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1 [The R.M.C. 803 session was called to order at 0902,
2 22 February 2016.]

3 MJ [COL POHL]: The commission is called to order. Trial
4 Counsel, any changes in the constitution of the government
5 attorneys since we last recessed?

6 CP [BG MARTINS]: Good morning, Your Honor. Not since the
7 last session of the commission, no.

8 MJ [COL POHL]: Okay. I am talking about the last open
9 session.

10 CP [BG MARTINS]: Correct.

11 MJ [COL POHL]: Mr. Nevin?

12 LDC [MR. NEVIN]: No, Your Honor, although Mr. Mohammad is
13 absent this morning.

14 MJ [COL POHL]: Ms. Bormann?

15 LDC [MS. BORMANN]: No changes, Judge.

16 MJ [COL POHL]: Mr. Harrington?

17 LDC [MR. HARRINGTON]: No changes, Judge.

18 MJ [COL POHL]: Mr. Connell?

19 LDC [MR. CONNELL]: Good morning, Your Honor. No changes.

20 MJ [COL POHL]: Mr. Ruiz?

21 LDC [MR. RUIZ]: No changes.

22 MJ [COL POHL]: I note for the record, Mr. Mohammad and
23 Mr. Bin'Attash are absent. The other three detainees are

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1 present.

2 Mr. Ruiz, that is Mr. Hawsawi next to you, right?

3 LDC [MR. RUIZ]: It is.

4 MJ [COL POHL]: It is kind of hard to see him. All right.

5 Mr. Swann.

6 MAJOR, U.S. ARMY, was called as a witness for the prosecution,
7 was sworn, and testified as follows:

8 DIRECT EXAMINATION

9 Questions by the Trial Counsel [MR. SWANN]:

10 Q. Are you the same major who testified last week?

11 A. I am.

12 Q. Again, I remind you you are still under oath.

13 A. I understand.

14 Q. Did you have occasion to advise both Mr. Mohammad and
15 Mr. Bin'Attash of their rights to attend this morning's
16 hearing?

17 A. I did advise both of them of their rights to attend.

18 Q. All right. You have in front of you what's been
19 marked as AE 408B consisting of a total of three pages.

20 Let's take Mr. Bin'Attash first. Did you advise him
21 in English or in Arabic?

22 A. With Mr. Bin'Attash, I read the entire waiver in
23 English and then it was read from Arabic by the camp

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1 translator.

2 Q. And did he execute the Arabic version of this form?

3 A. He did.

4 Q. And did you advise him of all the rights as required?

5 A. I did. I read everything on the English version, and
6 then that was translated.

7 Q. All right. There was something written down about
8 midway of that page?

9 A. That is correct.

10 Q. What does that say?

11 A. It is written in Arabic, and I asked the camp
12 translator to translate that for me; and he indicated that
13 Mr. Bin'Attash wrote that the reason he is not coming is
14 "because of the presence of the attorneys Cheryl Bormann and
15 Michael Schwartz on my defense team."

16 Q. He did understand that that was a decision that he
17 would have to make?

18 A. That is correct. I advised him or reminded him what
19 the judge told him, that simply coming because those attorneys
20 are still on his team would be a voluntary act on his part.

21 Q. Now turning to Mr. Mohammad. Did you advise him in
22 English or in Arabic?

23 A. I read the English-only version to him and he said

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1 that was fine.

2 Q. All right. Did he indicate that he understood his
3 rights?

4 A. He did.

5 Q. Did he indicate anything further?

6 A. He did not.

7 Q. What about attendance this afternoon?

8 A. He advised that he would come this afternoon.

9 TC [MR. SWANN]: All right. I have nothing further.

10 Thank you.

11 WIT: Thank you.

12 MJ [COL POHL]: Mr. Nevin or Ms. Bormann, do either of you
13 have questions for this witness?

14 LDC [MR. NEVIN]: No, thank you.

15 LDC [MS. BORMANN]: No, thank you.

16 MJ [COL POHL]: Thank you, Major.

17 WIT: Thanks, Judge.

18 [The witness withdrew from the courtroom.]

19 TC [MR. SWANN]: I took a look at the record this morning.
20 I didn't see where you made your determination at last
21 Friday's session or the session this morning.

22 MJ [COL POHL]: Okay. Actually, it would have been last
23 Thursday's session. Just to put on the record, it is I find

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1 all the absences up to this point, since we last met last
2 Monday, are knowing, free and voluntary. And on this
3 particular issue with Mr. Bin'Attash, he was told that just
4 because he disagrees with the court's ruling, that if he
5 chooses not to come because of disagreement with said ruling,
6 his decision then not to come would be considered knowing and
7 voluntary, and therefore I am treating his caveat of why he is
8 not coming as having no impact on the fact that it is a free
9 and knowing waiver of his right to be present today.

10 That being said, we're going to pick up with, as I
11 stated earlier, AE 400, which is a third-party motion by the
12 press movants. Who is here to represent ----

13 CP [BG MARTINS]: Your Honor, the press movant's counsel,
14 Mr. David Schulz, is in the gallery, and we have arranged to
15 have him come in to the podium here.

16 MJ [COL POHL]: Okay.

17 CP [BG MARTINS]: Give me a moment to get him.

18 MJ [COL POHL]: Ms. Bormann?

19 LDC [MS. BORMANN]: I also have a request of the same
20 type. We have a fourth attorney that Mr. Ryan referred to the
21 other day when arguing on AE 380 and that's Mr. Edwin Perry,
22 P-E-R-R-Y. He is licensed by the bars of the District of
23 Columbia and Maryland, has been a practicing lawyer for close

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1 to 15 years, has been a federal employee for more than a
2 dozen, was a Federal Defender, applied for his TS/SCI
3 clearance way back in June of 2015, didn't have the expedited
4 type of clearance that Major Seeger had as a result of this
5 hearing, has a Secret clearance and is prepared to argue for
6 400 on behalf of Mr. Bin'Attash.

7 So we are requesting that even though he doesn't have
8 his TS/SCI, that under this limited circumstance he be
9 permitted to argue before the court so that Mr. Bin'Attash can
10 be represented by Mr. Perry despite the slowness of the
11 clearance process as there will be another uncleared
12 individual here.

13 I should note for the record that Mr. Perry has
14 signed a nondisclosure agreement and is bound by all of the
15 MOUs, which he has also signed.

16 MJ [COL POHL]: Any objection?

17 CP [BG MARTINS]: Yes, Your Honor. We received no notice
18 of this. Mr. Schulz is being brought in in order to give
19 effect to the remedy that the Secretary of Defense provided in
20 the Regulation for Trial, properly coordinated. We were going
21 to take the measure here to instruct everyone to cover any
22 classified information to have him come in; but, no, I am not
23 at liberty to say he can come into the SCIF.

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1 MJ [COL POHL]: Ms. Bormann?

2 LDC [MS. BORMANN]: The same remedies, control measures
3 that General Martins just spoke about, would be present
4 whether Mr. Perry is here or not.

5 MJ [COL POHL]: Let me go back to a separate issue on
6 Mr. Perry. Is he a member of the Bin'Attash defense team?

7 LDC [MS. BORMANN]: He is.

8 MJ [COL POHL]: How did he become ----

9 LDC [MS. BORMANN]: He was detailed by Brigadier General
10 Baker.

11 MJ [COL POHL]: Okay. He is a detailed member of the
12 team?

13 LDC [MS. BORMANN]: Actually, first by Colonel Mayberry
14 and then by the now Chief Defense Counsel. Yes, he is a
15 member. Unfortunately he can't participate because of the
16 appearance issue.

17 MJ [COL POHL]: I got the reason why. Okay.

18 I understand the government's objection. This person
19 has a Secret clearance, which is more than clearance that
20 Mr. Schulz has, and that he will be escorted in and out only
21 for the part of his argument.

22 CP [BG MARTINS]: So is he coming in as a third party or
23 are you -- the commission is recognizing him as counsel to

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1 Mr. Bin'Attash?

2 MJ [COL POHL]: Well, that's the next question.

3 LDC [MS. BORMANN]: His detailing letter has been filed.

4 It can be found at AE ----

5 MJ [COL POHL]: Okay.

6 LDC [MS. BORMANN]: ---- 006C.

7 CP [BG MARTINS]: Has Mr. Bin'Attash accepted him as
8 counsel? This is something we could have gotten notice of as
9 well. So we object. If they sort it out, if he becomes
10 counsel of record to this accused, then coming in later and
11 arguing isn't any hardship to them.

12 Mr. Schulz is down here at great logistical ----

13 MJ [COL POHL]: Okay. I got it. I got it. And we are
14 going to hear from Mr. Schulz first. If Mr. Perry is a
15 detailed member of the defense team and the issue is only the
16 clearance, he will need to put his detailing qualifications on
17 the record, and as such he will only be in this hearing for
18 his presentation, his presentation alone, and then he will
19 leave. And then, going forward, we will go over that that.

20 So the objection is overruled.

21 LDC [MS. BORMANN]: Thanks, Judge.

22 CP [BG MARTINS]: I will go get Mr. Schulz.

23 MJ [COL POHL]: Yes, Mr. Schulz.

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1 LDC [MS. BORMANN]: Judge, just a reminder that there is a
2 40-second delay, so Mr. Perry, who is currently in the
3 gallery, is listening, but is not up to date. So before we
4 bring him in to argue for Mr. Bin'Attash, we are going to need
5 to give him the 40 seconds or ask that he sit in the back for
6 now.

7 MJ [COL POHL]: He can listen with the 40-second delay.
8 He is going to hear it 40 seconds from now. I am not sure how
9 much difference it makes, but I am not going to allow him to
10 be in the courtroom except for his presentation.

11 Mr. Schulz.

12 PRESS [MR. SCHULZ]: Good morning, Dave Schulz. I am here
13 again on behalf of 15 news organizations that are seeking to
14 enforce the public's right of access to a transcript of an
15 open proceeding that was held before this commission in a
16 pretrial hearing conducted October 30, 2015. After the fact
17 the government unilaterally decided to redact ----

18 MJ [COL POHL]: Mr. Schulz, I am going to ask you to slow
19 down.

20 PRESS [MR. SCHULZ]: The New York problem.

21 MJ [COL POHL]: No. No, in fact the court reporters asked
22 me beforehand to remind you to slow down so we can get the
23 translation in.

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1 PRESS [MR. SCHULZ]: I will do my best.

2 MJ [COL POHL]: Thank you. Go ahead.

3 PRESS [MR. SCHULZ]: After the fact the government
4 unilaterally decided to redact or censor the October 30
5 transcript that was made available to the public on the
6 commission's website, it redacted the testimony of a witness
7 who appeared under the pseudonym Staff Sergeant Jinx, who had
8 testified for several hours in open court without any
9 objection by the government or any claim of privilege.

10 Now, beyond the importance of this particular
11 transcript, there are a couple of very important principles at
12 stake here, which is why we made this motion; and that is to
13 reaffirm or to establish that the public has a constitutional
14 right to the transcripts of such open official proceedings and
15 that the government may not unilaterally censor a public
16 record after the fact, as it has sought to do here.

17 There are three legal issues framed by our motion.
18 First, that the transcript of the proceedings of these
19 proceedings are in fact judicial records and that they are
20 therefore subject to the constitutional access right.

21 Second, that the government's effort to
22 unilaterally -- the second issue is whether the government has
23 the constitutional authority to unilaterally redact these

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1 transcripts without any involvement of the court and any
2 review of its reasons for redaction.

3 And then finally, assuming we are correct about the
4 scope of the constitutional right here, whether the government
5 in this case has made the proper showings necessary to uphold
6 the redactions that it has undertaken.

7 I'd like to take each of those issues in turn. The
8 first is that the transcript clearly is a judicial record and
9 that the constitutional access right applies to it. As the
10 Fourth Circuit said in a case called Application for U.S.
11 Order Pursuant to U.S.C. 2703(d), a judicial record is any
12 document filed with the court that plays a role in the
13 adjudicative process. The transcripts we have been talking
14 about here clearly play such a role. They are verbatim
15 transcripts made from the public viewing gallery so as to
16 avoid any disclosure of classified information, they were
17 required by the commission rules to be promptly made available
18 to the public, and that rule exists so that the public can
19 follow these proceedings. It's not just that they are made
20 available to the public; the same transcripts are used by the
21 parties in making motions, they're relied upon by the court in
22 issuing its orders and they clearly constitute judicial
23 records.

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1 And there really can be no serious doubt that the
2 First Amendment, the constitutional right of the public to
3 inspect that record applies to these transcripts. There is no
4 dispute in this proceeding that the commission's hearings are
5 subject to the constitutional right. This commission has
6 already held the government concedes that the Press-Enterprise
7 standards apply to questions of closure of these proceedings,
8 and because the transcript is a verbatim proceeding -- sorry,
9 a verbatim statement of what happens in these proceedings, it
10 is also subject to the constitutional standard as a matter of
11 constitutional law.

12 As the Third Circuit said in the case of Antar, where
13 the issue was whether the constitutional right applied to a
14 transcript of the selection of a jury in a criminal case, that
15 the right of access encompasses both the live proceeding and
16 the transcript, and both are vitally important. As the Third
17 Circuit said, openness is ongoing. It's a status rather than
18 an event. At the heart of the Supreme Court's right-of-access
19 analysis is the conviction that the public should have access
20 to information. The court has never suggested that an open
21 proceeding is only open to those who are bodily able to be
22 present in the courtroom itself. True public access ----

23 MJ [COL POHL]: Mr. Schulz, does it make a difference that

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1 the commission plays absolutely zero role in what is put on
2 the website?

3 PRESS [MR. SCHULZ]: Well, under the commission order, the
4 commission's rules, the transcript is required to be made and
5 is required to be made available on the website. So I think
6 the answer is ----

7 MJ [COL POHL]: Where does it say that?

8 PRESS [MR. SCHULZ]: ---- it does play a role.

9 MJ [COL POHL]: Where does it say that?

10 PRESS [MR. SCHULZ]: I believe that's in Rule 806. Hold
11 on one second.

12 Sorry, it's in the rules -- the Regulation for Trials
13 by Military Commission 19-4.

14 MJ [COL POHL]: And I guess, you know, the government
15 points it out into -- in its pleading -- and this may be
16 unique to perhaps military practice as opposed to civilian
17 practice -- in military trials, as well as commission trials,
18 the transcript, the official transcript, requires it to be
19 authenticated by the military judge. Okay? There is no
20 comparable daily transcript system. Now, whether there should
21 be or not is a separate issue altogether, and the government
22 in this case has chosen on their own to put nonverbatim
23 transcripts on their website. So you're reading 19-4, when it

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1 uses the term "transcript," as referring to the unofficial
2 transcripts, not just the official transcript?

3 PRESS [MR. SCHULZ]: Correct.

4 MJ [COL POHL]: Because there is no judicial review of
5 what goes on the website.

6 PRESS [MR. SCHULZ]: And there is traditionally no
7 judicial review of what happens in civilian practice either.
8 The court reporters ----

9 MJ [COL POHL]: That's a distinction. In military
10 practice, courts-martial and commissions, there is a review of
11 judicial proceedings. There is judicial review and the judge
12 goes through the entire transcript and then does what's called
13 authentication of the transcript and says it's a true and
14 accurate transcript, so it is an official transcript that the
15 judge does review; and then there is this thing that the
16 government has chosen to put on the website. And I know
17 normally we say, well, transcripts means transcripts, and now
18 we have got two separate things.

19 But what I am just saying is it is never contemplated
20 that this would be the official transcript and that because
21 what goes on the website is not subject to judicial review, as
22 a regular matter, although apparently now you want me to
23 review it, you see that as a distinction without a difference?

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1 PRESS [MR. SCHULZ]: Absolutely. Whether it was called a
2 transcript or a hamburger, the fact of the matter is it is a
3 judicial record. It is taken down word for word, what happens
4 in this proceeding, in the public gallery. Nothing is removed
5 from what the public hears. It is a verbatim transcript of
6 the proceeding. It was made specifically with the intent to
7 inform the public about what happens here and it is
8 specifically used in that way. It is very important that
9 these things be open because this is how reporters check for
10 the accuracy of what they want to do after the fact, it's how
11 reporters who are unable to be here are able to follow these
12 proceedings. And the fact of the matter is these transcripts,
13 whether they are authenticated or finalized at the end of the
14 process, are actually used by the participants to this
15 proceeding and by the commission itself in addressing motions
16 and resolving motions, and therefore, the constitutional
17 access right applies.

18 Press-Enterprise II makes it very clear that the
19 title given to a proceeding is not dispositive of the nature
20 of the access right. We submit that very same principle
21 applies here.

22 The fact that there is no commission review before it
23 is made public does not affect the constitutional right. The

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1 relevance of the role of the court is that if the government
2 decides after the fact that it wants something removed from
3 the public record, they must come to the judge and get
4 permission for that. That is central to what we're arguing
5 here. All apart from whether these redactions are right or
6 not, there can't be a procedure that says the government can
7 rewrite history or conceal things from the public after the
8 fact in this case.

9 And the principles that they are arguing for here as
10 a constitutional matter would apply the same in the Southern
11 District of New York or the Eastern District of Virginia or in
12 any federal court. It would suggest that the executive branch
13 has the power to limit what the public knows about how our
14 criminal justice system works, and that is wrong. That's what
15 the Supreme Court specifically has rejected.

16 So if you accept that these are records that are
17 subject to the constitutional access right, the government's
18 second point is that that right doesn't apply where classified
19 information is at stake. And with one caveat, I would note at
20 the outset it is not clear from the government's papers
21 whether they're asserting that the redactions were made
22 because the information is classified or whether there is some
23 lower protective status that they are attempting to assert.

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1 But let's stick with the classified argument that
2 they make in their papers. The government is just wrong that
3 the court has no role to play. Even under the court's rules,
4 Rule 806 makes clear that it is the military judge who is
5 responsible for protecting both the accused's right to and the
6 public interest in a public trial. It is the role for the
7 court. Rule 806(b)(2) requires specific findings by the
8 military judge before there is closure of a proceeding, and
9 these same things apply whether the information is classified
10 or not classified.

11 The government is simply wrong in arguing that there
12 is a blanket exemption from the constitutional access right in
13 a judicial setting to classified information. Classification
14 does not automatically exempt public access where a
15 constitutional right to inspect exists. The D.C. Circuit said
16 as much in the Bismullah case. They said it is the role of
17 the court, not the government, that has the discretion to seal
18 a judicial record. They did that in rejecting a proposal by
19 the government that you could unilaterally determine what
20 protected information would be shown.

21 MJ [COL POHL]: But, Mr. Schulz, if we have a -- pursuant
22 to 505 and 806, have a closed session to protect classified
23 information -- and, again, there is comparable procedures in

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1 federal court for the exact same thing.

2 PRESS [MR. SCHULZ]: Correct.

3 MJ [COL POHL]: You do not have an issue with that?

4 PRESS [MR. SCHULZ]: I do not, Judge. And the role of the
5 court and the processes that are necessary to make a
6 determination of what can be said in open court, we are not
7 challenging here.

8 MJ [COL POHL]: Okay.

9 PRESS [MR. SCHULZ]: What we are challenging is, after the
10 fact, trying to remove something that has been said in open
11 court.

12 MJ [COL POHL]: Let me ask you this. If something is said
13 in open court that turns out to be classified, okay, does the
14 fact it was said in open court without objection by the
15 government somehow declassify it?

16 PRESS [MR. SCHULZ]: No, Judge, it doesn't declassify it,
17 and just to keep the terminology straight here, but it does
18 mean that the public has a constitutional right to a
19 transcript of that statement. And if the government wants to
20 seal it up after the fact on the grounds that it is
21 classified, it must meet the constitutional standard and it
22 must convince the court that there is a compelling reason.

23 In our papers we actually argue two positions. One

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1 is, which we believe is the better position, that once
2 something is said in open court, the government, if it hasn't
3 objected, it has waived its rights. In Craig v. Harney, the
4 Supreme Court essentially said that what happens in open court
5 is the public property. Quote, "What transpires in the
6 courtroom is public property. Those who see and hear what
7 transpired can report it with impunity. There is no special
8 prerequisite of the judiciary which enables it, as
9 distinguished from other institutions of government, to
10 suppress, edit or censor events which transpire in open
11 proceedings." That was Craig v. Harney quoted, again, in
12 Nebraska Press. Nebraska was a prior restraint case, but the
13 point of the matter is when something is said in open court,
14 there is substantial constitutional concern about protecting
15 the public record of that.

16 The transparency of judicial proceedings is what
17 gives public credibility, public assurance that fairness is
18 being done and therefore a very, very high standard. So to
19 get back to your special question, though, the fact that
20 classified information may have been said in open court, the
21 circuit courts have dealt with. As I mentioned, Bismullah
22 talked about the fact that it is the court, not the judge,
23 that gets to decide.

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1 In The Washington Post case cited in our brief, the
2 Fourth Circuit, back in 1986, addressed just this issue.
3 There was a plea session that was going to be taken in an
4 Espionage Act case that the State Department wanted to be done
5 in closed session because it involved a prisoner swap.
6 The Washington Post objected. It was appealed to the
7 D.C. Circuit -- sorry, to the Fourth Circuit, and they very
8 clearly held that regardless of the nature of the information,
9 whether it's classified or not, if it is being presented in a
10 proceeding to which the First Amendment access right applies,
11 the First Amendment's access standards govern. And it, after
12 the fact, remanded back to the District Court to review very
13 specifically whether an affidavit that the government
14 submitted and had classified -- it was no doubt that it was
15 classified -- whether the government had made a sufficient
16 showing to keep that classified information from the public.

17 In the Dhiab case, which we also cite more recently,
18 the District Court in the District of Columbia held that
19 videotape evidence in a habeas proceeding that the government
20 had classified once it was offered into evidence and viewed by
21 the court in connection with a preliminary injunction hearing,
22 it became subject to the constitutional right of access and
23 the court in that case held that the government hadn't met its

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1 burden.

2 The point of all these cases, and in the military
3 court, in Grunden, which we cite, the court said the same
4 thing. It says the fact that there is military information
5 disclosed in a public proceeding doesn't mean you
6 automatically close it, that the court itself must make that
7 decision.

8 The courts routinely have recognized the role of a
9 court to decide whether information becomes public in other
10 settings, in FOIA cases that the government relies on, in
11 cases involving prepublication review of individuals who have
12 signed away their First Amendment rights, those cases apply a
13 different standard because in both of those cases the only
14 question is whether the information was properly classified;
15 but they stand for the proposition that the court itself must
16 make that independent assessment of whether the government has
17 met its burden.

18 And the difference here, the difference between FOIA
19 cases and prepublication review cases, is that we are talking
20 about access where there is a constitutional right to know.
21 That does not exist under FOIA, it does not exist in the
22 prepublication review context because the author has waived
23 away their First Amendment rights. And the law is very clear

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1 that the standard that the government must meet is that it
2 must make a logical and plausible showing to the court that
3 disclosure of the information would cause a substantial
4 probability of harm to a compelling interest. Certainly
5 national security is a compelling interest, but the government
6 must make that showing.

7 And I would direct the court's attention to one other
8 support for this proposition that shows that this is how the
9 system is supposed to work, and that's CIPA itself, the
10 Classified Information Procedures Act. That addresses the
11 question in federal criminal court how classified information
12 is to be held -- to be handled, and it has procedures such as
13 your 505(h) procedure here that says when the issue comes up,
14 the judge is permitted, in an in-camera session, to make a
15 determination as to whether the classified information is even
16 material and relevant or needed in the case, because if it is
17 not or if it is not admissible for some reason, we don't need
18 to worry about how it gets used in a proceeding to which the
19 public has a right to attend.

20 But what it says is if the classified information is
21 relevant to that proceeding, the government is then put to the
22 burden. It has three options: It can either declassify that
23 information so that it can be used without objection; it can

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1 find an alternative that is acceptable to the court; or, in
2 Section 8, it can allow the information to be used without
3 objection, even in its classified status. It does not become
4 declassified, but it can be used in the public proceeding.

5 The same principles apply here, and the fact that
6 this information came up in open court, without objection, and
7 notwithstanding here there is extraordinary measures to
8 protect against inadvertent disclosures -- there is the red
9 button, the rules provide specifically for the right to
10 object -- none of that was invoked.

11 So to the extent that there was some concern that
12 this information shouldn't have come out, it should have been
13 raised at that time. And it would be our position that after
14 the fact it's just too late, because, as I said, we believe
15 that the proper analysis is that when it comes out in a public
16 proceeding, that should be the end of the story.

17 MJ [COL POHL]: So if it came out in a public proceeding,
18 let's assume the government, instead of doing it on their own,
19 and assume for the sake of this discussion that this
20 constitutes a judicial record, then the government -- you said
21 that should be the end of the inquiry, but could the
22 government have the option to propose redactions to the judge
23 to approve?

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1 PRESS [MR. SCHULZ]: Well, that's our alternative
2 position. One position, the most extreme position would say,
3 you know, you have rights, and if you rest on your rights, you
4 waive your rights; that's the end of the story.

5 In a case of particular harm, if the government could
6 show some overwhelming need to redact and convince the judge
7 that the constitutional standard has been met, that's the
8 minimum that they should be required to do, and they're
9 arguing here that they have no obligation to come to the
10 court, no standard that they have to meet; if they say it's
11 classified, that's the end of it, and that just can't be
12 right.

13 From terms of applying that standard, if they were to
14 come forward here and look at the assertions of harm that they
15 have made in their papers -- again, I would just underscore a
16 couple of points. One, it's a question for the judge, which
17 we have said. Two is that in evaluating the showing that has
18 been made by the government, as the D.C. Circuit said in the
19 McGehee case, the court of course is going to give deference
20 to the experts in the executive branch who deal with national
21 security, but deference is not a rubber stamp. It's not
22 acquiescence to their conclusions and their predictions.

23 The standard that should be applied that gives

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1 appropriate deference to their determinations is a very low
2 standard, that the court must find that the government has
3 provided a reasoned and detailed explanation to establish
4 plausibly that there are good reasons to classify. That's the
5 standard that applies in FOIA cases and in cases involving
6 judicial review.

7 MJ [COL POHL]: When you say "good reasons to classify
8 it," does that imply that the judge is second-guessing the
9 classification decision by the executive branch?

10 PRESS [MR. SCHULZ]: Judge, I believe that the role of the
11 court -- as I said, there is certain deference that must be
12 paid, but the role of the court is to decide if there is a
13 logical and plausible basis between the explanation offered
14 for the need for classification and the facts that are being
15 withheld. It's admittedly a low threshold, but ----

16 MJ [COL POHL]: That wasn't my question and I think you
17 know that wasn't my question so let me just try it again.
18 Does a judge, Article III court, Article I court, whatever,
19 have the authority to look behind the classification decision
20 on its merits as opposed to making sure it was properly
21 processed, for want of a better term?

22 PRESS [MR. SCHULZ]: If I understand the question, the
23 answer is not only the authority but the duty. The duty to

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1 protect the public's right to the information suggests that
2 you must determine if the government has presented a plausible
3 and logical basis for believing that release would harm
4 whatever compelling interests they are seeking to protect.

5 MJ [COL POHL]: So if you have a Secret document, which I
6 believe the standard is serious harm to national security, I
7 sometimes get these confused, but let's assume that is, and
8 the government established that the document was properly
9 marked by the proper people. Okay? Then do I make an
10 independent determination -- or does a judge make an
11 independent determination of well, yeah, this is serious harm
12 to national security? Or is it simply a procedural
13 verification that they run?

14 PRESS [MR. SCHULZ]: I understand.

15 MJ [COL POHL]: Because you are getting close to where the
16 judge is saying I don't think that ought to be Secret, that
17 ought to be Confidential, and that's my question. To apply
18 your standard, it would seem like -- and I know I keep asking
19 the question and not giving you a chance to answer, but I will
20 after this -- but it would seem to imply that the judge should
21 revisit the classification decision itself on its merits.

22 PRESS [MR. SCHULZ]: The answer to that is that the
23 classification decision itself is not the issue before the

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1 court. Whether it's properly classified or not no longer is
2 dispositive or is the key to whether or not the public can see
3 it. Once it becomes into a zone where the public has a
4 constitutional right to inspect, the issue for the court is
5 has the government satisfied the constitutional standard
6 whether it's classified or not.

7 The judge does not declassify it. He has no power to
8 declassify it. But the judge decides whether the judicial
9 record that contains that information can be sealed consistent
10 with the public's constitutional rights to know what happened.

11 MJ [COL POHL]: Okay. I understand.

12 PRESS [MR. SCHULZ]: Again, in applying the constitutional
13 standard, it is totally appropriate to apply deference to the
14 government's position, but the government's position must be
15 plausible and logical and clearly articulated. That's what we
16 believe is the governing standard.

17 MJ [COL POHL]: Okay. Go ahead.

18 PRESS [MR. SCHULZ]: And that's the standard that the
19 Fourth Circuit said applies in The Washington Post case, what
20 the District Court said applies in the Dhiab case and is
21 consistent with Bismullah and other cases dealing with this
22 issue about what do you do when national security information
23 or operational security information is needed in a forum where

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1 the public has a constitutional right to know. This is
2 different than FOIA.

3 And if you go through -- just maybe to approach
4 Your Honor's question from a slightly different perspective,
5 the reason the classification decision itself is not the issue
6 is, is -- you know, there are many contexts in which
7 information may be leaked by a whistle-blower or something
8 might happen and it's still properly classified, and there are
9 a lot of FOIA cases -- and the government cites them -- just
10 because something is public, the government hasn't properly
11 acknowledged it, it is still properly classified, but it would
12 be a very different question if the information was used in a
13 criminal trial.

14 For example, if Mr. Snowden was brought back to the
15 United States and put on trial for the material he leaked --
16 just today, this morning, in the newspaper there was a long
17 story about Apple and its fight with the government over
18 access to its cellphones, and that story made clear that the
19 national security agencies of this country have access to
20 information when it is stored on Apple's iCloud, that
21 different standards govern and that the agencies are able to
22 get into that information. We know that from the Snowden
23 disclosures.

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1 Now, if the government considers some of that
2 information still classified, which it may well, there could
3 be no doubt that at Snowden's trial, if that issue came up and
4 there was testimony about the ability of the agencies to get
5 access to the iCloud, which has been on the front page of
6 newspapers across the country, the government's claim of harm
7 would not satisfy the constitutional standard. They may still
8 have some reason to classify it, but it couldn't be kept from
9 the public in a public proceeding because they couldn't
10 credibly, logically and plausibly show that discussion of
11 information that's been reported on the front page of
12 The New York Times can't be said in a criminal trial because
13 it will create a risk of harm.

14 MJ [COL POHL]: But isn't that then the result of, by
15 publicly -- and again, we are getting a little far afield from
16 the issue before me but I think it bears discussing. Isn't
17 the end result there that if a classified piece of information
18 is widely known, it remains classified, but it means -- the
19 classification restrictions means nothing because in a
20 criminal trial, it would come out -- it would still come out
21 under the First Amendment? Is that where you are at?

22 PRESS [MR. SCHULZ]: Yes, if it is widely known.

23 MJ [COL POHL]: Does that in effect make these other

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1 widely known sources of information, whether it's Wikileaks or
2 Edward Snowden or The New York Times, don't -- aren't they in
3 essence declassifying information? You can say the
4 information is declassified, but if everybody knows it and
5 there are no restrictions on its dissemination by people
6 without authority to disclose it, they are in effect
7 declassifying the information.

8 PRESS [MR. SCHULZ]: I guess I would leave the ethical
9 issue to the government here because they would object that it
10 is not classified and there may be circumstances under which,
11 but my point is ----

12 MJ [COL POHL]: I know, but it is treated as if it weren't
13 classified.

14 PRESS [MR. SCHULZ]: For purposes of the constitutional
15 access rights, you would never be able to say the public
16 doesn't know that if it is talked about in a criminal trial
17 because if it remains public, if the government can't show
18 that the disclosure of the fact in the trial in the trial is
19 going to have a substantial probability of harm to national
20 security. That's the test.

21 And I raise that because when you get down to looking
22 at the specific redactions that were made here, and the
23 reasons why we believe that getting these rules right is so

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1 important, is that there clearly were inappropriate
2 redactions. When the transcript first came out, whole pages
3 were redacted. We raised this with the government. We said,
4 what's going on here, under what authority have you done this?
5 And the response was, well, we'll look at it, and they came
6 out with a less redacted version, and things that were
7 redacted quite clearly couldn't satisfy the constitutional
8 test. They redacted the acronym, what "DIMS" stands for, even
9 though the department has had press releases about what that
10 is and how it works. They redacted a statement by Ms. Bormann
11 that she is ----

12 MJ [COL POHL]: Mr. Schulz, let's not talk about the
13 particulars of it because we may drift into a ----

14 PRESS [MR. SCHULZ]: But my point is ----

15 MJ [COL POHL]: I have got the redactions. I have your
16 brief on it. I want to make sure we don't slide into another
17 issue about disclosing classified information, at least right
18 now. Okay?

19 PRESS [MR. SCHULZ]: My point is what they released
20 between the first time and the second time shows a number of
21 things. One is that they haven't -- well, the main one is
22 that what they have done is not narrowly tailored, which is
23 another part of this, because it clearly wasn't on the first

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1 round. It is hard to tell on the second round except that we
2 know by comparing the redactions in the flow of the brief to
3 publicly available information, things that were tweeted
4 contemporaneously with the hearing, and these are in the
5 record, that they have redacted things that are on the public
6 record, including things apparently -- for example, one of the
7 things that was redacted is the number of guards that are used
8 during forced cell extractions. That's been the subject, I
9 believe, of debate here and there is no issue that the
10 procedures for that are publicly known.

11 So again, my point is I don't know what's still
12 redacted, but it's for the court to decide whether that
13 information is proper under what is already known. And the
14 final point I would just make in terms of why I don't believe
15 the government has met its burden is that the claims of harm
16 here are really speculative because no one is arguing that the
17 reporters who watched that proceeding, attended that
18 proceeding, are not free to continue to report on it, to use
19 what's in their notes and what's there. So the government has
20 a burden to show both that the specific information that they
21 want to withhold, if disclosed, if it remained on the
22 transcript, would credibly cause a substantial probability of
23 harm to some compelling interest that is narrowly tailored and

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1 that they have shown that by more than mere speculation.

2 Thank you.

3 MJ [COL POHL]: Thank you, Mr. Schulz. I am going to ask
4 you to return to the gallery, please, and ----

5 PRESS [MR. SCHULZ]: Will I have a right to reply if
6 necessary?

7 MJ [COL POHL]: I'm sorry?

8 PRESS [MR. SCHULZ]: Will I have a right to reply if
9 necessary?

10 MJ [COL POHL]: Yes.

11 PRESS [MR. SCHULZ]: Do you want me to wait outside?

12 TC [MR. RYAN]: Your Honor, before Mr. Perry comes in, I
13 would like to address the court on a matter concerning counsel
14 and his appearance.

15 MJ [COL POHL]: Sure.

16 TC [MR. RYAN]: Judge, as you recall -- I am sure very,
17 very clearly -- in the area of counsel for Mr. Bin'Attash, we
18 have been at a rather delicate juncture now for a few
19 different sessions. During the last week's proceedings,
20 Mr. Bin'Attash sought to fire or have dismissed both
21 Ms. Bormann and Mr. Schwartz and then right on the heels of
22 that Ms. Bormann herself moved the court to withdraw from the
23 case. Major Seeger has appeared for the first time and the

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1 court did -- the commission did, in fact, address the accused
2 in regard to it. My memory of it was not so much that he
3 accepted Major Seeger, but he noted he had just met him for
4 the first time and he was taking him on a sort of wait-and-see
5 kind of basis. Obviously, we all have hopes that that will
6 become a fruitful relationship.

7 Now, throughout the course of the case,
8 Mr. Bin'Attash has never accepted any other counsel, when
9 asked; but certainly, at least as to Major Seeger and
10 Ms. Bormann, both have recognized rule-based roles within the
11 case and the commission way back when in appointing at least
12 Ms. Bormann by default was acting properly and I think as
13 dictated by the law and the rules.

14 Mr. Schwartz, I note, really no longer has any
15 official role in the case. He is no longer detailed military
16 counsel. As best we can figure it out under Rule 506, at this
17 point he serves at the pleasure of the accused; and as we
18 heard last week, the accused doesn't seem to be feeling an
19 awful lot of pleasure about this.

20 Now, this morning's order from the commission
21 provides for independent counsel to advise Mr. Bin'Attash, and
22 I thought that was a wise move in the sense that some
23 pragmatism was needed in light of a very longstanding

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1 relationship where, for all the reasons I noted last week that
2 relationship is important going forward.

3 It took me a minute to realize what was going on now,
4 and that is they are seeking to introduce another counsel who
5 also has no rule-based role in the case to argue on behalf of
6 Mr. Bin'Attash, who has not accepted him and, to the best of
7 my knowledge, has never even met him, put up by counsel who
8 Mr. Bin'Attash wants to fire and who has asked to withdraw
9 from the proceedings.

10 I think, Judge, we've -- in light of everybody that
11 has been in place for a good period of time, there is as I
12 said a good sort of rule of reason involved in how we handle
13 things going forward. But now to introduce a whole nother
14 counsel into this interesting equation, and in light of
15 Mr. Bin'Attash's very intense feelings about counsel at this
16 point, I'd submit that's a mistake. In light of everything
17 that's before this commission right now, counsel has no right
18 to be appearing.

19 MJ [COL POHL]: Ms. Bormann.

20 LDC [MS. BORMANN]: A couple of clarifications and then I
21 will answer any question that you have. Rule-based --
22 Mr. Ryan discussed rules, so the rule that he appears under as
23 an employee of the Department of Justice is the rule that

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1 permits the office -- the Chief Prosecutor to detail members
2 to a team. The rule that Mr. Perry operates under is the rule
3 that allows the Chief Defense Counsel to detail defense
4 counsel. It's the same rule that Mr. Schwartz appears under,
5 that I appear under, that Major Seeger appears under.

6 The issue before you is whether or not you, as the
7 commission, are going to hold against Mr. Perry and
8 Mr. Bin'Attash, who has corresponded with Mr. Perry over a
9 period of time -- as I indicated, he has been detailed to this
10 case since June, so for some eight months -- what you would
11 be, in essence, doing is saying, well, we allow somebody into
12 a courtroom to argue a position on behalf of a party, with no
13 clearance and no privity as an employee of the United States
14 Government, but we are going to deny detailed defense counsel
15 for Mr. Bin'Attash the ability, despite the fact that he has
16 already been granted a Secret clearance, signed a
17 nondisclosure agreement, and I think, as you noted in an
18 earlier argument of similar nature by the prosecution with
19 respect to Mr. Sowards, Mr. Nevin was the captain of the ship
20 and how Mr. Nevin chose to put forward who argued what was his
21 decision.

22 In this case Mr. Perry is the most proficient in this
23 area and has specially prepared for this, and so I am asking

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1 that that -- that Mr. Perry, since there is no national
2 security implications here, be allowed to argue on behalf of
3 Mr. Bin'Attash.

4 MJ [COL POHL]: Let me just see a couple of little points
5 here. First of all, the accused has a right to two kinds of
6 counsel as a matter of right in a capital case: Learned
7 counsel and detailed military counsel. Okay? Then the other
8 counsel are not required, but obviously helpful; and you are
9 correct that Mr. Nevin represented that Mr. Mohammad wanted
10 Mr. Sowards. Okay. So I've got that.

11 Now, two things. One is, and correct me if I am
12 wrong, I thought last week Mr. Ryan made a reference to
13 Mr. Perry in the counsel argument and you said he wasn't a
14 member of the team or something like that.

15 LDC [MS. BORMANN]: No.

16 MJ [COL POHL]: You took issue with his characterization
17 of having four attorneys.

18 LDC [MS. BORMANN]: I said he has four attorneys.

19 MJ [COL POHL]: Okay.

20 LDC [MS. BORMANN]: Unfortunately, one is hampered by the
21 lack of movement on the TS/SCI clearance.

22 MJ [COL POHL]: Okay. Now, I notice that, and perhaps I
23 just don't see it, but I have noticed that I have a notice of

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1 joinder here by Mr. Ali, Mr. al Hawsawi and Mr. Binalshibh.
2 Right?

3 LDC [MS. BORMANN]: Yes.

4 MJ [COL POHL]: You said he has been working on this.
5 Your team decided not to file a notice of joinder on this?

6 LDC [MS. BORMANN]: As soon as Mr. Ali -- he was the first
7 to have joined the particular issue from the five
8 defendants -- as soon as he joined, by operation of the rules
9 of this commission, we automatically joined. So we didn't
10 file a special joinder because when one party, one of the
11 defendants, files something, under your rule we are
12 automatically joined to it unless we decline to join.

13 So our position was we agreed with counsel for
14 Mr. Ali on this issue and we are automatically joined as soon
15 as they make a filing.

16 LDC [MR. NEVIN]: And I would say that was the position we
17 took as well, Your Honor.

18 MJ [COL POHL]: But apparently not the position two others
19 didn't take. What I'm saying is ----

20 LDC [MS. BORMANN]: I mean, I can't comment on why people
21 join things despite it's happened -- people are still filing
22 joinders despite your trial conduct order that says we
23 shouldn't unless we are declining to join. I don't know why

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1 people do that. I can't comment on that. But we prefer not
2 to waste resources to duplicate the same filing over and over.

3 MJ [COL POHL]: I don't have the rules in front of me.
4 There may be a distinction between joining a motion,
5 automatically joining a motion that's filed by the parties,
6 and joining a third-party motion which you may or may not
7 agree with. So -- but that's a technical thing; we don't need
8 to worry about it.

9 Tell you what we are going to do. Because Mr. Ryan
10 indicated there is an independent counsel coming in to
11 determine -- to advise Mr. Bin'Attash about his legal team one
12 way or the other, and that would include -- of course,
13 Mr. Schwartz may be in a different category than you and Major
14 Seeger, and as far as Mr. Perry is concerned, I will take your
15 representation, just like I did with Mr. Nevin, but that's for
16 this. And you said he has prepared for this?

17 LDC [MS. BORMANN]: Yes.

18 MJ [COL POHL]: That is for this issue and this issue
19 only. I am not making any representations that he can
20 continue to represent him unless we have something firm from
21 Mr. Bin'Attash. The difference is, is there is no
22 dissatisfaction expressed by Mr. Mohammad with Mr. Nevin and
23 therefore Mr. Nevin represents that Mr. Mohammad wanted

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1 Mr. Sowards. That's fine. That's not the dynamic of your
2 team. So understanding, I'll permit Mr. Perry today on this
3 one issue, but I'm not necessarily going to agree that he can
4 represent Mr. Bin'Attash unless I hear from Mr. Bin'Attash.

5 LDC [MS. BORMANN]: Judge, that's an issue the court will
6 I'm sure take up at some future point.

7 MJ [COL POHL]: Okay.

8 LDC [MS. BORMANN]: Right now, Mr. Perry is prepared to
9 argue in due course.

10 MJ [COL POHL]: Mr. Ryan, do you want to be heard again?

11 TC [MR. RYAN]: Very briefly, sir. You noted that you
12 would accept Ms. Bormann's representation. I would suggest to
13 the court that the correct question to ask her is can she
14 represent that Mr. Bin'Attash wants this man speaking for him?
15 And if she can't make that representation, in light of the
16 difficulties within that defense camp, I don't think you can
17 accept her representations.

18 MJ [COL POHL]: I understand you, Mr. Ryan, but I thought
19 I heard her say that, but I will ask her again.

20 TC [MR. RYAN]: Yes, sir.

21 LDC [MS. BORMANN]: What would you like to ask me?

22 MJ [COL POHL]: Has Mr. Bin'Attash affirmatively told you
23 or told Mr. Perry that he wants him part of the defense team?

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1 LDC [MS. BORMANN]: Yes. He has absolutely no objection
2 to Mr. Perry or Major Seeger.

3 MJ [COL POHL]: Okay. Let's change it to no objection to
4 he has indicated to you he wants Mr. Perry?

5 LDC [MS. BORMANN]: He was involved with the selection of
6 Mr. Perry. I haven't spoken with him in the last two weeks
7 about the matter, but he is aware of Mr. Perry, was involved
8 in the consultation and the bringing on of Mr. Perry, has
9 expressed no dissatisfaction with Mr. Perry, knew that
10 Mr. Perry was detailed, and has corresponded with Mr. Perry.

11 MJ [COL POHL]: Got it. I believe that answers Mr. Ryan's
12 question. We will now hear from Mr. Perry.

13 LDC [MR. NEVIN]: Your Honor, I will ask the military
14 commission to be heard on AE 400 as well. I discussed this
15 joinder question with the military commission in our last
16 session.

17 MJ [COL POHL]: Okay.

18 LDC [MR. NEVIN]: I thought I had an understanding
19 that ----

20 MJ [COL POHL]: Okay. Understand, Mr. Nevin, again, it's
21 slightly different since it is a third party, basically a
22 third party raising a third-party issue; and my preference
23 would be to have affirmative joinders on that, because you may

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1 or may not agree with that position. But for the purpose of
2 this hearing I will apply the automatic joinder rule.

3 LDC [MR. NEVIN]: Yes, sir. And just so we are clear, I
4 didn't regard myself as having automatically joined
5 Mr. Schulz's motion.

6 MJ [COL POHL]: I know, you are joining the joinder.

7 LDC [MR. NEVIN]: The other three parties who filed
8 joinders, joined them ----

9 MJ [COL POHL]: You are joining the joinders.

10 LDC [MR. NEVIN]: ---- unless I un-join.

11 MJ [COL POHL]: I got it.

12 CP [BG MARTINS]: Your Honor, I realize you are trying to
13 move on from that, but I would just like to point out that the
14 language of your -- the trial judiciary rules of court -- AE
15 400B was a notice of joinder. So joining a motion is one
16 thing, it has content; joining a notice of joinder is not
17 pursuant to your rules. So if you are making ----

18 MJ [COL POHL]: What I am going to do -- there appears to
19 be confusion here, General Martins, and I understand it.
20 That's how you are interpreting it, that's the way I
21 interpreted, it quite frankly, and when I had three joinders
22 and two non-joinders, I assume that the two people who didn't
23 file notice of joinder were not joining.

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1 They apparently were under the impression that think
2 automatically joined the joinder, so the purpose of this
3 motion today I am going to interpret it leniently for them to
4 be heard, simply be heard. But in the future going forward,
5 if it's a third-party motion, I need affirmative joinders of
6 the motion, not joinders of the joinder.

7 CP [BG MARTINS]: Thank you.

8 MJ [COL POHL]: Okay.

9 LDC [MR. NEVIN]: Just so we are clear, when it is a
10 third-party motion, but notices would be -- we would be joined
11 to -- in other words, the distinction between notice and
12 motion ----

13 MJ [COL POHL]: What I am saying is you are automatically
14 joined with motions filed with these parties.

15 LDC [MR. NEVIN]: Only motions as opposed to ----

16 MJ [COL POHL]: Right. If there is a joinder of a
17 third-party motion, you have to join affirmatively on it.

18 LDC [MR. NEVIN]: What about where one party gives notice
19 of its position on the question whether on the meaning of
20 pending classification review, which the military commission
21 says you have until tomorrow, you have until next week to tell
22 me what your position is ----

23 MJ [COL POHL]: If it is coming -- if the affirmative

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1 motion is coming from the parties, I'm assuming it's automatic
2 joinder. It's these third-party ones I am concerned about
3 because they sometimes will raise issues that's not consistent
4 with an individual defense counsel's strategy.

5 LDC [MR. NEVIN]: So it's not so much motion, it's more
6 filing. It's a filing that ----

7 MJ [COL POHL]: When in doubt, file a joinder.

8 LDC [MR. NEVIN]: Got it.

9 LDC [MS. BORMANN]: Just to be clear.

10 MJ [COL POHL]: Yes.

11 LDC [MS. BORMANN]: And I brought this to General Martins'
12 attention. The filing AE 400B (AAA) is tied to
13 Mr. al Baluchi's Motion to Join Press Movant's Motion to
14 Unseal 30 October 2015 Transcript of Public Proceedings. It
15 was filed on January 20 of 2016. It contains subsequent legal
16 argument, is not simply a pro forma motion. That is in
17 fact ----

18 MJ [COL POHL]: But what's clear here, Ms. Bormann, we are
19 spending way too much time on this issue. What's unclear
20 here, then, under that theory, you are joining Mr. Connell's
21 motion only and not the 400 filed by Mr. Schulz?

22 LDC [MS. BORMANN]: He has joined -- he has adopted all of
23 Mr. Schulz's argument and supplemented some of his own. We

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1 are seeking to join that. We thought we joined it,
2 because ----

3 MJ [COL POHL]: I got it. I got it. Now it's clear.

4 LDC [MS. BORMANN]: Okay.

5 DC [MR. PERRY]: Good morning, Your Honor.

6 MJ [COL POHL]: Good morning.

7 DC [MR. PERRY]: My name is Edwin Perry. I am licensed to
8 practice in Maryland and D.C., a member of good standing. I
9 have been detailed to this case by the Chief Defense Counsel,
10 Brigadier General John Baker. My detailing memo has been
11 previously entered into the record as AE 006C. I'm qualified
12 to act as defense counsel in accordance with the Rule for
13 Military Commission 502. I have acted in no way that would
14 tend to disqualify me from these proceedings.

15 MJ [COL POHL]: One moment. Are you a United States
16 citizen?

17 DC [MR. PERRY]: Yes, Your Honor.

18 MJ [COL POHL]: You have signed the appropriate
19 nondisclosure agreements?

20 DC [MR. PERRY]: Yes, Your Honor.

21 MJ [COL POHL]: One moment.

22 [Pause.]

23 MJ [COL POHL]: You want to be heard on AE 400?

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1 DC [MR. PERRY]: Yes, Your Honor.

2 MJ [COL POHL]: Go ahead.

3 DC [MR. PERRY]: Thank you, Your Honor. From the
4 perspective of Mr. Bin'Attash, we are essentially joining in
5 the request of the press movants for Your Honor to rule that
6 the government's conduct in this case of ex-post redacting the
7 transcript of October 30, 2015 should not be allowed, and in
8 fact we are asking Your Honor to consider an order disallowing
9 that kind of action in the future, absent proper procedures in
10 accordance with Rule 505.

11 In the normal course of things, if an individual is
12 testifying and the government believes something should be
13 closed at that point, the normal procedures, of course,
14 request a closed session and to present some reason before
15 Your Honor to determine whether that should be closed or not.

16 For the government to ex-post redact without giving
17 Your Honor that benefit of the balancing is something that
18 Mr. Bin'Attash joins in the press movants' arguing is
19 unconstitutional, our perspective is under the Sixth Amendment
20 as opposed to the First.

21 The government mistakenly believes it has this power
22 under Rule of Court 19-4.e. Of course, nothing in 19-4.e says
23 something about ex-post redacting. When a government believes

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1 that something should be closed or should be redacted from a
2 transcript, and we agree that a transcript is public record
3 and there is -- once it's in the public record, the public, as
4 well as Mr. Bin'Attash, has a right to access to it and use
5 it. We use the unauthenticated transcript every day in our
6 practice. Once that occurs, the government must proffer
7 evidence about what that danger to national security is. The
8 mere suggestion that there is some danger to national
9 security -- and we assume that they are suggesting this
10 because of their redactions -- but, again, as our friend
11 Mr. Schulz said, it's unclear from their pleading exactly what
12 their basis is to redact, whether it's classification or
13 something lower than that. But, again, when that opportunity
14 comes up it's their burden to demonstrate that to Your Honor
15 in a session.

16 And Your Honor asked Mr. Schulz several times about
17 what role you have to play. Your role is simply this: It's a
18 balancing test that Your Honor has to employ in the four
19 factors under Press-Enterprise. Your Honor is not in the
20 position to second-guess their determination about
21 classification, but Your Honor -- once something is testified
22 to in open court, Your Honor does have a role to play in
23 whether that remains in open court and on the transcript.

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1 From the perspective of Mr. Bin'Attash, at AE 400, at
2 page 5, there are six categories that the press movants, you
3 know, highlight as some of the categories of the testimony and
4 the information that was put out in the transcript that would
5 be at issue, potentially. And specifically to Mr. Bin'Attash,
6 we would submit that any testimony of Sergeant Jinx's
7 qualifications and his service history, that there couldn't
8 possibly be any national security interest in that.

9 And if the government is seeking to redact that at
10 this time, they need to demonstrate with some detailed,
11 reasoned position why that is so. Simply just ----

12 MJ [COL POHL]: It is not good enough if they simply say
13 it's classified?

14 DC [MR. PERRY]: Right. It's not good enough that they
15 simply say it's classified because that ----

16 MJ [COL POHL]: Wouldn't that be -- if I would order the
17 redactions, let's assume the information was classified and
18 the proper procedures were followed and I order that the
19 redactions be lifted, wouldn't I be ordering the disclosure of
20 classified information?

21 DC [MR. PERRY]: Not if Your Honor employs the balancing
22 test that the press movants and the parties in this case are
23 asking you to do, because it's not a situation where you are

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1 second-guessing the government's determination of
2 classification. It's that once it's in the public record,
3 that Your Honor has a role to play in determining whether it
4 remains in the public record or not.

5 MJ [COL POHL]: At the end of the day, though, I would be
6 ordering the government to disclose classified information. I
7 am not saying I can't do it; I am just simply saying no matter
8 how you rephrase this, if the information is properly
9 classified ----

10 DC [MR. PERRY]: Right.

11 MJ [COL POHL]: ---- and the theory is it's already out
12 there and therefore leave it out there, to give you the relief
13 that's being requested, I would essentially -- not
14 essentially. I would be saying, "Government, disclose
15 classified information on your website." True?

16 DC [MR. PERRY]: Your Honor, the dissemination has already
17 occurred, but Your Honor does have a role to play in
18 determining whether it remains redacted, not because it's
19 classified or not, but because after considering the four
20 factors of Press-Enterprise, it remains redacted in that
21 public record.

22 It may sound like a distinction without a difference,
23 but that is your role to play, Your Honor. You have a role to

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1 play. The government can't take that role away from you by
2 instead of not objecting on the front end, not asking for a
3 closed session on the front end, after the hearing, just
4 redacting it unilaterally. They are taking away Your Honor's
5 role, and that's what we are asking Your Honor to reassert
6 both with respect to these redactions and going forward, so
7 that there is no misunderstanding by anybody about how this
8 should go on moving forward.

9 And with respect to the complaints of the detainees,
10 we would also submit, that's one of the five -- that's one of
11 the six categories that the press movants highlight as one of
12 the subject matters of the redactions. We would submit that
13 there is no possible way that the complaints of the detainees
14 about the use of female guards could possibly have a national
15 security implication. It's possible to corroborate our cause,
16 our claims in 254Y, it certainly goes to the probativeness of
17 what's going on in the testimony; but we would submit that it
18 has no substantial probability of a prejudice to a compelling
19 interest that Mr. Bin'Attash or other detainees complained.
20 All right?

21 And the restriction will not effectively protect,
22 obviously, against that interest. Let's suppose there is a
23 compelling interest to not let the public know that detainees

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1 are complaining about the use of female guards. Redacting it
2 afterward, after it's been in the public record, after it has
3 been in an unauthenticated, unredacted transcript, after it
4 has been reported in several newspapers, after it has been
5 tweeted by Mrs. Rosenberg, redacting it ex post facto is not
6 going to effectively protect against that threatened harm. So
7 Your Honor balances that out and weighs in favor of keeping in
8 the record as opposed to taking it out, if you can.

9 MJ [COL POHL]: Thank you.

10 DC [MR. PERRY]: Thank you, Your Honor.

11 MJ [COL POHL]: I think, Mr. Connell, you joined first.

12 LDC [MR. CONNELL]: Good morning, Your Honor.

13 MJ [COL POHL]: Good morning.

14 LDC [MR. CONNELL]: The starting point for this analysis
15 from the point of view of a defendant or Mr. al Baluchi, as
16 opposed to the press movant, is the Sixth Amendment. The
17 Sixth Amendment contains within it the right to a public
18 trial. The government has not claimed that that right to a
19 public trial is impracticable or anomalous under the standard
20 in Boumediene v. Bush, and it is our position that the Sixth
21 Amendment is fully applicable to these defendants at
22 Guantanamo Bay.

23 That Sixth Amendment interest is most prominently

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1 reflected in the case of Waller v. Georgia at 467 U.S. 39,
2 1984 case, which is cited in the brief for the Sixth Amendment
3 analysis. There are actually a lot of briefs on the Sixth
4 Amendment analysis, and I want to briefly remind the military
5 commissions of where they are since they are incorporated by
6 reference in 400B (AAA), our pleading in this matter.

7 The first of those is at AE 013E, which was the first
8 time this issue came up. It was our motion to join the ACLU's
9 motion for public access. The second is AE 013G, the
10 unclassified portion, which was our response to the
11 government's motion against disclosure of national security
12 information. The third is AE 013D, which was our response to
13 the government's motion or disclosure of classified
14 information. And last, AE 400B, our joinder to the press
15 movement -- movants' motion to unseal.

16 In this situation, Your Honor, that Sixth Amendment
17 interest in a public trial is especially important. First, we
18 are located in a secure facility on a remote island. In
19 AE 013C, the military commission entered an order about public
20 access to these proceedings and it noted, I quote, the
21 logistical difficulties and security limitations of reaching
22 Guantanamo.

23 The courtroom itself has controlled access; the base

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1 at Guantanamo Bay Naval Station, or, for that matter, Fort
2 Meade, has controlled access; and there are substantial
3 interests of the public in the case. The Victim Family
4 Members have an important issue in seeing the process of
5 justice, the NGOs, nongovernmental organizations, have an
6 interest in the process, and the public at large has an
7 interest in the process. I think it's also important to note
8 that there is no general electronic transmission, there is
9 specific electronic transmission to specific locations, but
10 the military commission denied AE 022, the defense motion for
11 public access through electronic transmission of the trial,
12 and which we also briefed in AE 033A.

13 There is no -- as the military commission noted
14 earlier, there is no official transcript available until the
15 end of the case after the parties have had a chance to review
16 the transcript and the military commission authenticates it.
17 So the unofficial transcript becomes an important way that
18 members of the public who cannot make their way to
19 Guantanamo Bay, Cuba, or to Fort Meade, Maryland, have to
20 understand what's going on in the military commissions.

21 The Press-Enterprise factors thus weigh -- are
22 especially important in this case, and there is one factor --
23 we have already talked about the Press-Enterprise factors, the

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1 fact of an overriding governmental interest that is no broader
2 than necessary without reasonable alternatives and supported
3 by adequate findings to close a proceeding.

4 That -- there is one more factor which I think is
5 important inherent in the nature of due process, which is the
6 notice and the opportunity to be heard by the public which the
7 military commission addressed in the AE 081 series telling the
8 military -- telling the public that it would have the
9 opportunity and the notice to be heard. 245 -- while the
10 Supreme Court hasn't addressed that case, the issue of notice
11 and opportunity to be heard in this situation, the circuit
12 courts have, including In re Knight Publishing Company at 743
13 F.2d 231, a Fourth Circuit case from 1984. Now, these factors
14 articulated by the Supreme Court in Press-Enterprise and
15 applied by the circuit courts clearly apply to transcripts.
16 Press-Enterprise II itself was a transcript case. The trial
17 court had closed voir dire to the public and had denied the
18 public access to the transcript. The Supreme Court treated
19 those two things as equivalent to each other.

20 MJ [COL POHL]: Why did the judge do that?

21 LDC [MR. CONNELL]: There were two reasons. The judge
22 articulated two reasons. The first was to protect the
23 defendants' interests in a fair trial. That was a case where

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1 the defense wanted the voir dire closed as well. And second,
2 to protect the privacy of the jurors when/if they were
3 cross -- if they were examined in the course of the voir dire
4 process in sensitive matters, he didn't want the public to
5 know about it.

6 Another case which very clearly applies the
7 Press-Enterprise factors to the transcripts is United States
8 v. Antar at 48 F.3d 348, a Third Circuit case from 1994. This
9 is not simply academic. In fact, in this particular case the
10 government has relied on the availability of transcripts to
11 justify its regime, and that is at page -- excuse me, in the
12 record at AE 331, one of the government's public access
13 motions, at page 7, where they rely on the analysis from the
14 Moussaoui case where public transcripts will be available each
15 day, which serves the public interest in transparency.

16 Now, the tenor of some of the military commission's
17 questioning earlier was that the, quote, Government puts the
18 information on the website and that's true in a sense. Of
19 course, I get confused which one is the big G and the little
20 G, but we have the government which is the prosecution which
21 is closely integrated with the rest of the government, but
22 sometimes it's not the Office of Chief Prosecutor who does
23 things. But the transcript is not a matter of governmental

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1 largess. The Regulation for Trial by Military Commission,
2 which was implemented by the Secretary of Defense at 19-4.e
3 requires that except under exceptional circumstances,
4 including equipment failure, the Convening Authority shall
5 ensure the custodian of the OMC website posts a draft,
6 unofficial/unauthenticated transcript of the public portions
7 of the military commission's proceeding to the OMC website as
8 soon as practicable after the conclusion of a hearing each day
9 the military commissions is in session, whether the hearing is
10 recessed, adjourned or closed. This draft,
11 unofficial/unauthenticated transcript shall be prepared by a
12 court reporter seated in a room that receives an audio feed of
13 the proceedings that is identical to the audio feed broadcast
14 in the public gallery. There is more which I'm going to talk
15 about in a moment, but let me stop there.

16 This is not a discretionary matter for the
17 government, either the United States Government as a whole or
18 the Office of the Chief Prosecutor to provide this transcript.
19 This instead has been ordered by the Secretary of Defense as
20 reflected in 19-4.e.

21 19-4.e continues, "This procedure" -- and by "this
22 procedure," the antecedent of this procedure is the transcript
23 being prepared by reporters who are seated outside the

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1 courtroom, that procedure. "This procedure will avoid
2 inclusion in the draft, unofficial/unauthenticated transcript
3 of any inadvertent utterances of classified or protected
4 information inside the courtroom."

5 The reason why that's significant is the process for
6 protection is already built into the Secretary of Defense's
7 regulation on this matter. When counsel for Mr. Bin'Attash
8 says, correctly, that there is no provision for ex parte --
9 excuse me, ex-post redactions in 19-4.e, it's correct, but
10 there is a procedure for protection in 19-4.e which is
11 structural. That structural protection is the fact that the
12 court reporters, who report the transcript quite well, do so
13 from outside the courtroom.

14 Now, that's in fact a fairly close analogy to what
15 happens in an Article III court. In an Article III court, the
16 court reporter is an employee of the judiciary, an employee of
17 the court, and essentially anyone -- but they are often a
18 contractor -- sometimes they are an employee, sometimes a
19 contractor -- but anyone can call up that court reporter and
20 order a copy of the transcript. It is typically not the
21 situation that transcripts are posted each day as a matter of
22 course, but any party can call up and order those transcripts.

23 The -- so the reason why that seems to be a fairly

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1 close analogy to what happens here is there is no judicial
2 oversight of the production of the transcript itself in the
3 ordinary case.

4 MJ [COL POHL]: But under that scenario, though, the court
5 reporter works for the judge to begin with. So I suspect
6 there may not be an individual discussion every time, but I
7 suspect the court reporter gets some overall guidance from his
8 judge of what to do and not to do in those situations, unlike
9 here -- well, whether they do or not, what I'm saying is he
10 has that ability to do that if he wants to.

11 LDC [MR. CONNELL]: Yes.

12 MJ [COL POHL]: Because, again, it is a judicial employee.

13 LDC [MR. CONNELL]: Right.

14 MJ [COL POHL]: Even a contractor, be it a judicial
15 employee -- here the court reporters are not judicial
16 employees. They do not work for the judge, they work for
17 the ----

18 LDC [MR. CONNELL]: Convening Authority.

19 MJ [COL POHL]: ---- for the Convening Authority, so there
20 is less control -- well, not less control. The judge has no
21 control necessarily over what the court reporters do, except,
22 you know, the normal keeping integrity of the proceedings, but
23 it is not the neat employer-employee relationship that perhaps

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1 is true in federal court.

2 LDC [MR. CONNELL]: It's -- with all due respect, I think
3 that the analogy is closer than you think. In a federal
4 court -- you know, the military, because of the importance of
5 the chain of command in the military, the military pays close
6 attention to who owns what asset and the idea of ownership of
7 assets in a metaphorical sense is very important, but there is
8 no sense in which a court reporter is an employee or a
9 contractor to the judge.

10 The court reporters are a contractor or employee of
11 the administrative office of the courts, which is an
12 administrative body that handles all the parts of the
13 administration of the courts other than the administration of
14 justice, right? The administrative office of the courts make
15 sure there are court reporters, they get the leases on the
16 buildings, they make sure that the defense gets resourced. In
17 fact, they operate -- they have an extremely analogous
18 position -- on this point, not on other points -- but on this
19 point they an extremely analogous position to one of the many
20 rules of the Convening Authority. They are the administrative
21 part which houses the defense. We are a tenant, so it is not
22 fully analogized, but the court reporter who works for the
23 administrative office of the courts, not directly for a judge,

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1 is very similar to the court reporters here who work for the
2 Convening Authority and not directly for a judge.

3 So the importance of that is that the transcripts in
4 a federal court are ordinarily available unless something
5 important happens, and that important thing is that a party
6 asks that a transcript be sealed. It's routine that parties
7 ask that transcripts be sealed. In some -- I will tell you
8 that in the District of Maryland, where I am admitted, in
9 every sentencing case they have a policy that they seal one
10 portion of the transcript just so anyone who comes along later
11 can't say oh, there is a sealed portion of the transcript, the
12 person must be cooperating. They have a -- they have a policy
13 and they seal things all the time. That is done by the
14 judicial authority at the request of one of the parties.

15 And as I understand the position of the press
16 movants, certainly as we interpret it, the same situation
17 should apply here. It is not a request for the military judge
18 to become involved in the ordinary operations of the
19 production of transcripts any more than an Article III judge
20 is involved in the ordinary production of transcripts. But
21 when something, a constitutional event, happens -- that is,
22 when one of the parties wants to seal a portion of the
23 transcript, or any other judicial record for that matter --

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1 you know, there have been a number of judicial records in this
2 that have sealed -- in this case that have been sealed, some
3 of them on the request of the prosecution, some of them on the
4 request of the defense -- but the sealing is a judicial act,
5 and the same applies to the transcripts.

6 The -- and there is a reason for that, which is that
7 under Rule 806 and its statutory complement and First
8 Amendments and Sixth Amendments themselves, the judge has a
9 responsibility to protect the openness of the courtroom, not
10 merely for the people who are sitting here, but those who are
11 beyond the courtroom as well. And the one case that makes
12 that point rather eloquently I thought was Application of
13 National Broadcasting Company, 635 F.2d 945, a Second Circuit
14 case which describes the responsibility of the judiciary to
15 protect the right to transparency of those who might read the
16 transcript later as well as those who are physically located
17 in the court.

18 Now, that brings us to the question -- so that's sort
19 of the procedure of how things happen. I can tell the court I
20 have about 10 to 15 more minutes. I can ----

21 MJ [COL POHL]: Keep going.

22 LDC [MR. CONNELL]: Okay. But what about the substance?
23 The substance here is really two privileges: The classified

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1 information privilege and the government information
2 privilege. And I think one of the flaws in some of the
3 analysis that we have heard this morning is to equate the
4 administrative executive act of classification, which we --
5 under Executive Order 13526, which we discussed at some length
6 last week, with the invocation of the classified information
7 privilege. There is space between those two things. It is
8 possible for information to be classified by the government
9 for whatever reason, including its interest in public policy,
10 its interest in transparency or other reasons, not to invoke
11 the classified information privilege, in the same way that in
12 a sense virtually all the information that we deal with here
13 is governmental information, but in the ordinary case the
14 government chooses not to assert government information
15 privilege under M.C.R.E. 506 for its -- after no doubt
16 conducting its own analysis of the equities in the case.

17 Both of those privileges were initially recognized in
18 Reynolds v. United States at 345 U.S. 1, a 1953 case. And as
19 we discussed last week, there is a close analogy between the
20 classified information privilege and the previously
21 recognized, before 1953, previously recognized informer's
22 privilege; that is, that there is certain information that the
23 government has the authority to shield from the public.

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1 But in both -- in all three situations, whether
2 that's the Roviaro informer's privilege or whether that's the
3 Reynolds classification and government information privilege,
4 it requires an invocation from the government of that
5 classified information privilege.

6 So that brings us to what I see as the five problems
7 with the transcript redactions in this case. The first of
8 those is that the military commission -- excuse me, the
9 government has not made any valid public invocation of the
10 classified information privilege. The governing case in the
11 D.C. Circuit on this matter is Ellsberg v. Mitchell at
12 709 F.2d 51, a D.C. Circuit case from 1983.

13 Ellsberg requires that in order to assert the
14 classified information privilege, the government has to do two
15 things. First, it has to make a formal public claim of
16 privilege on the record and, second, it must make a public
17 explanation in detail of the kinds of injury to national
18 security that it seeks to avoid with the reasons, or it must
19 explain why such an explanation would itself endanger national
20 security. From a procedural point of view, that invocation is
21 simply lacking here.

22 The second fundamental flaw in the government's
23 approach is that of prior authorized disclosure, and one of

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1 the questions that the military commission addressed to both
2 the attorneys who spoke is the question about leaks. And
3 there is a critical distinction in all of the D.C. Circuit
4 cases on this topic, both the Freedom of Information Act cases
5 and the other classified handling cases between
6 prior authorized disclosure and leaked disclosure. Now, many
7 of us, like myself, have signed nondisclosure agreements
8 which, as a matter of contract, prohibit us from revealing
9 information which is classified. But that's not the situation
10 here.

11 The Ellsberg sets out two factors that it says can
12 mitigate against an invocation of classified information
13 privilege. The first of those is the passage of time, which
14 is not really an issue here; the techniques, tactics and
15 procedures, the TTP that is at issue here is currently in use.

16 But the second Ellsberg factor is authorized public
17 disclosure of the information at issue. There are a number of
18 cases that apply this in the criminal analogy which is found
19 in the press movants' brief AE 400 at page 13, and it's what's
20 fundamentally different from the leak. What happened here in
21 this situation on 30 October 2015 was not a leak; it was an
22 authorized public disclosure of information.

23 In fact, it's quite significant in that transcript

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1 that the -- on multiple occasions either the witness or the
2 government did invoke privilege. There were a number of
3 questions that Staff Sergeant Jinx and others simply declined
4 to answer and sometimes the military commission made them
5 answer and sometimes the military commission didn't make them
6 answer. There were invocations -- those were invocations of
7 privilege.

8 The third problem with the government's analysis here
9 is the government's unilateral control of the transcript.
10 Now, ordinarily, any person can purchase a transcript from the
11 court, as we discussed, and the decision to block that
12 process, to close that element of a courtroom, belongs to the
13 judge. That's important for a really basic reason to due
14 process, which is the Knight Publishing Company case that I
15 cited about notice and opportunity to be heard, if the
16 prosecution wants to seal a motion, as it routinely does with,
17 for example, the 505(f) pleadings, and they give notice to the
18 defense and the defense has the opportunity to object, as our
19 team routinely does. That is notice and the opportunity to be
20 heard, which is at the core of due process.

21 If the government simply acts unilaterally, through
22 an administrative process with no government -- with no
23 judicial involvement whatsoever, then it denies the defense

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1 and the public the notice and opportunity to be heard. There
2 is no forum outside of this one to which we can object. So
3 the unilateralness of the government's control is actually
4 quite constitutionally significant.

5 The fourth issue with the government's analysis here
6 is that of waiver. Now, I mentioned earlier that there is
7 space between the idea of a document being classified and the
8 invocation of classified information privilege, and that's
9 significant, because even if information is classified, the
10 government has -- must assert its interest in classified -- in
11 the -- excuse me, the classified information privilege.

12 In the D.C. Circuit, of course, as is everywhere, the
13 general rule is that if you sit on your rights, you lose them;
14 that if you fail to raise a privilege, you have waived that
15 privilege.

16 As I mentioned earlier, the government on multiple
17 occasions during the testimony of Staff Sergeant Jinx and
18 others on 30 June 2015 did waive their classified privilege
19 but they did not ----

20 MJ [COL POHL]: You said 30 June. You meant 30 October?

21 LDC [MR. CONNELL]: I did mean 30 October. My son's
22 birthday is 30 June. Thank you.

23 Here we have a situation where they are attempting to

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1 go back and retroactively invoke government information
2 privilege which is simply ineffective.

3 The last -- if I could have the court's indulgence
4 for just one moment.

5 [Pause.]

6 LDC [MR. CONNELL]: Your Honor, the fifth and final issue
7 with the government's position here is that many of the
8 redactions in the transcript are simply not supported by the
9 Clark declaration, which is AE 400C, Attachment C. I have
10 prepared for the military commission and provided to the
11 government and each of the parties a red box transcript of
12 30 October 2015 in which I have -- to make it easier for the
13 military commission to review the individual redactions. I
14 have not provided a copy of this to the press movants because
15 it remains classified. I would ask to tender this to the
16 military commission and make it the next appellate exhibit
17 number.

18 MJ [COL POHL]: Was this your 505(g) notice?

19 LDC [MR. CONNELL]: I did give 505(g) notice of it.

20 MJ [COL POHL]: On this?

21 LDC [MR. CONNELL]: This is the transcript itself. This
22 is the red box transcript to present to the court.

23 MJ [COL POHL]: But your 505(g) notice is that?

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1 LDC [MR. CONNELL]: It covers this, yes.

2 MJ [COL POHL]: But you are not asking for a 505(h)
3 hearing?

4 LDC [MR. CONNELL]: Not at this moment. I don't know
5 whether the government will argue it is a useful document. I
6 found it useful in preparing. I thought the military
7 commission might as well.

8 CP [BG MARTINS]: Your Honor, if I may address the
9 counsel?

10 MJ [COL POHL]: Sure.

11 CP [BG MARTINS]: This is the
12 unofficial/unauthenticated -- or this is the official
13 transcript with red boxes pertaining to the redactions?

14 LDC [MR. CONNELL]: Correct.

15 MJ [COL POHL]: Let's make sure we are precise on language
16 here.

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

18 MJ [COL POHL]: You used the term "Official Transcript."
19 Okay. We are talking about the stenographer transcript here,
20 correct?

21 LDC [MR. CONNELL]: May I describe?

22 MJ [COL POHL]: No, I am saying the source document here
23 is the unofficial transcript on the website, or are you saying

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1 the source document here is the court reporters' ----

2 LDC [MR. CONNELL]: The source document is the court
3 reporters' transcript, so it is official but unauthenticated.

4 MJ [COL POHL]: Okay. That's fine. I understand.

5 LDC [MR. CONNELL]: The red boxes are the redactions which
6 were indicated in the government's filing AE 400C,
7 Attachment B.

8 MJ [COL POHL]: Got it.

9 LDC [MR. CONNELL]: I found it difficult to look at two
10 different documents and marry them up. I put them all into
11 one document which I thought might be useful to the military
12 commission. May I approach?

13 MJ [COL POHL]: Yes. These are Secret?

14 LDC [MR. CONNELL]: They are TS, Your Honor.

15 MJ [COL POHL]: They are TS?

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

17 CP [BG MARTINS]: Your Honor, that's the provisional
18 marking that the court reporters put on it.

19 MJ [COL POHL]: Got it. I just wanted to know how they
20 will be handled.

21 LDC [MR. CONNELL]: And they are properly marked. They
22 have a cover sheet.

23 MJ [COL POHL]: Okay. That will be marked as 400F.

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1 LDC [MR. CONNELL]: And, Your Honor, because that is
2 classified, I don't have any arguments about it at this time.

3 MJ [COL POHL]: Okay.

4 LDC [MR. CONNELL]: So that completes my argument.

5 MJ [COL POHL]: Thank you. We will take the 15-minute
6 morning recess. The commission is in recess.

7 [The R.M.C. 803 session recessed at 1036, 22 February 2016.]

8 [END OF PAGE]

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