AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION,	)	IN THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW
	)	RESPONSE ON BEHALF OF RESPONDENT
Petitioners,	)	
v.	)	U.S.C.M.C.R. Case No. 13-003
UNITED STATES OF AMERICA,	)	
Respondent.	)	DATE: March 7, 2013

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW

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ISSUES PRESENTED

I. WHETHER THE PROTECTIVE ORDER VIOLATES THE PUBLIC'S FIRST AMENDMENT RIGHT TO ACCESS THE PROCEEDINGS BY ALLOWING THE COMMISSION TO CLOSE THE COURTROOM CONSISTENT WITH THE MILITARY COMMISSIONS ACT OF 2009 AND SUPREME COURT PRECEDENT.

II. WHETHER ALLOWING CLASSIFIED PLEADINGS TO BE FILED UNDER SEAL WITH THE COMMISSION AMOUNTS TO CLOSURE OF THE COURTROOM.

III. WHETHER THE STATUTORY RIGHT OF PUBLIC ACCESS TO THE TRIAL OF THE ACCUSED IS ABROGATED BY THE IMPLEMENTATION OF A 40-SECOND DELAY IN THE TRANSMISSION OF COMMISSION PROCEEDINGS.

IV. WHETHER INFORMATION THAT CAN BE ORALLY CONVEYED CAN BE PROPERLY CLASSIFIED BY THE EXECUTIVE BRANCH.

V. WHETHER CLASSIFIED INFORMATION REMAINS CLASSIFIED, EVEN WHEN IT MAY EXIST IN THE PUBLIC DOMAIN, UNTIL THE UNITED STATES GOVERNMENT OFFICIALLY DECLASSIFIES IT.

STATEMENT OF STATUTORY JURISDICTION

In light of *ABC, Inc. v. Powell*, 47 M.J. 363 (1997), Respondent does not dispute the Court's jurisdiction to hear this Petition for a writ of mandamus.

STATEMENT OF THE CASE

The military commission in *United States v. Khalid Shaikh Mohammad et al.* entered a protective order after extensive litigation between the parties. The Petitioners seek to have this Court review the Commission's order protecting against the disclosure of classified information, arguing that the order automatically closes the courtroom and seals pleadings containing classified information, in violation of the public's First Amendment right to access the proceedings. The Commission's order, however, does not violate the public's First Amendment right of access. The order, designed to protect against the unauthorized disclosure of classified information, merely contemplates the possibility that the Commission might close the courtroom after it makes appropriate findings consistent with the Military Commissions Act of 2009

("M.C.A.") and Supreme Court precedent—the same precedent that applies in every federal court. Indeed, there is no dispute between the parties as to what must happen before the Commission may close the courtroom: the Commission must consider the Supreme Court's *Press-Enterprise* factors. *See, e.g.*, ACLU Pet. 25. And there should be no dispute that, to date, the Commission has not closed the courtroom, nor have the parties asked the Commission to close the courtroom. If and when that occasion arises, the Commission must then balance the public's right of access against the interests of national security.

The Petitioners also argue that the Commission's Protective Order violates the public's First Amendment right to access the proceedings by: (i) accepting the Executive Branch's determination that the accuseds' personal observations are classified; (ii) sealing pleadings containing classified information, where that information may exist in the public domain even though it has not been officially declassified by the United States Government; and (iii) implementing a 40-second delay in the transmission of Commission proceedings. The Petitioners are incorrect. The Executive Branch may classify information that can be conveyed orally so long as that classification determination meets the requirements set forth in the applicable Executive Order. *ACLU v. DOD*, 628 F.3d 612, 618 (D.C. Cir. 2011). The government met those requirements here. Moreover, information determined to be classified by the Executive Branch remains classified until the United States Government officially declassifies it, even when the information exists in the public domain. *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007). Further, the implementation of a 40-second delay in the transmission of Commission proceedings does not abrogate the statutory right of public access to the trial of the accused.

The Commission did not violate the public's First Amendment right of access by issuing the protective order in this case. There is no dispute about what the Commission must do before closing the courtroom (although the Commission has had no occasion to close the courtroom yet), and the protective order does not abrogate the Commission's responsibility to maintain an open courtroom unless the M.C.A. and case law require otherwise.

STATEMENT OF FACTS

On May 31, 2011 and January 26, 2012, pursuant to the M.C.A., charges were sworn against Khalid Shaikh Mohammad, Walid Muhammad Salih Bin Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi in connection with the September 11, 2001 attacks. The charges were referred jointly to a capital military commission on April 4, 2012. The defendants were arraigned on May 5, 2012.

On September 11, 2001, a group of al Qaeda operatives hijacked four civilian airliners in the United States. As a result of the September 11, 2001 attacks, a total of 2,976 people were murdered. Numerous other civilians and military personnel were also injured. In response to these attacks, the United States instituted a program run by the Central Intelligence Agency ("CIA") to detain and interrogate a number of known or suspected high-value terrorists, or "high-value detainees" ("HVDs"). This CIA program involves information that is classified TOP SECRET/SENSITIVE COMPARTMENTED INFORMATION ("TS/SCI"), the disclosure of which would cause exceptionally grave damage to national security. The five accused are HVDs and were thus detained and interrogated in the CIA program. As such, the accused were exposed to classified sources, methods, and activities. Due to their exposure to classified information, the accused are in a position to disclose classified information publicly through their statements.

On September 6, 2006, President George W. Bush officially acknowledged the existence of the CIA program and announced that a group of HVDs had been transferred by the CIA to Department of Defense ("DoD") custody at Joint Task Force-Guantanamo ("JTF-GTMO"). *See generally* President George W. Bush, Remarks on the War on Terror, 2 Pub. Papers 1612 (Sept. 6, 2006). The accused were among the group of HVDs transferred to DoD custody, and they have since remained in detention at JTF-GTMO.

Since September 6, 2006, a limited amount of information relating to the CIA program has been declassified and officially acknowledged, often directly by the President. This information includes a general description of the program; descriptions of the various "enhanced

interrogation techniques" that were approved for use in the program; the fact that the so-called "waterboard" technique was used on three detainees; and the fact that information learned from HVDs in this program helped to identify and locate al Qaeda members and disrupt planned terrorist attacks. *See id.*; CIA Inspector General, Special Review: Counterterrorism Detention and Interrogation Activities (September 2001-October 2003) (May 7, 2004), *available at* http://media.washingtonpost.com/wp-srv/nation/documents/cia_report.pdf.

Other information related to the CIA program has not been declassified or officially acknowledged and, therefore, remains classified. This classified information includes allegations involving: (i) the location of detention facilities; (ii) the identity of cooperating foreign governments; (iii) the identity of personnel involved in the capture, detention, transfer, or interrogation of detainees; (iv) interrogation techniques as applied to specific detainees; and (v) conditions of confinement. Because competent and accountable authorities have determined that the disclosure of this classified information would cause exceptionally grave damage to national security, it is classified at the TS/SCI level.

On April 26, 2012, the government filed a Motion To Protect Against Disclosure of National Security Information, and requested the military judge to issue a protective order pursuant to Military Commission Rule of Evidence ("M.C.R.E.") 505(e). *See* AE 013 (App. 1-46). M.C.R.E. 505(e) provides: "Upon motion of the trial counsel, the military judge shall issue an order to protect against the disclosure of any classified information that has been disclosed by the United States to any accused or counsel, regardless of the means by which the accused or counsel obtained the classified information, in any military commission under [the M.C.A.], or that has otherwise been provided to, or obtained by, any such accused in any such military commission." M.C.R.E. 505(e); 10 U.S.C. § 949p-3 (same).[1] The motion and its accompanying declarations set forth the classified information at issue in this case, the grave harm to national

[1] *See also* Section 3 of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 6 ("Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.").

security that unauthorized disclosure of such information would cause, and the narrowly-tailored remedies that seek to protect this national security information. *See* AE 013 (App. 1-46).

On May 2, 2012, the American Civil Liberties Union and the American Civil Liberties Union Foundation (collectively, the "ACLU" or the "ACLU Petitioners") filed a Motion for Public Access to Proceedings and Records, challenging the government's proposed protective order. AE 013A (App. 47-82). Specifically, the ACLU challenged the classification of the statements of the accused and the 40-second delay in the audio feed of Commission proceedings to the public galleries.[2] AE 013A (App. 47-48). On May 16, 2012, the government filed its response to the ACLU motion. AE 013D (App. 83-97). Also on May 16, 2012, fourteen news organizations (collectively, the "Press" or "Press Petitioners") filed an opposition to the Government's Motion To Protect Against Disclosure of National Security Information and Cross-Motion To Enforce Public Access Rights. AE 013F (App. 98-125). On May 24, 2012, the ACLU filed a Reply to the Government's Response to the Motion for Public Access to Proceedings and Records. AE 013H (App. 126-137). On September 25, 2012, the government filed a Supplemental Motion for Modified Protective Order To Protect Against Disclosure of National Security Information. AE 013L (App. 138-163). On October 12, 2012, the ACLU filed a Response to the Government's Supplemental Motion for Modified Protective Order To Protect Against Disclosure of National Security Information. AE 013N (App. 164-170).

On October 17, 2012, the military judge entertained oral argument on the government's Motion To Protect Against Disclosure of National Security Information (AE 013) at Guantanamo Bay, Cuba. Government counsel, counsel for the accused, the Press, and the ACLU all participated in the proceeding. Unofficial/Unauthenticated Transcript 670-814, *United States v. Khalid Shaikh Mohammad et al.* ("Tr.") (App. 171-315). On December 6, 2012, the military judge issued a Ruling on Government Motion To Protect Against Disclosure of National

[2] In addition to the public gallery in the courtroom, and pursuant to Commission order, the audio (and video) feed of the Commission's proceedings is also transmitted to closed-circuit television sites in the continental United States, as extensions of the courtroom's public gallery.

Security Information (AE 013O) (App. 316-320) and entered Protective Order #1 (AE 013P) (the "December 6, 2012 Protective Order") (App. 321-340). In his December 6, 2012 ruling, the military judge made certain findings as required by law, *see* AE 013O at 3-5 (App. 318-320), including that the information classified by the government was, as a matter of law, "properly classified by the executive branch pursuant to Executive Order 13526, as amended, or its predecessor Orders, and [was] subject to protection in connection with this military commission."

In the December 6, 2012 Protective Order, the military judge also made certain findings; namely, that "this case involves classified national security information . . . the disclosure of which would be detrimental to national security." December 6, 2012 Protective Order at 1 (App. 321). The Protective Order established procedures applicable to all persons who have access to, or come into possession of, classified information regardless of the means by which those persons obtained that classified information. *Id.* ¶ 1.a. (App. 321-322). Specifically, the Protective Order requires that members of the defense obtain a security clearance prior to accessing classified information; that the defense is precluded from disclosing classified information without prior authorization; that they provide notice of intent to disclose classified information during any pretrial or trial proceeding in accordance with M.C.R.E. 505(g); and that the Commission could order the closure of proceedings to the public when necessary to protect against the disclosure of classified information. Those procedures "apply to all aspects of pre-trial, trial, and post-trial stages in this case, including any appeals." *Id.* ¶ 1.a. (App. 321-322).

On February 9, 2013, after considering certain defense motions to amend the Protective Order, the military judge issued a Supplemental Ruling on the Government's Motion To Protect Against Disclosure of National Security Information (AE 013Z) (App. 341-344) and entered Amended Protective Order #1 (AE 013AA) (the "February 9, 2013 Amended Protective Order")

(App. 345-362).[3] The February 9, 2013 Amended Protective Order modified (1) paragraph 2.k. (defining "[u]nauthorized disclosure of classified information") and (2) paragraph 8.a.(1) (setting forth notice requirements in military commission proceedings) of the December 6, 2012 Protective Order. *See* February 9, 2013 Amended Protective Order (App. 350, 359).

On February 14, 2013, the Press filed its Petition for a writ of mandamus with the Court, which was docketed with Panel 2 that day as U.S.C.M.C.R. Case No. 13-002. On February 21, 2013, the ACLU filed its Petition for a writ of mandamus with the Court, which was docketed with Panel 2 on February 22, 2013 as U.S.C.M.C.R. Case No. 13-003. On February 22, 2013, the Court issued (i) a revised briefing schedule for the Press Petition and (ii) a briefing schedule for the ACLU Petition, directing Respondent to file its responses to these petitions by 5:00 p.m. EST, on Wednesday, March 6, 2013.[4]

On February 25, 2013, Ali Abdul Aziz Ali—an accused in the active military commission case of *United States v. Mohammad et al.*—filed a motion for leave to intervene in the Press Petition. On February 25, 2013, Abd Al Rahim Al Nashiri—the accused in the active military commission case of *United States v. Al Nashiri*—filed a motion for leave to intervene in the ACLU Petition. On February 26, 2013, Ali Abdul Aziz Ali filed a motion for leave to intervene in the ACLU Petition. The government responded to these three motions to intervene on March 4, 2013.

[3] Both the Supplemental Ruling and Amended Protective Order #1 were released to the military commissions website, www.mc.mil, on February 19, 2013, five days after the Press filed its Petition with the Court.

[4] Closure of the Office of the Clerk of Court (along with all Washington, D.C. area federal offices) due to inclement weather on Wednesday, March 6, 2013, caused the filing deadline to shift to 5:00 p.m. EST, Thursday, March 7, 2013, by operation of U.S.C.M.C.R. Rule of Practice 7.

ARGUMENT

I. THE COMMISSION MAY CLOSE THE COURTROOM CONSISTENT WITH THE MILITARY COMMISSIONS ACT OF 2009 AND SUPREME COURT PRECEDENT

The Protective Order does not close the courtroom *per se*. Instead, the Protective Order's overarching purpose is simply to preclude the parties from disclosing classified information without authorization and it merely contemplates the possibility that the Commission may, at some future time, close the courtroom after making appropriate findings. *See, e.g.*, Tr. 678 (App. 179) ("MJ [COL POHL]: But that's not the end of the inquiry. By that, I mean simply because it's classified, the way I read the rule, there's another inquiry that goes on."). The Protective Order *allows* the Commission to close the courtroom after it makes appropriate findings consistent with the M.C.A. and Supreme Court precedent. *See* 10 U.S.C. § 949d(c)(1); Rule for Military Commissions ("R.M.C.") 806(b)(2)(A); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"). There is no dispute between the parties on what must happen before the Commission may close the courtroom.

Indeed, the parties agree that the Commission must consider the Supreme Court's *Press-Enterprise* factors before closing the courtroom. *Compare* ACLU Pet. 25 (discussing *Press-Enterprise* factors), *with* Tr. 694 (App. 195) ("DTC [MS. BALTES]: But it's the government's interpretation of Rule 806, again, that in the event there is a proposed closure of the courtroom, that you would have to make findings and the government would certainly propose that the appropriate findings that should be made would be those as articulated by the Supreme Court in *Press Enterprise* factors.").[5] The parties also agree that the Commission may close the courtroom without violating the public's First Amendment right to access the proceedings.

[5] *See* R.M.C. 806(b)(2)(B), which provides that the "military judge may close to the public all or a portion of the proceedings" only upon making "a specific finding that such closure is necessary" to "protect information the disclosure of which could reasonably be expected to damage national security, including intelligence or law enforcement sources, methods, or activities."

Although the parties agree on how and when the Commission may close its courtroom, the Commission has not had the occasion to close the courtroom, nor have the parties asked the Commission to close the courtroom.

To date, the Commission has only entered a Protective Order that governs the storage, use, and handling of classified information. *See* 10 U.S.C. § 949p-3 ("Upon motion of the trial counsel, the military judge shall issue an order to protect against the disclosure of any classified information that has been disclosed by the United States to any accused in any military commission under this chapter or that has otherwise been provided to, or obtained by, any such accused in any such military commission."); M.C.R.E. 505(e) (same). Federal district courts routinely enter protective orders in terrorism prosecutions to govern the obligations of the parties with respect to classified information. *See* CIPA, § 3, 18 U.S.C. App. 6 ("Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States."); Protective Order, *United States v. Warsame*, No. 11 CR 559 (S.D.N.Y. Sept. 9, 2011) (Dkt. 26); Modified Protective Order Pertaining to Classified Information, *United States v. Ghailani*, No. 98 CR 1023 (S.D.N.Y. July 21, 2009) (Dkt. 765) ("Ghailani Protective Order") (App. 363-383); Protective Order, *United States v. Amawi*, No. 06 CR 719 (N.D. Ohio July 17, 2006) (Dkt. 116); Protective Order, *United States v. Moussaoui*, No. 01 CR 455 (E.D. Va. Jan. 22, 2002) (Dkt. 54); Protective Order, *United States v. Bin Laden*, No. 98 CR 1023 (S.D.N.Y. July 29, 1999) (Dkt. 78). There is nothing remarkable about the Commission's decision to enter a protective order in this case, nor is there is anything remarkable about the actual Protective Order entered in this case. Entering a protective order that allows the Commission to consider, *in camera*, issues relating to the disclosure of classified information is not a prohibited denial of public access. As the federal courts have explained, "[c]learly the press and the public are not entitled to attendance during the CIPA aspects of the hearing." *United States v. Ressam*, 221 F. Supp. 2d 1252, 1260 (W.D. Wash. 2002) (quoting *United States v. Poindexter*, 732 F. Supp. 165, 168 (D.D.C. 1990)). To be clear, the Commission

has not closed the courtroom in this case. The government's position is that the Commission must consider the Supreme Court's *Press-Enterprise* factors before closing the courtroom—as the Petitioners suggest. Thus, there is no dispute on that issue for this Court's consideration.

II. ALLOWING CLASSIFIED PLEADINGS TO BE FILED UNDER SEAL WITH THE COMMISSION DOES NOT AMOUNT TO CLOSURE OF THE COURTROOM

Consistent with federal court practice pursuant to CIPA, the parties are required to file pleadings under seal with the Commission, if they contain classified information. *See* December 6, 2012 Protective Order ¶ 7.b. (App. 333); February 9, 2013 Amended Protective Order ¶ 7.b. (same) (App. 357); *accord* Ghailani Protective Order ¶¶ 13-15 (App. 373-375). Contrary to the Petitioners' claim, however, such practice is not tantamount to a closure of the proceedings. First, there is no First Amendment right to receive properly classified information. *See Stillman v. C.I.A.*, 319 F.3d 546, 548 (D.C. Cir. 2003) ("If the Government classified the information properly, then [appellant] simply has no first amendment right to publish it."); *see also Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam) ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."); *ACLU v. DOD*, 584 F. Supp. 2d 19, 25 (D.D.C. 2008) ("[T]here is obviously no First Amendment right to receive classified information."); 10 U.S.C. § 949p-1(a) ("Under no circumstances may a military judge order the release of classified information to any person not authorized to receive such information."); *Ressam*, 221 F. Supp. 2d at 1260 (denying access to the press for CIPA filings and hearing because (i) this would defeat the entire purpose of conducting a CIPA hearing and (ii) it fails the "experience and logic" test enunciated in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982)). Second, court documents are covered by a common-law right of access,[6] not the standard established by *Press-Enterprise I*, 464 U.S.

[6] The Supreme Court has yet to extend the First Amendment right to access criminal proceedings to court documents, although the Supreme Court has considered public access to court filings based upon a common-law statutory right. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 608-09 (1978). The D.C. Circuit has applied a First Amendment analysis to the public's right to access criminal court documents, but only after determining a tradition of public

501. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 599 (1978). Under the common-law doctrine, court documents are presumptively available to the public, but may be sealed if the right of access is outweighed by the interests favoring nondisclosure. *Id.* at 602. Challenges to closure decisions based on the common-law right of access are reviewed for abuse of discretion. *Id.* at 599. Third, a writ of mandamus is an inappropriate remedy here because, although the Petitioners moved to unseal certain documents, the Commission has not yet ruled on their motions. *See, e.g.*, AE 013N at 4 (referencing AE 083) (App. 167). Given that the Commission has not issued a final ruling on the Petitioner's motion to unseal, the issue is not ripe for this Court.

III. THE STATUTORY RIGHT OF PUBLIC ACCESS TO THE TRIAL OF THE ACCUSED IS NOT ABROGATED BY THE IMPLEMENTATION OF A 40-SECOND DELAY IN THE TRANSMISSION OF COMMISSION PROCEEDINGS

The Supreme Court of the United States has said, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). The best traditions of American jurisprudence call for providing an opportunity for the public to witness the trial of the accused—to observe first-hand that each accused in a reformed military commission receives all the judicial guarantees which are recognized as indispensable by civilized peoples. The government has a strong interest in ensuring public access to these historic proceedings and therefore requested the Commission to authorize closed-circuit television ("CCTV") transmission of all Commission proceedings to remote viewing sites located in the continental United States.

The M.C.A. and the R.M.C. provide that trials by military commission shall generally be open to the public. 10 U.S.C. §§ 949d(c)(2), 949p-3; R.M.C. 806(b)(2)(B). This right, like analogous constitutional and common law rights of public access to proceedings in federal court

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access to ordinary court documents existed. *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1332-38 (D.C. Cir. 1985).

and courts-martial, is a qualified right. Due to the classified information involved in this case, and the harm to national security that its disclosure reasonably could be expected to cause—as specifically found by the military judge in this case—the M.C.A. allows for certain protective measures to be adopted by the Commission that apply at all stages of the proceedings. 10 U.S.C. § 949p-1.

The Protective Order thus provides for a 40-second delay in the transmission of the proceedings to the public viewing gallery (including transmission to the CCTV sites), so that if classified information is disclosed, inadvertently or otherwise, in open court, the Commission would have the opportunity to prevent it from being publicly disclosed. *See* December 6, 2012 Protective Order ¶ 8.a.(3) (authorizing employment of "a forty-second delay in the broadcast of proceedings from the courtroom to the public gallery") (App. 335-336); February 9, 2013 Amended Protective Order ¶ 8.a.(3) (same) (App. 359-360). Although Petitioners allege that a 40-second delay amounts to a closure of the courtroom, they cite no case that stands for the proposition that a 40-second delay could reasonably be considered a denial of public access because the transmission is not immediate or contemporaneous. Instead, this narrowly-tailored measure is necessary to protect the unauthorized disclosure of classified information during proceedings. If classified information is disclosed during a proceeding, and the transmission is suspended to prevent its public disclosure, then that portion of the proceeding will not be transmitted, but will remain part of the classified record. If it is determined that classified information was not disclosed, then the proceedings and the transmission, with the time delay, will resume. Additionally, the transcripts released at the end of each session will recapture any unclassified information that was not originally transmitted to the public.

During the arraignment of the five accused on May 5, 2012, and during subsequent motions hearings during October 2012, January 2013, and February 2013, the Commission proceedings were viewed on a delayed 40-second transmission by individuals and media at seven different sites in the United States, clearly satisfying the public's right of access. *See, e.g.*, *Nixon*, 435 U.S. at 610 (stating that public's right of access is constitutionally satisfied when

some members of both the public and the media are able to "attend the trial and report what they have observed"). Although the transmission has been briefly suspended on three occasions for mere minutes, the transcripts that were publicly released recaptured the information once it was determined to be unclassified. The public access to these proceedings exceeds that which was deemed constitutionally sufficient in the terrorist prosecutions of Zacarias Moussaoui and Timothy McVeigh. *See, e.g., United States v. Moussaoui*, 205 F.R.D. 183, 185 (E.D. Va. 2002); *United States v. McVeigh*, No. 96-CR-68-M (W.D. Okla.). Moreover, the public access to these proceedings fully satisfies the statutory requirements for openness and accessibility. The CCTV transmission has enabled and will continue to enable the media, the public, and victim family members to access the trial of the accused.

IV. THE EXECUTIVE BRANCH MAY CLASSIFY INFORMATION THAT CAN BE ORALLY CONVEYED

The Executive Branch properly classified information regarding the CIA's Rendition, Detention and Interrogation ("RDI") program. Statements of the accused are classified if they relate to sources and methods, including: (i) the location of detention facilities; (ii) the identity of cooperating foreign governments; (iii) the identity of personnel involved in the capture, detention, transfer, or interrogation of detainees; (iv) interrogation techniques as applied to specific detainees; and (v) conditions of confinement. The Commission's Protective Order memorializes the Executive Branch's classification determination, stating that the "observations and experiences of an accused" are classified. *See* December 6, 2012 Protective Order ¶ 2.g.(5) (App. 325); February 9, 2013 Amended Protective Order ¶ 2.g.(5) (same) (App. 349). The Petitioners argue that the Executive Branch "has no legal authority to classify [the accuseds'] personal experiences, thoughts and memories." ACLU Pet. 21. The Petitioners further argue that "the Government does not own, possess, or control the [accuseds'] thoughts and memories in any event." *Id.* The Petitioners have mistakenly framed the issue.

The D.C. Circuit rejected a similar argument in *ACLU v. DOD*, 628 F.3d 612 (D.C. Cir. 2011), where the court held the government may classify information sourced from an accused's

personal observations and experiences. There, the ACLU argued "the government lacks the authority to classify information derived from the detainees' personal observations and experiences." *Id.* at 623. The D.C. Circuit disagreed, explaining the "ACLU's argument is irrelevant to the reality that the information that the CIA wishes to withhold is within the government's control." *Id.* The D.C. Circuit concluded "[t]here is simply no legal support for the ACLU's argument that the government lacks the authority to classify the information withheld from the [Combatant Status Review Tribunal] documents." *Id.*

The D.C. Circuit's decision in *ACLU v. DOD* is consistent with the well-established rule that classification determinations are a matter committed solely to the Executive Branch. *See, e.g.*, *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988) ("The authority to protect [classified] information falls on the President as head of the Executive Branch and as Commander in Chief."). The Supreme Court has recognized this broad deference to the Executive Branch in matters of national security, holding that "it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." *CIA v. Sims*, 471 U.S. 159, 180 (1985).

Neither the U.S.C.M.C.R. nor the Commission may conduct a *de novo* review of the Executive Branch's decision to classify information, nor should either court review the classification level assigned to information by the Executive Branch. *See, e.g.*, M.C.R.E. 505(f), Discussion (stating the military judge should simply determine "that the material in question has been classified by the proper authorities in accordance with the appropriate regulations"). While acknowledging the fundamental role that courts serve in ensuring that the rights of an accused are protected and that procedures are fair, courts consistently have recognized the principle that neither an accused nor the courts can challenge the classification of information. *See, e.g.*, *United States v. Smith*, 750 F.2d 1215, 1217 (4th Cir. 1984) ("It is apparent, therefore, that the Government [] may determine what information is classified. A defendant cannot challenge this

classification. A court cannot question it."), *vacated on other grounds,* 780 F.2d 1102 (4th Cir. 1985) (en banc); *see also United States v. Aref*, No. 04-CR-402, 2007 WL 603510, at *1 (N.D.N.Y. Feb. 22, 2007) (The Court's function in a CIPA case is not to hold "mini-trials in which the Judiciary—not the Executive Branch—becomes the arbiter of this Country's national security."), *aff'd*, 533 F.3d 72 (2d Cir. 2008); *United States v. Moussaoui*, 65 F. App'x 881, 887 n.5 (4th Cir. 2003). The defense may not challenge the government's decision to classify information so long as that decision complies with the applicable Executive Order. *See* Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009) (App. 384-409).

Because the accused have been exposed to highly classified sources and methods, the public disclosure of which reasonably could be expected to cause exceptionally grave damage to national security, the Executive Branch properly determined that statements of the accused related to the five categories enumerated above are classified. Executive Order No. 13,526 authorizes the classification of "information" that can be conveyed orally. *See* Exec. Order No. 13,526, § 6.1(t), 75 Fed. Reg. 707, 728 (Dec. 29, 2009) (App. 406) (defining "[i]nformation [as] any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, that is owned by, is produced by or for, or is under the control of the United States Government"). Such oral information may include the personal observations of the accused because those observations relate to certain post-capture, treatment-related subjects determined to be classified by the Executive Branch.

Finally, the Petitioners fail to acknowledge that the language in the Commission's Protective Order as it relates to the personal observations of the accused is materially identical to federal court precedent on this issue and is, therefore, authoritative. The United States District Court for the Southern District of New York entered a modified protective order in *United States v. Ghailani* with the same protections for classified sources and methods for a detainee who was previously held in CIA custody. *Compare* December 6, 2012 Protective Order ¶ 2.g.(5) ("[T]he term 'information' shall include, without limitation, observations and experiences of an accused . . . .") (App. 325), *and* February 9, 2013 Amended Protective Order ¶ 2.g.(5) (same) (App. 349),

with Ghailani Protective Order ¶ 3.c. ("[T]he term 'information' shall include without limitation observations and experiences of the Defendant . . . .") (App. 367-368). The *Ghailani* protective order is based on CIPA, which Congress determined should be authoritative in the interpretation of M.C.R.E. 505 (the military-commission rule relating to classified information). *See* 10 U.S.C. § 949p-1(d); M.C.R.E. 505(a)(4). The fact that classified information is involved in this case does not equate to a closure of the courtroom. The parties are required to provide notice of their intent to disclose classified information during a proceeding. *See* M.C.R.E. 505(g), 505(h). If the Commission determines that the noticed classified information is relevant to the proceedings, and will therefore be disclosed, the government may request a closure. As discussed above, however, the Commission can only close the proceedings after it makes appropriate findings, consistent with the M.C.A. and Supreme Court precedent. 10 U.S.C. § 949d(c)(1); R.M.C. 806(b)(2)(A); *Press-Enterprise I*, 464 U.S. 501; *Press-Enterprise II*, 478 U.S. 1.

V. CLASSIFIED INFORMATION REMAINS CLASSIFIED, EVEN WHEN IT MAY EXIST IN THE PUBLIC DOMAIN, UNTILTHE UNITED STATES GOVERNMENT OFFICIALLY DECLASSIFIES IT

Although some details of the CIA program have been declassified, many details that relate to the capture, detention, and interrogation of the accused, for reasons of national security, remain classified. The Protective Order simply acknowledges that classified information in this case includes certain statements of the accused. The obligations of the parties to properly handle all categories of classified information as set forth in the Protective Order are based upon the requirements for maintaining a security clearance or are statutorily mandated for criminal proceedings in which classified information is at issue. To be sure, the parties are under no obligation to treat as classified information regarding the CIA program that has been officially declassified, nor would there be a basis to exclude the public from a proceeding where unclassified CIA information is disclosed. The Petitioners, however, appear to argue that declassification of some information undermines any justification for continuing to classify any information about the capture, detention, and interrogation of the accused. The Petitioners,

however, are not in a position to assess the risk to national security inherent in declassifying the remaining categories of information. Indeed, the Supreme Court repeatedly has stressed that even courts should be "especially reluctant to intrude upon the authority of the Executive in . . . national security affairs." *Egan*, 484 U.S. at 530; *see also Sims*, 471 U.S. at 168-69 (the Director of Central Intelligence has broad authority to protect all sources of intelligence information from disclosure); *Haig v. Agee*, 453 U.S. 280, 307 (1981) (protecting the secrecy of the U.S. government's foreign intelligence operations is a compelling interest).

The Petitioners' argument is further undermined by the proposition that, even when classified information has been leaked to the public domain, it remains classified and cannot be further disclosed unless it has been declassified or "officially acknowledged," which entails that it "must already have been made public through an official and documented disclosure." *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) (internal quotations and citations omitted) (recognizing that "the fact that information exists in some form in the public domain does not necessarily mean that official disclosure will not cause [cognizable] harm" to government interests); *see also Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990) ("[I]n the arena of intelligence and foreign relations, there can be a critical difference between official and unofficial disclosures."); *Moussaoui*, 65 F. App'x at 887 n.5 ("[I]t is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so.") (quoting *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975); *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983) ("[E]ven if a fact . . . is the subject of widespread media attention and public speculation, its official acknowledgement by an authoritative source might well be new information that could cause damage to the national security.").

The Petitioners baselessly assert that disclosure of classified information by the accused "would not result in harm because that information has already been substantially declassified and much of it is already within the public domain." ACLU Pet. 28. Petitioners fail to acknowledge that classification decisions are not subject to review by the media or by the

Commission. However, in evaluating whether a compelling interest is served by closing a proceeding, the Commission will be free to consider whether a closure request would effectively address the government's national security concerns if the same information sought to be disclosed exists in the public domain.

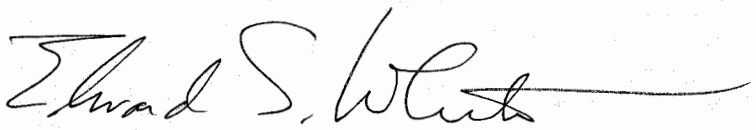
The law is clear: classified information remains classified unless and until the United States Government officially declassifies the information. *See* Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009) (App. 384-409). The fact that information is classified and not subject to disclosure is not akin to closing the courtroom. The Executive Branch makes classification determinations; the Commission determines whether its courtroom must be closed. The Petitioners offer no reason to depart from such an important and well-settled principle.

CONCLUSION

The Petition for a writ of mandamus should be denied.

Respectfully submitted,

MARK S. MARTINS
Brigadier General, U.S. Army
Chief Prosecutor



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by electronic mail to Hina Shamsi and Brett Max Kaufman on March 7, 2013.

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UNITED STATES
COURT OF MILITARY COMMISSION REVIEW

Before Gallagher, Gregory, Krauss, Ward, Silliman, J.J.

AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION,	)	RULING ON PETITION FOR A WRIT OF MANDAMUS
	)	U.S.C.M.C.R. Case No. 13-003
Petitioners,	)	
	)	DATE: _____, 2013
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

HAVING CONSIDERED the Petition for a Writ of Mandamus in the above-captioned matter, the brief in support thereof, and Respondent's response thereto;

This Court hereby

DENIES the Petition for a Writ of Mandamus.

FOR THE COURT:

Copy to:

Convening Authority, OMC
Judges Listed
Appellate Counsel (copy to Accused)