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1 [The Military Commission was called to order at 0900,  
2 17 October 2012.]

3 MJ [COL POHL]: Please be seated.

4 Good morning. This Commission is called to order.  
5 All defense counsel appear to be present that were present  
6 when the court recessed. Trial counsel, have you made any  
7 change since the court recessed?

8 CP [BG MARTINS]: Your Honor, all members of the  
9 prosecution are present, with the addition of Major McGovern,  
10 who has returned.

11 MJ [COL POHL]: Thank you. I would note that the only  
12 accused present is Mr. Ali Abdul Aziz Ali. The other four are  
13 currently absent.

14 Mr. Swann, I assume you wish to go through the  
15 same procedure today that we went through yesterday for the  
16 absent accused?

17 TC [MR. SWANN]: Yes, Your Honor.

18 MJ [COL POHL]: Proceed.

19 Commander? [Inaudible]

20 DC [CDR RUIZ]: [No audio] last night -- hope to file it  
21 tonight and have it heard at some point this week.

22 [The Witness was sworn]

23 TC [MR. SWANN]: Be seated, please.

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1 DIRECT EXAMINATION

2 QUESTIONS BY TC [MR. SWANN]:

3 Q. Now, you are part of the Staff Judge Advocate's  
4 staff here at Guantanamo Bay, Cuba, is that correct?

5 A. Yes, I am.

6 Q. All right. Did you have occasion to wake the  
7 accused this morning?

8 A. Yes, I did.

9 Q. Now I've handed you what's been marked as  
10 Appellate Exhibit 99. Let's go through these items one by  
11 one.

12 LDC [CDR RUIZ]: If I may, I've not seen a copy of that  
13 appellate exhibit, if the prosecution might provide me a copy.

14 TC [MR. SWANN]: Your Honor, is this the process every  
15 morning, I have to give a copy to defense counsel?

16 MJ [COL POHL]: Yes.

17 TC [MR. SWANN]: All right. Thank you.

18 MJ [COL POHL]: Just to be clear, Mr. Swann, that's the  
19 practice that applies to all exhibits to both sides.

20 TC [MR. SWANN]: They may be out of order that I gave  
21 you, but let's take Walid Bin'Attash first, please.

22 A. All right.

23 Q. What time did you notify Mr. Bin'Attash this

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1 morning?

2 A. I notified him at 5:05 a.m.

3 Q. When you notified him, were there any witnesses  
4 with you at that time?

5 A. Yes, there was.

6 Q. Did you deviate from the notification that's been  
7 marked as Appellate 99?

8 A. No, I did not.

9 Q. Did the accused inform you that he did not want to  
10 attend today's session?

11 A. Yes, he did.

12 Q. And did the accused sign the document in your  
13 presence and in the presence of the witnesses?

14 A. Yes, he did.

15 Q. With respect to Mr. Bin'Attash, did he say  
16 anything else this morning regarding his presence?

17 A. He indicated that he may decide to change his mind  
18 and come this afternoon. He specifically asked with respect  
19 to paragraph 8 on the form if that was his -- if that was a  
20 correct understanding, that if he waived this morning that he  
21 could still change his mind this afternoon.

22 Q. All right. Did you indicate to him that if he  
23 decided to change his mind that he should notify the guard

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1 staff?

2 A. Yes. I told him number 8 did mean he could change  
3 his mind, and if he wanted to change his mind he should notify  
4 the guard staff and they would contact the SJA's office.

5 Q. Very well. Let's go with Mr. Ali. I'm not going  
6 to mark this form because Mr. Ali is in the court this  
7 morning. But when you notified Mr. Ali this morning, did he  
8 initially indicate that he did not want to come?

9 A. He initially indicated that he was going to waive  
10 his presence for the day.

11 Q. At some later point in time did he change his  
12 mind?

13 A. Yes, he did. I originally notified him at 5:10  
14 and at approximately 5:50 he asked to speak to me, asked if he  
15 could in fact change his mind, having signed the form. I said  
16 yes, he could, and that we would make sure he had the chance  
17 to get his belongings together to come today.

18 Q. With respect to Ramzi bin al Shibh, what time did  
19 you notify Mr. bin al Shibh?

20 A. I notified Mr. bin al Shibh at 5:15 a.m.

21 Q. Did you have a witness with you at that time?

22 A. I did.

23 Q. Did you deviate at any time from the notification

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1 that's been marked as Appellate 99?

2 A. No, I did not.

3 Q. Did the accused inform you that he did not want to  
4 attend today's session?

5 A. Yes, he did.

6 Q. Did the accused sign the form in your presence and  
7 in the presence of the witness?

8 A. Yes, he did.

9 Q. With respect to Mr. bin al Shibh, did you read the  
10 form to him in English or was it read by an interpreter in  
11 Arabic?

12 A. When I presented -- he indicated he wanted to  
13 waive. I informed him that I had to read the form in English  
14 and that I also had a copy in Arabic. He asked for blank  
15 copies of both forms, which I gave him. I then asked him if  
16 he wanted the interpreter present while reading in English.  
17 He said no, I could then proceed by reading in English, which  
18 I did.

19 Q. Next is Mustafa Ahmed Adam al Hawsawi. What time  
20 was Mr. Hawsawi notified?

21 A. 5:20.

22 Q. You notified him that he had a session today; is  
23 that correct?

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1           A.       Yes, I did. I went to his specific cell,  
2 indicated that it was October 17th, that he had a Commission  
3 hearing that began at 9:00 o'clock, and asked him whether he  
4 intended on attending, at which point he said no.

5           Q.       Did you deviate from the notification that's been  
6 marked as Appellate Exhibit 99?

7           A.       I did not.

8           Q.       Did the accused inform you that he did not want to  
9 attend today's session?

10          A.       He did.

11          Q.       When you read the form to him in English -- excuse  
12 me. An interpreter did not read the form in Arabic; is that  
13 correct?

14          A.       No. When I presented him the forms I handed him a  
15 copy of the Arabic form, indicated that I had a requirement to  
16 read it to him in English and that if he wanted the  
17 interpreter present, the interpreter could translate what I  
18 was saying in addition to reading along. He said -- he told  
19 me no interpreter, English was fine.

20          Q.       Did he indicate anything about one form being  
21 enough?

22          A.       Yes, when I -- I originally prepared the English  
23 document and filled that out and asked him to sign both the

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1 English and the Arabic. He declined to sign the English but  
2 instead filled out the Arabic version in his own handwriting  
3 and indicated -- said that basically this one form was enough,  
4 he didn't need to sign the English as well.

5 Q. Did he say that in English?

6 A. Yes, he did.

7 Q. When you've talked to him in the past in  
8 English ----

9 LDC [CDR RUIZ]: Objection, Your Honor, relevance.

10 TC [MR. SWANN]: It is relevant, Your Honor, to the  
11 issue of whether he understands the reading of the form. This  
12 morning she read the form to him in English. There's been  
13 much dispute about whether he speaks English.

14 MJ [COL POHL]: The objection's overruled. Understand  
15 I'm only considering it for the limited purpose of whether or  
16 not the accused understood his rights to come and voluntarily  
17 waived said right. Go ahead.

18 QUESTIONS BY TC [MR. SWANN]:

19 Q. In the past, when you have asked him questions in  
20 English -- and I don't want to know what that's about -- has  
21 he understood and responded to you in an appropriate manner in  
22 English?

23 A. Yes, he has.

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1 Q. With respect to Khalid Shaikh Mohammad, what time  
2 was he notified?

3 A. He was originally notified at 5 a.m. at which  
4 point he indicated that he planned on attending today's  
5 session; therefore, I did not go over a rights, statement of  
6 understanding with him at that time.

7 Q. And did he come to the facility, this facility  
8 this morning?

9 A. Yes, he did.

10 Q. At what point in time were you informed that he  
11 did not want to come into the courtroom?

12 A. I was notified at approximately 8:50.

13 Q. What did you do at that time?

14 A. I went back to the holding cell with the forms,  
15 asked -- basically asked him -- I said, "You asked to see me?"

16 He said, "Yes."

17 I said, "It's my understanding you decided to  
18 waive your appearance this morning."

19 He said, "Yes, that's true."

20 I said, "Understand I have to read the form;  
21 here's a copy in Arabic." He declined the copy in Arabic. I  
22 said, "I'm going to read this in English. Would you like an  
23 interpreter?"

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1 He said, "No, please proceed."

2 I read it in English. He then signed the English  
3 document.

4 Q. All right. Did you deviate from the form in any  
5 manner?

6 A. No, I did not.

7 Q. Did the accused inform you that he did not want to  
8 attend today's session?

9 A. That is correct.

10 Q. Did he sign the document in your presence and in  
11 the presence of any witness?

12 A. Yes, he did.

13 Q. I have nothing further, thank you.

14 MJ [COL POHL]: Any counsel for any absent accused wish  
15 to question this witness?

16 [Inaudible].

17 MJ [COL POHL]: What's the relevance of your inquiry,  
18 then?

19 LDC [MR. CONNELL]: It is about the exchange that took  
20 place when he initially signed the waiver, when the  
21 prosecution gave it to us.

22 MJ [COL POHL]: Your client is here.

23 LDC [MR. CONNELL]: Yes, Your Honor, I know that.

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1 MJ [COL POHL]: Isn't the sole issue about whether or  
2 not absent accused have voluntarily waived their presence?

3 LDC [MR. CONNELL]: Yes, Your Honor.

4 MJ [COL POHL]: I will give you some leeway, because I  
5 fail to see how there would be any relevant inquiry. But if  
6 you've got something -- if it's -- do you have any relevant  
7 inquiry about the absence of the accused when the accused is  
8 present?

9 LDC [MR. CONNELL]: Your Honor, I just ----

10 MJ [COL POHL]: Come on.

11 CROSS-EXAMINATION

12 QUESTIONS BY LDC [MR. CONNELL]:

13 Q. Good morning, ma'am.

14 A. Good morning.

15 LDC [MR. CONNELL]: Your Honor, I assume that the  
16 court's ruling about the name of the witness stands from  
17 yesterday?

18 MJ [COL POHL]: Yes.

19 Q. Your position is a Staff Judge Advocate; is that  
20 correct?

21 A. That is correct.

22 MJ [COL POHL]: Mr. Connell, what do you want to talk  
23 about with her?

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1 LDC [MR. CONNELL]: I want to talk about  
2 Mr. al-Baluchi's change of mind did not affect the process.  
3 One question we went over on Monday was this going to be back  
4 and forth and was it going to interrupt or disrupt the court  
5 by people changing their mind, and I wanted to point out the  
6 process functioned and show it functioned smoothly, even  
7 though he initially waived and then later said he wanted to  
8 come to Court.

9 MJ [COL POHL]: Has the witness already established  
10 that?

11 LDC [MR. CONNELL]: I would not say so. I have like  
12 three questions.

13 MJ [COL POHL]: Okay, go ahead.

14 CROSS-EXAMINATION CONTINUED

15 QUESTIONS BY LDC [MR. CONNELL]:

16 Q. In the -- did the fact that Mr. Baluchi initially  
17 waived his right to appear then later asked to speak to you,  
18 did that disrupt the functioning of the JTF transportation  
19 process at all?

20 A. No, because when he originally notified me that he  
21 wanted to attend the session, it was only 5:00, 5:10 in the  
22 morning. Moves weren't scheduled to begin for approximately  
23 an hour later. So when he notified me that he wished to

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1 attend, there was still adequate time for us to accomplish the  
2 move as originally scheduled.

3 Q. You were able to accommodate his wishes without  
4 disrupting the JTF process?

5 A. That's right.

6 LDC [MR. CONNELL]: Thank you, Your Honor.

7 MJ [COL POHL]: Commander Ruiz?

8 LDC [CDR RUIZ]: Yes, Your Honor.

9 CROSS-EXAMINATION

10 QUESTIONS BY LDC [CDR RUIZ]:

11 Q. Good morning, Commander.

12 A. Good morning.

13 Q. Commander, it is safe to assume you have not  
14 advised Mr. Hawsawi on complexion legal matters?

15 A. I have not advised him on complex legal matters,  
16 that is correct.

17 Q. When you have engaged with him in conversations in  
18 English in the past, you have not explained to him legal  
19 concepts at issue in this Commission. Is that correct?

20 A. No, that would not be my rule.

21 Q. When he answered to you that has not been in  
22 relation to any complex legal issues?

23 A. No, it has not.

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1 TC [MR. SWANN]: Your Honor, I have no intention of  
2 offering the waiver of Mr. Baluchi.

3 MJ [COL POHL]: As I said, when the issue came up,  
4 the -- I'm sorry, you were talking about something that I was  
5 going to -- okay. Okay. Got it. I just was going down  
6 Commander Ruiz's inquiry.

7 Understand that any testimony of this witness as  
8 far as to any accused understanding or not understanding  
9 English will be limited only to the issue before the court now  
10 and not any other potential issue that may come up at a later  
11 time.

12 LDC [CDR RUIZ]: I understand that, Your Honor. I just  
13 want to make sure the prosecution does.

14 EXAMINATION BY THE COMMISSION

15 QUESTIONS BY MJ [COL POHL]:

16 Q. Commander, which detainee indicated that he might  
17 change his mind?

18 A. It was Mr. Bin'Attash.

19 Q. Since he's already indicated he may change his  
20 mind, I want him re-notified at approximately 1130 hours to  
21 give an opportunity, if he so desires, to transport him here  
22 for the afternoon session.

23 A. Yes, sir.

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1           Q.       I understand it is their affirmative  
2 responsibility to go to the guard force, but since we are sort  
3 of on notice of him, and that only applies to him, and in the  
4 future if any detainee says he may change his mind and wants  
5 to attend the afternoon session, the same procedure?

6           A.       Yes, sir.

7           MJ [COL POHL]: Thank you, Commander. You're excused.

8                   The Commission finds that Mr. Mohammad,  
9 Mr. bin al Shibh, Mr. Bin'Attash, and Mr. Hawsawi have  
10 knowingly, freely, and voluntarily waived their presence and  
11 their right to attend this Commission hearing today.

12                   General Martins.

13           CP [BG MARTINS]: Your Honor, before moving off of  
14 Appellate 37 and the issue of the presence of the accused, we  
15 had a chance to study your ruling and, as your finding today  
16 draws from the guidance in that ruling, I want to confirm one  
17 aspect of it.

18           MJ [COL POHL]: Sure.

19           TC [BG MARTINS]: On paragraph 7, Your Honor, a fair  
20 reading of that, I believe, is that you're noting the rules  
21 that bear on the presence of the accused. I wanted to confirm  
22 that that is your considered understanding also of 949(d).  
23 You didn't list it, not that it's essential, but I wanted to

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1 confirm that 949(d) of the current Military Commissions Act  
2 and of the express phrase "shall be conducted in the presence  
3 of the accused" is in your reasoning process, because it's not  
4 in the ruling. It was the focus of my oral argument and one  
5 of our pleadings. I just want to confirm.

6 MJ [COL POHL]: General Martins, I did consider it and  
7 I'm looking at this ----

8 CP [BG MARTINS]: You note that the change with regard  
9 to the right in ----

10 MJ [COL POHL]: Would that go to 7 Bravo?

11 CP [BG MARTINS]: I'm looking at -- well, the whole  
12 paragraph 7 lists the relevant provisions but nowhere in there  
13 is the current statutory provision relating to presence, to  
14 presence.

15 MJ [COL POHL]: Perhaps -- are you looking at 7 Bravo?

16 TC [BG MARTINS]: Well, I'm looking at 7-A, B, and C  
17 because A talks about 949(d) the parallel provision to  
18 that ----

19 MJ [COL POHL]: I know. I'm just saying I'm not sure,  
20 sometimes when there's multiple drafts of a ruling, of the one  
21 that actually goes out, but I'm saying "read the one sitting  
22 in front of me." Which is my understanding of the one that  
23 went out and if it didn't I will amend it and send it out that

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1 7 Bravo starts out starts out, "Although MCA 2009 Section  
2 949(d), Delta, states the accused shall be present at all  
3 sessions" ----

4 CP [BG MARTINS]: The version I've got does not have  
5 that in it. It does say 949(d).

6 MJ [COL POHL]: Yes, sir. I will make sure there is a  
7 corrected copy in the --

8 CP [BG MARTINS]: Thank you, sir.

9 MJ [COL POHL]: That being said, let's pick up where we  
10 left off from yesterday, and I believe the attorney from the  
11 ACLU was next in line. Is she present?

12 CP [BG MARTINS]: Your Honor, she is in the gallery. I  
13 just motioned for her to come.

14 MJ [COL POHL]: I got it. I got it.

15 Ma'am? Go ahead.

16 MS. SHAMSI: Thank you. Good morning, Your Honor.

17 Your Honor, I have just two points I'd like to  
18 make this morning to finish up from yesterday. One is to  
19 clarify any confusion I might have left you with about the  
20 scope of the protective order and why we think it applies now  
21 and to all stages of the proceeding; and, two, to address  
22 briefly why we don't believe that Section 7 of the protective  
23 order meets the First Amendment's compelling interest

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1 standard.

2           Your Honor, with respect to the scope of the  
3 protective order, the face of paragraphs 40, 41, and 42 apply  
4 to any proceeding and to all stages of the proceeding. And,  
5 the government, too, when we objected to the protective order  
6 because of its scope and because we understood it to provide  
7 to closure provisions at all stages, the government, in its  
8 response, didn't disagree with us.

9           It does not appear anyone thinks we misunderstood  
10 what the government's intent was with respect to the proposed  
11 protective order. It also applied at the arraignment.  
12 Paragraph 42, I believe, is what allowed the sound to be cut  
13 off when counsel for one of the defendants mentioned the word  
14 "torture." And in that sense, the protective order acted as a  
15 classic prior restraint as we discussed yesterday, Your Honor,  
16 in that the government was restricting speech before it was  
17 made public, although afterwards the fully unredacted  
18 transcript was made available.

19           And the 40-second rule, as I understand it,  
20 Your Honor, has been in place throughout these proceedings  
21 under paragraph 42. And the reason that I said yesterday that  
22 it is the tool that implements the classification rule and the  
23 censorship regime is that it permits the closure of testimony.

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1 And what we are challenging is the standards under which that  
2 closure can take place.

3 And we believe, and I just want to reiterate what  
4 I said yesterday, that you must make it clear, Your Honor,  
5 that the compelling-interest standard controls when  
6 information may be withheld and the proceedings closed from  
7 the public under the 40-second rule and the protective order  
8 in general; and that you must provide the constitutionally  
9 required guidance.

10 MJ [COL POHL]: Hold, please.

11 General Martins?

12 CP [BG MARTINS]: I apologize to counsel for  
13 interrupting. We received a note as of 9:26 that Khalid  
14 Shaikh Mohammad requested to be brought back in during the  
15 recess. I wanted to bring that to Your Honor's attention.

16 MJ [COL POHL]: Okay. We'll take our normal 10:15ish  
17 recess. Unless, Mr. Nevin, you want to take a recess now and  
18 discuss this with your client? Okay.

19 Go ahead, ma'am.

20 MS. SHAMSI: So, Your Honor, I was saying that we're  
21 asking you to provide the constitutionally required guidance  
22 about when the 40-second rule may be used to close the  
23 proceedings from the public.

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1 MJ [COL POHL]: How do I do that ahead of time?

2 MS. SHAMSI: Your Honor, we don't think you can do this  
3 so categorically ahead of time. What you're required to do,  
4 what the cases instruct from the Supreme Court, is that you  
5 must make a determination that the justifications that the  
6 government offers must be meeting the -- must meet the  
7 compelling interests test, i.e., there must be a substantial  
8 likelihood of the harm that the government claims and you must  
9 make that determination on a fact-by-fact basis.

10 MJ [COL POHL]: But my point is -- I'm not disagreeing  
11 with that, but before I can make said determination, I have to  
12 know what the evidence is. And I don't know what the evidence  
13 is until it's articulated by somebody. And then I understand  
14 the standard now, again ----

15 MS. SHAMSI: Right.

16 MJ [COL POHL]: ---- there may be disagreement among  
17 some of what the actual standard is, that's a separate issue,  
18 but there clearly is a standard to close the proceedings, but  
19 I only can apply that standard if I know what the testimony or  
20 evidence is that the government's seeking to close it on.

21 And if I don't have -- if it comes out  
22 inadvertently or not -- without a 505 notice, how can I close  
23 the court and make those findings or not close the court until

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1 I hear the evidence, and the evidence is already out there  
2 with the 40-second delay, then what I need is there -- why  
3 should I close the court, even if it was the most damaging  
4 information in the world? I need to hear the evidence, make a  
5 finding, like you said.

6 I don't disagree with that in deciding whether  
7 that evidence can be repeated in open court or stays in a  
8 closed-court session.

9 MS. SHAMSI: I think that's some of the course of the  
10 confusion we had yesterday, how do the CIPA provisions of the  
11 MCA relate to the question of closure. There is the entire  
12 process laid out within CIPA about how you are able to provide  
13 and oversee a system in which you are able to determine which  
14 information comes in.

15 What that doesn't answer the question of, and what  
16 we're talking about now, is that you must make findings of  
17 fact under the constitutional standard, if it turns out that  
18 classified information is going to be revealed.

19 Our problem here is not with the CIPA provisions  
20 at all. Our problem here is that the government is asking  
21 you, in advance, to make categorical, unjustified  
22 determinations about what closure will be and the normal  
23 process, as it occurs in other proceedings, is that when

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1 classified information is intended to be introduced, you  
2 follow the procedure that -- the CIPA rules.

3           What no other court has ever ruled is that the  
4 kinds of information that the government seeks to say is  
5 classified and must categorically be kept out at all stages of  
6 the proceeding, that's simply impermissible.

7           MJ [COL POHL]: Okay. I understand this is a  
8 government-proposed order. So how they think it covers and  
9 you think it covers and defense think it covers may not be  
10 what they think it covers. Understand that?

11          MS. SHAMSI: Absolutely.

12          MJ [COL POHL]: As I said yesterday, what comes out in  
13 court is a different issue than what I envision the initial  
14 protective order is. Now, there may be parts of the  
15 protective order that seem to apply to -- one can read them as  
16 you're reading them to apply to prospective procedures of  
17 what's going to come in or not come in. However, those are  
18 governed by different rules. And if there is an apparent  
19 conflict between those rules and the protective order as  
20 interpreted by somebody else, my responsibility as the judge,  
21 since I'm signing the order anyway, if I sign the order, is to  
22 follow the appropriate rules at the appropriate stage of the  
23 trial.

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1           My view is, at the end of the day, any protective  
2 order does not necessarily trump -- rephrase that, would not  
3 trump the normal CIPA rules or their corresponding 505 rules  
4 that are in the Military Commission Rules of Evidence.

5           MS. SHAMSI: I appreciate that, Your Honor. And if that  
6 is the view you have of what this protective order should do,  
7 then the protective order would require substantial revision.  
8 And that's part of what I would like to explain what our view  
9 is about why it requires those substantial revisions.

10           Because if, Your Honor, the protective order was  
11 about, you know applying the regular CIPA provisions, we  
12 probably wouldn't be here before you today. That's not what  
13 we think that this protective order does.

14           MJ [COL POHL]: You think this deviates from similar  
15 protective orders in federal court?

16           MS. SHAMSI: Absolutely. I was listening carefully when  
17 government's counsel said yesterday that this protective order  
18 was almost verbatim what the government has offered in other  
19 proceedings, and the word "almost" in that sentence was doing  
20 a lot of work, because there is no other protective order that  
21 we have ever seen that does what this protective order does.  
22 In the bin Laden prosecution, in the Hawsawi prosecution, the  
23 Moussaoui prosecution, those provisions did not contain the

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1 kind of protective orders here.

2           What those protective orders did not contain are  
3 paragraphs in Section 7 that relate to the overbroad  
4 categories of what the government claims is classified with  
5 respect to defendant's thoughts, memories, and experiences of  
6 their own torture, rendition and detention.

7           Those protective orders also do not contain the  
8 closure provisions in this protective order, 40, 41, and 42,  
9 and those protective orders did not contain provisions that  
10 because of Section 7 would act as a prior restraint gag rule  
11 on defendants' testimony.

12           The one protective order, Your Honor, that is  
13 somewhat similar to the one the government proposes to you  
14 today is the one in the Ghailani case. That protective order  
15 includes paragraphs that are similar to the government's  
16 proposed definition of classified information. I'll come back  
17 to that.

18           That protective order -- and I have a copy if you  
19 don't have it handy that I'd be happy to hand it up to you --  
20 but the Ghailani protective order in federal court does not  
21 contain closure provisions and does not contain a 40-second  
22 rule that presumptively in advance and categorically would  
23 prevent the public from hearing testimony in the courtroom.

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1           Now, the Ghailani protective order with respect to  
2 Section 7, it was not actually challenged on First Amendment  
3 grounds and so no court has actually upheld that protective  
4 order in the face of a First Amendment challenge. And I think  
5 one of the reasons may have been what I said stands on its own  
6 as to why that protective order cannot be precedent.

7           But in the Ghailani case, the government took the  
8 death penalty off the table and Mr. Ghailani never had  
9 occasion to testify, so the kinds of concerns that we are  
10 raising here before you simply did not arise in that case.

11           And we are aware, Your Honor, of no other  
12 protective order that is as radical as what the government is  
13 asking you to judicially bless here, with that overbroad  
14 definition of "classified" as well as provisions specifically  
15 ex ante providing for closure of the proceedings.

16           Your Honor, if you have questions about the  
17 Ghailani protective order, I would be happy to answer that or  
18 I can move on to other issues I'd like to address.

19           MJ [COL POHL]: No. Go ahead, please.

20           MS. SHAMSI: One of the things we were going back and  
21 forth on yesterday that I want to be clear about is the effect  
22 of classification, what that means. The government's position  
23 is that when information is classified, that's the end of the

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1 inquiry, and that's simply not the case. Classification by  
2 itself is not determinative of the First Amendment inquiry; it  
3 is one facet of it.

4           The government's arguments about why information  
5 is classified and what harm would result from disclosure in  
6 open court is part of what you should consider to determine  
7 whether or not the compelling interest standard has been met.  
8 But courts are uniform in not saying that classification  
9 itself is determinative of the First Amendment inquiry.

10           And one other point here, Your Honor. While it is  
11 true that a measure of deference is given to the government's  
12 factual determinations on harm, the case law is also clear  
13 that judicial deference does not mean judicial acquiescence.  
14 And on legal issues, some of which are before you in our  
15 motion, you owe the government no deference.

16           On factual issues you may owe the government some  
17 deference, but for the reasons I laid out yesterday when I was  
18 talking about harm and why the compelling interest standard is  
19 not met, we don't believe that the government's justifications  
20 arise to the level of a compelling interest.

21           Your Honor, let me turn to paragraph 7 of the  
22 protective order, with which we have very specific concerns.  
23 That is because the protective order allows the categorical

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1 suppression of information that has largely been made public  
2 and that is not justified when it is applied to defendants'  
3 thoughts and experiences. Let me take the public aspect of it  
4 first and try and make it very, very concrete about how we  
5 think these issues might arise in this context.

6           So for example, if the issue were to be whether or  
7 not a statement made by one of the defendants is voluntary,  
8 the issue would come up. You might have before you an  
9 assertion from Mr. Mohammad, for example, that he was  
10 waterboarded 183 times. Now in a May 30, 2005, memo from the  
11 Justice Department to the CIA's general counsel, the  
12 government discussed the fact that Mr. Mohammad was  
13 waterboarded. That information was made public, and there's  
14 no reason why Mr. Mohammad saying the same thing would result  
15 in any additional harm. Yet the protective order would apply  
16 to restrict the public from hearing that information from  
17 Mr. Mohammad himself, and there's no legitimate reason, let  
18 alone a compelling one, why that might be the case. That is  
19 an instance of information disclosed by the government itself.

20           Now, we also know, say, keeping with the  
21 hypothesis of voluntariness, that Mr. Mohammad, in  
22 government-sanctioned disclosures to the ICRC, said that  
23 during the harshest periods of his interrogation he gave a lot

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1 of false information to satisfactory what he believed  
2 interrogators wished to hear in order to make the ill  
3 treatment stop.

4 MJ [COL POHL]: Ma'am, let me ask you a question. I  
5 understand the wording of the order may cause your conclusion.

6 MS. SHAMSI: I'm sorry, Your Honor, I can't hear you.

7 MJ [COL POHL]: I understand how the order is worded  
8 could lead one to your conclusion. But offering the  
9 assumption of the number of times Mr. Mohammad has been  
10 waterboarded is unclassified or has been declassified, which  
11 to the best of my knowledge it has been, which is why I'm  
12 saying it. You think this would still apply to that?

13 MS. SHAMSI: I do, Your Honor. The broad wording of the  
14 protective order ----

15 MJ [COL POHL]: But if paragraph 7 is only limited to  
16 currently classified information, if it's read that way, and  
17 reworded it that way, would you have any objection to it?

18 MS. SHAMSI: Your Honor, we would, and that's for two  
19 reasons: One is that classification itself should not be the  
20 determination. It cannot be.

21 MJ [COL POHL]: No, but as a starting point, the  
22 government has a legitimate right to protect classified  
23 information. If information is classified, as everybody who's

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1 got a clearance knows, it must be handled in a certain way.  
2 Okay? Now, that's not the end of the inquiry. I got it.  
3 That's not the end of the inquiry, what can be disclosed in  
4 open or closed session. I've got all that.

5           But the starting point is that if it is  
6 classified, currently classified, then in the protective order  
7 covers currently classified information, you believe that's  
8 overly broad if this is applied to the discovery phase?

9           MS. SHAMSI: No.

10          MJ [COL POHL]: Any right to know classified information  
11 disclosed in the course of discovery?

12          MS. SHAMSI: Your Honor, the public actually does have a  
13 right to know classified information if the First Amendment  
14 standard is not met. Now, when you --

15          MJ [COL POHL]: In the pretrial discovery and evidence  
16 involving a classified -- I'm not talking about what happens  
17 in court, I'm talking about there is all sorts of classified  
18 information floating around this trial and other trials  
19 similar to these issues. I'm not talking about what comes  
20 into court, not talking about that. But the discovery phase  
21 where both sides have access to a lot of classified  
22 information, somehow you believe the government -- that the  
23 government has a burden to prevent disclosure over and above

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1 the classification requirement?

2 MS. SHAMSI: No, Your Honor, and thank you for  
3 clarifying what you meant when you said "during the discovery  
4 phase." We don't have a problem with the protection of  
5 classified information during the discovery phase, of course  
6 not, that is the normal order of business.

7 What this does in paragraph 7 is it applies to  
8 information that defendants knew and acquired outside of the  
9 discovery context, by virtue of the fact that they were forced  
10 to participate in the CIA rendition, interrogation, and  
11 detention program. That's why we have a problem with this.  
12 It's not that the protective order applies to information  
13 within the discovery process. We wouldn't be here before you  
14 if it did.

15 MJ [COL POHL]: Is it your concern then, is that  
16 information known to the accused that falls within the  
17 protective order cannot be disclosed at this time?

18 MS. SHAMSI: Information known to the accused that they  
19 acquired outside of the discovery process by virtue of their  
20 own experiences and knowledge cannot be subject to withholding  
21 from the public.

22 MJ [COL POHL]: At what point in time?

23 MS. SHAMSI: I'm sorry, Your Honor?

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1 MJ [COL POHL]: At what point in time? What I'm saying  
2 is you're saying -- are you saying that because it doesn't  
3 apply to the defendant, they are free to communicate all this  
4 information, assuming they got a method to do it, even if it's  
5 classified?

6 MS. SHAMSI: I am, Your Honor, because the government's  
7 label of classification does not turn third parties'  
8 knowledge, experience, and memories into something that the  
9 government can suppress.

10 Let me say this a slightly different way. What  
11 we're talking about is not information that the defendants or  
12 their counsel obtained during the course of these Commission  
13 proceedings through discovery. What we are concerned about is  
14 the government's attempt to say because -- through  
15 classification that the public cannot hear about information  
16 the defendants had outside of this discovery process.

17 And here's the reason, Your Honor. You know, it  
18 should go without saying, but perhaps the CIA needs to hear it  
19 said: Thoughts, experiences and memories belong to human  
20 beings, they do not belong to the government. And in every  
21 other context in which the government is able to protect --  
22 prevent human beings from disclosing government secrets, those  
23 human beings are employees, agents, in privity with the

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1 government or in some kind of relationship of trust with the  
2 government.

3 MJ [COL POHL]: A third party without said  
4 relationship ----

5 MS. SHAMSI: Your Honor, I can't hear.

6 MJ [COL POHL]: I'm sorry. I never quite understood the  
7 sound system in this building.

8 If the third party who is not in privity with the  
9 government, as you defined it becomes -- for some reason gets  
10 access to classified information, that party is free to  
11 disclose that?

12 MS. SHAMSI: Yes, Your Honor, because the threshold  
13 requirement under Executive Order 13526 that governs the  
14 executive branch's classification authority is that  
15 information be owned, produced, or controlled by the  
16 government. And that requirement has simply never been held  
17 to extend to third parties. The executive order doesn't  
18 contemplate it, let alone permit the government to classify  
19 third-party information.

20 Think of it this way: The government could have a  
21 legitimate interest, perhaps even a compelling one, in  
22 preventing its own employees and agents from testifying in  
23 public about what they did to the defendants. But it has

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1 never been the case that when the government voluntarily  
2 provides information, let's assume that it's properly  
3 classified, voluntarily provides information to people that  
4 the government admits were not authorized to receive it, that  
5 the government can then gag those people. And think about the  
6 implications of that.

7           Because the -- you know, if, for example, there  
8 was a witness to the capture of one of the defendants, that  
9 information is not and cannot be classified. The thoughts,  
10 memories, knowledge of the witness cannot be gagged by the  
11 government, but that's exactly what the government seeks to do  
12 here because defendants are in the position not just as  
13 subjects of the CIA program, but as witnesses to government  
14 misconduct.

15           And permitting the suppression of their thoughts,  
16 memories, and experiences is unprecedented, Your Honor,  
17 because it is essentially saying that the government can gag  
18 people from talking about what the government illegally did to  
19 them in a court proceeding.

20           That simply has not been the case, and there is no  
21 compelling interest, Your Honor -- that's the critically  
22 important thing, that the government has no compelling  
23 interest in preventing the public from hearing this

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1 information, because it has no legal authority under the  
2 executive order to classify information that it voluntarily  
3 provided.

4           And here's the other part that is so radically  
5 different from any other authority we've seen the government  
6 assert. Which is, on the government's part, the disclosure  
7 was voluntary, assuming the information is properly  
8 classified. On the part of the defendants, they didn't want  
9 this classified information. They were forced to acquire  
10 their knowledge of the government's torture methods, the  
11 government's black site detention and the government's  
12 rendition program, and there is no compelling interest under  
13 those circumstances in permitting the government to withhold.

14           Just another quick point here, Your Honor. The  
15 only thing that keeps the -- that prevents the defendants from  
16 disclosing their personal knowledge of information acquired  
17 outside of these proceedings is the fact that they are in the  
18 government's custody and under the government's complete  
19 control.

20           There are other victims and therefore witnesses to  
21 the CIA's rendition, illegal detention program, who have been  
22 released and are free, out there, describing their  
23 experiences. If there is no harm that is coming from them and

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1 there is no harm that the government has publicly alleged  
2 would come from them, then there surely is no harm here in  
3 this context. And it simply cannot be, Your Honor, that the  
4 government has control of information and can maintain control  
5 of information only in this context in which it maintains  
6 control if the defendants are killed, if the death penalty is  
7 imposed, or if they continue to be detained indefinitely.

8           And think about the logic of the government's  
9 position, Your Honor. If it is true, if it is true that the  
10 defendants' exposure to foreign activities or foreign sources  
11 and methods -- or intelligence sources and methods justifies a  
12 gag on their experiences and testimony based on their  
13 experiences, then it must follow, Your Honor, that anyone who  
14 disclosed ----

15           MJ [COL POHL]: Slow down for the translators.

16           MS. SHAMSI: Sorry. That anyone who disclosed that  
17 information to terrorism suspects who were not authorized to  
18 receive it should be prosecuted for transmitting intelligence  
19 secrets. Now that may sound absurd in this context, but it  
20 sounds no less absurd than the idea that the government would  
21 ask you to judicially bless that the CIA can assert authority  
22 over defendants' thoughts and experiences and memories.

23           Your Honor, the government makes a couple of

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1 arguments about the dangers that might come if defendants are  
2 able to testify. It claims that the defendants are an  
3 authoritative source of what the CIA's program contains. You  
4 mentioned this yesterday, Your Honor; you talked about  
5 official acknowledgment.

6 In every other context, the government is adamant  
7 that official acknowledgment only occurs when the current  
8 official of a particular agency talks about specific  
9 information.

10 Here the government is putting terrorism suspects  
11 into the position of agents of the government by virtue of the  
12 fact that they have knowledge of what was done to them.  
13 Your Honor, that's simply a very radical proposition that the  
14 government is asking you to accept and it would be  
15 extraordinary for you to find that there is a compelling  
16 interest in suppressing defendant's testimony based on their  
17 thoughts, experiences, and memories of any of the information  
18 in Section 7(d) when they are defendants in a capital trial in  
19 this extremely important prosecution.

20 It would also, Your Honor, do tremendous damage to  
21 the legitimacy of these proceedings if they are organized  
22 around judicially approved censorship of what the CIA did to  
23 the defendants. And just imagine, and I'll close with this,

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1 Your Honor, that if any other country allowed its intelligence  
2 agency to prevent subjects of illegal conduct by that  
3 intelligence agency, permitted intelligence agency that  
4 tortured people to prevent those tortured people from talking  
5 in a court proceeding, we would not only condemn that  
6 intelligence agency, we would question and likely condemn the  
7 judicial proceeding itself. We would not find it fair, we  
8 would not find it transparent, we would not find it just.

9           And that, Your Honor, is the reason that we are  
10 asking you to reject the government's proposed protective  
11 order, because it would prevent the American public from the  
12 constitutionally guaranteed access that it is entitled to in  
13 these proceedings.

14           Your Honor, if you have any other questions, I'm  
15 happy to address them.

16           MJ [COL POHL]: No, ma'am, I think that's -- I  
17 understand your position. Thank you very much.

18           MS. SHAMSI: Your Honor, one final thing, which is we  
19 haven't heard the government's arguments and in many ways the  
20 government's arguments in response to our motion were  
21 nonresponsive to the issues that we've raised. If it would be  
22 at all helpful, Your Honor, both Mr. Schulz and I are here for  
23 the rest of the day and if you have further questions for us

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1 once the government is able to provide its arguments to you  
2 and once the defense provides its arguments, we would be more  
3 than pleased to be of assistance.

4 MJ [COL POHL]: Thank you. If I believe that's  
5 necessary, I will request your return. Thank you, very much.

6 MS. SHAMSI: Thank you, Your Honor.

7 MJ [COL POHL]: Because of the nature of the proceedings  
8 today, I have to ask you and Mr. Schulz to return to the  
9 spectator section.

10 MS. SHAMSI: Yes, we'll be right behind the soundproof  
11 wall, sir. Thank you.

12 MJ [COL POHL]: Thank you. Before I hear from the  
13 government, defense, any other new discussion of AE 13? Okay,  
14 go ahead.

15 LDC [MR. CONNELL]: [Inaudible].

16 MJ [COL POHL]: I'm not going to restrict any argument  
17 but understand I'm listening, I don't need to hear the same  
18 thing five times. If you have something new I will give the  
19 government and defense one more opportunity on 13.

20 [No audio.]

21 MJ [COL POHL]: Okay.

22 LDC [MR. CONNELL]: The government didn't file a reply  
23 on 13.

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1 MJ [COL POHL]: We've mixed 13 and 9 all the way through  
2 this thing. Okay. Some may disagree. I don't see how we  
3 have not been mixing 9 and 13. You are correct, Mr. Nevin, 13  
4 is a government motion. I'll hear from the government and  
5 then I'll hear from the defense. But to say we've not been  
6 talking about 13 today and yesterday, I think we have been.  
7 You are correct, it is a government motion.

8 The government will have an opportunity to talk  
9 about 13 and the defense will be able to talk further about 13  
10 as I've listened to arguments the past couple days.

11 LDC [MR. CONNELL]: Your Honor, just so it's clear,  
12 yesterday my position, was and it's my position today, that in  
13 9 I wanted to talk about properly classified and the defense  
14 security officer, Commission's security officer issue; and  
15 then I bracketed the other issues, the definition of  
16 classified information, et cetera, for argument today.

17 I think where the bleed-over occurred, and I am  
18 not blaming anybody, but Commander Bogucki raised the  
19 Section 7 definition question and that's where our bleed-over  
20 happened. You are right, there has been bleed-over there, but  
21 I haven't addressed that question yet.

22 MJ [COL POHL]: All right. I will give you an  
23 opportunity to be heard on that. Just treat it in that order.

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1 To make sure, we're done with 9, though.

2 Ms. Baltes, on 13.

3 ATC [MS. BALTES]: Good morning, Your Honor.

4 MJ [COL POHL]: Good morning.

5 ATC [MS. BALTES]: This is the government's motion so I  
6 do want to actually get to the protective order, but I would  
7 like to respond to some of the argument that we heard from  
8 Mr. Schulz yesterday and from Ms. Shamsi yesterday and today.

9 I heard the statement from Ms. Shamsi that no  
10 other court has ever ruled or allowed a protective order with  
11 the provisions that the ACLU is currently challenging. I want  
12 to be clear, and Ms. Shamsi apparently had a copy of the  
13 Ghailani order; maybe they don't understand how the protective  
14 order worked in that case, but paragraph 2 in Ghailani  
15 specifically states that it applies to all stages of the  
16 proceeding. It is the standard protective order that the  
17 government seeks in federal terrorism cases. That protective  
18 order was issued on July 21, 2009, by Judge Kaplan in the  
19 Southern District of New York.

20 MJ [COL POHL]: Ms. Baltes, do you see, just to make  
21 sure, that this protective order applies to all stages but  
22 there's a different, for want of a better term, a different  
23 procedure about what's admitted at trial?

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1           ATC [MS. BALTES]: Absolutely. The protective order  
2 doesn't -- I'll get there. People always say that but I'm  
3 going to answer now.

4           The protective order does not say that just  
5 because there's definitions in paragraph 7 about what's  
6 classified that there's an automatic closure. If that was the  
7 case it would have been a shorter order. It would have been  
8 paragraph 7, this is the definition of classified, therefore  
9 closure will occur. That is absolutely not what the  
10 protective order says.

11           The protective order goes through the different  
12 stages of the proceedings, of how proceedings will happen.  
13 There's obviously the discovery phase, access to classified  
14 information; there's the explanation of what a court security  
15 officer does; there's an explanation of how the parties file  
16 documents that may contain classified information; then  
17 there's the part of the protective order that explains if the  
18 defense wants to disclose classified information, that would  
19 be the 505(g) process. In federal court, it is the Section 5  
20 notice.

21           Then the protective order goes through what  
22 happens in an actual hearing, what happens for disclosure.  
23 That's what it does. There is no, again, automatic closure,

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1 and that's certainly not what the government's advocating.

2 In fact, the closure provision for proceedings in  
3 this Commission are not even found in MCRE 505. It's in a  
4 separate part of the statute and found in a separate rule.

5 MJ [COL POHL]: Just so we're clear on this, which I may  
6 be or may not be, the closure rules are governed by 806.

7 ATC [MS. BALTES]: Right. And it is 949(d) in the  
8 statute.

9 MJ [COL POHL]: Okay. And specifically there's a  
10 separate -- now -- the issue was if it's classified, that does  
11 not warrant automatic closure, but there's a separate inquiry  
12 that the judge must do to close the court and it would appear  
13 that's the reading of 806(b)(2)(B).

14 ATC [MS. BALTES]: That's absolutely correct.  
15 806(b)(2)(B) provides that there's a statutory right of access  
16 then there's provisions for closure of the courtroom. Again,  
17 that's not an automatic. The language is that the military  
18 judge may close the courtroom.

19 MJ [COL POHL]: The mere fact it is classified is not  
20 sufficient showing by government to close the proceeding.

21 ATC [MS. BALTES]: Right. It is a justification that  
22 806 talks about, that is a justification for closing the  
23 courtroom, but it is not an automatic closure. We agree that,

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1 yes, you, the military judge, have discretion and you must  
2 make findings.

3 MJ [COL POHL]: If I make a finding that this  
4 information, although classified, must be discussed in open  
5 court, then that gives the government options.

6 ATC [MS. BALTES]: Correct.

7 MJ [COL POHL]: Just procedurally -- I think there are  
8 two separate issues being connected here of the pretrial  
9 discovery phase and what could come out in the course of the  
10 trial, both pretrial evidentiary hearings, trial of the merits  
11 and sentencing, if any.

12 DTC [MS. BALTES]: Absolutely. I want to respond to  
13 this because I think it's an inflammatory allegation for the  
14 ACLU to come in and claim they've never seen anything like  
15 this. In Ghailani, again the exact definitions that we used  
16 in paragraph 7, which is what they are so upset about, are  
17 verbatim to what was used in paragraph 3 in the Ghailani  
18 protective order.

19 Specifically, the observations and -- let me get  
20 the exact language. The term in paragraph 3 in Ghailani  
21 specifically says that classified information will include,  
22 without limitations, observations and experiences of the  
23 defendants with respect to the matters set forth in the

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1 several paragraphs above, which is the CIA RDI program. That  
2 was classified in that case as well. It's the same here.  
3 It's the same in this case.

4 The fact that the ACLU chose not to challenge on  
5 First Amendment grounds in Ghailani, I don't have an answer  
6 for that, but for them to come into this court and somehow  
7 imply that because the government proposed a protective order  
8 in this case that somehow we're violating the First Amendment  
9 is disingenuous. The same provisions are in Ghailani.

10 In addition, although the protective order in  
11 Ghailani doesn't have the 40-second delay, no courtroom in the  
12 United States has the technology that we have. There is a  
13 40-second delay that was built into this courtroom  
14 specifically because of the types of cases that would be tried  
15 down here. These are international terrorism cases.

16 And I would submit, and I believe Your Honor noted  
17 yesterday, that the 40-second delay actually minimizes the  
18 times that closure has to occur, and it provides a very  
19 appropriate balance between making sure that the proceedings  
20 can be opened without unnecessarily risking the disclosure of  
21 classified information from an inadvertent comment.

22 MJ [COL POHL]: Ms. Baltes, how do you respond to the  
23 argument which I heard from a number of the press side,

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1 including the press objectors, about the government  
2 voluntarily disclosing this information to the accused who in  
3 some cases involuntarily received it and then somehow it --  
4 we're restricting their ability to talk about that?

5 TC [MS. BALTES]: There are a couple of points. Number  
6 one, this protective order does not restrict or impose  
7 sanctions upon the accused. It would be quite different if we  
8 were seeking a contractual obligation from the accused that  
9 they're never allowed to talk about this.

10 MJ [COL POHL]: But if you take the protective order as  
11 drafted, the accused says something that's covered by your  
12 paragraph 7 to their defense counsel, there's no problem with  
13 that, they got clearances. Defense counsel wants to convey  
14 this information to a mitigation expert, an uncleared  
15 mitigation expert, they would not be permitted to do that  
16 under this order.

17 TC [MS. BALTES]: That is correct, but I --

18 MJ [COL POHL]: I'm not saying -- just so we all  
19 understand, at this point what we're talking about is not  
20 communication between the accused and his counsel or, quite  
21 frankly, the accused to anybody other than his counsel, but  
22 the further dissemination of said information to uncleared  
23 people.

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1 TC [MS. BALTES]: That's correct.

2 MJ [COL POHL]: The protective order is designed at that  
3 step for the defense teams and not necessarily within the  
4 preparation between the accused and the defense.

5 TC [MS. BALTES]: Right. The protective order does not  
6 purport to restrict any communication between -- I know the  
7 defense doesn't believe this. I've heard this a number of  
8 times.

9 Let me be clear. The protective order does not  
10 purport to restrict communication between the accused and the  
11 attorneys. They can talk about what -- regardless of whether  
12 it's in paragraph 7 or any other definition or anything that  
13 the attorneys have been told is classified, the accused can  
14 talk to them, to the attorneys, about it.

15 Now, the attorneys holding security clearances are  
16 obviously restricted in talking about other classified  
17 information that they know back to the accused. I think  
18 that -- I think there's clarity on that. I don't think that's  
19 necessarily in dispute.

20 But the protective order, again, is supposed to  
21 govern how parties handle classified information throughout  
22 the proceedings, which is why it goes stage by stage of the  
23 different parts that we're going to get to. But certainly

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1 when it comes to a trial stage or the disclosure of that  
2 information, there's other procedures in place.

3           MCRE 505(g) provides a mechanism for the defense  
4 to provide notice to the government if it intends to disclose  
5 classified information during any stage of the proceeding.

6           And then typically, as you've seen, the government  
7 will file a notice, a 505(h) notice, requesting an opportunity  
8 to be heard so that the military judge can determine the use,  
9 relevance, and necessity of the disclosure of that  
10 information. That can happen at the pretrial stage, which  
11 we've seen and certainly most often, particularly in federal  
12 court, we see it in the trial stage where the defense believes  
13 there's classified information they seek to use at trial and  
14 therefore -- that's when we get to a hearing about it.

15           MJ [COL POHL]: Once we complete the 505(h) session, the  
16 hearing is kind of a misnomer because that implies it's with  
17 the accused, but I know that's how it's referred to. Then the  
18 next session is, if necessary, relevant material to the  
19 defense, then you go to the 806 issue of how it comes out.

20           TC [MS. BALTES]: Right. And as you have experienced  
21 already during a 505(h) hearing or session, I mean, the  
22 government proposes alternatives for ways to either minimize  
23 the exposure or come up with ways for the defense to present

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1 their information in a way that may not lead to the harm to  
2 national security.

3           Again, yes, if at that point you determine that  
4 the classified information must come in, for whatever reason,  
5 whatever your ruling is, then you would go to an 806 analysis  
6 of do I then close the courtroom. You're absolutely justified  
7 in closing the courtroom because of classified information,  
8 but that doesn't mean that you obviously shouldn't make the  
9 necessary findings.

10           MJ [COL POHL]: But that's not the end of the inquiry.  
11 By that, I mean simply because it's classified, the way I read  
12 the rule, there's another inquiry that goes on. It's not  
13 declassifying, it is whether or not it meets the test of 806  
14 to close the court.

15           TC [MS. BALTES]: Absolutely, and the test of 806 --  
16 military courts applied the Press Enterprise factor as well as  
17 United States v. Grunden talks about Press Enterprise factors.  
18 8016 incorporates the four-part test the Supreme Court showed  
19 in Press Enterprise enterprise. The four factors are whether  
20 there's a substantial probability of prejudice to a compelling  
21 interest, whether there is no alternative to adequately  
22 protecting the information, whether the restriction that is  
23 sought would be effective and whether it's narrowly tailored.

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1           I'm sure you're familiar with 806. It  
2 incorporates that language that it has to be tailored, have a  
3 compelling interest. If we were ever to get to that stage,  
4 the parties would be able to articulate. Again, it's not  
5 always the prosecution. It typically is the defense that  
6 wants to put on the information. But certainly there would be  
7 an ability to articulate those factors should Your Honor wish  
8 to close a portion of the courtroom. That's not a foregone  
9 conclusion.

10           The fact there's a provision in the protective  
11 order that talks about closure simply refers to closure is  
12 authorized by statute 949(d) and authorized in the rule,  
13 Rule 806. So the fact we have paragraph 7, which includes  
14 definitions that apparently no one likes, that the statements  
15 of the accused about the RDI program are classified, and  
16 closure in the same document somehow means government is  
17 seeking closure of proceedings in this case, and that is  
18 absolutely not accurate.

19           The other -- let me go back to Ghailani for a  
20 second. Not to belabor the federal court, which I'm sure  
21 you're sick of hearing, but in Ghailani the protective order  
22 didn't have provision for closure of the courtroom. But  
23 federal courts have inherent authority to close a courtroom as

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1 well.

2           In Ghailani, that's what happened on numerous  
3 occasions. The courtroom was closed specifically when talking  
4 about capture information. So it's again somewhat  
5 disingenuous for ACLU to come in and argue that for some  
6 reason what government's suggesting in this case is something  
7 courts have never done or never seen before with an accused  
8 similarly situated to the accused in this case.

9           The other point I believe that the ACLU made was  
10 somehow if a third party gets hold of classified information  
11 that the government has no legitimate interest in keeping that  
12 information classified. And that, as I know you understand,  
13 would lead to absolutely absurd results. If for some reason  
14 there's a leak or unauthorized disclosure of classified  
15 information and then a non-government employee, someone in the  
16 public, learns of that information, the government still has  
17 an interest in keeping it classified.

18           MJ [COL POHL]: How is that? Better?

19           I don't believe there is much dispute, although  
20 I'm sure I'm probably wrong, about the unauthorized leak of  
21 classified information doesn't somehow declassify it. Okay?  
22 I don't think that's what they're addressing.

23           What they're addressing in this particular case,

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1 maybe it is a distinction without difference in your mind, but  
2 I believe that's what the issue is. When the government  
3 voluntarily discloses classified information to non-cleared  
4 people, that somehow that then the government cannot come back  
5 and say these non-cleared people, in this case the accused,  
6 are somehow bound by the classification restriction of  
7 discussing that information.

8           So I don't think it's your scenario -- do you see  
9 a difference between ----

10           TC [MS. BALTES]: I do see it differently. Number one,  
11 again, I think certainly the government, you know, believes  
12 that there's a compelling interest in maintaining the  
13 integrity of classified information regardless of whether it's  
14 disclosed. I think you're familiar with the line of cases  
15 that talks about the official confirmation versus speculation.  
16 The Supreme Court clearly established that it is not the same  
17 thing.

18           Just because information -- that a reporter may  
19 speculate about some classified information is quite different  
20 from a government official actually confirming the existence  
21 of that, and that there is still a compelling government  
22 interest in maintaining the integrity of that classified  
23 information. That is -- *Afshar*, *Knopf*, *CIA v. Sims*, *Haig*

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1 v. Agee, all are cases that stand for that proposition.

2           What I believe the ACLU is arguing is just because  
3 the government involuntarily exposed the accused to --

4           MJ [COL POHL]: Their argument is the government  
5 voluntarily exposed accused to this information, they may have  
6 involuntarily received it, depending what we're talking about.

7           TC [MS. BALTES]: Right.

8           MJ [COL POHL]: Their argument, appears to me, is not an  
9 unauthorized leak going out to a media outlet. The  
10 government, by using these techniques, voluntarily exposed  
11 this classified information, if you want to call it that, to  
12 these accused.

13          TC [MS. BALTES]: I understand their position, and I  
14 misspoke when I said "involuntary." I agree, I understand  
15 that that's their position. Again, if the government was  
16 seeking to exact some type of nondisclosure agreement on the  
17 accused at this point to say, "You were exposed to classified  
18 information, you're going to face sanctions just like someone  
19 with a security clearance if you disclose that," I agree that  
20 would be an absurd result. That's not what government's  
21 seeking to do. Again, the protective order applies to the  
22 parties in this case that hold security clearances that,  
23 because of their participation in this case, they are exposed

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1 to classified information.

2 MJ [COL POHL]: I may have misunderstood the point but  
3 I'm not sure -- what the question becomes is by voluntarily  
4 supposing this to people who do not have a clearance, does  
5 that somehow waive the classification issue?

6 ATC [MS. BALTES]: No.

7 MJ [COL POHL]: You say no, but that's the way I kind of  
8 glean this thing. We all agree that classified information  
9 has to be handled a certain way. Their position appears to be  
10 that if the government releases this -- voluntarily releases  
11 it to somebody without a clearance in this case, in this  
12 case -- but, therefore, that relieves the defense of the  
13 burden of treating this information as classified.

14 TC [MS. BALTES]: No.

15 MJ [COL POHL]: I know you disagree. I think that's  
16 what their position is.

17 TC [MS. BALTES]: I agree that is what their position  
18 is. That would lead to absurd results if the government's  
19 unable to -- again, we're talking about information that the  
20 government still maintains control over at this point.  
21 Whether people like to believe it or not, the fact is the  
22 accused are held in a detention facility where they don't have  
23 access to people other than their attorneys so -- but it is

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1 perfectly appropriate for the government, as an original  
2 classification authority did in this case, pursuant to the  
3 executive order, to look at information about the sources and  
4 methods that are at issue in this case and the RDI program and  
5 determine that that is currently and properly classified.

6           The fact that they can communicate that  
7 information and orally convey that information to their  
8 attorneys is what's at issue. So it's the attorneys'  
9 obligation who hold security clearances in this case to make  
10 sure that that information then is not further disclosed.

11           You're looking at the time. Do you want me  
12 to ----

13           MJ [COL POHL]: I just -- how much more do you got?

14           TC [MS. BALTES]: Well, I -- my team won't like this  
15 either.

16           MJ [COL POHL]: My concern -- normally, I would not  
17 mind, but my concern is we do have a detainee who wanted to  
18 join us and we normally recess at 10:15. What we'll do --  
19 normally I would let you continue. But because Mr. Mohammad  
20 apparently wants to join us, and whether he does or not,  
21 that's of course up to him, we'll go ahead and take a  
22 15-minute recess now.

23           And then, Mr. Nevin, I'm sure you will tell me

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1 whether -- if he doesn't come, indicates he doesn't wish to  
2 come, wishes to stay in the holding cell.

3 Court is in recess until 1035.

4 [The Military Commission recessed at 1018, 17 October 2012.]

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