IN THE
UNITED STATES COURT OF MILITARY COMMISSIONS REVIEW

IN RE MIAMI HERALD, ABC INC., ASSOCIATED PRESS, BLOOMBERG NEWS, CBS BORADCASTING, INC., FOX NEWS NETWORK, THE MACCLATCHY COMPANY, NATIONAL PUBLIC RADIO, THE NEW YORK TIMES, THE NEW YORKER, REUTERS, TRIBUNE COMPANY, DOW JONES & COMPANY, INC., AND THE WASHINGTON POST, *Petitioners*, v. UNITED STATES, *Respondent*.	**PRESS PETITIONERS' REPLY BRIEF** U.S.C.M.C.R. CASE NO. 13-002 MARCH 18, 2013

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF MILITARY COMMISSION REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The Government's Response to the petition for mandamus largely concedes the controlling points of law advanced by the Press Petitioners. The Government agrees that:

- jurisdiction to review the protective order is proper in this tribunal (at v);
- the First Amendment access right applies fully to Commission proceedings (at vi);
- before closing a proceeding the four-factor test of *Press-Enterprise* must thus be applied, which imposes an obligation on the Commission to determine whether disclosure of information in open court would create a substantial probability of harm to a compelling interest, such as national security or personal safety (at 1,3,9);
- the *Press-Enterprise* test also requires the Commission to assess whether closing a proceeding would effectively protect national security, and in so doing must consider whether the information to be withheld already "exists in the public domain" (at 11);
- the findings required by *Press-Enterprise* must be made by the Commission before closing a proceeding, even for information that is "classified" (at 1, 9); and
- no such findings have yet been made (at 1-2).

None of this is in dispute.

The Government's defense of the Commission's protective order instead rests upon a mischaracterization of its current and ongoing impact on the public's constitutional right of access to in-court proceedings, and its denial that this same constitutional right applies to the motion papers, exhibits and other records relating to those proceedings, arguing that a common law right alone governs access to these records. In both respects, the Government is incorrect.

The Government is wrong in contending that the protective order itself does not close any proceedings. In its view, the order simply ensures the preliminary protection of classified information so that a *future* determination of the need to close proceedings can be made on proper factual findings. This is not what the order says or how it has been applied. The order requires the immediate closure of the courtroom whenever classified information is discussed or "might be" discussed—and this authority has been used. At least three times already these proceedings have been closed to the public by the termination of the audio and video feed, which

is the only available means of public access, even to the press and public physically present in the sealed viewing gallery adjacent to the Guantanamo courtroom. No factual findings have been made to justify these closures, and they violate petitioners' rights.

The Government is equally incorrect in defending the order's sealing of all classified information contained in the records of this prosecution on the ground that records are covered only by a common law right of access and not a constitutional one. Records of a prosecution that relate to in-court proceedings or that independently satisfy the "history and logic" test are covered by the constitutional access right. Such records can be sealed, like proceedings, only if the Government first demonstrates a compelling need to keep specific information from the public—something not done here. The protective order instead requires all classified information to be sealed without any finding of risk to national security from the disclosure of specific information, or any assessment of the effectiveness of sealing that information.

All apart from the protective order's improper sealing and closing of all classified information, the Government is wrong to claim authority to "classify" the thoughts and memories of the five defendants. No such right exists, and the veil of secrecy imposed around the defendants threatens to undermine confidence in the integrity of these prosecutions.

ARGUMENT

The Press Petition raised three legal challenges to the protective order entered by the Commission, specifically objecting that it:

1) Denies public access to all classified information disclosed in proceedings and records, without satisfying the *Press-Enterprise* standards (Press Pet. at 19-27);

2) Closes proceedings and seal records for no purpose and in a futile manner when the information being protected is already public (Press Pet. at 28-31); and

3) Prevents the public from hearing defendants' testimony and evidence concerning their treatment while in U.S. custody by defining defendants' own thoughts and memories to be "classified" (Press Pet. at 32-34).

As demonstrated in the Press Petition, each of these restrictions on public access is improper as a matter of law; the Government's Response fails to justify any of them.

I.
THE PROTECTIVE ORDER CLOSES PROCEEDINGS AND SEALS RECORDS IN VIOLATION OF THE PUBLIC'S RIGHT OF ACCESS

The Response is as significant for what it admits about the public's right of access to these proceedings as for anything it disputes. The Response agrees that the First Amendment access right applies to Commission proceedings and the four-part test of *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 13-15 (1986) ("*Press-Enterprise II*"), must therefore be met before public access is denied.[1] It also agrees that the Commission may not automatically close a proceeding simply because classified information is to be discussed, but must independently determine whether the Government has established a compelling need to keep specific information secret.[2] Under *Press Enterprise II*, this requires a finding of a "substantial probability" of harm to a compelling interest, *id.* at 13-14, a higher standard than required to classify information under Executive Order 13526 or to close a proceeding under the protective order. The Government also acknowledges that the Commission has made no such findings, urging that findings will be made, if necessary, in the future.[3]

Accepting the controlling legal standards, the Government defends the protective order by asserting that it does not actually authorize the closing of *proceedings* (and claiming that no

[1] *See, e.g.,* Resp. at vi ("no dispute between the parties as to what must happen before the Commission may close the courtroom: the Commission must consider the Supreme Court's *Press Enterprise* factors").

[2] Resp. at 9 (when the Government asks to close a proceeding to protect classified information, "the Commission can only close the proceedings after it makes appropriate findings"); *see also, id.* at 1, 3.

[3] *See* Resp. at 1 (the protective order "contemplates the possibility" of future closed proceedings after "appropriate findings" are made). The Response makes passing reference to language in the introduction to the protective order, drafted by the Government, reciting that this prosecution generally "involves classified national security information…the disclosure of which would be detrimental to national security." Resp. x. This boilerplate fails to constitute the necessary findings of a need for secrecy for specific information, as the Government itself recognizes.

closed proceedings have been held), and by arguing that public access to *records* is governed by a lesser common law standard, which must be applied on a case by case basis and is not properly reviewed on a challenge to the protective order itself. None of its arguments withstands scrutiny.

A. The Protective Order Improperly Closes Proceedings

According to the Response, the protective order "merely contemplates the possibility that the Commission *might* close the courtroom after it makes appropriate findings" in the future, but "to date, the Commission has *not* closed the courtroom." Resp. at v, vi (emphasis supplied). This portrayal is incorrect. The protective order prohibits any participant in a proceeding from disclosing "classified information or any information that tends to reveal classified information" Prot. Order ¶ 8.a(2)(b), and automatically closes any proceeding where it is "reasonably believed" that classified information will be disclosed, *id.* ¶ 8.a(3)(c). The courtroom is closed by terminating the delayed audio and video feed—immediately cutting off public access. Such closures have occurred. *See* Resp. at 5-6 (noting three occasions when the feed was terminated); Press Pet. at 24 (termination of feed on Jan. 28, 2013).

This blanket denial of access for all classified information is improper. The *Press-Enterprise* standards require the Commission to make findings that the disclosure of specific information in a public proceeding would create a substantial probability of harm to a compelling interest. "[E]ven when the interest sought to be protected is national security, the Government must demonstrate a compelling need to exclude the public." *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985). In Commission proceedings, M.C.R.E 505(h) provides the procedure for this to occur, requiring a party to request an *in camera* hearing in advance of any use of classified information. If information is deemed admissible at the Rule 505(h) hearing, the Government must then satisfy the *Press Enterprise* standards before the public can be denied access to information deemed relevant and admissible, whether classified or not.

The protective order violates the constitutional access right by closing proceedings for all classified information, with no particularized finding of any need to keep specific information secret. The Government's straw-man arguments that the mere existence of the 40 second delay does not amount to closing the courtroom (Resp. 5), and that the video/audio feed is available for viewing at more off-site locations than in a typical prosecution (*id.* 6), are entirely beside the point. Press Petitioners do not object to the use of a 40 second delay *per se*, but to the automatic termination of the delayed feed for all classified information.

Nor does the release of transcripts of the closed proceedings after the fact excuse the constitutional violation. As has been stressed, "[t]he ability to see and to hear a proceeding as it unfolds is a vital component of the First Amendment right of access." *ABC, Inc. v. Stewart,* 360 F.3d 90, 99 (2d Cir. 2004). The availability of a trial transcript is "no substitute for a public presence at the trial itself." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 597 n.22 (1980). *See also, United States v. Antar*, 38 F.3d 1348, 1360 n.13 (3d Cir. 1994) (transcript does not substitute for contemporaneous access because information "is necessarily lost in the translation of a live proceeding to a cold transcript").

In short, under legal standards the Government does not dispute, the protective order violates the public access right by closing proceedings without the findings required to do so.

B. <u>The Protective Order Improperly Seals Records</u>

The protective order also improperly seals commission records. The Response seeks to avoid this conclusion by characterizing the protective order as simply governing the "storage, use and handling of classified information," and offering several theories to support the sealing of classified information. None has merit.

The Response first asserts that the requirement to seal all classified information "does not amount to closure of the courtroom" (Resp. 3), but misses the point. The First Amendment right

of access applies to certain court *records*, and not just to court proceedings. The same two-prong "history and policy" test used to identify proceedings that are subject to the constitutional access right (Press Pet. at 14-15) is used to determine when court records are themselves subject to a First Amendment right of access. *E.g., Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004) (applying history and policy test to find right of access to court docket); *In re Herald Co.*, 734 F.2d 93, 101 (2d Cir. 1984) (First Amendment right of access to suppression hearing exhibits); *Application of N.Y. Times Co. for Access to Certain Sealed Ct. Records*, 585 F. Supp. 2d 83, 87 (D.D.C. 2008) (First Amendment right of access to search warrant materials); *In re Guantanamo Bay Detainee Litig.*, 624 F. Supp. 2d 27, 35-39 (D.D.C. 2009) (First Amendment right of access to habeas proceeding records).

A First Amendment right of access to various court records also exists as a direct corollary of the First Amendment right to attend proceedings. The constitutional access right necessarily applies "to written documents submitted in connection with judicial proceedings that themselves implicate the right of access." *In re N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (finding First Amendment right of access to papers submitted on motion to suppress in criminal case). As the D.C. Circuit similarly observed in finding a constitutional right of access to written plea agreements, "[t]he first amendment guarantees the press and the public a general right of access to court proceedings *and court documents* unless there are compelling reasons demonstrating why it cannot be observed." *Wash. Post Co. v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991) (emphasis added). *See also, Lugosch v. Pyramid Co. of Onondaga,* 435 F.3d 110, 124 (2d Cir. 2006) (First Amendment right of access to documents submitted to the court in connection with a summary judgment motion).

Under either approach, it is widely recognized that the First Amendment right of access "is not limited to the criminal trial itself, but extends to many pre- and post-trial documents and proceedings." *In re Special Proceedings*, 842 F. Supp. 2d 232, 238 (D.D.C. 2012). The right attaches to substantive motions, evidence introduced at hearings, hearing transcripts and other Commission records relating to the merits of this prosecution. The Government is simply wrong in finding the *Press Enterprise* standards irrelevant to the sealing of records.[4]

The Government advances another red-herring argument in asserting that "there is no First Amendment right to receive properly classified information." Resp. at 3. There is a First Amendment right to inspect certain judicial records, and it is *this* right that Petitioners assert. Given this constitutional right, where information relevant and necessary to a prosecution is "classified," a judge has the duty to apply the *Press-Enterprise* standards and determine whether public access to that classified information can properly be denied.[5] *See* Press Pet. at 19-25.

The Government concedes the existence of this duty, but cites two cases in which courts upheld the CIA's right to prohibit disclosure of classified information. In those cases, former CIA employees sought to publish confidential information obtained during the course of their employment, and the courts found that the CIA may "protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected

[4] The Response is thus incorrect in asserting that the order should be reviewed under a deferential "abuse of discretion" standard. Resp. at 4. A protective order is reviewed *de novo* where, as here, an incorrect legal standard has been applied. *United States v. Mejia*, 448 F.3d 436, 456–57 (D.C. Cir. 2006). Moreover, where constitutional access rights are at stake, a reviewing court must conduct an independent examination of the record to ensure that there is no proscribed intrusion on First Amendment rights. *See United States v. Aref*, 533 F.3d 72, 82-83 (2d Cir. 2008) (conducting "independent review of the sealed documents" subject to First Amendment access right); *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004) (reviewing First Amendment access decision *de novo*); *In re Providence Journal Co.*, 293 F.3d 1, 10 (1st Cir. 2002) ("constitutional access claims engender *de novo* review").

[5] The Government's reliance on M.C.R.E. 505(e) (Resp. viii) is misplaced because whether information is classified or not, it cannot automatically be sealed from Commission records without meeting the *Press-Enterprise* standards.

by the First Amendment." *Snepp v. United States,* 444 U.S. 507, 509 n.3 (1980); *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003) (same). Here, no voluntary restrictions accepted by government employees are involved, and no First Amendment rights have been waived. Moreover, even in those employment cases, the courts independently reviewed the CIA's classification claims to be sure the censored material was properly classified. *See also ACLU v. DOD*, 628 F.3d 612 (D.C. Cir. 2011) (independently reviewing factual basis for government claim in a FOIA case that documents were properly classified and thus exempt from disclosure).

The Government also cites cases holding that CIPA authorizes closed *in camera* hearings to determine whether classified information is relevant and necessary to a prosecution. Resp. 3. Petitioners do not dispute that certain preliminary findings concerning the relevance and materiality of classified information may be taken up in closed Rule 505(h) hearings, so the reasoning of cases like *United States v. Ressam*, 221 F. Supp. 2d 1252 (W.D. Wash. 2002) does not apply. Those cases, however, do not stand for the proposition that substantive motion papers and proceedings may automatically be closed once it is determined that relevant information is classified. In such circumstances, the court must then make the findings necessary under *Press Enterprise* before it may abridge the public's right of access to the information. Press Pet. 20-25.

C. <u>The Sealing Provisions of the Protective Order Are Ripe for Review</u>

The Government mistakenly asserts that a writ of mandamus is inappropriate to challenge the document sealing provisions of the protective order because Petitioners can challenge the sealing of any particular document, and petitioner ACLU has done so. Gov't. Resp. at p. 4.

Mandamus is appropriate where it would promote judicial economy and efficiency, as it plainly would here. As the Court of Appeals only recently explained, "mandamus is an equitable remedy that takes account of practical considerations such as timing, resources, and efficacy, among other things." *In re Aiken County*, 2012 WL 3140360, at *1 (D.C. Cir. Aug. 3, 2012)

(Kavanaugh, J., concurring); *see also, United States v. Washington*, 549 F.3d 905, 918 (3d Cir. 2008) (avoiding piecemeal litigation favors the use of mandamus).

Challenging each sealed document on a case by case basis, as the Government advocates, would be a colossal waste of time and effort. The protective order denies public access to records on a categorical basis for all "classified" information, and the propriety of this step is a matter of law properly raised by mandamus challenging the protective order itself. *See e.g.*, *Rodgers v. U.S. Steel Corp.*, 536 F.2d 1001, 1006 (3d Cir. 1976) (reviewing protective order on mandamus "to confine the district court to the proper sphere of its lawful power"); *CBS Inc. v. Young*, 522 F.2d 234, 237 (6th Cir. 1975) (mandamus proper to challenge blanket gag order).

II.
THE COMMISSION CANNOT PROPERLY CLOSE PROCEEDINGS OR SEAL RECORDS TO PROTECT INFORMATION THAT IS PUBLICLY KNOWN

The Government asserts that public access can be denied when classified information is presented to the Commission, even if that information is already publicly known, but fails to explain how a compelling threat to national security could possibly be created by allowing the public to follow the discussion in these proceedings of information that is available outside the proceedings. No purpose is served by denying public access to these proceedings to protect information that is not secret.

The Government objects that "Petitioners fail to acknowledge that classification decisions are not subject to review by the media or by the Commission" (Resp. 11), and contends that classified information—public or not—must be kept confidential until it is officially declassified (*id.*, 7-8). The issue is not whether the Commission has the power to declassify information, but whether the Commission must enforce the constitutional access right when classified information

is placed in the record of a Commission proceeding.[6] Plainly, it must—an Executive Order cannot defeat a constitutional right. *See* Press Pet. 19.

In applying the constitutional standard, a key question is whether public disclosure of classified information in the prosecution would cause substantial harm to national security that could effectively be avoided by narrowly abridging the access right. *Press-Enterprise II*, 478 U.S. at 14 (party seeking secrecy must demonstrate "that closure would prevent" harm to a compelling interest); *see* Press Pet. 20-25 (citing cases). This question must be independently decided by the trial judge, affording appropriate deference to agencies with expertise on issues of national security and foreign affairs. *E.g., In re Wash. Post Co.,* 807 F.2d 383, 392-93 (4th Cir. 1986) (rejecting "blind acceptance" of government need for secrecy on matters of national security); *United States v. Grunden*, 2 M.J. 116, 122 (C.M.A. 1977) (trial judge must be satisfied of risk to national security); *United States v. Pelton*, 696 F. Supp. 156, 159 (D. Md. 1986) (conducting "own analysis of the classified affidavit" to determine if "serious national security concerns that would be affected" from disclosure).

Where classified information is already publicly known, it is impossible to understand how a compelling need for closed proceedings and sealed records could possibly exist, or how a denial of access to otherwise public material effectively accomplishes anything—even the Government admits that the Commission should take prior public knowledge into account in assessing the effectiveness of a requested closure (Resp. at 11). National security cannot

[6] The Government's reliance on cases affirming the exclusive right of the Executive Branch to classify information is entirely misdirected. *United States v. Smith,* 750 F.2d 1215 (4th Cir. 1984), for example, did not address the constitutional right of access to court proceedings, in holding that courts cannot question a classification decision. *United States v. Moussaoui,* 65 F. App'x 881, 887 (4th Cir. 2003) is similarly inapposite because the petitioners "disavow[ed] any desire to obtain the release of confidential information," and the court in *United States v. Aref,* 533 F.3d 72, 82 (2d Cir. 2008), independently determined that classification levels "were properly invoked pursuant to Executive Order."

plausibly be harmed from discussing in court facts that are publicly known. *See, e.g. Robinson*, 935 F.2d at 291-92 (disclosure could not pose additional threat in light of already public information); *Grunden*, 2 M.J. at 123 n.18 ("the 'public' nature of the material [would] establish a separate ground prohibiting exclusion of the public"); *In re Charlotte Observer*, 882 F.2d 850, 854-55 (4th Cir. 1989) ("where closure is wholly inefficacious to prevent a perceived harm, that alone suffices to make it constitutionally impermissible"). Yet, the protective order denies public access to all classified information, whether known or not.

In *ACLU v. DOD*, cited by Respondent, the court allowed allegedly public information nonetheless to be withheld from public disclosure under the national security exemption in the Freedom of Information Act ("FOIA"), 5 U.S.C. §552(b)(1), but did so only *after* making a detailed comparison of the withheld material to the public information and finding "substantive differences between the content of the publicly released government documents and the withheld information." 628 F.3d at 621. The Commission here undertook no such analysis.

In comparing the public information to the still classified material, the *ACLU* court considered only public information officially disclosed by the government. It did so because "'[i]n the arena of intelligence and foreign relations there can be a critical difference between official and unofficial disclosures.'" *Id.* (citing *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990)). This concern about the potential impact of an "official" disclosure through a FOIA response has no proper application to "classified" information originating with the defendants here. Their statements are not an official acknowledgment of anything. *See ACLU*, 628 F.3d at 623 (noting detainee's may lie about or embellish their experiences).[7]

[7] Cases cited by the Government for the proposition that it may properly continue to classify information that has been leaked by others are thus beside the point. *E.g. Wolf v. CIA*, 473 F.3d 370 (D.C. Cir. 2007); *Fitzgibbon,* 911 F.2d 755. Those case address the sometimes relevant differences between an official and

The International Committee of the Red Cross, the Council of Europe, and others have prepared widely available reports describing the interrogation and treatment of these defendants. *See* Press Pet. at 28-32. Even though this information may not officially be declassified, no legitimate interest is served by preventing the public from hearing defendants' testimony about their treatment, offered under oath in a court of law, when their statements to the Red Cross on the very same topics are known. National security is not plausibly protected by denying access to such testimony; but the public would be denied a basis to trust the fairness of this prosecution.

Moreover, there are reasons to review with particular care the claimed need to protect classified information in this case, given the inherent potential for information to be classified to avoid embarrassment, and the incentive to manipulate public opinion by the selective use of classification. *See id.; see also, e.g.,* Jose A. Rodriguez, Jr., Hard Measures (2012) (disclosing various details of CIA rendition program and interrogation techniques to advocate that they were necessary and useful). Taking note of a recent public statement by a former CIA official that water boarding was done with small plastic bottles and not with large buckets as depicted in the movie "Zero Dark 30," one commentator concluded that the CIA exhibits a "double standard" toward the protection of its classified information:

> The C.I.A. invokes secrecy to serve its interests but abandons it to burnish its image and discredit critics. . . . Somewhere along the way, the agency that clung to "neither confirm nor deny" had morphed into one that selectively enforces its edicts on secrecy, using different standards depending on rank, message, internal politics and whim.

Ted Gup, Secret Double Standard, N.Y. Times (Jan. 9, 2013) *available at* http://www.nytimes.com/2013/01/09/opinion/the-cias-double-standard-on-secrecy.html?_r=0.

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an unofficial acknowledgement of activity, but disclosure by a defendant in this criminal case would not amount to any "official" disclosure.

There is simply no basis to close proceedings and seal records in this historic prosecution to conceal information that is already public. To the extent that the protective order authorizes all classified information to be kept from the public, without making factual findings that closure will effectively avoid a demonstrated threat to national security, it violates the right of access.

III.
THE COMMISSION CANNOT PROPERLY CENSOR DEFENDANTS' EVIDENCE AND ARGUMENTS FROM THE PUBLIC

The protective order is improper for the further reason that it defines as "classified" the defendants' memories about the CIA's efforts to gather information from them. Defending this Orwellian effort to prevent defendants from disclosing their own treatment, the Government asserts that "[t]he Executive Branch may classify information that can be conveyed orally so long as that classification determination meets the requirements set forth in the applicable Executive Order." Resp. at vi. The Government's position, again, is entirely off-base.

As detailed in the Press Petition (at 32-33), the issue is not whether the Government may classify information conveyed orally. The issue is whether the thoughts and memories of defendants about physical acts done to them can be deemed "classified." It cannot. If defendants' memories of their physical treatment could be classified, the Government could silence any witness to any classified operation by "classifying" their memories. This is plainly beyond any authority granted in Executive Order 13526.

Under the Executive Order, agencies may only classify information "under the control of the United States government." Executive Order 13526 § 1.1(a)(2). The Government does not control the thoughts and memories of individuals who observe classified conduct, such as the defendants. While the Government may control *access* to the defendants so long as they are in custody, it does not control what a defendant may think. It equally does not control what a

defendant may say about his own relevant experiences, when brought before a court of law to stand trial in a public proceeding that will determine if he lives or dies.

The holding in *ACLU v. DOD* mistakenly relied upon by the Government is not to the contrary. That FOIA case held that documents prepared by the Government during its interrogation of Guantanamo detainees could properly be classified, and to the extent that information in those documents had not previously been officially disclosed, the documents could be withheld under FOIA's national security exemption. As the Court of Appeals explained: "The fact that the information originated from detainees then in the government's custody has no relevance to the unquestionable fact that *the information* so obtained is in the government's control." 628 F.3d at 623 (emphasis added). The court thus distinguished between information contained in the government's *records* of the interrogation, which could properly be classified, and the *thoughts* of the detainees themselves, which could not:

> Any *documents* generated in the process of interrogation are in the hands of the government and will remain subject to the government's authority whether the detainees are retained, released or transferred. Not only may the information *within such records* constitute intelligence in and of itself, it certainly may reveal the sources and methods of the government's acquisition.

Id. (emphasis added). Any doubt that the detainees own thoughts and memories are not subject to classification in the same manner as government records of an interrogation is dispelled by the court's recognition that detainees remain free to tell their stories. As it observed, some "detainees might embellish or outright lie about their experiences, illustrating the government's continuing interest in keeping *its own records* secret." *Id.* (emphasis added).

There is simply no authority for the Government to declare the defendants' thoughts and memories to be "classified," and thus prevent the public from hearing their testimony or seeing evidence offered in their defense. Nor is the government correct in suggesting that similar

protective orders have been entered in district court terrorism trials. The Government mistakenly relies on the modified protective order in *United States v. Ghailani*, No. 98 Cr. 1023 (S.D.N.Y. July 21, 2009) (ECF No. 765) (Gov't App. 363-83) as support for the proposition that "observations and experiences" of an accused may be classified.[8] (Resp. at 8-9.) Although paragraph 3(c) of that protective order does contain a similar classification provision, the defendant in that case was never expected to testify and in fact never sought to do so. No First Amendment challenge was therefore mounted to the provision barring the public from his non-existent testimony. The untested and never invoked provision in that protective order has no precedential value. *See* ACLU Petition (U.S.C.M.C.R. Case No. 13-003), p.22 n.11.

Simply put, the Government has no power under the Executive Order to classify the "observations and experiences" of a defendant in a criminal trial.

CONCLUSION

For all the foregoing reasons and these reasons set forth in Petitioners' initial motion papers, the requested writ of mandamus should issue forthwith.

Dated: March 18, 2013

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[8] Other than *Ghailani*, none of the protective orders referenced by the Government contain language or provisions similar to those at issue here, which purport to recognize the government's authority to classify a criminal defendant thoughts and memories.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was emailed on the 18th day of March, 2013 to the following by 5:00 pm (EST):

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