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

UNITED STATES OF AMERICA v. ABD AL HADI AL IRAQI	AE 141 (U) Unclassified Notice to Defense Motion to Compel Proper Reclassification of Discovery Materials 13 February 2019
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~~(U)~~ In accordance with Military Commissions Trial Judiciary Rule of Court 3.10.d.(3)(e), the Defense provides this unclassified notice that it has filed a classified motion, AE 141, Defense Motion to Compel Proper Reclassification of Discovery Materials, via a SIPR email to the Clerk of the Trial Judiciary and to the Government.

~~(U)~~ **Attachment.**

~~(U)~~ A. Certificate of Service, dated 13 February 2019.

Respectfully Submitted,

//s//
SUSAN HENSLER
Detailed Defense Counsel

//s//
DAHOUD ASKAR
LT, JAGC, USN
Detailed Defense Counsel

//s//
CHARLES D. BALL
LT, JAGC, USN
Detailed Defense Counsel

Classified By: James Anderson,
Derived From: Multiple Sources
Declassify On: ~~2041, 2046, 210~~

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~~(U) ATTACHMENT A~~

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(U) CERTIFICATE OF SERVICE

~~(S)~~ I certify that on **13 February 2019**, I caused **AE 141, Unclassified Notice** to Defense Motion to Compel Proper Reclassification of Discovery Materials, to be filed with the Office of the Military Commissions Trial Judiciary and I served a copy on Government counsel of record.

//s//

SUSAN HENSLER
Detailed Defense Counsel

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

<p align="center">UNITED STATES OF AMERICA</p> <p align="center">v.</p> <p align="center">ABD AL HADI AL IRAQI</p>	<p align="center">AE 141</p> <p align="center">(U) Defense Motion to Compel Proper Reclassification of Discovery Materials</p> <p align="center">13 February 2019</p>
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1. ~~(U)~~ Timeliness.

~~(U)~~ This motion is filed timely pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.c(1) and AE 110F Second Amended Litigation Schedule.

2. ~~(U)~~ Relief Requested.

~~(U)~~ The Defense respectfully request the Military Judge order the Government to do the following (1) to conduct a classification review and reproduce all discovery previously provided on the P2P network; (2) to conduct a classification review of all SECRET discovery and reproduce it at its proper classification level; (3) to review all redactions included in unclassified discovery and produce unredacted versions to the maximum extent possible; (4) to conduct a classification review and reproduce all MCRE 505 substitutions currently marked at a SECRET level at their proper classification level; and (5) produce any and all source material on which the MCRE 505 substitutions are based where the documents should no longer be classified at their original levels.

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3. ~~(U)~~ Overview

~~(U)~~ The Government has demonstrated through its filings and in hearings that the materials in this case often have had shifting levels of classification.¹ To properly litigate the charges against Mr. al-Tamir, and in keeping with the Military Commissions Act and Regulation for Trial by Military Commission guidance with respect to classification, the Commission should compel the Government to conduct a review of classified discovery and substitutions and assess whether classified discovery should be properly marked at a lower classification level, whether redactions contained in unclassified discovery are unnecessarily overbroad, whether the source material for 505 substitutions should properly be disclosed, and, finally, whether 505 substitutions marked at the SECRET level are properly marked.

4. ~~(U)~~ Burden of Proof

~~(U)~~ As the moving party, the Defense bears the burden to show the requested relief is merited by a preponderance of the evidence.²

5. ~~(U)~~ Facts

a. ~~(U)~~ On 18 July 2013, the Secretary of Defense directed that the Washington Headquarters Services disable the Military Commissions Defense Organization's (MCDO) access to classified intelligence information accessible via web browsers residing in the Joint Worldwide

¹~~(U)~~ See, e.g., AE 130 Government Notice Of Updated Classified Information Handling Guidance, dated 8 November 2018, at Attachment B (Updated Classified Information Handling Guidance (Classified S//NF)).

²~~(U)~~ RMC 905(c)(1)(2).

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Intelligence Communication System (JWICS) and the Secret Internet Protocol Router Network (SIPRNET).³

b. ~~(U)~~ A recent 9/11 hearing highlighted the fact that discovery documents produced by the Government in military commission cases have subsequently been reclassified at a lower level or produced in a less-redacted format than documents delivered to defense teams. Ammar al-Baluchi's defense team illustrated how this problem can impede an Accused's ability to adequately investigate and litigate pressing issues the July 2018 military commission hearing session in the 9/11 case. At that hearing, the defense team sought documentation to refute the Government's assertion that statements elicited during interrogations could be regarded as a product of a "clean team" interrogation, separate and apart from any information elicited while an individual was held in CIA custody at a black site.

c. ~~(U)~~ In that hearing, al-Baluchi's defense team pointed to a redacted document produced in discovery by the Government. That material was subsequently released to a *Buzzfeed* reporter pursuant to a Freedom of Information Act (FOIA) request, however, the version of the document produced pursuant to the FOIA request contained significantly more detail than the version of the document provided to al-Baluchi's defense team. For example, the FOIA version included the addressee of the cable, the dates of interrogation, the date of the cable, the fact of the involvement of U.S. Government personnel and the active planning of interrogation by non-CIA personnel.⁴

d. ~~(U)~~ The Government thereafter acknowledged the discrepancies between the FOIA version of the document and the document provided to al-Baluchi's defense team in discovery

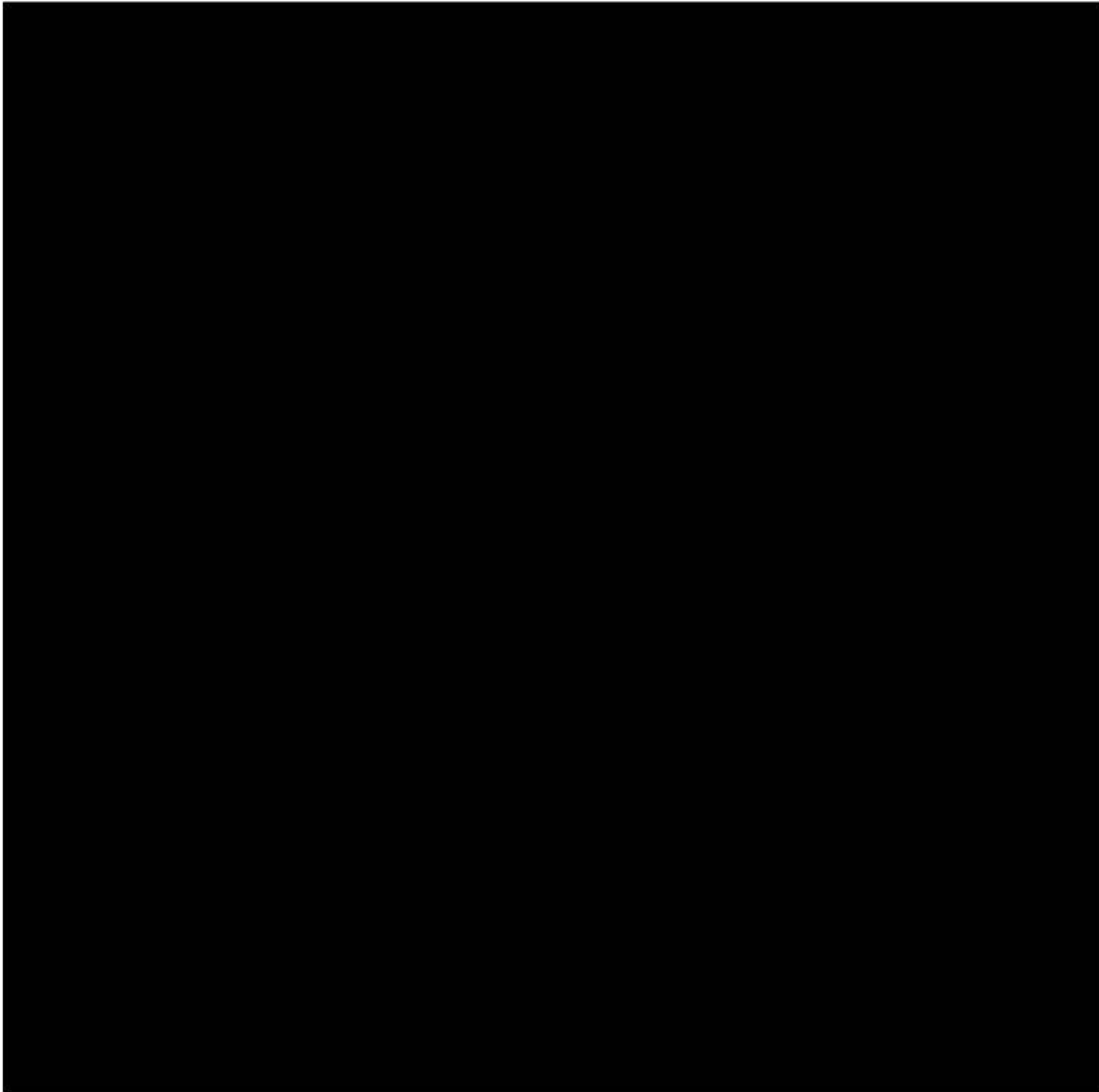
³ ~~(U)~~ See AE 070XXX, Attachment F.

⁴ ~~(U)~~ *U.S. v. KSM et al.* Unofficial Transcript at 20005 dated 23 July 2018.

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and explained that subsequent reviews of classified materials may result in material being reclassified or produced in a less redacted form than when the document was originally reviewed.⁵



⁵ ~~SECRET//NOFORN~~ *Id.* at 20011.

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i. (U) Mr. Bumpus never responded to undersigned counsel's request for clarification regarding the new classification guidance.

j. (U) Since the Defense does not have direct access to the OCA, it relies on WHS-OSS to facilitate the classification review of discovery material. Unfortunately, this is a broken process. For example, on 2 December 2016, the Defense submitted a classification review request for approximately 100 pages of family photographs seized when Mr. al-Tamir was first detained. These photographs were originally produced at the SECRET//NOFORN level despite having no

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apparent evidentiary or intelligence value. Despite regular inquiries to WHS-OSS on the status of these materials, WHS-OSS first notified undersigned counsel of the declassification of those documents on 24 May 2018—*some 18 months later*.

k. ~~(U)~~ On 18 October 2018, undersigned counsel submitted another request for classification review of forty-three (43) discovery documents to WHS/OSS. Nearly four months later, the Defense has yet to receive a response to that request.

l. ~~(U)~~ The Government, for its part, has demonstrated the ability to conduct classification reviews expeditiously when prompted by this Commission.¹¹

m. ~~(U)~~ On 17 April 2018, the Government confirmed to this Commission its ability to review and reclassify 4,163 documents improperly marked “TOP SECRET Pending Classification Review” (and thus stored on the P2P network) with six-week turnaround period.¹² Those documents were subsequently reproduced at the SECRET or Unclassified level.

¹¹ (U) See AE 114.

¹² (U) Unauthenticated Transcript dated 17 April 2018 at 2070-2071.

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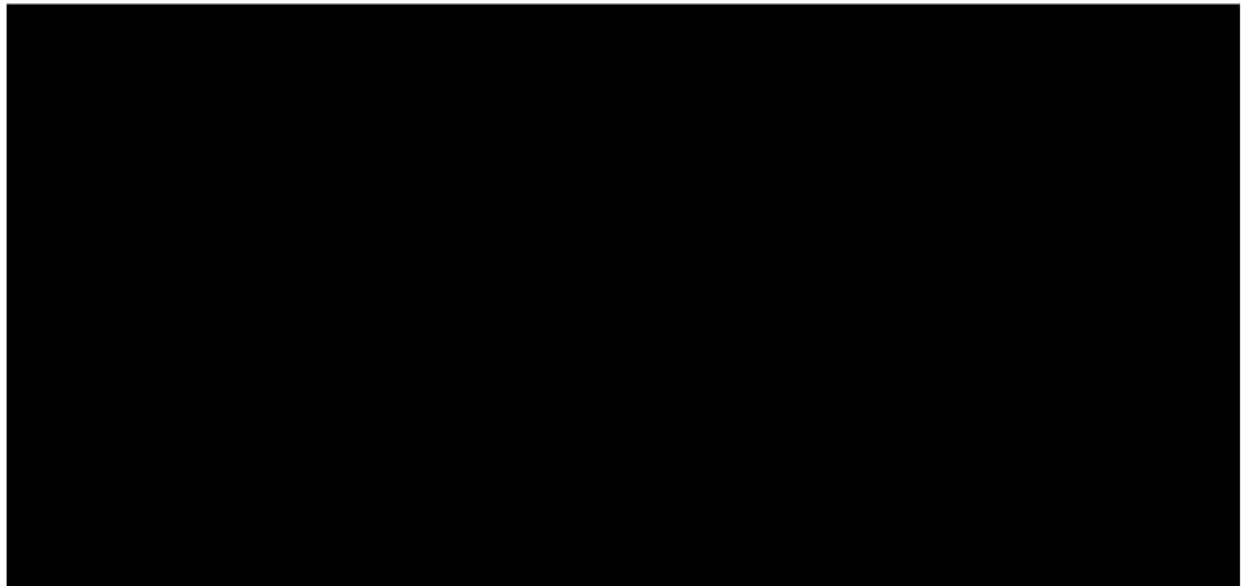
6. ~~(S)~~ Argument

~~(S)~~ The Military Commissions Act of 2009, § 9499-1c directs “[t]rial counsel shall work the original classification authorities for evidence that may be used at trial to ensure that such evidence is declassified to the *maximum extent possible*, consistent with the requirements of national security.” (emphasis added)

~~(S)~~ Department of Defense Regulation for Trial by Military Commission (RTMC) paragraph 18-1(b) implements and amplifies the statutory directing stating in pertinent part, “[t]rial Counsel has principal responsibility for liaising with the DoD Security Classification/Declassification Review Team and appropriate original classification authorities at pertinent non-DoD federal departments and agencies to ensure that: (i) they are afforded the opportunity to review all documents or other materials containing classified or protected information either intended for use in litigation by trial counsel, or to be provided to defense counsel in discovery, for classification review and use authorization, and (ii) in accordance with Mil. Comm. R. Evid. 505(a) (3), evidence that may be used at trial is declassified to the maximum extent possible, consistent with the requirements of national security.”¹⁷

¹⁷ ~~(S)~~ See also, RTMC 8-4; RTMC 9-1.

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(U) Undersigned counsel also asks that the Commission order the Government to conduct a classification review of all SECRET discovery and reproduce it at its proper classification level.

(U) The rules governing classification contemplate that materials will not remain classified forever. Executive Order 13526 § 1.5 requires that “[a]t the time of original classification, the original classification authority shall establish a specific date or event for declassification based on the duration of the national security sensitivity of the information.” It further states that “no information may remain classified indefinitely. The DOD Manual 5200.01-V2 explains that an original classification authority should specify the date or independently verifiable event for declassification or, as provided in subparagraph 8.b (5) of this section, an approved exemption category. The DoD Manual contemplates the setting of a declassification date less than ten (10) years to twenty-five (25) from the origination of a document absent some exemption.¹⁸

¹⁸ (U) DOD Manual 5200.01V-2 Enclosure 3 pgs. 25-26. 8

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~~(S)~~ Given the passage of almost five years since the beginning of the discovery process in this case, it is necessary and appropriate for the Commission to require that the Government conduct a classification review of all SECRET discovery prior to trial, to ensure that trial counsel is complying with its obligation under the Military Commissions Act of 2009 to ensure that “evidence is declassified *to the maximum extent possible*.”

~~(S)~~ Defense teams do not have direct access to the OCA. Rather, pursuant to AE 013K Third Amended Protective Order #1 § IV, the Defense Information Security Officer for undersigned counsel are required to submit requests for classification review to the Chief Security Officer of the WHS/OSS. As in the examples cited above, the process of routing materials for reclassification through WHS-OSS can take *as much as a year and a half* to reach its conclusion. This bureaucratic process has proven itself to be fundamentally broken, and incapable of handling the volume of material that must be reviewed prior to a trial in this case.

~~(S)~~ In a similar vein, undersigned counsel also requests that the Commission compel the Government to review all redactions included in unclassified discovery and produce unredacted versions of those documents “to the maximum extent possible.” As the Government recently acknowledge in the 9/11 commission case, subsequent review of redacted materials often results in the disclosure of documentation in its original format, with substantially fewer redactions. In the 9/11 case, the FOIA document—which was *not* produced to al-Baluchi’s defense team in the regular discovery production process, but rather, published on the internet by a reporter—provided substantially more pertinent information to defense counsel, allowing it effectively dispute the existence of statements purportedly “cleansed” of the chain of torture associated with the CIA’s RDI program.

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~~(U)~~ Classification of such materials at the SECRET level effectively precludes their use in pretrial investigation, litigation and at trial, undermining the basis for their very existence under MCRE 505. Moreover, in light of the arguments presented above, we also ask that the Commission compel the Government to produce any and all source material on which the MCRE 505 substitutions are based where the underlying documents are no longer classified at their original levels. Again, this is an appropriate exercise in light of the MCA's mandate that military commissions evidence be declassified to the "maximum extent possible" and given the passage of almost 5 years since the referral of charges in this case.

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7. ~~(U)~~ Oral Argument.

~~(U)~~ The Defense requests oral argument unless the Commission grants the motion on the pleadings.

8. ~~(U)~~ Witness and Evidence.

~~(U)~~ The Defense reserves the right to present evidence and call witnesses on this motion.

9. ~~(U)~~ Conference with Opposing Counsel.

~~(U)~~ The Prosecution opposes the relief Mr. al-Tamir seeks herein.

10. ~~(U)~~ List of Attachments.

A. ~~(U)~~ Certificate of Service, dated 13 February 2019.

B. ~~(U)~~ Email From Susan Hensler to Tyrone Bumpus (OSS), dated 4 December 2018.

Respectfully submitted,

//s//
Susan Hensler
Detailed Defense Counsel

//s//
Dahoud Askar
LT, JAGC, USN
Detailed Defense Counsel

//s//
Charles D. Ball
LT, JAGC, USN
Detailed Defense Counsel

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~~(U)~~ **CERTIFICATE OF SERVICE**

~~(U)~~ I certify that on **13 February 2019**, I caused **Defense Motion to Compel Proper** Reclassification of Discovery Materials, to be filed with the Office of the Military Commissions Trial Judiciary and I served a copy on Government counsel of record.

//s//

SUSAN HENSLER
Detailed Defense Counsel

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~~(U)~~ ATTACHMENT B

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