

UNCLASSIFIED//FOR PUBLIC RELEASE  
**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 013EEEE (GOV)**

**Government Response**

To Defense Motion to  
Reconsider and/or Modify AE013AAAA,  
*Third* Supplemental Ruling, Government  
Motion to Protect Against Disclosure of  
National Security Information and  
AE013BBBB, *Third Amended* Protective  
Order #1 to Protect Against Disclosure of  
National Security Information

13 August 2015

**1. Timeliness**

This Response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.

**2. Relief Sought**

The Prosecution respectfully requests that this Commission deny without oral argument the requested relief in AE 013CCCC (KSM). Further, the Prosecution requests that this Commission order Defense counsel to sign the Memorandum of Understanding Regarding Receipt of Classified Information no later than 21 August 2015 or be considered disqualified.

**3. Burden of Proof**

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

**4. Overview**

The Defense Motion for Reconsideration should be denied. If the Defense Motion for Reconsideration, however, is granted, the Defense requested relief therein should be denied as well. Defense counsel has all of the resources and classification guidance it requires to effectively represent their client and the Memorandum of Understanding Regarding Receipt of

Classified Information (“MoU”) has no impact to the contrary. A criminal defendant's Sixth Amendment right to counsel of one's choice is not absolute, and the right to counsel of choice does not extend to defendants who require counsel to be appointed for them.

Based upon the record that has been established on this issue over the course of three years, and balancing proper considerations of judicial administration, the Commission is legally justified in coming to the reasoned decision to disqualify members of the four Defense teams who have not signed the MoU as ordered. The Defense motion should be denied, and Defense counsel ordered to sign the MoU no later than 21 August 2015. If they have not signed by that date, they should be considered disqualified by this Commission.

## **5. Facts**

Under clear authority granted to it in statute and implementing rules, this Commission issued Protective Order #1 on 6 December 2012 (AE 013P) in order to safeguard and regulate the use of classified information during the pendency of *United States v. Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin ‘Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi*. After additional argument, Protective Order #1 was later amended on 9 February 2013, *see* AE 013AA, *Amended Protective Order #1*, and once again on 16 December 2013. *See* AE 013DDD, *Second Amended Protective Order #1*.<sup>1</sup>

Despite multiple amendments made to Protective Order #1, however, the Military Judge has unequivocally maintained throughout that, ancillary to the terms of the Protective Order, and each of the amendments, it is a requirement for “each member of the Defense” to execute an MoU as a “condition precedent to ... having access to classified information for the purposes of

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<sup>1</sup> Following issuance of the *Second Amended Protective Order #1*, the Defense filed two (2) motions challenging provisions of the Order: Motion to Make Conforming Amendments to AE 013DDD, the Commission’s *Second Amended Protective Order #1*, filed 6 January 2014 (AE 013EEE (MAH)), and Mr. al Baluchi 's Notice of Joinder, Factual Supplement and Argument to Motion to Make Conforming Amendments to AE 013DDD, the Commission's *Second Amended Protective Order#1*, filed 13 January 2014 (AE 013EEE(AAA Sup)). *See* AE 013AAAA (Third Supplemental Ruling).

these proceedings.” See AE 013P at ¶ 5.b.; AE 013AA at ¶ 5.b.; AE 013DDD at

¶ 5.b. That MoU, which was submitted by the Prosecution, states, in pertinent part:

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 . . .

AE 013P, Attachment.

On 14 July 2014, the Prosecution filed AE 308A (GOV), in which the Prosecution committed to disclose, provided that the Defense can articulate with requisite particularity its theory of relevance and materiality to this case, the ten categories of information first articulated in *United States v. Al Nashiri*. See AE 308A (GOV). Those ten categories of information were outlined as follows:

- (1) A chronology identifying where the Accused was held in detention between the date of his capture to the date he arrived at Guantanamo Bay, Cuba in September 2006;
- (2) A description of how the Accused was transported between the various locations including how he was restrained and how he was clothed;
- (3) All records, photographs, videos, and summaries the Government of the United States has in its possession, which document the condition of the Accused’s confinement at each location, and the Accused’s conditions during each movement between the various locations;
- (4) The identities of medical personnel (examining and treating physicians, psychologists, psychiatrists, mental health professionals, dentists, etc.), guard force personnel, and interrogators, whether employees of the United States Government or employees of a contractor hired by the United States Government, who had direct and substantial contact with the Accused at each location and participated in the transport of the Accused between the various locations. This includes individuals described in paragraph 10a and 10d of the Defense Request for Discovery dated 9 August 2012. (Attachment A of AE 120)

- (5) Copies of the standard operating procedures, policies, or guidelines on handling, moving, transporting, treating, interrogating, etc., high value detainees at and between the various facilities identified in paragraph 5a. This includes documents described in paragraphs 15, 17, 18, 21a, and 22 of the Defense Request for Discovery dated 9 August 2012. (Attachment A of AE 120);
- (6) The employment records of individuals identified in paragraph 13d of this order and 5d of AE 120 limited to those documents in the file memorializing adverse action and/or positive recognition in connection with performance of duties at a facility identified in paragraph 13a of this order and 5a of AE 120 or in transporting the Accused between the various facilities;
- (7) The records of training in preparation for the performance of duties of the individuals identified in paragraph 13d of this order and 5d of AE 120 above at the various facilities or during transport of the Accused.
- (8) All statements obtained from interrogators, summaries of interrogations, reports produced from interrogations, interrogations logs, and interrogator notes of interrogations of the Accused and all co-conspirators.
- (9) Copies of requests with any accompanying justifications and legal reviews of same to employ Enhanced Interrogation Techniques on the Accused and all co-conspirators identified in Appendix C of the Charge Sheet dated 15 September 2011. This includes documents described in paragraphs 48, 49, and 51 of the Defense Request for Discovery dated 9 August 2012 (Attachment A of AE 120), with “particular detainees” being the Accused and all co-conspirators identified in Appendix C of the Charge Sheet dated 15 September 2011; and,
- (10) Copies of documents memorializing decisions (approving or disapproving), with any additional guidance, on requests identified in para 5i to employ Enhanced Interrogation Techniques on the Accused and all co-conspirators identified in Appendix C of the Charge Sheet.

*Id.* at 17-22.

On 6 July 2015, the Commission issued AE 013AAAA, its *Third* Supplemental Ruling, Government Motion to Protect Against Disclosure of National Security Information. In its ruling, the Commission, among other things, denied the Defense motion (AE 013TTT) to eliminate the requirement for the MoU and granted the Prosecution’s motion (AE 013VVV (GOV)) to have all members of the Defense teams sign the MoU. AE 013AAAA at 18. In so doing, the Commission ordered “all members of each Defense Team who will have access to the classified discovery provided by the Government [to] sign the MoU . . . ,” and

issued a *Third Amended* Protective Order #1 in conjunction with its Ruling. *Id.* at 18. Further, the Military Judge took note and incorporated, by reference, the additional classification guidance provided to the Defense by the Prosecution in AE 013RRR (GOV), Attachment B, “Classification Guidance for Information about the Central Intelligence Agency’s Former Rendition, Detention, and Interrogation Program.” *See* AE 013AAAA at 17.

On that same day, the Military Judge issued AE 013BBBB, *Third Amended* Protective Order #1. Like its predecessors, the *Third Amended* Protective Order #1 states that,

[w]ithout authorization from the Government, no member of the Defense, including defense witnesses, shall have access to classified discovery in connection with this case unless that person has: (1) received the necessary security clearance from the appropriate DoD authorities and signed an appropriate non-disclosure agreement, as verified by the Chief Security Officer, Office of Special Security; (2) signed the Memorandum of Understanding Regarding Receipt of Classified Information (MOU), attached to this Protective Order, and (3) a need-to-know for the classified information at issue, as determined by the Government for that information.

AE 013BBB at 9. It further states that,

[i]n order to be provided access to classified discovery in connection with this case, each member of the Defense shall execute the attached MOU, file the executed originals of the MOU with the Chief Security Officer, Office of Special Security, and submit copies to the CISO. The execution and submission of the MOU is a condition precedent to the Defense having access to classified discovery for the purposes of these proceedings.

*Id.* at 9. The Protective Order also defines “classified national security information” as,

- (1) 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 any information controlled as “SENSITIVE COMPARTMENTED INFORMATION (SCI);”
- (2) 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)";

- (3) verbal or non-documentary classified information known to the Defense;
- (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; *and*
  - (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.
- (5) 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

*Id.* at 4-6.

Prior to the issuance of the Commission's *Third Amended* Protective Order #1, the Military Judge provided each Defense team with a Defense Information Security Officer (DISO). Under the *Third Amended* Protective Order #1, the DISO is charged with the following responsibilities:

- (1) Assist the Defense with applying classification guides, including reviewing pleadings and other papers prepared by the defense to ensure they are unclassified or properly marked as classified.
- (2) Assist the Defense in performing their duty to apply derivative classification markings pursuant to E.O. 13526 §2.1(b).
- (3) Ensure compliance with the provisions of any Protective Order.

See AE 013BBBB at 7-8.

As in other versions of Protective Order #1, within *Third Amended* Protective Order #1, the Military Judge additionally provided Defense counsel with the ability to seek classification review determinations in procedures designed, to the fullest extent possible, to preserve the lawyer-client and other legally-recognized related privileges. See AE 013BBBB at 7-8. The procedures set forth for security review are as follows:

- (1) The Defense may submit documents to the Chief Security Officer, Office of Special Security with a request for classification review. If the Defense claims privilege for a document submitted for classification review, the defense shall banner-mark the document "PRIVILEGED."
- (2) The Chief Security Officer, Office of Special Security, shall consult with the appropriate OCA to obtain classification review of documents submitted for that purpose. The Chief Security Officer, Office of Special Security, shall not disclose to any other entity any information provided by a DISO, including any component of the Office of Military Commissions, except that the entity may inform the military judge of any information that presents a current threat to loss of life or presents an immediate safety issue in the detention facility. This does not include administrative matters necessary for the management of the security responsibilities of the Office of Military Commissions.
- (3) Submission of documents for classification review shall not be construed to waive, limit, or otherwise render inapplicable the attorney-client privilege or work product protections.

AE 013BBBB at 8.

In implementing its *Third Amended* Protective Order #1 and the above provisions, the Commission specifically found that "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." AE 013AAAA at 14. In arriving at this conclusion, the Commission held that "the MoU documents recognition of how classified information will be safeguarded in this specific trial and provides the [Court Information Security Officer (CISO)] with a listing of who is permitted to participate both in discovery and during any closed sessions pertaining to discovery." *Id.* at 14-15. Further, the Commission stated that, "the various objections of the Defense have been duly noted and are part of the record

of this trial,” but found that “[t]o progress further, the responsibilities [under Protective Order #1] must be acknowledged or, as requested by the Government, counsel removed from the case having been provided ample chance to press their objections.” *Id.* at 15.

## **6. Law and Argument**

### **I. The Defense Motion for Reconsideration Should Be Denied**

Rule for Military Commissions (R.M.C.) 905(f) permits the Military Judge to reconsider any ruling, other than one amounting to a finding of not guilty, prior to the authentication of the record of trial. However, granting of the request for reconsideration is in the Military Judge’s discretion. *See, e.g.*, AE 108AA at 2 (“Generally, reconsideration should be limited to a change in the facts or law or instances where the ruling is inconsistent with case law not previously briefed.”). Courts grant motions for reconsideration if “there has been an intervening change in controlling law, there is new evidence, or there is a need to correct clear error or prevent manifest injustice.” *United States v. Libby*, 429 F. Supp. 2d 46, 46-47 (D.D.C. 2006) (internal quotation marks omitted); *accord Nat’l Ctr. for Mfg. Sciences v. Dep’t of Defense*, 199 F.3d 507, 511 (D.C. Cir. 2000); *see* AE 155F at 1 (“Generally, reconsideration should be limited to a change in the facts or law, or instances where the ruling is inconsistent with case law not previously briefed.”).

Pulling bits and pieces from various former filings, repackaging them together, and supplementing them with a declaration from an attorney reiterating legal arguments he has already made to the Commission, does not a “new” fact or law make. Here the Defense does nothing more than recycle previously rejected arguments in an attempt to request that the Commission reconsider its Ruling and Order in AE 013AAAA and AE 013BBBB, respectively. *See* AE 054 (AAA) (requesting documents “regarding the scope of, classification guidance regarding, and handling requirements for relevant security controls,” and arguing, “[i]t will be difficult, if not impossible, for the military commission to fashion a protective order that both protects national security and creates a safe harbor for advocacy without access to documents describing the scope of security controls and their handling requirements.”); AE 054C, Order

(denying Defense request that the Government produce classification guidance); *see also* AE 013JJ (AAA) (requesting, in part, Protective Order #1 be amended to allow Defense counsel to provide classified discovery to the Accused); AE 136E, Order, at 4 (stating that “Federal courts have held limiting disclosure of classified or otherwise sensitive information to a defendant’s counsel, while withholding it from a defendant personally under the terms of a protective order, is permitted under CIPA and does not violate a defendant’s constitutional rights.” (citing *United States v. Rezaq*, 156 F.R.D. 514, 525 (D.D.C. 1994))); AE 013CCC, Order, at ¶6.g. (denying Defense request to amend Protective Order #1 to allow Defense counsel to share classified discovery material with the Accused); AE 013III (Mohammad) (requesting that the Military Judge not require Defense counsel to sign the MoU because it requires that they receive discovery material to be withheld from the Accused).

The Defense motion (AE 013CCC (KSM)) fails to meet this Commission’s previously articulated criteria for reconsideration. There are no new facts or law to justify reconsideration, and Mr. Nevin’s declaration (written by a party-advocate of this Commission and not subject to cross-examination) should be accorded little or no weight; especially in light of the fact that nearly every averment therein has been the subject of written or oral arguments he has already previously made before this Commission. Counsel has raised absolutely nothing new that should alter the Commission’s previous four rulings requiring the signing of the MoU. As such, the Defense Motion for Reconsideration should be denied and Defense counsel should be ordered to sign the MOU by 21 August 2015 or be removed from this case.

These repetitive unsubstantiated motions to reconsider are a blatant attempt to make a mockery of this Commission and its orders; to undermine the certain and clear legal authority this Commission possesses to issue protective orders; and, to prevent this Commission from moving forward. If every litigant in national security cases were permitted to continually challenge and move to reconsider the lawful orders of a court, *ad infinitum*, as Mr. Nevin has, no national security case could ever be tried to completion in any forum; something that no true system of justice can tolerate.

**II. If the Defense Motion for Reconsideration Is Granted, the Defense Requested Relief Should Be Denied****A. The Defense Has All the Resources and Classification Guidance It Needs to Effectively Represent Its Client and the MoU Does Not Impact That**

Defense counsel for Mr. Mohammad, and the other four Accused in this case, have all the classification guidance and resources they need to represent their clients.

As has been stated in earlier filings, the Accused in this case are in a unique position because of their exposure to classified information while in the Central Intelligence Agency's (CIA) former Rendition, Detention, and Interrogation (RDI) Program. *See* AE 013 at 5-6; AE 013HHH at 10-11; AE 200F (GOV) at 2, 15. Although much has been recently declassified about their experiences while in custody, such as interrogation techniques utilized to gain intelligence on Al Qaeda's war effort against the United States, certain information still remains classified.

In this case, the Defense have ample classification guidance and resources at their disposal in order to ensure that they are appropriately safeguarding and handling classified information associated with this case. Under the Commission's *Third Amended* Protective Order #1, the Defense has been provided guidance as to what classified information remains in this case regarding the Accused's capture and/or detention. Specifically, it provides that the following information remains classified:

- (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; *and*,
- (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.

AE 013BBB at 4-6. Further, beyond the Protective Order, the Defense has also been provided a five-page Classification Guidance for Information about the Central Intelligence Agency's Former Rendition, Detention, and Interrogation Program. See AE 013RRR, Attachment B. This combined with the fact that all classified information provided by the Prosecution will either be marked as "CONFIDENTIAL," "SECRET," "TOP SECRET," or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI)", or that the Defense will be explicitly informed what the correct classification of the document is orally or in writing, ensures that the national security information relevant to this case is used, stored, and handled appropriately. While vitally important in protecting national security information of the United States, applying the classification guidance in this instance is not rocket science.

Although this case involves a range of classified information, the nature of the classified information Mr. Nevin continually references tends to focus primarily on the Accused's time in the CIA's RDI Program. When coupled with the five-page classification guidance previously mentioned, the Commission's *Third Amended Protective Order #1*, is all the Defense needs, as derivative classifiers, to adequately protect the classified information that should be at issue in this case that they may receive from their client.

The Defense takes great pains to claim that without classification guidance they cannot sign the MoU because it would create a misrepresentation of a fact. See AE 013CCCC (KSM) at 8-9. In making this argument they pin their last hopes on the language contained within the MoU that 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." See AE 013CCCC (KSM) at 8-9; see also AE 013BBBB, Attachment at 1. However, the applicable laws and regulations for use, storage, and handling of classified information is not a direct reference to the various executive agencies' classification guides (the overwhelming majority of which would be completely inapplicable to the Accused in this case and serve to eviscerate the need-to-know principle) and the Prosecution is overwhelmingly confident in this assertion.

Indeed, the Prosecution is certain of this interpretation because *it was the Prosecution that proposed the Order* and knows what it intended when the Order was written. Furthermore, the Military Judge granted the Prosecution's motion for the Order containing that exact provision on three separate occasions. *See* AE 013, Attachment E; AE 013L, Attachment B; AE 013P; AE 013RRR (GOV), Attachment C; AE 013BBBB. Throughout the pendency of these proceedings, the Prosecution has steadfastly refused to provide classification guides, and the Military Judge has denied motions for the same. *See* AE 054 (AAA) (requesting documents "regarding the scope of, classification guidance regarding, and handling requirements for relevant security controls," and arguing, "[i]t will be difficult, if not impossible, for the military commission to fashion a protective order the both protects national security and creates a safe harbor for advocacy without access to documents describing the scope of security controls and their handling requirements."); AE 054C (denying Defense request that the Government produce classification guidance). The Prosecution would not have proposed an internally inconsistent order, requiring the Defense counsel to refer to classification guidance that it had no intention of ever providing, and the Military Judge would not have required adherence to classification guides where he denied motions to compel those same guides. The Defense's belabored reading of the protective order, and the entire line of argument it proffers, strains credulity.

The Defense should possess little, if any, classified information that was not provided by the Prosecution or the Accused in this case; however, to the extent they do encounter such information, they have the guidance and resources necessary to be able to handle it safely and effectively. To be sure, the guidance the Defense has received, to date, is culled from classification guides, but only following a need-to-know determination of the specific guidance they received. They would not have a need-to-know all of the classification guidance of the various executive agencies who have equities in this case. And the fact that a DISO (a creature created from whole cloth, over Prosecution objection, for this Military Commission that does not exist in national security cases in federal court) does not believe they can adequately perform their duties without the classification guidance is of no moment in determining whether the Accused can receive adequate representation before this

Commission. Over 117+ defense teams have been required to sign an MoU in national security cases and still managed to adequately represent their clients, to include habeas counsel for Mr. Ali. *See, e.g., United States v. Hamidullin*, No. 3:14-CR-140 (HEH), (E.D. Va. Nov. 7, 2014); *United States v. Fawwaz & Bary*, Nos. 1:98-cr-1023-15, 1:98-cr-1023-17 (S.D.N.Y. Jan. 11, 2013) (1998 Embassy Bombings in Kenya and Tanzania); *United States v. Sedaghaty*, No. 6:05-cr-60008 (D. Ore. Mar. 19, 2010); *United States v. Ghailani*, No. 1:98-cr-1023-9 (S.D.N.Y. July 21, 2009) (1998 Embassy Bombings in Kenya and Tanzania); *United States v. Shnewer*, No. 1:07-cr-459 (D.N.J. May 29, 2008) (Bombing Plot at Ft. Dix); *United States v. Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. Apr. 5, 2005) (Fish, J.) (Terrorist Financing); *United States v. Holy Land Found.*, No. 3:04-cr-240 (N.D. Tex. May 7, 2005) (Solis, J.) (Terrorist Financing); *United States v. Ahmed*, No. 1:06-cr-147 (N.D. Ga. Feb. 8, 2007); *United States v. Hassoun*, No. 0:04-cr-60001 (S.D. Fla. Apr. 28, 2006) (Jose Padilla Case); *United States v. Franklin*, No. 1:05-cr-225 (E.D. Va. June 16, 2004) (Giving State Secrets to Lobbyists); *United States v. Rosen*, No. 1:05-cr-225 (E.D. Va. Sept. 19, 2005) (Giving State Secrets to Lobbyists); *United States v. Weissman*, No. 1:05-cr-225 (E.D. Va. Sept. 19, 2005) (Giving State Secrets to Lobbyists); *United States v. Warsame*, No. 0:04-cr-29 (D. Minn. Mar. 8, 2005) (Al Shabaab Terrorist); *United States v. Lindh*, No. 1:02-cr-37 (E.D. Va. Feb. 27, 2002) (American Taliban); *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Jan. 22, 2002) (Al Qaeda Associate); *United States v. Regan*, No. 1:01-cr-944 (E.D. Va. Sept. 4, 2001) (Spying Case); *United States v. El Hage*, No. 1:98-cr-1023 (S.D.N.Y. July 29, 1999) (1998 Embassy Bombings in Kenya and Tanzania); *see also In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 143, 148 (D.D.C. 2008) (Civ. Action Nos. 02-cv-0828, 04-cv-1136, 04-cv-1164, 04-cv-1194, 04-cv-1254, 04-cv-1937, 04-cv-2022, 04-cv-2035, 04-cv-2046, 04-cv-2215, 05-cv-0023, 05-cv-0247, 05-cv-0270, 05-cv-0280, 05-cv-0329, 05-cv-0359, 05-cv-0392, 05-cv-0492, 05-cv-0520, 05-cv-0526, 05-cv-0569, 05-cv-0634, 05-cv-0748, 05-cv-0763, 05-cv-0764, 05-cv-0877, 05-cv-0883, 05-cv-0889, 05-cv-0892, 05-cv-0993, 05-cv-0994, 05-cv-0998, 05-cv-0999, 05-cv-1048, 05-cv-1189, 05-cv-1220, 05-cv-1244, 05-cv-1347, 05-cv-1353, 05-cv-1429, 05-cv-1457, 05-cv-1458, 05-cv-1487, 05-cv-1490, 05-cv-1497,

05-cv-1504, 05-cv-1505, 05-cv-1506, 05-cv-1509, 05-cv-1555, 05-cv-1592, 05-cv-1601, 05-cv-1602, 05-cv-1607, 05-cv-1623, 05-cv-1638, 05-cv-1639, 05-cv-1645, 05-cv-1646, 05-cv-1678, 05-cv-1704, 05-cv-1971, 05-cv-1983, 05-cv-2010, 05-cv-2088, 05-cv-2104, 05-cv-2185, 05-cv-2186, 05-cv-2199, 05-cv-2249, 05-cv-2349, 05-cv-2367, 05-cv-2370, 05-cv-2371, 05-cv-2378, 05-cv-2379, 05-cv-2380, 05-cv-2381, 05-cv-2384, 05-cv-2385, 05-cv-2386, 05-cv-2387, 05-cv-2398, 05-cv-2444, 05-cv-2479, 06-cv-0618, 06-cv-1668, 06-cv-1684, 06-cv-1758, 06-cv-1759, 06-cv-1761, 06-cv-1765, 06-cv-1766, 06-cv-1767, 07-cv-1710, 07-cv-2337, 07-cv-2338, 08-cv-0987, 08-cv-1101, 08-cv-1104, 08-cv-1153, 08-cv-1185, 08-cv-1221, 08-cv-1223, 08-cv-1224, 08-cv-1227, 08-cv-1228, 08-cv-1229, 08-cv-1230, 08-cv-1231, 08-cv-1232, 08-cv-1233, 08-cv-1235, 08-cv-1236, 08-cv-1237, 08-cv-1238, 08-cv-1310, 08-cv-1440)); AE 013VVV (GOV), Attachment C, D. Federal practice is not merely persuasive in these matters, as statute requires the Commission to comply with “standards generally applicable to discovery of or access to classified information in Federal criminal cases.” 10 U.S.C. § 949p-4(a)(2). The Accused in this case can still receive an adequate defense under the *Third Amended* Protective Order #1 and adequately protect classified information in this case; but, it will simply have to be by different defense counsel if the current Defense counsel refuse to sign the MoU.

If all else fails, and the categories of classified information provided within the *Third Amended* Protective Order #1 as well as the five-page classification guidance do not provide adequate means by which the Defense can derivatively classify information it has in its possession, the Military Judge has additionally provided Defense counsel with the ability to seek classification review determinations in procedures designed, to the fullest extent possible, to preserve the lawyer-client and other related legally-recognized privileges. *See* AE 013BBBB at 7-8.

The Defense claims this to be inadequate because it is a system “that cannot be trusted to protect privileged information” and because the Original Classification Authorities (OCAs) have “refused to provide attestations that the privilege shall be maintained.” *See* AE 013CCCC (KSM) at 6. Recalling, specifically, that use of this review is completely voluntary, the Military

Judge made crystal clear that the Chief Security Officer, Office of Special Security (who is tasked with consulting with the appropriate OCA to obtain classification review of documents that the Defense submits) “shall not disclose<sup>2</sup> to any other entity any information provided by a DISO, including any component of the Office of Military Commissions.” AE 013BBBB at 8. The Military Judge also made clear that “submission of documents for classification review shall not be construed to waive, limit, or otherwise render inapplicable the attorney-client privilege or work product protections.” *Id.* The fact that OCAs have failed to disclose their identities to the Defense and make attestations, which is not required by the Military Judge’s Order, is of no consequence. While the Defense may find this shocking due to their own intransigence on this issue, the Government actually follows the orders of this Commission.

If, in fact, any of the Defense teams have utilized this voluntary system for classification, the Prosecution certainly has not been made privy to any of the contents of the attorney-client or attorney work-product materials submitted. As such, it would not be used at trial or to the substantial detriment of the Accused, and would therefore not be a violation of the Accused’s rights to counsel even if it were not being protected pursuant to the Commission’s Order. “There being no tainted evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion by [the government’s agent],<sup>3</sup> there [is] no violation of the Sixth Amendment.” *See Weatherford v. Bursey*, 429 U.S. 545, 558 (1977).

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<sup>2</sup> This provision is provided with the exception “that the entity may inform the military judge of any information that presents a current threat to loss of life or presents an immediate safety issue in the detention facility.” AE 013BBBB at 8.

<sup>3</sup> Federal courts “have elicited four so-called *Weatherford* factors to consider in determining whether a sixth amendment violation has been established when government actors are in possession of defense-privileged information are the following: (1) was evidence used at trial produced directly or indirectly by the intrusion; (2) was the intrusion by the government intentional; (3) did the prosecution receive otherwise confidential information about trial preparations or defense strategy as a result of the intrusion; and (4) were the overheard conversations and other information used in any other way to the substantial detriment of the defendant?” *United States v. Kelly*, 790 F.2d 130, 137 (D.C. Cir. 1986) (citing *Weatherford v. Bursey*, 429 U.S. 545, 554, 557 (1977); *United States v. Steele*, 727 F.2d 580, 585 (6th Cir.), *cert. denied*, 467 U.S. 1209 (1984); *United States v. Brugman*, 655 F.2d 540, 546 (4th Cir. 1981)).

The voluntary classification review process in this case is a resource available to the Defense, should they choose to use it, in the derivative classification of information it possesses. Utilizing said system would be lawful and protective of the privilege. However, for the Defense to suggest that they would be misrepresenting a fact by signing the MoU, in light of all of the guidance and other resources made available to them, is simply absurd.

**B. Mr. Nevin's Motions Have Never Truly Been About the MOU. They Have Been About a Desire to Share Classified Information With Khalid Shaykh Mohammad In Contravention of the Protective Order and an Attempt to Set Up An Ineffective Assistance of Counsel Claim on Appeal.**

As acknowledged by Mr. Nevin,<sup>4</sup> striking the MoU requirement does not in any way vitiate or alter the prohibition to share classified information with his client, because the MoU only incorporates Protective Order #1, where the prohibition is found, by reference. While the MoU serves a vitally important auditing function in the protection of classified information (as laid out in exhaustive detail in the Prosecution's Response to the Military Judge's Order to Show Cause, AE 013PPP (GOV) at 13-17, and not reiterated herein), the MoU does not in any way change counsel's obligations under the Protective Order.

It is not necessary for counsel to be able to share every piece of classified information they receive with their client in order to effectively represent him, nor does the Accused have any other right that would guarantee such access to classified information. See *United States v. Rezaq*, 156 F.R.D. 514, 525 (D.D.C. 1994) (holding that under circumstances where the need to protect sensitive information clearly outweighs defendant's need to know of that information personally when his knowledge of it will not contribute to his effective defense, limiting disclosure to

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<sup>4</sup> During a 14 August 2013 open session of this Commission in which the United States was represented by the Special Review Team, Mr. Nevin had the following colloquy with the Commission:

MJ [COL POHL]: Let me ask you this, okay? Is it your position that you are bound by the protective order even without signing the MOU?

LDC [MR. NEVIN]: Of course. It's an order of the court.

See Tr. at 8132. (Mr. Nevin does not reconcile his statement with the fact that signing of the MoU is also an order of the court, or why he would not be bound by the order to sign).

defendant's counsel is warranted under Federal Rules of Criminal Procedure and CIPA, and does not violate defendant's constitutional rights.). But even if the Accused had all of those rights, signing the MoU, itself, would have no impact on them. Rather, Defense counsel have sought, and continue to seek here, to challenge the Protective Order itself, which has always been their intent. However, unlike the MoU, which requires a signature and acknowledgment by counsel, the Protective Order is immediately enforceable, and thus not as conducive a target for an asymmetric attack.

Make no mistake, if the Defense signs the MoU, they will have all of the classified information they need to provide adequate and effective assistance of counsel to their client. As previously stated, the Prosecution has already committed to providing the ten categories of information articulated above relating to the CIA's RDI Program, *see* AE 308A (GOV), some of which will not be classified and may be shared with the Accused. The Defense will also be provided information regarding Enhanced Interrogation Techniques that were applied to the Accused and be able to discuss them with him as well. Further, if any information will be used against the Accused as evidence on the issue of guilt, and cannot be declassified, the Accused will still be able to view said information. *See* 10 U.S.C. § 949a (b)(2)(A). This is of course all provided that the Defense can articulate the reason such information is relevant and material, and in the case of information that remains classified, that Defense counsel sign the ordered MoU.

The Defense argument that signing the MoU prohibits them from effectively representing their clients is simply subterfuge for further delay of the proceedings and the type of "civil disobedience" strategy the Defense counsel has employed whenever they perceived their acquiescence was required for anything to progress at JTF-GTMO or in this Commission.<sup>5</sup> They should not be allowed to hijack the proceedings for one additional second on this issue.

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<sup>5</sup> *See* Defense counsel's refusal to submit mitigating matters to the Convening Authority (not including Mr. Ali's Defense Team) prior to referral when not granted an indefinite extension of time to do so (AE 008); *see also* Defense counsel refusing to utilize the privilege team established by the 27 December 2011 "Admiral Woods Order" (AE 008); *see also* four defense teams refusing to sign an MoU in order to receive classified information for over two years. (AE 013).

**C. A Criminal Defendant's Sixth Amendment Right to Counsel of One's Choice is Not Absolute**

A criminal defendant's Sixth Amendment right to counsel of one's choice is not absolute; "where 'considerations of judicial administration' supervene, the presumption in favor of counsel of choice is rebutted and the right must give way." *See United States v. Merlino*, 349 F.3d 144, 150 (3d Cir. 2003) (citing *United States v. Voigt*, 89 F.3d 1050, 1074 (3d Cir. 1996)). "Thus, while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States*, 486 U.S. 153, 159 (1988) (citing *Morris v. Slappy*, 461 U.S. 1, 13-14, (1983); *Jones v. Barnes*, 463 U.S. 745 (1983)).

As an initial matter, the Prosecution takes issue with Mr. Nevin's characterization that he is Mr. Mohammad's "counsel of choice," *see* AE 013CCCC (KSM) at 2-3, for two reasons. First, all of Mr. Mohammad's attorneys are default counsel, assigned by the Military Judge and paid for by the U.S. Government, as a result of Mr. Mohammad's refusal to acknowledge the Commission during arraignment regarding his choice of counsel.<sup>6</sup> *See* Unofficial/Unauthenticated Transcript (Tr.) at 46-48. Secondly, even if Mr. Mohammad had specifically requested his counsel, "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006) (citing *Wheat*, 486 U.S. at 159, *Caplin & Drysdale*, 491 U.S. 617, 624 (1989)). The fact that Mr. Nevin has been assigned to Mr. Mohammad for several years is also of no moment. *See United States v. Parker*, 469 F.3d 57, 61 (2d Cir. 2006) ("There is no constitutional right to continuity of appointed counsel. While the criminal defendant does of course retain some interest in continuous representation, courts are afforded considerable latitude in their decisions to replace appointed counsel, and may do so where a potential conflict of interest exists and 'in the interests of justice,' 18 U.S.C. § 3006A(c), among other circumstances."). As such, counsel

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<sup>6</sup> Defense Counsel's recent representations in their filing to the contrary do not establish a record of Mr. Mohammad's desire to have them represent him. *See* AE 013CCCC (KSM) at 4.

can be disqualified without violating the Sixth Amendment or the Military Commissions Act of 2009, and Mr. Mohammad may be assigned other qualified counsel who are willing to abide by the orders of this Commission.

Assuming, *arguendo*, that the Sixth Amendment both applies, and current counsel were considered “counsel of choice,” even the Sixth Amendment right to choose one's own counsel is circumscribed in several important respects. As set forth by the Supreme Court in *Wheat v. United States*,

Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court. Similarly, a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant. Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party, even when the opposing party is the Government.

486 U.S. at 159. Courts have also disqualified “counsel of choice” based on potential prejudice to the Government when the attorney could be acting as an “unsworn witness.”<sup>7</sup> *United States v. Locascio*, 6 F.3d 924, 934 (2d Cir. 1993) (“When an attorney is an unsworn witness, however, the detriment is to the government, since the defendant gains an unfair advantage, and to the court, since the fact finding process is impaired. Waiver by the defendant is ineffective in curing the impropriety in such situations, since he is not the party prejudiced.”).

The Supreme Court has held that “federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.” *Wheat*, 486 U.S. at 160. The Supreme Court has also “recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness,” and even “against the demands of its calendar.” *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006) (citing *Wheat*, 486 U.S. at 163-164; *Morris v.*

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<sup>7</sup> An attorney acts as an unsworn witness when his relationship to his client results in his having first-hand knowledge of the events presented at trial. This gives rise to concerns that his role as advocate may give his client an unfair advantage, because the attorney can subtly impart to the jury his first-hand knowledge of the events without having to swear an oath or be subject to cross-examination.

*Slappy*, 461 U.S. 1, 11-12 (1983) (Upholding a judge's decision to not grant a continuance in the case despite the public defender, who represented the defendant at the preliminary hearing and supervised an extensive investigation, being unavailable at trial due to his own surgery)).

This Commission has ordered all counsel to sign the MoU to acknowledge, *inter alia*, their responsibilities to protect classified information in this case. Four of the five defense teams have continued to refuse to sign the MoU. The Military Judge has also expressed concern that counsel could not competently represent their clients without receiving classified information in discovery from the Prosecution. Tr. at 2710-2713. This tension between the Defense counsel's refusal, and the Military Judge's concerns, if not remedied, is an intolerable position for this Military Commission. As aptly stated by the Supreme Court,

. . . the court should not be required to tolerate an inadequate representation of a defendant. Such representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court . . . .

*Wheat*, 486 U.S. at 162 (quoting *United States v. Dolan*, 570 F.2d 1177, 1184 (3d Cir. 1978)).

### 1. *Standard of Review for Disqualification of Counsel*

When moving to disqualify a defense attorney, courts will look to whether a judge's "disqualification was arbitrary -- 'the product of a failure to balance proper considerations of judicial administration against the right to counsel.'" *United States v. Stewart*, 185 F.3d 112, 120 (3d Cir. 1999) (quoting *Voigt*, 89 F.3d at 1074). In determining whether a decision is arbitrary, the court looks for "such elements as a reasoned decision and a developed record." *United States v. Tinsley*, 172 Fed. Appx. 431, 434 (3d Cir. 2006) (citing *Voigt*, 89 F.3d at 1074). Based on the ample record that has been established on this issue over the course of three years, and balancing proper considerations of judicial administration, the Commission would be legally justified in coming to the reasoned decision to disqualify the four defense teams at this time who have not signed the MoU.

In essence, Defense counsel have taken a straight-forward and legally unassailable legal requirement of signing the MoU, and turned it into a staring contest with the Prosecution and the Commission; betting on the fact that, instead of having counsel walk away from the proceedings at this stage or be disqualified, that the Prosecution or the Commission would blink and not require the MoU be signed. The Prosecution's legal position on this issue has remained the same since the day it first filed its proposed protective order for classified information on 26 April 2012, and it has the weight of legal authority firmly on its side. The Prosecution implores this Military Commission to remain steadfast in its requirement that the MoU be signed (as it has done in its four Protective Orders on the issue and in its rulings on various other filings) or Defense counsel be removed from the case.

To be clear, disqualification of counsel is not the Prosecution's preferred course of action, and it acknowledges that disqualifying counsel will have its own attendant delays. As such, the Prosecution would prefer the Defense counsel simply sign the MoU, as counsel in 117+ other National Security Cases have done before them, and remain on the case. However, this Commission must be able to enforce its own orders, and the Defense counsel must get classified discovery so the case can progress toward trial, which will not occur until Defense counsel sign the MoU. Hence, the Commission and the Defense counsel are at an impasse.

As the Military Judge has correctly noted, "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." AE 013AAAA at 15. On 5 July 2015, this Commission ordered the Defense to sign the MoU no later than 7 August 2015. *Id.* at 18. The Defense waited almost a month, and instead of complying with the Order, Defense counsel filed a motion to reconsider the Order four days prior to the signing deadline, wherein they reiterated many of the same arguments they have been making for the last three years. They should not now be given an additional opportunity, with more attendant delay, to show cause as to why they should not be removed from the case for failure to follow the Commission's order, when they were unable to convince the Military Judge over the course of the prior three years that the MoU

requirement was legally infirm. Simply put, there is not now any scenario by which the Defense could show cause as to why they should not be removed, so no additional time or opportunity to do so is warranted or justified under the circumstances. The Defense motion should be denied, and Defense counsel ordered to sign the MoU no later than 21 August 2015. If they have not signed by that date, they should be considered disqualified by this Commission.

#### **7. Conclusion**

The Defense Motion for Reconsideration should be denied. If the Defense Motion for Reconsideration is granted, however, the Defense requested relief therein should be denied. The Defense has all of the resources and classification guidance it needs to effectively represent its client and the MoU has no impact to the contrary. A criminal defendant's Sixth Amendment right to counsel of one's choice is not absolute, and the right to counsel of choice does not extend to defendants who require counsel to be appointed for them. Based on the record that has been established on this issue over the course of three years, and balancing proper considerations of judicial administration, this Commission is legally justified in coming to the reasoned decision to disqualify the four defense teams who have not signed the MoU. The Defense motion should be denied, and Defense counsel ordered to sign the MOU no later than 21 August 2015. If they have not signed by that date, they should be considered disqualified by this Commission.

#### **8. Oral Argument**

The Defense motion should be denied, without further argument, and Defense counsel ordered to sign the MoU by 21 August 2015. If they have not signed by that date, they should be considered disqualified by this Commission. As such, no further oral argument would be required.

#### **9. Witnesses and Evidence**

The Prosecution will not rely on any witnesses or additional evidence in support of this filing.

**10. Additional Information**

The Prosecution has no additional information.

**11. Attachments**

A. Certificate of Service, dated 13 August 2015

Respectfully submitted,

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//s//

Clay Trivett  
Managing Deputy Trial Counsel

Mark Martins  
Chief Prosecutor  
Military Commissions

# ATTACHMENT A

**CERTIFICATE OF SERVICE**

I certify that on the 13th day of August 2015, I filed AE 013EEEE (GOV) the **Government Response** To Defense Motion to Reconsider and/or Modify AE013AAAA, Third Supplemental Ruling, Government Motion to Protect Against Disclosure of National Security Information and AE013BBBB, Third Amended Protective Order #1 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//

Clay Trivett  
Managing Deputy Trial Counsel  
Office of the Chief Prosecutor  
Office of Military Commissions