MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI	**AE 013B** **Government Reply** To Defense Response to Government Motion to Protect Against Disclosure of National Security Information 25 July 2014

1. Timeliness

This reply is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.d(2).

2. Law and Argument

The Defense suggests four revisions to the Government's proposed Protective Order, and lodges an objection. The Government's position on those four revisions is as follows:

Paragraph	Current Language	Defense Proposed Revision	Government Position
II(g)(4)(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	Information that would reveal or tend to reveal the names, identities, and physical descriptions of any persons involved with the capture, transfer, detention, or enhanced interrogation of the Accused or specific dates regarding the same, from the time he entered U.S. custody through 27 April 2007	Oppose revision.
II(g)(4)(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	Information that refers or relates to the enhanced interrogation techniques that were applied to the Accused from the time he entered U.S. custody through 27 April 2007, including descriptions	Oppose revision.

	descriptions of the techniques as applied, the duration, frequency, sequencing, and limitations of those techniques	of the techniques as applied, the duration, frequency, sequencing, and limitations of those techniques	
II(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.	"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, where the very existence of the information is classified, constitutes disclosing that information.	Revision is unnecessary, but no objection if the Commission finds that the revision enhances clarity.
V(a)(3)	a need-to-know for the classified information at issue, as determined by the Original Classification Authority (OCA) for that information.	a need-to-know for the classified information at issue.	Oppose revision.

The Defense further objects to the proposed Protective Order on the basis that it is overbroad and argues that the observations and experiences of the Accused cannot be classified. The Defense's position is inaccurate, as the manner in which the Accused acquired classified information—through his observations and experiences—does not dictate whether and at what level information is classified. When determined to be classified by an appropriate authority, such information is classified and must be handled consistent with classified information handling procedures, *see* Executive Order 13,526 Part IV, and should be handled consistent with the Government's proposed Protective Order, *see* Part IV, *infra*.

I. The Word "Enhanced" Should Not Be Added to the Protective Order at Paragraphs II(g)(4)(c) and II(g)(4)(d)

The Defense suggests adding the word "enhanced" before the word "interrogation" in Paragraphs II(g)(4)(c) and II(g)(4)(d) of the proposed Protective Order. The Government opposes this revision, because it would narrow the scope of the proposed Protective Order to a

particular type of interrogation, rather than applying broadly to any classified interrogation of the Accused, or classified information related to any interrogation. Paragraph II(g)(4)(c) of the proposed Protective Order validly seeks to protect the names, identities, and physical descriptions of persons involved with interrogation of the Accused, as well as specific dates. Paragraph II(g)(4)(d) validly seeks to protect the interrogation techniques that were applied to the Accused. The proposed Protective Order should not be narrowed to apply only to a particular type of interrogation, because classified information relating to any type of interrogation of the Accused must be protected.

Moreover, the ten "enhanced interrogation techniques" were not applied to the Accused, as those techniques are defined in the Draft OMS Guidelines on Medical and Psychological Support to Detainee Interrogations at 1-2 (Sept. 4, 2003), *reprinted in* OFFICE OF INSPECTOR GENERAL, CENTRAL INTELLIGENCE AGENCY, SPECIAL REVIEW: COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPTEMBER 2001-OCTOBER 2003) app. F, *available at* http://www.hsdl.org/?view&did=34272. Nonetheless, should any classified information relating to these enhanced interrogation techniques become relevant to this case, they should be handled in a manner consistent with their classification level and the Government's proposed Protective Order.

II. Paragraph II(k) Contains No Error; Nonetheless, the Government Does Not Object to the Proposed Revision

Paragraph II(k) of the proposed Protective Order states:

> "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.

AE 013 Attachment E. The Defense suggests replacing the phrase "including its very existence" with the phrase "where the very existence of the information is classified" in the second sentence in this Paragraph. This revision is unnecessary. The first sentence defines what "Unauthorized disclosure of classified information" means. The second sentence defines what "disclosure"

means. The disclosure must still be of classified information in order to fall within the protections of this paragraph. If the disclosure is not of classified information, the disclosure cannot run afoul of Paragraph II(k). The Defense's own example illustrates the point. If Defense counsel were to state "the location of a defendant's detention is classified," that statement would not violate Paragraph II(k) because the statement itself is not classified. The statement would constitute disclosure of the information that the defendant is detained somewhere, but it would not constitute "unauthorized disclosure of classified information" because it does not contain any classified information.

Nevertheless, the Government does not object to this proposed revision, if the Commission finds that it would enhance clarity.

III. The OCA Determines the Need-to-Know

The Defense suggests removing the phrase "as determined by the Original Classification Authority (OCA) for that information" from Paragraph V(a)(3) of the Protective Order. The Defense argues that the OCA sets the classification level, but does not specifically determine who has a need-to-know, unless the information is designated ORCON.[1] The Defense is mistaken and cites no authority. The OCA sets the classification level and is authorized to determine whether a particular member of the Defense does or does not have a need-to-know classified information, even if the information is not designated ORCON. *See* Executive Order 13,526 § 6.1(dd) ("'Need-to-know' means a determination within the executive branch in accordance with directives issued pursuant to this order that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized government function."); Executive Order 13,526 § 6.1(gg) ("'Original classification authority' means an individual authorized in writing, either by the President, the Vice President, or by agency heads or other officials designated by the President, to classify information in the first

[1] ORCON means "Originator Controlled." DoD Manual No. 52.001, Vol. 2 (Feb. 23, 2012) at 88. "ORCON may be used by the DoD Components to mark information that requires the originator's consent for further dissemination or extraction of information when the classification level and other controls alone are insufficient to control dissemination." *Id.*

instance."); 32 CFR § 2001.40(d) ("Need-to-know determinations. (1) Agency heads, through their designees, shall identify organizational missions and personnel requiring access to classified information to perform or assist in authorized governmental functions. These mission and personnel requirements are determined by the functions of an agency or the roles and responsibilities of personnel in the course of their official duties. Personnel determinations shall be consistent with section 4.1(a) of the Order.").

Executive Order 13,526 "prescribes a uniform system for classifying, safeguarding, and declassifying national security information." Executive Order 13,526 Preamble. Section 1.3 of that Order shows that the OCA is delegated the authority to make classification determinations. Those determinations impliedly include authority to determine the need to know. Before the Defense team receives any classified discovery in this case, as with all cases involving "High Value Detainees" ("HVDs") as accused, an OCA will review that discovery and determine that the Defense has a need to know.[2]

IV. The Defense Team Must Handle All Classified Information in a Manner Consistent with Its Classification Irrespective of the Source of That Information, and *Pappas* Is Inapposite on This Issue

The Government's proposed Protective Order actually governs the *Defense team's* handling of classified information, not the Accused's handling of classified information outside this litigation.[3] Irrespective of whether the Defense team acquires classified information through discovery from the Government or conversations with the Accused, they are obliged by the relevant authorities—as further defined by the Government's proposed Protective Order—to handle such information in a manner consistent with its classification level. *See* Executive Order 13,526 Part IV.

[2] The need-to-know determination is informed by the rules and authority that govern discovery in military commissions. *See, e.g.*, R.M.C. 701; M.C.R.E. 505.

[3] The Government has employed other means to control inappropriate dissemination of classified information by the Accused. For example, AE 004D, Interim Protective Order #1, orders that a forty-second delay be employed to prevent the Accused from disclosing classified information to the public during proceedings in this case.

The Defense argues that Executive Order 13,526 § 1.1(a)(2) prohibits the Government from classifying the observations and experiences of the Accused, because the Government does not own, control, or produce the Accused's observations and experiences. That may be true in the abstract; however, many of the Accused's observations and experiences in this instance may include classified information owned and produced by the U.S. Government, because those observations and experiences were generated by and relate to a classified U.S. Government program.[4] The fact that the Accused became aware of these classified facts through a controlled disclosure to him by the U.S. Government does not alter the classification level of the underlying facts. By way of analogy, consider classified information that is relayed to representatives of a foreign nation under a "DISPLAY ONLY" dissemination control. *See* Department of Defense Manual ("DoD Manual") 5200.01-V2, pp. 93-96 (Feb. 24, 2012) (explaining the handling procedure termed "DISPLAY ONLY"). Displaying such information to a foreign national does not alter the classification of the information when the original document containing the classified information remains in the possession of a person with the appropriate security clearance. Similarly, the fact that the Accused may have learned classified information through a purposeful and controlled disclosure by the U.S Government does not alter the classification of the information when the underlying program and information continues to be maintained in appropriate classified channels. This remains equally true when the classified information is then received by a person with the appropriate security clearance, such as a member of the Defense team. Therefore, if the Accused relays observations and experiences to the Defense team that include classified information, the Defense team is obliged to handle such information in accordance with the law, rules, and regulations governing classified information.

The Defense further argues that, under *United States v. Pappas*, 94 F.3d 795, 801 (2d Cir. 1996), CIPA only regulates information disclosed by the Government during the litigation, not information obtained by the defendant before the litigation. At its most basic level, the

[4] Moreover, any classified information that became known to the Accused through his observations and experiences remains "under the control" of the United States, because Accused is in U.S. custody.

Defense's position is true: CIPA only governs classified information in the context of litigation. That is because CIPA is a procedural statute that is specifically aimed at controlling the exchange and use of classified information during litigation. It is other bodies of law, criminal and administrative, that govern classified information outside of the context of litigation. The Defense, however, misapplies the holding of *Pappas*, as the Government's proposed Protective Order deals squarely with classified information in the context of litigation.

Under *Pappas*, a federal court applying CIPA may still issue a protective order preventing the disclosure of any classified information in connection with the litigation, regardless of whether the information was obtained by the defendant before the litigation, or was obtained by the defendant in discovery during the litigation. *Pappas* held merely that a protective order cannot prohibit disclosure by the defendant of certain classified information outside the context of the litigation (*e.g.*, to a third party), if the classified information was obtained by the defendant before the litigation:

> [T]he scope of CIPA prohibitions on a defendant's disclosure of classified information may be summarized as follows: information conveyed by the Government to the defendant in the course of pretrial discovery or the presentation of the Government's case may be prohibited from disclosure, including public disclosure outside the courtroom, but information acquired by the defendant prior to the criminal prosecution may be prohibited from disclosure only "in connection with the trial" and not outside the trial.

United States v. Pappas, 94 F.3d 795, 801 (2d Cir. 1996). *Pappas* dealt with information obtained by the defendant outside the context of the litigation that the defendant himself was seeking to disclose outside the context of the litigation. The defendant in *Pappas* is therefore differently-situated than the Accused, who is in U.S. custody.

To the extent *Pappas* even applies here, the proposed Protective Order is consistent with its holding because it prohibits disclosure of classified information of any type in the context of the litigation, and it prohibits Defense counsel from disclosing any classified material they obtain during the litigation. Significantly, Defense counsel will have obtained all the classified information at issue (regarding, for example, the treatment of their client), only in the context of

this litigation. Consistent with *Pappas*, the Commission can issue a protective order prohibiting Defense counsel from disclosing that information to anyone who lacks a security clearance and a need-to-know. *See Pappas*, 94 F.3d at 801.

The *Pappas* court further reasoned that the disclosure of information obtained by the defendant before the criminal prosecution may be prohibited by other sources of law, such as criminal laws or contracts, and cited a Senate Report that stated that federal criminal statutes apply to disclosure of classified information outside the context of trials. *Pappas*, 94 F.3d at 800 (quoting S. Rep. No 823, 96th Cong., 2d Sess, at 6, *reprinted in* 1980 U.S.C.C.A.N. 4294, 4299).[5] Based on this, the Defense argues that if the Government could prohibit public disclosure, it could do so only on the basis of contracts with the Accused, and that the Accused has no such contract.

The Defense is incorrect. It is irrelevant that the Accused has no contract with the Government, because the proposed Protective Order does not seek to prohibit the Accused's communications outside the context of this litigation. The proposed Protective Order merely seeks to prohibit the members of Accused's Defense team from making disclosures of classified information that they receive in the context of this litigation, *i.e.*, from the Accused himself, or from the Government in discovery. Members of the Defense are obligated not to disclose classified information to anyone who lacks a security clearance or a need-to-know, and the Commission may issue a protective order consistent with that requirement.

The proposed Protective Order also governs the conduct of attorneys with respect to statements by the Accused in these proceedings. If the Accused were to testify at trial, or respond to a question from the Commission during a pretrial proceeding, his attorneys would be obligated by the Protective Order and M.C.R.E. 505(g) to provide notice "if an Accused intends

[5] The two district court cases cited by the Defense reach a similar conclusion. *See United States v. Oakley*, 2008 U.S. Dist LEXIS 78721, at *6 (E.D. Tenn. 2008) ("[T]he Court in no way finds that the defendant, and Defense counsel, are free to disclose to the public the information at issue, but rather, the Court merely finds that CIPA cannot serve as a basis to preclude such disclosure."); *United States v. Chalmers*, 2007 U.S. Dist. LEXIS 13640, at *4-6 (S.D.N.Y. 2007).

to make statements or offer testimony that might reasonably include classified information at any proceeding." Proposed Protective Order, AE 013 Attachment E, at 16, ¶ VIII.a.(1)(b); *see* M.C.R.E. 505(g) (describing obligation of Accused to provide notice if he reasonably expects to disclose or cause the disclosure of classified information).

Because the proposed Protective Order does not seek to prohibit the Accused's communications outside the context of this litigation, and merely regulates the conduct of the members of the Defense who will have received classified information only in the context of this litigation, the proposed Protective Order is fully consistent with *Pappas*.

3. Conclusion

For the foregoing reasons, the Commission should enter the proposed Protective Order.

4. Witnesses and Evidence

None.

5. Additional Information

None.

6. Attachments

A. Certificate of Service, dated 25 July 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 25th day of July, 2014, I filed **AE 013B, Government Reply To Defense Response to 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//_____
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