



U.S. Department of Justice

Civil Division

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October 20, 2004

RE: Proposed Protective Order for Classified and Protected Information

Dear Counsel:

Pursuant to Judge Green's September 20, 2004 Order, enclosed is the respondent's proposed Protective Order establishing procedures for the use of classified and protected information in this litigation.

Among other provisions, the Protective Order specifically defines classified and protected information and describes how they are to be handled.¹ It also describes who is entitled to access classified and protected information and the prerequisites for being provided classified or protected information. The Order also has provisions for the creation of a secure area in which petitioners will be able to use and discuss classified information. The rules for use of this secure area are also detailed in the Order.

In order to assist with the handling of classified and protected materials, the Order also designates members of the Dept. of Justice Security & Emergency Planning Staff as Court Security Officers (CSO). The CSOs will assist with coordinating use of the secure space where petitioners can access and use classified information. They will also assist in filing all pleadings submitted by petitioners. As detailed in the Protective Order, all pleadings by petitioners must be filed with the CSOs in order to go through a classification review prior to filing with the Court.

Finally, the Protective Order outlines the penalties for unauthorized disclosure of classified or protected information.

Three attachments accompany the Protective Order. Attachment A includes the previously issued procedures applicable to counsel access to detainees. In addition, please note

¹ For your information, the types of information included as "protected information" are described in the declarations accompanying the government's factual returns filed in the Khadr and Al Odah cases last week.

that the attachment also includes supplemental procedures entitled, "Procedures for Handling Mail Between Detainees and Habeas Counsel" and "Procedures for Handling Materials Brought Into or Out of the Meeting Between Detainees and Habeas Counsel." These supplementary procedures provide clarify and address the handling of the exchange of documents between detainees and habeas counsel and shall henceforth govern such exchanges. We understand that a challenge to counsel access procedures has been made, and the proposed order provides for possible court rulings on those issues.

The next attachment is the Memorandum of Understanding which must be signed to indicate agreement to comply with the terms of the Protective Order concerning classified information. The final attachment is an Acknowledgment that must be signed to indicate agreement to comply with the terms of the Protective Order concerning Protected Information.

Please review the proposed Protective Order and reply with comments to my email address, james.schwartz@usdoj.gov. If you have any questions concerning the terms of the Protective Order, please call at (202) 616-8267.

Sincerely yours,

/s/

James J. Schwartz
Trial Attorney
Federal Programs Branch

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

, et al.)
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)
 Petitioners,)
)
 v.) Civil Action No.
)
 GEORGE W. BUSH,)
 President of the United)
 States, et al.,)
)
 Respondents.)

PROTECTIVE ORDER

This matter comes before the Court upon Respondents' Motion for Protective Order to prevent the unauthorized disclosure or dissemination of classified national security information and other protected information that may be reviewed by, made available to, or are otherwise in the possession of, the petitioners and/or petitioners' counsel in this case. Pursuant to the general supervisory authority of the Court in order to protect the national security and for good cause shown;

IT IS ORDERED:

1. The Court finds that this case may involve classified national security information or documents, the storage, handling and control of which require special security precautions, and access to which requires a security clearance and a "need to know." This case may also involve other protected information or documents, the storage, handling and control of which require special precautions in order to protect the security of United

States government personnel and facilities, and other significant government interests.

2. The purpose of this Protective Order is to establish the procedures that must be followed by all petitioners' counsel, their respective petitioner(s), all other counsel involved in this case, translators for the petitioners, any Court personnel, and all other individuals who receive access to classified national security information or documents, or other protected information or documents, in connection with this case.

3. The procedures set forth in this Protective Order will apply to all aspects of this case, and may be modified by further order of the Court.

4. Nothing in this Order is intended to or does preclude the use of classified information by the government as otherwise authorized by law.

5. Petitioners' counsel shall be responsible for advising their employees, the petitioners, and others of the contents of this Protective Order, as appropriate or needed.

6. Petitioners' counsel agree to be bound by the terms and conditions set forth in the "Procedures For Counsel Access To Detainees At the U.S. Naval Base In Guantanamo Bay, Cuba," and the procedures for handling mail and documents brought into and out of counsel meetings, attached hereto as Exhibit A. This Protective Order specifically incorporates by reference all terms

and conditions established in the procedures contained in Exhibit A to the extent they place limitations on petitioners' counsel in their access to and interaction with petitioners or handling of information. Any violation of the terms and conditions of those procedures will also be deemed a violation of this Protective Order. This paragraph does not apply with respect to provisions in the procedures contained in Exhibit A that are overridden by the Court.

Definitions

7. As used herein, 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, graphs, interoffice and intra-office communications, notations of any sort concerning conversations, meetings, or other communications, bulletins, teletypes, telegrams, telefacsimiles, invoices, worksheets, and drafts, alterations, modifications, changes and amendments of any kind to the foregoing;

b. 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;

c. electronic, mechanical or electric records of any kind, including, but not limited to, tapes, cassettes, disks, recordings, electronic mail, films, typewriter ribbons, word processing or other computer tapes or disks, and all manner of electronic data processing storage; and

d. information acquired orally.

8. The terms "classified national security information and/or documents," "classified information" and "classified documents" refer to:

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

as amended, or its predecessor Orders as "CONFIDENTIAL," "SECRET," or "TOP SECRET," or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI)";

c. verbal or non-documentary classified information known to the petitioner or petitioners' counsel; or

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

9. 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 original classification authority of the document or the information contained therein (hereinafter, the "original classification authority").

10. The terms "protected information and/or documents," "protected information" and "protected documents" refer to:

a. any document or information contained within the records of proceedings before the Combatant Status Review Tribunals that:

i. is not classified national security information and/or documents as defined in paragraph 8; and

ii. has not been filed in the public record in the government's factual returns to petitioners' petitions for writ of habeas corpus.

b. information designated by the government as protected because the storage, handling and control require special precautions in order to protect the security of United States government personnel and facilities, and other significant government interests.

11. For purposes of this Protective Order, "petitioners' counsel" shall be defined to include an attorney who is employed or retained by or on behalf of a petitioner for purposes of representing the petitioner in habeas corpus or other litigation in federal court in the United States, as well as co-counsel, interpreters, translators, paralegals, investigators and all other personnel or support staff employed or engaged to assist in the litigation.

12. "Access to classified information" or "access to protected information" shall mean having access to, reviewing, reading, learning, or otherwise coming to know in any manner any classified information or protected information.

13. "Secure area" shall mean a physical facility accredited or approved for the storage, handling, and control of classified information.

Designation of Court Security Officer

14. The Court designates Christine E. Gunning as Court Security Officer for this case, and Michael P. Macisso, James P. Londergan, Mary M. Cradlin, Daniel O. Hartenstine, John P. Molinard, Jennifer Campbell, and Barbara J. Russell as Alternate Court Security Officers, for the purpose of providing security arrangements necessary to protect from unauthorized disclosure of any classified documents or information, or protected documents or information, to be made available in connection with this case. Petitioners' counsel shall seek guidance from the Court Security Officer with regard to appropriate storage, handling, transmittal, and use of classified documents or information.

Access to Classified Information and Documents

15. Without authorization from the government, no petitioner or petitioners' counsel shall have access to any classified information involved in this case unless that person shall first have:

- a. been determined to have a "need to know"; and
- b. received the necessary security clearance as determined by the Department of Justice Security Officer; and
- c. signed the Memorandum of Understanding ("MOU"), attached hereto as Exhibit B, agreeing to comply with the terms of this Protective Order.

16. Petitioners' counsel to be provided access to classified information shall execute the MOU appended to this Protective Order, and shall file executed originals with the Court and submit copies to the Court Security Officer and counsel for the government. The execution and submission of the MOU is a condition precedent for petitioners' counsel to have access to, or continued access to, classified information for the purposes of this proceeding.

17. The substitution, departure, or removal of petitioners' counsel from this case for any reason shall not release that person from the provisions of this Protective Order or the MOU executed in connection with this Order.

18. The government shall arrange for an appropriately approved secure area for the use of petitioners' counsel. The secure area shall contain a working area that will be supplied with secure office equipment reasonable and necessary to the preparation of the petitioners' case. Expenses for the secure area and its equipment shall be borne by the government.

19. The Court Security Officer shall establish procedures to ensure that the secure area is accessible to the petitioners' counsel during normal business hours and at other times on reasonable request as approved by the Court Security Officer. The Court Security Officer shall establish procedures to ensure that the secure area may be maintained and operated in the most

efficient manner consistent with the protection of classified information. The Court Security Officer or other supervising government official may place reasonable and necessary restrictions on the schedule of use of the secure area in order to accommodate appropriate access to all petitioners' counsel in this and other proceedings.

20. All classified information provided by the government to counsel for petitioners, and all classified information otherwise possessed or maintained by petitioners' counsel, shall be stored, maintained, and used only in the secure area.

21. No documents containing classified information may be removed from the secure area unless authorized by the Court Security Officer or other government official supervising the area.

22. Consistent with other provisions of this Protective Order, petitioners' counsel shall have access to the classified information made available to them in the secure area, and shall be allowed to take notes and prepare documents with respect to those materials.

23. Petitioners' counsel shall not copy or reproduce any classified information in any form, except with the approval of the Court Security Officer or in accordance with the procedures established by the Court Security Officer for the operation of the secure area.

24. All documents prepared by petitioners or petitioners' counsel that do or may contain classified information (including without limitation, notes taken or memoranda prepared by counsel and pleadings or other documents intended for filing with the Court) shall be transcribed, recorded, typed, duplicated, copied, or otherwise prepared only by persons who have received an appropriate approval for access to classified information. Such activities shall take place in the secure area on approved word processing equipment and in accordance with the procedures approved by the Court Security Officer. All such documents and any associated materials containing classified information (such as notes, memoranda, drafts, copies, typewriter ribbons, magnetic recordings, exhibits) shall be maintained in the secure area unless and until the Court Security Officer advises that those documents or associated materials are unclassified in their entirety. None of these materials shall be disclosed to counsel for the government unless authorized by the Court, by petitioners' counsel or as otherwise provided in this Protective Order.

25. Petitioners' counsel shall discuss classified information only within the secure area or in another area authorized by the Court Security Officer, shall not discuss classified information over any standard commercial telephone instrument or office intercommunication system, and shall not

transmit or discuss classified information in electronic mail communications of any kind.

26. The Court Security Officer or supervising official shall not reveal to the government the content of any conversations she or he may hear by or among petitioners' counsel, nor reveal the nature of documents being reviewed by them, or the work generated by them, except as necessary to report violations of this Protective Order to the Court. In addition, the presence of the Court Security Officer or supervising official shall not operate as a waiver of, limit, or otherwise render inapplicable, the attorney-client privilege or work product protections.

27. Petitioners' counsel shall not disclose the contents of any classified documents or information to any person, to include counsel in related cases brought by Guantanamo Bay detainees in this or other courts, except those authorized pursuant to this Protective Order, the Court, and counsel for the government with the appropriate clearances and the need to know that information.

28. Petitioners' counsel shall not disclose classified information not learned from petitioner-detainee to that petitioner-detainee. Should petitioners' counsel desire to disclose classified information not learned from petitioner-detainee to that petitioner-detainee, petitioners' counsel will provide in writing to the privilege review team (See Ex. A) a

request for release clearly stating the classified information they seek to release. The privilege review team will forward the petitioner counsel's request to the appropriate government agency authorized to declassify the classified information for a determination. The privilege review team will inform petitioners' counsel of the determination once it is made.

29. No petitioner or counsel for petitioner shall disclose or cause to be disclosed any information known or believed to be classified in connection with any hearing or proceeding in this case except as otherwise provided herein.

30. At no time, including any period subsequent to the conclusion of the proceedings, will petitioners' counsel make any public or private statements regarding any classified information or documents accessed pursuant to this Protective Order.

31. All documents containing classified information prepared, possessed or maintained by, or provided to, petitioners' counsel (except filings submitted to the Court and served on counsel for the government), shall remain at all times in the control of the Court Security Officer for the duration of this case. Upon final resolution of this case, including all appeals, all such documents shall be destroyed by the Court Security Officer.

Access to Protected Information and Documents

32. Without authorization from the government, protected information shall not be disclosed or distributed to any person or entity other than the following:

a. petitioners' counsel, provided such individuals have signed the Acknowledgment, attached hereto as Exhibit C, attesting to the fact that they have read this Protective Order and agree to be bound by its terms; and

b. the Court and its support personnel.

33. The execution of the Acknowledgment is a condition precedent for petitioners' counsel to have access to, or continued access to, protected information for the purposes of this proceeding. A copy of each executed Acknowledgment shall be kept by counsel making the disclosure until thirty (30) days after the termination of this action, including appeals.

34. The substitution, departure, or removal of petitioners' counsel from this case for any reason shall not release that person from the provisions of this Protective Order or the Acknowledgment executed in connection with this Protective Order.

35. Petitioners' counsel shall not disclose the contents of any protected documents or information to any person, to include counsel in related cases brought by Guantanamo Bay detainees in this or other courts, except those authorized pursuant to this Protective Order, the Court, or counsel for the government. Petitioners' counsel shall maintain all protected information and

documents received through this proceeding in a confidential manner.

36. Petitioners' counsel shall not disclose protected information not learned from petitioner-detainee to that petitioner-detainee without prior concurrence of counsel for the government.

37. No petitioner or counsel for petitioner shall disclose or cause to be disclosed any information known or believed to be protected in connection with any hearing or proceeding in this case except as otherwise provided herein.

38. At no time, including any period subsequent to the conclusion of the proceedings, will petitioners' counsel make any public or private statements regarding any protected information or documents accessed pursuant to this Protective Order.

39. Protected information shall be used only for purposes directly related to this action and not for any other litigation or proceeding. Photocopies of documents containing such information shall be made only to the extent necessary to facilitate the permitted use hereunder.

40. Nothing in this Protective Order shall prevent a party providing protected information from using that information for any purpose. Nothing in this Protective Order shall entitle another party to protected information.

41. Supplying protected information to another party does not waive privilege with respect to any person or use outside that permitted by this Protective Order.

42. Within sixty (60) days of the resolution of this action, and the termination of any appeal therefrom, all protected documents or information, and any copies thereof, shall be promptly destroyed, provided that the party to whom protected information is disclosed certifies in writing that all designated documents and materials have been destroyed, and further provided that counsel for the government may retain one complete set of any such materials that were presented in any form to the Court. Any such retained materials shall be placed in an envelope or envelopes marked "Protected Information Subject to Protective Order."

Procedures for Filing Documents

43. Until further order of this Court, any pleading or other document filed by the petitioners shall be filed under seal with the Court through the Court Security Officer. The date and time of physical submission to the Court Security Officer shall be considered the date and time of filing with the Court. The Court Security Officer shall promptly examine the pleading or documents and forward it to the appropriate agencies for their determination whether the pleading or document contains classified information. If it is determined that the pleading or

document contains classified information, the Court Security Officer shall ensure that that portion of the document, and only that portion, is marked with the appropriate classification marking and that the document remains under seal. If it is determined that the pleading or document contains protected information, the Court Security Officer shall ensure that that portion of the document, and only that portion, remains under seal. Any document filed by petitioner that is determined not to contain classified information or protected information, and is not subject to any other restrictions on disclosure, shall immediately be unsealed by the Court Security Officer and placed in the public record. The Court Security Officer shall immediately deliver under seal to the Court and counsel for the government any pleading or document to be filed by petitioners that contains classified information or protected information. The Court shall then direct the clerk to enter on the docket sheet the title of the pleading or document, the date it was filed, and the fact that it has been filed under seal with the Court Security Officer.

44. Any pleading or other document filed by the government containing classified information or protected information shall be filed under seal with the Court through the Court Security Officer. The date and time of physical submission to the Court

Security Officer shall be considered the date and time of filing with the Court.

45. Nothing herein shall require the government to disclose classified or protected information. Nor shall anything herein prohibit the government from submitting classified information or protected information to the Court in camera or ex parte in these proceedings, or entitle petitioners or petitioners' counsel access to such submissions or information.

Penalties for Unauthorized Disclosure

46. Any unauthorized disclosure of classified information may constitute violations of United States criminal laws. In addition, any violation of the terms of this Protective Order shall be immediately brought to the attention of the Court and may result in a charge of contempt of Court and possible referral for criminal prosecution. Any breach of this Protective Order may also result in the termination of access to classified information and protected information. Persons subject to this Protective Order are advised that direct or indirect unauthorized disclosure, retention, or negligent handling of classified documents or information could cause damage to the national security of the United States or may be used to the advantage of an adversary of the United States or against the interests of the United States. Persons subject to this Protective Order are also advised that direct or indirect unauthorized disclosure,

retention, or negligent handling of protected documents or information could risk the security of United States government personnel and facilities, and other significant government interests. This Protective Order is to ensure that those authorized to receive classified information and protected information will not divulge this information to anyone who is not authorized to receive it, without prior written authorization from the original classification authority and in conformity with this Protective Order.

47. The termination of this proceeding shall not relieve any person or party provided classified information or protected information of his, her, or its obligations under this Protective Order.