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 013ZZZ ORDER Mr. al Baluchi's Motion to Amend Protective Order #1 to Allow Defense to Share Information with Cleared Habeas Counsel 01 July 2015

1. Mr. Aziz Ali (aka "Mr. al Baluchi") filed a motion[1] requesting the Commission authorize his counsel to provide "highly relevant" information to Mr. Aziz Ali's habeas counsel. Mr. Aziz Ali argues that without a legitimate interest in withholding the information from habeas counsel, the "the anti-habeas provisions of Protective Order #1 unconstitutionally undermine Mr. al Baluchi's ability to pursue habeas relief."[2] Despite the statutory prohibitions, Mr. Aziz Ali states the right to "challenge the conditions of his confinement," under *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014) (internal quotes omitted)[3], gives this Commission authority to release classified information to individuals outside the established security protocols.[4] Mr. Aziz Ali argues that habeas counsel similarly have a "need-to-know" the classified information.[5]

[1] Mr. al Baluchi's Motion to Amend Protective Order #1 to Allow Defense to Share Information with Cleared Habeas Counsel, filed 3 June 2015 (AE 013UUU (AAA)).
[2] *Id.* at 1.
[3] *Aamer v. Obama* stands for the proposition that confinement condition is a matter of consideration for *habeus* proceedings. The opinion does not involve classification questions.
[4] *Id.* at 7-10.
[5] *Id.* at 7-8.

2. The Government's response[6] argued that determinations in regard to classifications and "need to know" are rightly reserved to the Executive Branch. Further, they argued that the habeas system has their own process to adjudicate discovery and classified information necessary for those proceedings. The Defense replied[7] arguing the "imbalance" created by the rule artificially, unfairly, and unconstitutionally prevents Commission counsel from sharing attorney classified work product information with *habeas* counsel.

3. The Military Commissions Act of 2009 (MCA 2009), 10 U.S.C. § 949p-1(a) specifically preludes a military judge from releasing classified information to anyone not authorized to receive such information.[8] As noted by the United States Supreme Court, authorization for access to any classified information, or more colloquially "a need-to-know," is exclusively the role of the Executive Branch. *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988). Having the "need-to-know" is a restriction on information for which, even if an individual has the requisite security clearance, a determination has been made by the appropriate authority, there is a specific need for that particular information for the conduct of an official function.[9]

4. While *habeas* counsel, may have the requisite security clearances, it is beyond the authority of this Commission to usurp Executive authority to make such a decision.

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[6] Government Response To Mr. Ali's Motion to Amend Protective Order #1 to Allow Defense to Share Information with Cleared Habeas Counsel, filed 17 June 2015 (AE 013XXX (GOV)).

[7] Mr. al Baluchi's Reply to Government Response To Mr. Ali's Motion to Amend Protective Order #1 to Allow Defense to Share Information with Cleared Habeas Counsel, filed 24 June 2015 (AE 013YYY (AAA)).

[8] 10 U.S.C. § 949p- 1(a) PROTECTION OF CLASSIFIED INFORMATION.- Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security. Under no circumstances may a military judge order the release of classified information to any person not authorized to receive such information.

[9] *See* Sec. 6.1, Executive Order 13526 - Classified National Security Information.
(dd) "Need-to-know" means a determination within the executive branch in accordance with directives issued pursuant to this order that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function.

5. The motion of Mr. Aziz Ali to have the Commission authorize transmittal of classified information to *habeas* counsel is **DENIED**.

So **ORDERED** this 1st day of July, 2015.

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