1	[The Military Commission was called to order at 0900,
2	17 Oct ober 2012.]
3	MU [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	MU [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 a
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- 1 DI RECT EXAMINATION
- 2 QUESTIONS BY TC [MR. SWANN]:
- O. 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 O. 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.
- MJ [COL POHL]: Just to be clear, Mr. Swann, that's the
- 19 practice that applies to all exhibits to both sides.
- TC [MR. SWANN]: They may be out of order that I gave
- 21 you, but let's take Walid Bin' Attash first, please.
- A. All right.
- Q. What time did you notify Mr. Bin' Attash this

- 1 morning?
- A. I notified him at 5:05 a.m.
- 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.
- Q. All right. Did you indicate to him that if he
- 23 decided to change his mind that he should notify the guard

- 1 that's been marked as Appellate 99?
- A. No, I did not.
- 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 O. 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?

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?
0	A. He did.
1	Q. When you read the form to him in English excuse
2	me. An interpreter did not read the form in Arabic; is that
3	correct?
4	A. No. When I presented him the forms I handed him a
5	copy of the Arabic form, indicated that I had a requirement to
6	read it to him in English and that if he wanted the
7	interpreter present, the interpreter could translate what I
8	was saying in addition to reading along. He said he told
9	me no interpreter, English was fine.
20	Q. Did he indicate anything about one form being
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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.
- MJ [COL POHL]: Okay, go ahead.
- 14 CROSS- EXAM NATI ON 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?
- 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

- 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 RUI Z]: Yes, Your Honor.
- 9 CROSS- EXAM NATI ON
- 10 QUESTI ONS BY LDC [CDR RUI Z]:
- 11 Q. Good morning, Commander.
- 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?
- A. No, that would not be my rule.
- Q. When he answered to you that has not been in
- 22 relation to any complex legal issues?
- A. No, it has not.

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

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

- 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.
- 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

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.
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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.
- MU [COL POHL]: But my point is -- I'm not disagreeing
 with that, but before I can make said determination, I have to
 know what the evidence is. And I don't know what the evidence
 is until it's articulated by somebody. And then I understand
 the standard now, again ----
- 15 MS. SHAMSI: Right.
- MJ [COL POHL]: ---- there may be disagreement among
 some of what the actual standard is, that's a separate issue,
 but there clearly is a standard to close the proceedings, but
 l only can apply that standard if I know what the testimony or
 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

- 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.
- 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.
- 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

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

- 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.
- 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.
- 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

- 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.
- 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

- 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 --
- 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	MU [COL POHL]: At what point in time? What I'm saying
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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.
- 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

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, the criticallyN, aoœernmeh 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

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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.
- Your Honor, the government makes a couple of

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 su8 Tcaysvea
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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
0	asking you to reject the government's proposed protective
1	order, because it would prevent the American public from the
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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.

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

- 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 termin 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 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.

- 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.
- 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.
- 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

- 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.
- 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.
- 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

- 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.
- MU [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.
- 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.

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

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
0	somehow if a third party gets hold of classified information
1	that the government has no legitimate interest in keeping that
2	information classified. And that, as I know you understand,
3	would lead to absolutely absurd results. If for some reason
4	there's a leak or unauthorized disclosure of classified
5	information and then a non-government employee, someone in the
6	public, learns of that information, the government still has
7	an interest in keeping it classified.
8	MJ [COL POHL]: G662 Tn5j8 0 TD.0656 Tc30013 Tww(se ng t?
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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.
- 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, ClAv. Sims, Haig

- 1 v. Agee, all are cases that stand for that proposition.
- What I believe the ACLU is arguing is just because
- 3 the government involuntarily exposed the accused to --
- 4 MU [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.
- 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

- 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 ----
- MJ [COL POHL]: I just -- how much more do you got?
- 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.
- And then, Mr. Nevin, I'm sure you will tell me

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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