

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

**KHALID SHAIKH MOHAMMAD,
WALID MUHAMMAD SALIH
MUBARAK BIN ATTASH,
RAMZI BINALSHIBH,
ALI ABDUL AZIZ ALI,
MUSTAFA AHMED ADAM AL
HAWSAWI**

AE 013AAAA

THIRD SUPPLEMENTAL RULING

Government Motion
To Protect Against Disclosure of
National Security Information

6 July 2015

1. This Commission issued Protective Order #1 on 6 December 2012 (AE 013P) regulating the use and safeguarding of classified information during the pendency of *United States v. Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak BinAttash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi*. On 9 February 2013, *Amended Protective Order #1* was published by the Commission (AE 013AA) and a *Second Amended Protective Order #1* was issued on 16 December 2013 (AE 013DDD).¹

2. After the issuance of the *Second Amended Protective Order #1*, the Defense filed two (2) motions challenging provisions of the Order:

a. Motion to Make Conforming Amendments to AE 013DDD, the Commission's *Second Amended Protective Order #1*, filed 6 January 2014 (AE 013EEE (MAH)) which was

¹ In each instance the Order was accompanied by a ruling setting forth the rationale of the Commission in issuing or amending the order. Ruling, Government Motion To Protect Against Disclosure of National Security Information, 6 December 2012 (AE 013O) preceded Protective Order #1, Government Motion To Protect Against Disclosure of National Security Information, 6 December 2012 (AE 013P); Supplemental Ruling, Government Motion To Protect Against Disclosure of National Security Information, 9 February 2013 (AE 013Z) preceded *Amended Protective Order #1*, Government Motion To Protect Against Disclosure of National Security Information, 9 February 2013 (AE 013AA); and *Second Supplemental Ruling, Government Motion To Protect Against Disclosure of National Security Information*, 16 December 2013 (AE 013CCC) preceded *Second Amended Protective Order #1, To Protect Against Disclosure of National Security Information*, 16 December 2013 (AE 013DDD).

supplemented by Mr. Aziz Ali.² In response the Prosecution requested the Commission deny the relief sought by the Accused.³ Defense replies⁴ reiterated their belief the relief sought was not prohibited by the Classified Information Procedures Act (CIPA).⁵

b. Defense Motion to Conform Definition of “Unauthorized Disclosure” in AE 013DDD [Second Amended] Protective Order #1 with AE 013Z Supplemental Ruling, filed 7 January 2014 (AE 013FFF (AAA)). The Prosecution, in its response,⁶ did not oppose the relief sought by the Defense.

c. The Defense requested argument on both motions; the Government waived argument in both instances, however reserving the right to argue in response to the Defense motion to make conforming amendments to the *Second Amended Protective Order #1* if the Defense was granted an opportunity to present argument.

3. In addition to the two (2) Defense motions, the Prosecution filed a motion to further amend the *Second Amended Protective Order #1*. In December 2014, the Commission, taking cognizance of the public release of the Executive Summary of the Senate Select Committee on Intelligence

² Mr. al Baluchi's Notice of Joinder, Factual Supplement and Argument to Motion to Make Conforming Amendments to AE 013DD, the Commission's *Second Amended Protective Order #1*, filed 13 January 2014 (AE 013EEE(AAA Sup)).

³ Government Response To Defense Motion to Make Conforming Amendments to AE 013DDD, the Commission's *Second Amended Protective Order #1* and Mr. al Baluchi's Notice of Joinder, Factual Supplement and Argument, filed 27 January 2014 (AE 013HHH).

⁴ Reply to Prosecution Response to Defense Motion to Make Conforming Amendments to AE 013DDD, the Commission's *Second Amended Protective Order #1*, filed 3 February 2014 (AE 013KKK (MAH)); Mr. al Baluchi's Reply to Government Response to Motion to Make Conforming Amendments to AE 013DDD, the Commission's *Second Amended Protective Order #1*, filed 5 February 2014 (AE 013LLL (AAA)).

⁵ Classified Information Procedures Act (CIPA) (18 U.S.C.A. App. §§ 1–16).

⁶ Government Response To Defense Motion to Conform Definition of “Unauthorized Disclosure” in AE 013DDD [Second Amended] Protective Order #1 with AE 013Z Supplemental Ruling, filed 22 January 2014 (AE 013GGG).

Study of the Central Intelligence Agency's Detention and Interrogation Program,⁷ directed the Prosecution to reassess the impact of changes to classification guidance, as a result of the release of this study, on the *Second* Amended Protective Order #1.⁸ The Prosecution filed a response on 30 January 2015, requesting further amendment of the *Second* Amended Protective Order #1.⁹ Mr. Aziz Ali filed a response to the Prosecution's motion asserting it did not go far enough in reassessing the classified prohibitions specified in the *Second* Amended Protective Order #1.¹⁰ The Prosecution did not file a reply. The Government did not request argument.

4. Ancillary to the terms of the Protective Order, and each of the amendments, has been a requirement for "each member of the Defense" to execute a Memorandum of Understanding (MOU) as a "condition precedent to ... having access to classified information for the purposes of these proceedings."¹¹ In pertinent part the MOU submitted by the Prosecution states:

I understand that in connection with this case I will receive classified documents and information that are protected pursuant to both the terms of this 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, ...

⁷ Executive Summary: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, <http://www.intelligence.senate.gov/study2014/executive-summary.pdf> (last visited 19 May 2015).

⁸ Trial Conduct Order, 12 December 2014 (AE 331).

⁹ Government Motion to Amend AE 013DDD, *Second* Amended Protective Order #1 To Protect Against Disclosure of National Security Information, filed 30 January 2015 (AE 013RRR (GOV)).

¹⁰ Mr. al Baluchi's Response to Government Motion to Amend AE 013DDD *Second* Amended Protective Order #1 to Protect Against Disclosure of National Security Information, filed 23 February 2015 (AE 013SSS (AAA)).

¹¹ Para 5b; *Second* Amended Protective Order #1, To Protect Against Disclosure of National Security Information. The same requirement was included in the original Protective Order #1 (AE 013P) and the Amended Protective Order #1 (AE 013AA).

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 and the applicable laws and regulations governing the use, storage, and handling of classified information could result in sanctions or other consequences, including criminal consequences.

I understand that the terms of this 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.¹²

Since Protective Order #1 was first considered by the Commission in 2012, four (4) of the Defense Teams¹³ for the Accused have repeatedly refused to sign the MOU. The basis for their objections has varied over time: e.g. during a hearing in 2014 counsel for Mr. Mohammad stated they were bound by the terms of the Order and the MOU was redundant with other security documents they had already signed;¹⁴ another time counsel for Mr. Aziz Ali asserted the MOU was meaningless since the Government had waived application a number of times and was therefore unnecessary;¹⁵ Counsel for Mr. Hawsawi took the position the MOU would prevent the Accused from pursuing legal remedies in other fora to complain about torture;¹⁶ Mr. Mohammad's counsel advanced his belief there is no statutory requirement for the MOU in either the Military Commissions Act of 2009¹⁷ or in CIPA and to withhold classified discovery from an Accused facing capital punishment would violate the "ethical and professional

¹² Attachment E2, Government Motion To Protect Against Disclosure of National Security Information, filed 26 April 2012 (AE 013).

¹³ Counsel for Mr. Aziz Ali have signed the MOU; *see*: Mr. al Baluchi's Notice Of Filing Memoranda of Understanding, filed 24 January 2014 (AE 013JJJ (AAA)).

¹⁴ Unofficial/Unauthenticated Transcript of the KSM et al. (2) Motions Hearing Dated 8/14/2014 from 9:04 AM to 10:46 AM; pp. 8130-32.

¹⁵ Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammed et al (2) Hearing Dated 2/11/2015 from 10:00 AM to 11:15 AM, pp. 8302-03.

¹⁶ Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammed et al (2) Hearing Dated 2/12/2015 from 9:04 AM to 10:31 AM, pp. 8420-21.

¹⁷ Military Commissions Act of 2009, 10 U.S.C. §§948a, *et seq.*, (M.C.A.)

obligations” of counsel in representing their client;¹⁸ and Mr. Aziz Ali’s counsel most recently took the position the MOU controversy interfered with his ability to participate in a joint defense.¹⁹ As a remedy the Defense, save for Counsel for Mr. Aziz Ali, ask they not be required to sign the MOU and be permitted to provide classified discovery to the Accused and others. The Prosecution response requests the Commission deny the Defense motion, require the MOU be signed by a date certain, and require counsel “to show cause as to why they should not be removed as counsel for their respective clients”²⁰ if they fail to sign. The Defense requested oral argument on this issue; the Government response waived argument.

5. DISCUSSION

a. The Defense requested oral argument for AE 013EEE (MAH), AE 013EEE (AAA Sup), AE 013FFF (AAA) and AE 013III. The Prosecution’s position regarding to AE 013EEE (MAH) and AE 013EEE (AAA Sup) was oral argument was not required, however if the Defense request was granted, the Prosecution desired to be heard. The Government waived argument as to AE 013FFF and AE 013III. In accordance with Rule for Military Commission (R.M.C.) 905(h) the decision to grant oral argument on a written motion is within the sole discretion of the Military Judge.²¹ In this instance, oral argument is not necessary to the Commission’s consideration of the issues before it. The Defense requests for oral argument in conjunction with AE 013EEE (MAH) and AE 013EEE (AAA Sup), AE 013FFF (AAA) and AE 013III are **DENIED**.

¹⁸ Motion for Appropriate Relief (Defense Legal Objections to Order to Sign MOU (AE 013CCC and AE 013DDD), filed 23 January 2014 (AE 013III (KSM)).

¹⁹ Mr. al Baluchi’s Motion to Strike MoU Requirement, filed 28 May 2015 (AE 013TTT (AAA)).

²⁰ Government Response To Motion for Appropriate Relief Defense Legal Objections to Order to Sign MOU (AE 013CCC and AE 013DDD), filed 5 February 2014 (AE 013MMM).

²¹ Military Commissions Trial Judiciary Rule of Court 3(5)(m) (5 May 2014).

b. Since the Government motion for a Protective Order was first filed in April 2012 it has become even more apparent the juxtaposition of the Government's perception of CIPA on trials under the Military Commissions Act has been an imperfect fit, both by the very nature of who the Accused are²² and because of the pre-existing security structure inherent in any military organization.²³ For instance, the draft order,²⁴ provided by the Government with the original motion, did not recognize the security structure already in place within the Department of Defense to provide security clearances or establish and manage Secure Classified Information Facilities (SCIFs), and outlined a number of security provisions that are second nature within most military organizations. Since then the series of amendments have reinforced the need to tailor the Protective Order to fit the Commissions process, as was the expectation of Congress.²⁵

c. Mr. Hawsawi's motion²⁶ asks two things of the Commission: first, to extend the suspense date requiring members of the Defense to sign the MOU until such time as the Commission has the opportunity to rule on this motion; second, to change the *Second* Amended Protective Order #1 to conform with the Order of the Commission denying relief on their motion to dismiss alleging Amended Protective Order #1 violated the Convention Against Torture

²² As articulated in the Senate report the purpose of CIPA was to address criminal prosecutions involving situations when "...intelligence information had been passed to foreign powers through espionage or through leaks to the media. (See: S. REP. 96-823, S. Rep. No. 823, 96TH Cong., 2ND Sess. 1980). The Accused before this Commission are charged as "unprivileged enemy belligerents" by definition they alleged to have engaged in or supported hostilities against the United States. (See Rule for Military Commission 103(a)(29).

²³ In AE 0130, the Ruling issuing Protective Order #1 in December 2012 the Commission opined "[t]he draft protective order provided by the Government, while closely mirroring that used in *U.S. v Ghailani* and other federal cases, is not totally appropriate for use in the Commissions."

²⁴ Attachment E, Government Motion To Protect Against Disclosure of National Security Information, filed 26 April 2012 (AE 013).

²⁵ "The details of each order are fashioned by the trial judge according to the circumstances of the particular case." (See: S. REP. 96-823, S. Rep. No. 823, 96TH Cong., 2ND Sess. 1980).

²⁶ See AE 013EEE (MAH).

(CAT).²⁷ As to the first request, the delay is *fait accompli* attributable to issues presented by other motions.²⁸ The *gist* of the second request was the MOU required by Protective Order #1 interfered with the Accused's right to seek redress through venues or agencies other than the Commission because of the limitations placed on counsel in assisting their clients in seeking alternate relief. The specific change requested was to amend paragraph 8(b) by deleting the "Accused" from the prohibition. Paragraph 8(b) now states:

(b) 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. (*emphasis added*)

The rationale offered for the deletion of the reference to "Accused"²⁹ lies in the Commission determination in AE 200II the Accused do not have an obligation to safeguard classified information as they are not subject to the statutes,³⁰ Executive Orders,³¹ administrative regulations,³² or signed security agreements³³ imposing such an obligation. Moreover, in the ruling³⁴ accompanying the *Second* Amended Protective Order #1, the Commission removed language defining classified information as including "without limitation, observations and

²⁷ Order to Defense Motion To Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture, 16 December 2013 (AE 200II).

²⁸ See: Government Motion For R.M.C. 909 Hearing in April 2014 and Direct Inquiry by the Military Judge to Mr. Binalshibh Regarding His Capacity to Stand Trial By Military Commission, filed 4 February 2014 (AE 152J); Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused, filed 13 April 2014 (AE 292 *et seq.*).

²⁹ The Commission notes a similar use of "Accused" in para 5f of the Order.

³⁰ See generally 18 U.S.C. §793, 18 U.S.C. §798, 18 U.S.C. §1924, 50 U.S.C. §421, 50 U.S.C. §426, and 50 U.S.C. §783.

³¹ Classified National Security Information, Exec. Order No.13526, 75 Fed. Reg. 707 (2009).

³² See generally, DoD Dir 5210.50, Unauthorized Disclosure of Classified Information to the Public, 22 July 2005; Army Regulation 380-5, Department of The Army Information Security Program, 29 September 2000; Air Force Instruction 31-401, Information Security Program Management, November 2005, through Interim Change 1, 19 August 2009; and, Secretary of the Navy Manual 5510.36, 30 June 2006.

³³ Classified Information Non-Disclosure Agreement, Standard Form 312 (Rev 7-2013), Sensitive Compartmented Information Nondisclosure Agreement Form 4414; Affidavit and Agreement by Civilian Defense Counsel (MC Form 9-2); and the MOU required by the Commission Protective Order.

³⁴ AE 013CCC.

experiences of the accused with respect to the matters” set out in subparagraphs specifying categories of classified information.³⁵ Mr. Hawsawi believes the cumulative effect of continuing to include “Accused” in paragraph 8(b) “imposes an affirmative obligation on Defense Counsel to police the accused and prevent them from exercising rights they have under international law to seek investigation and recourse as victims of torture.”³⁶ Mr. Aziz Ali’s factual supplement advances two (2) additional requests: first, amend paragraph 8(a)(1) to “mirror” Military Commission Rule of Evidence (MCRE) 505(g); second, clarification that the testimony of the Accused “on any topic, is not classified unless it references classified information obtained by the defendants in the military commission process.”³⁷ The Government response³⁸ requested denial in that:

...the Defense is seeking tacit support from this Commission for the Accused to disclose classified information to uncleared, foreign individuals. Although such disclosures will be limited based on practical safeguards within JTF-GTMO and prior Commission orders, the statutory rules prohibiting the unauthorized disclosure of classified information govern the actions of all participants in this proceeding, and this Commission need not make a change.

Further, Mr. Aziz Ali “seeks an amendment to paragraph 8(a)(1) that would fundamentally alter the definition of classified information in a manner that is inconsistent with Executive Branch determinations” by altering “the definition of classified information to only that ‘information obtained by the defendant through the military commissions process.’” The position the Commission has taken in regard to the “obligation” of the Accused to protect our secrets is reinforced by the stated intent of Congress when they enacted CIPA to govern discovery in criminal trials involving

³⁵ Para 6i, AE 013CCC.

³⁶ Para 3, AE 013EEE (MAH).

³⁷ Para. 3, AE 013EEE (AAA Sup).

³⁸ Para. 4, AE 013HHH (GOV).

classified information. The Senate Report regarding CIPA specifically demarcates protections afforded classified information in the court process from other venues stating:

The court is given authority to issue orders protecting against the disclosure of classified materials in connection with the prosecution by the United States. To the *extent that such information has been given to the defendant in the course of discovery* under Federal Rule of Criminal Procedure 16, this authority makes explicit the protective orders permitted under that Rule. An order protecting materials under Rule 16 (of 'Brady' materials) can forbid disclosure by a defendant or an attorney in any context. *If the defendant already had classified materials in his possession, such protective order can prevent disclosure in connection with the trial but it cannot be expected to reach disclosure outside the trails (sic). Federal criminal statutes apply to such disclosures.* The details of each order are fashioned by the trial judge according to the circumstances of the particular case.³⁹ (emphasis added)

Reading of the Congressional intent, buttressed by the few trial decisions,⁴⁰ leads to an interpretation by this Commission as to information that the United States has determined is classified, but already known by an Accused, is outside the scope of discovery. The intent expressed by the Congress obviously contemplated unauthorized disclosure of classified information under such circumstances would be governed by separate criminal proceedings. The Commission has doubts as to whether this recourse is available to prosecute purported avowed enemies of the United States but that is beyond the determination to be made now. It is clear, CIPA governs the discovery and use of all classified information, even information known by an accused before the criminal proceeding, at all stages of a criminal trial; CIPA protects classified information, provided during discovery "in any context," including outside the trial; but CIPA does not afford protection to classified information known by an Accused prior to the discovery process that is disclosed outside of the trial.

³⁹ Section 3- Protective Orders, S. REP. 96-823, S. Rep. No. 823, 96TH Cong., 2ND Sess. 1980.

⁴⁰ *U.S. v. Chalmers*, 2007 WL 591948 (S.D.N.Y. 2007), *U.S. v. Oakley*, 2008 WL 4559810 (E.D.Tenn. 2008), *U.S. v. Pappas*, 94 F.3d 795 C.A.2 (N.Y. 1996).

Mr. Aziz Ali joined Mr. Hawsawi's motion, and requested the Commission to amend the testimonial notice provision of the Order and "make clear that testimony by the defendants, on any topic, is not classified unless it references classified information obtained by the defendants in the military commissions (sic) process."⁴¹ Just as the legislative intent showed limitations on the courts' ability to control the disclosure of previously known classified information outside the trial process, it also clearly indicates "[i]f the defendant already had classified materials in his possession, such protective order can prevent disclosure in connection with the trial[.]"⁴² The notice provisions of M.C.R.E. 505(g) as to information known to be classified, and the 40 second delay authorized by this Protective Order, used to buffer the unauthorized disclosure of classified information, provide necessary protections for the Government in this regard.

d. The Defense requests⁴³ the Commission amend *Second* Amended Protective Order #1 so as to have the definition of "unauthorized disclosure" in paragraph 2(k) comport with the previous version of the Protective Order and the ruling that accompanied it.⁴⁴ The Government did not oppose this change.⁴⁵

e. In response to an Order⁴⁶ of the Commission, the Government has proposed a further amended Protective Order⁴⁷ that takes into consideration changes in specifically classified information based on changes in policy due to the release of the Executive Summary of the Senate Select Committee on Intelligence Study of the Central Intelligence Agency's Detention and Interrogation Program. In the previous versions of the Protective Order the definition of

⁴¹ AE 013EEE (AAA Sup) paragraph 2.

⁴² Section 3- Protective Orders, S. REP. 96-823, S. Rep. No. 823, 96TH Cong., 2ND Sess. 1980

⁴³ AE 013FFF (AAA).

⁴⁴ AE 013Z and AE 013AA.

⁴⁵ AE 013GGG.

⁴⁶ AE 331.

⁴⁷ AE 013RRR (GOV).

“classified national security information and/or documents,” “classified information,” and “classified documents” included five specific categories of information:

(4) 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:

- (a) Information that would reveal or tend to reveal details surrounding the capture of an accused other than the location and date;
- (b) Information that would reveal or tend to reveal the foreign countries in which: Khalid Shaikh Mohammad and Mustafa Ahmed Adam al Hawsawi were detained from the time of their capture on or about 1 March 2003 through 6 September 2006; Walid Muhammad Salih Bin “Attash and Ali Abdul Aziz Ali were detained from the time of their capture on or about 29 April 2003 through 6 September 2006; and Ramzi Bin al Shibh was detained from the time of his capture on or around 11 September 2002 through 6 September 2006;
- (c) The names, identities, and physical descriptions of any persons involved with the capture, transfer, detention, or interrogation of an accused or specific dates regarding the same, from on or around the aforementioned capture dates through 6 September 2006;
- (d) The enhanced interrogation techniques that were applied to an Accused from on or around the aforementioned capture dates through 6 September 2006, including descriptions of the techniques as applied, the duration, frequency, sequencing, and limitations of those techniques; and
- (e) Descriptions of the conditions of confinement of any of the Accused from on or around the aforementioned capture dates through 6 September 2006;⁴⁸

The Government motion would eliminate subparagraphs (d) and (e) but otherwise keeps the remainder of the Order intact.

f. In his response⁴⁹ to the Government motion Mr. Aziz Ali did not oppose the position of the Government, but maintained it did not clearly reflect all the changes in classification brought forth with release of the Senate Report. He requested the Commission consider including language from another series of motions, concerning discovery of the entire Senate Report, as a modifier to the remaining three subparagraphs. In a notice by the Government as to status of

⁴⁸ Para 2g(4). AE 013DDD.

⁴⁹ AE 013SSS (AAA).

providing discovery of the Senate Report the Government took this interim position in reference to the Protective Order:

All unredacted information specifically set forth within the four corners of the Executive Summary is unclassified even where such information would otherwise fit within one of the above five categories. Conversely, any information that fits within one or more of the above five categories that is not specifically set forth within the four corners of the Executive Summary remains classified and must continue to be treated as classified until such time as further classification guidance is provided by the United States.⁵⁰

Mr. Aziz Ali takes the position this modifying language should be used in interpreting the parameters of the remaining three subparagraphs in the Protective Order. The Government did not offer a reply as to this interpretation.

g. The Defense is correct in asserting the MOU, required by the Government before it will provide any classified discovery to the Defense, is not specifically required by statute or regulation. The Defense is partially correct when they assert it is redundant with the multitude of other forms previously executed in connection with obtaining a security clearance. The Government is equally right, however, when it asserts the MOU provides an “audit” trail of who has had access to the classified discovery. In the eyes of the Commission the MOU is the next step in establishing accountability for having access to classified materials. To this point the clearance procedures have been general in nature; basically the same for anyone having access to classified materials and the requisite need to know. Thus, Counsel in this case and a military intelligence officer on the battlefield have all executed the same documents. The Protective Order establishes procedures out of the norm for criminal trials and accountability for specific access to classified discovery provided for use in this specific trial and this trial alone. The

⁵⁰ Government Fifth Notice To Defense Motion To Compel Discovery of Senate Select Committee on Intelligence Study of RDI Program and Related Documents, filed 15 December 2014 (AE 286G (GOV)).

“normal” criminal trial, whether it be a military court-martial or a prosecution in Federal District Court does not have a Court Information Security Officer, specialized filing procedures or specific storage facilities for discovery material - all of which are provided for by the Protective Order. In the same vein, the Protective Order translates the general requirements for access to classified materials and applies them to the discovery requirements mandated by the needs of this specific trial. As stated previously, Congress recognized the need for the court to tailor the Protective Order to fit the trial. After the protracted litigation involving this Order, and the number of modifications either agreed upon by the parties or directed by the Commission, this Order has shifted the discovery dynamic in a number of ways, but still needs to provide for accountability for access to the classified materials provided to counsel for the Accused. Since this is a joint trial, the Commission is aware, from having reviewed classified materials both for release to the parties and filed by the parties that counsel for the Accused have access to different information pertaining to their client. This demonstrates the need to track who receives classified discovery and what classified information is provided to each Defense Team. As such, the MOU provides the Commission with the necessary information to fulfill its obligation to protect national security interests as envisioned by Congress when it enacted CIPA.

h. Defense counsel have opposed signing the MOU, in part, because of desires to share classified information either with the Accused or with other fora who they believe may assist in freeing their client. The Commission is specifically prohibited from ordering the release of classified information to any person, including an Accused, not authorized to receive it. 10 U.S.C. § 949p-1(a). However, as a corollary, the Commission must balance the requirement of preventing disclosure of classified information to those not authorized to receive it with the responsibility of ensuring that the accused has access to any information admitted into evidence.

10 U.S.C. § 949p-1; Military Commission Rule of Evidence (M.C.R.E.) 505. Federal courts have held that limiting disclosure of classified or otherwise sensitive information to a defendant's counsel, while withholding it from the defendant personally under the terms of a protective order, is permitted under CIPA and does not violate the defendant's constitutional rights a belief shared by this Commission.⁵¹ There is a clear distinction between classified material provided during the course of discovery and classified information admitted into evidence. In distinct contrast to 10 U.S.C. § 949p-1(a), the next subsection states:

Any information admitted into evidence pursuant to any rule, procedure, or order by the military judge shall be provided to the accused. 10 U.S.C. § 949p-1(b)

without distinction as to classification or the lack thereof. Thus the CIPA based limitations on discovery are not directly applicable as to evidence admitted for use during trial. As to sharing classified information with other organizations, courts or assemblies this Commission has previously held⁵² determinations in regard to classifications and "need to know" are rightly reserved to the Executive Branch and it is beyond the authority of this Commission to usurp Executive authority to make such a decision or to authorize counsel to usurp this authority.

i. After reflection, the Commission recognizes the requirement for the execution of the MOU is an appropriate and necessary prerequisite for classified discovery for all members of each defense team who will have access to that classified information. The MOU documents recognition of how classified information will be safeguarded in this specific trial and provides the CISO with a listing of who is permitted to participate both in discovery and during any

⁵¹ See: *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93 (2d Cir. 2008), *United States v. Klimavicius-Viloria*, 144 F.3d 1249 (9th Cir. 1998), *United States v. Rezaq*, 156 F.R.D. 514 (D.D.C. 1994).

⁵² ORDER, Mr. al Baluchi's Motion to Amend Protective Order #1 to Allow Defense to Share Information with Cleared Habeas Counsel, 1 July 2015 (AE 013ZZZ); ORDER, Mr. al Baluchi's Motion to Authorize Counsel to Provide Classified Information to Appropriately Cleared Members of the Legislative Branch, 12 March 2015 (AE 232C).

closed sessions pertaining to discovery. The various objections of the Defense have been duly noted and are a part of the record of this trial. To progress further the responsibilities must be acknowledged or, as requested by the Government, counsel removed from the case having already been provided ample chance to press their objections.⁵³ As expressed in a previous ruling “Memorandums of Understanding (MOU) can be provided to the Chief Security Officer of the Office of Special Security and the Court Security Officer. In turn, the Chief Security Officer, can provide the Prosecution the names of the Defense team members, identified on the record, and who have executed the MOU. The MOUs for Defense Team members who have been provided *ex parte* may be provided, under seal, to the Chief Security Officer of the Office of Special Security and the Court Security Officer under seal and will not be further released without authority of the Commission.”⁵⁴

6. FINDINGS:

a. Mr. Hawsawi’s request for an extension on the suspense date to sign the MOU has been overcome by events and circumstances of litigation.

b. Congress intended to provide measures to control discovery and the use of classified information during a criminal trial. Congress did not intend to attempt to control what an Accused does with previously-known classified information outside the trial process. The Government has other remedies if classified information is disclosed in venues other than this Commission. The Accused, who, if convicted, are considered enemy belligerents, should face different restrictions even though remedies outside the Commission may be limited. The *Third*

⁵³ Government Response To Motion for Appropriate Relief (Defense Legal Objections to Order to Sign MOU (AE 013CCC and AE 013DDD), filed 5 February 2014 (AE 013MMM); Government Response To Order to Show Cause Government Motion To Protect Against Disclosure of National Security Information, filed 26 September 2014 (AE 013PPP), Government Response To Mr. Ali’s Motion to Strike MoU Requirement, filed 10 June 2015 (AE 013VVV).

⁵⁴ Para 6a, AE 013CCC.

Amended Protective Order will recognize this by making the change suggested by Mr. Aziz Ali (para 3f) and a conforming change in paragraph 8(2)(b). However, any information considered to be classified, whatever the source, will be treated as classified during Commission proceedings. Counsel are cautioned that while the Accused may not be subject to limitations on what they can do with information, counsel are, and counsel must adhere to all the protections afforded classified information and material.

c. Mr Aziz Ali's supplement⁵⁵ to Mr. Hawsawi's motion also asked the Commission to modify paragraph 8a(1) of the Protective Order to "mirror" Commission Rule of Evidence (MCRE) 505(g) and clarify that the testimony of the Accused "on any topic, is not classified unless it references classified information obtained by the defendants in the military commission process." The Government acceded to the first change amending the language to read:

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, *including classified information introduced through the testimony of a defendant.*

The Government opposed the second change limiting the concept of classified information to that which an Accused learned through the discovery process. The intent of Congress is clear on this issue⁵⁶ and the Commission will follow that guidance. Testimony by an Accused concerning information properly classified by an Original Classification Authority will be treated as classified no matter its origin.

d. The Defense Motion to Conform the Definition of "Unauthorized Disclosure" in the *Second Amended Protective Order #1* (AE 013DDD) with AE 013Z Supplemental Ruling was not opposed by the Government.

⁵⁵ AE 013EEE (AAA Sup)

⁵⁶ "If the defendant already had classified materials in his possession, such protective order can prevent disclosure in connection with the trial..." See : S. REP. 96-823, S. Rep. No. 823, 96TH Cong., 2ND Sess. 1980.

e. The reassessment of the categories of classified categories of information identified in the *Second* Amended Protective Order was coordinated by the Prosecution at the behest of the Commission. As a result, two (2) of the five (5) categories are to be removed entirely. Mr. Aziz Ali believes this does not suffice and challenges the remaining three (3) categories. As this Commission has noted before:

The military judge, like any other judge, lacks authority to abridge the powers of the Executive to properly safe guard information relating to our national security. *Jewel v. National Security Agency*, 2013 WL 3829405 (N.D.Cal., 2013); *Fazaga v. F.B.I.*, 884 F.Supp.2d 1022 (C.D.Cal. 2012); *Al-Haramain Islamic Foundation v. Bush*, 451 F. Supp.2d 1215 (D. Or. 2006).

The Commission lacks the authority to tell an Original Classification Authority they are “wrong” in the exercise their office in defining what information is or is not classified, To provide some definition to the remaining three (3) categories the Commission will incorporate, by reference, the classification guidance provided as part of the Government’s motion.⁵⁷

f. Pursuant to 10 U.S.C. §§ 949p-1 to 949p-7, Rules for Military Commissions 701 and 806, Military Commission Rule of Evidence 505, Regulation for Trial by Military Commission (R.T.M.C.) §17-3, and the general judicial authority of the Commission, the release of classified information is restricted to those persons with the appropriate clearance and need to know. Defense Counsel for the accused possess the appropriate clearances and need to know in order to receive access to classified information, which enables them to provide effective assistance to the Accused during pretrial discovery.

7. RULING:

⁵⁷ Attachment B, AE 013RRR.

- a. The Defense motion (AE 013EEE) (MAH)) to extend the time to respond to the requirement to sign the Memorandum of Understanding is **MOOT**;
- b. The Defense motion (AE 013EEE) to further amend the *Second* Amended Protective Order #1 to conform with previous orders is **GRANTED**;
- c. The motion of Mr. Aziz Ali (AE 013EEE (AAA Sup)) to amend the *Second* Amended Protective Order #1 is **GRANTED in part**;
- d. The Defense motion (AE 013FFF) (AAA)) to amend paragraph 2(k) of the Order is not opposed by the Government and is **GRANTED**;
- c. The Government motion (AE 013RRR (GOV)) to amend the *Second* Amended Protective Order #1 is **GRANTED**;
- d. the Defense motion (AE 013SSS (AAA)) to interpret the Protective Order in consonance with AE 286 was not opposed by the Government and is **GRANTED in Part**; the Protective Order will incorporate by reference the classification guide submitted by the Government at Attachment B to their motion;
- e. the Defense motion (AE 013TTT) to eliminate the requirement for the MOU is **DENIED**;
- f. The motion of the Government (AE 013VVV (GOV)) to have all members of the Defense teams sign the MOU that accompanies the *Third Amended* Protective Order #1 is **GRANTED**. All members of each Defense Team who will have access to the classified discovery provided by the Government will sign the MOU and submit it to the Chief Security Officer, Office of Special Security, and submit copies to the Court Information Security Officer not later than 7 August 2015; and

g. A *Third Amended* Protective Order #1, with the MOU to be executed, will be issued in conjunction with this RULING.

So ORDERED this 6th day of July 2015.

//s//
JAMES L. POHL
COL, JA, USA
Military Judge