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 013D** **Government's Response** To the American Civil Liberties Union Motion for Public Access to Proceedings and Records 16 May 2012

1. **Timeliness.**

This response is filed timely pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.c(1).

2. **Relief Sought.**

The government respectfully requests that the Commission deny the American Civil Liberties Union's (ACLU) motion challenging certain provisions contained within the government's proposed order protecting against disclosure of national security information. Specifically, the ACLU asserts that the Commission reject the following provisions: 1) that statements of the accused are treated as classified until an Original Classification Authority ("OCA") conducts a classification review; and 2) implementing a 40-second delay of the audio feed of commission proceedings to protect against the unauthorized disclosure of classified information during proceedings open to the public.

3. **Overview.**

The public has a statutory right to access military commission proceedings against the five accused who have been charged with multiple offenses related to the 11 September 2001

terrorist attacks which resulted in the deaths of 2,976 people, serious injury to others, and significant property damage. This right, like analogous constitutional and common law rights of public access to proceedings in federal courts and courts-martial, is a qualified right. The government has a strong interest in ensuring public access to these historic proceedings and has moved the Commission to authorize closed-circuit television (CCTV) transmission of all commission proceedings to remote viewing sites located in the continental United States. During the arraignment of the five accused on 5 May 2012, the proceedings were viewed by individuals and media at seven different sites in the United States. *See* AE7B. Such a transmission has enabled and will continue to enable the public and victim family members (VFM) to access the trial of the accused.[1]

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[1] The arraignment proceedings had widespread coverage by major media outlets and local news stations as reflected in the following news stories: http://www.cnbc.com/id/47317654 ("U.S. prosecutors say ready for long haul in 9/11 case"); http://www.cnn.com/2012/05/06/justice/guantanamo-ksm-arraignment/ ("9/11 victim's brother to alleged mastermind: 'I came a long way to see you, eye to eye'"); http://www.time.com/time/nation/article/0,8599,2114018,00.html ("9/11 defendants disruptive at Guantanamo"); http://www.cbsnews.com/8301-201_162-57428546/9-11-mastermind-others-back-before-guantanamo-judge/ ("9/11 "mastermind," others back before Guantanamo judge"); http://abcnews.go.com/blogs/politics/2012/05/911-plotters-accused-refuses-to-answer-in-guantanamo-bay-arraignment/ ("9/11 Plotters Defer Pleas at Guantanamo Bay Arraignment"); http://worldnews.msnbc.msn.com/_news/2012/05/05/11548929-alleged-sept-11-planners-disrupt-arraignment-at-guantanamo-hearing?lite ("Alleged Sept. 11 planners disrupt arraignment at Guantanamo hearing");http://www.foxnews.com/us/2012/05/06/anger-sighs-as-11-families-watch-terror-hearing-1682598921/ ("Anger, sighs as 9/11 families watch terror hearing"); http://www.usatoday.com/news/world/story/2012-05-05/911-mastermind-gitmo-defiant-court/54771104/1 ("9/11 defendants formally charged, ignore judge at hearing"); http://www.npr.org/2012/05/06/152129287/pleas-delayed-in-sept-11-case ("Pleas deferred in Sept. 11 case");http://online.wsj.com/article/SB10001424052702304752804577386102452510454.html?KEYWORDS=guantanamo ("Guantanamo judge grapples with disruptive terror suspects") http://www.nydailynews.com/news/national/khalid-sheikh-mohammed-co-defendents-court-arraignment-article-1.1073016 ("Arraignment ends with accused terrorist, Ramzi Binalshibh, mocking 9/11 family member with a thumbs up"); http://www.baltimoresun.com/news/breaking/bs-md-911-arraignments-20120505,0,7842454.story ("9/11 defendants refuse to participate in arraignment");http://www.latimes.com/news/nation/nationnow/la-na-nn-gitmo-mohammad-arraignment-begins20120505,0,6952315.story ("9/11 trial begins at Guantanamo with protest by defendants");http://www.washingtonpost.com/world/national-security/911-detainees-seek-to-disrupt-opening-of-arraignment-at-guantanamo-bay/2012/05/05/gIQAnGzh3T_story.html?tid=pm_world_pop ("9/11 detainees work to disrupt opening of arraignment at Guantanamo Bay");http://www.nytimes.com/2012/05/06/nyregion/families-watch-9-11-case-at-guantanamo-via-video.html?_r=1 ("Via Video Feed, Families Watch 9/11 Case and Seethe");http://www.chicagotribune.com/news/nationworld/la-na-nn-terror-trial-20120505,0,2288105.story ("Sept. 11 terrorism trial at Guantanamo gets off to a silent start");http://bostonglobe.com/news/world/2012/05/05/five-defendants-attacks-disrupt-tribunal-guantanamo/gcHr48BuoSPadgetGFEcWJ/story.html ("Five defendants in 9/11 attacks disrupt tribunal");http://www.miamiherald.com/2012/05/05/2784620/911-mastermind-back-before-

As in any prosecution involving national security, the government is responsible for protecting information that has been properly classified by the Executive Branch. Accordingly, the government has proposed narrowly tailored procedures to reduce the risk of unauthorized disclosures of classified information—to which there is no First Amendment right—where disclosure could cause exceptionally grave damage to national security. The ACLU attempts to substitute its judgment for the intelligence professionals within the Executive Branch in determining whether and to what extent the sources and methods employed by the United States can be protected to safeguard national security. The Supreme Court has cautioned against even judicial interference with the legitimate interest and responsibilities of the Executive Branch in assessing whether the disclosure of classified information may lead to an unacceptable risk of compromising national security. The ACLU's requested relief would force the government into the unenviable position of having to predict the accused's possible future behavior knowing that their interests are clearly inconsistent with the interests of the national security. As such, the ACLU's motion should be denied.

4. Burden of Proof.

As the moving party, the ACLU must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

5. Facts.

On 31 May 2011 and 26 January 2012, pursuant to the Military Commissions Act of 2009, charges related to the 11 September 2001 terrorist attacks were sworn against Khalid

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guantanamo.html ("9/11 defendants ignore judge at Guantanamo hearing"); http://www.nj.com/news/index.ssf/2012/04/nj_military_base_one_of_six_si.html ("N.J. military base one of six sites to broadcast alleged Sept. 11 mastermind's arraignment");http://www.nypost.com/p/news/local/families_outraged_at_tribunal_farce_EnauNo8nEjKhYLvkeKuwQO?utm_medium=rss&utm_content=Local ("Families outraged at tribunal's farce")

Sheikh Mohammad, Walid Muhammad Salih Bin Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi (collectively referred to as the "accused"). These charges were referred jointly to this capital Military Commission on 4 April 2012. The accused are charged with Conspiracy, Attacking Civilians, Attacking Civilian Objects, Intentionally Causing Serious Bodily Injury, Murder in Violation of the Law of War, Destruction of Property in Violation of the Law of War, Hijacking an Aircraft, and Terrorism.

The arraignment for this Commission was held on 5 May 2012. Pursuant to an order signed by the Military Judge on 26 April 2012, the proceedings were transmitted to multiple sites in the continental United States. *See* AE7B.

On 11 September 2001, a group of al Qaeda operatives hijacked four civilian airliners in the United States. After the hijackers killed or incapacitated the airline pilots, a pilot-hijacker deliberately slammed American Airlines Flight 11 into the North Tower of the World Trade Center in New York, New York. A second pilot-hijacker intentionally flew United Airlines Flight 175 into the South Tower of the World Trade Center. Both towers collapsed soon thereafter. Hijackers also deliberately slammed a third airliner, American Airlines Flight 77, into the Pentagon in Northern Virginia. A fourth hijacked airliner, United Airlines Flight 93, crashed into a field in Shanksville, Pennsylvania, after passengers and crew resisted the hijackers and fought to reclaim control of the aircraft. A total of 2,976 people were murdered as a result of al Qaeda's 11 September 2001 attacks on the United States. Numerous other civilians and military personnel also were injured. The al Qaeda leadership praised the attacks, vowing that the United States would not "enjoy security" until al Qaeda's demands were met. The United States Congress responded on 18 September 2001 with an Authorization for Use of Military Force.

In response to the terrorist attacks on 11 September 2001, the United States instituted a program run by the CIA to detain and interrogate a number of known or suspected high-value terrorists, or "high-value detainees" ("HVDs"). This CIA program involves information that is classified TOP SECRET / SENSITIVE COMPARTMENTED INFORMATION (TS/SCI), the disclosure of which would cause exceptionally grave damage to national security. The accused are HVDs and, as such, they were participants in the CIA program.

Because the accused were participants 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 disclose classified information publicly through their statements. Consequently, any and all statements by the accused are presumptively classified until a classification review can be completed.

On 6 September 2006, President George W. Bush officially acknowledged the existence of the CIA program and he announced that a group of HVDs had been transferred by the CIA to Department of Defense ("DoD") custody at Joint Task Force – Guantanamo (JTF-GTMO). *See* President George W. Bush, *President Discusses Creation of Military Commissions to Try Suspected Terrorists*, Remarks from the East Room of the White House, Sep. 6, 2006, *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html. The five accused were among the group of HVDs transferred to DoD custody, and they have remained in detention at JTF-GTMO since that time.

Since 6 September 2006, a limited amount of information relating to the CIA program has been declassified and officially acknowledged, often directly by the President. This information includes a general description of the program; descriptions of the various "enhanced interrogation techniques" that were approved for use in the program; the fact that the so-called

"waterboard" technique was used on three detainees; and the fact that information learned from HVDs in this program helped identify and locate al Qaeda members and disrupt planned terrorist attacks. *See id.*; *see also* CIA Inspector General, *Special Review: Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)*, May 7, 2004, *available at* http://media.washingtonpost.com/wp-srv/nation/documents/cia_report.pdf.

Other information related to the CIA program has not been declassified or officially acknowledged, and, therefore, such information remains classified. This classified information includes allegations involving (i) the location of detention facilities, (ii) the identity of cooperating foreign governments, (iii) the identity of personnel involved in the capture, detention, transfer, or interrogation of detainees, (iv) interrogation techniques as applied to specific detainees, and (v) conditions of confinement. The disclosure of this classified information would cause exceptionally grave damage to national security.

On 26 April 2012, the government filed its Motion to Protect Against Disclosure of National Security Information. *See* AE 013. The motion and accompanying declarations set forth the classified information at issue in the case, the harm to national security that unauthorized disclosure of such information would cause, and the narrowly tailored remedies that seek to protect national security information. The proposed order includes, in its definition of classified information, statements made by the accused, which, due to these individuals' exposure to classified sources, methods, or activities of the United States, are presumed to contain information classified as TOP SECRET / SCI. AE 013, Attachment E, Proposed Order at ¶ 7(d)(vi). To protect against the unauthorized disclosure of classified information during proceedings open to the public, the proposed order institutes a 40-second delay in the transmission of the proceedings from the courtroom to the public gallery. AE 013, Attachment

E, Proposed Order at ¶ 42. The proposed order also provides that an unofficial, unauthenticated, unclassified transcript of each proceeding shall be made available for public release. AE 013, Attachment E, Proposed Order at ¶ 47.

On 3 May 2012, the government filed its response to the defense Motion to End Presumptive Classification (AE 009A), which set forth the legal authority for the Executive Branch determination that the statements of the accused are properly presumptively classified until reviewed by an OCA. The ACLU's motion contains allegations that the government has previously addressed in AE 009 and AE 013, and the government respectfully requests that those responses be incorporated into this filing.

6. Law and Argument.

I. The Statutory Right Of Public Access To The Trial Of The Accused Is Not Abrogated By The Implementation Of A 40-Second Delay To The Proceedings.

The United States Supreme Court has said, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). The best traditions of American jurisprudence call for providing an opportunity for the public to witness the trial of the accused, to observe first-hand that the accused in a reformed military commission receives stronger protections than an accused tried under the London Charter at Nuremberg following World War II, and to see that the accused receives stronger protections than an accused in many respected criminal-justice systems around the world. The government has a strong interest in ensuring public access to these historic proceedings and has moved the Commission to authorize closed-circuit television (CCTV) transmission of all commission proceedings to remote viewing sites located in the continental United States.

The M.C.A. and the Manual for Military Commissions (M.M.C.) provide that trials by military commission shall generally be open to the public. 10 U.S.C. §§ 949d(c)(2), 949p-3; R.M.C. 806(b)(2)(B). This right, like analogous constitutional and common law rights of public access to proceedings in federal court and courts-martial, is a qualified right. Due to the classified information involved with this case, and the harm to national security that its disclosure reasonably could be expected to cause, the M.C.A. allows for certain protective measures to be adopted in this military commission that apply at all stages of the proceedings. M.C.R.E. 505(a)(1); *see generally* 10 U.S.C. §§ 949p-1 through 949p-7.

The government has requested a 40-second delay in the transmission to the public viewing gallery (including transmission to the CCTV sites) so that if classified information is disclosed, inadvertently or otherwise, in open court, the government will have the opportunity to prevent it from being publicly disclosed. The ACLU appears to allege that a 40-second delay amounts to a closure of the courtroom, but neither case cited by the ACLU stands for the proposition that a 40-second delay could reasonably be considered a denial of public access because the transmission is not immediate or contemporaneous.

Instead, this narrowly tailored measure is necessary to protect classified information during proceedings. If any of the accused testify, for example, the delayed-transmission mechanism is vital to the protection of classified information since the accused's statements are presumed classified until a classification review is completed. Because the government cannot predict what an accused will say during proceedings or whether he will comply with orders from the Military Judge, the time delay is the only effective means of preventing any intentional or inadvertent disclosure of classified information to the public. Additionally, the time delay will

prevent the public disclosure of classified information by other witnesses, who may reveal such information inadvertently during their testimony in proceedings.

If classified information is disclosed during the proceeding, and the transmission is suspended to prevent its public disclosure, then that portion of the proceeding will not be transmitted, but will remain part of the classified record of the proceeding. If it is determined that classified information was not disclosed then the proceedings and the transmission, with the time delay, will resume. Additionally, the transcripts released at the end of each session will recapture any unclassified information that was not originally transmitted to the public.

During the arraignment of the five accused on 5 May 2012, the proceedings were viewed on a delayed 40-second transmission by individuals and media at seven different sites in the United States, clearly satisfying the public's right of access. *See e.g., Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978) (public's right of access is constitutionally satisfied when some members of both the public and the media are able to "attend the trial and report what they have observed."). The transmission included statements made by one of the accused. Although the transmission was briefly suspended for approximately 60 seconds during the more than 13 hours of the proceeding, the unofficial unauthenticated, transcript that was publicly released recaptured the information once it was determined to be unclassified. The public access to these proceedings exceeds that which was deemed constitutionally sufficient in the terrorist prosecutions of Zaccarias Moussaiou and Timothy McVeigh. *See, e.g., U.S. v. Moussaoui*, 205 F.R.D. 183, 185 (E.D.Va. 2002); *United States v. McVeigh*, No. 96-CR-68-M (W.D.Okla.). And, the public access to these proceedings fully satisfies the statutory requirements for openness and accessibility. The closed-circuit

transmission has enabled and will continue to enable the public and victim family members (VFM) to access the trial of the accused.

II. The Executive Branch Is Legally Authorized To Classify Information That May Be Communicated Orally, And Such Practice Does Not Limit The Public Access To These Proceedings.

In its motion[2], the ACLU alleges that the government has no legal authority to make a presumptive determination that statements of the accused are classified pending a review by an OCA. However, a determination whether to classify information, and the proper classification thereof, is a matter committed solely to the Executive Branch. *See, e.g., Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988)("The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief."). The Supreme Court has recognized this broad deference to the Executive Branch in matters of national security, holding that, "it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of subtle and complex factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." *CIA v. Sims*, 471 U.S. 159, 180 (1985).

Because the accused have been exposed to highly classified sources and methods, the public disclosure of which reasonably could be expected to cause exceptionally grave damage to national security, an OCA properly decided that statements of the accused must be handled in a classified manner—thus the term presumptively classified—until an OCA conducts a classification review to determine what information contained within the statements are in fact classified. An OCA determined that the accused are in possession of classified material that falls within one of the eight substantive categories of material pursuant to Section 1.4 of Executive

[2] The government responded to many of the challenges raised by the ACLU in its response to AE009, incorporated here by reference.

Order 13526, and meets the conditions set forth in Section 1.1(a).[3] This determination provides a means to restrict the unauthorized disclosure of classified information that could cause exceptionally grave damage to the national security from an individual accused who does not hold a security clearance and who owes no duty of loyalty to the United States. Without a process to protect classified information that may be contained within the statements of the accused, the government would be in the unenviable position of having to predict the accused's possible future behavior knowing that their interests are clearly inconsistent with the interests of the national security.

The ACLU's assertions that presumptive classification of the statements of the accused prevents public access ignores the principal that, "[t]here is no First Amendment right to reveal properly classified information." AE 009, p. 22. *See, e.g., Stillman v. C.I.A.*, 319 F.3d 546, 548

[3] Executive Order 13526 is the current presidential order governing the classification of national security information. Section 1.1(a) provides that information may be originally classified under the terms of the Order only if the following conditions are met:

> (1) an original classification authority is classifying the information;
>
> (2) the information is owned by, produced by or for, or is under the control of the United States Government;
>
> (3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and
>
> (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

Section 1.4 of Executive Order 13526 requires that for information to be considered for classification, it must concern one of the eight substantive categories, which include: foreign government information; intelligence activities (including covert action), intelligence sources and methods, or cryptology; and foreign relations or foreign activities of the United States, including confidential sources. Pursuant to Section 1.2 of Executive Order 13526, information may be classified as TOP SECRET, SECRET, OR CONFIDENTIAL based on the severity to the damage to the national security reasonably expected to result from the unauthorized disclosure of information. Thus, if an unauthorized disclosure of information reasonably could be expected to cause *damage* to the national security, that information may be classified as CONFIDENTIAL. If an unauthorized disclosure of information reasonably could be expected to cause *serious damage* to the national security, that information may be classified as SECRET. Finally, if an unauthorized disclosure of information reasonably could be expected to cause *exceptionally grave damage* to the national security, that information may be classified as TOP SECRET.

(D.C. Cir. 2003) ("If the Government classified the information properly, then [appellant] simply has no first amendment right to publish it."); *see also*, *Snepp v. United States*, 444 U.S. 507, 510 n.3 (1980) ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."); *see also, ACLU v. DOD*, 584 F.Supp. 2d 19, 25 (D.D.C. 2008)("There is obviously no First Amendment right to receive classified information.") The protections that the government seeks in this case are narrowly tailored to protect the unauthorized disclosure of classified information, and do not amount to a suppression of any and all statements of the accused, as evidenced by the public broadcast on 5 May 2012, which included statements made by at least two of the accused in this case.

Although some details of the CIA's program have been declassified, many details that relate to the capture, detention, and interrogation of the accused, for reasons of national security, remain classified. The ACLU appears to argue that the fact that many details have been declassified undermines any justification for continuing to classify any information about the capture, detention, and interrogation of the accused. However, the ACLU could not possibly be in a position to assess the risk to national security inherent in declassifying the remaining categories of information. Indeed, the Supreme Court has repeatedly stressed that even courts should be "especially reluctant to intrude upon the authority of the Executive in . . . national security affairs." *Egan*, 484 U.S. at 530; *see also*, *CIA v. Sims*, 471 U.S. 159, 168-169 (1985) (the Director of Central Intelligence has broad authority to protect all sources of intelligence information from disclosure); *Haig v. Agee*, 453 U.S. 280, 307 (1981) (protecting the secrecy of the U.S. Government's foreign intelligence operations is a compelling interest).

The ACLU's position is further undermined by the principle that even when classified information has been leaked to the public domain, it remains classified and cannot be further disclosed unless it has been declassified or "officially acknowledged," which entails that it "must already have been made public through an official and documented disclosure." *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) (internal quotations and citations omitted) (recognizing that "the fact that information exists in some form in the public domain does not necessarily mean that official disclosure will not cause [cognizable] harm" to government interests); *see also Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990) ("[I]n the arena of intelligence and foreign relations, there can be a critical difference between official and unofficial disclosures."); *United States v. Moussaoui*, 65 Fed. Appx. 881, 887 n.5 (4th Cir. 2003) ("[I]t is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so.") (quoting *Alfred A Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975)); *see also Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983) ("[E]ven if a fact . . . is the subject of widespread media attention and public speculation, its official acknowledgement by an authoritative source might well be new information that could cause damage to the national security.").

7. Conclusion.

The ACLU's attempt to substitute its judgment for that of the intelligence professionals within the Executive Branch in determining whether and to what extent the sources and methods employed by the United States can be protected to safeguard national security should be rejected. Instead, such decisions should be left to the Executive Branch, which has the legitimate interest

and responsibility to assess whether the disclosure of classified information may lead to an unacceptable risk of compromising national security

8. Oral Argument.

The government waives oral argument; however, if the defense or ACLU has an opportunity to present oral argument, the government requests an opportunity to be heard.

9. Witnesses and Evidence.

The government will not rely on any witnesses or evidence in support of this motion.

10. Attachments.

A. Certificate of Service dated 16 May 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 16th day of May 2012, I filed AE 013D, the **Government's Response to the ACLU Motion for Public Access** with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record and counsel for the ACLU.

//s//
Joanna Baltes
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