

BEFORE THE MILITARY COMMISSION

UNITED STATES OF AMERICA)	
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)	Protective Order #1
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v.)	
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MOHAMMED HASHIM)	Protection of Classified Information
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1. Pursuant to the authority granted under Military Commission Rules of Evidence (MCRE) 505(e)(1) and the Rules for Military Commission (RMC) 701(l)(2) and to protect the national security, Trial Counsel's Motion for a protective order is GRANTED; and it is ordered:
2. I find that this case will involve classified national security information, the storage, handling and control of which requires special security precautions, and access to which requires a security clearance and a "need to know."
3. The purpose of this Order is to establish procedures that must be followed by all counsel of record, the accused, all other counsel involved in this case, translators and all other persons whose assistance the Defense Counsel reasonably requires, any Commission personnel, and all other individuals who receive access to classified information in connection with this case.
4. The procedures set forth in this Protective Order and MCRE 505 will apply to all pre-trial, trial, post-trial and appellate aspects concerning this case, and may be modified from time to time by further order of the Military Judge acting under RMC 701(l) and MCRE 505(e)(1).
5. As used herein, the terms "classified national security information and documents," "classified information" and "classified documents" refer to:

- a. any classified document or information which has been classified by any Executive Branch agency in the interests of national security or pursuant to Executive Order 12958 or its predecessor Orders as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI)," or any information contained in such document;
 - b. any document or information, regardless of its physical form or characteristics, now or formerly in the possession of a private party, which has been derived from United States government information that was classified, regardless of whether such document or information has subsequently been classified by the government pursuant to Executive Order 12958 or its predecessor orders as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI)."
 - c. classified information known to the accused, counsel or other person(s) assisting the defense or the Government, to be classified or reasonably should be known to be classified; or
 - d. any document and information as to which the accused, counsel or person(s) having been notified orally or in writing that such documents or information contains classified information.
6. As used herein, the term "Unclassified Government Information" shall refer to documents or information provided by Trial Counsel to the defense that is not classified.
7. The words "documents" or "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), and further include but are not limited to:
- a. papers, correspondence, memoranda, notes, letters, reports, summaries, photographs, maps, charts and graphs, inter-office and intra-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;

- b. graphic or oral records or representations an any kind, including but not limited to, photographs, charts, graphs, microfiche, microfilm, videotapes, sound recordings or any kind and motion pictures;
 - c. 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 thumbdrives and all manner or electronic data processing storage; and
 - d. information acquired orally.
8. All classified documents, and 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 and the information contained therein (hereinafter, the "originating agency").
9. "Access to classified information" means having authorized access to, reviewing, reading, learning, or otherwise coming to know in any manner any classified information.
10. In accordance with MCRE 505(e)(1), I designate the Senior Security Advisor selected by the Convening Authority, and his or her designated Alternate Security Advisors, for the purposes of providing security arrangements necessary to protect from unauthorized disclosure any classified documents or information to be made available in connection with this case. Reference to "Senior Security Advisor" in this Order also includes those persons designated as Alternate Security Advisors by the Senior Security Advisor. Defense Counsel, defense counsel employees, defense witnesses and any other person whose assistance the Defense Counsel reasonably requires to have access to classified information shall seek guidance from the Senior Security Advisor with regard to appropriate storage, handling, transmittal, and use of classified documents and information.
11. I have been advised that trial counsel assigned to this case, Major³ [REDACTED] and Capt³ [REDACTED] have the requisite security clearances and "need-to-know" to have access to classified documents and information that relate to this case. All references to Trial Counsel or government attorney as used in this order refer only to the attorneys listed in this paragraph.
12. I find that in order to protect the classified information involved in this case, no person, including the accused, detailed Defense Counsel, employees of the Office

of the Chief Defense Counsel, any civilian defense counsel or employees of civilian defense counsel, any witness for the defense, all other persons whose assistance the Defense Counsel reasonably requires, except Trial Counsel, appropriately cleared Office of Military Commission Office of the Chief Prosecutor employees, and personnel of the originating agency, shall have access to any classified document or information involved in this case unless that person shall first have:

- a. signed the Memorandum of Understanding in the form attached hereto, agreeing to comply with the terms of this Order and all applicable laws and regulations. The substitution, departure or removal for any reason from this case of counsel for the accused, or anyone associated with Office of the Chief Defense Counsel, the office of a civilian Defense Counsel, or any other person who has signed the Memorandum of Understanding shall not release that person from the provisions of this Order or the Memorandum of Understanding executed in connection with this Order;
- b. been granted the requisite security clearance by the Department of Defense or the Department of Justice, and verified by the Senior Security Advisor (for those named in paragraph 13 below); and
- c. been determined to have a "need to know" the classified information at issue by the originating agency. Any information provided to the originating agency, to include the name of the requested party, shall not be disclosed to any other governmental agency beyond that which is necessary to determine "need to know." In no event shall any provided information be disclosed to the Office of Chief Prosecutor.

13. Subject to provisions of paragraph 12 and subject to the "need to know" requirement of EO 12958, as amended, the attorneys for the defense and their approved employees, may be given access to certain classified documents and information as required by the government's discovery obligations:

- a. Any additional person whose assistance the defense reasonably requires may only have access to classified information in this case after obtaining verification by the Senior Security Advisor that the person possesses the pertinent security clearance and has been determined to possess a "need to know" as determined by the originating agency, and after satisfying the requirements described in paragraph 12 of this Order for access to classified information.

14. Unless already holding an appropriate security clearance, and approved for access to classified information in this case, Defense Counsel, defense counsel employees, defense witnesses and any other person whose assistance the Defense Counsel reasonably requires to have access to classified information, and such Court personnel as the Court requires for its assistance, for the purpose of establishing security clearances necessary for access to classified information that may be involved in this case, must complete and submit to the Senior Security Advisor forthwith a Standard Form 86 ("Security Investigative Data for Sensitive Position"), attached releases, and "major case" fingerprints. The Senior Security Advisor shall take all reasonable steps to process all security clearance applications as soon as possible.
15. I understand that both the Office of the Chief Prosecutor and the Office of the Chief Defense Counsel have appropriately approved secure areas in which their personnel can work with classified information. The Senior Security Advisor, in consultation with Defense Counsel, shall establish procedures to assure that the secure area may be maintained and operated in the most efficient manner consistent with the protection of classified information. No document containing classified information may be removed from this secure area unless authorized by the Senior Security Advisor. The Senior Security Advisor shall not reveal to the Trial Counsel any conversations she or he may hear, nor reveal the nature of documents being reviewed by them, or the work generated by them. In addition, the presence of the Senior Security Advisor shall not operate as a waiver of, limit, or otherwise render inapplicable, the attorney-client privilege.
16. Notwithstanding, any provision of paragraph 15, the Senior Security Advisor must consult with appropriate employees of the originating agency if a question arises about the classification or disclosure of any information provided to the defense. Such consultation shall not operate as a waiver of, limit, or otherwise render inapplicable, the attorney-client privilege.
17. Until further order of a Military Judge, any pleading or other document filed by the defense, which Defense Counsel 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 Defense Counsel is unsure, shall be filed under seal with the Senior Security Advisor. The time of submission to the Senior Security Advisor shall be considered the date and time of filing. The Senior Security Advisor shall promptly examine the pleading or document and, after consultation with representatives of the appropriate agencies, determine whether the pleading or document contains classified information. If the Senior Security Advisor determines that the pleading or document contains classified information, the Senior Security Advisor shall ensure that that portion of the

pleading or document, and only that portion, is marked with the appropriate classification marking and that the pleading or document remains under seal. All portions of any pleading or document filed by the defense that do not contain classified information shall be unsealed by the Senior Security Advisor and placed in the public record. The Senior Security Advisor shall deliver under seal to the Military Judge and Trial Counsel any pleading or document to be filed by the defense that contains classified information; the Military Judge shall then direct the clerk to enter on the docket sheet the title of the pleading or document (unless such title is itself classified), the date it was filed, and the fact that it has been filed under seal with the Senior Security Advisor. The Senior Security Advisor shall maintain a separate sealed record for those materials which are classified. The Senior Security Advisor shall be responsible for maintaining the secure record for purposes of later proceedings or appeals.

18. Any pleading or other document filed by the Trial Counsel containing classified information shall be filed under seal with the Court through the Senior Security Advisor. The date and time of physical submission to the Senior Security Advisor shall be considered the date and time of the filing.
19. Defense Counsel and their designated employees who have complied with the provisions of this Order may have access to certain classified information only as follows:
 - a. The originating agency shall have determined that the persons seeking access to classified information have a "need to know" the classified information at issue;
 - b. Classified information produced by the prosecution to the defense, in discovery or otherwise, and all classified information possessed, created, or maintained by the defense, shall be stored, maintained, and used only in the secure area established in the Office of Chief Defense Counsel offices;
 - c. Defense Counsel, defense counsel employees, defense witnesses and any other person whose assistance the Defense Counsel reasonably requires to have access to classified information shall have free access to the classified information made available to them in their secure area, and shall be allowed to take notes and prepare documents with respect to those materials. However, the Defense Counsel, defense counsel employees, defense witnesses and any other person whose assistance the Defense Counsel reasonably requires to have access to classified information shall not, except under separate order of a

Military Judge, disclose the classified information, either directly, indirectly or in any manner which would disclose the existence of such;

- d. No person, including the Defense Counsel, defense counsel employees, defense witnesses and any other person whose assistance the Defense Counsel reasonably requires to have access to classified information, shall copy or reproduce any classified information in any form, except with the approval of the Senior Security Advisor or in accordance with Department of Defense regulations governing the reproduction of classified information;
- e. All documents prepared by the Defense Counsel, defense counsel employees, defense witnesses and any other person whose assistance the Defense Counsel reasonably requires to have access to classified information (including, and without limitation to, pleadings or other documents intended for filing with the Court) that do or may contain classified information, shall be transcribed, recorded, typed, duplicated, copied, or otherwise prepared only by persons who have complied with the provisions of this Order, and in the secure area on approved information technology systems and in accordance with the procedures approved by the Senior Security Advisor. All such pleadings or documents and any associated materials (such as notes, drafts, copies, typewriter or label maker ribbons, portable memory media, photocopiers and exhibits) containing or believed to contain classified information shall be maintained in the secure areas unless the Senior Security Advisor determines that those documents or associated materials are unclassified in their entirety. The Senior Security Advisor will not disclose any of these materials to Trial Counsel;
- f. Defense Counsel, defense counsel employees, defense witnesses and any other person whose assistance the Defense Counsel reasonably requires to have access to classified information shall discuss classified information only within the secure area or in another area authorized by applicable Department of Defense regulations and shall not discuss or attempt to discuss classified information over any standard commercial telephone instrument or office intercommunication system, such as email;
- g. The Defense Counsel, defense counsel employees, defense witnesses and any other person whose assistance the Defense Counsel

reasonably requires to have access to classified information shall not disclose, without prior approval of a Military Judge, the contents of any classified documents or other classified information to any person, including the accused and the defense's witnesses, except the Military Judge, the Commission personnel and the Trial Counsel, who have been identified by the Senior Security Advisor as having the appropriate clearances and the need to know that information and who have complied with the provisions of this Order. Trial Counsel shall be given the opportunity to be heard in response to any defense request for disclosure to a person not named in this Order. Any person approved by a Military Judge for disclosure under this paragraph shall be required to obtain the appropriate security clearance and to sign and submit to the Military Judge the Memorandum of Understanding appended to this Order. If preparation of the defense requires that Classified Information be disclosed to persons not named in this Order, the Senior Security Advisor shall promptly seek to obtain security clearances for them at the request of the Defense Counsel and shall consult with the originating agency of the information before access to such information is provided.

20. Procedures for public disclosure of classified information by the defense shall be those provided in MCRE 505(g) and (h). No classified information shall be disclosed by the defense except:
- a. to the Military Judge, Commission personnel, and Trial Counsel and agents and employees thereof identified by the Senior Security Advisor as holding the appropriate approvals for access to classified information;
 - b. to representatives of the agency or department originating the classified information who have been identified by the Senior Security Advisor as holding the proper security clearances;
 - c. in accordance with the procedures of MCRE 505 and the procedures established in this Order;
 - d. to persons who have been authorized to have access to classified information pursuant to this Order or MCRE 505.
21. To facilitate the defense filing of notices required under MCRE 505(g), the Senior Security Advisor shall make arrangements with the appropriate agencies

for a determination of the classification level, if any, of materials or information either within the possession of the defense or about which the defense has knowledge and which the defense intends to use in any way in any pretrial proceeding or at trial. Nothing submitted by the defense to the Senior Security Advisor pursuant to this paragraph shall be made available to Trial Counsel unless so ordered by a Military Judge, or so designated by the defense.

22. Unclassified Government Information provided to the defense in discovery shall not be further disseminated by the accused, Defense Counsel to any individuals, organizations or other entities other than to military Defense Counsel, employees of the Office of the Chief Defense Counsel, civilian defense counsel or employees of civilian defense counsel, any witness for the defense, all other persons whose assistance the Defense Counsel reasonably requires for the preparation the case.
23. Any unauthorized disclosure of classified information may constitute violations of United States criminal laws. In addition, any violation of the terms of this Order shall be immediately brought to the attention of a Military Judge and may result in a charge of contempt and possible referral for criminal prosecution. Any breach of this Order regarding classified information may also result in the termination of that person's access to classified information. Persons subject to this Order are advised that direct or indirect unauthorized disclosure, retention, or negligent handling of classified documents or information could cause serious damage, and in some cases exceptionally grave damage, to the national security of the United States or may be used to the advantage of a foreign nation against the interests of the United States. This Order is to ensure that those authorized by the Order to receive classified information never divulge the classified information disclosed to them to anyone who is not authorized under this order to receive it, without the prior written authorization from the originating agency and in conformity with this order.
24. Unless otherwise ordered by a Military Judge, with due notice to Trial Counsel, all classified information to which the accused, Defense Counsel, defense counsel employees, any defense witness, or any person whose assistance the Defense Counsel reasonably requires has access in this case is now and will remain the property of the government. The accused, Defense Counsel, defense counsel employees, any defense witness, and any person whose assistance the defense counsel reasonably requires shall return all classified information in their possession obtained from the government in this case, or for which they are responsible because of access to classified information, upon demand of the Senior Security Advisor, subject to petition to the Military Commission Judge for redress. The notes, summaries, and other documents prepared by the defense that

do or may contain classified information shall be treated as classified material at the same level of classification as the material from which they were derived. At the conclusion of this case, which shall be at the final conclusion of any and all appeals, all such notes, summaries, and other documents are to be destroyed by the Senior Security Advisor in the presence of Defense Counsel.

25. A copy of this Order shall be issued forthwith to counsel for the accused, who shall be responsible for advising the accused, defense counsel employees, defense witnesses, and any other person whose assistance the defense counsel reasonably requires of the contents of this Order. The Defense Counsel, defense counsel employees, defense witnesses, and any other person whose assistance the defense counsel reasonably requires who at the time this Order is entered have been approved by Senior Security Advisor for access to classified information shall immediately execute the Memorandum of Understanding appended to this Order, and Defense Counsel shall file executed originals with the Military Judge and the Senior Security Advisor and serve executed originals of such documents upon Trial Counsel. The execution and filing of the Memorandum of Understanding is a condition precedent for the accused, Defense Counsel, defense counsel employees and defense witnesses and any other person whose assistance the Defense Counsel reasonably requires to have access to classified information.

ORDERED this 19th day of DEC '08 at NAS JACKSONVILLE, FL



Raymond E. Beal II
Lt Col, USMC
Military Judge

BEFORE THE MILITARY COMMISSION

 UNITED STATES OF AMERICA)

v.)

MOHAMMED HASHIM)

Government's Motion
For Appropriate Relief**Request for Protective Order Regarding
Classified Information****21 November 2008**

1. **Timeliness.** This motion is filed in accordance with the timelines specified by Rule for Military Commissions (R.M.C.) 905(h), the Military Commissions Trial Judiciary Rules of Court issued on 2 November 2007, and the Military Judge's scheduling order dated 19 November 2008.

2. **Relief.** The Government requests the Military Judge to issue the Protective Order attached hereto as attachment (a).

3. **Overview.** The Government's motion for protective order seeks to prevent unauthorized disclosure or dissemination of classified national security information and documents which may be reviewed by or made available to, or are otherwise in the possession of the accused or defense counsel in this case. The proposed protective order adequately safeguards national security information and is authorized under the Rules for Military Commissions (R.M.C.) and the Military Commission Rules of Evidence (M.C.R.E.). The entry of a protective order is a standard practice in U.S. courts where national security information is at issue.

This case will involve classified national security information, the storage, handling, and control of which requires a security clearance and "need to know."

The purpose of this motion and proposed protective order is to establish procedures to be followed by all defense counsel, the accused, all other counsel involved in this case, translators for the defense, all other persons whose assistance the defense counsel reasonably requires, any Commission personnel, and all other individuals who receive access to classified information in connection with this case.

4. **Burden of Proof.** M.C.R.E. 505(e)(1) provides that upon motion of the Government, the Court shall enter an appropriate protective order to guard against the compromise of classified information disclosed to the defense.

5. **Facts.** The Government alleges that the accused is a member of the Taliban. It is undisputed that the Taliban and its leadership commit and support attacks against United States and allied forces in Afghanistan. Furthermore, the Taliban has provided material support to al Qaeda, an international terrorist organization that has attacked United States military and civilian targets worldwide. The Government also alleges that the accused provided material support to al Qaeda. In view of the allegations, the subject case will involve national security information classified at the levels of "Confidential," "Secret," and, potentially "Top Secret."

6. **Discussion.**

A. The Protective Order is Appropriate for Classified Information

M.C.R.E. 505(a) states that classified information shall be protected and is privileged from discovery if disclosure would be detrimental to the national security. This provision recognizes the compelling interest of the government in protecting both the secrecy of information important to U.S. national security and the confidentiality which is essential to the effective operation of U.S. foreign intelligence services. *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989).

M.C.R.E. 505(b)(1) defines classified information as any information or material that has been determined by the United States government pursuant to an executive order, statute, or regulation to require protection against unauthorized disclosure for reasons of national security. Pursuant to Executive Order 12958, classified information is identified by labels which indicate the level at which the document is classified, i.e., "Confidential," "Secret" or "Top Secret."

M.C.R.E. 505(e)(1) provides that upon request by the Government, the judge shall enter an appropriate protective order to guard against the compromise of information disclosed to the defense. Further, the rule contemplates that such an order would address the manner in which the classified material should be stored, the individuals who will have access to the information, the requirement of security clearances, and the assignment of security personnel. M.C.R.E. 505(e)(1). These measures are designed to protect sensitive information in the interest of national security.

Definitions. The Government requests the following definitions be incorporated into the Court's Order:

The terms "classified national security information and documents," "classified information" and "classified documents" refer to:

a. any classified document or information which has been classified by any Executive Branch agency in the interests of national security or pursuant to Executive Order 12958 or its predecessor Orders as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI)," or any information contained in such document;

b. any document or information, regardless of its physical form or characteristics, now or formerly in the possession of a private party, which has been derived from United States Government information that was classified, regardless of whether such document or information has subsequently been classified by the government pursuant to Executive Order 12958 or its predecessor orders as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI)";

c. classified information known to the accused or defense counsel to be classified or reasonably should be known to be classified; or

d. any document and information as to which the accused or defense counsel have been notified orally or in writing that such documents or information contains classified information.

The term "Unclassified Government Information" refers to documents or information provided by Trial Counsel to the defense that are not classified.

The words "documents" or "information" 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), and further include but are not limited to:

a. papers, correspondence, memoranda, notes, letters, reports, summaries, photographs, maps, charts and graphs, inter-office and intra-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;

b. graphic or oral records or representations an any kind, including but not limited to, photographs, charts, graphs, microfiche, microfilm, videotapes, sound recordings or any kind and motion pictures;

c. 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 thumbdrives and all manner or electronic data processing storage; and

d. information acquired orally.

All classified documents, and information contained therein, 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 and the information contained therein (hereinafter, the "originating agency").

"Access to classified information" means having authorized access to, reviewing, reading, learning, or otherwise coming to know in any manner any classified information.

“Secure area” shall mean a physical facility accredited for the storage, handling and control of classified information.

B. Proposed Procedure

Pursuant to M.C.R.E. 505(e)(1)(G), the Government requests that the Court order the Convening Authority to designate a court security officer for this case, to provide security arrangements necessary to protect the subject classified information from unauthorized disclosure. Defense counsel should seek guidance from such court security officer with regard to appropriate storage, handling, transmittal, and use of classified information.

Trial counsel assigned to this case, Maj³ [REDACTED] and Capt³ [REDACTED] have the requisite security clearances and “need-to-know” to ensure access to classified documents and information that relate to this case.

In order to protect the classified information involved in this case, no person, including the accused, military defense counsel, employees of the Office of Military Commission, Office of the Chief Defense Counsel, civilian defense counsel or employees of civilian defense counsel, any witness for the defense, all other persons whose assistance the defense counsel reasonably requires, except Trial Counsel, appropriately cleared Office of Military Commission, Office of the Chief Prosecutor employees, personnel of the originating agency, should have access to any classified document or information involved in this case unless that person shall first have:

a. signed a Memorandum of Understanding wherein such person agrees to comply with the terms of the protective order. The substitution, departure or removal for any reason from this case of counsel for the accused, or anyone associated with Office of the Chief Defense Counsel, the office of a civilian defense counsel, or any other person who has signed the Memorandum of Understanding will not release that person from the provisions of the proposed Order or the Memorandum of Understanding executed in connection with the proposed Order;

b. been granted the requisite security clearance by the Department of Defense, and obtained permission of the Military Judge, either through the proposed Order, or otherwise;

c. been determined to have a “need to know” the classified information at issue by the originating agency.

The Government requests the Court require both the Office of the Chief Prosecutor and the Office of the Chief Defense Counsel to designate and maintain approved secure areas in which their personnel can work with classified information. Further, the Government requests the Court instruct the court security officer to establish procedures to assure the secured area be maintained and operated in a manner consistent with the protection of classified information.

The Government requests the Court order any pleading or other document filed by the defense, which defense counsel 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 defense counsel is unsure, be filed under seal with the Court Security Officer. Upon such a filing,

the Court Security Officer should promptly examine the pleading or document and, in consultation with representatives of the appropriate agencies, determine whether the pleading or document contains classified information.

Similarly, any pleading or other document filed by the Trial Counsel containing classified information should be filed under seal with the Court through the Court Security Officer.

The Government requests the Court establish procedures for the disclosure at trial of classified information comporting with those provided in M.C.R.E. 505(g) and (h).

7. **Oral Argument.** The Government requests oral argument, if deemed necessary by the Court.

8. **Witnesses.** The Government does not anticipate calling live witnesses in connection with this motion. However, the Government reserves the right to amend this request should the defense response raise issues that would require the Government to call live witnesses in order to rebut certain information.

9. **Certificate of Conference.** Trial Counsel discussed this Motion with Detailed Defense Counsel with Lt Col³ [REDACTED]. He stated that he requests the opportunity to consider the Government's Motion for Appropriate Relief in more detail and further reserves all rights to file an opposition.

10. **Additional Information.** None.

11. **Attachments.** The Government has the following attachments:

- (a) Proposed Protective Order
- (b) Proposed Memorandum of Understanding.

Respectfully Submitted by:

3 [REDACTED]

Major, USAF
Trial Counsel
Office of Military
Commissions
Office of Chief Prosecutor
1610 Defense Pentagon
Washington, D.C. 20301-1610

3 [REDACTED]

Capt, USAF
Assistant Trial Counsel
Office of Military
Commissions
Office of Chief Prosecutor
1610 Defense Pentagon
Washington, D.C. 20301-1610

BEFORE THE MILITARY COMMISSION

UNITED STATES OF AMERICA)	
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MOHAMMED HASHIM)	Memorandum of Understanding
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MEMORANDUM OF UNDERSTANDING

1. Having familiarized myself with the applicable law, I understand that I already have received, or may receive in the future, documents and information that pertain to the national security of the United States, and which are the property of the United States, and that such documents and information, together with the sources and methods of collecting such information, are classified according to security standards set by the United States Government.

2. I agree that I shall never divulge, publish, or reveal, either by word, conduct, or any other means, such classified documents and information unless specifically authorized to do so in writing by an authorized representative of the United States Government, or as required by applicable law, or as otherwise ordered by this Court.

3. I understand that the term “classified documents and information” includes, but is not limited to, documents and information now or formerly in the possession of a private party, which has been derived from United States government information that was classified,

regardless of whether such document or information has subsequently been classified by the government pursuant to Executive Order 12958 or its predecessor orders as “CONFIDENTIAL,” “SECRET,” or “TOP SECRET,” or additionally controlled as “SENSITIVE COMPARTMENTED INFORMATION” (SCI).

4. I further understand that this agreement will remain binding upon me after the conclusion of the trial in this military commission and any subsequent related proceedings, including any appeals.

5. I understand that this MOU creates obligations separate and apart from any Protective Order that may be issued in this case. I agree that this MOU does not in any way truncate or limit my obligations under any such Protective Order, nor does it restrict the full and complete enforcement of such a Protective Order.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this ____ day of _____, ____.

Print Name

Witness Name (print)

Signature

Witness Signature

BEFORE THE MILITARY COMMISSION

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 - c. classified information known to the accused, counsel or other person(s) assisting the defense or the Government, to be classified or reasonably should be known to be classified; or
 - d. any document and information as to which the accused, counsel or person(s) having been notified orally or in writing that such documents or information contains classified information.
6. As used herein, the term “Unclassified Government Information” shall refer to documents or information provided by Trial Counsel to the defense that is not classified.
7. The words “documents” or “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), and further include but are not limited to:
- a. papers, correspondence, memoranda, notes, letters, reports, summaries, photographs, maps, charts and graphs, inter-office and intra-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;

- b. graphic or oral records or representations an any kind, including but not limited to, photographs, charts, graphs, microfiche, microfilm, videotapes, sound recordings or any kind and motion pictures;
 - c. 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 thumbdrives and all manner or electronic data processing storage; and
 - d. information acquired orally.
8. All classified documents, and 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 and the information contained therein (hereinafter, the “originating agency”).
9. “Access to classified information” means having authorized access to, reviewing, reading, learning, or otherwise coming to know in any manner any classified information.
10. In accordance with MCRE 505(e)(1), I designate the Senior Security Advisor selected by the Convening Authority, and his or her designated Alternate Security Advisors, for the purposes of providing security arrangements necessary to protect from unauthorized disclosure any classified documents or information to be made available in connection with this case. Reference to “Senior Security Advisor” in this Order also includes those persons designated as Alternate Security Advisors by the Senior Security Advisor. Defense Counsel, defense counsel employees, defense witnesses and any other person whose assistance the Defense Counsel reasonably requires to have access to classified information shall seek guidance from the Senior Security Advisor with regard to appropriate storage, handling, transmittal, and use of classified documents and information.
11. I have been advised that trial counsel assigned to this case, Major³ [REDACTED] and Capt³ [REDACTED] have the requisite security clearances and “need-to-know” to have access to classified documents and information that relate to this case. All references to Trial Counsel or government attorney as used in this order refer only to the attorneys listed in this paragraph.
12. I find that in order to protect the classified information involved in this case, no person, including the accused, detailed Defense Counsel, employees of the Office

of the Chief Defense Counsel, any civilian defense counsel or employees of civilian defense counsel, any witness for the defense, all other persons whose assistance the Defense Counsel reasonably requires, except Trial Counsel, appropriately cleared Office of Military Commission Office of the Chief Prosecutor employees, and personnel of the originating agency, shall have access to any classified document or information involved in this case unless that person shall first have:

- a. signed the Memorandum of Understanding in the form attached hereto, agreeing to comply with the terms of this Order and all applicable laws and regulations. The substitution, departure or removal for any reason from this case of counsel for the accused, or anyone associated with Office of the Chief Defense Counsel, the office of a civilian Defense Counsel, or any other person who has signed the Memorandum of Understanding shall not release that person from the provisions of this Order or the Memorandum of Understanding executed in connection with this Order;
- b. been granted the requisite security clearance by the Department of Defense or the Department of Justice, and verified by the Senior Security Advisor (for those named in paragraph 13 below); and
- c. been determined to have a “need to know” the classified information at issue by the originating agency. Any information provided to the originating agency, to include the name of the requested party, shall not be disclosed to any other governmental agency beyond that which is necessary to determine “need to know.” In no event shall any provided information be disclosed to the Office of Chief Prosecutor.

13. Subject to provisions of paragraph 12 and subject to the “need to know” requirement of EO 12958, as amended, the attorneys for the defense and their approved employees, may be given access to certain classified documents and information as required by the government’s discovery obligations:

- a. Any additional person whose assistance the defense reasonably requires may only have access to classified information in this case after obtaining verification by the Senior Security Advisor that the person possesses the pertinent security clearance and has been determined to possess a “need to know” as determined by the originating agency, and after satisfying the requirements described in paragraph 12 of this Order for access to classified information.

14. Unless already holding an appropriate security clearance, and approved for access to classified information in this case, Defense Counsel, defense counsel employees, defense witnesses and any other person whose assistance the Defense Counsel reasonably requires to have access to classified information, and such Court personnel as the Court requires for its assistance, for the purpose of establishing security clearances necessary for access to classified information that may be involved in this case, must complete and submit to the Senior Security Advisor forthwith a Standard Form 86 (“Security Investigative Data for Sensitive Position”), attached releases, and “major case” fingerprints. The Senior Security Advisor shall take all reasonable steps to process all security clearance applications as soon as possible.
15. I understand that both the Office of the Chief Prosecutor and the Office of the Chief Defense Counsel have appropriately approved secure areas in which their personnel can work with classified information. The Senior Security Advisor, in consultation with Defense Counsel, shall establish procedures to assure that the secure area may be maintained and operated in the most efficient manner consistent with the protection of classified information. No document containing classified information may be removed from this secure area unless authorized by the Senior Security Advisor. The Senior Security Advisor shall not reveal to the Trial Counsel any conversations she or he may hear, nor reveal the nature of documents being reviewed by them, or the work generated by them. In addition, the presence of the Senior Security Advisor shall not operate as a waiver of, limit, or otherwise render inapplicable, the attorney-client privilege.
16. Notwithstanding, any provision of paragraph 15, the Senior Security Advisor must consult with appropriate employees of the originating agency if a question arises about the classification or disclosure of any information provided to the defense. Such consultation shall not operate as a waiver of, limit, or otherwise render inapplicable, the attorney-client privilege.
17. Until further order of a Military Judge, any pleading or other document filed by the defense, which Defense Counsel 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 Defense Counsel is unsure, shall be filed under seal with the Senior Security Advisor. The time of submission to the Senior Security Advisor shall be considered the date and time of filing. The Senior Security Advisor shall promptly examine the pleading or document and, after consultation with representatives of the appropriate agencies, determine whether the pleading or document contains classified information. If the Senior Security Advisor determines that the pleading or document contains classified information, the Senior Security Advisor shall ensure that that portion of the

pleading or document, and only that portion, is marked with the appropriate classification marking and that the pleading or document remains under seal. All portions of any pleading or document filed by the defense that do not contain classified information shall be unsealed by the Senior Security Advisor and placed in the public record. The Senior Security Advisor shall deliver under seal to the Military Judge and Trial Counsel any pleading or document to be filed by the defense that contains classified information; the Military Judge shall then direct the clerk to enter on the docket sheet the title of the pleading or document (unless such title is itself classified), the date it was filed, and the fact that it has been filed under seal with the Senior Security Advisor. The Senior Security Advisor shall maintain a separate sealed record for those materials which are classified. The Senior Security Advisor shall be responsible for maintaining the secure record for purposes of later proceedings or appeals.

18. Any pleading or other document filed by the Trial Counsel containing classified information shall be filed under seal with the Court through the Senior Security Advisor. The date and time of physical submission to the Senior Security Advisor shall be considered the date and time of the filing.
19. Defense Counsel and their designated employees who have complied with the provisions of this Order may have access to certain classified information only as follows:
 - a. The originating agency shall have determined that the persons seeking access to classified information have a "need to know" the classified information at issue;
 - b. Classified information produced by the prosecution to the defense, in discovery or otherwise, and all classified information possessed, created, or maintained by the defense, shall be stored, maintained, and used only in the secure area established in the Office of Chief Defense Counsel offices;
 - c. Defense Counsel, defense counsel employees, defense witnesses and any other person whose assistance the Defense Counsel reasonably requires to have access to classified information shall have free access to the classified information made available to them in their secure area, and shall be allowed to take notes and prepare documents with respect to those materials. However, the Defense Counsel, defense counsel employees, defense witnesses and any other person whose assistance the Defense Counsel reasonably requires to have access to classified information shall not, except under separate order of a

Military Judge, disclose the classified information, either directly, indirectly or in any manner which would disclose the existence of such;

- d. No person, including the Defense Counsel, defense counsel employees, defense witnesses and any other person whose assistance the Defense Counsel reasonably requires to have access to classified information, shall copy or reproduce any classified information in any form, except with the approval of the Senior Security Advisor or in accordance with Department of Defense regulations governing the reproduction of classified information;
- e. All documents prepared by the Defense Counsel, defense counsel employees, defense witnesses and any other person whose assistance the Defense Counsel reasonably requires to have access to classified information (including, and without limitation to, pleadings or other documents intended for filing with the Court) that do or may contain classified information, shall be transcribed, recorded, typed, duplicated, copied, or otherwise prepared only by persons who have complied with the provisions of this Order, and in the secure area on approved information technology systems and in accordance with the procedures approved by the Senior Security Advisor. All such pleadings or documents and any associated materials (such as notes, drafts, copies, typewriter or label maker ribbons, portable memory media, photocopiers and exhibits) containing or believed to contain classified information shall be maintained in the secure areas unless the Senior Security Advisor determines that those documents or associated materials are unclassified in their entirety. The Senior Security Advisor will not disclose any of these materials to Trial Counsel;
- f. Defense Counsel, defense counsel employees, defense witnesses and any other person whose assistance the Defense Counsel reasonably requires to have access to classified information shall discuss classified information only within the secure area or in another area authorized by applicable Department of Defense regulations and shall not discuss or attempt to discuss classified information over any standard commercial telephone instrument or office intercommunication system, such as email;
- g. The Defense Counsel, defense counsel employees, defense witnesses and any other person whose assistance the Defense Counsel

reasonably requires to have access to classified information shall not disclose, without prior approval of a Military Judge, the contents of any classified documents or other classified information to any person, including the accused and the defense's witnesses, except the Military Judge, the Commission personnel and the Trial Counsel, who have been identified by the Senior Security Advisor as having the appropriate clearances and the need to know that information and who have complied with the provisions of this Order. Trial Counsel shall be given the opportunity to be heard in response to any defense request for disclosure to a person not named in this Order. Any person approved by a Military Judge for disclosure under this paragraph shall be required to obtain the appropriate security clearance and to sign and submit to the Military Judge the Memorandum of Understanding appended to this Order. If preparation of the defense requires that Classified Information be disclosed to persons not named in this Order, the Senior Security Advisor shall promptly seek to obtain security clearances for them at the request of the Defense Counsel and shall consult with the originating agency of the information before access to such information is provided.

20. Procedures for public disclosure of classified information by the defense shall be those provided in MCRE 505(g) and (h). No classified information shall be disclosed by the defense except:
 - a. to the Military Judge, Commission personnel, and Trial Counsel and agents and employees thereof identified by the Senior Security Advisor as holding the appropriate approvals for access to classified information;
 - b. to representatives of the agency or department originating the classified information who have been identified by the Senior Security Advisor as holding the proper security clearances;
 - c. in accordance with the procedures of MCRE 505 and the procedures established in this Order;
 - d. to persons who have been authorized to have access to classified information pursuant to this Order or MCRE 505.
21. To facilitate the defense filing of notices required under MCRE 505(g), the Senior Security Advisor shall make arrangements with the appropriate agencies

for a determination of the classification level, if any, of materials or information either within the possession of the defense or about which the defense has knowledge and which the defense intends to use in any way in any pretrial proceeding or at trial. Nothing submitted by the defense to the Senior Security Advisor pursuant to this paragraph shall be made available to Trial Counsel unless so ordered by a Military Judge, or so designated by the defense.

22. Unclassified Government Information provided to the defense in discovery shall not be further disseminated by the accused, Defense Counsel to any individuals, organizations or other entities other than to military Defense Counsel, employees of the Office of the Chief Defense Counsel, civilian defense counsel or employees of civilian defense counsel, any witness for the defense, all other persons whose assistance the Defense Counsel reasonably requires for the preparation the case.
23. Any unauthorized disclosure of classified information may constitute violations of United States criminal laws. In addition, any violation of the terms of this Order shall be immediately brought to the attention of a Military Judge and may result in a charge of contempt and possible referral for criminal prosecution. Any breach of this Order regarding classified information may also result in the termination of that person's access to classified information. Persons subject to this Order are advised that direct or indirect unauthorized disclosure, retention, or negligent handling of classified documents or information could cause serious damage, and in some cases exceptionally grave damage, to the national security of the United States or may be used to the advantage of a foreign nation against the interests of the United States. This Order is to ensure that those authorized by the Order to receive classified information never divulge the classified information disclosed to them to anyone who is not authorized under this order to receive it, without the prior written authorization from the originating agency and in conformity with this order.
24. Unless otherwise ordered by a Military Judge, with due notice to Trial Counsel, all classified information to which the accused, Defense Counsel, defense counsel employees, any defense witness, or any person whose assistance the Defense Counsel reasonably requires has access in this case is now and will remain the property of the government. The accused, Defense Counsel, defense counsel employees, any defense witness, and any person whose assistance the defense counsel reasonably requires shall return all classified information in their possession obtained from the government in this case, or for which they are responsible because of access to classified information, upon demand of the Senior Security Advisor, subject to petition to the Military Commission Judge for redress. The notes, summaries, and other documents prepared by the defense that

do or may contain classified information shall be treated as classified material at the same level of classification as the material from which they were derived. At the conclusion of this case, which shall be at the final conclusion of any and all appeals, all such notes, summaries, and other documents are to be destroyed by the Senior Security Advisor in the presence of Defense Counsel.

25. A copy of this Order shall be issued forthwith to counsel for the accused, who shall be responsible for advising the accused, defense counsel employees, defense witnesses, and any other person whose assistance the defense counsel reasonably requires of the contents of this Order. The Defense Counsel, defense counsel employees, defense witnesses, and any other person whose assistance the defense counsel reasonably requires who at the time this Order is entered have been approved by Senior Security Advisor for access to classified information shall immediately execute the Memorandum of Understanding appended to this Order, and Defense Counsel shall file executed originals with the Military Judge and the Senior Security Advisor and serve executed originals of such documents upon Trial Counsel. The execution and filing of the Memorandum of Understanding is a condition precedent for the accused, Defense Counsel, defense counsel employees and defense witnesses and any other person whose assistance the Defense Counsel reasonably requires to have access to classified information.

ORDERED this _____ day of _____, at _____

Milita

Raymond E. Beal II
Lt Col, USMC
ry Judge

Subject: RE: U S v Hashim -- Government Motion for Protective Order
Concerning Classified Information
Signed By: [REDACTED]

Sir,

The Defense was unable to locate a Filing Number for this Motion. The Defense makes no formal Response to the Motion; however, the Defense requests special relief from formal Response requirements to simply suggest that para 24 of the Proposed Protective Order be amended as follows:

Para 24. "The notes, summaries, and other documents prepared by the defense that do or may contain classified information shall be treated as classified material at the same level of classification as the material from which they were derived. At the conclusion of this case, which shall be at the final conclusion of any and all appeals, all such notes, summaries, and other documents are to be destroyed " and ending the sentence there or add the requirement: "by Defense Counsel "

Deleting the language in paragraph 24 that occurs after the word "destroyed" to wit: "by the Senior Security Advisor in the presence of Defense Counsel " for the reason that Defense Counsel may well be assigned anywhere in the world at the time of conclusion of any appeals and to have a requirement to be physically present seems overly burdensome. In addition, atty work product continues to be privileged and, as proposed, this requires turning over atty work product to the Senior Security Advisor which drives the physical presence issue.

We have burn bags here in our office. My suggestion is that the Defense be placed with the burden of properly disposing of the classified material "prepared by the defense " which avoids the physical presence/attorney work product issue.

The Prosecution was contacted regarding this proposed amendment, but their position is unknown.

V/r

[REDACTED] Lt. Col. USAFR
OMC- Defense Counsel

[REDACTED] This electronic transmission may contain work-product or information protected under the attorney-client privilege, both of which are protected from disclosure under the Freedom of Information Act, 5 USC § 552. Do not release outside of DoD channels without the consent of the originator's office. If you received this message in error, please notify the sender by reply e-mail and delete all copies of this message.

-----Original Message-----
From: [REDACTED] MAJ, OSD OMC Prosecution [REDACTED]

Sent: Friday, November 21, 2008 4:04 P.
[REDACTED]

Subject: U S v Hashim -- Government Motion for Protective Order Concerning Classified Information [REDACTED]

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Please find attached the Government's Motion for Protective Order Concerning Classified Information. This e-mail also contains two attachments: a) a proposed order for the military judge; and a proposed memorandum of understanding.

V/r

Major [REDACTED]

[REDACTED] Major, USAF

Trial Counsel

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Office of the Chief Prosecutor
Office of Military Commissions

NIPPER

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