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 200F **Government Response** To Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture 3 October 2013

1. Timeliness

This Response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.c(1).

2. Relief Sought

The Prosecution respectfully requests that the Commission deny the motion.

3. Overview

No court, including this Commission, has jurisdiction to hear the defense claims under the Convention Against Torture, as that Convention is non-self-executing. Moreover, the principal of *jus cogens* does not confer this Commission with jurisdiction when domestic legislation has been enacted, as it has in this case. Finally, Amended Protective Order #1 does not violate any rights of the Accused and hence should be immediately enforced, including its requirement that counsel for the Accused sign the memorandum of understanding (MOU) long ordered by the Military Judge.

4. 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).

5. Facts

On 31 May 2011 and 26 January 2012, pursuant to the M.C.A., charges were sworn against Khalid Shaikh Mohammad, Walid Muhammad Salih Bin Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi in connection with the September 11, 2001 attacks. The charges were referred jointly to a capital military commission on 4 April 2012. The defendants were arraigned on 5 May 2012.

On 11 September 2001, a group of al Qaeda operatives hijacked four civilian airliners in the United States. As a result of the attacks, a total of 2,976 people were murdered. Numerous other civilians and military personnel were also injured. In response to these attacks, the United States instituted a program run by the Central Intelligence Agency ("CIA") to detain and interrogate a number of known or suspected high-value terrorists, or "high-value detainees" ("HVDs"). This CIA program involves information that is classified TOP SECRET/SENSITIVE COMPARTMENTED INFORMATION ("TS/SCI"), the disclosure of which would cause exceptionally grave damage to national security. The five accused are HVDs and were thus detained and interrogated in the CIA program. As such, the accused were exposed to classified sources, methods, and activities. Due to their exposure to classified information, the accused are in a position to disclose classified information publicly through their statements.

On 6 September 2006, President George W. Bush officially acknowledged the existence of the CIA program and announced that a group of HVDs had been transferred by the CIA to Department of Defense ("DoD") custody at Joint Task Force-Guantanamo ("JTF-GTMO"). *See generally* President George W. Bush, Remarks on the War on Terror, 2 Pub. Papers 1612 (6 Sept.2006). The accused were among the group of HVDs transferred to DoD custody, and they have since remained in detention at JTF-GTMO.

Since 6 September 2006, a limited amount of information relating to the CIA program has been declassified and officially acknowledged, often directly by the President. This information includes a general description of the program; descriptions of the various "enhanced interrogation techniques" that were approved for use in the program; the fact that the so-called

"waterboard" technique was used on three detainees; and the fact that information learned from HVDs in this program helped to identify and locate al Qaeda members and disrupt planned terrorist attacks. *See id.*; CIA Inspector General, Special Review: Counterterrorism Detention and Interrogation Activities (September 2001-October 2003) (May 7, 2004), *available at* http://media.washingtonpost.com/wp-srv/nation/documents/cia_report.pdf.

Other information related to the CIA program has not been declassified or officially acknowledged and, therefore, remains classified. This classified information includes allegations involving: (i) the location of detention facilities; (ii) the identity of cooperating foreign governments; (iii) the identity of personnel involved in the capture, detention, transfer, or interrogation of detainees; (iv) interrogation techniques as applied to specific detainees; and (v) conditions of confinement. Because competent and accountable authorities have determined that the disclosure of this classified information would cause exceptionally grave damage to national security, it is classified at the TS/SCI level.

On 26 April 2012, the government filed a Motion To Protect Against Disclosure of National Security Information, and requested the military judge to issue a protective order pursuant to Military Commission Rule of Evidence ("M.C.R.E.") 505(e). *See* AE 013 (App. 1-46). M.C.R.E. 505(e) provides: "Upon motion of the trial counsel, the military judge shall issue an order to protect against the disclosure of any classified information that has been disclosed by the United States to any accused or counsel, regardless of the means by which the accused or counsel obtained the classified information, in any military commission under [the M.C.A.], or that has otherwise been provided to, or obtained by, any such accused in any such military commission." M.C.R.E. 505(e); 10 U.S.C. § 949p-3 (same).[1] The motion and its accompanying declarations set forth the classified information at issue in this case, the grave harm to national

[1] The requirement of appropriate protective orders is substantially identical to that enforced in federal civilian criminal trials involving classified information. *See* Section 3 of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 6 ("Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.").

security that unauthorized disclosure of such information would cause, and the narrowly-tailored remedies that seek to protect this national security information. *See* AE 013.

On 2 May 2012, the American Civil Liberties Union and the American Civil Liberties Union Foundation filed a Motion for Public Access to Proceedings and Records, challenging the government's proposed protective order. AE 013A. The Defense also filed objections to the proposed order. AE 013E, G.

On 17 October 2012, the military judge entertained oral argument on the government's Motion To Protect Against Disclosure of National Security Information (AE 013) at Guantanamo Bay, Cuba. Trial counsel, counsel for the Accused, the Press, and the ACLU all participated in the proceeding. *United States v. Khalid Shaikh Mohammad et al.*, Unofficial/Unauthenticated Transcript ("Tr.") 670-814. On 6 December 2012, the Military Judge issued a Ruling on Government Motion To Protect Against Disclosure of National Security Information (AE 013O) and entered Protective Order #1 (AE 013P). In his 6 December 2012 ruling, the Military Judge made certain findings as required by law, *see* AE 013O at 3-5, including that the information classified by the government was, as a matter of law, "properly classified by the executive branch pursuant to Executive Order 13526, as amended, or its predecessor Orders, and [was] subject to protection in connection with this military commission."

Also in the 6 December 2012 Protective Order, the Military Judge also made certain findings; namely, that "this case involves classified national security information . . . the disclosure of which would be detrimental to national security." The Protective Order established procedures applicable to all persons who have access to, or come into possession of, classified information regardless of the means by which those persons obtained that classified information. *Id.* ¶ 1.a. Specifically, the Protective Order requires that members of the defense obtain a security clearance prior to accessing classified information; that the defense is precluded from disclosing classified information without prior authorization; that they provide notice of intent to disclose classified information during any pretrial or trial proceeding in accordance with M.C.R.E. 505(g); and that the Commission could order the closure of proceedings to the public

when necessary to protect against the disclosure of classified information. Those procedures "apply to all aspects of pre-trial, trial, and post-trial stages in this case, including any appeals." *Id.* ¶ 1.a.

On 9 February2013, after considering certain defense motions to amend the Protective Order, the Military Judge issued a Supplemental Ruling on the Government's Motion To Protect Against Disclosure of National Security Information (AE 013Z) and entered Amended Protective Order #1 (AE 013AA). The 9 February 2013 Amended Protective Order modified (1) paragraph 2.k. (defining "[u]nauthorized disclosure of classified information") and (2) paragraph 8.a.(1) (setting forth notice requirements in military commission proceedings) of the December 6, 2012 Protective Order. *See* Amended Protective Order #1.

After the issuance of Amended Protective Order #1, the Press and the ACLU each filed a petition for a writ of mandamus with the D.C. Circuit Court of Appeals. Counsel for Mr. Ali also filed a motion for leave to intervene in the press petition. On 27 March 2013, the D.C. Circuit summarily denied both writs and the motion for leave to intervene.

On 13 February 2013, the Military Judge had the following colloquy with Defense counsel regarding the Memorandum of Understanding (MOU):

> MJ [COL POHL]: Let me ask you this: Is there some reason preventing you guys from signing the MOU?
>
> LDC [CDR RUIZ]: Part of the reason is we still had ongoing litigation on very specific terms on what that final protective order was going to look like.
>
> MJ [COL POHL]: That's now done.

United States v. Khalid Shaikh Mohammad et al., Unofficial/Unauthenticated Transcript ("Tr.") 2303. At the conclusion of the February 2013 hearing session, the Military Judge advised Defense counsel that their failure to sign the MOU prevented them from receiving classified discovery:

> MJ [COL POHL]: But I will tell defense that if you think you have some legal basis not to follow, sign the MOU or follow the order, raise it to me now rather than later, because, again, you can't get the classified discovery without it, and if you can't get the classified discovery without it, it raises questions of whether or not you can competently represent the accused in this case.

Tr. 2713. By the commencement of the June 2013 hearing session, only one Defense team had signed the MOU. On 21 June 2013, the Military Judge informed Defense counsel that the suspense for signing the MOU was the August hearing:

> MJ [COL POHL]: Yes. Okay. Let's put it this way: If you have a legal basis -- and I'm always willing to listen to argument -- of why you don't have to sign the MOU, I'm just speaking to the four who have not signed it, and you have a legal basis for that, you are to file such a motion; otherwise, I expect compliance with the order by the next session or, again, I'm always willing to listen why you are not going to do it. So if there is a suspense on that suspense at the next hearing to be resolved.

Tr. 4136-4137. On 12 August 2013, counsel for Mr. Hawsawi, Mr. Binalshibh, and Mr. Bin Attash filed a Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture. *See* AE 200 (MAH, RBS, WBA). On the first day of the August session, the Military Judge inquired whether Defense counsel had signed the MOU:

> MJ [COL POHL]: I will do this sequentially, and understand if you have a legal reason I will entertain it, but that order was signed in January and basically by failing to sign the MOU you are not raising, to my knowledge, the legal objection to not signing it -- you've basically prevented the government from providing you with the discovery. So my question to each of them is do you have a legal reason of why you don't sign the MOU to get the classified information?

Tr. 4226. Defense counsel informed the Military Judge that their justification for not signing the MOU was based upon the instant motion:

> MJ [COL POHL]: Have you filed a motion that the MOU should not be signed for some legal reason?
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> DC [CDR RUIZ]: Yes, sir. We in filed a convention against torture motion.
>
> MJ [COL POHL]: When did you file that?

> DC [CDR RUIZ]: We filed it very recently.
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> MJ [COL POHL]: Like last week?
>
> DC [CDR RUIZ]: Let me tell you why ---
>
> MJ [COL POHL]: No, let me finish. You filed a motion based on convention against torture signed when, the convention against torture?
>
> DC [CDR RUIZ]: I don't recall the specific date.
>
> MJ [COL POHL]: '98, '99 sound about right?
>
> DC [CDR RUIZ]: Okay.
>
> MJ [COL POHL]: So you have an order signed in January, you wait until August to file a legal objection to the order filed in January based on legal precedence that has been in existence for 14 or 15 years, and I should not treat that as you just ignored the motion or the order?

Tr. 4227-4228. After additional colloquy, counsel for Mr. Hawsawi, Mr. Bin Attash, Mr, Binalshibh, and Mr. Mohammad advised the Military Judge that the sole impediments to them signing the MOU were resolution of the outstanding AE 13 series of motions and the instant motion. *See* Tr. 4246-4246, 4257-4258, 4260, 4262-4263.

On 17 September 2013, counsel for Mr. Ali filed a Notice of Joinder, Factual Supplement and Argument. *See* AE 200 (AAA). On 19 September 2013, counsel for Mr. Hawsawi filed a Factual Supplement. *See* AE200 (MAH Supp).

6. <u>Law and Argument</u>

The Defense filed the instant motion the week preceding the scheduled August 2013 hearing, alleging that the motion justified their failure to timely comply with the Amended Protective Order issued by this Commission on 9 February 2013. Counsel for Mr. Hawsawi, Mr. Binalshibh, Mr. Bin Attash, and Mr. Mohammad claim that they are unable to sign the Memorandum of Understanding issued by this Commission because its provisions violate the

Convention Against Torture, a treaty that was ratified in 1994.[2] In making such a claim, counsel fail to acknowledge that there are no individual rights recognized by any domestic court under the Convention Against Torture. In his joinder filed on 17 September 2013, counsel for Mr. Ali separately argues that the principal of *jus cogens* confers this Commission with jurisdiction to hear claims under the Convention despite clear action by Congress in enacting domestic law. The remaining arguments contained in both submissions merely rehash challenges to the Protective Order that have previously been litigated prior to the Commission issuing the Amended Protective Order.

I. This Commission Lacks Jurisdiction to Hear Claims under the Convention Against Torture

Amended Protective Order #1 does not operate to extinguish any individual rights of the Accused under the Torture Convention because there are no individual rights recognized by any domestic court under the Torture Convention. The Torture Convention is a non-self executing treaty. *See* S. Treaty Doc. No.100-20 (1988) (reservations and declarations of the United States Senate in ratifying the Torture Convention: "The Senate's advice and consent is subject to the following declarations: (1) That the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing."); *see also* 136 Cong. Rec. S17486-01, 1990 WL 168442 (daily ed. Oct. 27, 1990). As such, it creates no jurisdiction in any federal court to hear an individual's claim for protection under the treaty and no right of action in any individual. *See Head Money Cases*, 112 U.S. 580, 598-99 (1884); *Z & F Assets Realization Corp. v. Hull*, 114 F.2d 464, 470-71 (D.C.Cir. 1940), aff'd on other grounds, 311 U.S. 470, 489

[2] The United States signed United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, G.A. Res. 39/46, 39th Sess., U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (Torture Convention) on April 18, 1988, ratified the Convention on October 21, 1994 and it entered into force in November 1994, subject to certain reservations, understandings, and declarations, including a declaration that articles 1-16 of the Torture Convention were not self-executing and therefore required domestic implementing legislation. *See* Sen. Exec. Rpt. 101-30, III. (2), Resolution of Advice and Consent to Ratification, (1990).

(1941); *see also Haitian Refugee Center, Inc. v. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991) (per curiam).

In the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub.L. No. 105-277, 112 Stat. 2681-822 FARRA, Congress passed legislation authorizing the Attorney General to promulgate regulations for implementing the Torture Convention. FARRA § 2242. In that legislation, Congress expressly limited the jurisdiction of any court to review any decision made on a claim for protection under the Convention, granting judicial review authority under only one set of circumstances— as part of the review of a final order of removal under Section 242 of the Immigration and Nationality Act (INA). *Id.* §2242(d). The regulations ordered by Congress in FARRA § 2242(b) were promulgated by the Attorney General and became effective on March 22, 1999. See 64 Fed. Reg. 8478 (1999). These regulations were incorporated into existing INS regulations in 8 C.F.R. Parts 3, 103, 208, 235, 238, 240, 241, 253, and 507. *Id.*

Thus, until Congress passed implementing legislation and granted jurisdiction to federal courts to hear such a cause of action, no jurisdiction existed in any federal court to hear a Torture Convention claim. *See Diakite v. INS*, 179 F.3d 553, 554 (7th Cir. 1999) (holding that neither the Torture Convention nor FARRA §2242 "is a grant of jurisdiction" for an alien who is in deportation proceedings pursuant to old INA section 106(a) and who is seeking protection under the Convention); *Barapind v. Reno*, 1999 WL 627352, at *12 ("Congress has not granted jurisdiction to federal courts to hear claims involving the Torture Convention's protective provisions."); *Calderon v. Reno*, --- F. Supp. 2d ---, 1999 WL 116227, *2 (N.D. Ill. Feb. 22, 1999) (holding that "the [Convention Against Torture] was not intended to be self-executing and Congress has not given the federal courts jurisdiction over individuals seeking to invoke its protective provisions. The forthcoming regulations . . . cannot change this, for only Congress can expand or contract the jurisdiction of the federal courts"). *See generally Igartua De La Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (treaties that are "not self-executing . .. could not . . . give rise to privately enforceable rights under United States law"). Thus, even though the

Defense seeks protection in this Commission for rights of the Accused under the Torture Convention, they have no such rights enforceable in any court that Congress has not granted.

In FARRA § 2242, Congress expressly limited judicial review of any individual claim that might arise under regulations promulgated in accordance with its directive, to that which an alien obtains pursuant to review of a final removal order under INA section 242. FARRA § 2242(d). Thus, prior to FARRA, no one claiming protection under the Torture Convention could bring an individual claim in federal court asking the court to review his claim; and after FARRA, no one other than an alien who obtains judicial review of final removal orders pursuant to INA section 242 can find access to the federal courts for review of his or her claim for protection under the Convention. No other avenue of judicial review of Torture Convention claims has been provided by Congress, so none exists. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989) ("We start from the settled proposition that the subject-matter jurisdiction of the lower federal courts is determined by Congress 'in the exact degrees and character which to Congress may seem proper for the public good.'") (quoting *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845)); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) (holding that courts created by statute have no jurisdiction other than that which has been conferred upon them by statute). Therefore, if an alien claiming protection under the Torture Convention has any "right" to judicial review of his or her claim, it is through judicial review of a final removal order pursuant to INA section 242, and not through any other general or specific jurisdictional provision. No such order exists with respect to any of the Accused in this case, and in fact, such an order would be contrary to the current prosecution where the United States is seeking the death penalty against the five Accused for the murder of 2,976 people on September 11, 2001. Accordingly, the Defense motion fails to state a claim that is cognizable and should therefore be denied.

II The Principal of *Jus Cogens* does not Confer this Commission with Jurisdiction when Domestic Legislation has been Enacted

In an apparent acknowledgement that the Torture Convention is non self-executing, the Defense in its joinder next claim that *jus cogens* or the principals expressed under the Torture Convention are part of the domestic law of the United States and therefore this Commission is authorized to hear claims by the Accused. *See* AE 200 (AAA). This argument is misplaced, however, and is merely an attempted end-run around the clear and well-settled precedent that Congress has not granted any individual rights under the Torture Convention.

International law, whether in the form of treaties or United Nations High Commissioner for Refugees Handbook, is not binding on domestic courts or the Executive Branch where there is domestic legislation that addresses the law in question, particularly where the legislation post-dates an otherwise applicable treaty. Congress may "shut the door to the law of nations" either "explicitly, or implicitly by treaties or statutes that occupy the field." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004). "While 'international law" is part of this nation's laws, international law must give way when it conflicts with or is superseded by a federal statute. . . ." *United States v. Howard-Arias*, 679 F.2d 363, 371 (4th Cir. 1982 (citing *The Paquete Habana*, 175 U.S. 677 (1900)). "It is well-settled . . . that international law controls only 'where there is no treaty, and no controlling executive or legislative act or judicial decision.'" *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1451 (9th Cir.), *cert. denied*, 516 U.S. 976 (1995) (citing and quoting *The Paquete Habana*, 175 U.S. at 700, and citing *Alvarez-Mendez v. Stock,* 941 F.2d 956, 963 (9th Cir. 1991); *accord Oliva v. U.S. Dep't of Justice*, 433 F.3d 229, 236 (2d Cir. 2005) (clear congressional action trumps customary international law in immigration context as elsewhere)*;* *Bradvica v. INS*, 128 F.3d 1009, 1024 n.5 (7th Cir. 1997) ("[C]ustomary international law is not applicable in domestic courts where there is a controlling legislative act, such as the statute here."). Hence, the Defense implication that international standards or treaties trump congressional passage of the INA is contrary to long-standing and well-established precedent.

There are compelling policy reasons for clear legislative enactments to displace purported private rights of action that might be divined from international treaties, including the concern that civil claims by private parties lack the accountability inherent in actions brought by government officials. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement with the check imposed by prosecutorial discretion.").

III Amended Protective Order #1 Does Not Violate Any Rights of the Accused

Notwithstanding the extensive litigation preceding the Commission's issuance of Amended Protective Order #1, the Defense waited an additional six months to raise new challenges and to justify their lack of compliance with the Memorandum of Understanding. As discussed supra, this Commission lacks jurisdiction to consider claims pursuant to the Convention Against Torture. However, because it is unclear whether the Defense relies upon other authority for some of the allegations contained in their motion, joinder, and supplement, the Prosecution addresses them on the merits.[3]

The Defense claim that they are unable to carry out reasonable mitigation investigation, alleging that this inability constitutes ineffective assistance of counsel; that the MOU and the Amended Protective Order impose an affirmative obligation on Defense counsel to silence the Accused and infringe the right to seek redress for torture; that the Order effectively prevents the Defense from using Guantanamo Bay medical records to seek an independent medical

[3] Although not briefed by the Defense in the motion, joinder, or supplement, counsel for Mr. Mohammad explained to the Military Judge during the colloquy regarding his failure to sign the MOU, that: "There are a variety of problems there, and as I say, under *Lankford v. Idaho* I am entitled to know what all the rules are and where everything sits before I make outcome-determinative decisions." Tr. 4245. It is unclear however, how the Supreme Court's decision in *Lankford v. Idaho*, 500 U.S. 110 (1991) has any bearing on counsel's ability to sign an MOU. The narrow issue before the Court in *Lankford* was whether the defendant's due process rights were violated when the sentencing judge failed to give notice of its intention to impose the death sentence in spite of the State's notice that it was not seeking the death penalty.

evaluation; and that the Order interferes with the Defense attempts to investigate and prove ill-treatment because the Accused cannot discuss prior treatment with a forensic investigator. *See* AE 200 (MAH, RBS, WBA), p.8.; AE200 (AAA) section B.5; AE200 (AAA), Attachment B.

These latest challenges to the Amended Protective Order, issued on 9 February 2013, merely rehash previous complaints that have been rejected by this Commission, or misapprehend the order itself. As recognized by this Commission in enacting Amended Protective Order #1, counsel are not prevented from discussing any topic with the Accused, including information originating from the Accused that is classified. As a precondition for meeting with the Accused, typical in cases involving threats to the national security of the United States, all counsel were required to obtain a security clearance. Learned counsel in this case received clearances prior to the referral of this Commission in May 2012. To the extent that the Accused choose to meet with their counsel, they are free to discuss any topic, notwithstanding the fact that counsel are subject to handling requirements for classified information, as a condition of their security clearance. Accordingly, if counsel take notes during visits, they are required to handle the notes at the appropriate classification level. In response to Defense complaints regarding the burdens of handling classified information, the Government narrowly tailored their obligations with respect to statements of the Accused so that only information specifically related to the CIA RDI program, that has not been officially declassified, must be handled at the TS/SCI level. That classification guidance has been previously provided to Defense counsel and is summarized in paragraph 4(a)-(e) of Amended Protective Order #1.

The Order does not prevent the Defense from investigating the case. Defense counsel are free to retain the services of a variety of expert consultants, such as an independent medical professional, mitigation expert, or forensic investigator, all at Government expense, and request that they receive the appropriate security clearance to enable them to engage with the Accused. There is ample evidence in this Commission that the Accused have been afforded generous opportunities for such resources, and, despite Defense allegations to the contrary, have unprecedented ability to seek *ex parte* review to this Commission, of any Convening Authority

denial of such resources. Currently, the Prosecution is unaware, and the Defense have failed to cite in the instant motion, any pending request for expert medical or mitigation assistance that has been denied to them based upon the Amended Protective Order. To the extent that the Defense believe they are entitled to information that has been redacted in medical records or in any discovery, they may request that information from the Prosecution or file a motion to compel discovery.

None of the provisions contained in Amended Protective Order #1 or the MOU operate to silence the Accused. Rather, the order addresses the storage, use, and handling of classified information in this Commission. *See* 10 U.S.C. § 949p-3 ("Upon motion of the trial counsel, the military judge shall issue an order to protect against the disclosure of any classified information that has been disclosed by the United States to any accused in any military commission under this chapter or that has otherwise been provided to, or obtained by, any such accused in any such military commission."); M.C.R.E. 505(e) (same). Federal district courts routinely enter protective orders in terrorism prosecutions to govern the obligations of the parties with respect to classified information. *See* CIPA, § 3, 18 U.S.C. App. 6 ("Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States."); Protective Order, *United States v. Warsame*, No. 11 CR 559 (S.D.N.Y. Sept. 9, 2011) (Dkt. 26); Modified Protective Order Pertaining to Classified Information, *United States v. Ghailani*, No. 98 CR 1023 (S.D.N.Y. July 21, 2009) (Dkt. 765) (App. 363-383); Protective Order, *United States v. Amawi*, No. 06 CR 719 (N.D. Ohio July 17, 2006) (Dkt. 116); Protective Order, *United States v. Moussaoui*, No. 01 CR 455 (E.D. Va. Jan. 22, 2002) (Dkt. 54); Protective Order, *United States v. Bin Laden*, No. 98 CR 1023 (S.D.N.Y. July 29, 1999) (Dkt. 78). There is nothing remarkable about the Commission's decision to enter a protective order in this case, nor is there is anything remarkable about Amended Protective Order #1.

Although explicitly rejected by this Commission in issuing Amended Protective Order #1, the Defense again challenge whether information orally conveyed by the Accused can be

classified. *See* AE 200 (AAA), section 2(b). In this latest attempt, the Defense argue that classifying such information violates international law. As discussed *supra* however, this Commission has no jurisdiction to review claims made under the Torture Convention, nor is international law binding on domestic courts where there is controlling executive or legislative act or judicial decision.

The Defense seek to define what constitutes classified information, despite clear and controlling precedent from the Supreme Court that classification determinations are a matter committed solely to the Executive Branch. *See, e.g.*, *Department of the Navy v. Egan,* 484 U.S. 518, 527 (1988) ("The authority to protect [classified] information falls on the President as head of the Executive Branch and as Commander in Chief."). The Supreme Court has recognized this broad deference to the Executive Branch in matters of national security, holding that "it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of subtle and complex factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." *CIA v. Sims*, 471 U.S. 159, 180 (1985). This responsibility properly falls to the Executive Branch because it alone is in a position to weigh such factors.

Because the accused have been exposed to highly classified sources and methods, the public disclosure of which reasonably could be expected to cause exceptionally grave damage to national security, the Executive Branch properly determined that statements of the accused related to the five categories enumerated in Amended Protective Order #1 are classified. Executive Order No. 13,526 authorizes the classification of "information" that can be conveyed orally. *See* Exec. Order No. 13,526, § 6.1(t), 75 Fed. Reg. 707, 728 (Dec. 29, 2009) (App. 406) (defining "[i]nformation [as] any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, that is owned by, is produced by or for, or is under the control of the United States Government"). Such oral information may include the personal observations of the accused because those observations relate to certain post-capture, treatment-related subjects determined to be classified by the Executive Branch. Amended

Protective Order #1 memorializes the Executive Branch's classification determination, stating that the "observations and experiences of an accused" are classified. *See* AE13AA para. 2.g.(5).[4]

This classification determination was addressed by the D.C. Circuit in *ACLU v. DOD*, 628 F.3d 612 (D.C. Cir. 2011). There, the ACLU argued "the government lacks the authority to classify information derived from the detainees' personal observations and experiences." *Id.* at 623. The D.C. Circuit disagreed, explaining the "ACLU's argument is irrelevant to the reality that the information that the CIA wishes to withhold is within the government's control." *Id.* The D.C. Circuit concluded "[t]here is simply no legal support for the ACLU's argument that the government lacks the authority to classify the information withheld from the [Combatant Status Review Tribunal] documents." *Id.*

Although the Defense argue that these terms in Amended Protective Order #1 violate international law, they fail to acknowledge that the language as it relates to the personal observations of the accused is materially identical to federal court precedent on this issue and is, therefore, authoritative. The United States District Court for the Southern District of New York entered a modified protective order in *United States v. Ghailani* with the same protections for classified sources and methods for a detainee who was previously held in CIA custody. *Compare* 6 December 2012 Protective Order ¶ 2.g.(5) ("[T]he term 'information' shall include,

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[4] This Commission may not conduct a *de novo* review of the Executive Branch's decision to classify information, nor should it review the classification level assigned to information by the Executive Branch. *See, e.g.*, M.C.R.E. 505(f), Discussion (stating the military judge should simply determine "that the material in question has been classified by the proper authorities in accordance with appropriate regulations"). While acknowledging the fundamental role that courts serve in ensuring that the rights of an accused are protected and that procedures are fair, courts consistently have recognized the principle that neither an accused nor the courts can challenge the classification of information. *See, e.g.*, *United States v. Smith*, 750 F.2d 1215, 1217 (4th Cir. 1984), *vacated on other grounds,* 780 F.2d 1102 (4th Cir. 1985) (en banc); *see also United States v. Aref*, No. 04-CR-402, 2007 WL 603510, at *1-*4 (N.D.N.Y. Feb. 22, 2007) ("The Court's function in a CIPA case is not to hold mini-trials in which the Judiciary—not the Executive Branch—becomes the arbiter of this Country's national security."), *aff'd,* 533 F.3d 72 (2d Cir. 2008); *United States v. Moussaoui*, 65 F. App'x 881, 887 n.5 (4th Cir. 2003). The defense may not challenge the government's decision to classify information so long as that decision complies with the applicable Executive Order. *See* Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009) (App. 384-409).

without limitation, observations and experiences of an accused . . . ."), *and* 9 February 2013 Protective Order ¶ 2.g.(5) (same), *with* Modified Protective Order Pertaining to Classified Information ¶ 3.c., *United States v. Ghailani*, No. 98 CR 1023 (S.D.N.Y. July 21, 2009) (Dkt. 765) ("[T]he term 'information' shall include without limitation observations and experiences of the Defendant . . . ."). The *Ghailani* protective order is based on CIPA, which Congress determined should be authoritative in the interpretation of M.C.R.E. 505 (the military-commission rule relating to classified information). *See* 10 U.S.C. § 949p-1(d); M.C.R.E. 505(a)(4). There is simply no legal support for the Defense claim that the ability to classify information that can be conveyed orally constitutes a violation of international or domestic law.

The Defense also allege that classifying the observations and experiences of the Accused prevents the Defense from seeking redress through legislative, judicial, executive processes, in the public arena, and in international and foreign fora. *See* AE 200 (AAA), section B.1, 2. The Prosecution is unaware, and the Defense has failed to cite any authority for the proposition that the Accused have advocacy rights outside the current Commission and consequently, cannot show that any rights of the Accused are violated by Amended Protective Order #1.

Finally, the Defense claim that the Accused experience "much harsher conditions of confinement" than their circumstances warrant, not because they pose a risk of danger to themselves and others, but to prevent them from conveying information. *Id.* at B.3. It is unclear what conditions the Defense believe would be appropriate for the Accused other than a passing reference to the communal living conditions of other detainees at Guantanamo Bay. *Id.* The Defense fail to cite any legal basis for their claim and fail to acknowledge that the Accused are senior level associates of an international terrorist organization and are being prosecuted for their participation in the worst terrorist attack in the history of the United States. Here, the Defense have utterly failed to carry their burden of establishing that Amended Protective Order #1 violates the rights of the Accused, particularly in light of the Supreme Court's requirement that matters of security within the institutional setting are left to the sound and principled discretion of prison administrators. *Bounds v. Smith*, 430 U.S. 817, 832-33 (1977); *Lewis v. Casey*, 518

U.S. 343, 363 (1996); s*ee also, Bell v. Wolfish*, 441 U.S. 520, 547 (1979)(Courts accord prison officials "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.").

7. Oral Argument

The Prosecution waives oral argument and requests that the matter be submitted on the pleadings.

8. Witnesses and Evidence

None.

9. Additional Information

None.

10. Attachments

A. Certificate of Service, dated 3 October 2013.

Respectfully submitted,

//s//

Joanna Baltes
Deputy Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 3rd day of October 2013, I filed AE 200F, the **Government Response** To Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

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