

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

<p align="center">UNITED STATES OF AMERICA</p> <p align="center">v.</p> <p>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ATTASH, RAMZI BINALSHIBH, ALI ABDUL-AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p align="center">AE 0130</p> <p align="center">RULING</p> <p align="center">Government Motion To Protect Against Disclosure of National Security Information</p> <p align="center">6 December 2012</p>
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1. The Government requested this Commission issue a Protective Order regulating the use and safeguarding of classified information during the pendency of *United States v. Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak BinAttash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi*.

2. The American Civil Liberties Union and the American Civil Liberties Union Foundation (ACLU) subsequently filed an *amici* motion regarding "Public Access to Proceedings and Records" (AE 013A) challenging the portions of the Government's proposed protective order that, in their estimation, would permit the government to suppress accuseds' statements about their detention and treatment. Each of the accused adopted and joined the ACLU motion.

3. A response in opposition to the Government's motion was collectively filed by The Miami Herald, ABC, Inc., Associated Press, Bloomberg News, CBS Broadcasting, Inc., Fox News Network, The McClatchy Company, National Public Radio, The New York Times, The New Yorker, Reuters, Tribune Company, Wall Street Journal, and the Washington Post requesting this Commission deny the Government's request to deny public access to all records and proceedings involving any classified information as being overly broad.

4. Military Commission Rule of Evidence (M.C.R.E.) 505(e) directs that upon a motion by the Government, 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. An alliance between this Commission rule and that applied generally in Article III criminal proceedings is established by M.C.R.E. 505 (a)(4) directing:

The judicial construction of the Classified Information Procedures Act (18 U.S.C. App.) shall be authoritative in the interpretation of this rule, except to the extent that such construction is inconsistent with the specific requirements of this rule.

6. The language of M.C.R.E. 505(e) closely parallels language from the Classified Information Procedures Act (CIPA) (18 U.S.C. App. (2000), enacted by P.L. 96-456 (Oct. 15, 1980), 94 Stat. 2025-32) stating:

§ 3. Protective Orders

Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.

and is reinforced by the Security Procedures Established Pursuant to PL 96-456, 94 Stat. 2025, by Chief Justice Burger:

Para 8

Except as otherwise authorized by a protective order, persons acting for the defendant will not be given custody of classified information provided by the government. They may, at the discretion of the court, be afforded access to classified information....

7. Based upon CIPA and the guidance of the Chief Justice, the use of protective orders is evidenced in most, if not all, cases involving national security since the inception of the Act. *U.S. v. Bin Laden*, 2001 WL 66393 S.D.NY, 2001; *U.S. v. Rezaq* 156 F.R.D. 514 (D.D.C. 1994); *U.S. v. Musa*, 833 F.Supp. 752 (E.D.MO. 1993). Also see generally Reagan, Robert Timothy, Federal Judicial Center, National Security Case Management (2011).

8. The Military Rules of Evidence (M.R.E.), used in courts-martial involving issues of national security, provide another reference point for the issuance of a protective order for classified information in a criminal trial. *U.S. v. Pruner* 33 M.J. 272 (C.M.A. 1991); *Schmidt v. Boone* 59 M.J. 841 (A.F.Ct.Crim.App. 2004). By its language and provisions, M.C.R.E. 505(e) is drawn directly in large part from M.R.E. 505 (g) and, while apparently used infrequently, a protective order can be used to frame classified discovery in courts-martial.

FINDINGS

1. A protective order directed by CIPA is a procedural predicate for providing discovery in cases concerning matters deemed of national security and has become *de rigueur* in Article III courts and courts-martial. (Protective Order *United States v Hanssen*, 5 Mar 2001(E.D. VA); Protective Order, *United States v Moussaoui*, 22 Jan 2002 (E.D. VA); Protective Order, *United States v Ghailani*, 21 Jul 2009, (S.D. NY); and generally Reagan, Robert Timothy, Federal Judicial Center, National Security Case Management (2011))The protective order is to guard against the compromise of classified material and generally serves as the security procedural guide for the case.

2. As a procedural guide, the protective order does not address the relevance, materiality, or admissibility of evidence. The propose protective order neither expands the traditional rules of discovery nor addresses what use, if any, can be made of the disclosed information during the course of a trial. Rather, it provides the framework for defense counsel to obtain and assess classified information while at the same instance permitting the Government to preserve information relevant to our national security. *U.S. v. Pappas* 94 F.3d 795 (E.D. NY),1996; *U.S. v. Aref* 533 F.3d 72 (N.D. NY),2008.

3. The draft protective order provided by the Government, while closely mirroring that used in *US v Ghailani* and other federal cases, is not totally appropriate for use in the Commissions. In Article III courts, a court security officer (CSO), at the direction of the judge, is made available to help the court address issues concerning the use of classified material during a trial. Many of the functions performed by the federal CSO are accomplished as part of the routine support mission of the Office of Military Commissions (OMC); these include obtaining security clearances, maintaining storage facilities for classified documents, and providing secure communication technology. In light of the OMC support, most of the provisions in the draft pertaining to the CSO are not applicable. In Article III courts, the CSO provides support to defense counsel to help them navigate the maze of security regulations. The Defense has requested assistance in this regard.

4. The Government's draft order does not specifically address the issue of defense counsel working together, to include sharing classified information, in preparing the presentation of a joint defense. As now styled the draft would seem to preclude counsel from freely sharing information as they develop joint trial strategy and tactics.

5. As part of their motion, the Government requested the Commission to institutionalize a practice that has been in use for several years- the so called "40 second rule." Because of the security constraints at the Expeditionary Legal Center courtroom (Courtroom 2) there is a 40 second delay between something said in the courtroom and when those viewing the trial in the gallery or at closed circuit television (CCTV) sites actually hear what was said. The ACLU and collective press, as well as the accused, object to this delay as an unwarranted closure of the court. The Commission is acutely aware of its twin responsibilities of insuring the transparency of the proceeding while at the same instance preserving the interests of national security. Commission finds the brief delay is the least intrusive and least disruptive method of meeting both responsibilities. The delay permits the Commission to assess and remedy any negligent or intentional disclosure of classified information without unduly impacting on the ability of the public and press to fully see and understand what is transpiring. *U.S. v. Lonetree*, 31 M.J. 849 (N.M.C.M.R. 1990); *Denver Post Corp. v. U.S.*, 2005 WL 6519929 (Army Ct.Crim.App. 2005).

6. In support of its motion the Government submitted declarations, filed ex parte and under seal, 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 in that the information relates to the sources, methods, and activities by which the United States defends against international terrorism and terrorist organizations. 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. *U.S. v. Musa* 833 F.Supp.752

A Protective Order will be issued forthwith.

So ORDERED this 6th day of December, 2012.



JAMES L. POHL
COL, JA, USA
Military Judge