IN THE
UNITED STATES COURT OF MILITARY COMMISSIONS REVIEW

IN RE AMERICAN CIVIL LIBERTIES UNION & AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Petitioners, v. UNITED STATES, Respondent.	PETITIONER'S REPLY BRIEF U.S.C.M.C.R. CASE NO. 13-003 MARCH 18, 2013

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

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PRELIMINARY STATEMENT

According to the government, "The best traditions of American jurisprudence call for providing an opportunity for the public to witness the trial of the accused—to observe first-hand that each accused in a reformed military commission receives all the judicial guarantees which are recognized as indispensable by civilized peoples." Resp. at 4. It is remarkable, then, that the government continues to defend the censorship from the American public of defendants' testimony about the torture, illegal rendition, and black-site detention to which the CIA subjected them. As the ACLU explained at length in its Petition and explains below, the government's arguments in support of censorship fail because they are based on mischaracterizations of fact and distortions of law. The government's positions must also be rejected because they would further undermine the legitimacy of a military commission trial that is crucially important for our nation and the watching world: No civilized people can or should accept the judicially-approved censorship of defendants' personal memories and experiences of government-imposed torture, in a prosecution that will determine whether defendants live or die.

The controlling law here is not in dispute. The government has accepted the jurisdiction of this Court to hear the ACLU's Petition against censorship, and it has conceded that the American public has a First Amendment right of access to the military commissions. It also accepts that before the public's access right can be abridged, the First Amendment's strict-scrutiny standard requires the government to show, and the military judge independently to find, that the government has a compelling interest in suppressing defendants' testimony from the public, and that any censorship is narrowly tailored. Finally, the government concedes an operative fact: Neither the Protective Order challenged by the ACLU nor its accompanying

ruling make these constitutionally required findings.

The government's defense of the Protective Order's categorical censorship of defendants' personal accounts of torture begins with misdirection. It advances the claim that the Protective Order "merely contemplates the possibility" of future courtroom closure, Resp. at 1—but that claim is directly refuted by the Protective Order's plain language, which makes clear that the order applies now and to all stages of the proceedings. Indeed, the government's claim is contradicted by its own concession that the proceedings have already been closed three times.

At the core of the government's defense is its radical claimed authority to "classify" defendants' personal accounts of their torture and other abuse in U.S. custody, and its extreme argument that neither this Court nor the military judge below can determine the propriety of classification. But the government fails to show how the executive order governing classification could extend to defendants' "thoughts and experiences" of illegal government conduct that the government voluntarily disclosed and to which defendants were involuntarily subjected. And the

ARGUMENT

I. The Protective Order Impermissibly Censors Defendants' Testimony About Torture and Other Abuse At All Stages of the Proceedings.

As the government acknowledges at the outset of its Response, "there is no dispute between the parties" that before the public's First Amendment access right to this military commission prosecution can be abridged, the military judge must independently find that the government has articulated a compelling interest, based on specific factual evidence, and ensure that any restriction on access is narrowly tailored. Resp. at vi, 1; ACLU Pet. 25 (citing cases). At a minimum, therefore, the government and the parties agree that the four-factor test set forth by the Supreme Court in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"), must be met before the military judge can close the proceedings to the public. *See id.* at 13–15 (requiring judge to find: (1) there is a substantial probability of prejudice to a compelling governmental interest; (2) there is no alternative to closure that would protect the threatened interest; (3) the proposed restriction on access will be effective; and (4) the restriction on access is narrowly tailored); *see* Pet. at vi. There is no dispute between the parties that the Protective Order does not make these constitutionally required findings. *See* Resp. at 1–2; Pet. at 7.[1]

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[1] The Protective Order's boilerplate recitation that disclosure of classified information "would be detrimental to national security," App'x 341, hardly constitutes a specific finding of fact. Similarly, as the ACLU explained in its Petition, the military judge's ruling does not meet the constitutional standard because it does not contain "any reasoned explanation, legal analysis, or specific findings of fact." Pet. at 7. Instead, the military judge summarily found that information classified by the government was "properly classified" under Executive Order 13,526 and its predecessor orders, and that disclosure would result in harm to national security. App'x 320. But even if the government's "classification" of Defendants' personal knowledge and experiences were proper (and the ACLU shows in its Petition below that it is not), this cursory "finding"

In characterizing the Protective Order, however, the government incorrectly argues that it "merely contemplates the possibility" of closure "at some future time," after the military judge makes the constitutional inquiry. *See* Resp. at 1, v. That argument is conclusively refuted by the plain terms of the Protective Order itself. Section 1(a) of the Protective Order states that it "appl[ies] to all aspects of pre-trial, trial, and post-trial stages in this case, including any appeals." App'x 322 (P.O. § 1(a)); *see* App'x 334–37 (P.O. § 8); *accord* Resp. at x. And as the government itself concedes, the military commission courtroom has been closed on three occasions already, with transcripts of the closed sessions released publicly only after information discussed "was determined to be unclassified" under the Protective Order. *See* Resp. at 5–6.

There can be no question, therefore, that the specific Protective Order provision the ACLU challenges—Section 2(g)(5), which purports to define as "classified" defendants' "observations and experiences" of the CIA's rendition, detention, and interrogation program and, on that basis, suppresses from the public defendants' testimony—applies to all stages of the proceedings.[2] Indeed, the government does not dispute that this provision operates at all stages; it

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fails as a matter of law because it does not apply the constitutional standard, which the government concedes applies. *Compare* App'x 387 (Exec. Order 13,526, § 1.4, 75 Fed. Reg. 707 (Dec. 29, 2009)) (authorizing classification when, inter alia, "unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" (emphasis added)), *and* App'x 335 (P.O. § 8(a)(2)(a)) (allowing closure "in order to protect information, the disclosure of which could reasonably be expected to damage national security" (emphasis added)), *with, e.g.*, *Press-Enterprise II*, 478 U.S. at 14–15 (rejecting "reasonable likelihood"-of-harm standard for closing the courtroom because it did not meet the First Amendment's more stringent strict-scrutiny standard).

[2] The government's nearly identical oppositions it filed in response to the ACLU and the Press Petitioners fail to distinguish between the narrow challenge brought by the ACLU and the broader challenge brought by the Press Petitioners. Without agreeing with the broader grounds raised by the Press Petitioners, the ACLU specifically challenges the Protective Order's provision authorizing the censorship from the public of defendants' testimony concerning their

recites that fact in its Response, *see* Resp. at x.

Any doubt that the Protective Order operates as a blanket gag on defendants' public testimony at all stages is eliminated by the government's discussion of the forty-second audio and video delay in the transmission of the proceedings to the public. As the government correctly asserts, the forty-second delay is the mechanism now in place "to protect the unauthorized disclosure of classified information during proceedings." Resp. at 5; *see* App'x 359–60 (P.O. § 8(a)(3)). But it is because Section 2(g)(5) of the Protective Order improperly defines as "classified" defendants' personal knowledge and experiences of illegal government conduct that the government can use the forty-second delay to censor any testimony defendants provide about that illegal government conduct at any stage of the proceedings. Resp. at 5 (stating that any portion of the proceedings during which "classified information is disclosed" will not be transmitted and "will remain part of the classified record."). That is why the government's arguments that the public has access to the proceedings at various sites in the United States, and that the forty-second delay is a "narrowly tailored" restriction on access, Resp. at 5–6, miss the point entirely. The ACLU's concern is with Section 2(g)(5)'s categorical, ex ante, and unconstitutional censorship of information that cannot be kept from the public—and less with the mechanism used to impose that censorship. That also why, contrary to the government's assertion, Resp. at 5, the ACLU does not challenge the forty-second delay before this Court.

also fall to the extent it is based on an unconstitutional rationale. See Pet. at 14 n.6.

Focusing on the specific provision the ACLU challenges demonstrates why the government's citations to the Classified Information Procedures Act ("CIPA"), to cases interpreting CIPA, or to protective orders based on CIPA or other cases are inapplicable to the issue before this Court. See Resp. at 2. The ACLU seeks to vindicate the public's access to defendants' courtroom testimony, which Section 2(g)(5) categorically censors.[3] In that context, the case law makes clear, CIPA is "simply irrelevant" to the question of when a court may abridge the public's First Amendment access rights. In re Wash. Post Co., 807 F.2d 383, 393 (4th Cir. 1986) ("[E]ven if the Classified Information Procedures Act purported to resolve the issues raised here, the district court would not be excused from making the appropriate constitutional inquiry.").

In sum, the Protective Order operates as an unconstitutional gag on defendants' courtroom testimony now, and will continue to do so in the future, unless this Court overturns it.

II. The Protective Order's Censorship of Defendants' Testimony About Torture and Other Abuse Violates the First Amendment Strict-Scrutiny Standard.

Nothing in the government's Response persuasively disputes, let alone refutes, either of the ACLU's arguments that (1) the government has no legal authority to classify defendants' testimony about their personal knowledge, experiences, and memories of torture and other abuse,

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[3] The ACLU does not challenge protective order provisions that govern the parties' handling of classified information obtained or to be obtained by the defendants in discovery. Nor does it seek access to in camera CIPA hearings, in which courts may "rule on questions of admissibility
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ACLU Pet. at 20–24, and that (2) regardless of whether the government could somehow classify defendants' personal knowledge of government misconduct, classification does not itself establish a compelling interest, and the government cannot show one, ACLU Pet. at 24–33. Instead, the government's Response wrongly claims that neither this Court nor the military judge below have the authority to review Executive Branch classification decisions, while ignoring case law holding that such authority clearly exists. The government's conclusory assertion that it can classify defendants' accounts of their mistreatment and incarceration in government custody fails because the Executive Order governing classification cannot be extended to defendants' "observations and experiences" of illegal government conduct. Finally, the government's justification for censoring defendants' testimony cannot satisfy First Amendment strict scrutiny because the government has not shown that it has any legitimate interest in suppressing information the public already knows.

A. This Court has an obligation under the First Amendment to determine whether the government's classification of defendants' "observations and experiences" of torture and other abuse is proper.

The government's claim that neither this Court nor the military judge has the authority to determine whether the government can properly classify defendants' personal observations and experiences, Resp. at 7, fails as a matter of law. As the ACLU demonstrated in its Petition, military and civilian courts alike have squarely held that when the public's First Amendment right of access to criminal trials is at stake, as it is here, courts have an independent duty to scrutinize the government's classification decisions before permitting courtroom closure. *See* ACLU Pet. at 20–21 (citing, among other cases, *United States v. Lonetree*, 31 M.J. 849, 854 (N–M.C.M.R. 1990), and *United States v. Grunden*, 2 M.J. 116, 124 (C.M.A. 1977)). Nowhere in its

Response does the government even address these cases.[4]

Moreover, none of the cases the government cites in its Response, *see* Resp. at 7–8, support its argument against judicial review here. *American Civil Liberties Union v. U.S. Department of Defense*, 628 F.3d 612 (D.C. Cir. 2011) ("*ACLU v. DoD*"), was a case under the Freedom of Information Act (the "FOIA"); there, the court decided that the CIA's affidavits complied with the FOIA's statutory requirements. *CIA v. Sims*, 471 U.S. 159 (1985), *Department of the Navy v. Egan*, 484 U.S. 518 (1988), and *United States v. Smith*, 750 F.2d 1215 (4th Cir. 1984), each stand for the uncontested proposition that the Executive Branch has original classification authority. *See Sims*, 471 U.S. at 170; *Egan*, 484 U.S. at 529; *Smith*, 750 F.2d at 1217. These and other cases cited by the government also stand for the general proposition that courts owe some measure of deference to Executive Branch's classification decisions. *See Sims*, 471 U.S. at 179; *Egan*, 484 U.S. at 529–30; *Smith*, 750 F.2d at 1217; *United States v. Moussaoui*, 65 F. App'x 881 (4th Cir. 2003).[5] But it is equally clear that judicial "deference is

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[4] The government also fails to address others cases cited by Petitioners demonstrating that courts routinely review classification determinations even when lesser First Amendment or statutory access rights are involved than the public's right to access this death-penalty prosecution. *See, e.g.*, *Wilson v. CIA*, 586 F.3d 171, 185 (2d Cir. 2009) (holding, in First Amendment prepublication review case, court must "ensure that the information in question is, in fact, properly classified"); *Stillman v. CIA*, 517 F. Supp. 2d 32, 38 (D.D.C. 2007) (same); *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983) (same); *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 76 (D.C. Cir. 1987) (explaining, in Freedom of Information Act case, that "courts act as an independent check on challenged classification decisions"); *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 75 (2d Cir. 2009) (same); *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003) (same).

[5] Each of these cases arose in a factually and legally distinct context from this one. *Sims* considered the scope of the National Security Act's protection of an intelligence source from compelled disclosure, and found that the CIA may withhold only information about sources or methods that "fall[s] within the Agency's mandate." 471 U.S. at 169. Because the CIA's so-called "enhanced interrogation techniques" are illegal and have been categorically prohibited by

not equivalent to acquiescence." Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 30 (D.C. Cir. 1998). Finally, none of the cases the government cites even remotely contemplate the use of classification authority in the radical manner the government asserts in these proceedings.

B. The government has no authority to classify defendants' testimony about their "observations and experiences" of government misconduct.

Despite myriad opportunities, the government has been unable to cite any authority for the extraordinary proposition that "information" classifiable under Executive Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009), or its predecessors, extends to a criminal defendant's subjective knowledge, thoughts, experiences, and memories of the torture and other abuse to which he was forcibly subjected by the government. Because the only information defendants have about the CIA's rendition, detention, and interrogation program is their personal "observations and experiences" of "information" the government chose to force upon them, see Resp. at vii, the government is left without any authority—statutory, administrative, or judicial—to classify those observations and experiences.

The government's attempt at stitching any classification authority together fails even to find an initial thread. Its assertion that Executive Order 13,526 "authorizes the classification of

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the President, and because its overseas detention and interrogation facilities have been permanently closed, neither is within the Agency's mandate. See Pet. at 24–28. Egan concerned the Executive Branch's discretion to deny a security clearance to an individual who sought access to information that was, concededly properly classified; here, the propriety of the government's classification is contested, and the government itself acknowledges that it disclosed the information to prisoners who did not have (and surely have never sought) a security clearance. App'x 93. In Moussaoui, classification was also not contested, and the intervenors in that case explicitly "disavow[ed] any desire to obtain the release of classified information." 65 F. App'x at 887. Finally, S -.r0003 Tc .0T8yted, 3ly "disacilities have been

Id.[6]

ACLU v. DoDis a far cry from this case. Neither the D.C. Circuit's decision, nor the government's argument based on it, give anyone reason to equate the government's ownership of and control over documents to its ownership of or control over human beings or their personal 6

officials, which they manifestly are not. As the government so often asserts in arguing against judicial findings of "official acknowledgment," "in the arena of intelligence and foreign relations there can be a critical difference between official and unofficial disclosures." Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990). Defendants' public testimony would do nothing to alter that "critical difference."

More substantively, simply because publicly known facts have not been "officially" acknowledged by the government does not mean that a court can ignore these. See, e.g. Grunden, 2 M.J. at 123 n.18 (stating that a court's determination that information is properly classified "does not preclude the defense from going forward and demonstrating the 'public' nature of the material which would thus establish a separate ground prohibiting exclusion of the public"). In determining whether the government

declassified. Instead, Petitioners argue—as Supreme Court Justice Felix Frankfurter once put it—that “this Court should not be ignora

CONCLUSION

For the foregoing reasons, in addition to those in the Petition, Petitioners respectfully request that this Court issue a writ of mandamus.

Date: March 18, 2013

/s/ Hina Shamsi
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed on this 18th day of March, 2013, to the following:

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