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THROUGH D (FILED UNDER SEAL)~~

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA	AE 013
v.	Government Motion
ABD AL HADI AL-IRAQI	To Protect Against Disclosure of National Security Information
	7 July 2014

1. Timeliness

This Motion is timely filed pursuant to Rule for Military Commission (R.M.C.) 905(b) and Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.

2. Relief Sought

The Government respectfully requests that the Military Judge issue the attached proposed Protective Order (Attachment E) to protect classified information in connection with this case. *See* 10 U.S.C. § 949p-3; Military Commission Rule of Evidence (M.C.R.E.) 505(e). Furthermore, the Government respectfully requests that the Military Judge issue the attached proposed Order (Attachment F) sealing the classified declarations attached to this motion and filed *ex parte*, *in camera*, and under seal.

3. Overview

This Military Commission will involve classified information that must be protected throughout all stages of the proceedings. As discussed in the attached declarations from the Central Intelligence Agency (CIA), the Department of Defense (DoD), and the Federal Bureau of Investigation (FBI), filed herewith under seal, the substance of the classified information in this case deals with the sources, methods, and activities by which the United States defends against international terrorist organizations. Attachment B, Classified Declaration of Information Review Officer, Central Intelligence Agency, dated 3 July 2014 (CIA Decl.); Attachment C, Classified Declaration of David M. Cattler, Director, Defense Combating Terrorism Center,

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Defense Intelligence Agency, dated 11 June 2014 (DIA Decl.); Attachment D, Classified Declaration of John Giacalone, Assistant Director, Counterterrorism Division, Federal Bureau of Investigation, dated 30 June 2014 (FBI Decl.). The Military Commissions Act, 10 U.S.C. § 948a, *et seq.* (M.C.A.), specifically protects classified information, the disclosure of which would be detrimental to national security. 10 U.S.C. § 949p-1. The Government moves the Military Judge, pursuant to the M.C.A., to enter the attached proposed Protective Order to protect classified information in this case. *See* Attachment E.

4. Burden of proof

As the moving party, the Government must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c); *see also* M.C.R.E. 505(e) (“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.”).

5. Facts

On 3 February 2014, charges were sworn against Abd al Hadi al-Iraqi (Abd al Hadi). These charges were referred to this non-capital Military Commission on 2 June 2014. The Accused is charged with Denying Quarter, Attacking Protected Property, Use of Treachery or Perfidy, Attempted Use of Treachery or Perfidy, and Conspiracy to Commit Offenses Triable by Military Commission. On 18 June 2014, the Accused was arraigned before this Military Commission, with the national security protections of Interim Protective Order #1 in effect. *See* AE 004D.

This case involves classified information that deals with the sources, methods, and activities by which the United States defends against international terrorist organizations, including al Qaeda and its affiliates. *See, e.g.,* [REDACTED] DIA Decl. ¶¶ 37-45; FBI Decl. ¶¶ 15-16.

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The charged offenses arise out of a course of conduct that the Accused allegedly undertook from the period of approximately 1996 through approximately 1 November 2006, as well as the alleged conduct of the Accused's co-conspirators and subordinates during that time.

In response to the terrorist attacks of 11 September 2001, the United States instituted a program run by the 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 (SCI), the disclosure of which could reasonably be expected to cause grave damage to national security.

[REDACTED]

On 6 September 2006, President George W. Bush officially acknowledged the existence of this program and announced that a group of HVDs had been transferred by the CIA to DoD custody at Joint Task Force – Guantanamo (JTF-GTMO). *See* President George W. Bush, *President Discusses Creation of Military Commissions to Try Suspected Terrorists*, Remarks from the East Room of the White House, Sep. 6, 2006, *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html>.

On 27 April 2007, the Accused entered the custody of the Department of Defense and was placed under the control of JTF-GTMO. Prior to his arrival at Guantanamo Bay, he was held in CIA custody. Because the Accused was detained in CIA custody, he was exposed to classified sources, methods, and activities. Due to his exposure to classified information, the Accused is in a position to reveal this information publicly through his statements.

Consequently, any statements by the Accused regarding his capture, detention, rendition, or interrogation are presumed to be classified until a classification review can be completed.

[REDACTED]

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

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“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.*; *see also* 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 program has not been declassified or officially acknowledged, and therefore remains classified. This classified information includes allegations involving (i) the location of its detention facilities, (ii) the identity of any 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. [REDACTED] The disclosure of this classified information would be detrimental to national security. [REDACTED]

Information relating to DoD sources, methods, and activities at JTF-GTMO also remains classified. This classified information includes (i) force protection information, (ii) foreign government information, (iii) intelligence sources and methods, (iv) military and intelligence operational information, (v) certain detainee information, and (vi) derivatively classified information. DIA Decl. ¶¶ 9, 13-69. The disclosure of this classified information could reasonably be expected to cause grave damage to national security. *See id.*

Certain FBI documents involved in this case also contain classified information, the disclosure of which would be detrimental to national security. FBI Decl. ¶ 16.

6. Law and Argument

The M.C.A. mandates that the protection of classified information is paramount. *See* 10 U.S.C. § 949p-1. Recognizing the equities at stake when balancing the need for a system to prosecute terrorism-related offenses and the need to conduct ongoing counterterrorism operations, the M.C.A. includes unambiguous protections for classified information, including the sources, methods, and activities by which the United States acquires information. *See* 10

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U.S.C. §§ 949p-1 to 949p-7. The rules in this area provide that the protection of classified information “applies to all stages of the proceedings.” M.C.R.E. 505(a)(1).

The protections in the M.C.A. and M.C.R.E. establish well-defined pretrial, trial, and appellate procedures to govern the discovery, handling, and use of classified information in military commissions. Such protections and procedures include protective orders; *ex parte*, *in camera* presentations and proceedings; alternatives for disclosure of classified information; pretrial conferences and hearings; notice requirements; and protections for courtroom proceedings. *See generally* 10 U.S.C. §§ 949p-1 through 949p-7; M.C.R.E. 505. In analyzing these rules, it is also helpful to examine case law interpreting similar provisions under the Classified Information Procedures Act, 18 U.S.C. App. 3 (CIPA), upon which the M.C.A.’s provisions are patterned. *See* 10 U.S.C. § 949p-1(d) (making the judicial construction of CIPA authoritative under the M.C.A. where not inconsistent with specific M.C.A. provisions); 10 U.S.C. §§ 949p-2(b), 949p-4(b)(2), 949p-7(c)(2) (providing that conferences, presentations, and proffers take place *ex parte* as necessary, in accordance with federal court practice under CIPA); 155 Cong. Rec. S7947, 7987-89 (July 23, 2009) (Senate floor debate on M.C.A. amendments to adopt CIPA procedures).

Due to the classified information involved in this case, and the harm to national security that its disclosure reasonably could be expected to cause, the M.C.A. allows for certain protective measures to be adopted in this military commission. To that end, the Government filed AE 004 requesting a Protective Order accomplishing the following: (1) appointing a Court Security Officer to protect against the inadvertent public disclosure of classified information at the upcoming proceedings; (2) requiring that all personnel with live courtroom access possess appropriate clearances; and (3) authorizing a forty-second delayed audio feed of the proceedings to the public gallery and any remote CCTV viewing sites. On 13 June 2014, the Commission

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ordered an interim protective order to be applied to the arraignment of 18 June 2014, and any continuation of that proceeding. AE 004D Interim Protective Order #1, Courtroom Security. The Government now submits the attached proposed Protective Order (Attachment E) as a means of further protecting the classified information involved in this case, to be applied for all proceedings in this case.

In support of this motion, the Government submits declarations from representatives of the CIA, DoD, and FBI invoking the classified information privilege and explaining how disclosure of the classified information at issue would be detrimental to national security. [REDACTED]

[REDACTED] DIA Decl. ¶ 8-12; FBI Decl. ¶ 16. Due to the extremely sensitive nature of the classified information they contain, the Government files these declarations under seal, respectfully requests that they be considered by the Military Judge *in camera*, and further requests that the CIA Declaration be considered *ex parte*. See 10 U.S.C. §§ 949p-2(b), 949p-4(b)(2), 949p-6(a)(3), 949p-6(d)(4); M.C.R.E. 505(d)(2), 505(f)(2)(B), 505(h)(3)(A).¹

As these declarations describe, the classified information involved in this case relates to the sources, methods, and activities by which the United States defends against international terrorism and terrorist organizations, and the disclosure of such information would be

¹ In addition to being allowed under the military commission rules, *ex parte*, *in camera* inspection of national security information is routinely conducted by federal courts under the similar CIPA provisions upon which the M.C.A.'s classified information provisions are modeled. See, e.g., *United States v. Mejia*, 448 F.3d 436, 457 (D.C. Cir. 2006) (finding that when "the government is seeking to withhold classified information from the defendant, an adversary hearing with defense knowledge would defeat the very purpose of the discovery rules") (quoting H.R. Rep. No. 96-831, pt. 1, at 27 n.22 (1980)), *cert. denied*, 549 U.S. 1137 (2007); *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003) ("Precisely because it is often difficult for a court to review the classification of national security information, we anticipate that *in camera* review of affidavits, followed if necessary by further judicial inquiry, will be the norm.") (internal quotation marks and citation omitted); *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998) (recognizing that "*ex parte*, *in camera* hearings in which government counsel participates to the exclusion of defense counsel are part of the process that the district court may use," particularly "if the court has questions about the confidential nature of the information or its relevancy").

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detrimental to national security. [REDACTED] DIA Decl. ¶¶8-19, 24-69; FBI Decl. ¶ 16. This information is therefore properly classified by the executive branch pursuant to Executive Order 13526, as amended, or its predecessor Orders, and is subject to protection in connection with this Military Commission. 10 U.S.C. §§ 948a(2)(A), 949p-1(a); M.C.R.E. 505(a)(1), (c); M.C.R.E. 505(f), Discussion. *See also Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (“[T]he protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it.”); *Bismullah v. Gates*, 501 F.3d 178, 187-88 (D.C. Cir. 2007) (“It is within the role of the executive to acquire and exercise the expertise of protecting national security.”) (citations omitted).

The protection of such sources, methods, and activities relating to counterterrorism and other intelligence operations predates the enactment of the M.C.A. and is firmly rooted in federal law. In *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), for example, the Court of Appeals for the D.C. Circuit upheld a protective order that protected not only the contents of a defendant hijacker’s recorded conversations, but also the intelligence-gathering methods used to collect them. *Yunis*, 867 F.2d at 623. The court recognized that in some instances the national security interest “lies not so much in the contents of the conversations, as in the time, place and nature of the government’s ability to intercept the conversations at all.” *Id.*

Even when classified information has been leaked to the public domain, it remains classified and cannot be further disclosed unless it has been declassified or “officially acknowledged,” which entails that it “must already have been made public through an official and documented disclosure.” *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) (internal quotations and citations omitted); *see also Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990) (“[I]n the arena of intelligence and foreign relations, there can be a critical difference between

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official and unofficial disclosures.”); *United States v. Moussaoui*, 65 Fed. Appx. 881, 887 n.5 (4th Cir. 2003) (“[I]t is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so.”) (quoting *Alfred A Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975)).

Indeed, even false allegations about classified information related to this case must be protected from disclosure because, otherwise, the Government would be in the untenable position of having to deny false information and yet ignore true information, which would implicitly confirm the very information the Government seeks to protect. [REDACTED]

Any disclosure of classified information—which the Defense and the Accused are in a particularly credible position to confirm or deny—can have a significant impact on national security, even if that information is attributed to public sources. *See Wolf*, 473 F.3d at 378 (recognizing that “the fact that information exists in some form in the public domain does not necessarily mean that official disclosure will not cause [cognizable] harm” to government interests); *Afshar v. Dep’t of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983) (“[E]ven if a fact . . . is the subject of widespread media attention and public speculation, its official acknowledgement by an authoritative source might well be new information that could cause damage to the national security.”).

Accordingly, the Government’s proposed protective order precludes the Defense and the Accused from making public or private statements confirming, contradicting, or otherwise commenting on classified information, including information obtained from the public domain. To allow the Defense or the Accused to comment on such information would amount to an authoritative disclosure of classified information. Because the Government cannot predict whether the Accused intends to disclose classified information during public proceedings in this

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case, the Government requests that the Military Judge immediately implement the protective measures set forth in the proposed Protective Order. Moreover, such protective measures are consistent with those implemented in each military commission of an HVD thus far. *See e.g., United States v. al-Nashiri*, AE 013M (27 Mar. 2014); *United States v. Mohammad, et.al.*, AE 013DDD (16 Dec. 2013). Further, for the reasons stated in the Government's original Motion for Appropriate Relief for Protection of National Security Information Through Certain Courtroom Security Measures (AE 004), and those stated herein, the Government requests the Commission make Interim Protective Order #1 (AE 004D) permanent.

7. Conclusion

In light of the classified information at issue in this case, and the harm to national security that its disclosure reasonably could be expected to cause, the Government requests that the Military Judge enter the proposed Protective Order (Attachment E) and the proposed Order placing classified Attachments B through D under seal (Attachment F).

8. Oral Argument

The Government does not request oral argument. The Government requests that the proposed Protective Order be issued prior to any further commission proceedings in this case.

9. Certificate of Conference

The Defense has been notified of this motion and does object to the requested relief.

10. Attachments

- A. Certificate of Service, dated 7 July 2014.
- B. Classified Declaration of Information Review Officer, Central Intelligence Agency, dated 3 July 2014 (filed *ex parte*, *in camera*, and UNDER SEAL)
- C. Classified Declaration of David M. Cattler, Director, Defense Intelligence Agency, Defense Combating Terrorism Center, dated 11 June 2014 (filed *ex parte*, *in camera*, and UNDER SEAL)

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ATTACHMENT A

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CERTIFICATE OF SERVICE

I certify that on the 7th day of July, 2014, I filed **AE 013**, the **Government Motion 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/

Mikeal M. Clayton
Trial Counsel
Office of the Chief Prosecutor
Military Commissions

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ATTACHMENT B

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**MILITARY COMMISSIONS TRIAL JUDICIARY
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UNITED STATES OF AMERICA	FILED IN CAMERA
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PLACEHOLDER FOR CLASSIFIED FILING

ATTACHMENT B - CLASSIFIED DECLARATION OF INFORMATION REVIEW
OFFICER, CENTRAL INTELLIGENCE AGENCY, DATED 3 JULY 2014

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ATTACHMENT C

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**MILITARY COMMISSIONS TRIAL JUDICIARY
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PLACEHOLDER FOR CLASSIFIED FILING

ATTACHMENT C - CLASSIFIED DECLARATION OF DAVID M. CATTLER, DIRECTOR,
DEFENSE INTELLIGENCE AGENCY, DEFENSE COMBATING TERRORISM CENTER,
DATED 11 JUNE 2014

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ATTACHMENT D

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**MILITARY COMMISSIONS TRIAL JUDICIARY
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PLACEHOLDER FOR CLASSIFIED FILING

ATTACHMENT D - CLASSIFIED DECLARATION OF JOHN GIACALONE, ASSISTANT
DIRECTOR FEDERAL BUREAU OF INVESTIGATION, COUNTERTERRORISM
DIVISION, DATED 30 JUNE 2014

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ATTACHMENT E

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI	AE 013__ PROTECTIVE ORDER #3¹ To Protect Against Disclosure of National Security Information _____ 2014
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Upon consideration of the submissions regarding the Government's Motion To Protect Against Disclosure of National Security Information in this case (AE 013), the Commission finds this case involves classified national security information, including TOP SECRET / SENSITIVE COMPARTMENTED INFORMATION (SCI), the disclosure of which would be detrimental to national security, the storage, handling, and control of which requires special security precautions, and access to which requires a security clearance and a need-to-know. Accordingly, pursuant to authority granted under 10 U.S.C. §§ 949p-1 to 949p-7, Rules for Military Commissions (R.M.C.) 701 and 806, Military Commission Rule of Evidence (M.C.R.E.) 505, Regulation for Trial by Military Commissions (R.T.M.C.) (2011) ¶ 17-3, and the general judicial authority of the Commission, in order to protect the national security, and for good cause shown, the following Protective Order is entered.

¹ The Government's proposed protective order attached to AE 006 was incorrectly labeled "Protective Order #3." The Commission entered the order as Protective Order #2. AE 006A. Accordingly, this proposed protective order has been numbered consistent with, and consecutive to, the Commission's order in AE 006A.

I. SCOPE

a. This Protective Order establishes procedures applicable to all persons who have access to or come into possession of classified documents or information in connection with this case, regardless of the means by which the persons obtained the classified information. These procedures apply to all aspects of pre-trial, trial, and post-trial stages in this case, including any appeals, subject to modification by further order of the Commission or orders issued by a court of competent jurisdiction.

b. This Protective Order applies to all information, documents, testimony, and material associated with this case that contain classified information, including but not limited to any classified pleadings, written discovery, expert reports, transcripts, notes, summaries, or any other material that contains, describes, or reflects classified information.

c. Counsel are responsible for advising their clients, translators, witnesses, experts, consultants, support staff, and all others involved with the defense or prosecution of this case, respectively, of the contents of this Protective Order.

II. DEFINITIONS

a. As used in this Protective Order, the term "Court Security Officer (CSO)" and "Assistant Court Security Officer (ACSO)" refer to security officers, appointed by the Military Judge, to serve as the security advisor to the judge, to oversee security provisions pertaining to the filing of motions, responses, replies, and other documents with the Commission, and to manage security during sessions of the Commission. The CSO and ACSO will be administered an oath IAW Rule 10, Military Commissions Rules of Court.

b. The term “Chief Security Officer, Office of Special Security” refers to the official within the Washington Headquarters Service responsible for all security requirements and missions of the Office of Military Commissions and to any assistants.

c. The term “Defense” includes any counsel for the Accused in this case and any employees, contractors, investigators, paralegals, experts, translators, support staff, Defense Security Officer, or other persons working on the behalf of an Accused or his counsel in this case.

d. The term “Defense Security Officer” (DSO) refers to a security officer, serving as security advisor to the Defense, who oversees security provisions pertaining to the filing of motions, response, replies, and other documents with the Commission.

e. The term “Government” includes any counsel for the United States in this case and any employees, contractors, investigators, paralegals, experts, translators, support staff or other persons working on the behalf of the United States or its counsel in this case.

f. The words “documents” and “information” include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, conforming and non-conforming copies, whether different from the original by reason of notation made on such copies or otherwise, and further include, but are not limited to:

(1) papers, correspondence, memoranda, notes, letters, cables, reports, summaries, photographs, maps, charts, graphs, inter-office and intra-office communications, notations of any sort concerning conversations, meetings, or other communications, bulletins, teletypes, telegrams, facsimiles, invoices, worksheets, and drafts, alterations, modifications, changes, and amendments of any kind to the foregoing;

(2) graphic or oral records or representations of any kind, including, but not limited to: photographs, maps, charts, graphs, microfiche, microfilm, videotapes, and sound or motion picture recordings of any kind;

(3) electronic, mechanical, or electric records of any kind, including, but not limited to: tapes, cassettes, disks, recordings, electronic mail, instant messages, films, typewriter ribbons, word processing or other computer tapes, disks or portable storage devices, and all manner of electronic data processing storage; and

(4) information acquired orally.

g. The terms “classified national security information and/or documents,” “classified information,” and “classified documents” include:

(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 additionally 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 Accused or 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 the Accused other than the location and date as indicated in the charges;

(b) Information that would reveal or tend to reveal the location or locations in which the Accused was detained from the time he entered U.S. custody through 27 April 2007;

(c) Information that would reveal or tend to reveal the names, identities, and physical descriptions of any persons involved with the capture, transfer, detention, or interrogation of the Accused or specific dates regarding the same, from the time he entered U.S. custody through 27 April 2007;

(d) Information that refers or relates to the interrogation techniques that were applied to the Accused from the time he entered U.S. custody through 27 April 2007, including descriptions of the techniques as applied, the duration, frequency, sequencing, and limitations of those techniques; and

(e) Information that refers or relates to the conditions of confinement of the Accused from the time he entered U.S. custody through 27 April 2007;

(5) any information which includes, without limitation, observations and experiences of the Accused with respect to the matters set forth in subparagraphs II.g.(4)(a)-(e);

(6) 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.

(7) The terms “classified national security information and/or documents,” “classified information,” and “classified documents” do not include documents or information officially declassified by the United States by the appropriate OCA.

h. “National Security” means the national defense and foreign relations of the United States.

i. “Access to classified information” means having authorized access to review, read, learn, or otherwise come to know classified information.

j. “Secure area” means a physical facility accredited or approved for the storage, handling, and control of classified information.

k. “Unauthorized disclosure of classified information” means any knowing, willful, or negligent action that could reasonably be expected to result in a communication or physical transfer of classified information to an unauthorized recipient. Confirming or denying information, including its very existence, constitutes disclosing that information.

III. COURT SECURITY OFFICER

a. A Court Security Officer (CSO) and Assistant Court Security Officer(s) (ACSO) for this case have been designated by the Military Judge. AE 004D.

b. The CSO and any ACSO are officers of the court. *Ex parte* communication by a party in a case, to include the Office of Military Commissions, DoD General Counsel, or any intelligence or law enforcement agency, with the CSO/ACSO is prohibited except as authorized by the M.C.A. or the Manual for Military Commissions (M.M.C.). This is to preclude any actual or perceived attempt to improperly influence the Commission in violation of 10 U.S.C. § 949b.

This does not include administrative matters necessary for the management of the security responsibilities of the Office of Trial Judiciary.

c. The CSO/ACSO shall ensure that all classified or protected evidence and information is appropriately safeguarded at all times during Commission proceedings and that only personnel with the appropriate clearances and authorizations are present when classified or protected evidence is presented before a military commission.

d. The CSO shall consult with the Original Classification Authority (OCA) of classified documents or information, as necessary, to address classification decisions or other related issues.

IV. DEFENSE SECURITY OFFICER

a. Upon request of Defense Counsel for the Accused, the Convening Authority shall provide a Defense Security Officer for the Accused.

b. The Defense Security Officer is, for limited purposes associated with this case, a member of the Defense Team, and therefore shall not disclose to any person any information provided by the Defense, other than information provided in a filing with the military commission. In accordance with M.C.R.E. 502, the Defense Security Officer shall not reveal to any person the content of any conversations he hears by or among the defense, nor reveal the nature of documents being reviewed by them or the work generated by them, except as necessary to report violations of classified handling or dissemination regulations or any Protective Order issued in this case, to the Chief Security Officer, Office of Special Security. Additionally, the presence of the Defense Security Officer, who has been appointed as a member of the Defense Team, shall not be construed to waive, limit, or otherwise render inapplicable the attorney-client privilege or work product protections.

c. The Defense Security Officer shall perform the following duties:

(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.

d. To the fullest extent possible, the classification review procedure must preserve the lawyer-client and other related legally-recognized privileges.

(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 Defense Security Officer, including any component of the Office of Military Commissions, except that CSO 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.

V. ACCESS TO CLASSIFIED INFORMATION

a. Without authorization from the Government, no member of the Defense, including defense witnesses, shall have access to classified information 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, thereby agreeing to comply with the terms of this Protective Order; and

(3) a need-to-know for the classified information at issue, as determined by the Original Classification Authority (OCA) for that information.

b. In order to be provided access to classified information 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 CSO. The execution and submission of the MOU is a condition precedent to the Defense having access to classified information for the purposes of these proceedings. The Chief Security Officer, Office of Special Security and CSO shall not provide copies of the MOUs to the Prosecution except upon further order of the Military Commission. The Chief Security Officer can provide the Prosecution the names of the Defense team members, identified on the record, who have

executed the MOU. The MOUs for Defense Team members which have been provided *ex parte* may be provided, under seal, to the Chief Security Officer, Office of Special Security, and/or the CSO and will not be further released without authority of the Commission.

c. The substitution, departure, or removal of any member of the Defense, including defense witnesses, from this case for any reason shall not release that person from the provisions of this Protective Order or the MOU executed in connection with this Protective Order.

d. Once the Chief Security Officer, Office of Special Security verifies that counsel for the Accused have executed and submitted the MOU, and are otherwise authorized to receive classified information in connection with this case, the Government may provide classified discovery to the Defense.

e. All classified documents or information provided or obtained in connection with this case remain classified at the level designated by the OCA, unless the documents bear a clear indication that they have been declassified. The person receiving the classified documents or information, together with all other members of the Defense or the Government, respectively, shall be responsible for protecting the classified information from disclosure and shall ensure that access to and storage of the classified information is in accordance with applicable laws and regulations and the terms of this Protective Order.

f. No member of the Defense, including any defense witness, is authorized to disclose any classified information obtained during this case, outside the immediate parameters of these Military Commission proceedings. If any member of the Defense or any defense witness receives any summons, subpoena, or court order, or the equivalent thereof, from any United States or foreign court or on behalf of any criminal or civil investigative entity within the United States or from any foreign entity, the Defense, including defense witnesses, shall immediately

notify the Commission, the Chief Security Officer, Office of Special Security, and the Government so that appropriate consideration can be given to the matter by the Commission and the OCA of the materials concerned. Absent authority from the Commission or the Government, the Defense, the Accused, and defense witnesses are not authorized to disseminate or disclose classified materials in response to such requests. The Defense, the Accused, and defense witnesses and experts are not authorized to use or refer to any classified information obtained as a result of their participation in commission proceedings in any other forum, or in a military commission proceeding involving another detainee.

VI. USE, STORAGE, AND HANDLING PROCEDURES

a. The Office of the Chief Defense Counsel, Office of Military Commissions, has approved secure areas in which the Defense may use, store, handle, and otherwise work with classified information. The Chief Security Officer, Office of Special Security, shall ensure that such secure areas are maintained and operated in a manner consistent with this Protective Order and as otherwise reasonably necessary to protect against the disclosure of classified information.

b. All classified information provided to the Defense, and otherwise possessed or maintained by the Defense, shall be stored, maintained, and used only in secure areas. Classified information may only be removed from secure areas in accordance with this Protective Order and applicable laws and regulations governing the handling and use of classified information.

c. Nothing in this Protective Order shall be construed to interfere with the right of the Defense to interview witnesses, regardless of their location. If the Defense receives a document containing information described in ¶ 2(g) or memorializes information described in ¶ 2(g), while in a non-secure environment, the Defense shall:

- (1) Maintain positive custody and control of the material at all times;

(2) Unless under duress, relinquish control of the material only to other personnel with the appropriate security clearance and a need-to-know;

(3) Transport the material in a manner not visible to casual observation;

(4) Not add information (including markings) corroborating the material as classified until returning to a secure area;

(5) Not electronically transmit the information via unclassified networks;

(6) Transport the material to a secure area as soon as circumstances permit; and,

(7) After returning to a secure area, mark and handle the material as classified.

d. Consistent with other provisions of this Protective Order, the Defense shall have access to the classified information made available to them and shall be allowed to take notes and prepare documents with respect to such classified information in secure areas.

e. The Defense shall not copy or reproduce any classified information in any form, except in secure areas and in accordance with this Protective Order and applicable laws and regulations governing the reproduction of classified information.

f. Defense counsel can conduct open source searches from a computer not identifiable with the U.S. government. The raw search material can be stored in an unclassified format or on an unclassified system. However, if an individual has access to classified information, any information described in ¶¶ 2(g)(2) and 2(g)(4) of this Protective Order will be marked or treated as classified in a military commissions pleading if the information is specifically referenced to information available in the public domain.

g. All documents prepared by the Defense that are known or believed to contain classified information, including, without limitation, notes taken or memoranda prepared by counsel and pleadings or other documents intended for filing with the Commission, shall be

transcribed, recorded, typed, duplicated, copied, or otherwise prepared only by persons possessing an appropriate approval for access to such classified information. Such activities shall take place in secure areas, on approved word processing equipment, and in accordance with procedures approved by the Chief Security Officer, Office of Special Security.

h. The Defense may submit work product for classification review using the procedures outlined in ¶ 4(d). Except as provided in ¶ 6, all such documents and any associated materials containing classified information or information treated as classified under ¶¶ 6(f) and 6(g) such as notes, memoranda, drafts, copies, typewriter ribbons, magnetic recordings, and exhibits shall be maintained in secure areas unless and until the OCA or Chief Security Officer, Office of Special Security advises that those documents or associated materials are unclassified in their entirety. None of these materials shall be disclosed to the Government unless authorized by the Commission, by counsel for the Accused, or as otherwise provided in this Protective Order.

i. The Defense may discuss classified information only within secure areas and shall not discuss, disclose, or disseminate classified information over any non-secure communication system, such as standard commercial telephones, office intercommunication systems, or non-secure electronic mail.

j. The Defense shall not disclose any classified documents or information to any person, including counsel in related cases of Guantanamo Bay detainees in Military Commissions or other courts (including, but not limited to, habeas proceedings), except those persons authorized by this Protective Order, the Commission, and counsel for the Government with the appropriate clearances and the need-to-know that information.

k. To the extent the Defense is not certain of the classification of information it wishes to disclose, the Defense shall follow procedures established by the Office of Military Commissions

for a determination as to its classification. In any instance in which there is any doubt as to whether information is classified, the Defense must consider the information classified unless and until it receives notice from the Chief Security Officer, Office of Special Security, that the information is not classified.

l. Until further order of this Commission, the Defense shall not disclose to the Accused any classified information not previously provided by the Accused to the Defense, except where such information has been approved for release to the Accused and marked accordingly.

m. Except as otherwise stated in this paragraph, and to ensure the national security of the United States, at no time, including any period subsequent to the conclusion of these proceedings, shall the Defense make any public or private statements disclosing any classified information accessed pursuant to this Protective Order, or otherwise obtained in connection with this case, including the fact that any such information or documents are classified. In the event classified information enters the public domain without first being properly declassified by the United States Government, counsel are reminded they may not make public or private statements about the information if the information is classified.² In an abundance of caution and to help ensure clarity on this matter, the Commission emphasizes that counsel shall not be the source of any classified information entering the public domain, nor should counsel comment on information which has entered the public domain but which remains classified.

VII. PROCEDURES FOR FILING DOCUMENTS

a. See Rule 3, Motion Practice, Military Commissions Trial Judiciary Rules of Court.

b. For all filings, other than those filed pursuant to M.C.R E. 505, in which counsel know, reasonably should know, or are uncertain as to whether the filing contains classified information

² For specific examples of information which remains classified even if it is in the public domain, see paragraph II.g of this Protective Order.

or other information covered by Chapter 19-3(b), R.T.M.C., counsel shall submit the filing by secure means under seal with the Chief Clerk of the Trial Judiciary.

c. Documents containing classified information or information the Defense Counsel believes to be classified shall be filed pursuant to the procedures specified for classified information.

d. Classified filings must be marked with the appropriate classification markings on each page, including classification markings for each paragraph. If a party is uncertain as to the appropriate classification markings for a document, the party shall seek guidance from the Chief Security Officer, Office of Special Security, who will consult with the OCA of the information or other appropriate agency, as necessary, regarding the appropriate classification.

e. All original filings will be maintained by the Director, Office of Court Administration, as part of the Record of Trial. The Office of Court Administration shall ensure any classified information contained in such filings is maintained under seal and stored in an appropriate secure area consistent with the highest level of classified information contained in the filing.

f. Under no circumstances may classified information be filed in an otherwise unclassified filing except as a separate classified attachment. In the event a party believes an unsealed filing contains classified information, the party shall immediately notify the Chief Security Officer, Office of Special Security, and CSO/ACSO, who shall take appropriate action to retrieve the documents or information at issue. The filing will then be treated as containing classified information unless and until determined otherwise. Nothing herein limits the Government's authority to take other remedial action as necessary to ensure the protection of the classified information.

g. Nothing herein requires the Government to disclose classified information.

Additionally, nothing herein prevents the Government or Defense from submitting classified information to the Commission *in camera* or *ex parte* in these proceedings or accessing such submissions or information filed by the other party. Except as otherwise authorized by the Military Judge, the filing party shall provide the other party with notice on the date of the filing.

VIII. PROCEDURES FOR MILITARY COMMISSION PROCEEDINGS

a. Except as provided herein, and in accordance with M.C.R.E. 505, no party shall disclose or cause to be disclosed any information known or believed to be classified in connection with any hearing or proceeding in this case.

(1) Notice Requirements

(a) The parties must comply with all notice requirements under M.C.R.E. 505 prior to disclosing or introducing any classified information in this case.

(b) Because statements of an Accused may contain information classified as TOP SECRET/SCI, the Defense must provide notice in accordance with this Protective Order and M.C.R.E. 505(g) if an Accused intends to make statements or offer testimony that might reasonably include classified information at any proceeding.

(2) Closed Proceedings

(a) While proceedings shall generally be publicly held, the Commission may exclude the public from any proceeding, *sua sponte* or upon motion by either party, in order to protect information, the disclosure of which could reasonably be expected to damage national security. If the Commission closes the courtroom during any proceeding in order to protect classified information from disclosure, no person may remain who is not authorized to access

classified information in accordance with this Protective Order, which the CSO shall verify prior to the proceeding.

(b) No participant in any proceeding, including the Government, Defense, Accused, witnesses, and courtroom personnel, may disclose classified information, or any information that tends to reveal classified information, to any person not authorized to access such classified information in connection with this case.

(3) Other Protections

(a) During the examination of any witness, the Government may object to any question or line of inquiry that may require the witness to disclose classified information not found previously to be admissible by the Commission. Following such an objection, the Commission will determine whether the witness's response is admissible and, if so, may take steps as necessary to protect against the public disclosure of any classified information contained therein.

(b) Classified information offered or admitted into evidence will remain classified at the level designated by the OCA and will be handled accordingly. All classified evidence offered or accepted during trial will be kept under seal, even if such evidence was inadvertently disclosed during a proceeding. Exhibits containing classified information may also be sealed after trial as necessary to prevent disclosure of such classified information.

IX. UNAUTHORIZED DISCLOSURE

a. Any unauthorized disclosure of classified information may constitute a violation of United States criminal laws. Additionally, any violation of the terms of this Protective Order shall immediately be brought to the attention of the Commission and may result in disciplinary action or other sanctions, including a charge of contempt of the Commission and possible

referral for criminal prosecution. Any breach of this Protective Order may also result in the termination of access to classified information. Persons subject to this Protective Order are advised that unauthorized disclosure, retention, or negligent handling of classified documents or information could cause damage to the national security of the United States or may be used to the advantage of an adversary of the United States or against the interests of the United States. The purpose of this Protective Order is to ensure those authorized to receive classified information in connection with this case will never divulge that information to anyone not authorized to receive it, without prior written authorization from the OCA and in conformity with this Order.

b. Any party shall promptly notify the Chief Security Officer, Office of Special Security, upon becoming aware of any unauthorized access to or loss, theft, or other disclosure of classified information, and shall take all reasonably necessary steps to retrieve such classified information and protect it from further unauthorized disclosure or dissemination.

X. INTERIM ORDERS MADE PERMANENT

a. For the reasons stated in the Government's original Motion for Appropriate Relief for Protection of National Security Information Through Certain Courtroom Security Measures (AE 004), and those stated herein, Interim Protective Order #1 (AE 004D) is hereby made permanent and is subject to the terms of section XI of this Protective Order.

XI. SURVIVAL OF ORDER

a. The terms of this Protective Order and any signed MOU shall apply to all proceedings in this case, and survive and remain in effect after the termination of this case unless otherwise determined by a court of competent jurisdiction.

b. This Protective Order is entered without prejudice to the right of the parties to seek such additional protections or exceptions to those stated herein as they deem necessary.

So ORDERED this ____ day of _____ 2014.

J.K. WAITS
CAPT, JAGC, USN
Military Judge

DRAFT ORDER / GOVERNMENT / 07/02/14

ATTACHMENT TO PROTECTIVE ORDER #3

DRAFT ORDER / GOVERNMENT / 07/02/14

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI	MEMORANDUM OF UNDERSTANDING Regarding the Receipt of Classified Information
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I, _____ [print or type full name], have been provided a copy of and have read Protective Order #3 relating to the protection of classified information in the above-captioned case, and agree to be bound by the terms of that order. I understand that in connection with this case, I will receive classified documents and information that are protected pursuant to both the terms of the 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, including but not limited to 50 U.S.C. § 421; 18 U.S.C. § 641; 18 U.S.C. § 793; 50 U.S.C. § 783; and Executive Order 13256.

I agree to take all reasonable precautions to prevent any unauthorized use or disclosure of any classified documents or information in my possession or control. I understand that failure to comply with this Memorandum of Understanding Regarding the Receipt of Classified Information (MOU) or any protective order entered in this case could result in sanctions or other consequences, including criminal consequences. I understand that the terms of this MOU shall survive and remain in effect after the termination of this case, and that any termination of my involvement in this case prior to its conclusion will not relieve me from the terms of this MOU or any protective order entered in this case.

I make the above statements under penalty of perjury.

Signature

Date

Witness

Date

Witness

Date

ATTACHMENT F

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI	AE 013__ ORDER Sealing Declarations _____ 2014
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Upon consideration of the Government's request contained within its Motion for Protective Order to Protect National Security Information to maintain UNDER SEAL the classified declarations of CIA, DIA, and FBI (the "Declarations"), and pursuant to the Commission's authority under the Military Commissions Act of 2009, 10 U.S.C. § 948a, et seq. ("M.C.A."), Rule for Military Commissions 806, Military Commission Rules of Evidence 104, 505-507, and the general supervisory authority of the Commission;

THE COMMISSION FINDS that the Declarations contain classified and sensitive but unclassified information that, if publicly released, could reasonably be expected to damage national security and threaten the safety of individuals.

IT IS HEREBY ORDERED that the Declarations shall be kept UNDER SEAL.

So ordered this ____ date of _____, 2014.

J.K. WAITS
CAPT, JAGC, USN
Military Judge