[The Military Commission was called to order at 1448, 16 October 2012.]

MJ [COL POHL]: The Commission is called to order. All parties appear to be present again. The technical problem has seemed to be resolved. Mr. Connell.

LDC [MR. CONNELL]: Let me be concrete, Your Honor. With the Court's permission, I will show on the document camera the provision I was referring to from the standard order.

MJ [COL POHL]: Okay.

LDC [MR. CONNELL]: So this is the draft order we provided to the Convening Authority. This language in paragraph 2 is standard language for the Navy DSO order, which says -- which associates the defense security officer with the defense team.

The last sentence is the most important, which says the presence of the defense security officer, who has been appointed as a member of the defense security team, shall not be construed to waive, limit or otherwise render inapplicable the work product protections.

The middle section, which says the defense security officer shall not reveal to any person the content of any conversations, et cetera, et cetera, is very like the

language that the government has included in their paragraph 16, except the government's order would impose that kind of confidentiality upon a member of the trial, of judiciary staff, which doesn't seem appropriate to me.

The second step of the process, because I'm trying to be concrete, we have this privileged document, the defense security officer can review it and tell us --

MJ [COL POHL]: Mr. Connell, let me ask you a question. Where -- which part of your pleadings has this attachment?

LDC [MR. CONNELL]: 009 supplement, and it's attachment Charlie.

MJ [COL POHL]: Thank you. Go ahead.

LDC [MR. CONNELL]: Yes. There's one other piece that I -- so I can -- I know what the court's thinking, you have attorney-client privilege to this person, this defense security officer, and they're going to liaise with an OCA, what happens then?

Well, in fact the government has given us the answer to what happens then. If we could switch back to the feed from table four, please, I want to draw your attention to the government's response which is on 009A, then it's -- their note 6 on page 12 which we'll pull up for you.

MJ [COL POHL]: Put it on the big screen.

LDC [MR. CONNELL]: We're trying to pull up that number 6 to make it big enough that you can see it. We'll see if the technology cooperates there. Very good. And, the note 6 on page 12 of the government's response says, In consultations with the defense about classification issues, the OCAs agree not to disclose the information provided to them unless the information provides a current threat to loss or life or presents an immediate safety issue in the detention facility.

I included that language in our proposed order. I don't have any problem to the loss or life or immediate safety issue exception to that. And it essentially provides if you take the DSO -- the standard DSO language and combine it with the prosecution's agreement on behalf of the OCAs, it essentially provides a mechanism for privileged classification review which is what the defense office has been asking for in various ways for a number of years, as I attached to my briefs.

MJ [COL POHL]: Looking at paragraph 3, you describe the duties of your defense security officer, and specifically it says he or she would do nothing else.

LDC [MR. CONNELL]: The paragraph 3 of this -- actually, let me go on and show you the rest of it.

MJ [COL POHL]: I've got the whole document in front of me.

LDC [MR. CONNELL]: If you look at paragraph 6, Your Honor.

MJ [COL POHL]: I see it. Now, direct me to the part -- it may be here. I haven't found it. -- of where your envisioned DSO is going down to the OCA and say and advocate your position for declassification of a document.

LDC [MR. CONNELL]: Your Honor, let me show you that. If we could switch back to the document camera.

MJ [COL POHL]: I've got it in front of me if you've got it in front of you.

LDC [MR. CONNELL]: We put language in our proposed order to this court. The one you're looking at is the one we proposed to the Convening Authority. I put language describing exactly what you are asking me about in the proposed order we submitted to you in 13.

MJ [COL POHL]: Just so I'm clear, this description of the duties is not really what you meant. You want something else?

LDC [MR. CONNELL]: This description of duties is overinclusive. It is more than -- this description of duties that we submitted to the Convening Authority, we wanted to

stay as close to the standard language because we were trying to say we're just like the --

MJ [COL POHL]: Captain Schwartz?

DDC [CPT SCHWARTZ]: [Inaudible].

MJ [COL POHL]: Too low? Too high?

DDC [CPT SCHWARTZ]: We're good.

MJ [COL POHL]: Okay.

LDC [MR. CONNELL]: It's not that we're trying to bait and switch, it's that the security consultant that the defense office has helps us with things like keeping safe combinations correct and, you know, making sure that the SCIF is locked up -- SCIF is locked up, that's what the DSO, the standard DSO includes those duties. We don't need that. So the section that the court specifically asked me about is in section C of paragraph 16 of our attachment Bravo to 313 Mike, if that's not complex enough. Act as liaison with OCAs and others including security classification of Section 52613(e) which I contend is the proper approach to what the government claims is presumptive classification classification challenges person with the section 1. 8 Alpha and requests for declassification, guidance or assistance with other security matters.

MJ [COL POHL]: You define it, "liaison," as to include

going down and talking and try to convince an OCA that a certain document is improperly classified?

LDC [MR. CONNELL]: Your honor, I have never had access to any communications between any security officer and any OCA.

MJ [COL POHL]: I'm just trying to figure out what you want. When I ask about what is the role of the CSO, and I inartfully refer to it as Western Union, I understand, and I'm not minimizing, you say, no, we want them to advocate for our position on a classification issue, and defense team, they won't be able to do that.

If I sign your version of the order, you're interpreting the term "liaison" to include an advocation position of going to OCA and saying this is not properly classified; let me tell you why.

LDC [MR. CONNELL]: That's not exactly what I said. I said when I tried to make a classification challenge, which is my one experience with this liaison process, my one window into it, the way it was explained to me is it may not be advocacy like a lawyer advocates, but someone has to take the material, have a meeting with someone at the OCA and say here's what this guy thinks, here's what he says. What do you think. This -- I'm sorry, "this guy" being ----

MJ [COL POHL]: I understand that. If you write a justification or your rationale why should we declassify it, this person takes it and hands it to the OCA. Now you say you don't have that ability.

LDC [MR. CONNELL]: Correct.

MJ [COL POHL]: Why isn't that person just done and the OCA picks up your information, reads it, and says yes or no?

LDC [MR. CONNELL]: I believe it is because the regulation in the CFRs requires an informal classification challenge before a formal classification challenge takes place. This situation is very opaque to me. Please accept that qualification.

MJ [COL POHL]: I accept opaqueness in this situation.

LDC [MR. CONNELL]: I have read the regulation, which requires informal challenges prior to formal challenges, and I believe this process I'm describing of here is what Connell says, what do you say, is the informal challenge process.

MJ [COL POHL]: Okay.

LDC [MR. CONNELL]: Let me be a hundred percent clear. I don't care what we call the person. That's not the issue. We need a mechanism for privileged classification review and we don't have it. And we can call it anything that we want and structure it any way we want so long as it involves --

maintains attorney-client privilege for the defense and there is some way for us to seek classification review.

MJ [COL POHL]: Okay. I understand that issue. Is that the issue before me?

LDC [MR. CONNELL]: There are two issues briefed in AE 009. That's number 2.

MJ [COL POHL]: I thought we were on 13. That's okay. Hold on a second.

Okay. Perhaps I just didn't read it that expansively, but in your 30-odd pages of the brief on the main brief you mentioned at the start that it's been 90 percent of your discussion in presumptive classification. Now at the end you talk about mechanism for privileged classification review. Is that -- which is I think a little less than what you're asking for now.

LDC [MR. CONNELL]: No, it's exactly what we're asking for now, Your Honor. I will fully accept the criticism of being overly verbose.

MJ [COL POHL]: That's okay.

LDC [MR. CONNELL]: My wife says the same thing.

The third request for relief is a mechanism for ordering the convening authority to provide a mechanism for classification review, without waiver of attorney-client

privilege. That is what we asked for.

I later learned there is a creature in the courts-martial system, the Navy courts-martial system called a defense security officer which seemed to be what we were asking for. I know before my time, different chief defense counsels, I attached all of their briefs on this to our main brief, have called this privilege team, defense privilege team, you know, they called it different things.

MJ [COL POHL]: Those have been focused on -- this is where I got confused. They focused on identifying, as I understand it, classified information, not this liaison or going down to the OCA, they're designed to see whether it's classified or not, and, if not, perform that little function of going to the OCA and saying is this classified. That's much different than where I think I envision your defense CSO. I'm not saying it's not in there.

You're asking for a different kind of relief for the procedure, which I'm not sure, I'm picking out of three separate documents to try to figure out what exactly you're asking for.

By that what I mean is I think that's a stand-alone issue.

LDC [MR. CONNELL]: Okay.

MJ [COL POHL]: Okay. You want somebody to assist you in classification review and reconsideration and verification, for want of better terms, okay?

LDC [MR. CONNELL]: Let me be concrete here. The real question is we get a -- I get a new document. I read an article in the New York Times. It's on a topic covered by a Classification Guide. I need to know what can I do with this? What is the guidance on this? And I'm not going to say much about it, but the documents that are covered by the 505 are like us begging for guidance, please help us. This can only help national security for us to know what we're talking about, for somebody to say that is classified, that is not classified. And for us to have a way to do that can only help national security.

MJ [COL POHL]: But you know, Mr. Connell, the mere fact that a piece of paper, piece of information happens to be in the public media does not necessarily mean it has been properly unclassified.

LDC [MR. CONNELL]: That is precisely my point.

MJ [COL POHL]: The New York Times is not an original classification authority, neither is anybody else improperly leaking this to anybody.

LDC [MR. CONNELL]: Precisely my point. We don't know

whether that information was properly released by the White House or whether it was improperly leaked. And, in fact, the prosecution's argument, we don't know what we're talking about, we're not OCAs, is the reason why we need the defense security officer.

MJ [COL POHL]: That is why I come back to is this information classified?

LDC [MR. CONNELL]: The only way for us is to have a mechanism. Maybe the word "liaison" is a bad word. I won't use it anymore. We need a mechanism to get classification --

MJ [COL POHL]: You may revisit that part, but not today.

Any other defense counsel want to be heard on 13? Mr. Nevin?

LDC [MR. CONNELL]: 13, Your Honor? 9?

MJ [COL POHL]: Weren't we just on 13? We're still on 9?

LDC [MR. CONNELL]: 9. I was just approached by the prosecution. I think everyone agrees that the interveners first could argue on 13, if that's the Commission's pleasure.

MJ [COL POHL]: That's fine.

CP [BG MARTINS]: Your Honor, the two counsel are right now in the gallery.

MJ [COL POHL]: They can come in that way.

CP [BG MARTINS]: They don't allow them to come in this way.

MR. SCHULZ: Good afternoon, Judge. My name is David Schulz. I'm with the law firm of Levine, Sullivan, Schulz & Koch in New York. I'm a representative of 14 United States news organizations who wish to object to certain provisions in the proposed protective order which they contend violate the public's right of access to this proceeding, its right to observe the proceedings and its right to inspect the record of this case.

MJ [COL POHL]: Mr. Schulz, I'm going to ask you to slowdown for the translator.

MR. SCHULZ: I need to follow Mr. Connell's advice and put a big "S" on each page.

I want to emphasize the points because it is important to understand that nothing is likely to shape the public's perception of the fairness of these proceedings more significantly than the way the court handles the requests for protective order.

We would submit there is one fundamental question for the court to answer in regard to public access and that is simply this: Does the public 's constitutional right to

observe and attend judicial proceedings extend to the proceedings of this military tribunal? We submit that it does. We don't know that it is seriously in dispute here.

It would seem that both the defense and prosecution agree with us. The prosecution has indicated the Press Enterprise II standards should apply, which of necessity means they accept the notion that the public has a constitutional right to know what is being done in its name in this tribunal.

But here's the rub. If the Commission agrees that the public has a constitutional right to observe these proceedings, then the government's proposed protective order, the standards it advances and the methods it offers up to close those proceedings cannot be accepted because they violate the constitutional mandate, the standards that must be met to satisfactory the First Amendment.

A proceeding that the public has a constitutional right to attend can be closed even temporarily only if the court, the court, a judge first finds that secrecy is essential to preserve some higher value and is narrowly tailored.

We don't have secret trials in this country.

MJ [COL POHL]: Mr. Schulz, is the protective order

impact on what is opened or closed at trial?

MR. SCHULZ: It does because the provision authorized the closing of proceedings and sealing of records, paragraphs 40 and 41.

MJ [COL POHL]: For court proceedings, isn't there a separate process altogether?

MR. SCHULZ: No, as I read the proposed protective order.

MJ [COL POHL]: What I'm saying is under 505 before a proceeding can be closed there must be a session to determine whether it should be closed, then the closure is narrow only to protect the narrow classification, release of classified documents. You're not arguing that the American public or anybody else -- excuse me, the American public has a right to classified information?

MR. SCHULZ: To the contrary, I'm arguing exactly that not to all classified information, but the constitutionality standard is different than the standard for classification for good reasons, because the classifying authority has incentive to overclassify, to protect embarrassing information and to classify for other reasons and not bear on the question of whether a criminal trial is closed.

Therefore, when Congress passed CIPA the

procedural rules for handling classified information in federal courts it made very clear that it was not, not mandating that courts must be closed when classified information is to be discussed.

Look at the procedures in CIPA because I think they're actually very instructive. What Congress did in that statute was to try to create a set of procedures so the issues surrounding the use of classified information could be handled in advance of trial to avoid surprises and to avoid graymail by defendants who threaten to use classified information to try to get the government to back down or cut a plea deal. It sets a series of standards for handling classified information.

Section 5 requires notice if a defendant or anybody intends to use classified information. Section 6 sets forth a series of standards where the court must, in advance of the hearing, make a determination on whether that information is relevant and necessary. If it is, then the court rules it inadmissible.

And under Section 8, Section 8 of CIPA specifically says that classified information can be admitted in the criminal proceeding without a change in its classified status. What CIPA does is place the burden on those who

should have the burden to decide the difficulty questions of that to be answered.

If the Attorney General believes, after a judge rules, that classified information is material and necessary, if the Attorney General believes that that information is so important that it should not be disclosed, he can certify to the court that that classified information should remain protected and the judge must then protect it.

But the remedy is not to go forward with a closed proceeding. The remedy is to sanction the government for refusing to allow that necessary and relevant evidence to be used in the criminal trial. The typical sanction is dismissal of the charges, but the statute also authorizes a number of other steps where the information does not go to the heart of the crime, such as instructing the jury that certain facts may be found against the government.

So the statute itself makes clear that Congress never understood that the solution to dealing with classified information at criminal trial was to close the trial. It understood that it couldn't do that because that was a constitutional right.

MJ [COL POHL]: Aren't trials closed all the time?

MR. SCHULZ: Pardon me?

MJ [COL POHL]: Aren't trials closed all the time?

MR. SCHULZ: I would beg to differ, and would argue a number of cases in our brief.

MJ [COL POHL]: Are you telling me -- are you saying that trials that aren't sometimes closed sessions dealing with classified material, that lets the defense raise the material but it's just not done in a public session, are you saying that's unconstitutional?

MR. SCHULZ: Absolutely not. I'm not saying that's never done. I'm saying the test is not whether something is classified, not even whether it's properly classified. While there has been a very interesting discussion this morning about whether the government can classify the memories and thought processes of a defendant, if the court accepts that, that does not mean records automatically can be sealed or proceedings closed to discuss that.

What it means is that the court, in a 505 process, has an obligation to make an initial determination as to whether that specific classified information is relevant and necessary. And if you decide that it is, the government has a choice to make. They can either say, fine, we'll proceed and it can be used in evidence, or they can say, no, we're going to insist on the classification. Then the burden is shifted

to the judge to decide how to deal with that.

MJ [COL POHL]: The government, after we do this and the government says, yes, it can be used, does that then -- are you saying the only time it can be used would be in open session?

MR. SCHULZ: No, I'm saying one option is it could be used.

MJ [COL POHL]: I understand that. That's not what we're talking about. We're talking about classified evidence -- I understand there is a procedure where they say we don't want this to go to defense at all. That's prong one out here. I've got that one. But the more likely scenario we're talking about here is classified evidence that the defense is going to be able to use. So the question is whether or not that that evidence is done in open court or in a closed session. And you're not telling me -- my question is you don't think there's any authority to close a session for discussion of classified evidence?

MR. SCHULZ: No, there is authority. The authority is quite clear. The court can decide that the proceeding will be closed to accept classified evidence only if it first decides it's material and necessary and then independently determines, makes factual findings that if that evidence were disclosed in

open court it would gravely damage, would cause a substantial probability of serious harm to the national security. That's a decision for the judge, not a decision based automatically on the fact that it's classified.

MJ [COL POHL]: Once the decision is made it is perfectly proper to close the court?

MR. SCHULZ: Pardon me?

MJ [COL POHL]: Once those decisions are made, it is proper to close the court when that narrow bit of evidence is discussed?

MR. SCHULZ: Yes. We think to satisfactory the First Amendment standard, there are four things a judge must determine. The heart of it is you would have to make findings that the specific information that is about to be disclosed or would be disclosed in open session is so important to national security that it overrides the public interest in an open proceeding, something courts very, very rarely do.

Then you would have to assure that whatever closure happens is as narrowly tailored as possible both in time and scope. That's the way things are intended.

We cite several cases in our brief. U.S. v. Pelton is most directly on point in the District of Maryland where they were dealing with this as a CIPA

standpoint. The District Court made clear there is nothing in the legislative history of CIPA to suggest the government may close all or part of a trial.

The point the court was making is that's not what it was intended to address. You see the penalties imposed in CIPA in Section 6 when the government says we want to keep this secret for the most part are for the court to penalize the government. They're keeping information from a public trial that should be public. There may be rare circumstances where a court concludes that that's an inappropriate sanction, but then the choice is either to do it in open court, which the court can do. If the court finds the government has not met the burden of showing this grave national security interest, notwithstanding it's classified under CIPA, the court has the power to allow it to be disclosed in the judicial proceeding. That's Section 8 and, in this proceeding, in 505(i).

Where we have a problem, just to be very clear, is when the government, when the Department of Defense was drafting the regulations for these proceedings they claim are patterned on CIPA, they put in 505(i)(2) which has no counterpart in federal law. That says if it's classified, it will be taken in a closed session. And that, we submit,

violates the constitutional obligation of this court to make that determination. We cite several cases as authority for this. The most -- directly on point probably is "The Washington Post" case in the Fourth Circuit where they were dealing specifically with classified information in a terrorism trial. And as they said there, "troubled as we are that the risk of disclosure of classified information could endanger the lives of Americans and their foreign informants, we are equally troubled by the notion that the judiciary should abdicate its decision-making responsibility to the executive branch whenever national security issues are present."

That's the problem we have here. We have the government saying we decide what's classified and then coming here with a protective order that essentially says if we say it's classified, this proceeding is closed. They don't have the right to make that decision.

MJ [COL POHL]: Don't you think one decision is the protective order of how classified information is handled during the discovery process and isn't there a separate and apart procedure as to whether or not a particular hearing is closed?

MR. SCHULZ: Yes, I would absolutely agree.

MJ [COL POHL]: Your argument is focusing more on the latter part than first part?

MR. SCHULZ: Yes, and the parallel to civil litigation and criminal -- there are a lot of rules of what can be done in the discovery process that don't implicate First Amendment concerns. Clearly information the defendants learn only because of the discovery process the court can restrict, put limitations on what can be said outside the court proceeding. Even there, this Pappas, In Re: Pappas, another case that we cite is a Second Circuit case dealing with CIPA which makes the same distinction in a different context. Pappas was a case where the defendant in that case, like the defendants here, had information from his prior existence that the government claimed was classified. The issue was whether he could use information he already knew in the criminal case. The court entered a protective order saying you can't disclose in the courtroom and elsewhere material that's classified unless we go through this process.

And the District Court went broader and said you can't disclose it anywhere. There was a gag order on the defendant. The Second Circuit said you overreached your bounds. CIPA allows you to control information inside the courtroom and allows you to control information you learn in

the discovery process, but you can't enter an injunction on a defendant against speaking outside of the courtroom about information that he knows independent of the judicial process. That's a prior restraint and CIPA doesn't authorize it. Again, you have to have the same First Amendment standards.

MJ [COL POHL]: If a defendant becomes -- during the pretrial process becomes aware of classified information --

MR. SCHULZ: I'm sorry. I'm having trouble hearing you.

MJ [COL POHL]: I understand. My microphone -- I keep moving it because they --

I'm trying to understand your position. Are you saying if a defendant becomes aware of classified information during the discovery process, has a right to --

MR. SCHULZ: That can absolutely be restricted under CIPA. I'm saying what the Second Circuit said in CIPA -- in the Pappas case is the authorities granted under CIPA for the court to control classified information exchanged in the discovery process and to disclose -- to control the release of classified information inside the courthouse does not give the court authority to enter a prior restraint on a defendant talking about things he knows completely outside of the litigation. That was a case where the defendant claimed he had some sort of prior involvement with the government.

MJ [COL POHL]: Does that have relevance to this case?

MR. SCHULZ: What it shows, a slightly different context, is CIPA does not abrogate any of the normal constitutional First Amendment concerns. It does not extend the power of the court to enter a prior restraint on someone about information they know. It doesn't allow the government to demand that a proceeding be closed if it doesn't meet the First Amendment standard. That's what I think is the relevance of the Pappas case here.

And the standard, we would submit, should be very strictly construed in this case for two reasons. One is the government is asking, in the protective order, that proceedings be closed in the interest of national security. I think the Supreme Court, in the various opinions that were issued in the Pentagon Papers case, made two really important points on this issue about national security and the flow of information to the public that the court should keep in mind in deciding how to handle this situation. One is the notion of security and national security is an extremely amorphous term and subject to abuse.

The second is that national security and the way in which our country executes national security largely through the executive has no constitutional check and balance

the way other powers of the government do and therefore the only meaningful check on abuse in national security is public exercise of the right to vote, democratic oversight.

And for both of those reasons, the expansive use of the term "security" and the need for the public to know what is being done to the greatest extent possible in order to have an appropriate check on abuse of executive power are reasons why claims of national security in this case should be very strictly construed.

As Justice Black said on the first point in the Pentagon Papers case, the word "security" is a broad, vague generality whose something should not be invoked to abrogate the fundamental law embodied in the First Amendment, the guarding of military and diplomatic secrets at the expense of the government provides no security for our Republic. And Justice Stewart made the point about the checks and balances stressing in that case that the only effective restraint upon executive policy and power is public knowledge.

Remember, that was the case why the government was arguing the need to keep secret information for national security purposes. The argument was made that lives would be lost, our allies would no longer do business with us. And the Supreme Court there said you haven't made a sufficient showing

to justify overriding the First Amendment protections, and we would submit that same standard should be applied before the government is allowed to close any aspect of this proceeding.

This proceeding raises fundamental issues of importance, not only to the citizens of the United States but to people around the world, about what happened, what was done, what was done to these defendants, what was done by our government in the name of security. All of that will be informed through the trial here.

And, as has been said many times by the participants here, justice is not a result, justice is a process. People are not going to understand or credibly believe justice was done if classified -- if information the government declares to be classified on the standards the government imposes automatically justifies removing the public from the proceedings, conducting things in secret.

That's why we have several specific objections to the protective order. One is its just drastic overbreadth. If you look at the sections in 7 that are still left in 13L, they cover things that quite clearly can't credibly constitute a significant threat to our national security. They basically say everything that happened to these defendants in custody is classified, yet a great deal is known and documented in our

briefs, a great deal has been released by our government.

MJ [COL POHL]: If it was released by the government, is it still classified?

MR. SCHULZ: That's my point, Judge. Classification is not the test. They may still have grounds to classify it.

MJ [COL POHL]: No, I'm just saying you said it's been released by our government.

MR. SCHULZ: Some of it has.

MJ [COL POHL]: Some has been released by the president of the United States.

MR. SCHULZ: Some of it has.

MJ [COL POHL]: Is that still classified?

MR. SCHULZ: As I read the protective order, Section 7, anything that happened to these defendants in custody remains subject to the protective order. My point is it doesn't matter whether it's been officially released. I recognize there are cases that deal with that, and there are circumstances where the government can legitimately say the fact we have not acknowledged something just because a rumor is out there allows us to keep it classified. There are good and valid reasons that we are not going to comment on it. It happens in FOIA all the time.

There is something known as the Glomar test.

We're not going to tell you if it has validity. For purposes of closing a criminal trial for the government to say a specific piece of information must be kept from the public, if it's widely known, whether or not the government officially acknowledged it, the question the court should ask is how is that going to damage national security.

MJ [COL POHL]: I understand. That may be two separate questions. The mere fact that a piece of classified evidence is widely known because it was improperly released or released without authority on a web site or through a newspaper, whatever, doesn't make it unclassified. You're not giving -- the New York Times is not a classification authority, the leaker is not a classification authority, so even if the whole world gets it does that mean therefore it becomes unclassified?

MR. SCHULZ: No, Judge. CIPA has that provision. CIPA says in Section 8 when there is classified information and the judge determines can be admitted -- as does the discussion in 505(i), the introduction of the classified evidence during the trial does not affect the classified status.

MJ [COL POHL]: That's my point. Earlier you were saying somehow if it is common knowledge because it's been in the newspapers and on the internet, whatever, therefore that

somehow implicates it's no longer classified.

MR. SCHULZ: Let me clarify that. I think it's a critical distinction. My point is the fact that it's common knowledge must necessarily affect the court's determination of whether discussion of that fact in the courtroom is likely to have a substantial impact on our national security. It's irrelevant to the First Amendment test, largely irrelevant --

MJ [COL POHL]: We're talking about the closure issue.

MR. SCHULZ: The closure. We're not so concerned about procedures in place to deal with discovery, we're talking about paragraphs 40 and 41 to close proceedings and the use of the 40-second switch, because we submit that violates the First Amendment unless whoever is exercising that 40 second -- the right to seal the courtroom, has essentially a guide from the court of those facts which the court has determined can legitimately be kept from the public. The court has to make findings about that. Otherwise, you're arbitrarily closing proceedings. We agree the 40-second delay can be less restrictive than closing.

MJ [COL POHL]: The 40-second delay is designed so that if information is inadvertently disclosed. Before it is disseminated there is an opportunity to consider whether it is classified and whether it should be disclosed or not. It is a

device for unexpected disclosure. Do you believe that somehow is a -- by definition, if it was an expected disclosure with a 505 procedure?

MR. SCHULZ: There are two points I would make there. I don't disagree with the premise you are saying, it is less restrictive in terms of other devices that might be used to protect information that can be protected. I would underscore the use of that should be limited to those facts which the court has determined satisfy the constitutional standard. The test is not classified information. The test is I made findings that the government has come forward and said here's facts, I have no idea what they be, X, Y, Z, not publicly known, but if discussed in the courtroom will have a significant impact on the national security and here's why and convince you that's the case.

MJ [COL POHL]: I fail to see how this impacts -- substantial impact on the ability to observe the proceedings. All the 40-second delay does is if something comes up unexpected, because by definition it was classified material that was going to be released, or discussed, we would have notice of it.

If it is unexpected, we don't know what it is. It gives the judge an opportunity to consider, A, is it

classified and, B, make that closure decision under the rule. The answer is it should not be classified, then -- I don't see it as -- I think it is an abundance of caution that if something were to come up -- once it's said and I would make a determination that it should not go out and it already went out, it's hard to undo that.

MR. SCHULZ: I can understand that in a purely unexpected situation. I would submit there probably is large category of information which the defendants or others could document which is currently classified which could not possibly satisfactory the constitutional standard and they should be entitled -- the public should be entitled for the judge to review that and make some determination of what can be the subject of an exclusion and what can't. It should not be left to a whim as they go forward.

MJ [COL POHL]: We're talking about closure of the courtroom. In the rules, 806(b)(2)(B)(i), it talks about this scenario. I think you may disagree with this but I want to get your -- the standard to close it on a national security issue. Protect information, the disclosure of which could reasonably be expected to damage national security including intelligence or law enforcement sources, methods or activities. Is it your view that standard is consistent with

the constitutional standard or is that a lower standard that you think a higher one -- you used other terms earlier.

MR. SCHULZ: It is our position that that standard is the standard in 505(i)(2) about classified information automatically being sealed violates the constitutional standard. I think that the Press-Enterprise II, the 1986 case that we cited in our brief, the Supreme Court is very clear about that. That was a case where a criminal trial, a preliminary proceeding to a criminal trial in California was closed pursuant to a state statute like the Military Commissions Act, a statute that specifically authorized a magistrate to close preliminary proceedings on a finding that open proceedings would likely damage the defendant's fair trial rights.

And what the Supreme Court said in that case is that the reasonable likelihood standard which is in the Military Commissions Act and the regulation is insufficiently protective of the public's right to attend and observe criminal proceedings. It is so important. The standard they articulated is there must be a finding of a substantial probability of harm. So we would submit that's the standard.

MJ [COL POHL]: Do you analogize from that case, dealing with protecting the defendant's fair trial rights, it's the

same standard that should be applied to disclosure of national security information?

MR. SCHULZ: I would for some of the reasons I mentioned earlier. If you read that opinion, and there are several concurrences, but in fact three of the judges would have gone so far as to say that you could never close a criminal proceeding to protect fair trial rights. What was motivating the court was the sort of claim when a defendant comes in and says there's so much publicity I can't get a fair trial, they said that's very amorphous, difficult to prove, and if we don't have a high standard, judges will err toward closing proceedings.

I think the same thing can be said toward national security that's the thrust of what Justices Stewart and Black said in the Pentagon Papers case because it is an amorphous term. There could be circumstances with national security where the potential harm is so severe. And of course the court should take that into account. But our fundamental point is it's a judicial determination that must be made before a courtroom can be closed and that as a country under the Constitution we take the guarantee of open trials very seriously. So seriously that when Congress passed CIPA, it said in typical sanction when the government won't let

classified information into a proceeding because they have the right to do that under CIPA, is to throw charges out, not to hold a secret trial because we don't do that.

MJ [COL POHL]: You keep doing this back and forth. Isn't the issue if information comes in that the government doesn't mind -- the government can object to the use of information going to the defense and you're talking about the remedies, you're talking about, but once the government lets the defense have that information, does the analysis simply change -- "simple" may not be the right word, but whether this information can be discussed in open or closed court?

MR. SCHULZ: That's not the point. The question is not whether the government gives it to them. There are procedures for that, in discovery. The critical moment comes when a defendant says, We want to use this in a court document or in an open proceeding. Under CIPA, there are procedures set up to require that to be brought to the court first. And when the court first makes a decision of is this material relevant and necessary, if the court says it is, then the burden shifts back to the government. The government has a choice it can make. At that point it can say, okay, we're going to -- the first they can do is say we have alternative ways.

MJ [COL POHL]: What if they say you can use it? Now

we're just talking about using in open or closed court?

MR. SCHULZ: The government has an opportunity to say we have material --

MJ [COL POHL]: We're over the hump.

MR. SCHULZ: It falls to you. First the government has to notify the court that the material should not -- essentially that they're standing on the classification.

MJ [COL POHL]: We're moving on. I'm saying classified material relevant and necessary to the defense, defense wants to use it, and under the rule it seems the decision is whether or not it can be used in open or closed court.

MR. SCHULZ: That is the rule under 505(i)(2). That's the rule that's unconstitutional. Under CIPA, what happens at that point is the judge has to make determinations about what the appropriate thing to do is. It can be throw charges out, find certain facts against the government so the information is no longer necessary, or, in some limited circumstances, it can be to say I'm going to allow it to be used and I'm going to close the proceeding because the constitutional standard can be met. Pelton is an example of that. Pelton explains that the classification alone is not the determination and it allowed, I think it was an audiotape, a five-minute tape, a videotape to be used and shown to the jury, played to the jury

but not played on the loudspeaker in open court.

And they were very careful about saying that could be permitted because it was such a small piece of the trial, a five-day trial, only five minutes of evidence. A redacted transcript was made available. But they cautioned that even in that circumstance if it had been more significant evidence they're not sure that would be the appropriate remedy. And it comes back to we don't have secret proceedings.

Can you imagine a criminal trial where a defendant gets on the stand to defend himself, to offer an explanation to justify his crime, none of it gets disclosed to the public, no one is going to accept the outcome of that proceeding for good reason. That's why we have constitutional right of access and that's why closed proceedings are the exception, extremely rare, and only can be made where the judge makes a judicial finding the standard has been met. And we don't believe the protective order satisfies any of those criteria. Thank you, Judge.

MJ [COL POHL]: Thank you, Mr. Schulz.

MS. SHAMSI: Good afternoon, Your Honor. My name is Hina Shamsi. I'm here on behalf of the American Civil Liberties Union.

I'd like to begin by thanking you for hearing our

arguments in support of the public's right to access these Commission's proceedings.

Your Honor, everyday courts around our country deal with classified information without the need to built a censorship chamber. Courts deal with hundreds of sensitive national security and terrorism cases without the need to build a soundproof wall between the courtroom and the American public.

No other American courtroom has a government official sitting in the corner with a finger on a censor button. The reason this courtroom was built, the reason for the censorship regime that the government seeks to impose is the government wants to ensure that the American public will never hear the defendants' accounts of the torture, rendition and black site detaining to which the CIA subjected them.

We've extensively laid out in our filings why the American public has a constitutional right to hear all of defendants' testimony in this, the most important terrorism prosecution of our time, and a case that could result in the death penalty. Anything the government seeks to put in the way of the public's right of access must meet the First Amendment's stringent, strict scrutiny stands.

The government has not contested the American

public has the First Amendment right here, and it would be extraordinary if it did. If it does so, I would like to ask for a couple minutes to respond at the end. What I'd really like to do is focus on a couple of areas where there is significant disagreement between our position and that of the government. If that is all right with you.

MJ [COL POHL]: Sure, go ahead.

MS. SHAMSI: The core question, first question that I'd like to talk about addresses some of the issues you've been asking about, Mr. Schulz and counsel for the defense earlier today. If I may phrase it this way: If people who are not government employees have access to classified information or national security information, does the government have a compelling interest, playing that First Amendment standard, in gagging them so the public is prevented from hearing what they have to say?

Your Honor, the Supreme Court answered this question 40 years ago in the Pentagon Papers case which Mr. Schulz referenced which I'd like to talk to you about in a bit more detail because of the guidance it significantly provides. There, the court set the standard for how courts adjudicate cases in which national security interests come up against First Amendment rights. Just as a reminder, the

information in the Pentagon Papers, the papers themselves were classified, no question in that case as here about classification.

MJ [COL POHL]: Isn't it a prior restraint case?

MS. SHAMSI: It was. The justices did decide ultimately that The New York Times and Washington Post couldn't publish information. But what's important here is what that case said about national security and First Amendment which has been followed by other courts.

MJ [COL POHL]: That's a prior restraint case.

MS. SHAMSI: Part of what's going on here, Your Honor, is a form of prior restraint.

MJ [COL POHL]: How so?

MS. SHAMSI: Because what the protective order the government seeks to do, specifically Section 7, seeks to prevent the defendants -- here's the narrow issue we're before you on -- seeks to prevent the defendants from talking and the public from hearing what the defendants experienced outside of this courtroom proceeding.

MJ [COL POHL]: But that protective order addresses the pretrial discovery period, it does not -- it is not the end of the inquiry what can be said in court.

MS. SHAMSI: No, Your Honor, I'm afraid I don't read it

that way. Perhaps we can talk about it.

MJ [COL POHL]: The whole issue that comes up is whether the court is closed or not.

MS. SHAMSI: That's exactly what the protective order seeks to do based on the classified information in Section 7, Sections 40, 41 and 42 provide you with the standards the government proposes for closing these proceedings.

MJ [COL POHL]: Are they inconsistent with the standards in rule and statute?

MS. SHAMSI: The standards in the statute, and this is why it is important to talk about Pentagon Papers. If I may, the standard in the statute is inconsistent with what the Constitution requires. We've set out for you in our papers ways for you to read the MCA in order to avoid raising the constitutional issues, but you can only do that if you apply the constitutional standard, which is whether there is a compelling interest, a substantial likelihood of harm being done.

What the Supreme Court said in Pentagon Papers -- and here's part of what is analogous there -- in that case, the documents concerned internal government decision making about what led the nation into The Vietnam War and the information included disclosures about or potential

disclosures about cooperation with allies, foreign allies, it included how the executive branch conducted its national defense operations and included information that, as the justices in the case recognized, showed that the American government had deceived the American people.

In that case, the crucial point is that the solicitor general of the United States stood up and told the court that grave and irreparable damage would occur if the Pentagon Papers were disclosed. And the justices reviewed that information, including information the government said would be the most sensitive and destructive, and they didn't just review the affidavits from the government, they acknowledged that disclosures would harm national security. And Justice White, joined by Justice Stewart, said he was confident that disclosure would cause substantial damage to public interests, but the Court did not defer to the government's assertion of classification or harm.

What's significant is that the six justices found that the government -- that the government had not satisfied the high constitutional standard that must be met before the courts will permit censorship of any kind. The government has to show a compelling interest that outweighs the importance that our society places on a democratic system with an

informed public. And the court refused to permit the government from preventing the public dissemination of information that was concededly classified.

The -- another point that is instructive here was in Justice Brennans' concurrence when he talked about what the narrow pragmatic category of cases would be in which the kind of temporary censorship might be justified and he said that only when our nation is at war the government might be able to prevent the publication of details about troop movements. Even then he said conclusory government statements would not suffice and only government allegation and proof that publication must inevitably directly and immediately cause the occurrence of an event kindred to imperiling the safety of transport would justify even temporary censorship.

That's the kind of emphasis and concern that the Supreme Court said must be taken into account when considering whether First Amendment rights will be restricted. This is a stronger case, in many ways, than Pentagon Papers, because it involves an ongoing death-penalty prosecution in, as I said, the most important terrorism prosecution of our time, one in which the government -- the public and the government has an overwhelming interest.

Your Honor, just as the public has a right to know

and to hear the government's case against the defendants, it has a right to hear defendants' testimony. And when you consider the government's security-based arguments, the court's reasoning in Pentagon Papers should inform you, guide you, and instruct you. Because as the court said there, the greater the threat to our nation, the more imperative the need to preserve First Amendment rights so the public is able to engage in free debate about how the government responds to national security threats.

And we don't -- the public has an overwhelming right here, and I just want to briefly lay out where its overwhelming interest lies. First, in the defendants' testimony on their own terms to assess, for example, whether there was voluntariness to assess, if this trial goes to a guilt phase, whether the punishment is justified.

Second, the government's conduct with respect to defendants and the lawfulness of the government's actions with respect to the defendants is the topic of a significant public debate that centers on this case. Closing off the courtroom from discussion from the people to whom the government's conduct happened would prevent the government -- the public's significant interest in these issues from being heard.

And in addition, finally, the public has an

interest, independent of all of that, in the fairness and legitimacy of these proceedings.

The Supreme Court's decision in Press Enterprise II and Richmond Newspaper tells you that public administration in the fair administration of justice. Your Honor, you know better than most that there is public debate here and abroad about the fairness and legitimacy of these proceedings and that question isn't going to finally be resolved by how you decide here, but it will be impacted if the government's proposal is accepted.

One other way in which this case differs from Pentagon Papers and why it's a stronger case, in Pentagon Papers the classified information, secret information was taken from the government. Here the government voluntarily provided it to the defendants. The government tells you that the defendants weren't authorized to receive that information. I will come back to that when I address the classification issue, if I may.

But here, what's important is when the government chose to provide what it says is classified information to the defendants, it cannot now argue that it has a compelling interest in censoring it in the public.

None of the justifications that the government has

offered, at least publicly, meet the compelling interest standard. The information about the CIA's rendition, detention interrogation program is already in the public sphere. It is, as you pointed out, in the public sphere as a result of official government disclosures about what the so-called enhanced interrogation methods were and how they were actually used, the fact that they went beyond what was actually authorized, as well as government-sanctioned disclosures by the defendant to the ICRC.

There is an ICRC report that sets out accounts from the defendants about what was done to them where, and the consequences of it.

There's also widely disseminated investigative reporting by the press, human rights organizations and other organizations including the United Nations and European Council that contain copious details about what the CIA does, and did.

Our brief lays all of that information out. But what's important is we know such controversial information as the fact that the CIA waterboarded Mr. Mohammad 183 times. We know that the CIA used beatings, forced nudity, threats against family members, including children, stress positions, deprivation of food. If that information is already out there

in the public sphere the government does not have a compelling interest in preventing the public from hearing defendants' testimony about it in this courtroom.

That's one of the other lessons of Pentagon Papers, where Justices Douglas and Black said in their concurrence when there has been wide distribution of the information the government seeks to censor then a substantial part of the damage it fears has already occurred. And the government here has not actually shown, at least publicly, that the information that is already publicly available has resulted in any harm.

MJ [COL POHL]: Do they have that burden?

MS. SHAMSI: They absolutely have that burden.

MJ [COL POHL]: Again, I keep getting confused here, which is easy for me. The protective order talks about disclosure and handling of classified information at the discovery phase. It is a different procedure altogether -- well, not altogether, but it's a different procedure whether or not a courtroom is closed.

MS. SHAMSI: Actually, Your Honor, if I turn to the proposed protective order --

MJ [COL POHL]: Which version are you looking at?

MS. SHAMSI: I'm looking at the one in 13-L, or perhaps

I should say Lima.

MJ [COL POHL]: That's good.

MS. SHAMSI: Paragraph 40 refers to the closure of any proceeding. There is no restriction in that protective order to what I think would be the narrow category of proceedings in which closure would be permitted and uncontested, which is 505 hearings. The First Amendment right of the public applies throughout the pretrial process as well as through trial itself. We knowledge that CIPA --

MJ [COL POHL]: Again, and this is what I come back to, is the provision in paragraph 40 refers to a second step. What I'm saying is closure of the courtroom is a different concept than protecting private or classified information during the discovery phase. The question, I don't know about your co-counsel, but of your colleague is what the standard is and you disagreed what the standard is in the rule and the standard you guys are promulgating as dealing with closure opposed to -- so I'm seeing this protective order as regulating discovery. And it is certainly not any type of final decision of -- for example, it says information which could reasonably be expected to damage national security. Again, that's a standard that your colleague believes is too low and I suspect you do too, but that's straight out of the

rule that talks about closure of the courtroom during the trial itself or during evidentiary hearing.

Most of this protective order just addresses, like I think all of it is, it is a proposed protective order, does not mean it won't be changed, deals with how defense is supposed to deal with classified information at the pretrial stage. Does not at any point in time -- let me put it this way: I don't treat it as the end of the inquiry of whether or not information can be disclosed in court open or closed court, I say that is separate from court altogether. That's what I'm saying.

I understand your point. When you talk about public right to know and things like that, I think that is more addressed at the evidentiary stage when there is a preliminary evidentiary issue, trial of the merits or sentencing, which is a different issue -- my view, all of the protective order is designed to address, which is pretrial discovery handling of classified evidence.

MS. SHAMSI: Your Honor, if it were true that the protective order applied solely to the kinds of CIPA-type proceedings that are permitted to be conducted in enclosed ex parte -- not ex parte, but in camera sessions, then we would have less of a problem with this. That's not what I read this

protective order to do and not, it seems to me, how the government more importantly reads this protective order to do.

When we objected to the government's proposed protective order, both the original one and this one, we objected on the grounds that the government cannot close -- cannot seek to close and you should not order and we don't believe constitutionally can order closure of the courtroom to defendant's testimony based on what is in paragraph 7's definition of classified information.

The government hasn't come back in their responses to our brief or to anything else --

MJ [COL POHL]: I don't mean to belabor the point. You do not take issue there is a procedure under CIPA, and frankly under 505(h), of where we have a session without the accused to discuss whether classified information is necessary and relevant and how it should be handled and that's a closed session.

MS. SHAMSI: I don't take issue, we don't take issue with that narrow category.

MJ [COL POHL]: That closed session is designed whether or not the government met its burden to close the session itself of when the evidence comes in.

MS. SHAMSI: We don't take issue with the process as

laid out in 505. What we do take issue with here is what the outcome of that process will be in terms of closure of the courtroom potentially or limitations on defendants' testimony based on the classification authority that the government claims. I'd like to address that, but what I'd also like to say -- to note that it doesn't seem to us that the government reads the protective order so narrowly.

And, in fact, the most obvious evidence that the government doesn't read the protective order so narrowly is that the 40-second rule is being applied through all stages of these proceedings, proceedings at which the public's constitutional rights apply. Those constitutional rights aren't only at the trial itself --

MJ [COL POHL]: Are you saying the 40-second thing abrogates the public's right to these proceedings?

MS. SHAMSI: The 40-second rule implements the regime we object to. And the regime we object to is based upon an improper assertion of what the public can be restricted from hearing. If I could address why that is improper, and I think that will get back to also the issues that you're talking about.

MJ [COL POHL]: Hold on for a second, please.

Mr. Nevin, you indicated we wanted to finish close

to 1600. It would -- actually, you raised it. Let me address it to somebody.

Mr. Harrington and Ms. Bormann, the issue was it's too long a day for your clients, so again, I hate interrupting counsel but I said that's the rule I would follow, unless you have no objection to her completing her argument.

Okay, Mr. Harrington?

DC [MR. HARRINGTON]: No problem, judge.

MJ [COL POHL]: Go ahead, ma'am.

MS. SHAMSI: So, Your Honor, the protective order that the government seeks applies to all stages of the proceeding. It isn't simply about the 505 hearings themselves, because once put in place, as I understand it, because there's nothing else public on the docket about this, this is the only authority that would apply as to what the government censor can actually prevent the public from hearing about what happens in the courtroom.

MJ [COL POHL]: You lost me there. When you say the government censor, who are you referring to?

MS. SHAMSI: The official. I understand it's a judicial CSO officer.

MJ [COL POHL]: Just understand the role here, as I explained earlier, that if something comes out that is

classified, okay, and we can't know that ahead of time, otherwise we have a 505 notice, then we stop. We stop, why is it classified, then the closure rules apply, and I determine whether to be closed or not. If the answer is no, we go forward and put the information out. If the answer is no, then we go ahead and follow the normal rules.

In the sense you say censor, we stop to make sure, but that's designed to protect the inadvertent disclosure of classified information. You think the 40-second delay is overly burdensome on the public's right to hear these proceedings?

MS. SHAMSI: The 40-second delay sounds seductively reasonable, right? It's just 40 seconds and it's going to prevent classified information from perhaps being blurted out, but that's not how the 40-second delay has to be judged.

The justification for the 40-second delay must meet the constitutional standard for whether there is a compelling interest for it, and that's what our problem is.

We understand, and you know we would prefer not to have the 40-second delay because it's not justified, for reasons I'll get into, but we would certainly prefer that to a complete closure of the courtroom. But what the 40-econd delay implements is what is problematic.

The 40-second delay would allow the testimony to be closed forever, information to be redacted from transcripts forever, of defendant's testimony about the experiences, thoughts and memories of the CIA's detention, rendition, and interrogation program.

MJ [COL POHL]: That's just -- either you or I have a complete misunderstanding. By the time there's evidence taken in a classified nature from a defendant or anybody else, we would do the normal 505 thing. The 40-second delay isn't designed for that.

Now, if during testimony a decision has been made, it can be made in open court. During that testimony the witness, whoever that witness is deviates into classified material, then we will do the 40-second delay -- or the plan is, the suggestion is to do the 40-second delay to make a determination whether that should be closed or not. If the answer is yes, based on the standards, that's the answer; if the answer is no, then it's broadcast to the world.

We can't run a system -- ma'am?

[Inaudible].

MJ [COL POHL]: Let's do this. I suspect you have more to do and I also want to hear the government on this same issue. What we'll do now is we will recess for the day rather

than have people -- I want to respect the right for prayer. Then, Ms. Shamsi, you can pick up tomorrow.

The Commission is in recess until 0900.

[The Military Commission recessed at 1608, 16 October 2012.]