal Katyal, Visiting Professor, Yale Law School, and Professor of Law, Georgetown University), *available at* http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1095&context=cong.

proper procedures are being followed; (2) discouraging biased decisions; (3) providing an outlet for community hostility and emotion; (4) ensuring public confidence in a trial's results through the appearance of fairness; and (5) inspiring confidence in government through public education regarding the methods followed and remedies granted by government). Our nation's courts recognize that the truth, no matter how ugly, is better aired than concealed, and that the legitimacy of adjudicatory tribunals is undermined by secrecy.

Thus, just as with civilian judicial proceedings, military courts recognize that an open military proceeding "reduces the chance of arbitrary or capricious decisions and enhances public confidence," which would "quickly erode" if proceedings are arbitrarily closed. *Scott*, 48 M.J. at 665 (citations and internal quotation marks omitted); *see also Anderson*, 46 M.J. at 731 (same). Indeed, even before the Supreme Court recognized the right of access to criminal proceedings in *Richmond Newspapers*, the Court of Military Appeals had identified the functional benefits of public proceedings: (1) improving the quality of testimony; (2) curbing abuses of authority; and (3) fostering greater public confidence in the proceedings. *See Brown*, 22 C.M.R. at 45–48; *Hershey*, 20 M.J. at 436; *see also United States v. Hood*, 46 M.J. 728, 731 n.2 (A. Ct. Crim. App. 1996). Whether this adjudicative military commission is seen as legitimate and inspires public confidence depends in part on the openness of the proceedings it holds.

2. The Presumption of Public Access Can Only Be Overcome by An Overriding Interest That is Narrowly Tailored.

The public's constitutional right of open access to these military commission proceedings can be overcome only if there is a countervailing interest of "transcendent" importance. *Richmond Newspapers*, 448 U.S. at 581; *Press-Enterprise Co. II*, 464 U.S.

at 510. The adjudicatory tribunals of the military branches apply this same standard. As explained in *Hershey*, "the party seeking closure must advance an overriding interest that is likely to be prejudiced [by openness]; the closure must be narrowly tailored to protect that interest; the trial court must consider reasonable alternatives to closure; and it must make adequate findings supporting the closure to aid in review." 20 M.J. at 436; *see also Anderson*, 46 M.J. at 729 ("[T]he military judge placed no justification on the record for her actions. Consequently, she abused her discretion in closing the court-martial."); *Scott*, 48 M.J. at 665. If access is to be denied, judicial findings on the need for closure or sealing must be entered as written findings of fact, made with sufficient specificity to allow appellate review. *Press-Enterprise II*, 478 U.S. at 9−10, 14.

B. The Military Commissions Act and its Implementing Regulations Require Meaningful Public Access to All Commission Proceedings.

In adopting the Military Commissions Act in 2006 and again in 2009, Congress recognized that it is critically important for these criminal proceedings to be conducted in the open so their validity is accepted by the public. Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended 10 U.S.C. §§ 949−950 (2009)) ("MCA"). The MCA thus expressly mandates access by "the public" to all "proceedings" of any military commission, unless specifically delineated exceptions are found to apply. 10 U.S.C. § 949d(c)(1).

The statutory right of access is recognized and implemented in both the 2011 Regulation for Trial by Military Commissions and the 2010 Manual for Military Commissions ("Manual") containing the 2010 Rules for Military Commissions ("2010 RMC"). *See* Regulation 19-6 ("The proceedings of military commissions *shall* be public to the maximum extent practicable." (emphasis added)); 2010 RMC 806(a) ("[M]ilitary

commissions *shall* be publicly held." (emphasis added)). The MCA and its implementing regulations make clear that the public's right of access extends beyond the "trial" to all aspects of the "proceeding" against an accused. 10 U.S.C. § 949d(c). Under the Regulation, the right of access applies "from the swearing of charges until the completion of trial and appellate proceedings or any final disposition of the case." Reg. MC 19-2. Motions, rulings, and summaries of Rule 802 conferences are all required to be part of the Record of Trial, and thus expressly subject to the right of access. The 2010 Manual also identifies pre-trial motions as being among the "proceedings" that a judge controls.

C. This Commission Must Adjudicate the Propriety of the Government's Proposed Categorical Classification of Defendants' Statements.

This Commission must review the government's proposed categorical classification of defendants' statements about their detention and mistreatment under the First Amendment's strict scrutiny standard, and make specific factual findings on the record before permitting any national-security-related closure. *Grunden*, 2 M.J. at 121 ("The blanket exclusion of the spectators from all or most of a trial . . . has not been approved . . . nor could it be absent a compelling showing that such was necessary to prevent the disclosure of classified information."); *see also Richmond Newspapers*, 448 U.S. at 581; *Globe Newspaper*, 457 U.S. at 606–07; *Press-Enterprise II*, 478 U.S. at 13-14. The MCA supports this demanding standard, permitting this Court to deny public access to the proceedings "*only* upon making a *specific finding* that such closure *is necessary* to — (A) protect information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities; or (B) ensure the physical safety of individuals." 10 U.S.C. § 949d(c)(2) (emphases added).

Only the Military Commission judge, and not the government, may make the decision to limit public access to these commission proceedings. 10 U.S.C. § 949d(c) ("The *military judge* may close to the public all or part of the proceedings of a military commission under this chapter." (emphasis added)). Part of the military judge's obligation in ruling on a government request to close proceedings is assessing whether purportedly classified information is in fact properly classified. *Grunden*, 2 M.J. at 122–23 & n.14 ("Before a trial judge can order the exclusion of the public on this basis, he must be satisfied from all the evidence and circumstances that there is a reasonable danger that presentation of these materials before the public will expose military matters which in the interest of national security should not be divulged."); [6] *see also* 10 U.S.C. § 949d(c)(2).

The government may argue that MCA Sections 949p-1(a) and (c) bar this Commission from independently determining the propriety of the government's decision to classify the defendants' personal knowledge of their detention and treatment. The Commission should reject any such argument, and has three grounds on which to do so.

First, the Commission should find that Section 949p-1(a) permits it to determine that only *properly* classified information may be withheld from the public, and thus that the military judge has the authority to review the government's classification decisions. [7] This is what the term "classified information" in the statute clearly requires; it is

---

[6] Although *Grunden* was decided under the Sixth Amendment right to a public trial, the considerations and procedures set forth in the opinion apply equally to First Amendment right-of-access challenges. *See Powell*, 47 M.J. at 365 ("[W]hen an accused is entitled to a public hearing, the press enjoys the same right and has standing to complain if access is denied.").

[7] MCA Section 949p-1(a) reads:

> Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security. Under no circumstances may a military judge order the release of classified information to any person not authorized to receive such information.

elementary that in order to designate information as classified, the government must properly adhere to the requirements of the relevant executive order. *See* Exec. Order No. 13,526, 75 Fed. Reg. 707 § 1.1(a) (Dec. 29, 2009). This reading would avoid conflict with the military judge's constitutional obligation to adjudicate whether the government's classification decisions constitute a "transcendent" interest that overrides the public's First Amendment right of access. *See Gomez v. United States*, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.").

Second, the Commission should find that a plain text reading of Section 949p-1(c) limits its application to evidence presented by the government. [8] The plain language of Section 949p-1(c) constrains only the military judge's power to review a decision not to declassify evidence *submitted by the prosecution* at trial, not information presented by the defense, including statements of the accused.[9] Indeed, the provision makes no mention of the defense or the accused. Thus, the military judge's authority to scrutinize strictly the government's purported classification of information that is within the personal knowledge of the defendants is unaffected by Section 949p-1(c). This plain text reading also avoids any conflict with the military judge's obligation to determine whether the

[8] MCA Section 949p-1(c) reads:

> Trial counsel shall work with the original classification authorities for evidence that may be used at trial to ensure that such evidence is declassified to the maximum extent possible, consistent with the requirements of national security. A decision not to declassify evidence under this section shall not be subject to review by a military commission or upon appeal.

[9] The ACLU does not concede that this reading of Section 949p-1(c) is a constitutionally permissible restriction on the judge's authority with respect to classified information the government seeks to offer at trial, but this Commission need not reach this issue in order to decide the instant motion.

government's classification decisions may override the public's First Amendment's right of access.

Third, and in the alternative, if this Commission were to find that Sections 949p-1(a) and (c) bar it from reviewing the propriety of the government's proposed classification of defendants' statements, it must find those provisions unconstitutional as applied. That is because, read as a complete bar, the provisions would unconstitutionally prevent the military judge from fulfilling his mandate to preserve the public's First Amendment right of access to proceedings and to close proceedings *only* when necessary to protect *properly* classified national security information. The military judge has the authority to strike down the provisions under well-established civilian and military precedent.

It is a fundamental tenet of our constitutional system that federal statutes that are inconsistent with the Constitution and the Bill of Rights are invalid, and that courts have the power to hold statutes unconstitutional on their face or as applied. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). There is no question that a federal court faced with provisions analogous to Sections 949p-1(a) and (c) would be empowered to find them unconstitutional as applied. Federal courts routinely consider the impact of the First Amendment on federal statutory and regulatory schemes dealing with control and release of classified information. *See, e.g.*, *Wilson v. CIA*, 586 F.3d 171, 183–84 (2009) (evaluating constitutionality of government pre-publication review of book by former CIA employee); *Doe v. Gonzales*, 500 F. Supp. 2d 379, 411 (S.D.N.Y. 2007), affirmed in part and reversed in part sub nom *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008) ("Congress cannot legislate a constitutional standard of review that contradicts or

supercedes what the courts have determined to be the standard applicable under the First Amendment for that purpose.").

Military courts, no less than civilian courts, have the power to invalidate federal statutes or their specific provisions on constitutional grounds. In *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983), the Court of Military Appeals ("CMA") squarely rejected the prosecution's argument that, because it was a military court constituted under Article I of the Constitution, it lacked authority to rule on the constitutionality of provisions of the Uniform Code of Military Justice. The CMA noted that there is no absolute bar on Article I courts adjudicating the constitutionality of statutes, and that military courts' exercise of their judicial power includes the power to declare statutes unconstitutional. *Id.* at 364–66. It further explained that Congress is empowered by Article I of the Constitution to establish military courts, "with judges who are sworn to uphold the Constitution," and it would be "anomalous" if Congress could not "authorize those judges to refuse to enforce statutes which they determine are unconstitutional." *Id.* at 366. Indeed, the CMA held that precluding military judges from deciding constitutional issues "would itself raise the constitutional question whether a judge—even one appointed under Article I, rather than under Article III—could be required by oath to support the Constitution of the United States, *see* U.S. Const. art. VI, but at the same time be forced to make decisions and render judgments based on statutes which he concluded were contrary to that Constitution." *Id.*; *see also U.S. Navy-Marine Corps. Court of Military Review v. Carlucci*, 26 M.J. 328, 332 (C.M.A. 1988); *United States v. Graf*, 35 M.J. 450, 461–66 (C.M.A. 1992).[10] Military courts also routinely consider whether

[10] Inferior military courts also have the power to review the constitutionality of statutes, and frequently do so. *See, e.g.*, *United States v. Turner*, 30 M.J. 1276, 1277–83 (N-M.C.M.R. 1990); *United States v. Herd*,

federal statutes are unconstitutional as applied. *See, e.g.*, *United States v. Wilson*, 66 M.J. 39, 50–51 (C.A.A.F. 2008) ("[T]his Court may decide to hold the statute unconstitutional as applied in certain circumstances . . . ."); *United States v. Gorski*, 47 M.J. 370, 371 (C.A.A.F. 1997); *United States v. Lumagui*, 31 M.J. 789, 790 (A.F.C.M.R. 1990); *United States v. Stratton*, 2012 WL 244062, at *1 (N-M. Ct. Crim. App. Jan. 26, 2012).

This Commission is empowered to declare Sections 949p-1(a) and (c) unconstitutional as applied for the same reasons that judges presiding over other courts in the military justice system could do so. *Cf. Matthews*, 16 M.J. at 366 (military judges are judicial officers who are "required by oath to support the Constitution of the United States"). Accordingly, if this Commission interprets Sections 949p-1(a) and (c) to preclude it from reviewing the propriety of the government's classification claims in deciding whether to limit the public's right to open commission proceedings, the provisions are an unconstitutional infringement on the First Amendment and must be ruled as such.

D. There is No Legitimate Basis for the Government's Categorical Suppression of Defendants' Statements Concerning Abuse and Mistreatment

The government has invoked or will invoke Executive Order No. 13,526, or its predecessor Orders, for its classification authority. Gov't Al-Nashiri Mot. 7. Executive Order No. 13,526 provides a comprehensive system for classifying national security information, and contains four prerequisites: (1) the information must be classified by an "original classification authority"; (2) the information must be "owned by" or "under the control of" the government; (3) the information must fall within one of the authorized withholding categories under this order; and (4) the original classification authority must

---

29 M.J. 702, 705–08 (A.C.M.R. 1989); *United States v. Allen*, 1999 WL 305093, at *2 (A.F. Ct. Crim. App. Apr. 22, 1999).

"determine[] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and must be "able to identify or describe the damage." Exec. Order No. 13,526, § 1.1(a). To be properly classified, agency information must fall within an authorized withholding category set forth in the Executive Order; the government has or will rely on two: "intelligence activities (including covert action), intelligence sources or methods," and "foreign activities of the United States." *Id.* § 1.4(c), (d); Gov't Al-Nashiri Mot. 2, 5.

The government's claims that defendants' statements about their detention and treatment in U.S. custody may be classified fail because: (1) the government has no authority to classify information within the defendants' personal knowledge and experience, and which they acquired by virtue of having it involuntarily imposed on them by the government; (2) the President of the United States has banned the "enhanced interrogation techniques" to which defendants were subjected, and ordered permanently closed the CIA sites at which they were held; and (3) the information the government seeks to suppress has been declassified already and is publicly available. Moreover, because "enhanced interrogation techniques" are banned, the CIA sites closed, and information about the U.S. government's detention and mistreatment of the defendants public, defendants' statements on these issues would not harm the national security. The government's classification claims are therefore not legitimate and do not override the public's right to hear defendants' statements. *Richmond Newspapers*, 448 U.S. at 581; *Press-Enterprise Co. II*, 464 U.S. at 510.

1. **The government may not classify information within the defendants' personal knowledge.**

The government seeks to censor defendants' statements based on a chillingly Orwellian claim: because a defendant was "detained and interrogated in the CIA program" of secret detention, torture, and abuse, he was "exposed to classified sources, methods, and activities" and must be gagged lest he reveal his knowledge of what the government did to him. Gov't Al-Nashiri Mot. 3. It makes a similar claim with respect to defendants' knowledge of DOD sources, methods, and activities at Guantanamo. *Id.* at 5. But the government has no legal authority to classify statements based on the defendants' personal knowledge and experience of government conduct. The Executive Order's threshold requirement for classification, that national security information be "owned by . . . or [be] under the control of the United States Government," simply may not be categorically extended to *human beings* under the government's control, let alone to individuals who were "exposed" to classified information by virtue of having it forcibly imposed on them by the government. Exec. Order 13,526, § 1.1(a)(2).

Although the government may enjoin the disclosure of information by a government employee in ways that, if imposed on private individuals, would be unlawful, "this principle implies a substantially *voluntary assumption* of special burdens in exchange for special opportunities." *Wright v. F.B.I.*, 2006 WL 2587630, at *6 (D.D.C. July 31, 2006) (emphasis added); *see also McGehee v. Casey*, 718 F.2d 1137, 1143 n.11 (D.C. Cir. 1983) ("One who enters the foreign intelligence service thereby occupies a position of 'special trust' reached by few in government"); *Stillman v. CIA*, 517 F. Supp. 2d 32, 37 (D.D.C. 2007) (former CIA employee foreclosed from publicly discussing information obtained after his termination under broad terms of non-disclosure

agreements signed in consideration for offer of CIA employment). Unlike government employees or others in privity with the government, who might be contractually obligated to keep their knowledge and experiences secret, the defendants' "exposure" to the CIA torture and secret detention program and their detention and treatment in DOD custody have obviously not been voluntary, nor based on a special relationship of trust. The government has no legal authority to restrict information that comes from the defendants' own personal knowledge and observations.

Similarly, the defendants' statements about interrogation techniques and places or conditions of confinement are not protectable "activities, sources and methods" or "foreign activities" under the Executive Order because the government lacks the authority to classify information that detainees know based on their personal observations and experiences. There is no authority for the extraordinary proposition that the government's detention and interrogation of a prisoner somehow creates a new, unwritten power to classify any and all utterances made by that prisoner concerning his own knowledge of his whereabouts, incarceration, and treatment. Indeed, if the government were correct that the defendants' "exposure" to its "foreign activities" or "activities, sources and methods" justified the enforcement of a gag on defendants' statements about their experience, then surely it would follow that whoever in government was responsible for disclosing the classified information to terrorism suspects must have violated criminal statutes prohibiting transmission of intelligence secrets to anyone unauthorized to receive them. *See, e.g.*, 18 U.S.C. § 793(d) and (f).[11] That is an absurd proposition, to be sure,

[11] "Whoever, lawfully having possession of . . . information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated,

but no more so than the notion that when the government detains a person and applies coercive interrogation techniques against him, that person's statements or allegations of government misconduct must be suppressed.

The reality is that the government's practical authority – and ability – to suppress the defendants' descriptions of their own experiences of detention and mistreatment derives solely from its decision to detain defendants and either keep them in detention indefinitely or seek to impose the death penalty without permitting the knowledge they have to be revealed. This Commission should not accept – and become complicit in – the government's improper classification of detainees' statements based on their own knowledge and experience of their detention and abuse in U.S. custody.

2. The President of the United States has Categorically Banned the CIA's Coercive Interrogation and Secret Detention program.

The government's rationale for its proposed presumptive classification of defendants' statements about their "exposure" to the CIA's detention and interrogation program is that revelation would disclose the means by which the United States "defends against international terrorism and terrorist organizations" and result in damage to the national security. Gov't Al-Nashiri Mot. 7. But the government can have no legitimate interest, let alone a compelling one, in preserving its ability to use a "program" that the President of the United States has banned and that is prohibited by law. A protective order that permits the suppression of statements about clearly prohibited and illegal activities is overbroad on its face.

---

delivered, or transmitted . . . to any person not entitled to receive it . . . Shall be fined under this title or imprisoned not more than ten years, or both." 18 U.S.C. § 793(d).

The seminal Supreme Court case interpreting the government's authority to classify "intelligence sources and methods" makes clear that the CIA may withhold information about only those sources or methods that "fall within the Agency's mandate." *CIA v. Sims*, 471 U.S. 159, 169 (1985). The CIA's so-called "enhanced interrogation techniques" have been categorically prohibited by the President, and its overseas detention and interrogation facilities have been permanently closed. *See* Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009). Thus, neither the illegal "enhanced interrogation techniques," nor secret overseas detention is within the Agency's mandate. Even assuming that they did at one point legitimately and lawfully fall within the CIA's mandate, no amount of disclosure about their use in the past could reveal details about current "activities, sources and methods" that may be legitimately protected.

President Obama shares this view. In 2009, he ordered the release of the legal memos upon which the CIA relied for its interrogation program. Upon release of the memos, the President stated:

> First, the interrogation techniques described in these memos have already been widely reported. Second, the previous Administration publicly acknowledged portions of the program – and some of the practices – associated with these memos. Third, I have already ended the techniques described in the memos through an Executive Order. Therefore, withholding these memos would only serve to deny facts that have been in the public domain for some time.[12]

When the President himself has squarely rejected the argument that further dissemination of details of interrogation techniques would cause harm to national security, the CIA (as the "original classification authority") has no basis to assert that claim. The President's determination is, in effect, a finding by the Chief Executive that

[12] President Barack Obama, Statement on Release of OLC Memos (April 16, 2009), *available at* http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos.

the predicate element of the Executive Order upon which the CIA relies no longer applies. The government is now indisputably foreclosed from claiming that classification of such information is authorized on the ground that it "could reasonably be expected to result in damage to the national security."

The use of illegal interrogation methods on prisoners is also expressly prohibited by U.S. law, *see* 18 U.S.C. § 2340A (providing for prosecution of a U.S. national or anyone present in the U.S. who, while outside the U.S., commits or attempts to commit torture); 18 U.S.C. § 2441 (making it a criminal offense for U.S. military personnel and U.S. nationals to commit grave breaches of Common Article 3 of the Geneva Convention), and by international law, *see* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85. Neither the CIA nor DOD is exempt from these laws. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, § 1003 (2005) ("No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."); *see also* 109 Cong. Rec. S14257 (statement of Sen. Carl Levin) (stating that with enactment into law of this provision, "the United States will put itself on record as rejecting any effort to claim that these words have one meaning as they apply to the Department of Defense and another meaning as they apply to the CIA").

Similarly unlawful are the practices of extraordinary rendition and secret detention. Extraordinary rendition contravenes the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681−822 § 2242, which states that the United States "[shall] not . . . expel, extradite, or otherwise effect the involuntary

return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States," and Article 3 of the Convention Against Torture, which includes a similar proscription. Secret detention is prohibited by both the Geneva Conventions, *see* Third Geneva Convention Relative to the Treatment of Prisoners of War, art. 122–25, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 136–4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; and by the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment. The government does not have any legitimate interest in preserving the effectiveness of interrogation and detention methods that it is not authorized to use in the first place.

Finally, the Executive Order explicitly forbids classification to "conceal violations of law" or to "prevent embarrassment." Exec. Order No. 13,526, § 1.7(a)(1)–(2). To the extent that the government argues in any classified submission to this tribunal that disclosure of the details of the CIA program would harm the national security on either of these grounds, those arguments must be rejected.

3. The Defendants' Allegations of Abuse are Already Substantially Declassified and Public

The government cannot argue that the *details* of the CIA's detention and interrogation program remain categorically classified because numerous publicly available documents – including official, declassified government records – set forth in painstaking detail the types of interrogation techniques that were part of the CIA's

program, the CIA's use of those techniques on prisoners, including defendants, and the locations of the sites at which the CIA held the defendants.

On April 16, 2009, President Obama declassified four Department of Justice memoranda (the "OLC Memos") that purported to authorize, and described in concrete and minute detail, the interrogation techniques that the CIA applied to so-called "High-Value Detainees," including defendants. For example, a memo issued on May 10, 2005, contains nine pages of the CIA's operational details of thirteen "enhanced interrogation techniques," and an additional fifteen pages of descriptions mixed with legal analysis. *See* Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen. to John A. Rizzo, Senior Deputy Gen. Counsel, CIA, Re: Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005), *available at* http://bit.ly/JDphtn ("Techniques Memo").

The memo makes explicit how the CIA used and intended to use each of the interrogation techniques, including: waterboarding, *id.* at 13, 42–44 (involving "a gurney that is inclined at an angle of 10 to 15 degrees to the horizontal," the pouring of water "from a height of approximately 6 to 18 inches," and applications of water for no more than 40 seconds per "application" and describing the number of times the CIA may waterboard a detainee per session, per day, and per month, and the protocol required for the presence of medical personnel); "sleep deprivation," *id.* at 11−13 (describing operational details); "water dousing," *id.* at 9−10 (describing time limits based on water temperature); and, three specific "stress positions," *id.* at 9 (describing details of the position and angles at which prisoners' heads and limbs would be held).

Significantly, the Techniques Memo also reviewed the CIA's *actual application* of the techniques and their impact. *See, e.g.*, *id.* at 8 ("walling" "is not intended to—and based on experience you have informed us that it does not—inflict any injury or cause severe pain"); *id.* at 11 ("We understand from you that no detainee subjected to [sleep deprivation] by the CIA has suffered any harm or injury, either by falling down and forcing the handcuffs to bear his weight or in any other way."); *id.* at 11−12 n.15 ("Specifically, you have informed us that on three occasions early in the program, the interrogation team and the attendant medical officers identified the potential for unacceptable edema in the lower limbs of detainees undergoing standing sleep deprivation, and in order to permit the limbs to recover without impairing interrogation requirements, the subjects underwent horizontal sleep deprivation."); *id.* at 12 ("You have informed us that to date, more than a dozen detainees have been subjected to sleep deprivation of more than 48 hours, and three detainees have been subjected to sleep deprivation of more than 96 hours; the longest period of time for which any detainee has been deprived of sleep by the CIA is 180 hours.").

Another May 10, 2005 memo assesses the CIA's combined use of the "enhanced interrogation techniques" and describes the operational details of a full-scale "enhanced" interrogation from beginning to end, based on information provided by the CIA. *See* Memorandum from Steven G. Bradbury to John A. Rizzo, Re: Application of 18 U.S.C. §§ 2340–2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees (May 10, 2005), *available at* http://bit.ly/Iltguh. The memo describes the phases of interrogation (from "Initial Conditions", *id.* at 4, to the "Transition to Interrogation" and interrogation itself, including establishing a "baseline,

dependent state" and the use of "corrective" and "coercive" interrogation techniques, *id.* at 4–6)). The memo includes the CIA's description of a "prototypical interrogation," which contains detailed information about precisely how the CIA conducted interrogations and employed "enhanced interrogation techniques." *Id.* at 5–9.

A memo dated May 30, 2005 provides even greater detail about the CIA's application of specific torture and abusive techniques. *See* Memorandum from Steven G. Bradbury to John A. Rizzo, Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees (May 30, 2005), *available at* http://bit.ly/Iltguh. For example, it notes that the CIA "has employed enhanced techniques to varying degrees in the interrogations of 28 of these detainees," *id.* at 5, and that "the CIA has used [waterboarding] in the interrogations of only three detainees to date (KSM, Zubaydah, and 'Abd Al-Rahim Al-Nashiri)," *id.* at 6. The memo reveals granular details about the treatment of particular detainees, including that the CIA waterboarded defendant Mohammad "183 times during March 2003." *Id.* at 37.

On August 24, 2009, the CIA itself declassified large portions of a CIA Inspector General's report concerning the Agency's detention and interrogation operations. CIA Office of the Inspector General, *Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)* (May 7, 2004), *available at* http://wapo.st/3JNHM ("IG Report"). The IG Report describes actual applications of coercive techniques that *exceeded* the authority purportedly conferred by the OLC Memos, recounting in detail numerous instances in which CIA and contract interrogators engaged in unauthorized coercive practices. The report includes multiple descriptions of the treatment of

defendant Mohammed, *id.* ¶¶ 99–100, and other unauthorized interrogation activities that bear no relation to the techniques described in the OLC memos, including, for example, that an "experienced Agency interrogator reported that . . . interrogators said to Khalid Shaykh Muhammad that if anything else happens in the United States, 'We're going to kill your children.'" *Id.* ¶ 95. The report also reveals that defendant al Hawsawi was subject to interrogation. *Id.* ¶ 214.

A second CIA document declassified with the IG Report is a self-styled "Background Paper" prepared by the CIA to describe the Agency's "combined use of interrogation techniques." CIA, *Background Paper on CIA's Combined Use of Interrogation Techniques* (Dec. 30, 2009), *available at* http://bit.ly/3YJp0. The document is intended to provide "additional background on how interrogation techniques *are used*, in combination and separately, to achieve interrogation objectives." *Id*. at 1 (emphasis added). The entire document makes clear that actual descriptions of detention conditions and techniques have been declassified. *Id.* at 4 (summarizing "detention conditions that are used in all CIA HVD facilities," and describing in detail each of the techniques actually applied, *id.* at 4–17).

Any statements defendants make during the Military Commission proceedings about their experience while subject to CIA interrogation are likely to reveal little or nothing that the government, at the direction of the President, has not already officially disclosed.

Further, even if defendants were to describe information about their treatment beyond what the government has itself disclosed, that information would cause no harm to national security because a publicly available report by the International Committee of

the Red Cross, based entirely on the firsthand accounts of former CIA prisoners held at Guantanamo, describes their treatment in CIA custody. Int'l Comm. of the Red Cross, *Report on the Treatment of Fourteen "High Value" Detainees in CIA Custody* (Feb. 2007), *available at* http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf ("ICRC Report"). The ICRC Report is based on interviews with 14 detainees, including all five defendants here. *Id.* at 5. Although the Report does not constitute an official government disclosure, it contains much of the same information that defendants could potentially provide in testimony before the commission. *See, e.g.*, *id.* at 10 (Mr. Mohammed: "A cloth would be placed over my face. Water was then poured onto the cloth by one of the guards so that I could not breathe."); *id.* at 11 ("Mr Ramzi Binalshib alleged that he was shackled in this position for two to three days in Afghanistan his second place of detention and for seven days in his fourth . . . ."); *id.* ("Mr Bin Attash commented that during the two weeks he was shackled in the prolonged stress standing position with his hands chained above his head, his artificial leg was sometimes removed by the interrogators to increase the stress and fatigue of the position."); *id.* at 31–33 (full account of statement of Mr. Bin Attash); *id.* at 33–37 (full account of statement of Mr. Mohammed).

Official investigations by United Nations and European human rights officials and accounts in the press have made public the locations of the overseas CIA-operated detention facilities at which defendants were held, including Afghanistan, Poland, Romania, Lithuania, Morocco, and Thailand. A mere sampling of these reports reveals the very information about detention by the CIA that the government seeks to classify here. *See, e.g.*, U.N. Human Rights Council, *Joint Study on Global Practices in Relation*

to Secret Detention in the Context of Countering Terrorism, ¶ 114, U.N. Doc. A/HRC/13/42 (May 20, 2010), *available at* http://bit.ly/cziSQc (Defendants Mohamed, bin al-Shibh, and bin Attash held in the Polish village of Stare Kiejkut between 2003 and 2005); *id.* ¶ 108 ("The *Washington Post* also reported that the officials had stated that Ramzi Binalshibh had been flown to Thailand after his capture."); Memorandum from Dick Marty, Switzerland Rapporteur to the Council of Europe, Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report, ¶ 127 & n.85 (June 8, 2007), *available at* http://bbc.in/JMRLRM (same); *see also* Alex Spillius, *CIA 'Used Romania Building as Prison for Khalid Sheikh Mohammed,'* Telegraph, Dec. 8, 2011, http://tgr.ph/u18pgx ("Among the prisoners on board a flight from Poland to Bucharest in September 2003, according to former CIA officials, were [Khalid Sheikh] Mohammed and Walid bin Attash . . . . Later, other senior al-Qaeda suspect[] Ramzi Binalshibh . . . w[as] also moved to Romania."); *id.* ("The prison [in Romania] was part of a network of so-called 'black sites' that included prisons in Poland, Lithuania, Thailand and Morocco operated by the CIA."); Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, Wash. Post, Nov. 2, 2005, http://wapo.st/Ud8UD ("Sept. 11 planner Ramzi Binalshibh was also captured in Pakistan and flown to Thailand."); Matthew Cole & Brian Ross, *Exclusive: CIA Secret 'Torture' Prison Found at Fancy Horseback Riding Academy*, ABC News, Nov. 8, 2009, http://abcn.ws/IiByQk ("The CIA built one of its secret European prisons inside an exclusive riding academy outside Vilnius, Lithuania, a current Lithuanian government official and a former U.S. intelligence official told ABC News this week.").

Given the vast amount of information that is already public concerning the CIA's coercive interrogation techniques and the sites at which those techniques were administered, the government cannot meet its burden of demonstrating that the public must be excluded from hearing statements from the defendants about their knowledge and experiences in CIA custody. To the contrary, the government's proposed categorical suppression of defendants' statements—irrespective of the truth of those statements and whether their contents have been widely publicized—is the very antithesis of the narrow tailoring required by the First Amendment.

E. There is no justification for the 40-second audio feed delay.

Because the government's proposed classification of defendants' statements based on their personal knowledge of their detention and treatment in U.S. custody is improper, there is no justification for the government's proposed 40-second audio delay. The audio delay is also improper because it turns the presumption of open public access to these proceedings, subject only to narrowly-tailored exceptions, on its head by presumptively closing them. Gov't Al-Nashiri Mot. 15 (requesting audio delay "so that *if* classified information is disclosed, inadvertently or otherwise," the government may prevent it from being heard) (emphasis added). If this Commission nevertheless grants the government's request for a 40-second delay, it should order the public release of unredacted transcripts containing the defendants' statements on an expedited basis to minimize the infringement on the public's right of contemporaneous access to the proceedings. *Lugosch*, 435 F.3d at 126–27 ("Our public access cases and those in other circuits emphasize the importance of immediate access when a right of access is found." (emphasis added)); *Wash. Post*, 935 F.2d at 287 (recognizing "the critical importance of

contemporaneous access . . . to the public's role as overseer of the criminal justice process").

7. Oral Argument. The ACLU requests oral argument.

8. Attachment.

A. Declaration of David Glazier

Respectfully submitted,

Hina Shamsi
Nathan Freed Wessler
Zachary Katznelson
American Civil Liberties Union
Foundation
125 Broad St., 18th Fl.
New York, NY 10004
Tel.: (212) 549-2500
Fax: (212) 549-2654
hshamsi@aclu.org

DECLARATION OF DAVID GLAZIER

Pursuant to 28 U.S.C. § 1746, I, David Glazier, do declare as follows:

1. I am a Professor of Law at Loyola Law School in Los Angeles, California. After graduating with a B.A. in history from Amherst College in 1980, I attended Navy Officer Candidate School in Newport, Rhode Island. I was commissioned as an Ensign in September, 1980 and spent the next twenty-one years on active duty as a Surface Warfare Officer, culminating in command of USS George Philip (FFG 12). I retired from the Navy effective September 1, 2001 in order to take advantage of the opportunity to attend law school at the University of Virginia. Following graduation from law school I remained in Charlottesville for two additional years as a research fellow at the Center for National Security Law. I have been employed by Loyola since July 2006 and was promoted to full professor and granted tenure in July 2009.
2. I have been a scholar of military commissions and their historical use by the United States since my second semester of law school in the spring of 2002. My first publication on the subject was my student note for the Virginia Law Review, Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission (81 Va. L. Rev. 2005(2003)). The original argument I made in that note that Article 36 of the UCMJ should be read to require uniformity between court-martial and military commission procedure was adopted by the District Court as one of its two grounds for overturning Salim Hamdan's trial. Hamdan v. Rumsfeld, 344 F. Sup.2d 152, 166-72 (D.D.C. 2004). I have continued to engage in extensive scholarship on the subject of military commissions along with the closely interrelated issues of the history of U.S. military

justice and the law of war since that time, and have published three additional full-length law review articles on military commission history and law. I will be submitting a fourth article for publication in the very near future.

3. In the course of this research I have personally examined the results of every U.S. military commission conducted during the Mexican War (more than 400 trials) and Philippine Insurrection (more than 800 trials) via the holdings of the National Archives and Library of Congress, and have reviewed a mixture of primary and secondary source materials from the Civil War, 19th century Indian Wars, World War I, and World War II eras. I have also done extensive original research on claimed military commission precedents from the Revolution, War of 1812, and Seminole Wars which pre-date their formal creation by General Winfield Scott during the Mexican War.

4. As a practical matter the remote location of many military trials, both commissions and courts-martial, had the practical effect of limiting public attendance. But by rule they were open proceedings. This seems to have been so taken for granted that military justice commentators have found little reason to comment on it. Evidence of the openness of military commissions can be found in the publicly available descriptions of virtually every historically significant military commission trial, including those of Lambden Milligan, John Y. Beall, and the Lincoln assassination conspirators in the Civil War; the Dakota Sioux and Modoc Indian trials, and scores of war crimes trials in the aftermath of World War II. William Winthrop specifically noted the requirement for public court martial sessions in his seminal treatise on U.S. military justice. William Winthrop, Military Law and Precedents * 234-36 .He further opined that it is preferable for court-martial trial panels to retire for deliberations rather than clearing the courtroom to avoid

the significant "inconvenience and embarrassment caused to the accused, counsel, clerks and reporters, witnesses *and the public*." Winthrop, * 433 (emphasis added). Although specifically addressing courts-martial, he cites with approval the practice of the Milligan military commission as an example of a military trial following this practice. And it is important to note that until the 1942 military commission trial of eight Nazi saboteurs conducted at the Department of Justice in Washington D.C., there was no difference between military commission and court-martial procedure at all. Indeed, in Senate testimony explaining the rational for a new Article 15 proposed for inclusion in the Army's Articles of War (subsequently carried over as UCMJ Article 21) Judge Advocate General Enoch Crowder testified explicitly that the court-martial and military commission "have the same procedure." Senate Report 64-582 at 40 (1916). So the history of open conduct of courts-martial is clearly equally applicable to military commissions.

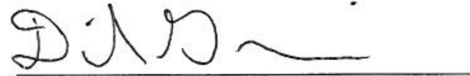
5. The one well-known historical anomaly, a closed military commission trial, took place in the *Quirin* case. That case concerned eight Nazi saboteurs who crossed the Atlantic in German U-boats before successfully penetrating porous U.S. coastal defenses on eastern Long Island and in Florida just south of Jacksonville. Despite the fact that Long Island group was observed on the beach by an unarmed Coast Guard patrol, the saboteurs were only rounded up by the FBI after one turned himself in and provided the identification and probable locations for the others. All eight were questioned by the FBI under the constitutional criminal procedure standards of the day and freely admitted their mission. They also revealed the existence of a German sabotage school which they attended that was training additional individuals to conduct follow-on raids on the United States. The

Quirin case is controversial for a number of reasons, including that the trial was conducted in secret. Some commentators have noted it may have been closed to avoid embarrassment to the U.S. government over its perceived incompetence in preventing the landings and the subsequent interagency bungling, and I think this may well have been a factor. What is clear, however, is that the secrecy of the proceeding contributed to what is widely acknowledged as the tarnished legacy of that case.

6. Based on my extensive study of the historical record, it is my conclusion that our nation has a strong tradition of opening military commissions to the public.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 30th day of April, 2012.



David Glazier