BEFORE THE MILITARY COMMISSION
GUANTANAMO BAY, CUBA
4 MARCH 2009

UNITED STATES OF AMERICA	)	
	)	
v.	)	PROTECTIVE ORDER # 4
	)	
AHMED KHALFAN GHAILANI	)	Protection of Classified
a.k.a. "Fupi",	)	Information Throughout All
"Haytham",	)	Stages of Proceedings
"Abubakar Khalfan Ahmed",	)	
"Sharif Omar"	)	

1. This Protective Order supersedes Protective Order #1 in this case, dated 21 October 2008, which is vacated. This Protective Order is issued pursuant to the Military Commissions Act of 2006 (10 U.S.C. § 948a, *et. seq.)* (hereafter "MCA"), and the Manual for Military Commissions (hereafter "MMC"), including Rules for Military Commissions (hereafter "RMC") 701(f)(8); Military Commission Rules of Evidence (hereafter "MCRE") 505; and Regulation for Trial by Military Commission, § 1703.

2. The Commission has considered all matters previously listed in paragraph 2 of Protective Order # 1, as well as the pleadings filed by the defense on 17 and 26 November 2008 and 16 January 2009, and the government response filed on 24 November 2008. The reasons for amending Protective Order # 1 are contained in this Commission's Order Granting in Part and Denying in Part Defense Motion D-001, dated 4 March 2009.

3. The commission finds that this case involves information that is currently and properly classified pursuant to Executive Order 12958, as amended. *See also* MCRE 505(b) (1) and (2). The storage, handling, and control of this information requires special precautions mandated by statute, executive order, and regulation, and access to which requires appropriate security clearances and a need-to-know determination by the Original Classification Authority (hereafter "OCA") over the information.

4. The purpose of this Order is to establish procedures that must be followed by all defense counsel of record, defense paralegals, defense translators and all other persons assisting the Defense (hereafter "the Defense") as well as any other person who comes into possession of classified information as a result of their participation in the case.

5. The procedures set forth in this Protective Order, and MCRE 505 and 506 will apply to all pre-trial, trial, post-trial, and appellate stages in this case, including discovery and may be subject to modification by further Order. The Prosecution has advised that it will promptly seek further protective orders to address additional issues relating to discovery and disclosure of classified information as this case progresses.

DEFINITIONS

6. As used herein, the term Classified Information shall mean:

a. Any document or information which has been classified by any Executive Branch agency in the interests of national security or pursuant to Executive Order 12958, its predecessors or as amended, as CONFIDENTIAL, SECRET, TOP

SECRET, or additionally controlled as SENSITIVE COMPARTMENTED INFORMATION ("SCI"), or any information in such document;

b. Any document or information that is currently and properly classified as set forth in section (a) and which has been approved for release to the Accused in this case. All Classified Information that is approved for release to the Accused will contain an appropriate classification marking and will be marked "Releasable to Ghailani";

c. Any document or information, regardless of physical form or characteristics, now or formerly in the possession of the Defense, private party or other person, which has been derived from United States government information that was classified, including any document or information that has subsequently been classified by the Government pursuant to Executive Order 12958;

d. Any document or information that the Defense knows or reasonably should know contains Classified Information, including information acquired or conveyed orally;

e. Any document or information as to which the Defense has been notified orally, or in writing, that such document or information contains Classified Information or implicates classified sources, methods or activities used by United States in acquiring such information;

f. Statements made by the accused, which are presumptively classified at the TOP SECRET//SCI level until such statements are reviewed by representatives from the agency holding original classification authority over the information; or

g. Any document or information, regardless of place of origin, including documents classified by a foreign government, that could reasonably be believed to contain classified information, or that refers to or relates to national security or intelligence matters.

7. As used in this protective order:

a. The words "documents" and "information" shall include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, conforming copies and non-conforming copies (whether different from the original by reason of notation made on such copies or otherwise), handwritten notes, or any electronic storage on any electronic storage media or device of any documents or information or information acquired orally, including but not limited to papers, correspondence, memoranda, notes, letters, reports, summaries, photographs, maps, charts, graphs, inter-office communications, notations of any

sort concerning conversations, meetings or other communications, bulletins, teletypes, telegrams, and telefacsimiles, invoices, worksheets and drafts, alterations, modifications, changes and amendments of any kind to the foregoing; graphic or oral records or representations of any kind, including but not limited to photographs, charts, graphs, microfiche, microfilm, videotapes, sound recordings of any kind and motion pictures; electronic, mechanical or electric records of any kind, including but not limited to tapes, cassettes, disks, recordings, films, typewriter ribbons, word processing or other computer tapes, disks, or thumb drives and all manner or electronic data processing storage, and Classified Information acquired orally;

b. The term "Access to Classified Information" means having authorized access to reviewing, reading, learning or otherwise coming to know in any manner Classified Information;

c. The term "Secure Area" means a physical facility accredited by the Department of Defense for the storage, handling, transmission and control of classified information at the appropriate level to match the level of classification of the information thus stored, handled, transmitted or controlled.

PROTECTION OF CLASSIFIED INFORMATION

8. With regard to Classified Information:

a. The Defense may not disclose or cause to be disclosed in connection with this case any information known or believed to be classified except as otherwise provided herein.

b. The Defense may not disclose classified information to the Accused unless that same information has been previously provided to the Defense by the Accused. The Defense may not confirm or deny to the Accused the assertions made by the Accused based on knowledge counsel may have obtained from classified documents, except where those classified documents have been provided to the accused.

c. The Defense shall not disclose the contents of any classified documents or information to any person, except those authorized pursuant to this Protective Order, the Commission, and the Prosecution who hold the appropriate clearances and have been determined to have a need to know that information.

d. In the event that Classified Information enters the public domain, counsel are not precluded from making private or public statements about the information already in the public domain, subject to the following limitation: Counsel may not

make any public or private statements revealing personal knowledge from non-public sources regarding the classified status of the information, or disclosing that counsel had personal access to classified information, confirming, contradicting, or otherwise relating to the information already in the public domain. 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.

e. The foregoing shall not prohibit counsel for the Accused from citing or repeating information in the public domain that counsel does not know or have reason to believe to be classified information or a classified document, or derived from classified information or a classified document.

9. All Classified Documents and other materials and the Classified Information contained therein shall remain classified unless the documents bear a clear indication that they have been declassified by the agency or department that is the originator of the document or the information contained therein (the OCA).

10. Mr. James Powell has been appointed by the Commission as the Senior Security Advisor (hereafter "SSA") to protect any Classified Information made available or created in connection with this case. The SSA is authorized to appoint Alternate Security Advisors (hereafter "ASAs") as necessary. The Defense shall seek guidance, as necessary, from the SSA or an ASA with regard to the appropriate storage, handling, transmittal and use of Classified Information, and the SSA or ASA shall consult with the owner of the information regarding classification decisions.

11. I have been advised that the Prosecutors assigned to this case have the requisite security clearances and need-to-know access to Classified Information that relates to this case.

12. I find that to protect the Classified Information involved in this case, no member of the Defense or other person shall have access to any Classified Information as a result of participation in this case unless that person shall first have:

a. Been granted the requisite security clearance by the Department of Defense or the Department of Justice and such clearance is verified by the SSA; and

b. Signed the Memorandum of Understanding (MOU) attached to Protective Order 1, agreeing to comply with the terms of this Protective Order; and

c. Been determined to have the requisite "need-to-know" the Classified Information at issue by the Original Classification Authority over the information.

13. Members of the Defense currently possessing the requisite security clearances, verified by the SSA, who have signed the MOU may not disclose classified information to any person except to other members of the Defense who have verified security clearances and have signed the MOU, or to the Commission (including the Trial Judiciary Staff), the SSA or ASA, and the Prosecutors assigned to this case. Until further order of this Commission, the Defense may not disclose Classified Information to the Accused except as specifically enumerated in Paragraph 6(b) above. Notwithstanding Paragraph 6(f) above, dialogue between the Accused and his Counsel is not limited by this provision. The Defense may not disclose Classified Information as defined by this Protective Order to the Accused unless it falls under the exception enumerated in Paragraph 6(b) above; but the Defense may discuss with the Accused, and disclose to other

members of the Defense possessing the requisite security clearances and having signed the MOU, any matters raised by the Accused in their meetings with him.

14. The Defense shall comply with MCRE 505 prior to any disclosure of Classified Information at any proceeding in this case. Specifically, written notice must be given, pursuant to MCRE 505(g), prior to any such disclosure and the Government must be given an opportunity to respond to such notice prior to any disclosure.

15. The Office of the Chief Defense Counsel has approved Secure Areas in which the Defense can work with Classified Information. The Office of the Convening Authority shall establish procedures to assure that such Secure Areas be maintained and operated in a manner consistent with the protection of Classified Information. Documents containing Classified Information shall only be removed from such Secure Areas pursuant to Department of Defense regulations. As the presence of the SSA or an ASA may be necessary in such areas while the Defense is working, until further order of the Commission, the SSA and ASAs shall not reveal to any person any conversations he or she may overhear from Defense team members, nor reveal the nature of documents being reviewed by them or the work generated by them except as specifically directed by the Defense, for purposes of obtaining guidance from the OCA as to the proper handling or treatment of specific Classified Information. The presence of the SSA or ASA or communication by the SSA to the OCA shall not waive, limit, or otherwise render inapplicable the privileges set forth in MCRE 502-504 and 513.

16. Until further order of this Commission, any pleading or other document filed by the Defense, which the Defense knows or has reason to know contains Classified Information in whole or in part, believes may be classified in whole or in part, or the proper classification of which is uncertain, shall be filed UNDER SEAL with the SSA. The time of submission to the SSA or ASA shall be considered the date and time of filing. The Military Commissions Trial Judiciary Staff is directed to enter a non-classified title of the pleading or document on the filings inventory, the date it was filed and a notation that it was filed UNDER SEAL. The SSA or ASA shall promptly serve the pleading on the Prosecution and deliver it to the Commission. The SSA or ASA shall also promptly review the pleading and, in consultation with representatives of the appropriate agencies, determine whether the document contains classified information in whole or in part. If the SSA or ASA determines that the document contains classified information, he or she shall ensure that the document is appropriately marked and that the classified information in the document remains under seal. The SSA will ensure that all classified documents filed with this Commission are stored in an appropriate Secure Area consistent with the highest level of classified information contained in the document. All portions of any document which do not contain classified information shall immediately be unsealed by the SSA and provided to the Clerk of the Commission for inclusion in the record.

17. Any pleading or document filed by the Prosecution containing Classified Information shall be filed UNDER SEAL with the SSA or ASA. The

Prosecution shall ensure that its pleadings or documents are appropriately marked to identify the classified information contained therein. The time of submission to the SSA or ASA shall be considered the date and time of filing. The Military Commissions Trial Judiciary Staff is directed to enter a non-classified title of the pleading or document on the filings inventory, the date it was filed and a notation that it was filed UNDER SEAL. The SSA or ASA shall promptly serve the pleading on the Defense and deliver it to the Commission. All portions of any document which do not contain classified information shall immediately be unsealed by the SSA, and provided to the Clerk of the Commissions for inclusion in the record.

18. Until further Order of this Commission, the Defense shall create, review, maintain and store all documents, notes, materials or any work product containing classified information or derived from classified information only in a Secure Area.

19. All documents prepared by the Defense (including but not limited to pleadings or other documents to be filed with the Commission) which do or may contain classified information shall be transcribed, recorded, typed, duplicated, copied or otherwise prepared only by persons who have complied with this Protective Order allowing them access to Classified Information, in a Secure Area on approved information technology systems and devices, and in accordance with Department of Defense regulations. All pleadings or documents and any associated materials, such as notes, drafts, copies, portable memory devices,

photocopies, or exhibits, containing any information reasonably believed to contain classified information shall be maintained in a Secure Area unless the SSA determines, in consultation with the OCA, if necessary, that such documents are unclassified in their entirety. The SSA shall not reveal the contents of such documents to any person except, as necessary, an ASA.

20. No member of the Defense shall copy or reproduce any classified information, in any form, except in accordance with Department of Defense regulations governing the reproduction of Classified Information.

21. No member of the Defense shall communicate, discuss or disseminate Classified Information outside the Secure Area, or on any standard commercial telephone instrument or office communication system or internet or email system or in the presence of any person who has not been granted access by the Commission to Classified Information.

22. Any violation or potential violation of this Protective Order shall be immediately brought to the attention of the Commission and may result in a charge of contempt pursuant to 10 U.S.C. § 950w and RMC 809. Persons subject to this Order are advised that direct or indirect unauthorized disclosure, retention or negligent handling of classified information or documents could cause serious damage, and in some instances, exceptionally grave damage to the national security of the United States and may be used to the advantage of a foreign power against the interests of the United States.

23. Persons subject to this Order are advised that all information to which they obtain access by this Order, or any other Orders issued by the Commission, is now and will remain the property of the United States Government. The Defense shall return all materials that may have come into their possession for which they are responsible because of such access upon demand by the Prosecution or the SSA.

24. The Defense shall comply with MCRE 505(g) prior to any disclosure of Classified Information at any time during this case. The Defense is required to notify the Prosecution in writing of any intention to disclose, or cause the disclosure of, classified information in any manner at any stage of the proceedings in this case. The Defense notice must be particularized and set forth the specific classified information sought to be disclosed. The Defense notice must be provided to the Prosecution with sufficient time for the Prosecution to respond and seek relief under MCRE 505(h) prior to the proceeding or presentation in which the disclosure is expected to occur.

PROCEDURES TO PROTECT THE UNAUTHORIZED DISCLOSURE OF CLASSIFIED INFORMATION DURING OPEN SESSIONS OF COURT

25. I find that the United States, pursuant to Executive Order and appropriate authority, has determined that the statements of the Accused are to be presumptively treated as classified information, classified at the TOP SECRET//SCI level.

26. I find that the Accused has been exposed to information that the U.S. Government continues to protect as properly classified. To protect against the unauthorized disclosure of classified information during any proceeding in this case, it is necessary for this Commission to employ certain technical and other procedural measures designed to prevent any such unauthorized disclosure by the Accused.

27. This Commission will employ a time-delay on the audio feed of the proceedings to the public in the gallery. The time-delay will be of sufficient length to guard against the unauthorized disclosure of Classified Information. The length of such delay shall be forty (40) seconds.

28. The SSA will ensure that a switch which will immediately terminate the audio feed to the public (hereafter "the switch") will be functional and available to the Military Judge, the SSA and Trial Counsel.

29. In the event the Accused makes any statement, because such statements are presumptively classified, any person with authorized access to the switch, and only such persons, may, if they reasonably believe classified information has been or is about to be disclosed, activate the switch to terminate the audio feed to the public.

30. In the event any person other than the Accused is about to or has made a disclosure of Classified Information, any person with authorized access to the switch may activate the switch to terminate the audio feed to the public.

31. The SSA shall immediately advise the Commission that the switch has been activated and that the audio feed to the public has been terminated.

32. If the switch is activated, consistent with MCRE 505(f), the Military Judge will immediately halt the proceedings and take a brief delay to evaluate whether or not the information disclosed is classified and subject to the National Security Privilege. Pursuant to MCRE 505(h)(1), the Prosecution may move for an *in camera* presentation concerning the invocation of the National Security Privilege or to address the disclosure of the Classified Information.

33. If the National Security Privilege is asserted, such information may not be disclosed except as authorized by MCRE 505.

34. If Classified Information is found to have been disclosed, that portion of the audio feed shall not be broadcast to the public.

35. If no Classified Information is found to have been disclosed, the audio feed will resume unaltered.

36. If the switch is not activated, statements by the Accused that were presumptively classified when made will no longer be presumptively classified once they are broadcast to the public, based on the absence of a claim of the National Security Privilege during the designated broadcast delay period.

37. The Clerk of the Commissions will ensure that transcripts of all proceedings are reviewed by the SSA prior to authentication or certification by the Military Judge, to ensure that no Classified Information is contained therein. The Clerk of the Commissions will ensure that transcripts of any classified proceedings

are properly segregated from the unclassified portion of the transcripts, properly marked with the appropriate security markings, stored in a Secure Area, and released only as a classified document when necessary and appropriate and /or in the due course of law.

38. The SSA shall ensure a similar system to the switch is employed with respect to any broadcast of the proceedings to any location in addition to the gallery of the courtroom (e.g., any closed circuit TV broadcast of the proceedings to remote locations).

39. All persons in the Courtroom will possess the requisite security clearances. The SSA shall verify the identity and clearances for each person present in the courtroom.

40. Any breach of this Protective Order may result in disciplinary action or other sanctions.

41. Persons subject to this Order are further admonished that they are obligated by law and regulation not to disclose any national security classified information in an unauthorized fashion and that any breach of this Order may result in the termination of their access to classified information. In addition, they are admonished that any unauthorized disclosure of classified information may constitute violations of United States criminal laws, including, without limitation, the provisions of 18 U.S.C. §§ 371, 641,, 1001, 793, 794, 798, 952, and 1503; 50 U.S.C. §§ 421 (the Intelligence Identities Protection Act) and 783; and that a

violation of this Order or any portion hereof may be punishable as a contempt of this Commission.

42. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it warranted.

Bruce W. MacKenzie
Captain, U.S. Navy
Military Judge