Military Commissions Trial Judiciary
Guantanamo Bay, Cuba

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI , MUSTAFA AHMED ADAM AL-HAWSAWI	**AE 013H** **Reply of the American Civil Liberties Union** to the Government's Response to the Motion for Public Access to Proceedings and Records **May 23, 2012**

1. Timeliness. This reply is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.d(2).

2. Overview. The government's response to the ACLU's motion for public access is remarkable both for what it leaves out and what it claims. The government fails to address the constitutional basis for the ACLU's motion the public's First Amendment right to access these proceedings which this commission must adjudicate, and which overrides any statutory provisions to the contrary in the Military Commissions Act of

Objectors' Mot. 14 15. Although the government fails to grapple with the public's First Amendment rights at stake here, this military commission must.[1] Once the First Amendment right is raised and attaches, this commission must adjudicate it. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) ("[R]epresentatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'").

scrutiny test. For the reasons set forth in Section C, the government cannot satisfy the First Amendment's searching requirements.

B. The Government Fails to Justify its Classification and Suppression of Defendants' Personal Accounts of Their Abuse and Mistreatment in Government Custody.

The ACLU has argued that the government lacks authority, under Executive Order 13,526, to classify the defendants' own accounts of their detention, torture and abuse, which the government coercively and illegally imposed upon them. Indeed, the government's ability to suppress the defendants' statements derives initially from the fact that the CIA illegally detained them *incommunicado*. *Cf.* CIA Office of the Inspector General, *Counterterrorism De240(t)-2(he)-246(de)4(>2)-4(t)-247(e)]TJ Ty1(de)4tegal46(a)473fs3(t)-25-252*

concern is only with the presumption of classification and not the classification itself. Rather the ACLU contends and asks this commission to find that the government does not have the legal authority to classify information that the government itself disclosed to defendants, who the government acknowledges were not authorized to receive classified information and would be under no obligation to keep silent about it. Gov't Resp. 11 (each defendant is an "accused who does not hold a security clearance and who owes no duty of loyalty to the United States").

The core argument the government makes in support of classification to this commission and in response to the ACLU is legally untenable. According to the government, "[b]ecause the Accused were detained and interrogated in the CIA program, they were exposed to classified sources, methods, and activities. Due to their exposure to classified information, the Accused are in a position to reveal this information publicly through their statements." Gov't Mot. 6; Gov't Resp. 10. The government fails utterly to explain how it has a legitimate interest, let alone a compelling one, in suppressing information about a CIA coercive interrogation and detention program that was illegal and has been banned by the President. *See* ACLU Mot. 21 24.

Even if the CIA program could properly be classified, the government cannot justifiably argue that it can also classify and suppress defendants' own accounts of their experiences because the government itself disclosed the program to defendants. Put another way, if the government is correct that the CIA's detention and interrogation program was properly classified, then it also follows that the very goal of the program was to disclose deliberately, purposefully, and with authorization from the highest levels of government classified information to individuals who the government

concedes were not authorized to receive it. Worse, the government disclosed classified information through coercion: it forced the defendants to acquire their knowledge of the secret methods of torture, abuse and confinement to which the government subjected them, the location of the secret foreign detention sites at which the government forcibly

been permanently closed, neither is within the Agency's mandate. Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009). Although *Sims and Egan* both acknowledge that courts owe some deference to Executive Branch classification decisions, it is also true, in a variety of contexts, that courts

tailored.[3] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 582 84 (1980); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"); *Press-Enterprise II*, 478 U.S. 1 at 13 14; *Lugosch v. Pyramid Co. of Onodaga*, 435 F.3d 110, 123 24 (2d Cir. 2006); *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985).

On its face, the government's blanket request for the presumptive closure of the proceedings in order to suppress detainees' accounts of their detention and interrogation does not meet the first three requirements of the First Amendment right-of-access test.

Although that is an accurate statement of the "official acknowledgement" doctrine, leaks and other "unofficial disclosures," either by the press or other sources, do lessen the harm caused by further unofficial disclosure, a factor this Court must take into account in the First Amendment right-of-access balancing test. Moreover, if any of defendants' accounts of their treatment in government custody constitute new and uncorroborated allegations, their discussion in open court would not require official confirmation of any government program, intelligence method, or interrogation technique. Disclosure in open court would be little or no different from the widespread public disclosure of the leaked report of the International Committee of the Red Cross, detailing interviews with 14 former CIA detainees, including each of the defendants in this case. Int'l Comm. of the Red Cross, *Report on the Treatment of Fourteen "High Value" Detainees in CIA Custody* (Feb. 2007), *available at* http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf. Finally, the government does not contest nor could it that the CIA's detention and interrogation program has now been banned and is prohibited by law, ACLU Mot. 21 24, further undermining its claim that sources and methods the government currently uses to defend against terrorism would be threatened if disclosed.

The fact that the automatic and presumptive 40-second audio delay is not a narrowly tailored restriction on the public's right of access is clear from the very first hearing in these proceedings, defendants' May 5, 2012 arraignment. According to the government, the arraignment audio transmission "was briefly suspended for

Lugosch, 435 F.3d at 126 27, but the government's censorship was a classic prior restraint of speech the government restricted speech before it was made public which is "the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). That the censorship turned out to be unnecessary further demonstrates that presumptive classification, as implemented through the 40-second audio delay, is the complete opposite of the case-by-case determination, based on specific factual findings, that the First Amendment requires before the public's right of access to judicial proceedings may be suppressed.

Respectfully submitted,

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