MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI	**AE 013H** **AMENDED SUPPLEMENTAL RULING** To Protect Against Disclosure of National Security Information 16 October 2014

1. On 13 June 2014, the Commission issued Interim Protective Order #1, Courtroom Security (AE 004D) in response to the Government's unopposed Motion for Appropriate Relief for Protection of National Security Information Through Certain Courtroom Security Measures (AE 004, filed 6 June 2014). On 7 July 2014, the Government filed a Motion to Protect Against Disclosure of National Security Information (AE 013). The Defense responded on 18 July 2014 (AE 013A), and the Government replied on 25 July 2014 (AE 013B). On 15 September 2014, oral argument was heard on AE 013. On 16 September 2014, the Commission issued a supplemental ruling (AE 013C) to protect against the disclosure of national security in which it granted the Government's Motion to Protect Against Disclosure of National Security (AE 013), but, *sua sponte,* did not grant the Government's request to require members of the Defense Team to sign a proposed memorandum of understanding (MOU). Immediately following the release of AE 013C, the Commission issued Amended Protective Order #1 to Protect Against Disclosure of National Security Information (AE 013D), rescinding AE 004D.

2. On 19 September 2014, the Government filed a Motion to Reconsider In Part AE 013C, Supplemental Ruling to Protect Against Disclosure of National Security Information and AE 013D, Amended Protective Order #1 to Protect Against Disclosure of National Security Information.[1] Specifically, the Government requested the Commission vacate the portion of AE 013C that did not grant the Government's request to require the Defense to sign the Government's proposed MOU before receiving classified information and enter an order including the Government's proposed MOU language and accompanying MOU. The Defense responded to the Motion to Reconsider on 2 October 2014, requesting the Commission deny the requested relief as unnecessary (AE 013F). The Government replied on 9 October 2014 (AE 013G).

3. Rule for Military Commission (R.M.C.) 905(f) permits the Military Judge to reconsider any ruling, other than a finding of not guilty, prior to authentication of the record of trial. Either party has the right to move for reconsideration, but granting the request is in the Military Judge's discretion.

4. The Motion to Reconsider is **GRANTED.**

5. In AE 013E, the Government averred the Commission's denial of the Government's request to require Defense to execute an MOU is a clear error of law in that it is inconsistent with protective orders instituted in over 130 federal cases involving national-security information as well as commission cases *United States v. Mohammad* (Mil. Comm'n Dec. 16, 2013) and *United States v. Al Nashiri* (Mil. Comm'n Dec. 8, 2011). The Government further argued a protective order that fails to require all members of the defense team to execute an MOU is ineffective in

[1] AE 013E, hereinafter "Motion to Reconsider".

meeting statutory obligations to fully and properly protect classified national-security information.

6. In its response, Defense argued the Government could not demonstrate the clear error of law required of a motion for reconsideration without any statutory justification, highlighting neither the Military Commissions Act of 2009 ("M.C.A") nor the Classified Information Procedures Act, 18 U.S.C. App 3 ("CIPA") specifically mandated the Commission require defense teams to execute MOUs as part of any protective order. Moreover, Defense argued the Commission's decision to exclude MOU language in AE 013 simply constituted denial of the Government's request, and was not a decision "outside the issues presented by the parties."[2] In support of that argument, the Defense cited to *Zdanok v. Glidden Co*., 327 F. 2d 944, 953 (2nd Cir. 1964) which says, "Where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again."

7. In its reply the Government added the *sua sponte* nature of the Commission's decision to exclude the MOU requirement deprived both the Government and the Defense of a meaningful opportunity to brief and argue the issue.

8. Findings:

a. During the 15 September 2014 session, neither the Government's request for an MOU nor the language of the accompanying MOU itself were addressed or placed at issue by the parties or the Commission. The Commission made a decision outside the issues presented by the parties, depriving the parties of an opportunity to argue the propriety of an MOU.

[2] See AE 013F, page 3.

b. No clear error of law was committed by the Commission as there is no statutory basis mandating the Commission issue an MOU in addition to a protective order.[3]

c. An MOU does, however, provide certain expedient and practical protections the Commission had not previously taken into consideration, including: a) setting out the procedures to implement CIPA in these particular proceedings; b) creating a record with the Chief Security Officer, Office of Special Security and the Court Room Security Officer of all defense personnel who have been given access to the classified information in this case and c) providing a method of accountability for all members of the Defense team extending beyond the powers of the Commission and beyond a time the commission ceases to exist.

d. The practical functions of the MOU far outweigh the minimal burden of executing the MOU.

e. Defense presently has no standing to object to the Government's proposed MOU because counsel failed to raise an objection when the issue was properly before the Accused.[4]

9. The Prosecution has requested oral argument only if the Commission had questions concerning the Motion to Reconsider and the Government's reply. The Defense requested oral argument if the Commission granted Government's Motion to Reconsider. "In accordance with Rule for Military Commission (R.M.C.) 905(h) the decision to grant oral argument on a written motion is within the sole discretion of the Military Judge."[5] In this instance, oral argument is not necessary to the Commission's consideration of the issue before it. Defense's request for oral argument is **DENIED**.

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[3] The M.C.A requires the military judge "shall issue an order to protect against the disclosure of any classified information that has been disclosed by the United States…in any military commission." 10 U.S.C. § 949p-3. Neither the M.C.A. nor CIPA require additional measures.

[4] Defense did not raise an objection to the language concerning the MOU in its response (AE 013F) to Government's Proposed Protective Order or the accompanying MOU. Defense also failed to raise an objection during oral argument at the 15 September 2014 session.

[5] Military Commissions Trial Judiciary Rule of Court 3.5(l) (24 April 2013 and amended 4 June 2013).

10. It is hereby **ORDERED**:

a. The substantive portion of the Government's Motion to Reconsider is **GRANTED**.

b. A Second Amended Protective Order #1 and the MOU will be issued in accordance with this ruling.

c. All Defense team members will sign the MOU attached to Second Amended Protective Order #1 not later than 31 October 2014.

So **ORDERED** this 16th day of October, 2014.

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