UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL-AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI

AE 009
Mr. al Baluchi's Motion
to End Presumptive Classification

17 April 2012

1. **Timeliness:** This motion is timely filed.

2. **Relief Sought:**

A. The military commission should make a conclusion of law that presumptive classification violates the First and Sixth Amendments, as well as Executive Order 13526 and other relevant authorities.

B. The military commission should not incorporate presumptive classification into any protective orders.

C. The military commission should order the Convening Authority to provide a mechanism for classification review without waiver of attorney-client privilege or abate the proceedings.

3. **Overview:**

The most egregious example of the government's use of overclassification to suppress unclassified but embarrassing information at Guantanamo Bay is the device of "presumptive classification." Presumptive classification—more mythology than law—attempts to extend traditional classification rules beyond information damaging to national security to all statements made by or information learned from Guantanamo Bay prisoners. Under the regime of presumptive classification, if a prisoner says that he misses his family, this information is "born

classified" even though no original classification authority would or could ever classify it. This practice, unchallenged for years, violates every relevant constitutional, presidential, statutory, and regulatory principle of classification.

Under the terms of Executive Order 13526, classification of information is an act: a person, specifically delegated authority, decides that the risks of disclosing a specific piece of information to the public outweigh the democratic imperative for transparency in the operation of government. Only one type of information—Restricted Data about nuclear weapons—is "born classified." Every other type of information must go through the classification process, which applies strict criteria, a presumption of non-classification, and mandatory declassification rules, before it becomes classified.

Presumptive classification reverses these principles and institutionalizes the practice of classifying unclassified but potentially embarrassing information. Executive Order 13526 not only does not authorize presumptive classification, but in fact prohibits it. Presumptive classification destroys the President's carefully designed classification protocol, eviscerates the defense function envisioned by Congress in the Military Commissions Act, and violates the constitutional rights of government employees and prisoners alike.

4. **Facts:**

Presumptive classification has become the rule at Guantanamo Bay.

Over the past eight years, a system of presumptive classification has emerged in Guantanamo Bay, wholly divorced from the Executive Orders which govern—and in fact create—classified information. Presumptive classification began as a compromise to permit *habeas* representation in an uncertain legal environment, but it has become a systemic distortion that affects every aspect of the Guantanamo Bay information environment.

A. Military commissions conducted pursuant to Military Commissions Order No. 1 did not purport to implement presumptive classification.

Early military commissions practice did not include presumptive classification. The orders which created the military commissions authorized the protection of "classified or classifiable" evidence. *See* Military Order of 13 Nov 2001 § 4(c)(4), 66 Fed. Reg. 57831 (Nov. 16, 2001), *superseded by* Executive Order 13425, 72 Fed. Reg. 7737 (Feb. 20, 2007); DoD Military Commission Order No. 1 § 6(D)(5)(a) (Mar. 21, 2002) ("MCO No. 1"). These orders did not actually prohibit any disclosure, and contained no reference to presumptive classification.

None of the military instructions issued pursuant to MCO No. 1 contained any reference to presumptive classification. The Affidavit and Agreement by Defense Counsel appended to DoD Military Instruction No. 5 (Apr. 30, 2003) imposed a broad gag order on defense counsel against disclosing "documents or information specific to the case except as is necessary to represent [a] client before a military commission." § II(E)(1). This gag order did not create a presumption that such information was classified; to the contrary, it allowed counsel to share information with commission personnel, potential witnesses, and "other individuals with particularized knowledge" as long as the information was not classified. *Id.* Presiding Officers Memoranda Nos. 9 (Oct. 4, 2004) and 9-1 (Sep. 14, 2005), both governing protective orders, did not contain any reference to presumptive classification.

Furthermore, the military commissions conducted pursuant to MCO No. 1 did not include presumptive classification in their protective orders. *See, e.g.*, Protective Order #3A, *United States v. Jabran Said bin al Qahtani* (Apr. 24, 2006); Protective Orders # 1-#3, *United States v. Abdul Zahir* (Jan. 31, 2006); Protective Orders #1-#3, *United States v. Jabran Said bin al Qahtani* (Jan. 23, 2006); Protective Orders #1-#3, *United States v. Ghassan Abdullah al Sharbi*

(Jan. 23, 2006); Protective Orders #1-#3, *United States v. Sufyian Barhoumi* (Jan. 23, 2006); Protective Orders #1-#3, #3A *United States v. Omar Ahmed Khadr* (Dec. 2005); Protective Order, *United States v. Ibrahim Ahmed Mahoud al Qosi* (Aug. 27, 2004); Protective Orders #2-#2A, *United States v. Salid Ahmed Hamdan* (Aug. 27, 2004); Protective Order (Jul. 9, 2004), Protective Order (Jun. 20, 2004), Protective Order (Mar. 17, 2004), *United States v. Ali Hamza Ahmed Suliman al Bahlul*.[1] Far from presumptively classifying the accused's statements, Protective Order #2 in *United States v. Zahir*, *United States v. al Sharbi*, *United States v. Barhoumi*, and *United States v. al Qahtani* specifically permitted counsel to reference nicknames or aliases that interrogators told the accused when he was questioned—information that would later become presumptively classified.

B. Presumptive classification first arose as a compromise in the uncertain legal environment of early Guantanamo Bay *habeas* litigation.

The idea of presumptive classification has its genesis in a compromise struck in the *habeas* cases during the early years of Guantanamo Bay litigation. Shortly after the Supreme Court confirmed District Court *habeas* jurisdiction in *Rasul v. Bush*, 542 U.S. 466 (2004), Judge Colleen Kollar-Kotelly of the D.C. District Court ordered the United States to file all proposed procedures for access to counsel by Guantanamo Bay prisoners. Order of Jul. 23, 2004, Document #38, *Al Odah v. United States*, 02-cv-828 (D.D.C. Jul. 23, 2004). The United States' primary position was that, "Petitioners have no right to relief, including the right of access to counsel, under the Constitution because petitioners, as aliens outside the sovereign territory of the United States, lack any cognizable Constitutional rights." Response to Complaint in

[1] It does not appear that the military commission entered a protective order in the proceedings under MCO No. 1 in *United States v. Binyam Ahmed Muhammad* or *United States v. David M. Hicks*.

Accordance with the Court's Order of July 25, 2004, Document #46 at 2-3, *Al Odah v. United States*, 02-cv-828 (D.D.C. Jul. 30, 2004).

The United States proposed extremely intrusive procedures, including monitoring of meetings, attorney notes, and legal mail between *habeas* attorneys and Guantanamo Bay prisoners by the use of a "privilege team." *Al Odah v. United States*, 346 F. Supp. 2d 1, 8-9 (D.D.C. 2004); Procedures for Counsel Access to Detainees at the US Naval Base in Guantanamo Bay, Cuba, Document #46-1, *Al Odah v. United States*, 02-cv-828 (D.D.C. Jul. 30, 2004) ("*Al Odah* proposed procedures"). These intrusive procedures also included the first iteration of presumptive classification: "Any information not subject to classification review by the privilege team, including oral communications with the detainee, must be treated as classified information unless otherwise determined by the privilege team." *Al Odah* proposed procedures § XI(b), at 8.

In their response, the petitioners offered to voluntarily abide by a gag order under which they would "commit not to disclose to any third party any information they obtained from their clients in this case without prior government approval or, if there was a disagreement, without approval of this Court." Memorandum of Points and Authorities in Opposition to Defendants' Response to Complaint, Document #48 at 3, *Al Odah v. United States*, 02-cv-828 (D.D.C. Aug. 4, 2004).

At a hearing on the issue, the court accepted petitioners' counsel's offer of a compromise. *Al Odah*, 346 F. Supp. 2d at 13; *see also* Brendan M. Driscoll, *The Guantanamo Protective Order*, 30 *Fordham Int'l L.J.* 873, 891 (2007). Under the compromise, to which the government objected, "The attorney would be required to treat all information subject to the attorney-client privilege as confidential, and would not disclose this information to anyone. In the event the

attorney wanted to disclose the information to anyone, including law firm colleagues or support staff, counsel would have to agree to the Government's proposed classification review, and would have to abide by the Government's decision to approve or prohibit the disclosure, if based on properly asserted national security concerns." *Al Odah*, 346 F. Supp. 2d at 13.

At the same time, Judge Joyce Hens Green was also supervising protective order litigation in a different set of Guantanamo Bay *habeas* cases (with a variety of captions and case numbers). *See, e.g.*, Order Setting Status Conference, Briefing Schedule for Protective Order, and for Notification of Released Detainees, Document #74, *Rasul v. Bush*, 02-cv-299 (D.D.C. Sep. 20, 2004). After negotiations failed to produce an agreed order, counsel for Moazzam Begg and Feroz Ali Abbasi argued that Judge Green should adopt the voluntary gag order approach of Judge Kollar-Kotelly in *Al Odah*, 346 F. Supp. 2d at 13. *See* Motion for an Order Requiring Parties to Abide by Proposed Procedures for Counsel Access and Request for Expedition, Document #33 at 7, *Begg v. Bush*, 04-cv-1137 (D.D.C. Oct. 22, 2004). But Mr. Begg and Mr. Abbasi's actual proposed counsel access procedures included presumptive classification: "Counsel is required to treat all written and verbal statements of a client as classified information, unless and until the information is submitted to a privilege team and determined to be otherwise." Procedures for Counsel Access for Clients Held at the US Naval Base, Guantanamo Bay, Cuba, Document #33-1 § IV(A)(4), *Begg v. Bush*, 04-cv-1137 (D.D.C. Oct. 22, 2004). The prisoners' proposed counsel access procedures authorized a privilege team to conduct classification review of information obtained from a client. *Id.* § VII(C). The United States objected to some of the counsel access procedure provisions proposed by Mr. Begg and Mr. Abbasi, but approved of the presumptive classification provision. *See* Respondent's Response to November 1, 2004 Order Setting Deadline for Submissions in Response to

Petitioner's Motion for an Order Requiring Parties to Abide by Proposed Procedures for Counsel Access, Document #47, *In re Guantanamo Detainee Cases*, 04-cv-1137 (D.D.C. Nov. 4. 2004).

Judge Green published two separate orders at *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004). The protective order itself defined "protected information" as "information deemed by the Court . . . as worthy of special treatment as if the document or information were classified, even if the document or information has not been formally deemed to be classified." *Id.* ¶ 11, at 177. This definition allowed the Court to designate specific information as protected without original classification authority ("OCA") review. The attached Revised Procedures for Counsel Access to Detainees at the U.S. Naval Base in Guantanamo Bay, Cuba, however, incorporated the proposed language of Mr. Begg and Mr. Abbasi requiring counsel to "treat all information learned from a detainee . . . as classified information." The order governed all detainee counsel except counsel for the three detainees addressed in *Al Odah*. *See, e.g.*, *In re Guantanamo Bay Cases*, 344 F.2d ¶ 29, at 179-80. Judge Green's order was subsequently "entered in the vast majority of Guantanamo *habeas* cases." *Adem v. Bush*, 425 F. Supp. 2d 7, 19 (D.D.C. 2006).

In fact, Judge Kollar-Kotelly's opinion and Judge Green's protective order and counsel access provisions represent three different approaches to the control of information. Judge Kollar-Kotelly's opinion used a voluntary gag order to control disclosure of information. Judge Green's protective order itself used an approach of Court-designated protected information to be treated as classified, but the counsel access procedures required counsel to treat all information learned from a prisoner as classified. These nuances have been overlooked in practice, and these procedures are frequently referred to as "presumptive classification."

In 2008, Judge Thomas F. Hogan revised Judge Green's protective order and counsel access procedures. *See In re Guantanamo Bay Detainee Litigation*, 577 F. Supp. 2d 143 (D.D.C. 2008). Judge Hogan altered the definition of protected information from information worthy of treatment as if it were classified to information "the Court deems . . . not suitable for public filing." *Id.* ¶ 11, at 147. Judge Hogan also expanded the institutions which could authorize counsel to treat information as unclassified: "Counsel shall treat all information learned from a detainee, as classified information, unless and until the information is submitted to the privilege team and the privilege team, *this Court, or another court* determines it to be otherwise." *Id.* ¶ 12(f), at 159 (emphasis added). Of course, if the information were classified, by means of a presumption or otherwise, relevant Executive Orders would not authorize the judicial branch to declassify it.

In Detainee Treatment Act cases in the D.C. Circuit, the question of the protective order arose again. The United States again argued for a more restrictive protective order, and attorneys for Guantanamo Bay prisoners defended the District Court order, a compromise they had endorsed. *See* Driscoll, *supra*, at 896-917 (describing positions of the parties). The petitioners did not dispute the presumptive classification provision, and the D.C. Circuit included the same language Judge Hogan used in the revised District Court protective order. *See Bismullah v. Gates*, 501 F.3d 178, 188, 199 (D.C. Cir. 2007), *vacated*, 554 U.S. 913 (2008). After the Supreme Court vacated *Bismullah*, the D.C. Circuit held that it no longer had jurisdiction, and the issue became moot. *See Bismullah v. Gates*, 551 F.3d 1068, 1070 (D.C. Cir. 2009).

As a prominent *habeas* attorney has explained, the system of presumptive classification "has created absurd results as the litigation has matured." Shayana Kadidal, *Confronting Ethical issues in National Security Cases: The Guantanamo Habeas Litigation*, 41 Seton Hall L. Rev.

1397, 1399 (2011). As one example among many, the *habeas* privilege team has indicated that poetry "should continue to be considered presumptively classified." Richard Lea, *Inside the Wire*, *The Guardian* (Feb. 26, 2007); *see also* Mark Falkoff, *Poems from Guantanamo: The Detainees Speak* 4 (2007) ("Hundreds of poems therefore remain suppressed by the military and will likely never be seen by the public.").

C. In the first military commission prosecution of the accused, the military commission adopted a policy of presumptive classification.

By the time of the first military commissions prosecution of the accused, the mythology of presumptive classification controlled the conduct of the proceedings. In Protective Order # 3, *United States v. Mohammad* (Jun. 4, 2008), the military commission found "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." ¶ 24, at 9; see also ¶ 6(e), at 3 ("Any statements made by the accused are presumptively Classified Information."). Six months after the issuance of Protective Order #3, the military commission amended it with the following language:

> Nothing in the Order precludes Defense Counsel from discussing matters disclosed by the accused which are unclassified with persons who do not have security clearances. Defense Counsel are directed to ensure that such matters are unclassified before any such discussions and shall consult with the Senior Security Advisor if they are not certain whether such matters are unclassified. In any instance where there is any doubt whether a matter is classified, such matter shall be considered presumptively classified, consistent with the Order.

Ten days later, the military commission again defined classified information to include, "Presumptively Classified Information, including any statements made by the accused . . . ." Protective Order #7, *United States v. Mohammad* (Dec. 18, 2008).

In the wake of the first 9/11 case, presumptive classification has become customary at Guantanamo Bay, and has been widely reported. *See, e.g.*, Josh Gerstein, *DoD: Transcript of public Guantanamo hearing "top secret,"* Politico.com (Jan. 16, 2012) ("every word uttered by a high-value detainee is considered presumptively classified at a level more stringent than 'top secret'"); *New York Times*, *From Secrecy to Absurdity*, May 1, 2011, at A26 ("all information obtained from clients is presumptively classified"). Following the example of the first 9/11 military commission, later military commission protective orders incorporated the idea of presumptive classification without qualification. For example, Protective Order #4, *United States v. Ghailani* (Mar. 4, 2009), defined "classified information" to include, "Statements made by the accused, which are presumptive classified at the TOP SECRET//SCI level until such statements are reviewed by representatives from the agency holding original classification authority over the information."

D. The Convening Authority sought to adopt presumptive classification for all Guantanamo Bay prisoners, but abandoned the attempt.

In March 2011, the Convening Authority promulgated but then withdrew a document entitled, "Protective Order and Procedures for Counsel Access to Detainees Subject to Military Commission Prosecution at the United States Naval Station in Guantanamo Bay, Cuba" (Mar. 4, 2011) ("Withdrawn Protective Order of 4 March 2011"). The Withdrawn Protective Order of 4 March 2011 purported to presumptively classify all statements made by Guantanamo Bay prisoners formerly incarcerated by the CIA. *See id.* at 21, § 71 ("Materials brought out of meetings between HVDs and detainee's counsel are presumptively classified at the TS/SCI level."); *id.* at 14, § 57 (defining "HVD"); *id.* at 11, § 46 (prescribing filing procedures for "[p]resumptively classified information that detainee's counsel learned from a high-value

detainee"); *id.* at 20, § 69(b) ("Any Outgoing Mail from an HVD will be handled as if it is classified at the TS/SCI level . . . ."); *id.* at 23, § 77 ("Detainee's counsel shall treat all information learned from an HVD . . .as classified information at the TS/SCI level . . . ."). This presumptive classification was not simply a matter of handling directions, but the formal imposition of a system of presumptive classification on detailed counsel for detainees.

E. JTF-GTMO has adopted presumptive classification in its order governing attorney-client communication.

Presumptive classification pervades the Order Governing Written Communications Management for Detainees Involved in Military Commissions (Dec. 27, 2011) ("Communications Order"). The Communications Order requires mail from a Guantanamo Bay prisoner to his counsel to be marked with, *inter alia*, "the presumptive classification level of any information contained within it," then handled as classified material. § 7(b) & (c), at 17-18. The order recognizes that the actual classification level may be different than the presumptive classification level: attorney materials must be marked with "the classification level (*or presumptive classification level*) of any information contained within it," § 9(b)(1) & (3), at 19 (emphasis added), then handled as classified material. § 9(b)(4), at 20; *see also* § 10(b)(2) (governing "classified or presumptively classified notes, documents, or material used or produced during [a] hearing").

Even though the public can watch the arraignment proceedings almost live on a video feed, and can read an unofficial transcript a few hours later, presumptive classification means that counsel cannot carry his or her own notes of the client's colloquy out of the military commission hearing without a courier card, a sealed courier bag, and an escort. § 10(b)(2), at 21. The order even expands presumptive classification to notes an attorney brings into a client

meeting, requiring a courier card to carry any material "*into* or out of a meeting" with a Guantanamo Bay prisoner. § 3(f), at 10. This portion of the Communications Order highlights the absurdity of presumptive classification, as it apparently extends classification even to information the attorney wants to learn from a prisoner, even though he or she has not yet learned it.

5. **Law and Argument:**

Presumptive classification of information violates established U.S. law.

A. Executive Order 13526, the sole source of authority to classify information, does not recognize categories of presumptively classified information.

In our constitutional system, the President's constitutional position as Commander in Chief gives him "authority to classify and control access to information bearing on national security." *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988); *see also* 50 U.S.C. § 435 (assigning the president the responsibility to regulate access to classified information). President Franklin Delano Roosevelt issued the first classification directive in 1940. *See* E.O. 8381, "Defining Certain Vital Military and Naval Installations and Equipment," 5 Fed. Reg. 1147 (Mar. 26, 1940). President Harry S Truman extended classification authority to civilian agencies in 1951. *See* E.O. 10290, "Prescribing Regulations Establishing Minimum Standards for the Classification, Transmission, and Handling, by Department and Agencies of the Executive Branch, of Official Information Which Requires Safeguarding in the Interest of the Security of the United States," 16 Fed. Reg. 9795 (Sep. 27, 1951); *see also Egan*, 484 U.S. at 527-28 (describing expansion of national security information to civilian agencies).

The President's carefully considered articulation of national classification policy in E.O. 13526 does not recognize a category of "presumptively classified" information. *See* E.O. 13526,

"Classified National Security Information," 75 Fed. Reg. 707 (Jan. 5, 2010). Classification does not occur by presumption, but rather by the official act of a designated Executive authority. E.O. 13526 § 6.1(f) defines "classification" itself as "the act or process by which information is determined to be classified information."[2] The President or Vice President delegates specific original classification authority; the act of original classification represents a judgment by the delegee that "the dangers of disclosure outweigh the costs of classification." *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1271 (2011). By definition, information only becomes classified after it "has been determined pursuant to [E.O. 13526] or any predecessor order to require protection against unauthorized disclosure." E.O. 13526 § 6.1(i) (defining "classified information").

Not only is original classification an official act, it is an official act which must occur within boundaries set by Executive Order. E.O. 13526 § 1.1(a) provides,

> Information may be originally classified under the terms of this order only if all of the following conditions are met:
> (1) an original classification authority is classifying the information;
> (2) the information is owned by, produced by or for, or is under the control of the United States Government;
> (3) the information falls within one or more of the categories of information listed within section 1.4 of this order; and
> (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

Presumptive classification clearly violates Conditions (1) and (4). Presumptive classification does not require an act by an original classification authority. *See* E.O. 13526 § 1.1(a)(1); DoD Manual 5200.01-V1 § 4(4)(b), DoD Information Security Program: Overview, Classification, and Declassification (Feb. 24, 2012). In a presumptive classification, no authority

[2] *See also* DoDM 5200.01-V1 § 4(4)(a), at 34 ("Original classification is the initial decision that an item of information could reasonably be expected to cause identifiable or describable damage to the national security if subjected to unauthorized disclosure and requires protection in the interest of national security.").

determines that unauthorized disclosure reasonably could be expected to damage national security. E.O. 13526 § 1.1(a)(4). And no authority identifies or describes the damage to national security, *id.*, or determines that the classification is not for the purpose of concealing violations of law, preventing embarrassment, or another prohibited purpose. *Id.* § 1.7(a). In fact, DoD requires an OCA to conduct nine separate determinations as in the classification process, DoDM 5200.01-V1 § 4(6), none of which are made in a presumptive classification.

In many situations, presumptive classification violates Condition (2) and (3) as well. Many statements by Guantanamo Bay prisoner will not relate to information "owned by, produced by or for, or . . . under the control of the United States Government." E.O. 13526 § 1.1(a)(2). Of all the vast amount of information a Guantanamo Bay prisoner might convey, only eight categories of information are eligible for classification under E.O. 13526.[3] The only categories of information Guantanamo Bay prisoners are likely to have is "intelligence activities (including covert action) [or] intelligence sources or methods" or perhaps "foreign government information" relating to rendition, detention, and interrogation by U.S. or other government agencies. E.O. 13526 § 1.4(c). Information on other subjects, which does not fall into one of the eight categories, cannot be classified.

The one presumption actually contained in E.O. 13526 starkly contrasts with the wholesale application of presumptive classification. E.O. 13526 § 1.1(d) states that, "The unauthorized disclosure of foreign government information is presumed to cause damage to the

[3] The complete list is: (a) military plans, weapon systems, or operations; (b) foreign government information; (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology; (d) foreign relations or foreign activities of the United States, including confidential sources; (e) scientific, technological, or economic matters relating to the national security; (f) United States Government programs for safeguarding nuclear materials or facilities; (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or (h) the development, production, or use of weapons of mass destruction. E.O. 13526 § 1.4.

national security." This statement does not create a presumption of classification, but only a presumption that the release of foreign government information satisfies the "damage" clause of § 1.1(a)(4). Presumptive classification, on the other hand, creates an unauthorized presumption that anything a Guantanamo Prisoner might say is presumed to satisfy all four prerequisites to classification.

E.O. 13526 does not permit presumptive classification to establish a "buffer zone" around actual classified evidence; rather, it prohibits such a practice. E.O. 13526 § 1.7(a)(4) specifically prohibits classification to "prevent or delay the release of information that does not require protection in the interest of the national security." In other words, the government may not classify—much less presumptively classify—all statements of prisoners unrelated to national security simply because some statements of prisoners may be classified.

None of the implementing regulations authorize presumptive classification, which strongly suggests that it is not authorized by E.O. 13526. For example, E.O. 13526 § 5.1(a) provides that the Director of the Information Security Oversight Office (ISOO) shall issue directives to implement the Order. In 2010, ISOO issued 32 C.F.R. Part 2001, which implements E.O. 13526. *See* 75 *Fed. Reg.* 123 (Jun. 28, 2010). Nothing in 32 C.F.R. 2001 authorizes or even mentions a system of presumptive classification superimposed on the structure established in E.O. 13526.

Implementing DoD regulations do not authorize presumptive classification, and in fact prohibit the practice. In February, the Under Secretary of Defense for Intelligence implemented DoD Manual 5200.01-V1, DoD Information Security Program: Overview, Classification, and Declassification (Feb. 24, 2012). DoDM 5200.01-V1 emphasizes that, "Information shall be classified only to protect national security." § 4(1)(a), at 33. It explains that, "Unnecessary or

higher than necessary classification is prohibited by [E.O. 13526]." *Id.* More specifically, in the derivative classification context, the use of "'general rules' about the classification of broad classes of information is prohibited." DoDM 5200.01-V1 § 11(c).

With one exception for nuclear Restricted Data, Congress has acted to enforce Executive restrictions on disclosure of classified information rather than create categories of classified information. *See* 18 U.S.C. § 798 (disclosure of classified information), § 1030 (unauthorized access to classified information), § 1924 (unauthorized removal of classified material); 50 U.S.C. § 421 (disclosure of covert agent identity through access to classified information), § 983 (communicating classified information to foreign agent); *see also* 18 U.S.C. § 641 (punishing theft or conversion); *United States v. Fowler*, 932 F.2d 306, 310 (4th Cir. 1991) (holding that classified information is property under § 641). Where Congress has acted to protect information, it has created new categories of information which are not co-extensive with Executive classification. *See* UCMJ Art. 106a, 10 U.S.C. § 906(a) (national defense information); 18 U.S.C. §§ 793-95, 797 (national defense information), § 952 (official diplomatic information); 35 U.S.C. § 186 (secret patent); 42 U.S.C. § 2274 ("Restricted Data"); *see also Gorin v. United States*, 312 U.S. 19, 28 (1941) (broadly defining "national defense" in the context of the Espionage Act); *Scarbeck v. United States*, 317 F.2d 546, 559 (D.C. Cir. 1962) (distinguishing a classified information offense under 50 U.S.C. § 783 from a national defense information offense under 18 U.S.C. § 793). Within these categories, only one type of information is "born secret": data about nuclear weapons, known as Restricted Data. *See* 42 U.S.C. § 2014(y); *see also United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. 1979) (granting preliminary injunction against publication about the hydrogen bomb, but recognizing

serious First Amendment issues); Howard Morland, *Born Secret*, 26 Cardozo L. Rev. 1401, 1402 (2005) (explaining origin and operation of the Restricted Data framework).

Finally, the Military Commissions Act of 2009 limits classified information to its traditional meaning rather than creating any new category of information "born secret." The MCA defined classified information as

> (A) Any information or material that has been determined by the United States Government pursuant to statute, Executive order, or regulation to require protection against unauthorized disclosure for reasons of national security.
> (B) Any restricted data, as that term is defined in . . . 42 U.S.C. 2014(y).

10 U.S.C. § 948a(2); *see also* Rules for Military Commissions 103(7), 505(b)(1) (providing same definition). The MCA authorizes the military commission to issue an order to protect classified information—in its traditional definition—but says nothing about presumptively classified information. *See* 10 U.S.C. § 949p-3; *see also* RMC 505(e).

B. Presumptive classification violates the presumption of non-classification established by E.O. 13526 § 1.1(b).

E.O. 13526 affirmatively mandates a presumption against classification. Different Presidents have treated this question in various ways, and E.O. 13526 § 1.1(b) specifically provides that, "If there is significant doubt about the need to classify information, it shall not be classified."

President Ronald W. Reagan's order on classified information created the practice of erring on the side of classification. *See* E.O. 12356, "National Security Information," 47 Fed. Reg. 14874 (Apr. 6, 1982). E.O. 12356 § 1.1(c) provided, "If there is reasonable doubt about the need to classify information, it shall be safeguarded as if it were classified pending a determination by an original classification authority, who shall make this determination within thirty (30) days. If there is reasonable doubt about the appropriate level of classification, it shall

be safeguarded at the higher level of classification pending a determination by an original classification authority, who shall make this determination within thirty (30) days."

President William J. Clinton reversed this practice. *See* E.O. 12958, "Classified National Security Information," 60 Fed. Reg. 19825 (Apr. 20, 1995). E.O. 12958 § 1.3(c) stated, "If there is significant doubt about the appropriate level of classification, it shall be classified at the lower level."

President George W. Bush's policy was more ambiguous that either President Reagan's or President Clinton's. President George W. Bush amended E.O. 12958, *inter alia*, by eliminating the "significant doubt" standard President Clinton had introduced, but did not replace it with an alternative. *See* E.O. 13292, "Further Amendment to Executive Order 12958, as Amended, Classified National Security Information," 68 Fed. Reg. 15315 (Mar. 28, 2003).

President Barack H. Obama eliminated this ambiguity. On January 21, 2009, President Obama issued a memorandum expressing that the new Administration "is committed to creating an unprecedented level of openness in Government." Executive Office of the President, "Transparency and Open Government," 74 Fed. Reg. 4685 (Jan. 26, 2009). A subsequent memorandum directing a review of E.O. 12958, as amended, explained," While the Government must be able to prevent the public disclosure of information where such disclosure would compromise the privacy of American citizens, national security, or other legitimate interests, a democratic government accountable to the people must be as transparent as possible and must not withhold information for self-serving reasons or simply to avoid embarrassment." Executive Office of the President, "Classified Information and Controlled Unclassified Information," 74 Fed. Reg 26277 (Jun. 1, 2009).

On 29 December 2009, President Obama issued E.O. 13526, which revoked E.O. 12958, as amended, and established the current classification policy. *See* E.O. 13526, "Classified National Security Information," 75 Fed. Reg. 707 (Jan. 5, 2010). The new policy declared that, "Protecting information critical to our Nation's security and demonstrating our commitment to open Government through accurate and accountable application of classification standards and routine, secure, effective declassification are equally important priorities." *Id.*

Congress has endorsed President Obama's goal of open and transparent government. In 2010, Congress enacted Pub. L. 111-258, the Reducing Over-Classification Act, to "prevent federal departments and agencies from unnecessarily classifying information or classifying information at a higher and more restricted level than is warranted." Senate Committee on Homeland Security and Governmental Affairs, *Reducing Overclassification Act*, *Report of the Committee on Homeland Security and Governmental Affairs, U.S. Senate, to Accompany H.R. 553*, S Rep. 111-200, 111th Cong. 2nd Sess, 1 (May 27, 2010).

In accordance with the Administration's avowed commitment to open government, E.O. 13526 articulates a presumption that information shall not be classified. Section 1.1(b) states, "If there is significant doubt about the need to classify information, it shall not be classified."[4] *See also* DoDM § 4(1)(a), at 33 (implementing this language in the DoD). Section 1.2(c) provides, "If there is significant doubt about the appropriate level of classification, it shall be classified at the lower level."

A system of "presumptive classification" flies in the face of the mandates of E.O. 13526. Presumptive classification requires holders to treat information as classified even when there is

[4] E.O. 13526 § 1.1(b) provides that this "significant doubt" standard does not "modify the substantive criteria or procedures" or "create any substantive or procedural rights." Section 1.1(b) does, however, articulate an important policy which guides classification decisions.

no doubt that the information is not classified. The system of presumptive classification would violate even E.O. 12356—rejected in E.O. 13526—which required treating information as classified if there was a reasonable doubt as to its classification. Not only does presumptive classification violate E.O. 13526, it would violate the standards of every Executive Order on classification ever promulgated by requiring the holder to treat obviously unclassified information as classified.

C. Presumptive classification violates the interim protection procedure established in E.O. 13526 § 1.3(e) and DoDM 5200.01-V1 § 4(9).

The military commissions are not the first body to consider the problem of how to protect information which should be classified, but has not yet been considered by an original classification authority. In fact, E.O. 13526—like its many predecessor orders—contains a provision which directs holders who subjectively believe that information should be classified to protect it and submit it for classification review. Presumptive classification violates E.O. 13526 § 1.3(e) by substituting a blanket presumption for the assessment of the authorized information holder.

Every Executive Order on classified information since 1953 has directed government employees to protect information they originate which they believe should be classified, pending classification review. *See* E.O. § 13292 § 1.3(e); E.O. 12958 § 1.4(e); E.O. 12356 § 1.2(e); E.O. 12065, "National Security Information," § 1-205, 43 Fed. Reg 28949 (Jul. 3, 1978); E.O. 11652, "Classification and Declassification of National Security Information and Material," § 10, 37 Fed. Reg. 5209 (Mar. 10, 1972); E.O. 10501, "Safeguarding Official Information in the Interests of the Defense of the United States," § 15, 18 Fed. Reg. 7049 (Nov. 10, 1953). The language of these provisions has been substantively similar.

Currently, § 1.3(e) of E.O. 13526 provides, "When an employee [or] government contractor . . . who does not have original classification authority originates information believed by that person to require classification, the information shall be protected in a manner consistent with this order and its implementing directives. The information shall be transmitted promptly as provided under this order or its implementing directives to the agency that has appropriate subject matter interest and classification authority with respect to this information. That agency shall decide within 30 days whether to classify this information."

E.O. 13526 § 1.3(e), like its predecessors, requires holders to treat information as classified pending review if the holder (1) originates the information and (2) subjectively believes it to require classification. This policy of requiring the information holder to make an initial determination of the need for classification makes sense, as access to classified information in the first place is only permitted after the Executive has determined that it is clearly consistent with the interests of national security. *See* 50 U.S.C. § 435; E.O. 13526 § 4.1(a); *Egan*, 484 U.S. at 528.

To implement E.O. 13526 § 1.3(e), DoDM 5200.01-V1 § 4(9) permits individuals to submit information to OCAs and, "as necessary, tentatively classify information or documents as working papers, pending approval by the OCA." This process incorporates both the presumption of non-classification and the interim protection procedures: if an individual believes information should be classified, he or she has the option to submit it and tentatively classify it pending review. This tentative classification has a high transactional cost: not only must the individual treat the tentatively classified information as classified, but DoD prohibits using it as a source of derivative classification. DoDM 5200.01-V1 § 4(9).

Presumptive classification is the antithesis of the procedure described in E.O. 13526 § 1.3(e) and DoDM 5200.01-V1 § 4(9). Under a system of presumptive classification, a person who originates information that they believe does *not* require classification must treat it as classified. Under the actual system implemented by DoD, a person who believes that information should be classified may tentatively classify it and submit it for review. Presumptive classification violates the mandates of E.O. 13526 by adopting an unsanctioned procedure which contradicts the plain text of § 1.3(e).

D. Presumptive classification violates the First Amendment rights of government employees and contractors.

Subject to certain conditions, government employees retain their First Amendment rights to free speech. *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 419-20 (2006); *Pickering v. Board of Ed.*, 391 U.S. 563, 573 (1968). There is no First Amendment right to reveal properly classified information. *See Snepp v. United States*, 444 U.S. 507, 510 n.3 (1980); *McGehee v. Casey*, 718 F.2d 1137, 1143 (D.C. Cir. 1983). Accordingly, the government may prohibit the communication of properly classified information, but—absent another consideration such as violation of a prepublication review requirement—may not restrict the communication of unclassified information. *See Snepp*, 444 U.S. at 513 n.8; *id.* at 521 n. 11 (Stevens, J., dissenting); *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003); *McGehee*, 718 F.2d at 1141; *United States v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir. 1972). Put simply, "The government has no legitimate interest in censoring unclassified materials." *McGehee*, 718 F.2d at 1141.

A dispute over the scope of non-disclosure agreements in the late 1980s demonstrates the unconstitutionality of attempting to censor federal employee speech by creating a "buffer zone" outside the scope of the Executive Orders on classified information. In *National Federation of*

Federal Employees v. United States, federal employees challenged versions of non-disclosure agreements which prohibited them from disclosing "classifiable" information as well as classified information. 695 F. Supp. 1196 (D.D.C. 1988), *vacated as moot sub nom. American Foreign Service Association v. Garfinkel*, 490 U.S. 153 (1989). After considering the range of possible definitions of the word "classifiable," the D.C. District Court held that the forms as written violate the First Amendment rights of federal employees because they "cannot know that 'classifiable' information does not include, for example, information that only speculation suggests will become classified." *Id.* at 1204. The United States deleted the word "classifiable" from its forms and replaced it with more limited language. *Garfinkel*, 490 U.S. at 159; *see* 52 Fed. Reg. 48, 367 (Dec. 21, 1987). After the District Court's ruling, ISOO replaced its previous form with the SF 312, which is still in use. *See* 53 Fed. Reg. 38, 278 (Sept. 28, 1988); *see also* DoDM 5200.01-V1 § 11(b)(1) (requiring use of SF312).

"Presumptively classified" information reaches far beyond the definition of the classified information found in SF 312 and approved by the court in *NFFE*: information that is (1) actually classified or (2) meets the standards for classification and is in the review process.[5] In promulgating the SF 312, ISOO clarified that, "The word 'classifiable' had been included in the [previous form] not to introduce concepts separate and distinct from classified information, but to emphasize the need to protect unmarked classified information and information in the process of a classification determination." 53 Fed. Reg. 38, 278 (Sep. 28, 1988). In the implementing

[5] "As used in this Agreement, classified information is marked or unmarked classified information, including oral communications, that is classified under the standards of Executive Order 12958, or under any other Executive order or statute that prohibits the unauthorized disclosure of information in the interest of national security; and unclassified information that meets the standards for classification and is in the process of a classification determination as provided in Sections 1.2, 1.3, and 1.4(e) of Executive Order 12958, or under any other Executive order or statute that requires protection for such information in the interest of national security." SF312 § 1.

regulation, ISOO explained that, "'Classified information' does not include unclassified information that may be subject to possible classification at some future date, but is not currently in the process of a classification determination." 32 C.F.R. § 2003.20(h)(2), *removed*, 75 Fed. Reg. 37, 254 (Jun. 28, 2010).[6]

The lesson of the non-disclosure agreement dispute which resulted in the SF 312 is that the government's authority to prohibit speech on the grounds that it is classified does not reach beyond the scope of the Executive Order creating the classification. The first category of restricted speech approved by the District Court and adopted by the executive is classified information, *i.e.*, "information that has been determined pursuant to [an Executive Order] to require protection against unauthorized disclosure." E.O. 13526 § 6.1(i). The second category—information under review which should be classified—is the information covered by the interim protections provision in E.O. 13526 § 1.3(e). Presumptively classified information does not fall under either category, and the government may not constitutionally restrict speech involving presumptively classified information unless that information is actually classified.

E. Presumptive classification violates the declassification provisions of E.O. 13526 § 3.

E.O. 13526 prescribes a number of procedures for mandatory and discretional declassification in an attempt to avoid overclassification. Presumptive classification defeats these safeguards because, in the vast majority of cases, no OCA authorized to set a declassification date ever reviews the presumptively classified information.

E.O. § 13526 § 1.5(a) requires that, "At the time of original classification, the original classification authority shall establish a specific date or event for declassification based on the duration of the national security sensitivity of the information." In general, the OCA can choose

[6] When ISOO promulgated the revised 32 C.F.R. Part 2001, Part 2003 was removed in its entirety.

an earlier specific date or event, ten years from the original decision, or up to twenty-five years from the original decision. *Id.* § 1.5(a). At least in the DoD, the OCA must choose the duration option which results in the shortest duration of classification that protects national security. DoDM 5200.01-V1 § 13(a).

Because presumptive classification purportedly arises by operation of law rather than by the act of an OCA, no authorized person ever makes a determination of the appropriate declassification date. Without a declassification date, presumptive classification violates the clear directive of E.O. 13526 § 1.5(d) that, "No information may remain classified indefinitely."

F. Presumptive classification eviscerates the defense function provided in the Sixth Amendment and the Military Commissions Act of 2009.

Although Congress skewed the rules of the forum in favor of the prosecution in the Military Commissions Act of 2009, it did create an adversarial system, and intended defense counsel to carry out its traditional defense function. *See* 10 U.S.C. §§ 948k(a), (c), 949a(b)(2)(C), 949c(b); *see also* RMC 506. Congress expressly found that "the fairness and effectiveness of the military commission system . . . will depend to a significant degree on the adequacy of defense counsel and associated resources for individuals accused, particularly in the case of capital cases. Military Commissions Act of 2009, Pub. L. 111-84, 123 Stat. 2190, § 1807. The conference report explicitly references Congress' expectation that the military commissions system will "give appropriate consideration" to the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases. *See* National Defense Authorization Act for Fiscal Year 2010, Conference Report to Accompany H.R. 2647, at 237.

Presumptive classification uniquely cripples the defense function, as its vague boundaries systemically chill the exercise of professional discretion in a way that actual classification does not. In 2009, then-Chief Defense Counsel Colonel Peter R. Masciola wrote to then-Convening Authority Judge Susan Crawford to describe the impact of presumptive classification on the defense function:

> The extent, complexity and ambiguity of these restrictions have proved major impediments to defense counsel's ability to perform their duties and provide effective assistance to their clients, especially in the HVD clients in which every statement by an accused is "presumptively" classified as TS/SCI. Counsel are not themselves classification authorities, nor have they been delegated that role. Counsel are thus put in the position of knowing the statements they make, in the courtroom and in court filings, may be treated as classified by the equity owner of the information, without being able to determine in advance with any degree of confidence that the statements are, in fact, classified or to whom they may be disclosed. Nor is this some abstract possibility; defense counsel have in fact been warned that they may be committed criminal violations in more than one instance based on such statements. At a minimum, this has a potentially chilling effect on counsel's choice of defense tactics and strategies in litigating on behalf of their clients.
>
> The problem is pervasive and, in the HVD cases, affects virtually every aspect of defense counsel's role.

Colonel Peter R. Masciola, Memorandum for the Honorable Judge Susan Crawford, at 1 (Oct. 27, 2009) (Attachment E); *cf. Mudd v. United States*, 798 F.2d 1509, 1512 (D.C. Cir. 1986) (describing the potential chilling effect of protective orders). Colonel Masciola explained that even after implementation of the point-to-point system, "the TS/SCI 'presumption' is still an enormous obstacle to counsel's ability to use even innocuous information gleaned from the client, in the absence of any means of rebutting this 'presumption.'" Masciola, *supra*, at 2.[7]

[7] The presumptive classification regime appears to have caused difficulties for habeas counsel as well. *See, e.g.*, Jonathan Hafetz, *Habeas Corpus After 9/11: Confronting America's New Global Detention System* 134-35 (2011) (describing "enormous logistical obstacles to effective representation" caused by presumptive classification); Steven T. Wax, *Kafka Comes to America: Fighting for Justice in the War on Terror* 175 (2008) (discussing interference with representation caused by presumptive classification).

The defense function of investigation

The impact of presumptive classification on the defense function of investigation is particularly severe. "It is the duty of the defense counsel to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of a conviction." Air Force Standards for Criminal Justice § 4-4.1 (2002); *see also* ABA Standards for Criminal Justice: Prosecution and Defense Function § 4-4.1 (3d ed. 1993).[8] This investigation is part of an attorney's ethical duty of competence, the scope of which "is determined in part by what is at stake; major litigation and complex transactions require more elaborate treatment than matters of lesser consequence." JAGINST 5803.1B I(a)(1)(c) (Comment). This duty is constitutional as well as statutory, regulatory, and ethical: As early as *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984), the Supreme Court held that to satisfy constitutional standards, counsel must either thoroughly investigate the facts or make a reasonable professional judgment that makes the investigation unnecessary. *See also, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 523 (2003); *Loving v. United States*, 64 M.J. 132, 141 (C.A.A.F. 2009).

Presumptive classification means that most investigation required by the defense function cannot go forward. In traditional criminal defense investigation, the first source of leads is the client. The client provides identifying information about possible witnesses, and a member of defense team then determines how to find and interview the witnesses using publicly available databases or other resources. If information learned from the client is presumptively TS//SCI, it

[8] Importantly, "The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty." Air Force Standards for Criminal Justice § 4-4.1 (2002); *see also* ABA Standards for Criminal Justice: Prosecution and Defense Function § 4-4.1 & p. 182 (Commentary) (3d ed. 1993).

cannot be processed using commercially available databases because they are not authorized to handle classified information. The defense team cannot ask other, known witnesses about the whereabouts of the witness being sought because the known witnesses do not hold a security clearance, or even if they do, have not received the SAP handling brief. The location of the witnesses in other countries adds another impediment: the defense team cannot seek the assistance of local investigators without revealing presumptively classified (but actually unclassified) information to foreign nationals. Presumptive classification makes investigation virtually impossible, because the defense team must reveal some information (such as biographical data) before it can receive information (such as the location of the witness). This communications-based restriction on investigation violates the right to effective assistance of counsel. *See, e.g.*, *United States v. Eniola*, 893 F.2d 383, 388 (D.C. Cir. 1990); *IBM v. Edelstein*, 526 F.2d 37, 42 (2d Cir. 1975).

Attorney-client privilege

Presumptive classification is particularly insidious because defense counsel has no mechanism to seek classification review without waiving the attorney-client privilege. The right to counsel includes the attorney-client privilege. *See, e.g.*, *Bieregu v. Reno*, 59 F.3d 1445, 1450-56 (3d Cir. 1995), *overruled in part on other grounds by Fontroy v. Beard*, 559 F.3d 173 (3d Cir. 2009); *Mann v. Reynolds*, 46 F.3d 1055, 1061 (10th Cir. 1995); *Lemon v. Dugger*, 931 F.2d 1465, 1467 (11th Cir. 1991); *United States v. Brugman*, 655 F.2d 540, 546 (4th Cir. 1981). The law creates this safe haven for attorney-client communications "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

Because the declassification process—such as it is—requires a Guantanamo Bay prisoner to waive his attorney-client privilege, its combination with presumptive classification violates the prisoner's right to confidential communication with his attorney. For example, the Convening Authority's Withdrawn Protective Order of 4 March 2011 at 23, § 80, provided, "Detainee's counsel may submit presumptively classified information learned from a detainee through the Commission Security Officer to the appropriate government agency authorized to declassify the information for declassification or a determination of its appropriate security classification level. . . . Materials submitted for declassification or classification review are not protected by the attorney-client privilege." This policy requires the prisoner to waive his right to confidential communications for his attorney to use unclassified information in his defense. Regulation for Trial by Military Commission § 18-1 (2011) gives Trial Counsel access to the DoD Security Classification/Declassification Review Team, but does not authorize access by the defense.

Thus, in order to obtain declassification, counsel must reveal the information to the very agencies responsible for investigating the accused. If the defense team reveals biographical information about a witness to OCAs without strict and enforceable guarantees of privilege, an investigator may arrive at the witness' location to find them already interviewed, threatened, abducted, or killed.

The presumption of classification interferes with the already broken intended operation of the Privilege Team established by the Communications Order of 27 December 2011. Section 4(f)(3), at 13, gives an example of the need for expedited processing that a prisoner "may provide Defense Counsel with a letter of introduction for the Defense Counsel to use when meeting with a witness." But the "Order does not authorize the Privilege Team to conduct a classification review of any document encompassed within the provisions of this Order." § 5(e),

at 14. Because the letter of introduction is presumptively classified, after the Privilege Team clears it, defense counsel is prohibited from presenting it to the actual witness.

The example of the letter of introduction illustrates the critical difference between a security officer within the attorney-client privilege with authority to conduct classification review and the document screening team established by the orders of 27 December 2011. Both are sometimes called "privilege teams," but function very differently. A privileged classification review team can authorize counsel to present the letter of introduction to the witness by determining that it is unclassified. A document screening team can do nothing other than determine that the letter of introduction does not contain contraband.

Mechanism for privileged classification review

For years, detailed defense counsel have sought the creation of a mechanism for privileged classification review. In May 2008, former Chief Defense Counsel Colonel Steven David built a consensus among OCDC, JTF-GTMO, and SOUTHCOM to allow classification review by the *habeas* privilege team, but the Convening Authority declined to act. Colonel Steven David, Email Regarding Privilege Classification Team (May 28, 2008) (Attachment B). In December 2008, then Lt Col Jeffrey P. Colwell—now Chief Defense Counsel—sought to ameliorate the effects of the presumption of classification through privileged classification review. Lt Col J.P. Colwell, Memorandum for the Convening Authority (Dec. 8, 2008) (Attachment C). The Convening Authority refused the request. Susan J. Crawford, Memorandum for Lt Col J.P. Colwell (Jan. 12, 2009) (Attachment D). Colonel Peter Masciola sought privileged classification review in 2009, again with no result. Masciola, *supra*, (Attachment E).

In the prior military commission prosecution of the accused, Mr. bin al Shibh and Mr. al Hawsawi sought the creation of a privilege team to review classified material. D-123 Defense Motion for Appropriate Relief to Compel Appointment of a Privilege Team to Review Classified Material, *United States v. Muhammad* (Jul. 1, 2009). Trial Counsel opposed classification review by a privilege team, and its reasoning is instructive:

> In classified information cases, it is left to the parties to determine what is classified. In federal cases such as this one, privilege teams are not appointed. If either party has a question, they may seek advice of the Court Security Officer, a neutral party whose job it is to answer questions regarding classified materials. If ultimately that office cannot answer the question, then that person may reach out to the original classification authority for additional clarification and guidance.

D-123 Government Response to the Defense Motion for Appropriate Relief to Compel Appointment of a Privilege Team to Review Classified Material, *United States v. Muhammad* (Sep. 17, 2009). Before the military commission ruled on the motion, Trial Counsel announced that the accused would be tried in federal court. *See* AE226 Government Notice of Forum Election in the Case of United States v. Muhammed *et al.* (Nov.26, 2009).

If not for the distortion introduced by presumptive classification, the procedure described by Trial Counsel would be basically accurate. In an analogous federal case, it would be "left to the parties to determine what is classified." That is, when defense counsel learned information from a client, he or she could apply classification guidance with appropriate advice to determine whether the information was classified. Under a system of presumptive classification, even though counsel applies relevant guidance to assess information as unclassified, he or she must treat it as classified because it is presumptively classified. In a federal court or court-martial, unclassified means unclassified; in a military commission, unclassified means presumptively classified.

G. This military commission should abolish the practice of presumptive classification in its orders, and, at a minimum, order the Convening Authority to provide a mechanism for privileged classification review.

The illegal practice of presumptive classification has gone on for too long, and this military commission should not condone it further. As a forum of limited jurisdiction, this military commission has limited authority to control the actions of other actors, but it has some ability to act. First, this military commission should make a conclusion of law that presumptive classification violates Executive Order 13526 and other relevant authorities. Although not binding on other decision-makers, this conclusion of law will assist the defense by providing authority they may cite in negotiations with other actors. Second, this military commission should decline to include presumptive classification in any of its orders governing this case. This action will help stop the spread of presumptive classification past its current applications. Third, the military commission should order the Convening Authority to provide a mechanism for privileged classification review or abate the proceedings. This order will help satisfy a critical deficiency that threatens the meaning exercise of the defense function envisioned by Congress.

6. **Request for Oral Argument:** Oral argument is requested.
7. **Request for Witnesses:** None.
8. **Conference with Opposing Counsel:** The moving party has conferred with the opposing party. The opposing party objects to the requested relief.
9. **Additional Information:** None.

10. **Attachments:**

A. Certificate of Service.

B. Colonel Steven David, Email Regarding Privilege Classification Team (May 28, 2008);

C. Lt Col J.P. Colwell, Memorandum for the Convening Authority (Dec. 8, 2008);

D. Susan J. Crawford, Memorandum for Lt Col J.P. Colwell (Jan. 12, 2009);

E. Colonel Peter R. Masciola, Memorandum for the Honorable Judge Susan Crawford (Oct. 27, 2009).

Very respectfully,

//s//
JAMES G. CONNELL, III
Detailed Learned Counsel

Counsel for Mr. al Baluchi

//s//
STERLING R. THOMAS
Lt Col, USAF
Detailed Military Defense Counsel

Attachment A
AE009

CERTIFICATE OF SERVICE

I certify that on the 19th day of April, 2012, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by e-mail.

//s//
JAMES G. CONNELL, III,
Learned Counsel

Attachment B
AE009

[redacted]

Subject: FW: Privilege Teams-Classification Teams [FOUO]

-----Original Message-----
From: [redacted] (L) [mailto:[redacted]
Sent: Sunday, June 01, 2008 10:22 AM
To: Crawford, Susan, Hon, DoD OGC; [redacted] CAPT USSOUTHCOM JTFGTMO; David, Steven, COL, DoD OGC
Cc: [redacted]
DoD
Subject: RE: Privilege Teams-Classification Teams [FOUO]

CLASSIFICATION: ~~FOR OFFICIAL USE ONLY~~

Ma'am,

The views expressed by JTF-GTMO are shared by U.S. Southern Command, and we concur with the creation of a Commissions privilege team/expansion of duties of the habeas/DTA privilege team.

V/r,
Don

[redacted]
Commander, JAGC, U.S. Navy
Deputy Staff Judge Advocate
U.S. Southern Command

-----Original Message-----
From: Crawford, Susan, Hon, DoD OGC
Sent: Friday, May 30, 2008 6:15 AM
To: [redacted] CAPT USSOUTHCOM JTFGTMO; David, Steven, COL, DoD OGC
Cc: [redacted]
DoD
Don,
Subject: Re: Privilege Teams-Classification Teams

Pat,
Thanks for your input.
Susan

[redacted]

Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: [redacted] CAPT USSOUTHCOM JTFGTMO [redacted]
To: David, Steven, COL, DoD OGC; Crawford, Susan, Hon, DoD OGC
CC: [redacted]
DoD
[redacted]; Martin, Don, CDR (L)
Sent: Fri May 30 06:11:08 2008
Subject: RE: Privilege Teams-Classification Teams

Ma'am,

JTF-Guantanamo concurs with COL David. A Privilege Team, similar to that utilized in support of habeas and DTA challenge cases would be extremely helpful for the reasons discussed below.

This command recommends that strong consideration be given to expanding the duties and responsibilities of the habeas/DTA Privilege Team. In short, the habeas/DTA Privilege Team:

1. Has been utilized since 2004 with great effect. The individuals on the team are familiar with detainee litigation support and are conversant in the classification and security issues that are being/will be encountered in the Military Commissions process.

2. Has a well established and respected level of professionalism within the federal court system, including at the DC Circuit Court, an appellate court within the Military Commissions appellate "chain of command." Moreover, many of the civilian counsel who are becoming involved in the Military Commissions process are also involved in habeas/DTA litigation. These counsel are very familiar with the habeas/DTA Privilege Team process, which would ease or mitigate any concerns that might be attendant with adoption of this "new" process in connection with Military Commissions.

3. Has already seen its duties and responsibilities expand from purely habeas litigation support to include DTA litigation support. This expansion necessitated the handling of TS/SCI (Codeword) information in connection with HVD DTA litigation. It would be only a slight further expansion to cover the Military Commissions process.

4. By all appearances, already has the minimum infrastructure in place to rapidly begin to support the Military Commissions process. A Privilege Team member arrives in Guantanamo on 31 May 2008 for a one year tour of duty and could be made available to support Military Commissions as well as habeas and DTA litigation, in Guantanamo. The remainder of the team is located in Washington, D.C., and they can support the Military Commissions process from that location. The Privilege Team is currently operated under contract and it would seemingly not be too difficult a task to expand the size of the team to fully accommodate the Military Commissions process.

5. Is overseen by the DoD General Counsel. Expansion of the duties of the Privilege Team under OGC cognizance/contract is consistent with the final paragraph of DepSecDef's guidance of 14 May 2008.

JTF-Guantanamo is standing by to discuss further and assist on this matter as appropriate and desired.

V/R

[redacted]

Captain, JAGC, U.S. Navy
Staff Judge Advocate
Joint Task Force-Guantanamo

-----Original Message-----
From: David, Steven, COL, DoD OGC [mailto:[redacted]
Sent: Thursday, May 29, 2008 8:57 PM
To: Crawford, Susan, Hon, DoD OGC
Cc: [redacted]
Subject: Privilege Teams-Classification Teams

Ma'am,
I am requesting that we immediately undertake coordinated efforts to establish at least

one Privilege Team to accommodate the mission of the Office of the Chief Defense Counsel as it relates to classified information, including but not limited to classification of such, review of classifications, challenges to classifications, transmission, distribution, etc.

I suggest that this "team" take over responsibility for "coordination and management" of some of the responsibilities that JTF-GTMO SJA's office has inherited in the Commission process. Specifically, those matters related to attorney-client mail and related communication would be a threshold starting point. I do not think JTF-GTMO SJA's office would object since they are caught between a rock and a hard place trying to perform their mission which is primarily, if not exclusively Detainee Operations. I believe the find themselves too often calling "balls and strikes" in this process and it is resource and credibility draining.

However, this area is but one piece of a larger puzzle that only will become more problematic in the future. In addition, this team should not be an extension of the Commissions, the CA nor the Prosecution. They should be independent. They should be available to us for discussion of attorney-client privileged information. They should be able to assist us and educate us, talk confidentially to us and not impede us.

Broader than just the issues relating to JTF-GTMO SJA involvement, the Privilege team needs to be an integral part of our review of and use of any information that is or might be classified. Right now, we are having occasional issues with classifications or questions after the fact regarding classification of documents. I have grave concerns about who and how entities are determining what is classified and what is not classified and who is the authority versus who is the messenger and who is the appellate or review authority. I am very concerned that the "classification" issue is being used or being branded as an offensive weapon not as a means to protect certain information, but to exclude information. We can do better to eliminate these concerns. It appears that too many people are involved in the classification process and everyone seems to be using different guidance or "rule of thumb" to determine the classification of information. With each person viewing the subject information through their own prism of experience, the risk is differing opinions and outcomes. I understand some of this is neither black nor white, but we have got to do a better job than we are doing. All of us. Many times, we are even uncertain of who is doing the classification or when it is being done. As one small example, JTF-GTMO personnel view information, wherever it was collected, through the GTMO classification guidelines. However, I am not confident that those guidelines extend to operations that took place outside of GTMO. As another example, outside of the JTF-GTMO environment, sometimes we are being told one thing on one day and then, on another day we are being told that now that someone else has reviewed the information, it is classified. Then when we ask by whom or under what authority, we don't get prompt answers. Indeed,
most recently, a written motion was made to you on behalf of a defense team and the response came back on the high side, marked "Secret". Why? I do not know.

With numerous agencies involved in gathering and processing information this phenomenon is compounded. Some of the documents I have seen have seen marked SECRET do not appear to contain classified information, and are perhaps improperly marked, making it impossible to identify the classified portion.
Other documents that have been unmarked or FOUO have contained information that appears to possibly be classified. (These documents were received in discovery on Khadr, and have already been redacted; however, we really never received any information regarding why or if they were actually
classified.)

Through the course of our case preparation, the defense teams are going to uncover volumes of information in addition to discovery information provided by the government. Some of it will be properly classified and clearly marked, but much of it will not be. Information will flow in from witnesses, the clients, or other sources outside the government. It is not reasonable to expect the defense team to be familiar with all classification guidelines, and to identify what is classified and what is not. As far as I am concerned, I think we have a very good argument that any information
obtained from these sources is unclassified. Any information obtained
from
a person unaware that the information they are providing is classified or protected creates a pretty good argument the government has released or made available the information to un-cleared persons.

I see real difficulty, and the potential for unintentional security violations, with the information relating to the HVD cases. I believe the best way to insulate all from this concern, and to protect classified information, would be to have the establishment of a privilege team or teams who might be required to check every document that goes forward when the attorney has any concern that the information may potentially be classified. I'm not sure of the mechanics of the team, or how to insulate them from prosecution or government interests, but it seems to make the most sense to me. Right now the process is ad hoc at best, and I do not think it will meet the needs of the defense in the future, puts everyone at risk and leads to more confusion and criticism of the process.

I'd be happy to discuss this issue in further detail if you need further information. I am not the expert on these matters but we have got to get our arms around this now. We have been waiting for guidance and waiting for assistance but we have reached critical mass.

Thank you.

COL Steven David
Chief Defense Counsel
Office of Military Commissions
[redacted]
Washington, DC 20005

"...(I)n America the law is King. For as in absolute governments the king is the law, so in free countries the law ought to be king, and there ought to be no other." from Common Sense by Thomas Paine

[redacted]

[redacted]

Attachment C
AE009

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

8 December 2008

MEMORANDUM FOR THE CONVENING AUTHORITY

SUBJECT: Request for Appointment of Privilege Team - *United States v. Ahmed Khalfan Ghailani*

References: (a) Protective Order #1 ico *United States v. Ahmed Khalfan Ghailani*
(b) D-001 Defense Motion to Modify Protective Order #1
(c) *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. November 8, 2004)
(d) *In re Guantanamo Bay Detainee Litigation*, 2008 U.S. Dist. LEXIS 69254 (D.D.C. September 11, 2008)

1. The Defense respectfully requests that a privilege team be appointed to assist the Defense in the above named case. We request that this privilege team be independent from your office and that of the prosecution, in order to allow us to submit attorney-client privileged information to the designated privilege team for review. The sole purpose of this request is to allow us to provide adequate legal representation to Mr. Ghailani; however, we note that attachment (1) contains a May 29, 2008 e-mail request to you from the then Chief Defense Counsel, Office of Military Commissions (OMC) seeking appointment of a privilege team to support the entire OMC-Defense mission. This request received a favorable recommendation from both the Joint Task Force – Guantanamo and from the U.S. Southern Command. It is our understanding that, to date, this request has not been formally acted upon.

2. Reference (a) currently provides that "the statements of the Accused are to be presumptively treated as classified information, classified at the TOP SECRET//SCI level." While the Defense has reason to believe that a majority of the statements of the accused are not classified at all, or at least not classified at the TS/SCI level, there is no mechanism in place to allow us to overcome the TS/SCI presumption. This means that any notes we take during our meetings with Mr. Ghailani are presumptively TS/SCI material and therefore we can not act upon any of the information that we receive from him. For example, if Mr. Ghailani were to provide us the name of a potential witness to contact, even the name of a family member, we could not act upon that information because it is presumptively classified at the TS/SCI level. This situation prevents the Defense from being able to provide Mr. Ghailani the adequate assistance of counsel that he is entitled.

3. In reference (b), the Defense has already requested, in part, to remove the presumption contained in paragraphs 6g and paragraph 26 [of Protective Order #1] that <u>all</u> statements by the Accused are classified at the TOP SECRET/SCI (TS/SCI) level and replace it with the guidance provided by the Central Intelligence Agency (CIA) for the protection of classified national security information enumerated by the CIA regarding former High Value Detainees (HVDs) currently in Department of Defense custody at U.S. Naval Station, Guantanamo Bay, Cuba (GTMO).[1] This motion is still pending with the military judge; however, in their response to this motion the prosecution has objected to removal of the presumption and argued that the military judge has no authority to either remove or modify the presumption. If this presumption must remain, appointment of the requested privilege team would at least provide the Defense a mechanism to overcome this presumption.

[1] As it is classified, the Defense does not attach a copy of the CIA Memo to this request. However, should the Convening Authority have any doubts as to which memorandum is being referenced, the Defense is willing and able to provide this memorandum for review.

4. We believe that our request is neither unreasonable nor novel. In references (c) and (d), a privilege team has been appointed to assist the defense in all of the detainee habeas petitions in the United States District Court for the District of Columbia. As you probably already know, this privilege team is "[a] team comprised of one or more DoD attorneys and one or more intelligence or law enforcement personnel who have not taken part in, and, in the future, will not take part in, any domestic or foreign court, military commission or combatant status tribunal proceedings involving the detainee." Reference (b) at p. 184. It is our understanding that the current habeas privilege team is comprised of mostly contract employees who possess past intelligence and/or law enforcement experience with the federal government. While you are certainly at liberty to grant our request in any fashion you deem appropriate, we believe that leveraging off of the existing habeas privilege team makes the most sense. The team already exists, has resources in place, has relevant experience in the areas we seek assistance, and has an existing contractual vehicle to obligate funding against. Our request may be accommodated with minimal additional investment in resources and funding.

5. In closing, we believe that appointment of the requested privilege team is essential in order to provide Mr. Ghailani adequate legal representation, will help avoid future delays in this case, and, from the government's perspective, will add an additional layer of protection for the handling of classified information in this ease. We respectfully request a written response to this request. We welcome the opportunity to discuss this request with you or your legal advisor in person. I may be contacted at: [redacted]

Respectfully submitted,

By: _____
LTCOL J.P. COLWELL, USMC
MAJ R.B. REITER, USAFR
Detailed Defense Counsels for
Ahmed Khalfan Ghailani
Office of the Chief Defense Counsel
Office of Military Commissions
1600 Defense Pentagon, Room [redacted]
Washington, DC 20301

Attachment:
1. CDC email re: Privilege Teams-Classification Teams of 29 May 08 w/ ends

Attachment D
AE009

OFFICE OF THE SECRETARY OF DEFENSE

OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CONVENING AUTHORITY

JAN 12 2009

MEMORANDUM FOR: LtCol J.P. Colwell, USMC, Defense Counsel, OMC
MAJ R.B. Reiter, USAFR, Defense Counsel, OMC

SUBJECT: Request for Appointment of Privilege Team – *United States v. Ahmed Khalfan Ghailani*

I reviewed your letter dated 8 December 2008 requesting appointment of a privilege team in the case of *United States v. Ahmed Khalfan Ghailani*. There are procedures in place in the Military Commissions system, similar to the federal system, whereby counsel may receive advice on security matters from Court Security Officers (CSO). There are currently five CSOs in the Military Commission organization which defense counsel may call upon for guidance on classification matters. Further, a Special Security Officer (SSO) provides an additional layer of support for the defense teams. When necessary, the defense SSO can interface with the appropriate Original Classification Authorities (OCA) to request further guidance on your behalf. Because there are existing procedures for dealing with classified information, I am not persuaded that it is necessary to appoint a privilege team. Therefore, your request is denied.

Susan J. Crawford
Convening Authority
for Military Commissions

Attachment E
AE009

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

27 October 2009

MEMORANDUM FOR THE HONORABLE JUDGE SUSAN CRAWFORD
CONVENING AUTHORITY FOR MILITARY COMMISSIONS

SUBJECT: Request for Approval and Funding of Privilege Teams for Defense Attorneys in Military Commission Cases

SUMMARY

Defense counsel in commission cases are required to negotiate a complex system of classification restrictions on the use and communication of information obtained from their clients, discovery, and independent investigation, as a result of the large amount of classified evidence involved. The extent, complexity and ambiguity of these restrictions have proved major impediments to defense counsel's ability to perform their duties and provide effective assistance to their clients, especially in the HVD cases in which every statement by an accused is "presumptively" classified as TS/SCI. Counsel are not themselves classification authorities, nor have they been delegated that role. Counsel are thus put in the position of knowing the statements they make, in the courtroom and in court filings, may be treated as classified by the equity owner of the information, without being able to determine in advance with any degree of confidence that the statements are, in fact, classified or to whom they may be disclosed. Nor is this some abstract possibility; defense counsel have in fact been warned that they may be committing criminal violations in more than one instance based on such statements. At a minimum, this has a potentially chilling effect on counsel's choice of defense tactics and strategies in litigating on behalf of their clients.

The problem is pervasive and, in the HVD cases, affects virtually every aspect of defense counsel's role. For the reasons listed below, the use of privilege teams will resolve most if not all of counsel's uncertainty and provide a safe harbor for them to pursue zealous advocacy and effective assistance unimpeded by extraneous concerns. This request a not a novelty. Privilege teams are already assisting all habeas corpus counsel representing detainees in federal court. It is an anomaly, to say the least, that counsel litigating the government's non-criminal right to detain their clients are provided with this key resource, while counsel defending clients from capital and potential life imprisonment criminal charges are not.

In light of the benefits accruing to all parties, both JTF-GTMO SJA, CDR Don Martin and Chief Prosecutor CAPT John Murphy, have stated to me that they support the establishment of a Military Commissions Defense Privilege Team. Should you approve this request, the Defense Privilege Team would be modeled on the existing privilege team contract process used

in the habeas cases, either as an amendment, new task order or as a separate contract. The details and statement of work would be coordinated with JTF-GTMO, OMC-P, OGC, and your office.

REASONS FOR REQUEST

Constitution and function of privilege teams: The protective order employed by the District of Columbia District Court in the habeas cases defines "privilege team" as follows:

> "Privilege Team" means a team comprised of one or more DoD attorneys and one or more intelligence or law enforcement personnel who have not taken part in, and, in the future, will not take part in, any domestic or foreign court, military commission, or combatant status tribunal proceedings involving the detainee. If required, the Privilege Team may include interpreters/translators, provided that such personnel meet these same criteria.

The habeas privilege team's primary function is to provide classification reviews of all information or materials sent from a detainee to counsel, or brought out of a meeting with a detainee by counsel. Privilege teams supporting the OMC-D would include this function, but would have a broader mandate covering the spectrum of defense functions that involve the use of classified and potentially classified information. Along with classification issues, privilege teams also provide advice on the frequently related issue of the attorney-client privilege and scope of disclosure required to satisfy security protocols.

History of OMC-D requests for privilege teams: This office and counsel for accused Bin Al Shibh, Hawsawi, Ghailani and Kamin previously requested that the Convening Authority, and/or military judge approve the use and funding of privilege teams. My predecessor, Colonel Steven David, wrote to the Convening Authority and identified the importance of privilege teams assigned to OMC-D more than a year and a half ago, and vetted the concept with relevant parties, to include SJAs at USSOUTHCOM and JTF-GTMO. Both SJAs favorably endorsed the concept, with the SJA of JTF-GTMO providing a detailed explanation of a privilege team's demonstrated utility.

I respectfully ask that you reconsider your denial of these requests. Your previous response concluded that the five Court Security Officers (CSOs) and a Special Security Officer (SSO) assigned to the commissions were already performing this function, However, practice in the Commissions has demonstrated the opposite -- that CSOs' and the SSO's roles in assisting with classification issues is extremely limited in comparison to the habeas privilege teams, and CSOs and the SSO have no authority to make binding classification rulings.

Problems addressed by privilege teams: Privilege teams will address, among others that arise, the following issues confronting defense counsel:

(1) Uncertain and *ad hoc* classification rulings: *Ad hoc* and uncertain classification determinations complicate attorney-client relations, overburden the JTF-GTMO SJA office, and hinder efficient resolution of cases pending before Military Commissions.

Recent Classification Guidance for High Value Detainee Information issued by the CIA itself states (in an unclassified paragraph) "what is now declassified is often a matter of interpretation"

and that "classification determinations often turn on subtle nuances and carefully parsed distinctions" (U//FOUO). Providing privilege teams to OMC-D would facilitate a speedy determination of what information is classified, the level of classification, and how such classified information must be handled and disseminated.

(2) Over-classification of statements by the accused: The presumption that all statements of HVD accused are classified at the TS/SCI level has meant that their counsel have been unable even to carry notes of their conversations with them back to their mainland offices. That situation has been ameliorated somewhat by the point-to-point system now in place, but the fact remains that the TS/SCI "presumption" is still an enormous obstacle to counsel's ability to use even innocuous information gleaned from the client, in the absence of any means of rebutting this "presumption." Among the functions of a privilege team would be to review all notes and the status of other client utterances that counsel wished to use in court, in order to determine whether the presumption was justified in particular cases, or, on the contrary, was an unnecessary impediment to counsel's ability to perform their duties.

(3) Protection of the confidentiality of attorney-client relations: Along with classified information, privilege teams would be charged with determining attorney-client privilege assertions invoked to protect materials that JTF-GTMO wishes to review, and any other context in which legitimate assertions of the attorney-client privilege comes into potential conflict with classification concerns. The existence of OMC-D privilege teams, fully independent of JTF-GTMO, the Convening Authority, and OMC-P, would ensure the protection of national secrets while not compromising defense tactics, strategy, and client communications.

(4) Affirmative use of classified information by defense: Defense counsel who intend to introduce classified evidence or information must provide notice to the government and the commission of its intention to do so, and the government may (and has) challenged the defense's need to use and/or the form in which the evidence is introduced. This procedure has already led to substantial collateral litigation that has bogged down the proceedings. Prior consultation with a privilege team for advice would streamline this process and reduce the need for litigation.

(5) TS//SCI reporting requirements: As part of the TS//SCI program, defense counsel who travel abroad to investigate their cases must provide detailed information about every individual with whom they had more than incidental contact. The effect of this disclosure is to reveal defense strategy as well as identifying potential witnesses who may be in danger from their own governments for their contacts with the defense. At a minimum it reveals defense witnesses prematurely, long before obligated to by trial rules, to an agency of the government. A privilege team could serve as an intermediary in this situation and satisfy the TS//SCI program requirements without threatening to invade the defense function.

These are only the problems that have already arisen in the 9/11 cases, and others, to date. As Military Commissions cases go forward, along with potentially other HVD cases, we anticipate even more problems given the pervasiveness of the classification issues. I therefore respectfully request that your office approve the appointment and funding of a Privilege Team for Defense Attorneys in Military Commissions Cases.

Very respectfully,

Peter R. Masciola
Colonel, USAFG
Chief Defense Counsel