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1 [The R.M.C. 803 session was called to order at 1056,
2 22 February 2016.]

3 MJ [COL POHL]: The commission is called to order. There
4 does not appear to have been any change of any party. Am I
5 correct in that? Apparently so.

6 Mr. Connell, just to -- okay. Just to clarify
7 something because there is a little confusion. Did you
8 request a 505(h) hearing on this?

9 LDC [MR. CONNELL]: Yes, sir.

10 MJ [COL POHL]: Do you want a 505(h) hearing on this?

11 LDC [MR. CONNELL]: Your Honor, not at this time. I am
12 going to wait to see what the government argues.

13 MJ [COL POHL]: I am going to assume that you don't unless
14 you renew the request.

15 LDC [MR. CONNELL]: Totally fair.

16 MJ [COL POHL]: Okay. Mr. Nevin.

17 LDC [MR. NEVIN]: Thanks, Your Honor. I can be -- I can
18 be brief here. I just really have two points to make. The
19 first is that I take it as a given that once the material is
20 placed into evidence here in open military commission, it's
21 your information; and I mean that literally, your information.
22 I was thinking -- I think it can be characterized as a
23 question of whether the privilege was invoked, whether there

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1 was a prior authorized disclosure or whether there was a
2 waiver, and I point out that this is also not an accident. It
3 is not a situation where somebody sits down on a park bench to
4 have lunch and walks off and leaves a classified document
5 sitting there by accident, unintentionally. We sat here for a
6 day and listened to this testimony.

7 And I was recalling the reaction that the military
8 commission had that day in January, I believe it was 2012,
9 when I was speaking and the red light went off and what I was
10 saying wasn't classified and it became apparent that neither
11 the military commission nor your court security officer had
12 activated the light, and it turned out that somebody else was
13 activating the light. And I remember very well what the
14 military commission said, that "If somebody else is
15 controlling what leaves this courtroom other than me and my
16 court security officer, we are going to have a discussion
17 about that."

18 And I understand that the military commission, after
19 that, disabled the ability of what we have been told is the
20 CIA at another location controlling the output of the court,
21 and the court reacted strongly to that -- I think rightly --
22 and I think that's because once the evidence gets presented to
23 you here, the government is not to be heard for the

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1 proposition that it is classified or that it is sensitive or
2 that it is in some other way still their permission -- their
3 property; it becomes your property at that point.

4 And my second point or my second argument is the
5 way -- is to ask you to direct your attention to the way this
6 goes as to fundamental fairness. One of the problems with the
7 Star Chamber was that it was done in secret. It's one of the
8 things we fought the American Revolution for, to put a stop to
9 that, and the way that the public assesses the legitimacy of
10 the proceedings is by being able to look at its output and to
11 see what's going on here. And I think this goes also to the
12 question under Common Article 3 as to whether this is a
13 regularly constituted court.

14 So, I mean, we have closed hearings; we have evidence
15 that's not made available to us, but nonetheless is relevant
16 to the question of whether Mr. Mohammad should be executed,
17 it's a capital case; and the legitimacy of these proceedings I
18 think in the public's mind is very much open to question and
19 in the mind of the world, and so this is not a minor matter
20 of -- and I am not saying I think you think it's a minor
21 matter, I understand we are holding extraordinary hearings on
22 the subject here -- but it goes directly to the question.

23 And I will say we received orders from Your Honor

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1 shortly before we came down here ten days ago that had been
2 issued in secret. I'm not going to discuss their content
3 here. But I will say we will be filing a motion to recuse the
4 military commission and to recuse the prosecution in view of
5 the events that transpired that led to the issuance of that
6 order.

7 So from our standpoint, this -- these proceedings
8 are -- their legitimacy is in play at all times, both with the
9 parties and with the public at large. And so now, quite apart
10 from me being preempted from saying something that wasn't
11 actually classified by some agency, now you have something
12 that the government watched for a day without objection -- at
13 times, even when the military commission made objections --
14 but the government watched this for a day; and now the
15 proposition is that, having done that, we now go back in time
16 and act as if those things had not been said, act as if they
17 can be kept in secret, when they were the basis for the
18 military -- for the government and the defendant asking the
19 military commission to grant relief and to take particular
20 types of action.

21 And this is not a level playing field. This is not
22 fair, in the basic sense of the term "fairness." And I
23 appreciate the opportunity to say that to you. Thank you.

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1 MJ [COL POHL]: Thank you, Mr. Nevin.

2 Mr. Harrington.

3 LDC [MR. HARRINGTON]: Judge, Mr. Nevin just said to you
4 that this is your property, and I think perhaps that triggered
5 the question that you brought up a few times earlier this
6 morning, about whether essentially you are -- I think the way
7 you are looking at it, you are sanctioning the disclosure of
8 classified information because you're making an order that
9 allows this unofficial transcript to continue, and I don't
10 think that that's the way that this has to be looked at.

11 The court has done nothing wrong here. This is the
12 horse went out the barn door and now the government is trying
13 to close the barn door. They are not even following the
14 procedure that was articulated earlier this morning by
15 Mr. Schulz on how they should try to close the barn door; they
16 just do it on their own.

17 But I don't think there is anything that the court
18 needs to fear about the mistake, the error or whatever was
19 done on the part of the government.

20 I think the context here is important, even though it
21 relates to this particular narrow issue here. But before the
22 hearing in October, with the assistance of the government, we
23 interviewed the witnesses who testified, and they were long,

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1 extensive interviews; and to the government's credit, they
2 didn't interfere, they sat there and watched and observed.
3 But the government had knowledge -- it wasn't that these
4 questions were just sprung on witnesses, as they testified.
5 They had knowledge of these witnesses and what they were going
6 to say before they testified, and they had knowledge of what
7 the questions were that counsel had. We had a room full of
8 lawyers, every one of whom asked questions from a different
9 way or in many different ways in many different areas that the
10 government had knowledge of. So it's not like this is
11 something that just, "Oh, I made a mistake," right away.

12 And then also, Judge, I think we talk about the horse
13 going out the door, this -- these proceedings are not only
14 conducted here, where there is an extremely limited audience
15 and an extremely limited broadcast of it, but they are
16 broadcast to other venues near Washington, D.C., and New York
17 City where the national media send representatives to watch
18 the argument, so that this information is out there and
19 broadly disseminated, or at least broadly available, whether
20 the press chooses to write about it or talk about it or not.
21 But I think the court needs to consider all of those in terms
22 of the analysis that the court applies.

23 MJ [COL POHL]: Thank you, Mr. Harrington.

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1 Mr. Ruiz, anything to add to that?

2 LDC [MR. RUIZ]: No, Judge. On behalf of Mr. Hawsawi, we
3 adopt the arguments of all counsel, including the press
4 representative.

5 MJ [COL POHL]: Trial counsel wish to be heard? General
6 Martins.

7 CP [BG MARTINS]: Yes, Your Honor. Your Honor, the United
8 States respectfully requests that the commission deny this
9 motion and thus decline to direct that the full
10 unofficial/unauthenticated transcript of the 30 October 2013
11 proceedings be released to the public.

12 Under the Trial Judiciary Rules of Court and under
13 the best reading of all applicable law, the military judge has
14 the responsibility and authority to ensure that the rights of
15 all parties are protected while affording public access in
16 protecting national security, and consistent with these
17 responsibilities and authorities the military judge ensures
18 that all the commission's proceedings are open and transparent
19 to the extent possible.

20 Also, and according to Rule of Court 6.3.b(3), the
21 unofficial transcripts that are made available through the
22 process defined in the Regulation for Trial by Military
23 Commission, quote, are not judicial records, because they are

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1 not the transcript that is authenticated by the military
2 judge.

3 When reviewing the unofficial/unauthenticated
4 transcript of the October 30, 2015 proceedings for public
5 release on the military commission's website, original
6 classification authorities determined, looking at the totality
7 of the circumstances surrounding the transcript, that further
8 disseminating certain of this information in the transcript
9 and on the Internet would cause damage to national security.
10 These are skilled and experienced professionals who are
11 authorized by Executive Order 13526 to make just such a
12 determination. They made the determination, even considering
13 that the information was uttered in a public session, and that
14 aspects of it were reported to the media.

15 Having so made this determination, the original
16 classification authorities with the United States Department
17 of Defense security classification/declassification review
18 team redacted protected information from the
19 unofficial/unauthenticated transcript before it was posted on
20 the military commission's publicly accessible website.

21 Although exceptionally rare and subject to public
22 questioning and media criticism when done, this after the
23 utterance redaction is itself fully authorized by Rule 19-4.e

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1 in the Regulation for Trial by Military Commission, Mr. Schulz
2 and the others who have orally argued and weighed in on the
3 matter have no compelling response to the statement in
4 Rule 19-4.e that the transcript in question, quote, is an
5 unofficial, unauthenticated draft that may be further revised.

6 When read in light of the Regulation for Trial, in
7 light of Rule for Military Commission 806 and in light of
8 applicable provisions of the Military Commissions Act, this
9 language must include the authority to redact classified or
10 otherwise properly protected information.

11 MJ [COL POHL]: General Martins, let me refer to another
12 paragraph of the regulation, paragraph 19-3.c, where it says,
13 "The military judge may resolve any dispute raised by the
14 parties or by members of the public, including news media
15 representatives, regarding whether material presented at
16 trial, at a hearing or in a filing, ruling, order or
17 transcript, may be released to the public or is not
18 appropriately designated as 'protected.'"

19 CP [BG MARTINS]: Right. That's part of why Mr. Schulz
20 was able to come in, avail himself of an opportunity to be
21 heard.

22 MJ [COL POHL]: Okay. So you interpret -- so you
23 interpret these two rules together meaning that the government

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1 can unilaterally alter, revise, redact, whatever term you want
2 to use, the transcript on the website; and then if there is an
3 objection to it that triggers 19-3, and then we resolve it at
4 that point?

5 CP [BG MARTINS]: The claim is being made, it's being
6 properly recognized by the military commission to hear if it
7 impacts on the fairness of the proceedings and on those --
8 those principles that are stated in the Rules of Court.

9 Your Honor, the reason we believe that because this
10 is an unauthenticated, unsealed record of official record of
11 trial, they're not subject to a public right of access. By
12 your own -- by the trial judiciary's own words in the Rules of
13 Court, it is not a judicial record.

14 MJ [COL POHL]: Is it a government record?

15 CP [BG MARTINS]: It is not a judicial record, which is
16 the operative standard, and we would refer to -- we cite this
17 in our brief, Securities and Exchange Commission v. American
18 International Group. That's a D.C. Circuit case from 2013,
19 our reviewing court, 712 F.3d 1, the point cite pages 3 to 5,
20 and it speaks of what is a judicial record. The Antar case
21 that Mr. Schulz cited and Mr. Connell cited is about a
22 judicial record. It's actually about the sealing of an
23 official transcript.

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1 The court occasionally cites to these transcripts,
2 the parties do in their pleadings. We would submit that
3 what's being relied upon is argument. You are not making
4 decisions, formal decisions, based on these, and that by your
5 own Rules of Court, you're stating that they are not
6 authenticated.

7 So, I mean, the first -- the standard -- the burden
8 is on press movants to show that this is a judicial record and
9 that's something that is traditionally subject to a right of
10 public access and also something that by logic should be, and
11 that's the Press-Enterprise II factors, which is our second
12 main argument. So our first argument is based right in the
13 text of the Regulation for Trial 19-4.e and Rule 6.3, which we
14 think is a strong argument setting up a burden that has not
15 been met here.

16 Our second argument actually goes to the standard in
17 Press-Enterprise II, which sets up the requirements of, you
18 know, experience and logic, two complementary considerations,
19 is this something that traditionally has been given public
20 access and protected information of this kind, the kind that
21 Rear Admiral Clarke in his declaration states needs to be in
22 this form, in this verbatim form, not posted on the web
23 because it would damage national security. That is not the

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1 kind of information that has traditionally had a right of
2 public access, nor does it meet the logic test of
3 Press-Enterprise II, and this is the 1986 Press-Enterprise
4 case, Press-Enterprise Company v. Superior Court of
5 California, 478 U.S. 1, point cite pages 8 to 9, the 1986
6 Supreme Court case.

7 The logic test is whether access will provide a
8 significant positive effect on the functioning of the process
9 in question, and that's not met here either. Classified
10 information has its positive effect because it remains
11 classified properly. So that's our second argument, and I
12 would ----

13 MJ [COL POHL]: Are all the redactions because it was
14 classified?

15 CP [BG MARTINS]: Your Honor, the declaration by Rear
16 Admiral Clarke does rely upon his authority as an original
17 classification authority. He is referring to his authority
18 under 13526, and his requirement under 13526 is that
19 "Information shall not be considered for classification unless
20 its authorized disclosure could reasonably be expected to
21 cause identifiable or describable damage to the national
22 security...and it pertains to one or more" enumerated
23 categories, including "military plans, weapons systems, or

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1 operations."

2 So he is invoking his authority under 13526. The
3 question of privilege, which was coming up in your exchanges
4 with Mr. Connell, relates to evidence in court and what's
5 admissible. Rules of Evidence include rules of privilege, of
6 course. This is now something that's not a judicial record
7 being redacted by a proper authority who's met that standard.
8 He has stated that if we were to put this out on the web, it
9 would reasonably be expected to cause identifiable and
10 describable damage.

11 In his specific words, Your Honor, I will quote from
12 an unclassified part of the declaration, "Media accounts are
13 less complete and detailed than the testimony provided in open
14 session. Public posting of the testimony on the OMC website
15 for the whole world to see essentially creates a permanent and
16 fixed asset that could be mined by those with intentions
17 hostile to the United States and JTF-GTMO." So that's
18 Attachment C to Appellate Exhibit 400C, our motion -- or our
19 response to the motion.

20 So, you know, even if we were to assume for the sake
21 of argument that this is a judicial record, it is not. But
22 even if we were to assume it, then press movants also must
23 demonstrate that the classified or otherwise protected

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1 information in the transcript is subject to a public right of
2 access; and under the experience and logic considerations of
3 Press-Enterprise II, they simply don't meet that burden.

4 MJ [COL POHL]: Do you see any distinction between the
5 First Amendment right to access and the release of classified
6 information? I'm hearing -- what I'm hearing from the other
7 side is, it is not a declassification decision; it is simply
8 ordering the release of classified information, is what it
9 amounts to, under some First Amendment analysis that is
10 different than the normal analysis of whether it's classified.

11 CP [BG MARTINS]: I think the First Amendment is
12 respected. I mean, there is not an unqualified public right
13 of access. The First Amendment is respected if the
14 classification authority in this instance is stating
15 identifiable or describable damage and that it's
16 reasonably ----

17 MJ [COL POHL]: So if the conclusion is that the
18 classification process was properly followed, okay, there
19 would be no -- it just seems that in some of the analysis that
20 I'm hearing under the First Amendment, that somehow it would
21 lead to a reconsidering of not the process, but of the
22 product, of whether it is properly classified.

23 CP [BG MARTINS]: We don't see it that way, Your Honor.

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1 Admiral Clarke is looking now at a specific situation in the
2 totality of the current circumstances, looking at this
3 product, and stating that the things that continue to be
4 redacted, were they to be posted permanently on-site where
5 they could be mined, that that would be damaging. That's all
6 he has to do. It's not unlimited. It's got to reasonably
7 state that identifiable and describable damage, and I believe
8 he has done that, and you have got his declaration. You also
9 have the transcript and can see what remains redacted.

10 But it is worthwhile, Your Honor, to look, you know,
11 just for the sake of argument, if they were to have met those
12 two burdens, that it was a judicial record, it is not, that it
13 met Press-Enterprise II as to whether there is a qualified
14 public right of access. The government still can overcome
15 that burden by showing that the unredacted transcript -- or
16 that protecting that unredacted transcript, the parts that
17 remain redacted is essential to preserve higher values and is
18 narrowly tailored to serve an overriding government interest,
19 and this is now Press-Enterprise I.

20 And even assuming that there is some limited right of
21 access to the still-redacted information on this
22 unauthenticated/unofficial document, the commission should
23 nevertheless deny the motion because redactions are necessary

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1 to prevent damage to the national security and are narrowly
2 tailored to serve an overriding interest. In this case, the
3 properly authorized executive branch officials have carefully
4 reconsidered each redaction in order to ensure maximum
5 disclosure while protecting information that is in the
6 public's interests to protect, and this process has resulted
7 in many more portions being unredacted.

8 The lesser-redacted transcript is Attachment B to our
9 response. Of the just over 45,000 words in the 30 October
10 transcript, there were just under 8,000 words originally
11 redacted, or about 18 percent of the total. Upon careful
12 relook, only about 2,800 words of the 45,000 remain redacted,
13 or a 6.2 percent of the overall transcription of the day's
14 proceedings, and 35 percent of what was originally redacted.
15 So there were judgment calls being made by this official. It
16 had to be contextual. These are the kinds of things that have
17 to be done by original classification authorities, and they
18 were done carefully and thoughtfully, and it resulted in a
19 narrowly tailored nondisclosure from public view.

20 MJ [COL POHL]: How do you respond to the defense argument
21 that the time for the government to object to this was during
22 the testimony and not after the testimony was already given;
23 that you have a responsibility, separate and apart from any

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1 responsibility that others may have to protect the classified
2 information, and that you certainly could have objected at the
3 time to make sure that it wasn't publicly disseminated? It is
4 a kind of a variation on the waiver argument ----

5 CP [BG MARTINS]: The process of protecting information in
6 court is supposed to start with a specified 505(g) notice that
7 states with specificity what is being elicited. There is a
8 declaration on file with the court. It's Attachment B to
9 your -- the appellate exhibit that led to your protective
10 order, Appellate Exhibit 014, Attachment B to that appellate
11 exhibit. There is a declaration from an authorized official
12 at the start of the litigation that talks about categories of
13 things.

14 So, I mean, the way CIPA is set up is there should be
15 a notice with sufficiency ----

16 MJ [COL POHL]: I understand that.

17 CP [BG MARTINS]: Those were not our witnesses and ----

18 MJ [COL POHL]: I understand that, but at least according
19 to Mr. Harrington, you sat in -- not you personally,
20 necessarily, but your team sat in and listened to what the
21 witnesses said. I am assuming that you have an idea of what
22 was classified and what was not.

23 Now, let's assume you want to say whether you should

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1 have gotten a 505(g) notice or not, but if we have a situation
2 where for whatever reason classified evidence appears to be
3 presented, are blurted out inadvertently and there is a
4 procedure for me and my court security officer, I have got
5 that, but doesn't the government also have an obligation to
6 stand up and say, "I object, Your Honor, that is classified
7 and there's the 40-second time lapse"?

8 CP [BG MARTINS]: There are measures here. I would not in
9 any way state that the measure of after the utterance
10 redaction can't be used. It ought to be exceptional. This is
11 exceptional. It subjects it to this kind of level of
12 scrutiny, but the fact that only a third of the original
13 redactions are left show this is an area that requires some
14 judgment and that any individual particle of information
15 relating to some of the things that were discussed can't
16 easily be culled out, and there are -- there are lots of
17 things about how we handle detainees that are both capable of
18 being put out there to show the public that what we do is
19 humane, secure, and where that line is is up to original
20 classification authorities.

21 And Admiral Clarke has now looked at this thing and
22 said were it to go out, as distinct from it being uttered
23 where someone could hear it and jotted down by a reporter, as

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1 distinct from that, looking at this now and saying should that
2 be out on the web to be mined, he is making the call that that
3 would damage national security. That's all that is necessary
4 here.

5 MJ [COL POHL]: So you don't give any weight to the --
6 what I am calling the waiver argument by the government at the
7 time?

8 CP [BG MARTINS]: Not to the decision Admiral Clarke made
9 to state that this unofficial/unauthenticated document ought
10 to be put on the web, no, I don't. Not at all.

11 Your Honor, in closing, I emphasize that the United
12 States shares the press movants' view that public scrutiny of
13 these proceedings is critically important. This is true even
14 though we oppose the underlying so-called emergency claim of
15 the accused from the time it was raised, have maintained that
16 this is a collateral matter that falls within the sphere of
17 the camp commander and have argued against the interim order
18 before and during the 14-month period of its imposition.

19 In the situation currently under your consideration,
20 the public's ability to understand what its government is
21 doing may spell the difference, for some, between confidence
22 and a lack of confidence in that government; and yet the
23 realtime observers in the gallery and in the closed circuit

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1 extensions of the courtroom in the continental United States
2 indeed were able to observe the two witnesses on 30 October
3 whose testimony was subject to limited eventual redaction in
4 the unofficial transcript. Those observers, and even members
5 of the public who did not attend but who are now able to read
6 the lightly redacted transcript, can discern the words and
7 actions of service members who were doing their duty and who
8 are accountable for their actions.

9 Observers are given the ability to scrutinize with
10 both witnesses under oath, an assistant watch commander and a
11 camp officer in charge who take their duties seriously and
12 take them professionally, even as the commission took
13 testimony that the interim order prohibiting contact between
14 the female guards and the accused was unpopular in the ranks,
15 the same testimony subjecting these and three other service
16 members to examination from five defense teams for more than
17 15 hours demonstrated that unpopular but clearly lawful orders
18 are obeyed.

19 This testimony also demonstrated that the methods of
20 restraint used by guards are humane, methodical and
21 secure ----

22 LDC [MS. BORMANN]: Judge, I am objecting.

23 CP [BG MARTINS]: ---- even while some of the details ----

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1 MJ [COL POHL]: Hold on a second. There is an objection.

2 LDC [MS. BORMANN]: This is not relevant to the items
3 before you in AE 400.

4 MJ [COL POHL]: Overruled. You may finish.

5 CP [BG MARTINS]: Humane, methodical and secure even when
6 some of the details about the guard force and their techniques
7 are not publicly posted on the website, and this ability to
8 scrutinize is not without value even if it is also not with --
9 not unlimited due to legitimate needs of protecting certain
10 information from permanent disclosure.

11 Subject to your questions, that's all I have.

12 MJ [COL POHL]: General Martins, let me ask you this.
13 Assuming these are judicial records for the sake of this
14 question, in looking at 19-3, what's the way ahead?

15 CP [BG MARTINS]: Your Honor, you are having a hearing on
16 this, you are going to issue some kind of ruling -- you are
17 going to issue a ruling. It wasn't an advance ruling, but I
18 presume you are going to state some rationale.

19 MJ [COL POHL]: I usually do. No, what I am saying is
20 this. If they are not judicial records, okay, and it says,
21 according to the Secretary of Defense -- now, whether it's the
22 largess of the Secretary of Defense or the government,
23 whatever, but it's the chosen procedure that covers this --

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1 would this way ahead be, then, that these redactions are
2 treated like other, where we do similar to the 505
3 substitution process, or ----

4 CP [BG MARTINS]: In going forward, that would be the
5 appropriate thing. Maybe the declaration of Rear Admiral
6 Clarke, you know, all of us taking notice of that, of the
7 declaration from -- I think it's late 2011 that was filed with
8 Appellate Exhibit 014 that we, you know, make sure that we are
9 looking at that and we are getting a requisite specificity in
10 the 505(g) process so we know what are you going to elicit,
11 what's that line of questioning, but all of us being vigilant
12 on that. But this ability to correct is in the rule and it is
13 something that we might have to avail ourselves with.

14 MJ [COL POHL]: Let's assume -- let's assume you are half
15 right and half wrong. Okay? And let's assume you are
16 assuming the half ----

17 CP [BG MARTINS]: That's an uncomfortable assumption.

18 MJ [COL POHL]: I know that they are judicial records. I
19 know what the rule says, my signature is on the front page, so
20 I know who wrote that rule. I got that. But I always can
21 reconsider my own ruling. Okay? Let's put that to the side.

22 If this were to happen again, would you need to come
23 to get judicial review of the redactions before you redact

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1 them onto the website?

2 CP [BG MARTINS]: Your Honor, it's not a judicial -- if
3 you were to republish a new Rule of Court -- that's not where
4 we are, but if you were to publish new law that's law of the
5 case or law of the jurisdiction, we would have to reconsider
6 that. There is no ----

7 MJ [COL POHL]: I understand that. I'm saying let's move
8 my own rule aside temporarily. Or the march ----

9 CP [BG MARTINS]: Okay.

10 MJ [COL POHL]: And I said I thought about what Mr. Schulz
11 says and it makes a lot of sense, that it is a judicial
12 record -- I am not saying I am going to do that. I am trying
13 to figure out a way ahead. As the way ahead, would you submit
14 things to the military commission for classifications on the
15 website or not?

16 CP [BG MARTINS]: Well, it's not the process in the
17 Regulation for Trial. The concern there, Your Honor, is you
18 are not an original classification authority. You are wise,
19 you are running these proceedings pursuant to your authority,
20 but you are not an OCA; and those are people who have the
21 authority properly to determine what could be reasonably
22 expected to cause damage.

23 MJ [COL POHL]: So whether or not I see it, a judge sees

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1 it before or after, as long as the government asserts this is
2 classified information, that's the end of the inquiry?

3 CP [BG MARTINS]: Well, I mean ----

4 MJ [COL POHL]: I am assuming the process is followed.

5 CP [BG MARTINS]: The process also involves media making
6 claims and doing things about it. So you are not out of the
7 process. You're making sure it's fair and as transparent as
8 possible. But at the end of the day, we can't change the
9 standard. That is a standard for original classification
10 authorities. It's not unlimited. It's got to be restricted
11 to the purposes of 13526, and you've -- you've got an ability
12 to look at the declaration and see if there is identifiable
13 and describable damage. We would submit you could, if you
14 look at that.

15 So, I mean, I think that's the way the process is
16 intended to work. If the military commission seeks notice in
17 advance of the posting, of course getting something out there
18 is a part of the transparency. Even though not unlimited,
19 because it has redactions, it's not lacking value to get
20 something out there, it's what people can then look at and
21 shoot at and say, hey, maybe that's too heavy-handed. But if
22 there is a desire for notice, we can do that. I just don't
23 want to in any way say the United States is giving to a

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1 non-authorized person of any kind the authority to essentially
2 determine something is unclassified.

3 MJ [COL POHL]: Thank you.

4 CP [BG MARTINS]: Thank you. I am going to give
5 Mr. Schulz another opportunity to respond, if he would like
6 to. Mr. Schulz.

7 PRESS [MR. SCHULZ]: Thank you, Judge. Just a few points
8 in response to General Martins. I would like to first start
9 with the question of whether this is a judicial record, and
10 not to repeat myself, but it's almost like Alice in
11 Wonderland, that a word means what I say it means.

12 Whether something is a judicial record for purposes
13 of the is constitutional access right is a constitutional
14 question. It's how the record is used. It's the role that it
15 plays in the proceeding. And by that standard, the
16 transcripts that we are talking about here are clearly
17 judicial records.

18 What I would like to turn to is a new point, which is
19 the argument that even if it is a judicial record, the First
20 Amendment right of access does not attach unless the press
21 movants show that historically and logically, access has been
22 granted to classified information. That fundamentally
23 misjudges Press-Enterprise II standard. The history and logic

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1 test is a test to determine where the right of access applies,
2 not whether it is overcome, and the argument that is being
3 advanced by the government here was squarely rejected by the
4 Supreme Court in the case called Globe Newspapers cited in our
5 memorandum, 457 U.S. 597. And in that case the question was
6 whether a statute passed by the State of Massachusetts that
7 required trials to be closed if there was a minor victim of a
8 sex crime called to testify. As a statutory matter,
9 Massachusetts said that must be closed. And that was
10 challenged by a newspaper, saying it violated the
11 constitutional access to the trial, and the Supreme Court
12 agreed. And what it said was not that you can't close a
13 courtroom when a minor victim of a sex crime testifies, but
14 you can't by statute require it to be closed because there is
15 a constitutional right of access to the proceeding, and they
16 specifically note in footnote 13 that the argument being
17 advanced here is an incorrect argument.

18 What the government essentially is arguing is because
19 this information needs to be closed, you should not find a
20 constitutional right of access. That simply is the wrong way
21 to look at it. If it is a judicial record, the constitutional
22 right of access applies. We went through that earlier. And
23 the question is whether the government can overcome that

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1 burden.

2 I haven't seen the declaration of Admiral Clarke. It
3 is filed under seal. I only know what is said about it in the
4 government's papers. But I would urge once again that the
5 proper standard here is that the court must decide whether
6 General -- sorry, whether Admiral Clarke has made a
7 sufficiently clear and particularized showing that this
8 information satisfies the high standards of
9 Press-Enterprise II. I would just underscore that, once
10 again, it is not a question of whether it is properly
11 classified. It can be classified and still be subject to the
12 access right. Section 8 of CIPA makes that clear. That's how
13 these constitutional and statutory procedures fit together.

14 Once the information comes out in public court, it
15 becomes subject to the right of access, and that's again -- I
16 think you were asking earlier if I agree, "am I not
17 essentially ordering the disclosure of classified
18 information," and, again, I think that's the wrong way to look
19 at it. What you are ordering is the prevention of censorship
20 by the government of material that the public has a
21 constitutional right to know.

22 We are not debating ----

23 MJ [COL POHL]: But that would mean the public would have

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1 a constitutional right to know classified information?

2 PRESS [MR. SCHULZ]: It has a constitutional right to know
3 the information disclosed in open court without objection by
4 the government, whether that is considered classified or not.
5 Whether it subsequently deserves to be redacted is a question
6 that can happen. As we say in our brief, we think because it
7 is in open court it should be an extraordinary circumstance.
8 That's what Nebraska Press was about. It was a prior
9 restraint case, but this is really akin to a prior restraint.
10 Our position is once that information is out, it is public
11 information and the government is trying to put the genie back
12 in the bottle.

13 So the Press-Enterprise standard has to be met, but
14 it should be very carefully and strictly applied by the court
15 when they are asking to put the information -- when the
16 information they are asking to prevent the public from knowing
17 has already been disclosed in open court.

18 One other point I just want to -- it is mentioned in
19 our brief, the government does not seem to contest it. But
20 the fact that this is not an Article III court does not change
21 the nature of this analysis a bit. The First Amendment
22 applies here. The military judge, the commission, has an
23 obligation to uphold the public's right and the fact that this

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1 is not an Article III court is irrelevant. We cite a case
2 called New York Civil Liberties Union v. New York City Transit
3 Authority where the Second Circuit goes through the analysis
4 where it says simply because an adjudicatory process where
5 penalties have been imposed does not mean the standards are
6 any different. It's also cited by the Sixth Circuit in the
7 Detroit Free Press and North Jersey Media which were cases
8 involving the deportation hearings run by the Department of
9 Justice, Article II hearings, so the same standards would
10 apply.

11 So we would submit that what happens in this
12 courtroom becomes public property. The government does not
13 have the unilateral right to say this needs to be closed at
14 that point. It becomes a decision that the court must be
15 involved in, and the way forward is that if they believe
16 something in a transcript needs to be withheld, they need to
17 come to the court and ask permission to do that.

18 The same way they have -- there is a standing
19 protective order here that allows things to be filed under
20 seal. If they are classified, the court has already made a
21 determination that that's an appropriate way to go. They are
22 not unilaterally doing that. The court has a constitutional
23 role to play here, and however the court resolves the dispute

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1 here in looking through the specific redactions, what is most
2 important to be decided in this proceeding is that it is the
3 role of the court. It is not the government's role to come in
4 and censor what happens in a judicial proceeding, and that
5 matters for the public perception of this proceeding, it
6 matters to the health of our constitution, and it matters to
7 the health of our country. And we submit that there is a
8 clear constitutional issue at stake here that should be upheld
9 by this tribunal. Thank you.

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

11 Any other defense counsel wish to -- Mr. Connell?

12 LDC [MR. CONNELL]: Your Honor ----

13 MJ [COL POHL]: Go ahead.

14 LDC [MR. CONNELL]: Your Honor, it was interesting that
15 the government's argument led with the fact that the military
16 judge has, quote, responsibility and authority to ensure the
17 openness of this proceeding because the government's analysis
18 would strip the military judge of any responsibility or
19 authority whatsoever, in contradiction of the Regulation for
20 Trial by Military Commission, the Rules of Court and the first
21 and Sixth Amendments.

22 The first argument that the government advances is
23 that under Rule of Court 6.3.b(3), that the military

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1 commission wrote rules that said unauthenticated transcripts
2 are not judicial records. It's important to look at the
3 context of that, the third sentence in this provision, because
4 this provision is not making a constitutional analysis. The
5 thrust of 6.3.b(3) is that a document generated
6 contemporaneously with the commission proceedings that
7 purports to record the words spoken by the parties.

8 The thrust of 6.3.b(3) is that the military
9 commission is not vouching for the accuracy of those
10 transcripts, which makes perfect sense given the military
11 distinction between an unofficial/unauthenticated transcript
12 and an official/authenticated transcript. In fact, the
13 remainder of the sentence that is cited by the government,
14 "Unauthenticated transcripts are not judicial records and may
15 not be an accurate representation of the proceedings."

16 This is not a constitutional determination that
17 transcripts are not judicial records. It's nothing more than
18 it purports to be, which is an explanation that the
19 unofficial/unauthenticated transcripts are just that.

20 But what's important is the next provision in the
21 Rules of Court, which is 6.3.c, and 6.3.c governs the release
22 of transcripts. 6.3.c provides, "A Military Judge may, to
23 preserve the integrity of a Commission proceeding, direct that

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1 all" -- excuse me -- "part or all of a transcript not be
2 released under the provisions of paragraph 19.4 -- 19-4.a of
3 DoD Regulation for Trial by Military Commission."

4 The operative subject of that sentence is "A military
5 judge may...direct." The authority that the government
6 referred to to protect the openness of proceedings is granted,
7 among other places, but 6.3.c, because it is not the Office of
8 the Chief Prosecutor who may direct that part of a transcript
9 not be released, it is not the Department of Defense security
10 classification declassification review team who may direct
11 that all or part of a transcript not be released, because this
12 is a judicial proceeding, an Article I judicial
13 proceeding ----

14 MJ [COL POHL]: You read that language to say that only a
15 military judge ----

16 LDC [MR. CONNELL]: No, I read it to be an authorization,
17 and it is not so much a limitation as an authorization. So
18 the question is whom is authorized, and the authorization here
19 is for the military judge. But you don't have to ----

20 MJ [COL POHL]: But by -- does that exclude others from
21 doing it?

22 LDC [MR. CONNELL]: Yes, because they don't have authority
23 to do it. There is actually more on this particular question.

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1 And there is a reason why the military judge is given that
2 authority under subsection (c), and that is because this
3 imposes a minimization requirement on the judicial authority.
4 The second sentence is, "Any directive -- any directive will
5 minimize the amount of information that may be withheld and
6 will be lifted as soon as the need for limiting the release
7 ends." The DRT or the Office of the Chief Prosecutor are
8 under no similar restrictions, no similar requirements. The
9 authority rests with the military judge.

10 MJ [COL POHL]: That would only go back that somehow I
11 controlled the unofficial transcript, then. I don't have any
12 authority over the unofficial transcript. Even in your
13 reading, and of course it is interesting if you are trying to
14 interpret the Rules of Court, of what they mean by the person
15 who signed them, but that's okay.

16 But what I am saying is, it has to constitute a
17 judicial record under review and you read this as a limitation
18 for others to adjust the transcript without the permission of
19 the judge. Is that how you read it?

20 LDC [MR. CONNELL]: No, sir. I read it as an
21 authorization. You have to read it in conjunction with
22 19-4.e, which was not written by the military commission, of
23 course, but written by the Secretary of Defense. 19-4.e sets

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1 forth the general rule. The general rule is that the
2 unofficial/unauthenticated transcript, enforced by the
3 Convening Authority, shall be posted at the end of each day by
4 a court reporter who is stationed outside of the courtroom,
5 and that process means that that court reporter would not have
6 access to classified information. That's the general rule.

7 Now, what 6.3.c, the Rule of Court, does is establish
8 an exception to that general rule. The exception to the
9 general rule is that a military judge may, to preserve the
10 integrity of the commission proceeding, direct that all or
11 part of a transcript not be released. So it is not simply
12 that language in 6.3.c that controls because that language is
13 not written in a vacuum. It was written against the
14 background of the First and Sixth Amendment requirements of
15 openness to begin with, the articulated policy of the
16 Department of Defense in Regulation for Trial by Military
17 Commission 19-1, that military commissions shall be open, and
18 the specific provision in 19-4 -- I am slowing down -- Echo,
19 that one aspect of that openness is the provision of
20 transcripts not by the Office of the Chief Prosecutor, but by
21 the Convening Authority.

22 The government, however, argues that 19-4.e
23 authorizes post-facto redactions. There is nothing -- in the

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1 four sentences of 19-4.e there is nothing that says -- that
2 gives the government any authority to do anything to create
3 post-facto redactions. The structural protection against the
4 disclosure of classified information in 19-4.e is the place
5 where the stenographer sits, which is that they are on the
6 40-second delay, they receive the same feed as the general
7 public, and that's the structural protection.

8 Now, the government's argument is under 6.3.b(3), the
9 transcript provision, that these transcripts are subject to
10 further revision, which is certainly true. But that's no
11 different than the transcript of every court. Half the
12 transcripts I have ever read in an appeal have an errata page
13 where the parties come forward and say, no, that's not what I
14 really said, I really said something else, approved by the
15 judge. Transcripts are always subject to revision.

16 MJ [COL POHL]: Is one of your authorities for the release
17 of this information the regulation, right, 19-4?

18 LDC [MR. CONNELL]: Yes.

19 MJ [COL POHL]: But doesn't 19-4.b say that the release
20 can only be the materials that contain no classified
21 information?

22 LDC [MR. CONNELL]: So the ----

23 MJ [COL POHL]: And therefore, what I'm saying is, and I'm

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1 not analogizing it to anything beyond this courtroom, so I
2 want to make this very clear.

3 LDC [MR. CONNELL]: Sure. Fair enough, sir.

4 MJ [COL POHL]: Say the information was classified and it
5 is treated as a spillage. Okay? And the government's attempt
6 to mediate that spillage by reducing the further dissemination
7 of the classified information in 19-4.b, it would appear to be
8 the Secretary of Defense telling them, do not put classified
9 information on the website. Aren't they following the
10 regulation?

11 LDC [MR. CONNELL]: There are two ----

12 MJ [COL POHL]: I understand. I am talking about the
13 regulatory authority here, not the Constitutional or other
14 issues, just the regulatory issue.

15 LDC [MR. CONNELL]: Sure. The fundamental question is who
16 decides -- who decides what goes on. There may be plenty --
17 you know, you asked a question of the government which was,
18 are all the redactions because of classification? And it
19 didn't answer you, and the reason for that is because, no, all
20 the redactions are not for classification. There may be
21 government interest privilege or something else. So the
22 government objection under 19-4.b is who decides that the
23 information is classified or protected, and our argument is

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1 that there is a role when that -- when someone seeks to
2 withhold such information, that decision has to be made by the
3 military commission, not by the prosecution.

4 MJ [COL POHL]: The military commission decides whether or
5 not it's classified?

6 LDC [MR. CONNELL]: No, of course not, sir.

7 MJ [COL POHL]: Okay. Then ----

8 LDC [MR. CONNELL]: The military commission decides
9 whether it is -- it can be released or not. I started with
10 the proposition that there is space between the idea of
11 classification, the marking, and the judicial operation of
12 that classification, whether that is the invocation of
13 classified information privilege or that is the sealing of a
14 courtroom or that is the directing of a witness not to answer.
15 That part of it, that second part of it, is what the military
16 judge controls, not whether the Executive Act of
17 classification has taken place.

18 MJ [COL POHL]: Got it.

19 LDC [MR. CONNELL]: The government made an argument, which
20 seems to be a new theme, that somehow the 505(g) notice was to
21 blame, and I want to exactly go through the order of events
22 here. The order of events were that on two separate
23 occasions ----

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1 MJ [COL POHL]: Mr. Connell, does this really make --
2 understand, the -- the 505(g) notice is in their pleading,
3 that somehow the defense didn't give them a 505(g) notice.
4 Okay? That's not where we are at. Does that really make any
5 difference? What I am saying is ----

6 LDC [MR. CONNELL]: The government thought it did. I
7 wanted to answer. If the military commission is saying it
8 doesn't, I will stay silent.

9 MJ [COL POHL]: The lack of a notice or whatever is not
10 the issue. The issue is whether something came out, whether
11 inadvertently -- I am not sure the defense was even aware it
12 was classified.

13 LDC [MR. CONNELL]: Which is precisely my point.

14 MJ [COL POHL]: So there could be no 505(g) notice, but be
15 that as it may, who knew it was classified is not relevant to
16 the issue. The government did not stand up to object, okay,
17 and so we're right where we are at.

18 LDC [MR. CONNELL]: Right.

19 MJ [COL POHL]: But the 505(g) notice, I think it doesn't
20 move the issue before me along.

21 LDC [MR. CONNELL]: All right.

22 MJ [COL POHL]: Because we are at where we are at.

23 LDC [MR. CONNELL]: Yes, sir. Our 505 notice, just for

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1 the record, is 254FFFF (AAA), which contains a great deal of
2 notice and a great deal of specificity. Once the government
3 told us something was classified, we put it in a 505(g).

4 MJ [COL POHL]: I got it. I got it. Again, I don't want
5 to spend time on 505(g) notices on this issue.

6 LDC [MR. CONNELL]: Sure. Now, the government argues
7 that -- makes substantial arguments based on the Clarke
8 declaration, and I just want to -- I can do this in an
9 unclassified fashion, but I would like to direct the military
10 commission's attention to AE 400F, which is the transcript
11 that I handed up earlier, beginning at page 246.

12 MJ [COL POHL]: One moment. One moment, please.

13 [Pause.]

14 MJ [COL POHL]: What page, please?

15 LDC [MR. CONNELL]: 246.

16 MJ [COL POHL]: Just so I understand your technique here,
17 what's in the boxes?

18 LDC [MR. CONNELL]: In AE 400F, the material in the boxes
19 is redacted in the latest version of redactions from the
20 government, that is, the redactions which are attached to
21 400B, Attachment B.

22 MJ [COL POHL]: And the other information is?

23 LDC [MR. CONNELL]: Unredacted. It's unclassified, and

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1 it's in the public domain.

2 MJ [COL POHL]: Trial Counsel, just so I am clear on this
3 thing, because we were treating -- this was generated as the
4 official transcript, official unauthenticated transcript, and
5 we were treating the unauthenticated unofficial transcript
6 until it has gone through a classification review as a
7 handling device as TS/SCI, but there is clearly unclassified
8 information contained therein. Do you have any problem with
9 Mr. Nevin -- or excuse me, Mr. Connell referring to ----

10 CP [BG MARTINS]: Your Honor, the pagination is different,
11 although we appreciate the painstaking effort of Mr. Connell
12 to put it on the official but unauthenticated transcript
13 overlay that we provided, what the government released as a
14 lesser redacted. But frankly, given the history of this
15 litigation, it will probably be more comfortable if we had a
16 chance to review what he is going to go over.

17 MJ [COL POHL]: Okay. We what we will do, we are about to
18 take a lunch break anyway, but let me just throw some thoughts
19 to you, is is that -- correct me if I am wrong here,
20 Mr. Connell. My understanding is that the unboxed-out
21 information is on the website, correct?

22 LDC [MR. CONNELL]: Yes, sir.

23 MJ [COL POHL]: And since the transcript on the website

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1 apparently went through some classification review ----

2 LDC [MR. CONNELL]: Apparently.

3 MJ [COL POHL]: ---- one might infer that it is
4 unclassified, even though it is currently on the court
5 reporters' system. Okay. So that may be the way ahead on
6 this, but we're to break for lunch anyway. We'll take some
7 time to look at it, and we will go on from there.

8 The commission is in recess until 1330.

9 [The R.M.C. 803 session recessed at 1155, 22 February 2016.]

10 [END OF PAGE]

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