

**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	AE013 Government Motion To Protect Against Disclosure of National Security Information 26 April 2012
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1. **Timeliness.** This motion is timely filed under Rule for Military Commissions (R.M.C.) 905(b) and Military Commissions Trial Judiciary Rule of Court 3.6.a.
2. **Relief Sought.** The Government respectfully requests that the Military Judge issue the attached proposed Protective Order to protect classified information in connection with this case. *See* 10 U.S.C. § 949p-3; Military Commission Rule of Evidence (M.C.R.E.) 505(e).
3. **Overview.** This military commission will involve classified information that must be protected throughout all stages of the proceedings, including the upcoming arraignment of the Accused. As discussed in the attached declarations from the Central Intelligence Agency (CIA), the Department of Defense (DoD), and the Federal Bureau of Investigation (FBI), filed herewith under seal, the substance of the classified information in this case deals with the sources, methods, and activities by which the United States defends against international terrorist organizations. Attachment A, Classified Declaration of David H. Petraeus, Director, Central Intelligence Agency, dated 7 April 2012 (Petraeus Decl.); Attachment B, Classified Declaration

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ATTACHMENTS A THROUGH D (FILED UNDER SEAL)**

of Information Review Officer, Central Intelligence Agency, dated 12 April 2012 (CIA Decl.); Attachment C, Classified Declaration of General Douglas M. Fraser, United States Air Force, Commander, United States Southern Command, dated 24 October 2011 (SOUTHCOM Decl.); Attachment D, Classified Declaration of Mark F. Giuliano, Assistant Director, Counterterrorism Division, Federal Bureau of Investigation, dated 7 September 2011 (FBI Decl.). The Military Commissions Act, 10 U.S.C. § 948a, *et seq.* (M.C.A.), specifically protects classified information, the disclosure of which would be detrimental to national security. 10 U.S.C. § 949p-1. The Government moves the Military Judge, pursuant to the M.C.A., to enter the attached proposed Protective Order to protect classified information in this case. *See* Attachment E.

4. **Burden of Proof.** As the moving party, the Government bears the burden of demonstrating by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c); M.C.R.E. 505(e) (“Upon motion of the trial counsel, the military judge shall issue an order to protect against the disclosure of any classified information that has been disclosed by the United States to any accused or counsel, regardless of the means by which the accused or counsel obtained the classified information, in any military commission [under the M.C.A.] or that has otherwise been provided to, or obtained by, any such accused in any such military commission”).

5. **Facts**

a. This case involves classified information that deals with the sources, methods, and activities by which the United States defends against international terrorist organizations, including al Qaeda and its affiliates. *See, e.g.,* [REDACTED] SOUTHCOM Decl. ¶ 12; FBI Decl. ¶ 10.

b. 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 were also injured. 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.

c. On 31 May 2011 and 26 January 2012, pursuant to the Military Commissions Act of 2009, charges in connection with the 11 September 2001 attacks were sworn against Khalid Shaikh Mohammad (Mohammad), Walid Muhammad Salih Bin Attash (Bin Attash), Ramzi Binalshibh (Binalshibh), Ali Abdul Aziz Ali (Ali), and Mustafa Ahmed Adam al Hawsawi (Hawsawi). These charges were referred jointly to this capital Military Commission on 4 April 2012. The accused are each 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.

(1) More specifically, Mohammad is alleged, among other things, to be the architect of the 9/11 concept. Once Usama bin Laden approved his plan, Mohammad oversaw its development and logistical progress to fruition. Mohammad also is accused of providing personal training and guidance to the hijackers. He is further charged with

attending a meeting in late 2001, during which Osama bin Laden confirmed al Qaeda's involvement in the 9/11 attacks in a videotaped message.

(2) Bin Attash, in part, is accused of being instrumental in establishing the means by which the al Qaeda hijackers ultimately were able to smuggle weapons onboard civilian airliners. Bin Attash also is alleged to have facilitated the transit of two hijackers into the United States, as well as provide them personal training in hand-to-hand combat. Bin Attash is further accused of attempting to apply for a visa that would allow him to travel to the United States.

(3) After leaving Hamburg, Germany, Binalshibh is alleged to have traveled to Afghanistan to attend an al Qaeda training camp and attempted, on multiple occasions, to become a pilot-hijacker along with co-conspirators Mohammed Atta (Atta), Marwan al Shehhi (Shehhi), and Ziad Jarrah (Jarrah). Binalshibh, among other things, is also alleged to have ultimately become the primary coordinator and communications hub between Mohammad and Atta.

(4) Ali, in part, is charged with having transferred more than \$100,000 to hijackers located within the United States for their living expenses and flight training. Ali also is alleged to have attempted to obtain a United States visa in order to become a hijacker for the 9/11 operation. He further is accused of facilitating travel to the United States for many of the hijackers as well as obtaining flight training materials for their use.

(5) Hawsawi, among other things, is accused of having facilitated the travel of many of the hijackers into the United States, as well as handling financial transactions directly associated with the 9/11 attacks.

d. The overall 9/11 conspiracy is alleged to have begun in 1996 when Mohammad met with Usama Bin Laden in Afghanistan and discussed the operational concept of hijacking commercial airliners and crashing them into buildings in the United States and elsewhere. This became known among al Qaeda leadership as the "Planes Operation." Surveillance of airline security, hand-to-hand combat training, and transit of hijackers to the United States began in earnest starting in 1999. Financial transactions and the creation of "martyr wills" relating to the "Planes Operation" continued in 2000. Flight training for the pilot-hijackers extended into 2001. Additional hijackers streamed into the United States during the summer of 2001, and weapons and equipment for use in the attacks were also purchased during this time. In late August 2001, a message to the conspirators allegedly informed them that Atta had chosen 11 September 2001 as the date of the operation. After the attacks, a video featuring Usama bin Laden, Binalshibh, Hawsawi, and other al Qaeda operatives allegedly documented a post-9/11 meeting, which was later released by al Qaeda for propaganda purposes.

e. 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 (SCI), the disclosure of which would be detrimental to national security. [REDACTED]

[REDACTED]

f. Mohammad and Hawsawi were captured on or about 1 March 2003; Bin Attash and Ali were captured on or about 29 April 2003; and Binalshibh was captured on or around 11 September 2002. After their captures, the Accused were detained and interrogated in the CIA program.

g. Because 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. Consequently, any and all statements by the Accused are presumptively classified until a classification review can be completed. [REDACTED]

h. On 6 September 2006, President George W. Bush officially acknowledged the existence of this program and announced that a group of HVDs had been transferred by the CIA to 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 JTF-GTMO, and have remained in detention at JTF-GTMO since that time.

i. 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 to 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.

j. Other information related to the program has not been declassified or officially acknowledged, and therefore remains classified. This classified information includes allegations involving (i) the location of its detention facilities, (ii) the identity of any 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 [REDACTED]. The disclosure of this classified information would be detrimental to national security. [REDACTED]

k. Information relating to DoD sources, methods, and activities at JTF-GTMO also remains classified. This classified information includes (i) force protection information, (ii) foreign government information, (iii) intelligence sources and methods, (iv) military and intelligence operational information, (v) certain detainee information, and (vi) derivatively classified information. SOUTHCOM Decl. ¶¶ 12-29. The disclosure of this classified information would be detrimental to national security. *See id.*

l. Certain FBI documents involved in this case also contain classified information, the disclosure of which would be detrimental to national security. FBI Decl. ¶ 10.

6. Discussion

The M.C.A. mandates that the protection of classified information is paramount. *See* 10 U.S.C. § 949p-1. Recognizing the equities at stake when balancing the need for a system to prosecute terrorism-related offenses and the need to conduct ongoing counterterrorism operations, the M.C.A. includes unambiguous protections for classified information, including the sources, methods, and activities by which the United States acquires information. *See generally* 10 U.S.C. §§ 949p-1 through 949p-7. The rules in this area provide that the protection of classified information “applies to all stages of the proceedings.” M.C.R.E. 505(a)(1).

The protections elaborated under the M.C.A. and M.C.R.E. establish well-defined pretrial, trial, and appellate procedures to govern the discovery, handling, and use of classified information in military commissions. Such protections and procedures include protective orders; *ex parte*, *in camera* presentations and proceedings; alternatives for disclosure of classified information; pretrial conferences and hearings; notice requirements; and protections for courtroom proceedings. *See generally* 10 U.S.C. §§ 949p-1 through 949p-7; M.C.R.E. 505. In analyzing these rules, it is also helpful to examine case law interpreting similar provisions under the Classified Information Procedures Act, 18 U.S.C. App. 3 (CIPA), upon which the M.C.A.'s provisions are patterned. *See* 10 U.S.C. § 949p-1(d) (making the judicial construction of CIPA authoritative under the M.C.A. where not inconsistent with specific M.C.A. provisions); 10 U.S.C. §§ 949p-2(b), 949p-4(b)(2), 949p-7(c)(2) (providing that conferences, presentations, and proffers take place *ex parte* as necessary, in accordance with federal court practice under CIPA); 155 Cong. Rec. S7947, 7987-89 (July 23, 2009) (Senate floor debate on M.C.A. amendments to adopt CIPA procedures).

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. To that end, the Government submits the attached proposed Protective Order (Attachment F) as a means of protecting the classified information involved in this case.

a. CLASSIFIED INFORMATION RELATING TO THE SOURCES, METHODS, AND ACTIVITIES OF THE UNITED STATES MUST BE PROTECTED FROM DISCLOSURE IN THIS MILITARY COMMISSION.

In support of this motion, the Government submits declarations from representatives of the CIA, DoD, and FBI invoking the classified information privilege and explaining how disclosure

of the classified information at issue would be detrimental to national security. [REDACTED]

[REDACTED] SOUTHCOM Decl. ¶ 10-29; FBI Decl. ¶ 10. Due to the extremely sensitive nature of the classified information they contain, the Government files these declarations under seal, respectfully requests that they be considered by the Military Judge *in camera*, and further requests that the Petraeus Declaration and the CIA Declaration be considered *ex parte*. See 10 U.S.C. §§ 949p-2(b), 949p-4(b)(2), 949p-6(a)(3), 949p-6(d)(4); M.C.R.E. 505(d)(2), 505(f)(2)(B), 505(h)(3)(A).¹

As these declarations describe, the classified information involved in this case relates to the sources, methods, and activities by which the United States defends against international terrorism and terrorist organizations, and the disclosure of such information would be detrimental to national security. [REDACTED] SOUTHCOM Decl. ¶ 12; FBI Decl. ¶ 10. This information is therefore properly classified by the executive branch pursuant to Executive Order 13526, as amended, or its predecessor Orders, and is subject to protection in connection with this military commission. 10 U.S.C. §§ 948a(2)(A), 949p-1(a); M.C.R.E. 505(a)(1), (c); M.C.R.E. 505(f), Discussion. See also *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (“[T]he protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it.”);

¹ In addition to being allowed under the military commission rules, *ex parte*, *in camera* inspection of national security information is routinely conducted by federal courts under the similar CIPA provisions upon which the M.C.A.'s classified information provisions are modeled. See, e.g., *United States v. Mejia*, 448 F.3d 436, 457 (D.C. Cir. 2006) (finding that when “the government is seeking to withhold classified information from the defendant, an adversary hearing with defense knowledge would defeat the very purpose of the discovery rules”) (quoting H.R. Rep. No. 96-831, pt. 1, at 27 n.22 (1980)), *cert. denied*, 549 U.S. 1137 (2007); *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003) (“Precisely because it is often difficult for a court to review the classification of national security information, we anticipate that *in camera* review of affidavits, followed if necessary by further judicial inquiry, will be the norm.”) (internal quotation marks and citation omitted); *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998) (recognizing that “*ex parte*, *in camera* hearings in which government counsel participates to the exclusion of defense counsel are part of the process that the district court may use,” particularly “if the court has questions about the confidential nature of the information or its relevancy”).

Bismullah v. Gates, 501 F.3d 178, 187-88 (D.C. Cir. 2007) (“It is within the role of the executive to acquire and exercise the expertise of protecting national security.”) (citations omitted).

The protection of such sources, methods, and activities relating to counterterrorism and other intelligence operations predates the enactment of the M.C.A. and is firmly rooted in federal law. In *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), for example, the Court of Appeals for the D.C. Circuit upheld a protective order that protected not only the contents of a defendant hijacker’s recorded conversations, but also the intelligence-gathering methods used to collect them. *Yunis*, 867 F.2d at 623. The court recognized that in some instances the national security interest “lies not so much in the contents of the conversations, as in the time, place and nature of the government’s ability to intercept the conversations at all.” *Id.*

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); *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)).

Indeed, even false allegations about classified information related to this case must be protected from disclosure because, otherwise, the Government would be in the untenable position

of having to deny false information and yet ignore true information, which would implicitly confirm the very information the Government seeks to protect. [REDACTED] Any disclosure of classified information—which the Defense and the Accused are in a particularly credible position to confirm or deny—can have a significant impact on national security, even if that information is attributed to public sources. *See Wolf*, 473 F.3d at 378 (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); *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.”).

Accordingly, the Government’s proposed protective order precludes the Defense and the Accused from making public or private statements confirming, contradicting, or otherwise commenting on classified information, including information obtained from the public domain. To allow the Defense or the Accused to comment on such information would amount to an authoritative disclosure of classified information. Because the Government cannot predict whether the Accused intends to disclose classified information at arraignment or during subsequent public proceedings in this case, the Government requests that the Military Judge immediately implement the protective measures set forth in the proposed Protective Order.

b. PURSUANT TO THE M.C.A., VARIOUS PROTECTIVE MEASURES SHOULD BE ADOPTED TO PROTECT CLASSIFIED INFORMATION FROM DISCLOSURE IN THIS CASE.

The M.C.A. and M.C.R.E. authorize the Military Judge to issue protective orders governing the storage, use, and handling of classified information, however it was obtained. 10 U.S.C. § 949p-3; M.C.R.E. 505(e). The attached proposed Protective Order therefore seeks to

protect *all currently and properly classified information* in this case, including classified information that may be obtained in the public domain. See Attachment F. As discussed below, the Government requests that the Military Judge issue the proposed Protective Order and take such additional steps as it deems appropriate to protect against the improper disclosure of classified information during this military commission, including arraignment, discovery, pretrial litigation, trial, and at all other stages of the proceedings.

(1) Commission Security Officer

The Government requests that the Military Judge appoint a Commission Security Officer (CSO), and authorize the CSO to appoint Alternate Commission Security Officers (ACSOs) as necessary, to ensure the proper storage, handling, and use of classified information by the parties in this case. This CSO will serve as the liaison between the owners of the classified information and those who are provided access to such information, and will ensure that the classified information is handled and treated appropriately.² The CSO will be available to advise the Commission on issues regarding classified information, and will assist the Defense and the Government regarding the handling and use of classified information, including pleadings, filings, and documents produced during discovery. The CSO will also assist in enforcing and implementing various protections and procedures designed to avoid harm to national security, including during open proceedings.

(2) Authorized Access to Classified Information

MCRE 505(a)(1), provides that "under no circumstances may a military judge order the release of classified information to any person not authorized to receive such information." The

² The CSO will work in conjunction with representatives of the originating agencies to make determinations on the appropriate classification status of particular materials; however, the CSO does not have classification authority and will not be in a position to interpret legal or procedural issues relating to the disclosure of such information.

protections for classified information found in MCRE 505 are designed to ensure that at all stages of the proceedings the prosecution is able to weigh the risk of disclosing classified information and reflect the understanding that determining whether an individual is granted access to classified information is inherently an Executive Branch function.

Authorized access to classified information involves several steps. First, an individual must obtain the necessary security clearance which simply allows that person to view classified material. It does not, however, entitle someone to access all classified information. *U.S. v. Bin Laden*, 126 F. Supp.2d 264, 287 n.27 (S.D.N.Y. 2000) (security clearances enable "attorneys to review classified documents, 'but do not entitle them to see all documents with that classification.'" (citing *United States v. Ott*, 827 F.2d 473, 477 (9th Cir. 1987)). Second, an individual must demonstrate a "need to know" the classified information in question. Exec. Order No. 13,292, § 6.1(z), 68 Fed.Reg. 15,315, 15,332 (Mar. 28, 2003). See *Badrawi v. Dep't of Homeland Security*, 596 F. Supp. 2d 389, 2009 U.S. Dist. LEXIS 2245, 2009 WL 103361, *9 (D.Conn.) (counsel without need to know properly denied access to classified information despite security clearance); *United States v. Ott*, 827 F.2d 473 at 477 (District Court unpersuaded that defense counsel's security clearance entitled them to review FISA material, noting that Congress has a legitimate interest in ensuring that sensitive security information is not unnecessarily disseminated regardless of whether an individual holds the appropriate security clearance.) In the current case, the Accused clearly fall into the category of persons "not authorized to receive" classified information. See MCRE 505(a)(1). Similarly, counsel for other detainees do not have the requisite "need to know" that would enable them to view classified information that the Accused's counsel may have in their possession. Nor would counsel representing the Accused in

a forum other than the current military commission have a "need to know" the classified information at issue in this case.

Accordingly, the Government's proposed protective order precludes the Defense from providing any classified information obtained during this case, outside the immediate parameters of these military commission proceedings. Further, the proposed protective order precludes the Defense from using classified information obtained as a result of their participation in commission proceedings in any other forum, or in a military commission proceeding involving another detainee.

(3) Clearances

Because the statements of the Accused are presumptively classified as TOP SECRET / SCI, all personnel with whom the Accused have or will have substantive contact must have a TOP SECRET / SCI clearance and be briefed into the appropriate SCI component. Section 4.1 of Executive Order 13526 outlines the requirements that must be met in order to have access to classified information: (1) a favorable determination of eligibility for access by an agency head; (2) a signed, approved nondisclosure agreement; and (3) a need-to-know the information. Under these rules, all members of the Defense, Government, and courtroom personnel, including the clerk, reporter, and CSO, must have the requisite clearances, as set forth in the proposed Protective Order limiting courtroom access to appropriately cleared personnel. The Government also requests that the Defense execute and file the Memorandum of Understanding attached to the Proposed Protective Order (Attachment E) as a precondition to receiving classified information in connection with this case.

(4) Storage, Handling, and Use of Classified Information

In addition to ensuring appointment of a CSO, the Government's proposed Protective Order details specific procedures that it requests the Commission to adopt for maintaining and operating secure areas in which to store and handle classified information. Approved Secure Compartmented Information Facilities (SCIFs) are provided at GTMO and elsewhere for use by the Military Judge, the Defense, and the Government during pretrial and trial proceedings, in order to ensure the proper handling and storage of classified information. The Government's proposed Protective Order details the procedures for maintaining and operating such secure areas and otherwise properly handling classified information in connection with this case. Under the terms of the proposed Protective Order, if there are any questions regarding the treatment or handling of classified information, the parties must seek guidance from the CSO, who will consult as necessary with the owners of the classified information at issue.

(5) Notice Requirements for Introducing Classified Information During Proceedings

The M.C.A. requires the Defense to give advance notice to the Government and the Military Judge whenever it reasonably expects to disclose classified information at a proceeding. M.C.R.E. 505(g)(1)(A). This rule allows both the Government and the Military Judge the opportunity to be fully apprised ahead of time of the classified information at issue, to ascertain the potential harm full disclosure could cause to national security, and to consider whether there are alternatives to disclosure that could minimize that harm. *See United States v. Badia*, 827 F.2d 1458, 1465 (11th Cir. 1987), *cert. denied*, 485 U.S. 937 (1988).

This notice requirement has three critical steps. *See* M.C.R.E. 505(g)-(h). First, the Defense must provide a detailed, written description of the specific classified information it reasonably expects to disclose. M.C.R.E. 505(g)(1)(A), Discussion. Courts interpreting the similar requirement under CIPA Section 5(a) have held that such descriptions "must be

particularized, setting forth specifically the classified information which the defendant reasonably believes to be necessary to his defense.” *United States v. Collins*, 720 F.2d 1195, 1199-1200 (11th Cir. 1983); *see also United States v. Smith*, 780 F.2d 1102, 1105 (4th Cir. 1985) (*en banc*). This notice requirement applies equally to information the Defense intends to introduce through documentary exhibits and to information it intends to elicit through testimony on direct or cross-examination. *See Collins*, 720 F.2d at 1195; *United States v. Wilson*, 750 F.2d 7 (2d Cir. 1984), *cert. denied*, 479 U.S. 839 (1986).

Second, the Defense must provide its notice sufficiently in advance of the proceeding to provide the Government with a reasonable opportunity to (1) invoke the classified information privilege, (2) move for an *in camera* hearing to discuss the information-at-issue, (3) obtain a ruling on the issue from the Military Judge, (4) propose any alternatives to disclosure, and (5) determine whether to pursue an interlocutory appeal for any ruling allowing the disclosure of classified information. M.C.R.E. 505(g)(1), 505(h). Thus, this timing requirement, similar to the one imposed under CIPA Section 5(a), takes into account the lengthy process that can ensue between the initial notice from the Defense and the proceeding at which the disclosure of classified information is expected to occur.

Third, as stated above, once the Defense has provided notice of its intent to disclose classified information in a proceeding, the Government may move for an *in camera* hearing to address the classified information privilege and the use of any classified information. M.C.R.E. 505(h). In connection with this *in camera* hearing, the Military Judge must determine whether the classified information is “relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible.” M.C.R.E. 505(h)(1)(C). If so, the Government can seek alternatives to full disclosure for the classified information, which must be used by the

Defense unless use of the classified information itself is necessary to afford the Accused a fair trial. M.C.R.E. 505(h)(1), 505(h)(3)-(4); *see also United States v. North*, 910 F.2d 843, 899 (D.C. Cir. 1990) (finding that under CIPA, the trial court must grant the Government's substitution "if it finds that the admission or summary would leave the defendant in substantially the same position as would disclosure").

Unless the Defense meets this notice requirement, and affords the Government a reasonable opportunity to seek the available protections discussed above, the Defense is prohibited from disclosing the classified information. M.C.R.E. 505(g). This prohibition pertains to both the introduction of the classified information at issue and the examination of any witness with respect to that information. M.C.R.E. 505(g)(2).

(6) Disclosure of Classified Information During Proceedings

The Government's proposed protective order provides that the Government may seek to limit the direct or cross-examination of a witness to protect against the public disclosure of classified information. *See* M.C.R.E. 505(e). To that end, Trial Counsel may object to any line of questioning during witness testimony that may require disclosure of inadmissible classified information. *See* M.C.R.E. 505(i)(3). Following such an objection, the Military Judge should determine whether the witness' response is admissible and, if so, take additional steps as necessary to protect against the public disclosure of any classified information.

To prevent the disclosure of classified information through physical or documentary evidence, the Military Judge may admit a portion of a document, recording, or photograph into evidence, or proof of the contents thereof, without requiring the introduction of the original classified item into evidence. M.C.R.E. 505(i)(2). The Military Judge also may permit the Government to introduce otherwise admissible evidence while protecting the classified sources,

methods, and activities by which the United States acquired the evidence, so long as the evidence is deemed reliable. M.C.R.E. 505(h)(3). Regardless of the manner in which such evidence is introduced, however, the evidence remains classified at its original classification level. M.C.R.E. 505(i)(1).

Finally, to protect against disclosure of classified information, including intelligence or law enforcement sources, methods, or activities, the Military Judge may order that the public be excluded from any portion of a proceeding in which such information will be disclosed, or take other lesser measures as necessary to protect against disclosure of information during open proceedings. *See* 10 U.S.C. § 949d(c); R.M.C. 806(b), Discussion. This express authorization to close proceedings to the public during the military commission process recognizes the national security interests at stake when handling or presenting classified information in connection with pretrial or trial proceedings.

(7) Delayed Audio Feed to the Public Gallery

In accordance with M.C.R.E. 505, certain safeguards have already been instituted in the courtroom used by this military commission, including a glass partition separating the public gallery from the courtroom itself, which is connected by an audio-video broadcast.³ The Government requests a forty-second delay in the broadcast to the gallery 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. If any of the Accused testify, for example, the delayed-broadcast 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 open proceedings or

³ This broadcast may also connect the courtroom to a remote viewing area.

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 open proceedings.

This measure, which is much less restrictive than closing the courtroom entirely, is necessary to protect classified information during open proceedings. In the event that classified information is disclosed during open proceedings, the forty-second delay would allow the Military Judge, the CSO, or the Government to take action to suspend the broadcast before the information is publicly disclosed. The Government can then consult with the equity holder of the classified information to determine what, if any, actions must be taken to limit its disclosure. *See* M.C.R.E. 505(i)(3). If classified information is disclosed during the proceeding, and the broadcast is suspended to prevent its public disclosure, then that portion of the proceeding will not be broadcast, but will remain part of the classified record of the proceeding. If the Military Judge determines, after consultation with the CSO, that the Government will not assert any privilege, or that classified information was not disclosed and is not at risk of disclosure, then the proceedings and the broadcast, with the time delay, will resume upon the Commission's order.

c. CONCLUSION

In light of the classified information at issue in this case, and the harm to national security that its disclosure reasonably could be expected to cause, the Government requests that the Military Judge enter the proposed Protective Order (Attachment E) and the proposed Order placing classified Attachments A through D under seal (Attachment F).

7. **Oral Argument.** The Government does not request oral argument. The Government requests that the proposed Protective Order be issued prior to any commission proceeding.
8. **Certificate of Conference.** The Defense has been notified of this motion and objects to the requested relief.
9. **Attachments**
- A. Classified Declaration of David H. Petraeus, Director, Central Intelligence Agency, dated 7 April 2012 (filed *ex parte*, *in camera*, and UNDER SEAL)
 - B. Classified Declaration of Information Review Officer, Central Intelligence Agency, dated 12 April 2012 (filed *ex parte*, *in camera*, and UNDER SEAL)
 - C. Classified Declaration of General Douglas M. Fraser, United States Air Force, Commander, United States Southern Command, dated 24 October 2011 (filed *in camera* and UNDER SEAL)
 - D. Classified Declaration of Mark F. Giuliano, Assistant Director, Counterterrorism Division, Federal Bureau of Investigation, dated 7 September 2011 (filed *in camera* and UNDER SEAL)
 - E. Proposed Protective Order and Memorandum of Understanding
 - F. Proposed Order placing Attachments A through D under seal
 - G. Certificate of Service

Respectfully submitted,

//s//

Joanna P. Baltes
Deputy Trial Counsel
Mark Martins
Chief Prosecutor
Office of the Chief Prosecutor
Office of Military Commissions
1610 Defense Pentagon
Washington, D.C. 20301

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA	FILED <i>EX PARTE</i>
v.	FILED <i>IN CAMERA</i>
KHALID SHEIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	FILED UNDER SEAL

**ATTACHMENT A – CLASSIFIED DECLARATION OF DAVID H. PETRAEUS,
DIRECTOR, CENTRAL INTELLIGENCE AGENCY, DATED 7 APRIL 2012**

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA	FILED <i>EX PARTE</i>
v.	FILED <i>IN CAMERA</i>
KHALID SHEIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	FILED UNDER SEAL

**ATTACHMENT B – CLASSIFIED DECLARATION OF INFORMATION REVIEW
OFFICER, CENTRAL INTELLIGENCE AGENCY, DATED 12 APRIL 2012**

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA v. KHALID SHEIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	FILED <i>IN CAMERA</i> FILED UNDER SEAL
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**ATTACHMENT C – CLASSIFIED DECLARATION OF GENERAL DOUGLAS M. FRASER,
UNITED STATES AIR FORCE, COMMANDER, UNITED STATES SOUTHERN
COMMAND, DATED 24 OCTOBER 2011**

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA v. KHALID SHEIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	FILED <i>IN CAMERA</i> FILED UNDER SEAL
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**ATTACHMENT D – CLASSIFIED DECLARATION OF MARK F. GIULIANO, ASSISTANT
DIRECTOR, COUNTERTERRORISM DIVISION, FEDERAL BUREAU OF
INVESTIGATION, DATED 7 SEPTEMBER 2011**

**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	PROTECTIVE ORDER #1 To Protect Against Disclosure of National Security Information _____ 2012
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Upon consideration of the submissions regarding the Government's motion for a protective order to protect classified information in this case, the Commission finds that this case involves classified national security information, including TOP SECRET / SENSITIVE COMPARTMENTED INFORMATION (SCI), the disclosure of which would be detrimental to national security, the storage, handling, and control of which requires special security precautions, and access to which requires a security clearance and a need-to-know. Accordingly, pursuant to authority granted under 10 U.S.C. §§ 949p-1 to 949p-7, Rules for Military Commissions (R.M.C.) 701 and 806, Military Commission Rule of Evidence (M.C.R.E.) 505, Regulation for Trial by Military Commissions (R.T.M.C.) ¶ 17-3, and the general supervisory authority of the Commission, in order to protect the national security, and for good cause shown, the following Protective Order is entered.

I. SCOPE

1. This Protective Order establishes procedures applicable to all persons who have access to or come into possession of classified documents or information in connection with this case,

regardless of the means by which the persons obtained the classified information. These procedures apply to all aspects of pretrial, trial, and post-trial stages in this case, including any appeals, subject to modification by further order of the Commission.

2. This Protective Order applies to all information, documents, testimony, and material associated with this case that contain classified information, including but not limited to any classified pleadings, written discovery, expert reports, transcripts, notes, summaries, or any other material that contains, describes, or reflects classified information.

3. Counsel are responsible for advising their clients, translators, witnesses, experts, consultants, support staff, and all others involved with the defense or prosecution of this case, respectively, of the contents of this Protective Order.

II. DEFINITIONS

4. As used in this Protective Order, the term "Defense" includes any counsel for the Accused in this case and any employees, contractors, investigators, paralegals, experts, translators, support staff or other persons working on the behalf of the Accused or his counsel in this case.

5. The term "Government" includes any counsel for the United States in this case and any employees, contractors, investigators, paralegals, experts, translators, support staff or other persons working on the behalf of the United States or its counsel in this case.

6. The words "documents" and "information" include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, conforming copies and non-conforming copies, whether different from the original by reason of notation made on such copies or otherwise, and further include, but are not limited to:

a. papers, correspondence, memoranda, notes, letters, cables, reports, summaries, photographs, maps, charts, graphs, inter-office and intra-office communications, notations of any sort concerning conversations, meetings, or other communications, bulletins, teletypes, telegrams, facsimiles, invoices, worksheets, and drafts, alterations, modifications, changes, and amendments of any kind to the foregoing;

b. graphic or oral records or representations of any kind, including, but not limited to: photographs, charts, graphs, microfiche, microfilm, videotapes, and sound or motion picture recordings of any kind;

c. electronic, mechanical, or electric records of any kind, including, but not limited to: tapes, cassettes, disks, recordings, electronic mail, instant messages, films, typewriter ribbons, word processing or other computer tapes, disks or portable storage devices, and all manner of electronic data processing storage; and

d. information acquired orally.

7. The terms "classified national security information and/or documents," "classified information," and "classified documents" include:

a. any classified document or information that was classified by any Executive Branch agency in the interests of national security or pursuant to Executive Order, including Executive Order 13526, as amended, or its predecessor Orders, as "CONFIDENTIAL," "SECRET," "TOP SECRET," or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI)" and specifically designated by the United States for limited or restricted dissemination or distribution;

b. any document or information, regardless of its physical form or characteristics, now or formerly in the possession of a private party that was derived from United States

Government information that was classified, regardless of whether such document or information has subsequently been classified by the Government pursuant to Executive Order, including Executive Order 13526, as amended, or its predecessor Orders, as "CONFIDENTIAL," "SECRET," "TOP SECRET," or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI)";

c. verbal or non-documentary classified information known to the Accused or the Defense;

d. any document or information as to which the Defense has been notified orally or in writing that such document or information contains classified information, including, but not limited to the following:

(i) documents or information that would reveal or tend to reveal details surrounding the capture of the Accused other than the location and date;

(ii) documents or information that would reveal or tend to reveal the locations in which: Khalid Shaikh Mohammad (Mohammad) and Mustafa Ahmed Adam al Hawsawi (Hawsawi) were detained from the time of their capture on or about 1 March 2003 through 6 September 2006; Walid Muhammad Salih Bin Attash (Bin Attash) and Ali Abdul Aziz Ali (Ali) were detained from the time of their capture on or about 29 April 2003 through 6 September 2006; and Ramzi Binalshibh (Binalshibh) was detained from the time of his capture on or around 11 September 2002 through 6 September 2006.

(iii) documents or information that refer or relate to the names, identities, and descriptions of any persons involved with the capture, transfer, detention, or interrogation of the Accused or specific dates regarding the same, from on or around the aforementioned capture dates through 6 September 2006;

(iv) documents or information that refer or relate to classified sources, methods, or activities used by the United States to acquire evidence or information, including information describing any interrogation techniques as applied to the Accused from on or around the aforementioned capture dates through 6 September 2006;

(v) documents or information that refer or relate to the conditions of confinement of the Accused from on or around the aforementioned capture dates through 6 September 2006;

(vi) 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; and

e. any document or information obtained from or related to a foreign government or dealing with matters of U.S. foreign policy, intelligence, or military operations, which is known to be closely held and potentially damaging to the national security of the United States or its allies.

8. "National Security" means the national defense and foreign relations of the United States.

9. "Access to classified information" means having authorized access to review, read, learn, or otherwise come to know classified information.

10. "Secure area" means a physical facility accredited or approved for the storage, handling, and control of classified information.

11. "Unauthorized disclosure of classified information" means any knowing, willful, or negligent action that could reasonably be expected to result in a communication or physical transfer of classified information to an unauthorized recipient. Confirming or denying information, including its very existence, constitutes disclosing that information.

III. COMMISSION SECURITY OFFICER

12. A Commission Security Officer (CSO) has been appointed by the Commission for the purpose of providing security arrangements necessary to protect against unauthorized disclosure of any classified documents or information in connection with this case. The CSO is authorized to appoint Alternate Commission Security Officers (ACSOs) as necessary. All references to the CSO herein shall be deemed to refer also to any ACSOs appointed to this case.

13. The parties shall seek guidance from the CSO with regard to the appropriate storage, handling, and use of classified information. The CSO shall consult with the original classification authority (OCA) of classified documents or information, as necessary, to address classification decisions or other related issues.

14. The CSO shall not reveal to any person, including the Government, the content of any conversations the CSO hears by or among the Defense, nor reveal the nature of documents being reviewed by the Defense or the work generated by the Defense, except as necessary to report violations of this Protective Order to the Commission after appropriate consultation with the Defense or to carry out duties pursuant to this Protective Order. Additionally, the presence of the CSO shall not operate as a waiver of any applicable privilege under the Military Commissions Act, 10 U.S.C. § 948a, *et seq.* (M.C.A.), R.M.C., or M.C.R.E.

IV. ACCESS TO CLASSIFIED INFORMATION

15. Without authorization from the Government, no member of the Defense, including defense witnesses, shall have access to classified information in connection with this case unless that person has:

- a. received the necessary security clearance from the appropriate Department of Defense (DoD) authorities and signed an appropriate non-disclosure agreement, as verified by the CSO;
- b. signed the Memorandum of Understanding Regarding Receipt of Classified Information (MOU), attached to this Protective Order, agreeing to comply with the terms of this Protective Order; and
- c. a need-to-know the classified information at issue, as determined by the OCA of that information.

16. In order to be provided access to classified information in connection with this case, each member of the Defense shall execute the attached MOU, file the executed originals of the MOU with the Commission, and submit copies to the CSO and counsel for the Government. The execution and submission of the MOU is a condition precedent to the Defense having access to classified information for the purposes of these proceedings.

17. The substitution, departure, or removal of any member of the Defense, including defense witnesses, from this case for any reason shall not release that person from the provisions of this Protective Order or the MOU executed in connection with this Protective Order.

18. Once the CSO verifies that counsel for the Accused have executed and submitted the MOU, and are otherwise authorized to receive classified information in connection with this case, the Government may provide classified discovery to the Defense, either directly or via the CSO, who will assist as necessary in ensuring the material is delivered to the Defense.

19. All classified documents or information provided or obtained in connection with this case remain classified at the level designated by the OCA, unless the documents bear a clear indication that they have been declassified. The person receiving the classified documents or

information, together with all other members of the Defense or the Government, respectively, shall be responsible for protecting the classified information from disclosure and shall ensure that access to and storage of the classified information is in accordance with applicable laws and regulations and the terms of this Protective Order.

20. No member of the Defense, including any defense witness, is authorized to disclose any classified information obtained during this case, outside the immediate parameters of these military commission proceedings. If any member of the Defense, the Accused, or any defense witness receives any summons, subpoena, or court order, or the equivalent thereof, from any United States or foreign court or on behalf of any criminal or civil investigative entity within the United States or from any foreign entity, the Defense, including defense witnesses, shall immediately notify the Commission, the CSO, and the Government so that appropriate consideration can be given to the matter by the Commission and the OCA of the materials concerned. Absent authority from the Commission or the Government, the Defense, the Accused, and defense witnesses are not authorized to disseminate or disclose classified materials in response to such requests. The Defense, the Accused, and defense witnesses and experts are not authorized to use or refer to any classified information obtained as a result of their participation in commission proceedings in any other forum, or in a military commission proceeding involving another detainee.

V. USE, STORAGE, AND HANDLING PROCEDURES

21. The Office of the Chief Defense Counsel, Office of Military Commissions, has approved secure areas in which the Defense may use, store, handle, and otherwise work with classified information. The CSO shall ensure that such secure areas are maintained and operated in a

manner consistent with this Protective Order and as otherwise reasonably necessary to protect against the disclosure of classified information.

22. All classified information provided to the Defense, and otherwise possessed or maintained by the Defense, shall be stored, maintained, and used only in secure areas. Classified information may only be removed from secure areas in accordance with this Protective Order and applicable laws and regulations governing the handling and use of classified information.

23. Consistent with other provisions of this Protective Order, the Defense shall have access to the classified information made available to them and shall be allowed to take notes and prepare documents with respect to such classified information in secure areas.

24. The Defense shall not copy or reproduce any classified information in any form, except in secure areas and in accordance with this Protective Order and applicable laws and regulations governing the reproduction of classified information.

25. All documents prepared by the Defense that are known or believed to contain classified information—including, without limitation, notes taken or memoranda prepared by counsel and pleadings or other documents intended for filing with the Commission—shall be transcribed, recorded, typed, duplicated, copied, or otherwise prepared only by persons possessing an appropriate approval for access to such classified information. Such activities shall take place in secure areas, on approved word processing equipment, and in accordance with procedures approved by the CSO. All such documents and any associated materials containing classified information—such as notes, memoranda, drafts, copies, typewriter ribbons, magnetic recordings, and exhibits—shall be maintained in secure areas unless and until the CSO advises that those documents or associated materials are unclassified in their entirety. None of these materials shall

be disclosed to the Government unless authorized by the Commission, by counsel for the Accused, or as otherwise provided in this Protective Order.

26. The Defense may discuss classified information only within secure areas and shall not discuss, disclose, or disseminate classified information over any non-secure communication system, such as standard commercial telephones, office intercommunication systems, or non-secure electronic mail.

27. The Defense shall not disclose any classified documents or information to any person, including counsel in related cases of Guantanamo Bay detainees in military commissions or other courts (including, but not limited to, habeas proceedings), except those persons authorized by this Protective Order, the Commission, and counsel for the Government with the appropriate clearances and the need-to-know that information.

28. To the extent that the Defense is not certain of the classification of information it wishes to disclose, the Defense shall consult with the CSO for a determination as to its classification. In any instance in which there is any doubt as to whether information is classified, the Defense must consider the information classified unless and until it receives notice from the CSO that such information is not classified.

29. Until further order of this Commission, the Defense shall not disclose to the Accused any classified information not previously provided by the Accused to the Defense, except where such information has been approved for release to the Accused and marked accordingly.

30. Except as otherwise stated in this paragraph, and to ensure the national security of the United States, at no time, including any period subsequent to the conclusion of these proceedings, shall the Defense make any public or private statements disclosing any classified information accessed pursuant to this Protective Order, or otherwise obtained in connection with

this case, including the fact that any such information or documents are classified. In the event classified information enters the public domain without first being properly declassified by the United States Government, counsel are reminded that they may not make public or private statements about the information if the information is classified. (See paragraph 7 of this Protective Order for specific examples of information which remains classified even if it is in the public domain.) In an abundance of caution and to help ensure clarity on this matter, the Commission emphasizes that counsel shall not be the source of any classified information entering the public domain, nor should counsel comment on information which has entered the public domain but which remains classified.

VI. PROCEDURES FOR FILING DOCUMENTS

31. Any pleading or other document filed with the Commission in this case, which counsel know, reasonably should know, or are uncertain of whether the filing contains classified information, shall be filed under seal in accordance with the provisions of the M.C.A., R.M.C., M.C.R.E., R.T.M.C., and the Military Commissions Trial Judiciary Rules of Court applicable to filing classified documents or information. Documents containing classified information that is not at the TS/CODEWORD level shall be filed pursuant to the procedures specified for classified information contained in the Trial Judiciary Rules of Court 3(10)(d) to the extent that the material can be transmitted via the Secret Internet Protocol Router Network (SIPR). Information that is classified at the TS/CODEWORD level, including presumptively classified statements of the Accused that have not yet been determined to be unclassified by the appropriate Government agency, cannot be transmitted via SIPR and must be provided in hard copy to the Chief Clerk of the Trial Judiciary.

32. Classified filings must be marked with the appropriate classification markings on each page, including classification markings for each paragraph. If a party is uncertain as to the appropriate classification markings for a document, the party shall seek guidance from the CSO, who will consult with the OCA of the information or other appropriate agency, as necessary, regarding the appropriate classification.

33. When filing classified documents or information under seal, the parties shall file the papers containing classified information with the Military Commissions Trial Judiciary Staff ("Judiciary Staff") and provide notice of the classified filing to the other party. Once a filing is properly filed, the CSO for the Judiciary Staff shall promptly review the filing, and in consultation with the appropriate Government agencies, determine whether the filing contains classified information and is marked appropriately. The Judiciary Staff shall then ensure the classified filing is promptly served on the other party (unless filed *ex parte*) and reflected in the filings inventory with an unclassified entry noting that it was filed under seal.

34. The CSO and Judiciary Staff shall ensure any classified information contained in such filings is maintained under seal and stored in an appropriate secure area consistent with the highest level of classified information contained in the filing. All portions of any filed papers that do not contain classified information will be unsealed (unless filed *in camera* or *ex parte*) for inclusion in the public record.

35. Under no circumstances may classified information be filed in an unsealed filing. In the event a party believes that an unsealed filing contains classified information, the party shall immediately notify the CSO and Judiciary Staff, who shall take appropriate action to retrieve the documents or information at issue. The filing will then be treated as containing classified information unless and until the CSO determines otherwise. Nothing herein limits the

Government's authority to take other remedial action as necessary to ensure the protection of the classified information.

36. Nothing herein requires the Government to disclose classified information. Additionally, nothing herein prevents the Government from submitting classified information to the Commission *in camera* or *ex parte* in these proceedings or entitles the Defense access to such submissions or information. Except for good cause shown in the filing, the Government shall provide the Defense with notice on the date of the filing.

VII. PROCEDURES FOR MILITARY COMMISSION PROCEEDINGS

37. Except as provided herein, and in accordance with M.C.R.E. 505, no party shall disclose or cause to be disclosed any information known or believed to be classified in connection with any hearing or proceeding in this case.

A. Notice Requirements

38. The parties must comply with all notice requirements under M.C.R.E. 505 prior to disclosing or introducing any classified information in this case.

39. Because all statements of the Accused are presumed to contain information classified as TOP SECRET / SCI, the Defense must provide notice in accordance with this Protective Order and M.C.R.E. 505(g) if the Accused intends to make statements or offer testimony at any proceeding.

B. Closed Proceedings

40. While proceedings shall generally be publicly held, the Commission may exclude the public from any proceeding, *sua sponte* or upon motion by either party, in order to protect information the disclosure of which could reasonably be expected to damage national security. If the Commission closes the courtroom during any proceeding in order to protect classified

information from disclosure, no person may remain who is not authorized to access classified information in accordance with this Protective Order, which the CSO shall verify prior to the proceeding.

41. No participant in any proceeding, including the Government, Defense, Accused, witnesses, and courtroom personnel, may disclose classified information, or any information that tends to reveal classified information, to any person not authorized to access such classified information in connection with this case.

C. Delayed Broadcast of Open Proceedings

42. Due to the nature and classification level of the classified information in this case, including the classification of the Accused's statements, the Commission finds that to protect against the unauthorized disclosure of classified information during proceedings open to the public, it will be necessary to employ a forty-second delay in the broadcast of the proceedings from the courtroom to the public gallery. Should classified information be disclosed during any open proceeding, this delay will allow the Military Judge, CSO, or Government to take action to suspend the broadcast—including any broadcast of the proceedings to locations other than the public gallery of the courtroom (e.g., any closed-circuit broadcast of the proceedings to a remote location)—so that the classified information will not be disclosed to members of the public.

43. The broadcast may be suspended whenever it is reasonably believed that any person in the courtroom has made or is about to make a statement or offer testimony disclosing classified information.

44. The Commission shall be notified immediately if the broadcast is suspended. In that event, and otherwise if necessary, the Commission may stop the proceedings to evaluate whether the information disclosed, or about to be disclosed, is classified information as defined in this

Protective Order. The Commission may also conduct an *in camera* hearing to address any such disclosure of classified information.

D. Other Protections

45. During the examination of any witness, the Government may object to any question or line of inquiry that may require the witness to disclose classified information not found previously to be admissible by the Commission. Following such an objection, the Commission will determine whether the witness's response is admissible and, if so, may take steps as necessary to protect against the public disclosure of any classified information contained therein.

46. Classified information offered or admitted into evidence will remain classified at the level designated by the OCA and will be handled accordingly. All classified evidence offered or accepted during trial will be kept under seal, even if such evidence was inadvertently disclosed during a proceeding. Exhibits containing classified information may also be sealed after trial as necessary to prevent disclosure of such classified information.

E. Transcripts

47. Transcripts of all proceedings shall be redacted as necessary to prevent public disclosure of classified information. The Clerk of the Military Commission, in conjunction with the CSO, shall ensure the transcripts of all proceedings are reviewed and redacted as necessary to protect any classified information from public disclosure. An unclassified transcript of each proceeding shall be made available for public release.

48. The Clerk of the Military Commission, in conjunction with the CSO, shall ensure that transcripts containing classified information remain under seal and are properly segregated from the unclassified portion of the transcripts, properly marked with the appropriate security markings, stored in a secure area, and handled in accordance with this Protective Order.

VIII. UNAUTHORIZED DISCLOSURE

49. Any unauthorized disclosure of classified information may constitute a violation of United States criminal laws. Additionally, any violation of the terms of this Protective Order shall immediately be brought to the attention of the Commission and may result in disciplinary action or other sanctions, including a charge of contempt of the Commission and possible referral for criminal prosecution. Any breach of this Protective Order may also result in the termination of access to classified information. Persons subject to this Protective Order are advised that unauthorized disclosure, retention, or negligent handling of classified documents or information could cause damage to the national security of the United States or may be used to the advantage of an adversary of the United States or against the interests of the United States. The purpose of this Protective Order is to ensure that those authorized to receive classified information in connection with this case will never divulge that information to anyone not authorized to receive it, without prior written authorization from the OCA and in conformity with this Order.

50. The Defense shall promptly notify the CSO upon becoming aware of any unauthorized access to or loss, theft, or other disclosure of classified information, and shall take all reasonably necessary steps to retrieve such classified information and protect it from further unauthorized disclosure or dissemination. The CSO shall notify the Government of any unauthorized disclosures of classified information so that the Government may take additional remedial measures as necessary to prevent further unauthorized access or dissemination.

IX. DISPOSITION OF CLASSIFIED INFORMATION

51. All classified documents and information to which the Defense has access in this case are the property of the United States. Upon demand of the CSO or the Government, the Defense

shall return any documents containing classified information in its possession which were obtained in discovery from the Government, or for which the Defense is responsible because of its access to classified information in connection with this case.

52. Unless otherwise ordered or agreed, within sixty days after the final termination of this action, including any appeals, the Defense shall, at its option, return or properly destroy all classified information in its possession in connection with this case, including all notes, abstracts, compilations, summaries, or any other form or reproduction of classified information. The Defense is responsible for reminding any expert witnesses, non-testifying consultants, and all other persons working with the Defense of its obligation to return or destroy classified information related to this case. The Defense shall submit written certification to the CSO and the Government by the sixty-day deadline confirming that all classified information has been returned or destroyed as set forth in this Protective Order.

X. SURVIVAL OF ORDER

53. The terms of this Protective Order and any signed MOU shall survive and remain in effect after the termination of this case.

54. This Protective Order is entered without prejudice to the right of the parties to seek such additional protections, or exceptions to those stated herein, as they deem necessary.

SO ORDERED:

DATED: _____

JAMES L. POHL
COL, JA, USA
Military Judge

**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**

**Memorandum of Understanding
Regarding the Receipt of Classified
Information**

I, _____, [print or type full name], have been provided a copy of and have read Protective Order #1 relating to the protection of classified information in the above-captioned case, and agree to be bound by the terms of that order. I understand that in connection with this case I will receive classified documents and information that are protected pursuant to both the terms of the Protective Order and the applicable laws and regulations governing the use, storage, and handling of classified information. I also understand that the classified documents and information are the property of the United States and refer or relate to the national security of the United States.

I agree that I will not use or disclose any classified documents or information, except in strict compliance with the provisions of the Protective Order and the applicable laws and regulations governing the use, storage, and handling of classified information. I have further familiarized myself with the statutes, regulations, and orders relating to the unauthorized disclosure of classified information, espionage, and other related criminal offenses, including but

not limited to 50 U.S.C. § 421; 18 U.S.C. § 641; 18 U.S.C. § 793; 50 U.S.C. § 783; and Executive Order 13526.

I agree to take all reasonable precautions to prevent any unauthorized use or disclosure of any classified documents or information in my possession or control. I understand that failure to comply with this Memorandum of Understanding Regarding the Receipt of Classified Information (MOU) or any protective order entered in this case could result in sanctions or other consequences, including criminal consequences. I understand that the terms of this MOU shall survive and remain in effect after the termination of this case, and that any termination of my involvement in this case prior to its conclusion will not relieve me from the terms of this MOU or any protective order entered in the case.

I make the above statements under penalty of perjury.

Signature

Date

Witness

Date

Witness

Date

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA)	
)	
v.)	ORDER
)	
KHALID SHAIKH MOHAMMAD;)	
WALID MUHAMMAD SALIH)	
MUBARAK BIN ATTASH;)	
RAMZI BINALSHIBH;)	
ALI ABDUL AZIZ ALI;)	
MUSTAFA AHMED ADAM AL)	_____ April 2012
HAWSAWI)	

Upon consideration of the Government's request to maintain UNDER SEAL the classified declarations of: David H. Petraeus, Director, Central Intelligence Agency, dated 7 April 2012; Information Review Officer, Central Intelligence Agency, dated 12 April 2012; General Douglas M. Fraser, United States Air Force, Commander, United States Southern Command, dated 24 October 2011; Mark F. Guiliano, Assistant Director, Counterterrorism Division, Federal Bureau of Investigation, dated 7 September 2011, (the "Declarations"), and pursuant to the Commission's authority under the Military Commissions Act of 2009, 10 U.S.C. § 948a, *et. seq.*, Rule for Military Commissions 806, Military Commission Rules of Evidence 104, 505-507, and the general supervisory authority of the Commission;

IT IS HEREBY ORDERED that the Declarations contain classified and sensitive but unclassified information that, if publicly released, could reasonably be expected to damage

national security and threaten the safety of individuals, and shall therefore be kept UNDER
SEAL.

SO ORDERED:

DATED: _____

James L. Pohl
COL, JA, USA
Military Judge

CERTIFICATE OF SERVICE

I certify that on the 26 day of April 2012, I filed AE 013, the **Government's Motion To Protect Against Disclosure of National Security Information** with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//

Joanna Baltes
Deputy Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions