

**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
HAWSA WI**

AE 232A

Government Response
To Defense Motion For Authorization to
Provide Classified Information to
Appropriately Cleared Members of
Congress

18 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. 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. 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 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).

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. 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). On 27 December 2012, the Defense filed a Motion to Reconsider Need-to-Know Provision in Protective Order #1, arguing that defense counsel, not the original classification authority should make such determinations. On 9 February 2013, the Military Judge denied the Defense motion to reconsider that provision and left intact the requirement that the original classification authority make need-to-know determinations for individuals outside the defense teams. (AE013Z). The Military Judge also issued an amended protective order modifying (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. (AE 013AA).

On 12 August 2013, counsel for Mr. Hawsawi, Mr. Binalshibh, and Mr. Bin Attash filed Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention

Against Torture. *See* AE 200 (MAH, RBS, WBA). On 17 September 2013, counsel for Mr. Ali filed a Notice of Joinder, Factual Supplement and Argument to Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture. *See* AE 200 (MAH, RBS, WBA); (AAA). On 19 September 2013, counsel for Mr. Hawsawi filed a Factual Supplement. *See* AE200 (MAH Supp).

The Prosecution filed its response on 3 October 2013, arguing that no court, including this Commission, has jurisdiction to hear the defense claims under the Convention Against Torture, as that Convention is non-self-executing. *See* AE200F.

5. Law and Argument

The Defense motion seeks authorization from this Commission to allow counsel to provide unspecified classified information to unidentified members of Congress who “counsel is informed” possess security clearances allowing them to receive such information. *See* AE232 at ¶ 4(b). According to the Defense motion, an opportunity for legislative advocacy has arisen since the filing of AE200, and therefore, this Commission should authorize counsel to share classified information. *Id.* Consistent with the Defense filing in AE 200 (AAA), counsel failed to cite any authority for the proposition that the Accused have legislative advocacy rights that would confer any rights cognizable in this Commission. More importantly however, the Defense motion fails to acknowledge that access to classified information is a decision made solely by the Executive Branch. *See Dep't of the Navy v. Egan*, 484 U.S. 518, 526-530 (U.S. 1988).

Defense counsel has access to classified information in this case solely based on their status as counsel for the defendant and solely for the purpose of representing the defendant in this proceeding. Counsel does not have authority to use or disclose this classified information for any purpose beyond the scope of that representation. The protective order limits defense counsel’s authorized disclosure of classified information to “the immediate parameters of these military proceedings” and appropriately so because the sole justification for granting defense

counsel access to this classified information is for use in their representation of the defendant in these proceedings.

Pursuant to 50 U.S.C. § 435(a), the President "shall establish procedures to govern access to classified information." The President, pursuant to this authority, mandated that a person may only receive access to classified information if an agency has determined that the person is eligible, the person has signed a non-disclosure agreement, and the person needs to know the information. Exec. Order No. 13526, Part 1, Sec. 4.1(a), 75 Fed. Reg.707 (Dec. 29, 2009).

Accordingly, gaining access to classified material involves two separate and distinct processes. First, there must be a determination that the person is suitable for receiving classified materials. It does not however, entitle someone to access all classified information. *U.S. v. Bin Laden*, 126 F. Supp.2d 264, 287 n.27 (S.D.N.Y. 2000) (security clearances enable "attorneys to review classified documents, 'but do not entitle them to see all documents with that classification.'") (citing *United States v. Ott*, 827 F.2d at 473, 477 (9th Cir. 1987).

Second, it must be determined that the person has a "need-to-know" the classified material. *Badrawi v. Dep't of Homeland Security*, 596 F. Supp. 2d 389, 2009 U.S. Dist. LEXIS 2245, 2009 WL 103361, *9 (D.Conn.) (counsel without need to know properly denied access to classified information despite security clearance). "Need-to-know" is a determination within the Executive Branch that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function. Exec. Order No. 13526 Part 1, Sec. 6.1(dd).

The Defense motion utterly fails to identify the classified information at issue, the prospective recipient, or the lawful and authorized governmental function at issue. There is no evidence in the record that any member of Congress has requested counsel's assistance in obtaining classified information to perform a lawful government function. And as previously recognized by the Commission, defense counsel is not authorized to make "need to know" determinations for anyone outside the defense team. *See* AE 013Z.

The motion also asserts that Amended Protective Order #1 limits the First Amendment rights of the defense team by hiding information from Congress that certain members of the Legislative Branch are authorized to receive. *See* AE 200 (AAA) at ¶ 5. However, the Defense has failed to cite any Congressional function that is impeded by the protective order in this case. Additionally, the motion fails to state a cognizable claim under the First Amendment for two reasons.

First, there is no First Amendment right to receive properly classified information. *See Stillman v. C.I.A.*, 319 F.3d 546, 548 (D.C. Cir. 2003) (“If the Government classified the information properly, then [appellant] simply has no first amendment right to publish it.”); *see also Snapp v. United States*, 444 U.S. 507, 510 n.3 (1980) (per curiam) (“The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.”); *ACLU v. DOD*, 584 F. Supp. 2d 19, 25 (D.D.C. 2008) (“There is obviously no First Amendment right to receive classified information.”); 10 U.S.C. § 949p-1(a) (“Under no circumstances may a military judge order the release of classified information to any person not authorized to receive such information.”)

Second, in communicating with the Accused, counsel does not speak as a citizen addressing a matter of public concern, and thus the First Amendment does not cover his communications with his client. *Cf. Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Rather, the speech presumably (although not described in the motion) is speech in which counsel engages solely pursuant to his duties as an employee of or an attorney appointed by the Office of the Chief Defense Counsel to represent Mr. Ali. As the Supreme Court has held, speech made by public employees pursuant to official duties, such as the speech at issue here, falls outside of the First Amendment’s protections. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Following *Garcetti*, courts have rejected claims by criminal defense counsel employed or appointed by the state that they are outside of *Garcetti*’s reach because of counsel’s responsibility to represent individuals in controversy with the state. *See, Maras–Roberts v. Phillippe*, No.05-cv-1148,

2007 WL 1239119, at *4-6 (S.D. Ind. Apr. 27, 2007); *Jacobson v. Schwarzenegger*, 650 F. Supp. 2d 1032, 1056 (C.D. Cal. 2009); *Ansell v. D'Alesio*, 485 F. Supp. 2d 80, 84 (D. Conn. 2007). To be sure, counsel's official duties include the duty to communicate with his client, but that duty does not implicate his *personal* First Amendment rights.

Accordingly, the Defense motion should be denied.

6. Oral Argument

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

7. Witnesses and Evidence

None.

8. Additional Information

None.

9. Attachments

A. Certificate of Service, dated 18 October 2013.

Respectfully submitted,

//s//

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ATTACHMENT A

