IN THE
UNITED STATES COURT OF MILITARY COMMISSIONS REVIEW

IN RE AMERICAN CIVIL LIBERTIES UNION & AMERICAN CIVIL LIBERTIES UNION FOUNDATION, *Petitioners*, v. UNITED STATES, *Respondent*.	**PETITION FOR A WRIT OF MANDAMUS** CMCR DOCKET NO. _____ FEBRUARY 21, 2013

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

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PRELIMINARY STATEMENT

Petitioners the American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the "ACLU") seek a writ of mandamus to enforce the public's constitutional right of access to the military commission prosecution of individuals accused of committing the September 11, 2001 attacks. In the proceedings below, the government sought, and—over the objections of the ACLU—the military judge entered, a protective order with provisions that censor as "classified" the defendants' every courtroom utterance concerning their personal experiences, thoughts, and memories of their torture, detention and other abuse in the custody of the Central Intelligence Agency ("CIA"). The protective order would not prevent the defendants from testifying about their personal experience and memories of illegal government conduct; it unconstitutionally prevents the public from hearing that testimony.

All the parties in the proceedings below agreed that the public's constitutional access right applies to the military commissions, and that the First Amendment's strict-scrutiny standard must be met before the proceedings can be closed. Yet in issuing the protective order, the military judge failed even to mention the constitutional standard, let alone to apply it.

The protective order's categorical censorship provisions fail strict scrutiny. There is simply no basis in law for the Orwellian proposition that the government owns or controls—and thus can classify and seek to censor—defendants' personal experiences and memories of a torture and unlawful detention program whose entire purpose was to forcibly "disclose" the torture and detention to the defendants. Additionally, the government chose to disclose its secrets to defendants, who the government concedes were not authorized to receive them; it has no legitimate interest now, let alone a compelling one, in censoring those secrets from the public.

Moreover, the President of the United States has banned the illegal CIA interrogation techniques to which the defendants were subjected and closed the secret facilities overseas at which they were held. The government's suppression of defendants' statements about a program that has been banned and is also prohibited by law—and that, accordingly, cannot be legitimately employed in the future—fails strict scrutiny as well. Finally, no harm would result if the public hears defendants' testimony when copious details about the CIA's use of torture and coercive techniques, including on the defendants, have also been disclosed publicly in official government documents and other widely disseminated reports and press accounts. Categorical censorship of information that the world already knows is also the very antithesis of the narrow tailoring required by the First Amendment.

The public's interest in the openness and legitimacy of these proceedings—the most important terrorism prosecution of our time—could hardly be greater. The protective-order provisions censoring from the public defendants' testimony about government torture and other abuse could hardly be more extraordinary or draconian. The public has a constitutional right to hear defendants' testimony, and Petitioners respectfully request that this Court vacate the protective-order provisions permitting this unconstitutional censorship.

ISSUE PRESENTED

Whether a military commission protective order violates the public's First Amendment right of access to criminal proceedings when it categorically censors and prevents the public from hearing defendants' testimony about their personal thoughts, memories, observations, and experiences of torture and other abuse in U.S. government custody.

STATEMENT OF FACTS

A. The Military Commission Prosecution

On April 4, 2012, the United States Department of Defense referred military commission charges against five individuals accused of planning, orchestrating, and committing the September 11, 2001 attacks. *See* Charge Sheet (Apr. 4, 2012).[1] The government charged the five men—Khalid Shaikh Mohammed, Walid Muhammed Salih Mubarek Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi (together, "defendants")—with conspiracy, attacking civilians, murder in violation of the law of war, hijacking an aircraft, and terrorism, and it sought the death penalty. *Id.* at 3. By the government's own admission, the defendants—who have been in U.S. custody since 2002 and 2003—were subjected to so-called "enhanced interrogation techniques," rendition, and detention at black sites abroad by the Central Intelligence Agency ("CIA"). *See, e.g.*, AE013 ¶ 5(e)–(k) (Apr. 26, 2012) (describing interrogation, rendition, and detention program to which CIA subjected defendants). Since the initial revelation of the government's harsh and illegal treatment of the defendants in

[1] All military commission filings and transcripts referenced in this Petition are available at http://www.mc.mil/CASES/MilitaryCommissions.aspx.

U.S. custody, that treatment has been and continues to be the focus of significant public concern and controversy.

B. The Government's Request for a Protective Order

On April 26, 2012, the government moved for an order "to protect classified information in connection with" the military commission prosecution "throughout all stages of the proceedings." *Id.* ¶¶ 2–3. The prosecution's filing expressed particular concern that, in the course of their defenses, the accused would seek to testify about their personal experiences in the CIA's "Rendition, Detention, and Interrogation" program. The government's proposed protective order included in its definition of classified information that the government sought to suppress all "statements made by the Accused, which, due to these individuals' exposure to classified sources, methods, or activities of the United States, are presumed to contain information classified as TOP SECRET / SCI." *Id.* Attach. E § II(7)(d)(vi). The proposed protective order included a provision authorizing "a forty-second delay in the broadcast of the proceedings from the courtroom to the public gallery." *Id.* Attach. E § VII(C)(42). In its memorandum in support of the motion, the government argued that

> [b]ecause the Accused were detained and interrogated in the CIA program, they were exposed to classified sources, methods, and activities. Due to their exposure to classified information, the Accused are in a position to reveal this information publicly through their statements. Consequently, any and all statements by the Accused are presumptively classified until a classification review can be completed. [REDACTED TEXT.]

Id. ¶ 5(g). It made a similar argument with respect to defendants' knowledge of Department of Defense sources, methods, and activities at Guantanamo. *Id.* ¶ 5(k). The government's protective-order motion was accompanied by the declarations of then–CIA Director David Petraeus, an unnamed CIA information review officer, General Douglas M. Fraser of the U.S.

Air Force, and FBI Assistant Director for Counterterrorism Mark F. Giuliano. *See id.* Attach. A–D. These declarations were filed ex parte, in camera, and under seal; they remain secret.

C. The ACLU's Opposition to the Proposed Protective Order

On May 2, 2012, the ACLU filed an opposition to the government's proposed protective order, asserting the public's right of access to the commission proceedings under both the First Amendment and the Military Commissions Act of 2009, Pub. L. No. 111–84, 123 Stat. 2190 (2009).[2] *See* AE013A (May 2, 2012). Two weeks later, a group of news organizations (the "Press Objectors") filed an opposition to the proposed protective order on similar grounds. *See* AE013F (May 16, 2012).

In its opposition, the ACLU argued that the public's right of access to the military commission proceedings is mandated by the First Amendment. It further argued that the First Amendment's strict-scrutiny standard requires that before any courtroom closure, the government must show, and the military judge must find, that there is specific evidence of a substantial likelihood of harm to an overriding government interest and that the requested closure is narrowly tailored. AE013A at 10–11; *accord* AE013H at 2 (May 24, 2012). Finally, the ACLU argued that provisions in the proposed protective order seeking to censor from the public defendants' testimony about their personal knowledge and experiences could not meet the First Amendment's strict-scrutiny test because:

[2] The ACLU has standing to seek enforcement of the public's constitutional right of access to the military commission pursuant to the Constitution and to regulations promulgated by the Department of Defense under authority of the MCA. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982); *Phx. Newspapers, Inc. v. U.S. Dist. Court for Dist. of Ariz.*, 156 F.3d 940, 949 (9th Cir. 1998); 2012 Rules for Military Commissions ("RMC") 806(a); 2011 Regulation for Trial by Military Commission ("Reg.") 19-3(c)–(d).

> (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.

AE013A at 18; *accord* AE013H at 9–12.

Two weeks after the ACLU filed its motion, the government filed an opposition that did not address the ACLU's constitutional argument; rather, the government argued that the public's *statutory* right to access the commission proceedings was a "qualified right" that, in the circumstances, did not permit the ACLU's requested relief. *See* AE013D at 1–3 (May 16, 2012). On May 24, 2012, the ACLU filed a reply. *See* AE013H.

Several months later, without a decision on the ACLU's motion by the military judge, the government filed a supplemental motion modifying its original application for a protective order. *See* AE013L (Sept. 25, 2012). The new proposed protective order specifically added to the definition of "classified information" the "observations and experiences of the Accused" concerning the CIA's rendition, detention, and interrogation program. *Id.* Attach. B § II(7)(e). The ACLU opposed the modified order on the grounds that, like the original proposed protective order, it categorically sought to censor from the public the defendants' testimony about their personal memories, thoughts, and experiences of torture and illegal rendition and detention by the U.S. government. *See* AE013N at 5–6 (Oct. 12, 2012).

The military judge heard oral argument on the series of protective-order motions and responses during its October 2012 session. *See* Transcripts of Oral Argument ("Tr.") (Oct. 16–17, 2012). At oral argument, the government specifically acknowledged that the American public's First Amendment rights applied to the military commission proceedings and that,

therefore, the military judge could only order a closure of those proceedings if it met the strict-scrutiny standard articulated in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606–07 (1982), and its progeny. *See* Tr. at 678–79, 694; *see also id.* at 678 (counsel for the prosecution) (The Rules for Military Commissions "incorporate[] the [Supreme Court's] four-part test . . . . The four factors are whether there's a substantial probability of prejudice to a compelling interest, whether there is no alternative to adequately protecting the information, whether the restriction that is sought would be effective[,] and whether it's narrowly tailored.").

D. The Military Judge's Entry of a Protective Order

On December 6, 2012, Military Judge James L. Pohl entered a protective order that adopted the government's proposed September 25, 2012 protective order nearly in full. *See* AE013O (Dec. 6, 2012); AE013P (Dec. 6, 2012).[3] But the judge's decision accompanying the order failed even to mention the First Amendment strict-scrutiny standard, let alone to apply it. *See* AE013O. The ruling also made no reference to the provisions of the government's proposed order at the core of the ACLU's challenge—those that deemed "classified" defendants' testimony about their personal "observations and experiences" and that, on that basis, sought the censorship of those statements. Without any reasoned explanation, legal analysis, or specific findings of fact, the military judge categorically concluded that the government's ex parte, classified declarations in support of the protective order demonstrated that "disclosure of the classified information at issue would be detrimental to national security in that the information relates to the sources, methods, and activities by which the United States defends against

[3] The military judge modified certain provisions of the September 25, 2012 proposed protective order to provide defense counsel with a "Defense Security Officer." *See* AE013O, Findings ¶¶ 3–4. Those modifications are not relevant here.

international terrorism and terrorist organizations." AE013O, Findings ¶ 6. The military judge then ruled, again without reference to the specific provisions challenged by the ACLU, that such "information is therefore properly classified" and, as a result, "is subject to protection in connection with this military commission." *Id.* Finally, the judge's ruling preserved the government's proposed forty-second audio delay in transmission of the proceedings to the public and the press. *Id*. ¶ 5.

STATEMENT OF THE RELIEF SOUGHT

Petitioners respectfully request that this Court issue a writ of mandamus vacating the portions of the military commission protective order in this case that, in violation of the public's First Amendment right of access, categorically censor and prevent the public from hearing defendants' testimony about their personal thoughts, memories, observations, and experiences of torture and other abuse in U.S. government custody.

REASONS WHY THE WRIT SHOULD ISSUE

I. This Court Has Jurisdiction to Issue a Writ of Mandamus

The common-law writ of mandamus against a lower court is codified at 28 U.S.C. § 1651(a) and provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Accord Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004). Both military and civilian courts of appeals exercise this authority "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 308 (1989) (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)); *see Clinton v. Goldsmith*, 526

U.S. 529, 534 (1999) ("[M]ilitary appellate courts are among those empowered to issue extraordinary writs under the Act.").

As a court established by Congress under the MCA, *see* 10 U.S.C. § 950f(a), this Court plainly possesses the authority to issue an extraordinary writ in aid of its jurisdiction. *See United States v. Frischholz*, 36 C.M.R. 306, 308 (C.M.A. 1966) ("The fact that a court is empowered by Congress to act only in a specially defined area of law does not make it any the less a court established by Congress."); *see also Gale v. United States*, 37 C.M.R. 304, 307 (C.M.A. 1967) ("We cannot believe Congress, in revolutionizing military justice and creating for the first time in the armed services a supreme civilian court in the image of the normal Federal judicial system, intended it not to exercise power to grant relief on an extraordinary basis, when the circumstances so require."); *accord Parisi v. Davidson*, 405 U.S. 34, 53 n.6 (1972) (Douglas, J., concurring); *Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969); *United States v. Dowty*, 48 M.J. 102, 106 (C.A.A.F. 1998); *United States v. Reinert*, Army Misc. 20071195, 2008 WL 8105416, at *5 (A. Ct. Crim. App. Aug. 7, 2008).[4]

Indeed, military-service courts of appeals have relied upon the All Writs Act to issue the writ in precisely the circumstances presented here: when a third party petitions to enforce the

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[4] The Supreme Court has held that the All Writs Act augments a court's existing jurisdictional grant with "supervisory authority." *See Clinton*, 526 U.S. at 534–35. Thus, when a court has statutory jurisdiction over a matter (here, under the MCA), it may issue the writ "in aid of" that jurisdiction under the All Writs Act. *San Antonio Express–News v. Morrow*, 44 M.J. 706, 708 (A.F. Ct. Crim. App. 1996) (it is "well settled" that military appeals courts have supervisory jurisdiction under the All Writs Act); *Dowty*, 48 M.J. at 106. Moreover, "it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong." *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 9 (1942); *see also Dettinger v. United States*, 7 M.J. 216, 220 (C.M.A. 1979). The same is true here. *See infra* § II (discussing irreparable injury to Petitioners absent extraordinary relief).

public's First Amendment right of access to an ongoing military judicial proceeding. In those cases, military-service courts have concluded that the All Writs Act grants them "clear" "authority to act on the merits of . . . petition[s]" like the one before this Court. *Denver Post Corp. v. United States*, Army Misc. No. 20041215, 2005 WL 6519929, at *2 (A. Ct. Crim. App. Feb. 23, 2005); *see ABC, Inc. v. Powell*, 47 M.J. 363, 364 (C.A.A.F. 1997) (granting mandamus petition where convening authority ordered closed an Article 32 hearing); *see also Stars & Stripes v. United States*, No. 200501631, 2005 WL 3591156, at *1 (N–M. Ct. Crim. App. Dec. 22, 2005) (considering mandamus petition by newspaper challenging closure of Article 32 hearing, but dismissing it as moot following government's dismissal of the charges below).

Likewise, the federal civilian courts of appeals routinely rely on the All Writs Act to consider, and grant, third-party petitions for writs of mandamus challenging trial courts' denials of First Amendment public-access rights. *See, e.g.*, *In re Providence Journal Co., Inc.*, 293 F.3d 1, 9 (1st Cir. 2002) (exercising mandamus jurisdiction over newspaper's petition to overturn district court's denial of public-access motions); *McClatchy Newspapers, Inc. v. U.S. Dist. Court for E. Dist. of Cal.*, 288 F.3d 369, 373–76 (9th Cir. 2002); *Oregonian Publ'g Co. v. U.S. Dist. Court for Dist. of Ore.*, 920 F.2d 1462, 1464–68 (9th Cir. 1990) (stating that "[t]he press has standing to seek review by petition for writ of mandamus of orders denying access to judicial proceedings or documents," and granting press intervenor's petition for a writ of mandamus); *Balt. Sun Co. v. Goetz*, 886 F.2d 60, 63 (4th Cir. 1989) ("Mandamus, not appeal, is the preferred method of review for orders restricting press activity related to criminal proceedings." (quotation marks omitted)); *In re Cincinnati Enquirer*, 85 F.3d 255 (6th Cir. 1996) (order of Merritt, C.J.) (granting emergency petition for writ of mandamus to secure newspaper's right of access to trial-court proceedings).

This Court's power under the All Writs Act to supervise the military commission below is no different than that of other military or civilian courts of appeals, and Petitioners respectfully ask the Court to exercise that clear authority to grant the relief Petitioners request here. *Cf.* Court of Military Commission Review Rules of Practice ("CMCR Rules") 21(a) (This Court "may dispose of any interlocutory or other appropriate matter not specifically covered by these rules, in such manner as may appear to be required for a full, fair, and expeditious consideration of the case.").[5]

II. Mandamus is Proper Because Petitioners Have No Other Means of Relief and Will Be Irreparably Harmed

Courts apply a three-part test to determine when a petitioner's request for a writ of mandamus should be granted: (1) there must be "no other adequate means to attain the relief"; (2) the right to relief must be "clear and indisputable"; and (3) the writ must be "appropriate under the circumstances" and prevent irreparable harm. *Cheney*, 542 U.S. at 380–81 (quotation marks omitted); *accord Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012). For the reasons set forth below, Petitioners satisfy the first and third prongs of the test; in Section III, *infra*,

[5] To the extent that CMCR Rule 21(b)—which states that "[p]etitions for extraordinary relief will be summarily denied, unless they pertain to a case in which there is an approved finding of guilty and appellate review has not been waived"—might be read to conflict with this Court's authority to issue extraordinary writs "in aid of jurisdiction," the Court should disregard the rule. This Court's statutory authority under the All Writs Act cannot be trumped by a rule of court. *See, e.g.*, *Amsler v. United States*, 381 F.2d 37, 42–43 (9th Cir. 1967) ("If there is a conflict between the rules and the statutes, the statutes must prevail."); *accord Zepeda v. Walker*, 581 F.3d 1013, 1017–18 (9th Cir. 2009) (holding state rule of court could not trump state statute); *Sw. Metal Fabricators, Inc. v. Internacional de Aceros, S.A.*, 503 F. Supp. 76, 78 (S.D. Tex. 1980) ("It is true that when a Rule conflicts with a statute, the Rule must fall."). More importantly, a rule cannot and should not be read to prevent this Court from adjudicating the constitutional claim Petitioners assert here.

Petitioners discuss the extensive reasons for which, in satisfaction of the second prong, their right to relief is clear and indisputable.

Cheney's first prong—the "no other adequate means" requirement—is "designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Cheney*, 542 U.S. at 380–81 (citing *Ex parte Fahey*, 332 U.S. 258, 260 (1947)). Petitioners plainly satisfy this test. They have no statutory right of appeal to this Court (or any other) because the MCA, the 2012 Rules for Military Commissions ("RMC"), and the 2011 Regulation for Trial by Military Commission ("Reg.") bar interlocutory appeal by any party other than the United States. *See* 10 U.S.C. § 950f; RMC 1201; Reg. 25-5. A mandamus petition is the only avenue for Petitioners to seek review of the military judge's restrictions on the public's constitutional right of access to the commission proceedings.

Faced with analogous limitations under the Uniform Code of Military Justice ("UCMJ"), military-service courts of appeals routinely hear and grant petitions for mandamus relief when military trial courts unconstitutionally infringe on the public's First Amendment right of access to military proceedings. *See, e.g.*, *Powell*, 47 M.J. at 364; *Denver Post*, 2005 WL 6519929, at *1; *see also United States v. Chagra*, 701 F.2d 354, 360 n.14 (5th Cir. 1983) (stating that "the great majority of cases involving challenges to closure and similar orders have been reviewed pursuant to some sort of extraordinary writ," and collecting cases). As this Court has recognized, Congress intended the military commission system's procedures and rules to mirror those of the UCMJ, *United States v. Khadr*, 717 F. Supp. 2d 1215, 1236 (C.M.C.R. 2007); *accord United States v. Hamdan*, 801 F. Supp. 2d 1247, 1260–63 (C.M.C.R. 2011), *rev'd on other grounds by* 696 F.3d 1238 (D.C. Cir. 2012); *cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 617 (2006) ("[T]he procedures governing trials by military commission historically have been the same as those

governing courts-martial."), and this Court should adjudicate Petitioners' request for mandamus just as any other military appeals court would do. If this Court were to deny Petitioners' request, "an effective remedial order . . . would otherwise be virtually impossible," *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 605 (1966), creating an "impairment of the effective exercise of appellate jurisdiction" over the rulings of an inferior military court, *id.* at 604.

Mandamus relief in this case is not just "appropriate" under the third *Cheney* prong—it is necessary. In addition to being Petitioners' only avenue for relief, a delay in this Court's review of the military judge's restrictions on the public's right of access to the military commission may, with "each passing day[,] . . . constitute a separate and cognizable infringement of the First Amendment," *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers) (quotation marks omitted); *accord Elrod v. Burns*, 427 U.S. 347, 373–74 (1976) (citing *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curium) ("*Pentagon Papers*")); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 127 (2d Cir. 2006) (A "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (quotation marks omitted)).

The First Amendment right to public trials functions in part to promote "confidence in the administration of justice." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995); *see Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*") (stating that the public nature of trial proceedings "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system"). Thus, First Amendment injuries caused by courtroom closures cannot be undone after the fact. "Since they punish utterances made during the pendency of a case," courtroom exclusions of the public "produce their restrictive results at the precise time when public interest in the matters discussed

would naturally be at its height." *Bridges v. California*, 314 U.S. 252, 268 (1941). And such exclusions almost inevitably produce those results "upon the most important topics of discussion." *Id.* Those precise concerns apply here because the protective order applies to all stages of the ongoing commission proceedings, and the public's interest in access to these proceedings—and in their legitimacy—is extremely high. *See infra* § III(B).

Finally, between the Petitioners' several filings in the commission below and to this Court, the government's various responses, and the oral argument held in the commission on the challenged censorship regime, the issue presented is ripe for appellate consideration. *See Shepardson v. Roberts*, 14 M.J. 354, 357 (C.M.A. 1983) ("excercis[ing]" the court's "extraordinary writ jurisdiction by considering the petition on its merits" based in part on "the opportunity to resolve promptly some recurrent issues that have now been thoroughly briefed and argued"). Unless this Court adjudicates Petitioners' request for a writ of mandamus under the All Writs Act, the public's First Amendments rights will continue to be abridged without the possibility of a later adequate remedy.

III. Mandamus is Proper Because the Protective Order Clearly and Indisputably Violates the Public's First Amendment Right of Access

The second prong of *Cheney* requires that a mandamus petitioner demonstrate that the right to relief is "clear and indisputable." *Cheney*, 542 U.S. at 381 (quotation marks omitted); *accord Hasan*, 71 M.J. at 418. For the reasons set forth below, Petitioners meet that burden here.[6]

[6] Below, Petitioners also challenged the protective order's imposition of a forty-second delay in the audio of courtroom proceedings transmitted to the public on the grounds that it permitted the categorical and ex ante prior restraint of defendants' public statements. *See* AE013A at 31; AE013H at 11–12. Though Petitioners do not raise that issue here, should this Court determine that the protective order violates the public's First Amendment right of access, the forty-second

A. The First Amendment protects the public's right of access to military commissions.

There should be no question that the public's First Amendment right of access applies to the military commissions, and the government acknowledged at oral argument below that it does. *See* Tr. at 679 (counsel for the prosecution, acknowledging that the Rules for Military Commissions "incorporate[] the [Supreme Court's] four-part test"), 694. Petitioners therefore address only briefly the doctrinal reasons that the First Amendment right of access applies, to inform this Court's adjudication of the issue before it.

In the context of access to judicial proceedings, 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); *accord Globe Newspaper Co.*, 457 U.S. at 604–06 (same); *see Press-Enterprise I*, 464 U.S. at 508–10, 513 (same as to *voir dire* proceedings); *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 10 (1986) ("*Press-Enterprise II*") (same as to preliminary hearings in a criminal prosecution).

Under the Supreme Court's prevailing "history and policy" test, the public's right of access exists (a) where government proceedings and information historically have been available to the public, and (b) where public access plays a "significant positive role" in the functioning of those proceedings. *Press-Enterprise II*, 478 U.S. at 8, 8–9; *accord Globe Newspaper*, 457 U.S. at 604; *Wash. Post v. Robinson*, 935 F.2d 282, 287–92 (D.C. Cir. 1991). The right of access "has special force" when it carries the "favorable judgment of experience." *Richmond Newspapers*,

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delay would do so as well to the extent that its operation is based on the military judge's unconstitutional censorship of defendants' personal experiences and knowledge.

448 U.S. at 589 (Brennan, J., concurring). 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." *Id.*; *see Press-Enterprise II*, 478 U.S. at 89; *Globe Newspaper*, 457 U.S. at 605–06; *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).

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). Indeed, based on this long tradition, military courts recognized the fundamental right to public access to military trials even before the Supreme Court recognized the First Amendment right of public access to civilian criminal proceedings in *Richmond Newspapers*. *See, e.g.*, *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). Since then, following the Supreme Court's "history and policy" approach, military-service courts have consistently found that a First Amendment right of public access 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."); *see also Powell*, 47 M.J. at 366 (holding that the First Amendment right of public access applies to investigations under UCMJ Article 32); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (concluding that the 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).

History's lesson with respect to military commissions is clear: Almost without exception, the thousands of military commissions held during wartime in our nation's history have been conducted publicly. *See* AE013A Ex. A ¶ 4. Secrecy in military commissions is the exception—one that history judges harshly. *Id.* Ex. A ¶ 5 (describing the "tarnished legacy" of *Ex parte Quirin*, 317 U.S. 1 (1942), due to the closed nature of the military commission conducted against eight Nazi saboteurs in that case); *cf. Hamdan*, 548 U.S. at 617.

Policies advanced by public access. The "policy" prong of the Supreme Court's test for whether the public-access right attaches to a given proceeding is also unquestionably met here because of the historic nature of the defendants' trial and the public's interest in the fairness and transparency of those proceedings. In *Richmond Newspapers*, the Supreme Court explained that among the most important interests advanced by open adjudicatory criminal proceedings are (1) ensuring public confidence in a specific trial's results through the appearance of fairness, *see* 448 U.S. at 570 (Burger, C.J.) (plurality opinion) (discussing "[t]he nexus between openness, fairness, and the perception of fairness"); *id.* at 593 (Brennan, J., concurring), and (2) more generally inspiring confidence in government through public education regarding the methods followed and remedies granted by government, *see id.* at 573 (Burger, C.J.) (plurality opinion); *Brown*, 22 C.M.R. at 45–48 (identifying the functional benefits of public proceedings as improving the quality of testimony, curbing abuses of authority, and fostering greater public confidence in the proceedings); *see also Hershey*, 20 M.J. at 436; *United States v. Hood*, 46 M.J. 728, 731 n.2 (A. Ct. Crim. App. 1996). Both of those interests are central to the long-running debate, both domestically and abroad, about the legitimacy and fairness of the entire military

commissions system. A judicially approved censorship regime that prevents the public from hearing the defendants' personal accounts of U.S. government-imposed interrogation, detention, and rendition—a matter of substantial public and press interest—significantly undermines the military commission's legitimacy. *Cf. Pentagon Papers*, 403 U.S. at 724 (Douglas, J., concurring) ("Open debate and discussion of public issues are vital to our national health.").

B. The Protective Order violates the public's First Amendment access rights by categorically censoring defendants' testimony about their personal experiences and memories of torture and other abuse.

In the proceedings below, not only did the government agree with Petitioners that the public's First Amendment access right attaches to the commission proceedings, it also agreed that before testimony can be censored, the government must meet the First Amendment's strict-scrutiny standard. *See* Tr. 678–79, 694. Thus, there is no dispute the government had a high burden of showing—and the military judge was required to find—that there is a "compelling governmental interest" justifying censorship, and that the censorship itself is "narrowly tailored to serve that interest." *Globe Newspaper Co.*, 457 U.S. at 606–07; *accord Press-Enterprise I*, 464 U.S. at 510; *Richmond Newspapers*, 448 U.S. at 581. Military courts apply this same standard. *Powell*, 47 M.J. at 365 (Military and "[c]ivilian jurisdictions have similarly protected the right of public access to criminal trials and have required articulated and compelling factors to justify closure."); *accord Hershey*, 20 M.J. at 436; *Grunden*, 2 M.J. at 124; *Scott*, 48 M.J. at 665; *Anderson*, 46 M.J. at 729. In other words, categorical suppression or closures are prohibited. *See Florida Star v. B.J.F.*, 491 U.S. 524, 539 (1989) ("We have previously noted the

impermissibility of categorical prohibitions upon media access where important First Amendment interests are at stake."); *Grunden*, 2 M.J. at 121.[7]

The government cannot meet the First Amendment's strict-scrutiny requirement that it demonstrate a "compelling government interest" to justify censorship for two independent reasons. First, the government has no legal authority to classify defendants' testimony about their personal knowledge, experiences, and memories of torture and other abuse, especially when the government purposefully and coercively disclosed its then-secret program to the defendants by subjecting them to it. Second, regardless of whether the government could somehow classify defendants' personal knowledge of government misconduct, classification does not itself establish a compelling interest, and the government has no legitimate interest—let alone a compelling one—in censoring testimony about a CIA interrogation, rendition, and detention program that has been banned by the President of the United States, that is illegal, and about

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[7] In addition to the constitutional basis for Petitioners' "clear and indisputable" access right, the MCA 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); *accord* Reg. 19-6 ("The proceedings of military commissions shall be public to the maximum extent practicable."); RMC 806(a) ("[M]ilitary commissions shall be publicly held."). 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); *accord* Reg. 19-2. In their motion below, Petitioners argued that the MCA's standard for closure supports, and should be read consistently with, the Constitution's the First Amendment's strict-scrutiny standard. *See* AE013A at 12.

Although all the parties agreed that the constitutional standard governed the government's request for closure of the proceedings, the protective order issued by the military judge impermissibly applied a lower standard. *See* AE013P § 8(a)(2)(a) (stating that the court may close proceedings when disclosure of information "could reasonably be expected to damage national security").

which copious details are already widely known. Moreover, the protective order's categorical, ex ante censorship of defendants' testimony is anything but narrowly tailored.[8]

1. *The government cannot properly classify defendants' personal experiences and memories of government-imposed torture and other abuse.*

When the government claims the authority to censor testimony on the grounds that it is classified, the First Amendment requires a court to independently determine whether classification is proper. *See United States v. Lonetree*, 31 M.J. 849, 854 (N–M.C.M.R. 1990) (concluding that the military trial judge appropriately "conducted [his] own analysis of the affidavits and the interests at stake" in assessing whether the government had "set[] forth valid reasons for the classification of the information and why it could not be revealed in public session"), *aff'd in relevant part*, 35 M.J. 396 (C.M.A. 1992); *Grunden*, 2 M.J. at 124 (holding that proceedings may only be closed after court determines propriety of classification and determines closure on that basis meets First Amendment test); *see also Wilson v. CIA*, 586 F.3d 171, 185 (2d Cir. 2009) (in First Amendment prepublication review case, court must "ensure that

[8] Defendants' testimony about their personal "observations and experiences" of the government's treatment of them will inevitably be at issue during these proceedings. For example, any dispute between the prosecution and defense regarding the voluntariness of defendants' statements while in U.S. custody will impact the court's analysis under MIL. COMM. R. EVID. 304. *See* Tr. at 657–58 (discussing relevance of voluntariness). In addition, should defendants be convicted of the charges against them, their testimony as to their treatment in government custody would be relevant to mitigation in the trial's penalty phase. *See, e.g.*, RMC 1001(c) note ("While no credit is given for pretrial detention, the defense may raise the nature and length of pretrial detention as a matter in mitigation."), 1004(b)(3) ("The accused shall be given broad latitude to present evidence in extenuation and mitigation.").

the information in question is, in fact, properly classified"); *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983) (same).[9]

The government has no compelling interest in censoring defendants' testimony because it has no legal authority to classify their personal experiences, thoughts and memories. The government has invoked Executive Order No. 13,526, and its predecessor orders, for its purported classification authority. *See* AE013D at 10–11 (discussing Exec. Order 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009)).[10] As an initial matter, however, there is no legal support for the extraordinary proposition that "information" under Executive Order No. 13,526 extends to a criminal defendant's personal knowledge, thoughts, experiences, and memories of his treatment

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[9] By contrast, in the proceedings below, the government took the manifestly erroneous position that "[t]he law is clear" that no party can "challenge the government's decision to classify information," AE009A (May 2, 2012). As the U.S. Principal Deputy Assistant Attorney General recently explained, that argument is a "straw man" and the government has not "suggested that the Executive Branch's determination that a document is classified should be conclusive or unreviewable." Final Reply Br. of Appellants at 8 n.1, *Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative*, No. 12-5136 (D.C. Cir. Nov. 27, 2012). Thus, in addition to First Amendment cases, courts adjudicate the propriety of classification in Freedom of Information Act ("FOIA") lawsuits, albeit under a lower standard of review in that statutory context. *See Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 76 (D.C. Cir. 1987) (explaining, in the context of evaluating a FOIA exemption claim, that "courts act as an independent check on challenged classification decisions"); *see also, e.g.*, *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 75 (2d Cir. 2009) (same). Even in that context, courts recognize that "deference is not equivalent to acquiescence." *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998).

[10] 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 "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, and the government has predominantly relied on two: "intelligence activities (including covert action), intelligence sources or methods," and "foreign activities of the United States." *Id.* § 1.4(c), (d).

in government custody, and the government, unsurprisingly, cited none in the proceedings below.[11]

Moreover, under the Executive Order, the government may only provide access to classified information to individuals who have a "need to know" the information, who sign a nondisclosure agreement, and who are deemed eligible to receive the information. Exec. Order 13,526, § 4.1. If the government were correct that the defendants' "exposure" to the CIA program justified the enforcement of a gag on defendants' statements about their personal experience of that program, 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), (f).[12] That is an absurd proposition, to be sure, 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.

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[11] The government asserted that its proposed protective order was similar to those in other cases, *see* AE013L (citing protective orders in federal civilian prosecutions of terrorism defendants), but none of those protective orders contain the provisions at issue here, in which the government claims the authority to classify personal knowledge of government misconduct. The single protective order that is similar to the one before this court, *see* Modified Protective Order, *United States v. Ghailani*, No. 98 Cr. 1023 (S.D.N.Y. July 21, 2009), ECF No. 765, does contain the classification provision, *id.* ¶ 3(c), but the defendant in that case never sought to testify, no First Amendment challenge was litigated, and the protective order has no precedential value.

[12] "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, 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).

During oral argument, the government revealed perhaps its only basis for asserting that it can classify defendants' personal experiences and memories: "the government still maintains control over" defendants' personal knowledge by virtue of their ongoing detention. *See* Tr. at 683 (counsel for the prosecution). But that Orwellian reference to 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," Exec. Order 13,526, § 1.1(a)(2)—may not be extended to human beings involuntarily under the government's control. Even if the government can be said to physically "control" the defendants, there is simply no authority for the radical assertion that the government's detention 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 mistreatment.

In other contexts in which courts have found that the government may gag individuals from disclosing national-security information, the individuals are government employees or others in a relationship of privity or trust with the government. As such, they have undertaken "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, e.g.*, *McGehee*, 718 F.2d at 1142 n.11 (D.C. Cir. 1983) ("[O]ne who enters the foreign intelligence service thereby occupies a position of 'special trust' reached by few in government."). The government itself does not disagree with that principle. *See* AE013D at 11–12 (citing *Snepp v. United States*, 444 U.S. 507 (1980) (concluding that CIA agent's employment agreement with the Agency stipulated a relationship of trust, prohibiting him from publishing information about CIA activities without CIA review); *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003)

(holding that former CIA employee could not publicly discuss information covered by non-disclosure agreements with CIA)).

The reasoning in those cases clearly does not apply here. Even if the CIA program itself was classified, the government cannot claim that defendants' personal experiences and memories of it are government secrets when the very purpose of the CIA's detention, rendition, and interrogation program was to disclose—deliberately, purposefully, and with authorization from the highest levels of government—purportedly classified information to individuals who were not authorized to receive it and would be under no obligation to keep silent about it. AE013D at 11 (government brief, asserting that each defendant is an "accused who does not hold a security clearance and who owes no duty of loyalty to the United States").[13] Worse, the government disclosed purportedly classified information through coercion: It forced the defendants to "acquire" their personal knowledge of the secret methods of torture and abuse to which the government subjected them, the location of the secret foreign detention sites at which the government held them, and (to the extent defendants are aware of these) the identities of foreign and U.S. government agents who perpetrated abuses on them.

The government's claim that defendants' personal experiences and memories of illegal government conduct are "classified" is legally untenable and morally abhorrent.

2. *Even if defendants' personal experiences and memories of government-imposed torture and other abuse could be properly classified, censorship of that testimony violates the First Amendment.*

[13] 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). As Petitioners argued below, torture, abuse, illegal rendition and detention do not fall within the CIA's mandate. *See* AE013A at 21–24.

It is settled law that when the government seeks to abridge the public's First Amendment access rights to a criminal trial, judges have an independent duty to determine whether the government has articulated a compelling need, based on factual evidence, and that any restriction is narrowly tailored. *Globe Newspaper Co.*, 457 U.S. at 606–07; *accord Press-Enterprise I*, 464 U.S. at 510. That duty applies regardless of whether the government could "classify" defendants' personal experiences and memory; classification does not determine the constitutional inquiry the Court must conduct. *See, e.g. Grunden*, 2 M.J. at 124. As the Fourth Circuit has explained,

> troubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, we are equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present.

In re Wash. Post Co., 807 F.2d 383, 391 (4th Cir. 1986) (holding that district court applying Classified Information Procedures Act, 18 U.S.C. app., was required to make separate constitutional inquiry when determining issue of closure); *cf. Pentagon Papers*, 403 U.S. at 719 (Black, J., concurring) ("The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment."); *United States v. Moussaoui*, 65 F. App'x 881, 887 (4th Cir. 2003) (unpublished) ("[T]he mere assertion of national security concerns by the Government is not sufficient reason to close a hearing or deny access to documents. Rather, we must independently determine whether, and to what extent, the proceedings and documents must be kept under seal." (citation omitted)).[14]

[14] On February 14, 2013, the Press Objectors filed a petition for a writ of mandamus in this Court arguing, in part, that "blanket" judicial closures, based in part on per se presumptions of harm to government interests, are unconstitutional under the First Amendment. *See* Petition for a Writ of Mandamus at 26–28, No. 13-002 (C.M.C.R. filed Feb. 14, 2013). Petitioners hereby join in the Press Objector's request for relief on that basis.

In the proceedings below, the government's rationale for its proposed censorship of defendants' testimony about their "exposure" to the CIA's detention and interrogation program was that revelation would disclose the means by which the United States defends against international terrorism and terrorist organizations and therefore result in damage to the national security. *See, e.g.*, AE013D at 12–13; AE019A at 8–10. But in 2009, President Obama categorically prohibited the CIA's so-called "enhanced interrogation techniques" and ordered its overseas detention and interrogation facilities permanently closed. *See* Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009). 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 will not be used again.

Moreover, the use of illegal interrogation methods on prisoners is also expressly prohibited by U.S. law, *see* 18 U.S.C. § 2340A (prohibiting torture abroad); 18 U.S.C. § 2441 (prohibiting grave abuses 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 ("C.A.T."). Neither the CIA nor the military is exempt from these laws. Similarly unlawful are the practices of extraordinary rendition, *see* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-822 (1998); C.A.T. art. 3, and secret detention, *see* Geneva Convention Relative to the Treatment of Prisoners of War art. 70, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 106, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; *see also* Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. GAOR, 43d Sess., Supp. No. 49, U.N. Doc. A/43/49, at 298 (Dec. 9, 1988); Standard Minimum Rules for the

Treatment of Prisoners, U.N. Doc. A/CONF/611, Annex I (Aug. 30, 1955), E.S.C. Res. 663C (XXIV), U.N. ESCOR, 24th Sess., Supp. No. 1, U.N. Doc. E/3048, at 11 (July 31, 1957), *amended by* E.S.C. Res. 2076 (LXII), U.N. ESCOR, 62d Sess., Supp. No. 1, U.N. Doc. E/5988, at 35 (May 13, 1977). As these domestic and international standards make clear, as a matter of law 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.[15]

Additionally, the President himself has ordered the release of the Department of Justice's legal memos (the "OLC Memos") upon which the CIA relied for its interrogation program. On ordering that release, 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.

Statement of President Barack Obama on the Release of OLC Memos (Apr. 16, 2009), *available at* http://1.usa.gov/QSQooj. When the President has squarely rejected the argument that further dissemination of details of interrogation techniques would cause harm to national security, neither the prosecution below nor the CIA (as the "original classification authority") has any basis to assert that claim. The President's determination was, in effect, a finding by the Chief Executive that any harm from disclosure of information about the CIA's interrogation program was outweighed by the public's interest in transparency. The government therefore cannot meet its burden of demonstrating a compelling government interest in preventing defendants' potential

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[15] Executive Order 13,526 explicitly prohibits classification of information in order to "conceal violations of law, inefficiency, or administrative error" or "prevent embarrassment to a person, organization, or agency." Exec. Order 13,526, § 1.7(a)(1)–(2).

testimony about similar information, much of which (like the OLC Memos) overlaps with "facts that have been in the public domain for some time," *id.*

Last, the testimony defendants could offer about their personal experiences in the CIA program would not result in harm because that information has already been substantially declassified and much of it is already within the public domain. Numerous widely-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.

For example, four of the OLC Memos that President Obama ordered disclosed purported to authorize, and described in concrete and minute detail, the interrogation techniques that the CIA applied to so-called "High-Value Detainees"—including the defendants. The OLC Memos contain operational details about the CIA program, specific examples of techniques used against prisoners, and descriptions of the phases of "enhanced interrogations." *See, e.g.*, 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) (describing operational details about, *inter alia*, waterboarding, sleep deprivation, and stress positions), *available at* http://1.usa.gov/W8kWRi. The OLC Memos even link specific techniques to individual prisoners, including defendants. *See, e.g.*, 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) (discussing the waterboarding of defendant

Mohammed and Abd Al-Rahim Al-Nashiri, defendant in a separate military commission trial), *available at* http://1.usa.gov/11TigPi.

The CIA itself has declassified large portions of an internal report concerning the Agency's detention and interrogation operations to which the defendants were subjected. *See* CIA OFFICE OF THE INSPECTOR GENERAL, COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPT. 2001–OCT. 2003) (May 7, 2004), *available at* http://nyti.ms/115wzq. The 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 Khalid Shaikh Mohammed, *see id.* ¶¶ 99–100, and other unauthorized interrogation activities that bear no relation to the techniques described in the OLC Memos; for example, 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 Mustafa al Hawsawi was subjected to coercive interrogation. *See 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 use of interrogation techniques. CIA, Background Paper on CIA's Combined Use of Interrogation Techniques (Dec. 30, 2004), *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. The entire document makes clear that actual descriptions of detention conditions and techniques have been declassified. *See id.* at 4 (summarizing "detention conditions that are used in all CIA HVD facilities"); *id.* at 4–17 (describing in detail each of the techniques actually applied).

Thus, any statements defendants make during the military commission proceedings about their personal experiences while subject to CIA interrogation are likely to reveal little or nothing that the government has not already officially disclosed. What's more, official investigations by the International Committee of the Red Cross, the United Nations, and European human rights officials, as well as reports by the world press, have made public first-hand accounts of the defendants' treatment in U.S. custody.[16] These reports have also disclosed the locations of the secret overseas CIA detention facilities at which that treatment took place and at which defendants were held.[17]

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[16] 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 first-hand accounts of former CIA prisoners held at Guantánamo Bay—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 (2007) ("ICRC REPORT"), *available at* http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf. The ICRC Report is based on interviews with fourteen prisoners, including all five defendants in the military prosecution below. *See 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."); *see also id.* at 31–33 (full account of statement of Mr. Bin 'Attash); *id.* at 33–37 (full account of statement of Mr. Mohammed).

[17] Official investigations by the 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 censor here. *See, e.g.*, Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism, Human Rights Council, 13th Sess., ¶ 114, U.N. Doc. A/HRC/13/42 (Feb. 19, 2010) (reporting that defendants Mohammed, Binalshibh, and Bin 'Attash were held in the Polish village of Stare Kiejkut

The government argued below that to the extent these investigative reports and press accounts are based on classified information that is leaked into the public domain, such information is not automatically declassified, the government has not officially acknowledged it, and the military judge should not permit its further disclosure. AE013D at 13. Although that argument reflects the government's invocation of the "official acknowledgement" doctrine in a number of contexts, it is both irrelevant and misses the point here. In all other contexts, the government is adamant that official acknowledgement only exists if a current official of the relevant agency discloses a specific government secret. *See Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990); *see also* Rule 28(j) Letter from Sharon Swingle, Attorney, U.S. Department of Justice, *Am. Civil Liberties Union v. CIA*, No. 11-5320 (D.C. Cir. Feb. 13, 2013). Under the

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between 2003 and 2005), *available at* http://bit.ly/cziSQc; *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 7, 2007) (same), *available at* http://bbc.in/JMRLRM; *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 Shaikh] 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/rpKQbG ("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."). Most recently, a human rights organization documented the "active participation" of fifty-four foreign governments in the CIA's program, including by hosting CIA prisons, conducting interrogations and abusing prisoners, and permitting the use of airspace and airports for secret CIA flights transporting detainees. OPEN SOCIETY FOUNDATIONS, GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION 61–118 (2013), *available at* http://osf.to/YzyE1C.

government's own theory, public allegations of government misconduct by criminal defendants cannot amount to official acknowledgment under any standard and may not be suppressed on that basis.[18] Defendants' testimony in open court would be little or no different from the widespread public disclosure of the leaked report of the International Committee of the Red Cross, detailing interviews with 14 former CIA prisoners, including each of the defendants in this case. *See supra* note 16.[19]

In sum, the vast amount of information—officially disclosed or not—already in the public domain that is the same as or substantially similar to defendants' potential testimony ineluctably undermines any government claim that it has a compelling interest in censoring that testimony. Moreover, given the existence of those copious public details about defendants' unlawful interrogation, rendition, and black site detention, the protective order's categorical censorship of all of defendants' testimony about their personal experiences and memories of illegal government conduct is the very antithesis of the narrow tailoring required by the First Amendment.

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[18] In the proceedings below, the government claimed that defendants are authoritative sources of torture information, and that they could lie about torture information. *See, e.g.*, AE013 at 10–11. It cannot have it both ways.

[19] Indeed, former prisoners who were subjected to the CIA's detention and torture program and were subsequently released have spoken publicly about their experience in CIA custody—without any visible harm to national security. *See, e.g.*, Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST, Dec. 4, 2005, http://wapo.st/eaM1RS (providing former CIA prisoner Khaled el-Masri's own account of his experience). The government could not silence them under any colorable legal theory.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court issue a writ of mandamus forthwith.

Date: February 21, 2013

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was emailed on this 21st day of February, 2013, to the following:

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