[The R.M.C. 803 session was called to order at 1334, 15 September 2014.]

MJ [CAPT WAITS]: This commission will come to order. All parties who were present when the commission recessed are once again present. In addition, we have a new detailed defense counsel who is Lieutenant Colonel Thomas Jasper, Jr., United States Marine Corps.

DDC [LtCol JASPER]: [Microphone button not pushed; no audio].

MJ [CAPT WAITS]: At this time, Colonel Jasper, would you please put your legal qualifications and status as to oath and your detailing information on the record?

DDC [LtCol JASPER]: Yes, sir. Your Honor, I have been detailed to this military commission by the Chief Defense Counsel in accordance with R.M.C. 503. I am qualified under R.M.C. 502 and have previously been sworn in accordance with R.M.C. 807. I have not acted in any manner that might tend to disqualify me at this proceeding. The document detailing me to this court has been previously marked and submitted as Appellate Exhibit 007A. Thank you.

MJ [CAPT WAITS]: Thank you, Colonel Jasper.

Okay. For those -- for anyone involved, is my microphone amplifying okay right now?

1 TC [MR. CLAYTON]: Your Honor, we can hear from the
2 government's table.
3 MJ [CAPT WAITS]: Everything is good over here.
4 Defense, you can hear?
5 DDC [LtCol JASPER]: Yes, Your Honor.
6 MJ [CAPT WAITS]: Very well. Okay. Now, before we
7 proceed, there was one matter that was not put on the record
8 from the proceedings of the arraignment, and that is that all
9 interpreters in this commission have been previously sworn.
10 All right. At this time I am going to address
11 Mr. Hadi directly related to his counsel rights given the fact
12 that we do have a new counsel, military counsel detailed to
13 the case.
14 Mr. Hadi, do you understand from my advisement at
15 your arraignment that Lieutenant Colonel Callen would be
16 excused from your case as of 1 October 2014, based on the
17 expiration of his active duty orders?
18 ACC [MR. HADI]: Yes.
19 MJ [CAPT WAITS]: At this time -- at this time the
20 commission finds good cause for excusal of Lieutenant Colonel
21 Callen from your case as of 1 October 2014 under Rule for
22 Military Commission 505(f). Based on the commission's
23 scheduling order that will be issued later today, at this time

1 the commission has elected not to release Lieutenant Colonel
2 Callen from your case until after his orders expire on 29
3 September 2014 -- I'm sorry, 30 September 2014.
4 The reason the court is doing this is because -- or
5 the commission is doing this is because the commission is
6 going to be ordering, in that scheduling order that you will
7 receive after the proceedings today, that counsel -- that the
8 parties provide sealed ex parte listings of the law motions
9 that they intend to file in this case. Obviously that will
10 not divulge any strategy from either side because, as I said,
11 those filings will be made ex parte and under seal.
12 From the commission's standpoint -- and obviously
13 this is up to the decisions within the defense team -- but the
14 commission believes that Colonel Callen could be instrumental
15 in performing the duties that would be required in identifying
16 law motions, given his longevity on the case, and that he
17 could assist the defense in providing that list to the
18 commission, again, ex parte and under seal.
19 Now, Mr. Hadi, with the detailing of Lieutenant
20 Colonel Jasper to your case, you still have two military
21 detailed counsel and you are technically, under the Rules for
22 Military Commissions, entitled to one detailed military
23 counsel. The commission has also been informed by your

1 detailed counsel at a meeting under R.M.C. 802 that the
2 commission held with the parties yesterday that you have not
3 proceeded with any effort to retain civilian counsel, which
4 you mentioned at the arraignment. And again, any civilian
5 counsel would have to be retained at no expense to the United
6 States.
7 Mr. Hadi, do you have any questions about your rights
8 to counsel in this commission?
9 ACC [MR. HADI]: I have no question regarding that, but as
10 far as a civilian attorney, I feel that he will be helpful to
11 my defense team.
12 MJ [CAPT WAITS]: All right. Mr. Hadi, I have advised you
13 that you do have the right to retain civilian counsel. Again,
14 it would have to be at no expense to the United States, and if
15 you desire to retain civilian counsel, that's a matter that
16 you need to take up with your detailed military counsel to
17 pursue that option for you.
18 ACC [MR. HADI]: Good.
19 MJ [CAPT WAITS]: All right. As the commission just
20 mentioned yesterday up at building AV-34 in the conference
21 room, with all counsel present, the commission did hold a
22 conference under R.M.C. 802 at which the following things
23 occurred:

1 First, the commission was introduced to Lieutenant
2 Colonel Jasper, the new detailed counsel.
3 The commission was informed that they had
4 requested -- the defense requested that the proceedings today
5 be moved back to 1300 in order for Lieutenant Colonel Jasper
6 to meet with his client for the first time. Then later today,
7 the start time was pushed back again to 1330 to accommodate
8 prayers.
9 The commission ascertained from the parties that
10 there would not be any additional evidence on the motion to be
11 litigated today, Appellate Exhibit 013. The court ascertained
12 -- or the commission ascertained from the defense that despite
13 the fact that they had objected in the certificate of
14 conference to the government's motion for a protective order
15 for sensitive but unclassified information, that they did
16 not -- to which they did not file a response, that they would
17 have no objection to that; that they had considered filing a
18 response but had elected not to.
19 The commission pointed out an omission in Footnote 1
20 of its proposed order to the commission for Appellate Exhibit
21 014 and asked for a clarification on that before the
22 commission issued its order.
23 The commission inquired of the defense about

1 Mr. Hadi's mention at the arraignment of possibly retaining
2 civilian counsel and was informed that no forward movement had
3 been made on that.
4 After that, the government requested clarification of
5 Appellate Exhibit 005F, which was the request for another
6 closed-circuit television site at Fort Devens, Massachusetts,
7 namely whether it was to be a public or a closed-circuit
8 television site open to the general public or only to family
9 members -- victim family members. The court made an order
10 yesterday that at least for purposes of today's hearing, it
11 would only apply to victim family members and the court will
12 issue a supplemental order making that permanent -- or the
13 commission.
14 From the defense, there was a request from Lieutenant
15 Colonel Jasper that the law motions be moved further to the
16 right to give the defense more time to file them. As stated,
17 the commission, in response to that, is filing or is
18 promulgating a new scheduling order today, which you will
19 receive after today's proceedings. We discussed the release
20 of Lieutenant Colonel Callen, which has already been addressed
21 on the record by the commission.
22 The government asked for clarification on whether,
23 within the definition of evidentiary motions, was included

1 various government notices. And we talked about the fact that
2 the interpreters -- that the issue of the interpreters having
3 been previously sworn was not put on the record of the
4 arraignment.
5 Finally, we talked about the fact that there were
6 some responses of Mr. Hadi at the arraignment that were not
7 interpreted into English. The commission received a copy of
8 those, of those questions and answers, and the commission has
9 determined that they -- any omissions from that colloquy are
10 overcome by the colloquy that I just conducted about rights to
11 counsel with Mr. Hadi on the record of this hearing.
12 Finally, the commission provided some dates into the
13 future, going into the middle of 2015, and asked the parties
14 to block their calendars for the future proceedings of this
15 commission. The exact subject matter or agenda of those
16 future proceedings obviously is not known at this time, but
17 the commission wanted to go ahead and have counsel make those
18 dates available for future proceedings of this commission.
19 Do counsel for either side have anything to add or
20 correct based on the court's summary of that R.M.C. 802
21 conference?
22 TC [MR. CLAYTON]: Nothing to correct, Your Honor, but we
23 do want to note for the record that these proceedings are

1 being transmitted to CCTV sites CONUS pursuant to this
2 commission's order. With respect to one of the new CCTV sites
3 locally, there is an infrastructural and technological issue
4 that did not allow these proceedings to be transmitted to that
5 site.
6 MJ [CAPT WAITS]: What site was that?
7 TC [MR. CLAYTON]: I believe the Bulkeley Hall. I believe
8 I'm pronouncing it right.
9 MJ [CAPT WAITS]: So it's here in Guantanamo Bay?
10 TC [MR. CLAYTON]: Yes, sir.
11 DDC [LtCol JASPER]: Nothing to add from the defense,
12 Your Honor.
13 MJ [CAPT WAITS]: All right. Just for the record, the
14 commission finds that this is a public hearing despite the
15 fact -- the commission considers these CCTV sites to be over
16 and above any constitutional or due process requirement for
17 these proceedings being considered to be public proceedings.
18 And particularly with respect to the Camp Bulkeley
19 closed-circuit television site, since it's right here in
20 Guantanamo Bay, the court particularly finds that that finding
21 is applicable.
22 All right. All right, counsel, any other
23 housekeeping or other issues we need to take up prior to the

1 commission hearing oral argument on Appellate Exhibit 013?
2 TC [MR. CLAYTON]: Nothing from the government,
3 Your Honor.
4 DDC [LtCol JASPER]: Nothing from the defense, sir.
5 MJ [CAPT WAITS]: Very well. All right. I note, I
6 believe, in the pleadings the government accepted a burden on
7 this motion. The defense's position was since it's a pure
8 question of law, that there was no burden, but since the
9 government has accepted the burden, I will give the burden to
10 the government; so I will allow the government to argue first
11 and last on this motion.
12 You may proceed. Mr. Clayton.
13 TC [MR. CLAYTON]: Your Honor, the Military Commissions
14 Act bestows upon both the United States in this litigation, as
15 well as the bench, a very serious shared obligation, and it's
16 a twofold obligation. The first is ensure a fair and full
17 trial for this accused. The second is to do so while
18 maintaining the integrity and protecting classified national
19 security information. This is an obligation the defense also
20 shares, but largely the burden falls I think at a greater
21 level to both the bench and to the government.
22 The MCA, however, doesn't leave us at sea in this
23 obligation. I think through the language of the MCA, there is

1 a quite clear preference for well articulated process for the
2 parties, as well as the bench, to follow in these matters.
3 And I look to Title 10, Section 949p-3 where the Congress has
4 made it such that the bench shall issue a protective order of
5 this nature upon request of the government by choosing the
6 word "shall," it becomes quite clear that Congress has decided
7 that the best way to ensure that the parties handle these two
8 very, very weighty obligations in the best means possible is
9 to provide well articulated and detailed process through each
10 step of the process. This is the same language that's used in
11 the Classified Information Protection Act of a federal court,
12 a civilian court, at Section 3.
13 The protective order of the United States proposed in
14 this particular instance does exactly that. It takes these
15 obligations and gives additional granularity to the parties as
16 well as the commission so that there are no inadvertent
17 mistakes, because as we well know in litigation, where there
18 are gray areas and there are question marks and there are
19 open -- open issues, that's where parties can sometimes run
20 afoul of what they are required to do.
21 As we have seen with this very case, there are
22 instances where well-intentioned pleadings by the government,
23 orders by the court, don't always meet up perfectly, so it

1 requires an additional question to make sure that we have
2 clarified that.
3 One of the purposes of a protective order of this
4 nature is an anticipation of those kinds of questions, as best
5 one can, as best we, the government and the commission can, we
6 articulate what those processes are. For example, we
7 articulate what the role of the court security officer is. We
8 articulate what the role of the defense security officer is.
9 We articulate the process for filing. We articulate the
10 process for handling information. We articulate the process
11 for notifying the court as to how information might be used,
12 classified information might be used in a proceeding, so that
13 there are no open questions.
14 And this preference for process and this use of the
15 word "shall" by Congress in both the MCA and 949p-1 -- excuse
16 me, p-3 as well as in CIPA, means that today we are not really
17 discussing whether or not there should be a protective order.
18 What we are discussing is a few of the discrete terms of that
19 protective order, that -- some of which the defense has
20 objected to, all of which we believe should be in the
21 protective order as proposed by the government. So I will now
22 turn to those objections and address them each in turn, if I
23 may.

1 MJ [CAPT WAITS]: You may.
2 TC [MR. CLAYTON]: The first objection the defense raised
3 is to the term "enhanced" at both paragraph II(g)(4)(c) and
4 (d). Per the defense's version, a preferred version of the
5 language, they would like to limit the protective order to
6 only those facts concerning "enhanced interrogation
7 techniques" rather than simply "interrogation techniques."
8 This artificially limits the protective order in a
9 way that ignores the realities of both classified information
10 and the realities of this case. As this court -- if this
11 court is not already aware, it will soon become aware that
12 there are any number of classified facts that surround an
13 interrogation technique, enhanced or otherwise; there are any
14 number of classified facts that can come out of an
15 interrogation; there are any number of classified techniques
16 that can go into an interrogation, enhanced or otherwise. So
17 by limiting the classified protective order to only those
18 enhanced interrogation techniques, you are eliminating a whole
19 variety of interrogation techniques, information and results
20 that span across any number of various interrogations in any
21 given case. So it ignores that basic reality of classified
22 information, and simply because an interrogation technique is
23 not an enhanced interrogation technique does not mean it is

1 not a classified interrogation technique, the same as any
2 information that comes out of those techniques.
3 Finally, it ignores the realities of this case. As
4 the government noted at page 3 of its reply brief, enhanced
5 interrogation techniques, as that term is defined in the
6 relevant authorities cited in our brief, weren't applied to
7 this accused. So by limiting the universe of the classified
8 protective order to only those enhanced interrogation
9 techniques in this particular case, you would render all of
10 the language utterly useless because there were no enhanced
11 interrogation techniques used in this particular case. So I
12 think for those two reasons the government's objection should
13 be overruled and the government's protective order should be
14 put into place as written and as proposed.
15 The second -- excuse me, the third objection that the
16 defense raises is to paragraph II(k) or kilo. They chose or
17 opted to request adding the following language, "where the
18 very existence of the information is classified." We don't
19 disagree with the defense to the extent the commission finds
20 that that language provides additional clarity in the spirit
21 of preferring process, in preferring process and granularity
22 in these types of proceedings, we have no objection to that
23 additional language should the commission find that it's

1 helpful.

2 The next objection ----

3 MJ [CAPT WAITS]: Before you move off of that one, I

4 understand the government's position in not having an

5 objection to the proposed change in the language by the

6 defense.

7 TC [MR. CLAYTON]: Yes, Your Honor.

8 MJ [CAPT WAITS]: But from the commission's perspective,

9 the added language is actually the definition of a different

10 term. It's the definition of -- it's a follow-on definition

11 of "unauthorized disclosure" rather than just the term

12 "disclosure." So they are actually asking to give the

13 definition of a different term, from the commission's

14 perspective.

15 So we either need to change the term that's being

16 defined in conjunction with accepting the defense's proffered

17 language, or we need to leave it the way it is. So I

18 understand that the government is making a concession there,

19 but I think it's a misplaced concession unless we are going to

20 say that we are going to define a different term.

21 TC [MR. CLAYTON]: Your Honor, I take some slight

22 disagreement with the court's reading of that language. The

23 way the government read the proposed term was to define the

1 universe of unauthorized disclosures to mean not only, for
2 example, the actual text of an item or piece of information or
3 text of a classified document, but also the fact that the
4 document exists in general can also be classified independent
5 of the text. I read that term, the government read that term,
6 to be further refining what could be in the universe of
7 unauthorized disclosure. I understand the commission reads
8 that term differently.
9 If my reading of that addition is incorrect, then I
10 defer to the commission. However, if you believe my reading
11 is correct, we would have no objection to the addition of that
12 term.
13 MJ [CAPT WAITS]: Well, what the commission would propose
14 is, if we are going to adopt the defense's language, that the
15 word "disclosing" -- it's the third word from the end of that
16 sentence -- I'll wait until you get there.
17 TC [MR. CLAYTON]: I am there, Your Honor.
18 MJ [CAPT WAITS]: ---- that the word "disclosing" should
19 be changed to "unauthorized disclosure of" that information.
20 The entire sentence would then read, "Confirming or denying
21 information where the very existence of the information is
22 classified constitutes unauthorized disclosure of that
23 information." I believe that would be a correct statement.

1 TC [MR. CLAYTON]: I think you are correct, Your Honor.
2 Given your reading of the sentence, which I don't fully
3 disagree with, I think that adding that language brings me
4 over to your understanding. I now am understanding what your
5 concern was, and I believe that correction does resolve that
6 issue.
7 MJ [CAPT WAITS]: Okay. All right. So you can move on to
8 the last, Section V(a)(3).
9 TC [MR. CLAYTON]: The next section -- as the court just
10 raised, the next argument that the defense counsel raised was
11 that they believed that the term the limitations in the
12 protective order that require the OCA to be the arbiter of
13 what is the need-to-know is a limitation that's artificial and
14 not reasoned within the law. For the reasons we stated in our
15 brief we disagree, and I start with the United States v.
16 El-Mezain case which is 664 F.3d 467 at 568. That's a Fifth
17 Circuit case of 2011, and I quote it and cite it for this
18 purpose.
19 There is oftentimes this misperception, particularly
20 in litigation involving classified information, that if the
21 parties or if the defense attorneys or whomever has a
22 clearance, then that ends the inquiry and in the El-Mezain
23 case that's simply not true. Having the requisite clearance

1 does not necessarily mean you have the need-to-know. And
2 while the need-to-know is governed and is informed by the
3 rules of procedure and the rules of discovery in these
4 particular cases, it's not the end of the story. And at its
5 most basic level, that makes sense.
6 As you know, the executive agency that classifies a
7 piece of information is essentially, for lack of better words,
8 the owner of that information. It stands to reason that the
9 owner of that information, through its designee, can determine
10 who it believes would have a need-to-know. And Executive
11 Order 13526 bears this out in this particular instance.
12 Section 6.1(dd) reads, "Need-to-know means a determination
13 within the executive branch," and I'm paraphrasing now, that a
14 prospective recipient requires access to specific classified
15 information to perform a lawful and authorized government
16 function.
17 The CFR we cited, which is 32 CFR 2001.40 (d) Delta
18 says, the need-to-know determinations: One, agency heads,
19 through their designees, shall identify personnel requiring
20 access to classified information to perform authorized
21 governmental functions. The OCAs are those designees. And if
22 you ask yourself the following question, it makes sense: If
23 the OCA doesn't hold the keys to the need-to-know

1 determination as the designee of the executive agency who owns
2 that information, then who?
3 MJ [CAPT WAITS]: Well, I was going to ask the defense
4 that question.
5 TC [MR. CLAYTON]: Then we are tracking. I can probably
6 short-circuit my argument a little bit.
7 MJ [CAPT WAITS]: I am not trying to short-circuit your
8 argument, but that's the obvious question. If not the OCA,
9 then who?
10 TC [MR. CLAYTON]: Correct, Your Honor. I believe there
11 is additional authority within the MCA which you and I seem to
12 share here, and that's at 949p-6(f)(2). There is a remedy.
13 If, for example, this court in assessing the rules of
14 discovery, the rules of procedure, believes the defense is
15 entitled to either disclose some classified or receive some
16 classified and the OCA and the government representing that
17 OCA says it's simply too sensitive, they don't have the
18 need-to-know, the court there has a remedy.
19 By including that provision, that implies that there
20 is a body out there, which must naturally be the OCA, who can
21 make those decisions. And not to belabor the point too much,
22 the Supreme Court I believe agrees with us and I reference CIA
23 v. Sims, 471 U.S. 159 at 1789, a 1985 case which says in part

1 that the decisions of a director who must of course be
2 familiar with the whole picture, as judges are not, are worthy
3 of great deference given the magnitude of the national
4 security interests and potential risks at stake.
5 Again, the designee, the OCA, standing in the shoes
6 of that director who can see the picture that maybe the
7 parties and the bench can't see, is well -- better situated to
8 make those determinations than anyone else.
9 With that, unless the bench has a question about that
10 particular issue, I am prepared to move on to the final
11 objection.
12 MJ [CAPT WAITS]: I thought that was the final objection.
13 TC [MR. CLAYTON]: There's a general objection to accused
14 observations.
15 MJ [CAPT WAITS]: Exactly. Go ahead, please.
16 TC [MR. CLAYTON]: With respect to the final objection,
17 sir, it seems that issue can be broken down into one of two
18 concerns, the first being whether or not there is an ability
19 to classify the accused's observations, the second being
20 whether or not there is an ability to control the accused from
21 relaying his observations to others outside the context of
22 this litigation.
23 I believe the defense's objection is to the latter

1 issue, and I believe that based upon the reliance of the
2 Pappas case. However, if the objection is to the former
3 issue, the ability to classify the accused's observations, I
4 think the government's brief and accompanying attachments
5 explain to the bench why that is. These observations and in
6 the spirit of the CIA v. Sims case, there is great deference
7 given to these representations by those who see the whole
8 picture, so to speak, and that deference shouldn't be
9 questioned or undermined where it is invoked in these
10 particular instances.
11 So looking now to the second question, which is the
12 Pappas case, talking a little bit about the facts of Pappas I
13 think shows the marked distinctions between that case and the
14 one presently before the commission. In Pappas, a man and his
15 wife were being prosecuted in criminal matters. One of his
16 potential mitigating factors or defenses was that he had done
17 some sort of intelligence work on behalf of the United States
18 Government prior to being prosecuted. The defendant in Pappas
19 then pursued newspaper reporters, or maybe newspaper reporters
20 pursued him. He then gave interviews about this classified
21 information.
22 The government in that case, as the court properly
23 struck down, improperly attempted to create what amounted to a

1 gag order relating to information the defendant had received
2 prior to the criminal prosecution outside of the context. The
3 court properly said that's not the function of CIPA. CIPA is
4 a trial process, as we have been discussing today, that
5 governs how information is handled in the context of trials or
6 the way in which information is received by the parties in a
7 trial. There are other bodies of law, criminal prosecutions,
8 contractual disputes, or other bodies of law that govern those
9 instances in which an accused, such as the defendant, seeks to
10 express that information elsewhere.
11 So Pappas is very different, but I believe it is
12 nonetheless somewhat informative. That's because the proposed
13 order we have here in this case does what the court in Pappas
14 says it should do and does not attempt to do what the court in
15 Pappas said it shouldn't do.
16 In this particular case, the proposed order tracks
17 with, as we have described before, the granularity required
18 for the parties, the litigants in this case, as well as the
19 accused and how these matters should be handled within the
20 context of this trial. There are certain great examples of
21 that just beyond the ways in which those who hold clearances
22 must handle the information. There is also, of course, the
23 40-second delay that this commission instituted in this case,

1 is a measure within the courtroom, within the context of this
2 trial, to control the unauthorized disclosure of classified
3 information. This protective order is in the spirit of that.
4 So to the extent the defense team, not the accused
5 themselves, sought to relay to an outside party any of the
6 classified information it's received in this case, obviously
7 the protective order limits that because they have received
8 this information in the context of this litigation consistent
9 with the holding of Pappas.
10 A slight digression. That also applies to
11 information that is in the public sphere but has not been an
12 authorized release where the defense is in a position to know.
13 It's a little bit of a more complicated issue, but the
14 Moussaoui case at 65 Federal Appendix 881, 887, Note 5, draws
15 a proper distinction between reporters who speculate about
16 what might be a classified fact and those who have government
17 clearances who are in a position to know confirming or denying
18 those facts.
19 So that is the obligation on the defense team, those
20 who hold clearances, those who are subject to the protective
21 order who receive their information through this particular
22 litigation.
23 Another slightly less obvious scenario is if the

1 defendant himself receives classified information through the
2 context of this litigation. Not yet in this case, but
3 certainly in other cases in the commissions, there have been
4 certain pieces of classified information that have been
5 displayed only to the accused. Those are limited releases of
6 classified information that the accused is then authorized to
7 see that has not been unclassified.
8 The accused would then be subject to the protective
9 order, to the extent that the court enforces the protective
10 order against the accused, should he seek to release that
11 information in other contexts. It seems as though that's a
12 unique situation, but the statute actually contemplates that
13 possibility where at 949p-1(b) it requires us, the government,
14 to give access to the accused of any piece of evidence we
15 intend to use. That could include pieces of classified
16 evidence, if that were the government's decision, to try to
17 use classified evidence.
18 But inconsistent with what the government did in the
19 Pappas case, but consistent with what the circuit held in the
20 Pappas case, this order does not attempt to limit the accused
21 in his ability, when he is in his confinement facility, to
22 talk to someone, whomever he wants, about his experiences
23 prior to this trial. There are other means to handle that.

1 There are other security measures in place, other limitations
2 on his access to various modes of communication that handle
3 that. So consistent with Pappas, we rely upon those security
4 measures to handle those instances, not the court's order.
5 And it's a crude analogy, but I think a fair one:
6 For example, any of the other detainees here at Guantanamo who
7 might have access to classified information through a similar
8 sort of background or history unless they are before a
9 commission with a similar protective order in place, they
10 wouldn't be subject to any limitations. They are subject to
11 exactly the same limitations as the accused is in this case
12 with respect to what he says when he is in his confinement
13 facility and relating to his earlier exposure to classified
14 information.
15 And I will conclude by saying this. We are really
16 not in unchartered territory here. This is fairly well
17 trodden. It is fairly routine in CIPA cases to have these
18 sorts of Section 3 protective orders, these omnibus orders
19 that give us this granularity, that give us this guidance to
20 the parties in the shared obligation. It is routine now in
21 commissions, as this commission is probably now well aware, a
22 very similar protective order is in place in United States v.
23 Mohammad, et al., as well as United States v. Nashiri, and it

1 is an important protective order, as articulated by Congress
2 when they chose the word "shall." With the ability of two
3 persons reading the same language to interpret it differently,
4 the greater granularity we can give and the less room we have
5 for faulty interpretation of the rules, the more likely it is
6 we can strike that proper balance between a full and fair
7 trial for this accused and protecting national security
8 information, and that's what this protective order seeks to
9 do.
10 And subject to questions from the bench, I would
11 yield the argument to the defense.
12 MJ [CAPT WAITS]: I guess my only question is, in light of
13 the arguments you just made, you do, in your reply,
14 differentiate the situation of the accused in this case to the
15 defendant in Pappas, in that in this case the accused is in
16 custody, and you seem to point that out as a significant
17 variance ----
18 TC [MR. CLAYTON]: Correct.
19 MJ [CAPT WAITS]: ---- in the facts of Pappas versus this
20 commission.
21 TC [MR. CLAYTON]: Correct.
22 MJ [CAPT WAITS]: Is there any legal authority that you
23 can cite that would inform the commission that that is a

1 valid -- I mean, the way I am interpreting it is somehow that
2 because the accused is in custody, the classified information
3 in his possession, I guess I'll call it, for lack of a better
4 word, is really under the custody of the United States.
5 That's what I am hearing from you in your reply. Is there
6 some legal authority for that proposition?
7 TC [MR. CLAYTON]: Your Honor, I think it is a practical
8 issue. As I said before, the central tenet of the Pappas case
9 is the ability to restrict an individual, a defendant accused
10 relaying, releasing classified information which he had
11 received prior to being an accused outside the context of
12 litigation is left to other measures aside from CIPA, aside
13 from 949p-1 through 7. So in this particular instance the
14 mere fact that he is in a fairly stringent custodial situation
15 is one of those measures that's in place outside of the CIPA
16 context, outside of the Rule 505 context that governs that.
17 So that's -- the spirit of the distinguishing mark is
18 consistent with Pappas and that fact, custody versus
19 non-custody, I think brings into high relief those two
20 distinctions.
21 In Pappas, the difference is other bodies of law,
22 such as the criminal penalties that attach to releasing
23 classified information, is the universe that reins in Pappas's

1 universe, so to speak. In this instance it really is, more
2 practically speaking, his custodial situation that we rely on
3 rather than the classified information procedures.
4 MJ [CAPT WAITS]: And thus, the examples that you use are
5 his conversations with other detainees, rather than
6 broadcasting what he knows ----
7 TC [MR. CLAYTON]: Correct.
8 MJ [CAPT WAITS]: ---- to the public?
9 TC [MR. CLAYTON]: Correct. And there are measures that
10 eliminate, throughout the context of this particular
11 commission, his ability to broadcast publicly from a telephone
12 or other means the information that he knows.
13 MJ [CAPT WAITS]: All right. Thank you, Mr. Clayton.
14 TC [MR. CLAYTON]: Thank you, Your Honor.
15 MJ [CAPT WAITS]: Defense? Major Stirk.
16 ADDC [Maj STIRK]: Thank you, Your Honor. Good afternoon.
17 MJ [CAPT WAITS]: Good afternoon.
18 ADDC [Maj STIRK]: From what the government just argued, I
19 think that we are actually very close together on this and
20 much closer than we were before. The reason that we asked for
21 oral argument primarily was to register more of a global
22 objection to these proceedings, specifically that there is
23 this body of secret evidence and secret discovery that may not

1 be available to our client to review and that we won't be able
2 to review with our client.
3 However, we do recognize that these procedures are
4 the law and these are the rules, and we think that by
5 narrowing the scope of some of these provisions I think we can
6 address a lot of our future concerns.
7 I think, going in reverse order from what the
8 government argued, I think we no longer are in disagreement
9 about classifying the observations of the accused. Our
10 objection was that the way we read the language, it said that
11 what he observed, that his actual observations were
12 classified; and what the government I believe is arguing now
13 is that they are going to be treated as classified in this
14 courtroom and by all parties, by defense counsel, by the court
15 and by the government. And the distinction with Pappas makes
16 that clear that were the accused not under the custody of the
17 United States, if he were walking around, he would be under no
18 obligation to protect that information. It wouldn't be
19 classified, what he knew -- or it might be classified, but he
20 would be under no obligation to safeguard it.
21 But because we are here in this place, he has no
22 opportunity to broadcast that to the public and, therefore, I
23 think that's a moot issue for us. I think we are basically in

1 agreement and in the same place on that one.
2 What we are most concerned with is marking this
3 information in a way that we can address it with our client,
4 specifically discovery. The government mentioned the Nashiri
5 case and how some of that information has been marked in a
6 way, "Display Only," so that counsel with security clearances
7 and nondisclosure agreements are allowed to show classified
8 information to an uncleared individual.
9 What we are asking for out of this commission and out
10 of this protective order is a way for us to show information
11 to our client without first having to go through a large
12 volume of information -- just for the sake of argument, let's
13 call it a thousand pages of classified discovery -- of that
14 which might be relevant for discovery purposes, but not
15 necessarily for evidence; you know, not all of that is going
16 to be something that much useful.
17 We are going to go through that and identify which
18 documents we want to show the client and we need to discuss,
19 be it through interviews, logs, whatever something it might
20 be. The process of us, his defense counsel, going through
21 that and then coming back to either the commission, through
22 the court security officer, and then to an original
23 classification authority to have that marked so that we can

1 show it to him, we believe that implicates attorney work
2 product and that we will have gone through and identified what
3 we believe are the most important pieces of information out of
4 a large volume.
5 So the protective order as proposed doesn't address
6 that at all, and we would like to have something in there so
7 that we don't have to come back to the court, to an OCA, to be
8 able to discuss discovery with our client.
9 In light of that, we also, going to the request for a
10 defense security officer, which is page 108 of 125 in
11 Appellate Exhibit 013, I think we are on the same page with
12 that, because the government spent some time on the meaning of
13 the word "shall," and we want to make it clear that in the
14 order, "The Convening Authority shall appoint a Defense
15 Security Officer" really means that the convening authority
16 will fund and approve a DSO. Based on past experience with
17 other commission cases, it became problematic and difficult to
18 get that person actually appointed. I think it's clear in the
19 order, but I just wanted to make it especially clear.
20 MJ [CAPT WAITS]: This is in the order proposed by the
21 government, in the protective order?
22 ADDC [Maj STIRK]: Yes, sir. It's paragraph 4(a). It's
23 in the one filed with the court. It's 108 of 125.

1 MJ [CAPT WAITS]: So what you are saying is that -- well,
2 have there been similar protective orders in the other cases
3 that you referred to where a commission's judge directs that a
4 defense security officer shall be appointed and one was not?
5 ADDC [Maj STIRK]: I believe that the order was issued,
6 and I don't know if there was confusion. I know that it took
7 a lot of time to have the DSO appointed. And I think that
8 it's clear here that this means we get one, but I didn't want
9 there to be any doubt on the issue.
10 MJ [CAPT WAITS]: Well, it does say "upon request of the
11 defense counsel," so I don't see any -- unless there is other
12 qualifying language that I am not seeing here, based upon a
13 quick read, then obviously you need to bring it to the
14 commission's attention, if this part of the protective order
15 is issued by the commission, at the earliest opportunity and
16 we will address it with the government.
17 ADDC [Maj STIRK]: Absolutely, Your Honor.
18 Based on the government's argument regarding our
19 first two objections to adding -- request to add the word
20 "enhanced," we'll leave that as a moot issue, that they have
21 now on the record said that he was not subjected to any
22 enhanced interrogation techniques, and that now makes this a
23 nonissue.

1 MJ [CAPT WAITS]: Okay. That's easy.
2 ADDC [Maj STIRK]: Our third objection to paragraph II(k),
3 we don't object to changing the word "disclosing" at the end
4 of that to "unauthorized disclosure."
5 MJ [CAPT WAITS]: Of?
6 ADDC [Maj STIRK]: "Unauthorized disclosure of classified
7 information." We believe that that is referencing the very
8 first two words of the paragraph of "unauthorized disclosure"
9 of classified information means all of these things and that
10 confirmation or denial just counts as disclosure for purposes
11 of unauthorized disclosure. But I think we are all on the
12 same page there.
13 MJ [CAPT WAITS]: It's a decision on what are we going to
14 define. Are we going to define the term "disclosure" or are
15 we going to define the term "unauthorized disclosure" in the
16 context of a GLOMAR response?
17 ADDC [Maj STIRK]: I think that our position is that this
18 entire definition is of unauthorized disclosure. The last
19 sentence is simply clarifying that this is a kind of
20 disclosure, but -- which would be unauthorized in this
21 situation.
22 MJ [CAPT WAITS]: Right.
23 ADDC [Maj STIRK]: But it is not, it just constitutes

1 disclosure.
2 MJ [CAPT WAITS]: Okay. I think we have reached a
3 consensus on the appropriate language for that, so I think we
4 can move on.
5 ADDC [Maj STIRK]: Yes, sir. I think the only open point
6 is to whether -- about the original classification authority;
7 if not them, who would have authority. And what our objection
8 there is we just want to be able to sit down with our client
9 and discuss the information. Whoever has to make that happen,
10 whether it's an original classification authority, whether
11 it's the court -- and I know there is a long line of CIPA
12 federal cases about OCAs know more than the court or the
13 parties about what's classified -- if that's the case, then we
14 need something that we can show the client and discuss.
15 If it's relevant enough to be provided in discovery,
16 then it needs to be provided in a way that we can show him and
17 we can talk about with our client. And if the OCA doesn't
18 want to make it available in that way, then we don't have to
19 have a case. But if that information exists, we have to be
20 able to discuss it with him, or what's the value -- what's the
21 point of giving it to us.
22 MJ [CAPT WAITS]: Well, I mean, as the government pointed
23 out in their argument, there are a lot of other ways -- and

1 for the record, the court, the commission agrees with all of
2 the case law that says that OCAs are in a better position to
3 decide who has a need-to-know. It's really -- that's really
4 not a legal or evidentiary determination.
5 The commission -- if the government elects not to
6 provide certain information based on a finding by an OCA that
7 the defense or the accused or anyone else does not have a
8 need-to-know, well, then the legal determination to be made by
9 the commission is what impact does that have on the
10 government's ability to bring the case.
11 ADDC [Maj STIRK]: Yes, sir. I agree with you.
12 MJ [CAPT WAITS]: So that's the commission's
13 determination. That's a legal evidentiary determination. It
14 is out of my realm. I don't have the expertise nor, I
15 believe, the authorization under case law to make a
16 need-to-know determination.
17 ADDC [Maj STIRK]: And I think that was inarticulately
18 stated in our response. What we wanted to highlight is that
19 when you -- when the commission is reviewing potential
20 discovery or evidence that an OCA has said we are not going to
21 provide to the defense or to the accused -- and those could be
22 two different things. There might be information that an
23 original classification authority is okay with defense counsel

1 seeing, but not the accused -- we want to highlight for the
2 commission that that matters, that that's important. And as
3 you are reviewing those documents and saying, okay, the
4 accused doesn't get to see this and this is relevant, but he
5 just doesn't get to see it, that that's very important.
6 That's justice if he doesn't get to see it, that's important.
7 I think that was really what we were trying to capture there.
8 MJ [CAPT WAITS]: Okay. The commission is on notice. I
9 mean, I understand those are different levels of need-to-know
10 or there are different determinations that could potentially
11 be propounded by the government in their discovery and the
12 court -- the commission will note that those are two different
13 things and make its decisions involving discovery accordingly.
14 ADDC [Maj STIRK]: Thank you, sir. I believe that's all
15 we have.
16 MJ [CAPT WAITS]: Okay. So, I mean, at this point, on
17 that note, the answer to the question of if not the OCA, then
18 who, is there is no answer, correct? Because I have ruled
19 myself out, okay? I have explained for the record what the
20 commission believes its purview is in this realm. So as far
21 as who, your answer is, what?
22 ADDC [Maj STIRK]: As far as who, I think we agree now
23 with the government that it is the OCA. The remedy is for the

1 commission to make the determination that if they are not
2 willing to share that with the accused or with his counsel,
3 then this case shouldn't proceed. It's that important.
4 MJ [CAPT WAITS]: Okay. And then my first question will
5 be -- when Mr. Clayton stands back up, is whether the
6 government agrees, and I believe they do based on their reply
7 to the government's -- I mean, to your response.
8 ADDC [Maj STIRK]: Yes, sir. When I started I believe,
9 yeah, we are much closer together than farther apart.
10 MJ [CAPT WAITS]: Okay.
11 ADDC [Maj STIRK]: Thank you, sir.
12 MJ [CAPT WAITS]: Thank you very much.
13 Mr. Clayton, last word?
14 TC [MR. CLAYTON]: Your Honor, if you would like, I will
15 take the bench's question first.
16 MJ [CAPT WAITS]: Thank you. That will be good.
17 TC [MR. CLAYTON]: The government stands by what I said in
18 the earlier argument. If there is an instance in which the
19 bench has made a determination that something must be
20 disclosed pursuant to the rules of discovery, but for
21 classified reasons an OCA simply disagrees, then the statute
22 has a remedy provision.
23 MJ [CAPT WAITS]: It has multiple remedies.

1 TC [MR. CLAYTON]: Multiple remedies. We would then be
2 discussing what is the most appropriate remedy without being
3 overly burdensome to the government, and we would have to
4 argue that and litigate that.
5 To talk a little bit more about Major Stirk's
6 concerns, these are exactly the kinds of nuts and bolts that
7 the government will be engaging with the commission in in this
8 shared obligation to ensure that the summaries, substitutions,
9 or other relief we seek from the commission when providing
10 discovery to the defense, puts them in a position as if the
11 defense had received the adequate underlying information.
12 Sometimes these classified pieces of information will
13 be summarized in a way that makes them then releasable to the
14 defendant, or even "Unclassified" or some other particularized
15 header or marking that allows the defense to make use of that.
16 However, it is not going to be the case that the
17 defense can simply wholesale say, "Please make a ruling,
18 court, that my client gets to see all of the classified
19 information that we receive in this particular litigation."
20 We talked about the shared burden from the defense's
21 perspective. That is the burden they share. They are obliged
22 to use their time to review their discovery materials and to
23 make calculated decisions based upon their legal expertise to

1 then move the commission, as appropriate, to seek whatever
2 relief they might seek from the commission to have additional
3 use of that information; and we believe that while this
4 process is labor intensive, it is one that could be done
5 fairly, fully, and result in a fair and transparent trial for
6 this particular accused.
7 Thank you, Your Honor.
8 MJ [CAPT WAITS]: Thank you, Mr. Clayton.
9 All right. I have alluded to the new scheduling
10 order here on the record today. I have a draft of it right
11 now before me. We were not able to finalize it and promulgate
12 it to the parties prior to coming on the record this morning,
13 but -- or this afternoon, but I am going to read it into the
14 record. I doubt that you are going to be able to -- I am not
15 doubting any of your abilities or prowess as attorneys, but
16 you are probably going to have to look at it to really digest
17 it, but I will read it for the record at this time and then
18 you will receive a hard copy of it once it is promulgated;
19 within the next day or two, I'm sure.
20 On 9 July 2014, the commission issued an order,
21 Appellate Exhibit 015, setting an initial trial schedule for
22 this case, including deadlines for both evidentiary and law
23 motions. On 23 July 2014, the commission issued an amended

1 scheduling order, Appellate Exhibit 015C, extending the law
2 motions' deadline to 1 October 2014 at the defense's request.
3 That was Appellate Exhibit 015A, with no objection from the
4 government, which was Appellate Exhibit 015B.
5 The commission finds counsel have had adequate time
6 since referral to contemplate law motions applicable to this
7 case. The commission is also mindful that in all litigation,
8 that decisions involving the relevance and usefulness of
9 filing certain motions and deferring others is an evolving
10 process, and motions appropriate for the defense to file may
11 not yet be apparent or appropriate at this early stage of the
12 case.
13 However, this evolution of motions practice in
14 shaping the case pretrial must have limits grounded in
15 pragmatic considerations of moving the case forward toward an
16 eventual trial date. Accordingly, the following trial
17 schedule is ordered:
18 Law motions. One, the first set of law motions,
19 including purely legal pretrial issues and systemic
20 challenges, are due to the commission and opposing counsel no
21 later than 17 October 2014.
22 The second set of law motions are due to the
23 commission and opposing counsel no later than 26 November

1 2014.

2 Responses to those motions are due 14 days after

3 filing. Replies to those responses are due seven days after

4 receipt of the response.

5 Two, counsel are encouraged to act in good faith with

6 regard to submitting motions by staggering and filing motions

7 with the commission as they are completed rather than waiting

8 until the deadlines to submit a compendium of motions all at

9 once.

10 Three, to assist counsel in meeting the commission's

11 deadlines, the parties shall submit to the commission no later

12 than 1 October 2014 an ex parte under-seal filing setting

13 forth the schedule for anticipated motions to be filed between

14 the date of this order and the 17 October 2014 and 26 November

15 2014 deadlines. This schedule will bind the parties to their

16 self-imposed deadlines, but does not limit the parties from

17 filing new motions, the necessity or wisdom of which may

18 become apparent after the 1 October 2014 ex parte under-seal

19 filing.

20 Four, if a party will require additional time beyond

21 26 November 2014 to file purely legal pretrial and systematic

22 challenges, the party will submit a motion to extend the

23 26 November 2014 deadline no later than 17 October 2014. The

1 motion will provide a detailed explanation in support of the
2 request.
3 Five, the parties shall submit to the commission no
4 later than 5 November 2014 an ex parte under-seal filing
5 setting forth a schedule of remaining law motions to be filed
6 no later than 26 November 2014. This schedule will bind the
7 parties to their self-imposed deadlines, but does not limit
8 the parties from filing new motions, the necessity or wisdom
9 of which may become apparent after 26 November 2014.
10 Six, during the hearings scheduled for 17 to
11 21 November 2014, oral argument will be heard on the first set
12 of law motions. Additionally, future scheduling milestones
13 will be discussed. The parties are encouraged to discuss
14 potential scheduling milestones ahead of time and provide
15 notice of their proposed milestones to the commission and the
16 opposing parties no later than 12 November 2014.
17 Evidentiary motions. The commission will determine
18 the deadline for evidentiary motions at a later date. The
19 previously ordered deadline of 10 October 2014 is rescinded in
20 accordance with paragraph 3 here in this scheduling order.
21 Future milestones will be scheduled at the
22 appropriate time. This order rescinds previous deadlines set
23 for law and evidentiary motions. It is hereby ordered that

1 future proceedings in this case will occur as follows: 17 to
2 21 November 2014; 26 to 30 January 2015; 23 to 27 March 2015;
3 25 to 29 May 2015; and 20 through 31 July 2015. Delay in the
4 assembly of this commission and trial of this case is excluded
5 in accordance with R.M.C. 707(b)(4)(E)(i) and R.M.C. 707(c) as
6 the resolution of the issues that require the delay outweighs
7 the interests of the public and the accused in a prompt trial.
8 All right. I'm not even going to ask if you have
9 questions about that, because the dates I know are all over
10 the place. So until you actually see the order for
11 yourselves, you line up the dates and make sense of why things
12 were ordered when they were ordered, I suspect that we would
13 not be making good headway by any questions at this point.
14 So I am not going to ask if you have questions on
15 that scheduling order, but I will ask if there are any other
16 matters that need to be taken up at this time prior to
17 recessing the commission. Government?
18 TC [MR. CLAYTON]: Nothing from the government,
19 Your Honor.
20 DDC [LtCol JASPER]: Nothing from the defense, Your Honor.
21 MJ [CAPT WAITS]: Very well, then. This commission is in
22 recess until 17 November 2014 at 0900 here in this courtroom.
23 **[The R.M.C. 803 session recessed at 1439, 15 September 2014.]**