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	**Response of the American Civil Liberties Union** to Government's Supplemental Motion for Modified Order to Protect Against Disclosure of National Security Information **October 12, 2012**

1. Timeliness. This application is timely filed under the Military Commissions Trial Judiciary Rules of Court ("RC") and the 2011 Regulation for Trial by Military Commission ("Regulation").[1]

2. Overview and Relief Sought. In case there were any doubt, the government's modified proposed Protective Order for these proceedings makes clear that the government is asking the military judge to impose a censorship regime that would prevent the public from hearing any statements by defendants about their memories, "observations[,] and experiences" of their torture and detention in U.S. custody. *See* AE 013L ("Supplemental Motion for Modified Order to Protect Against Disclosure of National Security Information") (Sept. 25, 2012) and "Protective Order #1," Attachment to AE 13L ("Mod. Prop. P.O. #1"), §§ I(7)(e) and I(7)(d)(i)–(v).

[1] RC 3.7(c)(1) provides that, generally, "a response is due within 14 calendar days after a motion is filed . . . ." Although the government's supplemental motion was filed on September 25, 2012, it was not made available to the public and the ACLU until October 4, 2012. The ACLU's Response is being timely filed within 14 days of the supplemental motion becoming public. *See also* AE 083 (ACLU motion seeking timely access to sealed filings related to the public's right of access to commission proceedings in order to receive notice and an opportunity to be heard).

The government's modified proposed Protective Order fails to meet the First Amendment's strict scrutiny standard and the public access requirements of the Military Commissions Act ("MCA"), Pub. L. No. 109-336, 120 Stat. 2600 (2006) (codified as amended 10 U.S.C. §§ 949–950 (2009)), for the same reasons that the original proposed Protective Order failed to meet that standard: The government has no compelling interest in keeping from the public defendants' testimony about their own knowledge of illegal government conduct when the interrogation, rendition, and detention program is illegal, has been banned by the U.S. President, and cannot be used in the future; copious details about the program and how it was applied to defendants are widely known; and the government purposefully and coercively disclosed its purportedly secret program to defendants by subjecting them to it. The government's proposed categorical restriction on the public's right to hear this testimony by imposing a 40-second broadcast delay of the proceedings also fails as an alternative to closure under First Amendment scrutiny, because it is not narrowly tailored. *See also* AE 013A ("Motion of the American Civil Liberties Union for Public Access to Proceedings and Records" ("ACLU Mot.")) (May 3, 2012); AE 013H ("Reply of the American Civil Liberties Union to the Government's Response to the Motion for Public Access to Proceedings and Records" ("ACLU Reply")) (May 24, 2012).

For these reasons and those set forth in the ACLU's previous filings, the ACLU respectfully requests that the military judge (1) deny the government's motion to enter Protective Order #1 as proposed; (2) revise the modified Protective Order to strike subsection I(7)(e) and provide that Section I(7) does not apply to defendants' personal knowledge, observations, and experiences of their interrogation, detention and treatment

in U.S. custody; (3) strike section VII(C) of the modified protective order, requiring delayed broadcast of the commission proceedings, as unjustified; and (4) in the event that the commission grants the government's request for a 40-second delay, 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. Statement of Facts

(a) AE 013. On April 26, 2012, the government filed a "Motion to Protect Against Disclosure of National Security Information" and an accompanying proposed protective order. *See* AE 013 (Apr. 26, 2012); "[Proposed] Protective Order #1" ("Orig. Prop. P.O. #1"), Attachment to AE 013 (Apr. 26, 2012). The ACLU opposed the government's motion, seeking to secure public access to these proceedings as required by the Constitution and the MCA. *See* AE 013A (ACLU Mot.) (May 3, 2012); AE 013H (ACLU Reply) (May 24, 2012). Counsel for Mr. al-Baluchi also filed a response to the government's motion, a filing that remains under seal, *see* AE 013G (May 18, 2012), as did a group of fourteen media organizations, *see* AE 013F (May 16, 2012). On August 24, 2012, this commission issued an Amended Docketing Order setting the government's motion for argument during the next Commission session, beginning October 15, 2012. *See* AE 05F (Aug. 24, 2012). On September 25, 2012, the government filed a supplemental motion modifying its original application for a protective order—the subject of this Response. *See* AE 013L (Sept. 25, 2012).

(b) AE 083. On October 3, 2012, the ACLU filed a motion seeking access to sealed commission filings relevant to its pending public-access challenge.[2] *See* AE 083 (Oct. 3, 2012).

4. Legal Basis for the Relief Requested.

The ACLU's previous filings in this case discuss in detail why the public has a First Amendment right to these military commission proceedings. *See generally* ACLU Mot.; ACLU Reply. The government does not address the public's First Amendment right of access in any of its filings, including 13L, but nor does it contest the ACLU's arguments (and evidence) that the public does indeed possess that right of access. ACLU Mot. at 6–10; Decl. of David Glazer, Attachment to ACLU Mot. Indeed, it would be extraordinary for the American government to take the position that the American public does not have a constitutional right of access to the most important terrorism prosecution of our time. *See* ACLU Mot. at 7–10 (demonstrating that the public's constitutional right of access applies in civilian and military proceedings). The government has not taken that position, and there should be no question that the public's constitutional right of access attaches to these commission proceedings.

Once the public's right of access attaches, as it does here, it may only be overcome if the government meets its high burden of showing, and if the military judge finds, both that there is a compelling interest justifying closure and that closure is narrowly tailored. *See, e.g.*, ACLU Reply at 9. The government's modified proposed protective order, like its original one, fails this constitutional test.

[2] On October 1, 2012, a group of fourteen news organizations filed a separate but similar motion seeking press and public access to sealed commission filings. *See* AE 081 (Oct. 1, 2012). Like the ACLU, these organizations will argue before the commission during the October 15–19, 2012 session.

According to the government, the modified proposed protective order allows "defense counsel [to] treat and handle as classified only information that they know or have a reason to know is classified." AE 013L at 7. In the government's view, the modification operates to ease burdens on defense counsel related to their communications with their clients in the course of representation. This modification does nothing, however, to address the core problem with the government's proposed censorship regime, which still improperly seeks to suppress, as both classified and protected, defendants' statements about their own knowledge of their abuse and detention in U.S. custody.

Indeed, other changes make pellucidly clear that the modified protective order untenably infringes on the public's First Amendment right of access to these proceedings. The modified protective order specifically adds to the definition of "classified information" the "observations and experiences of the Accused with respect to matters set forth in subparagraphs 7(d)(i)–(v) above." Mod. Prop. P.O. #1 § I(7)(e).[3] The specifically-referenced subparagraphs include such "matters" as the "enhanced interrogation techniques that were applied to the Accused . . . , including descriptions of the techniques as applied, the duration, frequency, sequencing, and limitations of those techniques," *id.* § I(7)(d)(iv), and "[d]escriptions of the conditions of confinement of the Accused . . . ," *id.* § I(7)(d)(v). Thus, the modified protective order seeks to do through subsection I(7)(e) what the original proposed order did through subsection I(7)(d)(vi): categorically suppress *ex ante,* and prevent the public from hearing, the memories,

[3] To the extent that the military judge reads the MCA as barring this commission from independently determining the propriety of the government's decision to classify and suppress the defendants' personal knowledge of their detention and treatment, the commission should either (1) read the MCA to authorize the withholding from the public of only *properly* classified information, which the defendants' personal knowledge is not; (2) read the MCA to apply only to evidence presented by the government, in line with the MCA's plain text; or (3) find the relevant provisions of the MCA unconstitutional as applied. *See* ACLU Mot. at 13–17.

thoughts, and experiences of the defendants about their illegal torture and detention at the hands of the U.S. government.

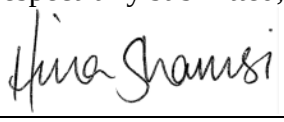
None of the justifications the government has offered for this censorship regime survive strict scrutiny. As the ACLU has previously shown, the government has no legitimate interest in censoring defendants' personal accounts of the CIA's rendition, detention, and interrogation program when that program was illegal and has been terminated by the President of the United States. *See* ACLU Mot. at 21–24; ACLU Reply at 7–8. Moreover, the government's own disclosures, as well as countless reports by the press, international organizations, and foreign governments, have already made widely public the very information the government seeks to suppress. S*ee* ACLU Mot. at 24–31; ACLU Reply at 10–11.

Nor can the government prevent the public from hearing defendants' statements based on their personal knowledge by claiming that the information is classified. As an initial matter, classification—whether proper or not—does not in itself determine the First Amendment question of whether the government has met the compelling interest requirement. *See* ACLU Mot. at 19–21; ACLU Reply at 4–9. Here, that requirement is not met for the reasons set forth above, and because Executive Order 13,526, which governs classification, simply does not extend to third parties who are not in a relationship of privity and trust with the government. *See* ACLU Mot. at 17–18; *see also* AE 013 at 13 ("[T]he Accused clearly fall into the category of persons 'not authorized to received' classified information."). Thus, even if information about the CIA's rendition, detention, and interrogation program were otherwise properly classified, the government itself purposefully disclosed that information to defendants—who the government admits

are not authorized to receive classified information—by forcibly subjecting them to the program; it cannot now prevent the public from hearing defendants' testimony. *See* ACLU Mot. at 19–21; ACLU Reply at 6.

This commission should not and cannot judicially bless the government's proposed censorship regime.

Respectfully submitted,



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