

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

**Defense Motion
To Dismiss**

(Unlawful Influence – Church and
Schmidt-Furlow Reports)

21 July 2008

- 1. Timeliness:** This motion is filed within the timeframe established by R.M.C. 905.
- 2. Relief requested:** The defense respectfully requests the Military Judge to dismiss all charges and specifications based on unlawful influence. Alternatively, the defense requests that the Military Judge suppress all evidence of statements allegedly made by Mr. Khadr to agents of the U.S. government in the course of his detention by U.S. authorities.
- 3. Burdens of proof and persuasion:** As the moving party, the defense bears the burden of establishing any factual issues necessary to resolve the motion by a preponderance of the evidence. R.M.C. 905(c)(2)(A). As to the merits, “the defense has the initial burden of raising the issue of unlawful command influence. ... Once the issue of unlawful command influence has been raised, the burden shifts to the government to demonstrate *beyond a reasonable doubt* either that there was no unlawful command influence or that the proceedings were untainted.” *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006) (emphasis added).

4. Facts:

a. On 24 March 2008, the defense submitted a supplemental request for discovery requesting production of, *inter alia*, the Church Report and Schmidt-Furlow Report. (Def. Supplemental Discovery Request, 24 Mar 08 at para. 1(l) (attachment A).) The Church and Schmidt-Furlow Reports are classified Department of Defense (“DoD”) investigations into detainee treatment. The Schmidt-Furlow Report relates specifically to allegations of detainee abuse at JTF-GTMO.¹ And the Church Report relates to interrogation operations in Guantanamo Bay, Afghanistan and Iraq. The defense request stated that the defense believed that the reports were documents “material to the preparation of the defense” within the meaning of R.M.C. 701. (*See id.*)

b. On 7 April 2008, the prosecution responded to the defense request, indicating that the prosecution had obtained the reports and that the prosecution was “reviewing them for any responsive information.” (Govt. Resp. to Def. Supplemental Discovery Request, 7 Apr 08 (attachment B).) The prosecution subsequently informed the defense that it would make the

¹ An unclassified “executive summary” of the report is available at <http://www.defenselink.mil/news/Jul2005/d20050714report.pdf>.

Church and Schmidt-Furlow Reports available (in their entirety) on the condition that defense counsel review them in the Office of the Chief Prosecutor (“OCP”) offices in Crystal City. They were two of a number of documents that the prosecution required defense counsel to examine in the prosecution’s Crystal City offices, rather than provide the defense with its own copy.² On one occasion the defense was required to review the documents in the spaces of OCP personnel, making confidential discussions about the documents impossible. (Kuebler email of 28 Apr 08 at para. 2 (attachment C).)

c. Over the next several weeks, defense counsel reviewed the materials to which it had been provided access by the prosecution. During one of these visits, defense counsel inquired into why the defense could not be provided with copies of the Church and Schmidt-Furlow Reports. Assistant Trial Counsel, Captain Keith Petty, indicated that it was “our policy” (referring either to OCP or the Khadr prosecution team) to make them available on those terms.

d. Since the prosecution did not permit the defense to have its own copy of several documents, in order to use the materials in connection with litigation, the prosecution invited the defense to “tab” pages of various documents the defense needed to use in connection with filings. The defense informed the prosecution that it intended to use portions of the Church and Schmidt-Furlow Reports in connection with discovery motions pending before the Commission and asked the prosecution to bring the tabbed copies of the reports to GTMO in connection with the 18 June 2008 session of the Commission. The prosecution agreed, but did not bring the documents.

e. The “Tiger Team SOP” is an attachment to the Schmidt-Furlow Report. The Tiger Team SOP is a standard operating procedure for JTF-GTMO interrogators, initially issued in January 2003. On or about 8 June 2008, Detailed Defense Counsel, LCDR Kuebler, executed an affidavit, intended to be filed in connection with *al Odah v. United States*, No. 06–1196 (petition for certiorari granted 29 June 2007), for which Mr. Khadr was a respondent in support of petitioner and which was then pending before the U.S. Supreme Court, together with *Boumediene v. Bush*, No. 06-1195. (Kuebler Aff. (attachment D).) The affidavit related to the Supreme Court certain unclassified provisions of the Tiger Team SOP relevant to questions then before the Court. (*Id.*)

f. Following news reports about the affidavit and Tiger Team SOP, the prosecution informed the defense that prosecutors had been told that they lacked “authorization” to provide the defense with access to the reports. They indicated that persons outside the OCP had expressed “consternation” over the release. Accordingly, the defense was not permitted to make copies of even the tabbed pages of the Schmidt-Furlow Report for use in connection with its motions. After defense counsel expressed a desire to take notes of the contents of the report and provide their notes to the Commission, the prosecution informed the defense that introduction of notes was not “authorized” either. The prosecution told the defense that it may be able to obtain “appropriate authorization” to provide the defense copies of the report in the future, but that authorization would not be received in time for the hearing. As a result, the defense was not

² The defense expects to develop many of the facts recited herein through the testimony of CPT Petty and/or MAJ Groharing at a hearing on this motion.

permitted to offer matters from the Schmidt-Furlow Report in connection with its motion to compel production of Analyst Support Packages. Over defense objection to the Commission considering the motion until it could offer into evidence portions of the Schmitt-Furlow Report, the Commission denied this motion on 20 June 2008. (*See* Ruling on D060.)

g. During a conversation about the issue with defense counsel while in GTMO before the 19 June 2008 session of the Commission, the prosecution again stated that it had been in contact with the DoD General Counsel's office concerning the Schmidt-Furlow Report and that it lacked "authorization" to allow the defense to use the document in connection with Commission motions.³ The prosecution indicated that the report was one of a number of classified documents provided to the OCP by various agencies and subject to a "gentleman's agreement" whereby the prosecution agreed to "coordinate" with the agency before disclosing it to the defense in the course of discovery. The prosecution indicated that the OCP had essentially been required to enter into this agreement in order to obtain access to materials in the possession of U.S. government agencies that are within the scope of the government's discovery obligations. According to MAJ Groharing, under the provisions of the "agreement," the way "the process is supposed to work" the defense makes its showing as to why certain information is "material" and then the prosecution takes that information to the relevant agency before deciding how to respond. According to prosecutors, in this case, they had been told that they had gotten "out in front" on producing the information (i.e., the Schmidt-Furlow Report) in an effort to "lean forward" in facilitating the process of discovery.

h. The Schmidt-Furlow Report is classified "secret." It is not marked "originator controlled," nor is it marked with any other caveat or condition on its dissemination. The defense believes that the "original classification authority" of the document (i.e., its owner) is the U.S. Central Command ("CENTCOM").

i. On 19 June 2008, the Commission granted a defense motion to compel production of detention facility SOPs. In an e-mail dated 1 July 2008 (after the prosecution had already missed a ten-day, Commission-imposed deadline for production of the documents), the prosecution indicated that its "authority to release" the SOPs was "contingent" upon obtaining a protective order, which the prosecution had requested the day before, suggesting that someone had directed the prosecution not to release the documents to the defense notwithstanding the existence of an order of this Commission to do so. When asked to identify the individuals who had so directed the prosecution not to comply, the prosecution declined to provide the requested information. (*See* Kuebler email string of 7 Jul 08 (attachment E); Petty e-mail string of 7 Jul 08 (attachment F).)

³ The defense's assertion regarding the involvement of the DoD General Counsel's office is based on statements by the prosecution. The prosecution has refused to provide additional information concerning these contacts. (*See* Kuebler email string of 7 Jul 08 (attachment E); Petty e-mail string of 7 Jul 08 (attachment F).)

5. Law and argument:

a. The exercise of unlawful influence over the proceedings of this Commission and/or the professional judgment of trial counsel (or the appearance thereof) warrants dismissal or other appropriate remedy.

(1) Article 37 of the UCMJ prohibits, *inter alia*, any person subject to the UCMJ from attempting to “coerce or, by any unauthorized means, influence the action” of courts-martial or military tribunals. The Military Commissions Act of 2006 (“MCA”), under the authority of which this Military Commission is convened, *broadens* the protections of Article 37, extending the scope of the prohibition to “any person” – not only those subject to the UCMJ – and prohibits attempts to coerce or influence the “exercise of professional judgment by trial counsel or defense counsel.” MCA 949b(a)(2)(C). There could be no stronger evidence of the seriousness with which Congress viewed the threat of unlawful influence in connection with military commission proceedings and its desire to eliminate comprehensively this “mortal enemy of military justice.” *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

(2) Under established military case law applying Article 37 in the context of court-martial proceedings, the defense bears the initial burden of raising the issue of unlawful command influence. *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006). The defense meets this burden by showing facts, “which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings.” *Id.* (citation omitted). Once the issue of unlawful command influence has been raised, the burden shifts to the government to demonstrate beyond a reasonable doubt either that there was no unlawful command influence or that the proceedings were untainted. *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002).

(3) Importantly, “disposition of an issue of unlawful command influence falls short if it fails to take into consideration the concern of Congress and this Court in eliminating even the appearance of unlawful command influence at courts-martial.” *Stoneman*, 57 M.J. at 42. The appearance of unlawful command influence is “as devastating to the military justice system as the actual manipulation of any given trial.” *United States v. Lewis*, 63 M.J. 405, 406 (C.A.A.F. 2006) (citing *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003)). Even in the absence of actual command influence, unlawful command influence may place an “intolerable strain on public perception of the military justice system.” *United States v. Wiesen*, 56 M.J. 172, 175 (C.A.A.F. 2001). The appearance of unlawful command influence exists where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding. *Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006). The prohibition against unlawful influence extends to efforts to interfere with a tribunal’s access to witnesses and evidence. *See United States v. Gore*, 60 M.J. 178, 187, (C.A.A.F. 2004) (if the government tampers with evidence, dismissal is appropriate if “the accused would be prejudiced or no useful purpose would be served by continuing the proceedings”); *United States v. Stombaugh*, 40 M.J. 208 (C.M.A. 1994) (Crawford, J.) (“The exercise of command influence tends to deprive service members of their constitutional rights. If directed against prospective defense witnesses, it transgresses the accused’s right to have access to favorable evidence.”).

b. Trial counsel had the authority to provide the defense access to the Church and Schmidt-Furlow Reports.

(1) Trial counsel were well within their authority to provide the defense with access to the Church and Schmidt-Furlow Reports in the course of discovery in this case.

(i) The MCA vests in trial counsel the authority to prosecute in the name of the United States Government. MCA 949c(a). And R.M.C. 701(c)(1) not only authorizes, it *requires*, the prosecution to provide the defense with access to documents material to the preparation of the defense.

(ii) Furthermore, “[t]he final responsibility for determining whether an individual’s official duties require possession of or access to any element or item of classified information . . . rests with the individual who has authorized possession, knowledge, or control of the information and not on the prospective recipient.” DoD 5200.1-R, ¶ C6.2.1; *see also id.* ¶ AP2.1.45 (an authorized holder of classified information determines whether the prospective recipient has a “need-to-know”) (attachment G). The authorized holder’s authority to grant access to the document is limited only if the document is marked with dissemination control markings. These markings place restrictions on the ability of the authorized holder of a document to reproduce, disseminate or extract information from it. SECNAV M-5510.36, ¶ 6-11 (attachment H); National Security and Intelligence Law Division (Code 17), OJAG, DON, The Judge Advocate’s Handbook for Litigating National Security Cases, Chpt. 1 at 3 [hereinafter Code 17 Handbook] (attachment I); Army Reg 380-5, ¶ 4-12(f) (attachment J). For example, if a document is marked Originator Controlled or ORCON, the authorized holder may not disseminate the document or extract information from it until he obtains approval from the originator of the document. Code 17 Handbook, Chpt. 1 at 3; *see also* SECNAV M-5510.36, ¶ 6-11(2)(a). Here, there are no markings on the documents at issue that require trial counsel to seek authorization before providing them to the defense. Trial counsel lawfully possessed the documents and therefore had authority to determine whether they should be given to defense counsel.

(iii) Finally, the national security privilege has not been invoked, so it does not limit the trial counsel’s authority to provide the defense access to the Church or Schmidt-Furlow Reports. The national security privilege may be invoked “if disclosure would be detrimental to the national security.” 10 U.S.C. § 949d(f)(1)(A). The authority to claim the privilege extends broadly to the heads of military and government departments, who may delegate that authority. 10 U.S.C. § 949d(f)(1)(B)-(C). A claim of privilege, however, must be explicit and triggers a set of procedures provided for in the M.C.A. and the R.M.C. These procedures place the authority in the hands of the military judge to “find that privilege is properly claimed,” R.M.C. 701(f)(1), and to order a wide array of alternatives to disclosure of classified information. R.M.C. 701(f)(2)-(8). The national security privilege has not been invoked here, so it did not limit trial counsel’s authority to provide the defense access to the Church and Schmidt-Furlow Reports.

(2) The MCA and applicable regulations authorize only two bases for denying the defense access to the Church and Schmidt-Furlow Reports – lack of materiality and assertion of privilege. This in turn creates a two step process for disclosure. First, either trial counsel or

the military judge determine that a particular piece of evidence is material and therefore necessary for disclosure to the defense. Only then do considerations of national security come into play, where trial counsel or an appropriate authority within the government can assert privilege and trigger the military judge's exclusive authority to either bar or put conditions on the disclosure of the privileged evidence.

c. The evidence shows that there has been unlawful influence exercised over trial counsels' professional judgment and the proceedings of this Commission.

(1) Here, trial counsel exercised its independent professional judgment as to what evidence was "material to the preparation of the defense" and provided defense counsel access to the Church and Schmidt-Furlow Reports. The documents were not marked with any distribution controls, such as ORCON, that would have limited trial counsel's ability to disseminate the reports. Neither trial counsel nor any government department has asserted the national security privilege; and even following an assertion of privilege, no one other than the military judge has the authority to vary trial counsel's obligations to disclose evidence. Yet after the disclosure had initially been made, unidentified government officials in the DoD General Counsel's office instructed trial counsel that they lacked "authorization" to make such a disclosure.⁴ To the contrary, once trial counsel deemed the Church and Schmidt-Furlow reports "material," they had all the "authorization" they needed to provide the defense with access to it.

(2) Trial counsel appropriately exercised their professional judgment as to what evidence was "material." The government's case against Mr. Khadr is built upon statements he is alleged to have made to interrogators who exploited an environment of abuse at, among other places, JTF-GTMO. Accordingly, one cannot imagine anything more "material to the preparation of the defense" than DoD investigations into allegations of detainee abuse at JTF-GTMO. After trial counsel exercised their professional judgment, individuals within the government prevailed upon them to reverse course. But not because they breached a departmental assertion of privilege, or transmitted documents in breach of dissemination controls. Instead, trial counsel were told to claw back this disclosure because of a "gentleman's agreement" trial counsel entered into with undisclosed government officials that has neither statutory basis nor binding effect.

(3) These instructions to withhold further disclosure were therefore done through an "unauthorized means," insofar as trial counsel can point to no provision in the law that allows them to circumvent their disclosure obligations or the privilege process by means of a confidential and informal contract with third parties. Absent an assertion of privilege, the only basis for refusing to disclose evidence is that it is not material. Once trial counsel had exercised

⁴ Based on statements of CPT Petty and MAJ Groharing, it appears that these individuals were from the DoD Office of the General Counsel. Assuming *arguendo* that some person or entity within the Executive Branch has the authority to influence the trial counsel in this matter, it is difficult to see how this could be someone other than the document's original classification authority or "owner" (i.e., CENTCOM), as opposed to some individual within the DoD General Counsel's office. If DoD GC did lean on trial counsel to prevent its disclosure of the Schmidt-Furlow Report, there is little question that DoD GC's attempt to influence the actions of trial counsel (and the Commission) in this case were unauthorized.

their professional judgment that it was material, the law protected them and this Commission from interference from third parties' surreptitious efforts to thwart disclosure.

(4) Nevertheless, these instructions had their desired effect, trial counsel clawed back its disclosure of the Church and Schmidt-Furlow Reports and defense counsel were barred from presenting squarely material evidence (in the judgment of both trial and defense counsel) in support of its motions before the Military Commission. As a result, the defense could not make clear to the military judge why Analyst Support Packages (and Interrogation Plans)⁵ discussed in detail in the Schmidt-Furlow Report are material to the preparation of its case. Without the benefit of this evidence, the military judge denied this motion over defense objection to considering the motion.

d. Dismissal or Suppression are the Only Appropriate Remedies

(1) Enforcing a "gentleman's agreement" as a means of limiting defense access to discovery is an "unauthorized means" of influencing trial counsel and the conduct of this Commission. It was done in the face of a clear congressional determination that greater protections against unlawful influence should apply in military commissions than even those applied in court-martial. Based upon admissions made by CPT Petty and MAJ Groharing to defense counsel, individuals outside the OCP caused the prosecution to restrict defense access to information indisputably within the scope of the government's discovery obligation. Not only is there a clear appearance of unlawful influence, the evidence demonstrates actual unlawful influence has inhibited trial counsel's exercise of professional judgment and the access of the defense and this Commission to relevant evidence. This warrants no remedy short of dismissal. *See, e.g., Lewis*, 63 M.J. 405.

(2) This appears to be one manifestation of a larger pattern of outside interference with the OCP's professional judgment respecting discovery of classified information. Under the terms of the "gentleman's agreement," the government appears to have established a process through which trial counsel are required to systematically invite unlawful influence by making even their compliance with the military judge's orders contingent upon the discretion of third parties. The issue appears to have surfaced again in connection with the prosecution's failure to produce the detention facility SOPs in accordance with the Commission's order. According to trial counsel, this most recent failure was based on an eleventh-hour demand from someone in the government, but outside OCP, who insisted that trial counsel's disclosure obligations be made contingent upon obtaining a protective order, which was largely redundant of existing protective orders that already covered the documents. (*See* MAJ Groharing e-mail of 1 July 2008 (attachment K).)

(3) Given that the unlawful influence exerted on trial counsel in this case is not an isolated incident, the pervasiveness of this practice and the influence it has had on trial counsel's determinations of materiality may be unknowable. Defense counsel can only speculate, after trial counsel's months of dilatory gamesmanship on discovery, what other evidence trial counsel has not been "authorized" to deem material. What is known is that after

⁵ In the course of the 19 June 2008 oral argument on the ASP motion, the defense orally amended the motion to include the companion Interrogation Plans.

being effectively chastised for properly discharging the government's discovery obligations and getting "out in front" of these third parties' judgment as to what evidence the defense is entitled, trial counsel will unquestionably be chilled from fulfilling their discovery obligations in the future. The public cannot have confidence in the fairness of this process when the suspicion that the commissions will be secret trials hangs over each session and when defense counsel, the military judge and the public do not even know who is denying the defense access to material evidence. Trial counsel's receiving and taking secret orders from behind the curtain makes it impossible to cure the actual and perceived prejudice through any remedy short of dismissal.

(4) The military judge has the authority to fashion a remedy appropriate to cure any potential prejudice resulting from the unlawful influence and sufficient to restore public confidence in the integrity of these proceedings. *United States v. Roser*, 21 M.J. 883 (C.M.A. 1984) ("Trial judges may employ appropriate remedies where necessary in order to preserve the actual or apparent fairness of proceedings before them . . . trial judges must tailor their responses to the situation at hand."). It is difficult to imagine a remedy short of dismissal that would serve these ends. Since the focus of the ongoing discovery disputes in this case pertain directly to defense counsel and experts' ability to evaluate the circumstances surrounding, and therefore the reliability of, inculpatory statements taken from Mr. Khadr at the hands of interrogators, the military commission should, at a minimum, suppress all evidence of statements Mr. Khadr allegedly made to agents of the U.S. government.

(5) As Judge Robertson ruled just a few days ago in declining to stay the military commission of Salim Hamdan, "The eyes of the world are on Guantanamo Bay. Justice must be done there, and must be seen to be done there, fairly and impartially." *Hamdan v. Gates*, 04-1519, slip op. at 17 (D.D.C. 18 July 2008). The available evidence shows that a third party has been unlawfully influencing trial counsel's professional judgment as to what evidence is or is not "material" and therefore available to the defense. Under the standard established in the MCA, there is no difference between some third party in the government telling trial counsel to withhold evidence and a commander telling a witness to withhold testimony. *See Gore*, 60 M.J. at 187. The specter of military justice's "mortal enemy" has appeared and dismissal is the appropriate remedy to ensure basic fairness and to restore public confidence in the military commission mission more broadly.

(6) If the military judge determines that some remedy short of dismissal is warranted, only the suppression of Mr. Khadr's statements will reestablish the credibility of these proceedings and streamline the fact-finding process as the Commission moves forward, unencumbered by third-party efforts to unlawfully influence this Commission's ability to unearth interrogation practices at Bagram and GTMO. This conclusion is bolstered by the fact that the very information contained in the Schmidt-Furlow report, the public disclosure of which presumably prompted the direction to claw back, deals with the destruction of handwritten notes containing "interrogation information," to prevent their use or disclosure in legal proceedings (*See Kuebler Aff. (Attachment D)*.) Thus, the direction to restrict the defense's ability to use the Schmidt-Furlow report in litigation is part of an apparent effort to conceal the fact that interrogators such as those who interrogated Mr. Khadr were themselves encouraged to conceal or destroy evidence of their activities. The public can have no confidence in the outcome of these proceedings to the extent the ultimate verdict is predicated in any way upon statements Mr. Khadr allegedly made to interrogators in light of such practices, and the apparent willingness of

senior government personnel to interfere in the proceedings of this Commission to cover them up.

7. Oral Argument: The defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h) (“Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions.”). Oral argument will allow for a thorough consideration of the issues.

8. Witnesses and evidence:

- a. Witnesses: CPT Keith Petty; MAJ Jeffrey Groharing; Ms. Rebecca Snyder.
- b. Other evidence: Attachments A through K.

9. Certificate of conference: The defense and prosecution have conferred. The prosecution objects to the relief requested.

10. Additional Information: In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

11. Attachments:

- A. Defense Supplemental Discovery Request, 24 March 2008
- B. Government Response to Defense Supplemental Discovery Request, 7 April 2008
- C. Kuebler email of 28 April 2008
- D. Kuebler Affidavit, 8 June 2008
- E. Kuebler email string of 7 July 2008
- F. Petty e-mail string of 7 July 2008
- G. DoD 5200.1-R excerpts
- H. SECNAV M-5510.36 excerpts
- I. National Security and Intelligence Law Division (Code 17), OJAG, DON, The Judge Advocate’s Handbook for Litigating National Security Cases

J. Army Reg 380-5

K. MAJ Groharing e-mail of 1 July 2008

A handwritten signature in black ink, appearing to read "William C. Kuebler". The signature is written in a cursive style with a large, stylized initial "W".

William C. Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

24 March 2008

From: LCDR William C. Kuebler, JAGC, USN, Detailed Defense Counsel

To: MAJ Jeffrey Groharing, USMC, Trial Counsel

Subj: SUPPLEMENTAL REQUEST FOR DISCOVERY ICO U.S. V. OMAR KHADR

Ref: (a) R.M.C. 701(c)

1. Pursuant to reference (a), the defense respectfully requests production of, or the opportunity to inspect and photocopy, the following materials:

a. The award and medal citations and letters of appreciation for the personnel who received awards due to their participation in the 27 July 2002 firefight at issue in this case as well as the documentation supporting the awards and medals;

b. OC1's (a/k/a XO3) sworn statement of 3 August 2005, "Memorandum for Commander", and 2-page DA Form 2823 (if different from XO3's sworn statement) referenced in the document labeled with Bates No. 00766-001026;

c. The front and back pages of the attachments to the 17 March 2004 summary of interview of OC1 containing SA Hagaman's markings that are referenced at 00766-000969;

d. Copies of all membership lists of al Qaeda, or other documents purporting to show the members of al Qaeda, from 1989 onwards;

e. Documents showing the structure of al Qaeda, the identity of its members, and the identity of individuals who have sworn bayat to al Qaeda (or Osama bin Laden), including, but not limited to, documents seized from the Kandahar house of Muhammad Atef (A/K/A/ Abu Hafs al Masri) in approximately 2002;

f. E-mail correspondence within the F.B.I. complaining about and calling into question the interrogation techniques or treatment of detainees held in Guantanamo Bay, Cuba;

g. Communications between the F.B.I. Office of Legal Counsel and the Department of Defense Office of the General Counsel regarding the interrogation methods and practices or treatment of detainees at GTMO;

h. A copy of the July 14, 2004 memorandum from T.J. Harrington, F.B.I. to MG Donald J. Ryder, Criminal Investigation Command, regarding aggressive interrogation techniques being used against detainees at Guantanamo by military interrogators;

i. A list of all people currently held by the United States who are believed to be members of al Qaeda and their current location and method to contact them;

j. Names of all unnamed co-conspirators alleged in Charge III known to the U.S. government;

k. Copies of all al-Qaeda training manuals/materials held by the U.S. Government;

l. A copy of the Church Report, the Schmidt-Furlow Report and reports by the International Committee for the Red Cross submitted to the United States regarding the treatment of detainees or concerns regarding interrogations techniques used on detainees;

m. Copies of all electronic surveillance of the accused while held in U.S. custody, including existing transcripts of the electronic surveillance;

n. Copies of reports referenced by SA John Chesnut in 00766-002260;

o. Copies of claims of abuse referenced in an ROI of 11 Sep 05, 00766-002270, in which it states that “[b]oth CITF GTMO and OARDEC records showed claims of abuse by Khadr while he was being held in Afghanistan”;

p. Copies of the medical file review referenced in an ROI of 14 July 05, 00766-002268, which states that a “medical file review has been submitted”;

q. Intelligence reports or other documents in the possession of Combined Joint Task Force 82 or other government agency relating to Abu Laith Al Libi generated on, before, or after 1 February 2008 (note: the defense believes this to be within the scope of its previous request, but supplements to assist the prosecution in locating responsive materials);

r. Intelligence reports or other documents relating to the Libyan Islamic Fighting Group (LIFG);

s. Intelligence reports (interrogations of KSM) relating to contacts between al Qaeda and the LIFG referenced at p. 489, note 15, of the 9/11 Report;

t. Videos or other materials produced by “Al Sahab” media relating to Abu Laith Al Libi and/or the 2007 affiliation of Al Libi and LIFG with Al Qaeda;

u. A copy of the Fatwah of Shaykh Hassan Qaid, dated 23 September 2000 (sic?) referenced by Evan F. Kohlman at p. 16, note 99, of the document available at the following web address: <http://www.nefafoundation.org/miscellaneous/nefalifg1007.pdf>;

v. Any documents or other materials relied upon by the United States Government in designating the LIFG a “terrorist organization” (or similar designation), including, without limitation, the 8 February 2006 designation by the Department of the Treasury,

23 September 2001 designation by the President of the United States (EO 12334), and 6 October 2001 designation by the National Security Council.

2. These requests seek production of matters “material to the preparation of the defense” within the meaning of reference (a) and extends to all matters within in the possession, custody or control of the U.S. Government. “Government” as used herein includes *all* departments or agencies of the United States Government. Matters within the scope of discovery include those matters that may become known to the trial counsel through the exercise of “due diligence.” *See* R.M.C. 701(c)(1). That matters responsive to these requests are not within the immediate possession and control of the Office of the Chief Prosecutor is therefore not a sufficient basis for denying the request.

3. Should you have any questions or concerns regarding this request, please contact me at (202) 761-0133 (ext. 116).

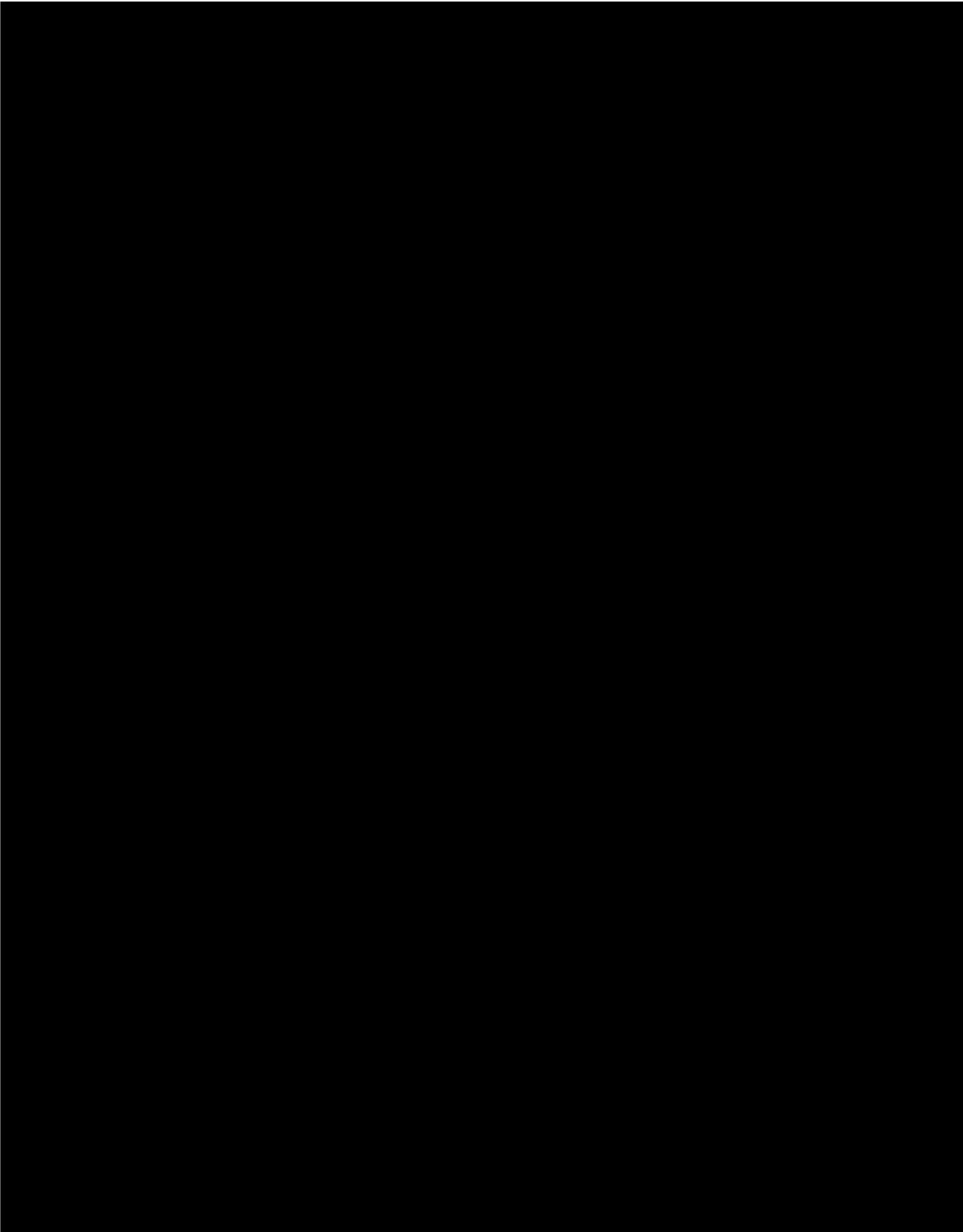
/s/

W. C. KUEBLER

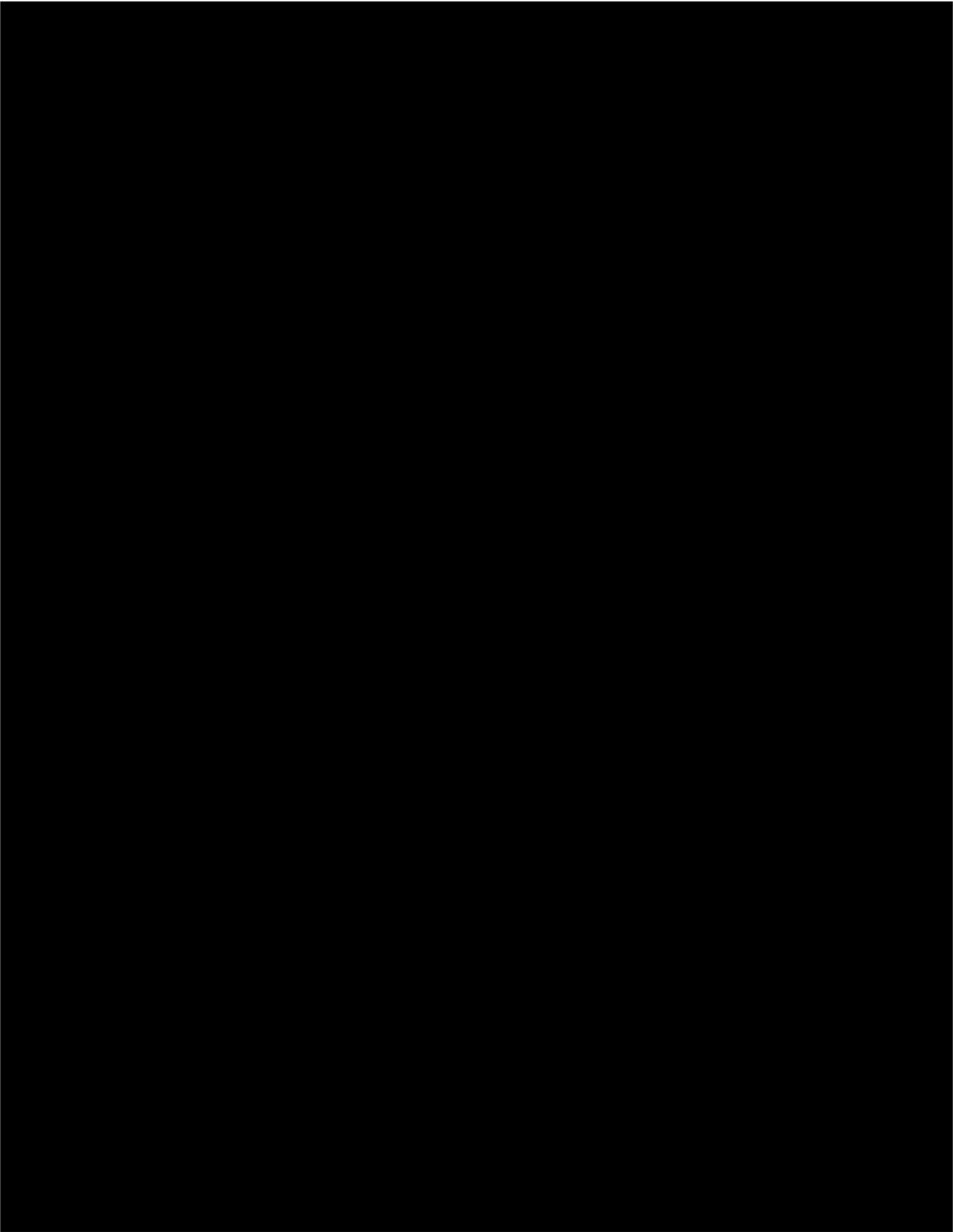
OF

FOR OFFICIAL USE ONLY
LAW ENFORCEMENT SENSITIVE

FOR OFFICIAL USE ONLY
LAW ENFORCEMENT SENSITIVE



FOR OFFICIAL USE ONLY
LAW ENFORCEMENT SENSITIVE



FOR OFFICIAL USE ONLY
LAW ENFORCEMENT SENSITIVE

From: [REDACTED]
Sent: Sunday, April 27, 2008 7:05 PM
To: [REDACTED]
Cc: [REDACTED]

Subject: U.S. v. Khadr -- Special Request for Relief (DIMS materials)

Sir,

1. The defense previously filed a motion to compel production of records relating to Mr. Khadr contained in the Detainee Information Management System (DIMS) (D-043). The prosecution agreed to provide matters in response to the defense request.
2. The DIMS records are classified "secret" and prosecution has provided access, subject to the condition (ostensibly imposed by JTF-GTMO) that the defense view the records in the OMC-P spaces in Crystal City and not be allowed to take copies back to the OMC-D offices. Moreover, the prosecution indicated (again, apparently at the insistence of JTF-GTMO) that any notes defense counsel made upon review of the records would have to be classified "secret," left with the prosecution, and transported to GTMO for declassification review by JTF personnel in connection with the next session of the commission. Defense counsel reviewed the DIMS records contained in two large binders and a couple of file folders, consisting of hundreds of pages, at the OMC-P offices on 24 Apr 08. Although the prosecution attempted to accommodate defense counsel as much as possible, due to logistical constraints, defense counsel were required to review the documents in a space occupied by OMC-P personnel and thus unable to freely discuss the DIMS materials without compromising work-product or attorney-client matters.
3. As the records are classified, the defense cannot go into any degree of detail about the contents of the records. However, based on our preliminary review, the DIMS records appear to contain a great deal of information relevant to the issues referenced in the defense motion. Given the need to access, discuss, capture, and cross-reference matters contained in the DIMS records with other discovery materials in the possession of the defense, it is simply impracticable to do so given the constraints imposed by the JTF. Accordingly, the defense respectfully requests that the Military Judge order production of copies of these materials to the defense.
4. The defense wishes to point out that it is not accusing or blaming the prosecution for anything in connection with this matter. This appears to be the latest in a series of issues arising from JTF-GTMO's belief that it can condition and limit access to JTF witnesses and evidence in a manner over and above that contemplated by the MMC. However, the defense does wish to note that there are currently a number of discovery items to which it is being provided access under the condition that it review matters at the OMC-P spaces, rather than being provided copies to take to its offices in Washington, DC. Such practices can only serve to hinder defense preparation and slow down the process of discovery in this case.
5. The defense has conferred with the prosecution in this matter and expects the prosecution to oppose the requested relief.

V/R

LCDR Kuebler

Attachment C

7/18/2008

IN THE SUPREME COURT OF THE UNITED STATES

KHALED A.F. AL ODAH, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

AFFIDAVIT OF LIEUTENANT COMMANDER WILLIAM C. KUEBLER

Lieutenant Commander William C. Kuebler, being duly sworn, deposes and says:

1. I am Counsel of Record for Omar A. Khadr (“Mr. Khadr”), as Respondent Supporting Petitioners, in the above-captioned case. I am also the Detailed Defense Counsel for Mr. Khadr in the military commission case of *United States v. Omar A. Khadr*. Mr. Khadr is a 21 year-old Canadian citizen, currently detained as an “enemy combatant” by the United States at the Guantanamo Bay Naval Station.
2. On 5 and 6 June 2008, while reviewing materials provided to the defense in the course of discovery in Mr. Khadr’s pending military commission case, I reviewed a document entitled “Tiger Team Standard Operating Procedure (SOP) for the JTF GTMO Joint Intelligence Group (JIG) Interrogation Control Element (ICE). (“Tiger Team SOP”).¹ The Tiger Team SOP is an attachment to the “Schmidt-Furlow Report,” a Department of Defense (“DoD”) investigation into allegations of detainee abuse at the Guantanamo Bay Naval Station. The paragraphs of the Tiger Team SOP are individually marked as to their level of classification. The matters referenced herein are derived exclusively from the unclassified portions of the Tiger Team SOP.
3. The contents of the Tiger Team SOP, as related herein, are based on my verbatim transcription of unclassified portions of the Tiger Team SOP. Although the prosecution in Mr. Khadr’s military commission case has made the Schmidt-Furlow report available for review in its offices, the prosecution has refused to provide the defense with a copy of the report or its attachments. Upon leaving the prosecution offices on 6 June 2008, I confirmed with counsel for the government that it would be appropriate to use information from the unclassified portions of the Tiger Team SOP in an unclassified filing.

¹ The unclassified cover page, indicates that the Tiger Team SOP was initially promulgated on 21 January 2003, and subsequently “revised” on 12 June 2003 and 26 July 2004, suggesting it was in effect (at a minimum) during most of 2003 and 2004.

4. Paragraph 2 of the Tiger Team SOP prescribes its scope and applicability:

“(U) **Scope.** These procedures and responsibilities apply to Tiger Teams serving within the Interrogation Control Element (ICE), Joint Interrogation Group (JIG) of Joint Task Force (JTF) GTMO.”

5. Paragraph 6 defines the term “Tiger Team”:

“(U) **Tiger Teams.** Intelligence exploitation teams consisting primarily of an Analyst and Interrogator who continuously work together during the Battle Rhythm Cycle.”

6. Subparagraph 3 of paragraph 14 governs policy relating to retention of handwritten interrogator notes by Tiger Team interrogators:

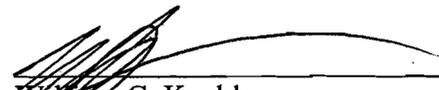
“(3) (U) Once Interrogator Notes² and/or [Intelligence Information Reports] have been created (Appendix G), handwritten interrogator notes may be destroyed. This mission has legal and political issues that may lead to interrogators being called to testify, keeping the number of documents with interrogation information to a minimum can minimize certain legal issues.”

7. The defense in Mr. Khadr’s military commission case has re-requested the government to provide it with a copy of Tiger Team SOP. If not immediately forthcoming, the defense will request the military judge to compel such production on an expedited basis. Given previous rulings of the military commission relating to the scope of discovery, the defense expects to receive a copy of the Tiger Team SOP and will file an appropriately-redacted, unclassified version of the document (or excerpts thereof) with this Court at the earliest opportunity.

8. The defense in Mr. Khadr’s military commission case has requested production of handwritten notes relating to intelligence interrogations of Mr. Khadr at both the Guantanamo Bay Naval Station and the Bagram Collection Point, Bagram Airbase, Afghanistan.³ Counsel for the government claim that, after a diligent search, they have been unable to locate and unable to provide responsive materials.

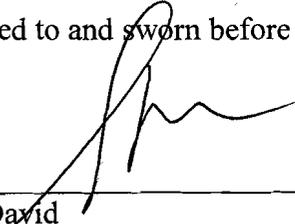
² Despite the name, these are *typewritten* documents summarizing the interrogation.

³ The government appears to have preserved, and has provided the defense with copies of handwritten notes taken by *law enforcement* agents, e.g., agents of the Federal Bureau of Investigation and Criminal Investigation Task Force, for *some* interrogations. The defense has, however, been provided with numerous Intelligence Information Reports and typewritten Interrogator Notes relating to *intelligence* interrogations for which there are no known handwritten interrogator notes.



William C. Kuebler
LCDR, JAGC, USN

Subscribed to and sworn before me this 8th day of June 2008



Steven David
Col, JA, USAR
Authority: 10 U.S.C. § 1044a
No seal required

From:

Subject:

[REDACTED] DoD OGC

RE: Schmidt-Furlow

Thanks, Keith.

Can you at least confirm whether there are communications relating to this issue? And can you identify the name of the person(s) at OGC that you were communicating with about the matter?

V/R

Bill

From:

Subject:

[REDACTED] DoD OGC

RE: Schmidt-Furlow

Bill/Rebecca,

We do not intend to release any communications between OMC-P and DoD OGC.

V/r,

Keith A. Petty
Captain, U.S. Army
Prosecutor
Office of Military Commissions

From:

Subject:

[REDACTED] DoD OGC

FW: Schmidt-Furlow

Jeff/Keith,

Just wanted to check whether you had seen the email below and, if so, whether you intend to respond? Thanks.

V/R

Bill

From:

Subject:

[REDACTED] OGC

Schmidt-Furlow

Jeff/Keith,

Following up on our conversation in GTMO, do you have any e-mail correspondence between your office and DoD OGC (or anyone else) relating to the release of the Schmidt-Furlow report? If so, would you be willing to produce the correspondence for our review? Thank you.

V/R

Bill

From:

[REDACTED]

[REDACTED]

Subject:

RE: UCI issues

Bill/Rebecca,

At this time we decline to entertain the below request.

V/r,

Keith A. Petty
Captain, U.S. Army
Prosecutor
Office of Military Commissions

From: Kuebler, William, LCDR, DoD OGC
Sent: Monday, July 07, 2008 11:44 AM
To: Groharing, Jeff, Maj, DoD OGC; 'jeffredg@ptf.gov'; Petty, Keith, CPT, DoD OGC
Cc: Snyder, Rebecca, Ms, DoD OGC
Subject: UCI issues

Jeff/Keith,

Although it presents a slightly different issue, we will probably fold the SOP issue into the UCI motion we intend to file relating to Schmidt-Furlow. Accordingly, would you please identify the person (or persons) who directed you not to comply with the Commission's production order until you obtained a protective order. Thank you.

V/R

Bill



INFORMATION

SECURITY

PROGRAM

January 1997

**THE ASSISTANT SECRETARY OF DEFENSE FOR
COMMAND, CONTROL, COMMUNICATIONS, AND
INTELLIGENCE**

C5.2.7.4. Waivers of the requirements of this paragraph may be granted only by the Director of the Information Security Oversight Office. Waivers granted before October 14, 1995 by DoD officials are no longer valid. Requests for waivers from DoD Components shall be forwarded to the Principal Director (Information Warfare, Security & Counterintelligence), ODASD(I&S) for submission to the Director, ISOO. Waiver requests for Special Access Programs will be forwarded to the Director, Special Programs, ODTUSD(P)PS, who will then forward them to the Director, ISOO. The waiver request must include the following:

C5.2.7.4.1. Identification of the information or class of documents for which the waiver is sought;

C5.2.7.4.2. A detailed explanation of why the waiver should be granted;

C5.2.7.4.3. The Component's judgment of the anticipated dissemination of the information or class of documents for which the waiver is sought; and

C5.2.7.4.4. The extent to which the documents subject to the waiver may be a basis for derivative classification.

C5.2.8. Page Marking

C5.2.8.1. Each interior page of a classified document (except blank pages) shall be conspicuously marked, top and bottom, with the highest classification of the information on the page. These markings must stand out from the balance of the information and thus a particular size is not specified. Pages containing only unclassified information shall be marked "UNCLASSIFIED." Blank interior pages will not be marked.

C5.2.8.2. An alternative interior page marking scheme is the same as described above except that each page is marked with the highest classification of information in the document. If this alternative is used, parenthetical portion markings must be used instead of the means specified in subparagraph C5.2.7.2., above.

C5.2.9. Special Control and Similar Notices. Besides the following, other notices may be required by other DoD Directives. Unless another Directive prescribes different placement, these additional control notices shall be placed on the face of the document.

C5.2.9.1. Restricted Data. Documents containing Restricted Data shall be marked:

"RESTRICTED DATA"

"This material contains Restricted Data as defined in the Atomic Energy Act of 1954. Unauthorized disclosure subject to administrative and criminal sanctions."

C5.2.9.2. Documents containing Formerly Restricted Data, but no Restricted Data, shall be marked:

"FORMERLY RESTRICTED DATA"

"Unauthorized disclosure subject to administrative and criminal sanctions. Handle as Restricted Data in foreign dissemination. Section 144.b, Atomic Energy Act, 1954."

C5.2.9.3. The Director of Central Intelligence (DCI) establishes policies and procedures for the control of dissemination of intelligence information. The current DCI Directive on this subject is at Appendix 5.

C5.2.9.4. COMSEC Material. The following marking will be placed on classified COMSEC documents before release to contractors. Apply it when the document is created if release to contractors is likely.

C5.2.9.5. Dissemination and Reproduction Notices. Classified information that is subject to specific dissemination or reproduction limitations may be marked with notices such as:

"Reproduction requires approval of originator or higher DoD authority", or

"Further dissemination only as directed by (insert appropriate office or official) or higher DoD authority."

C5.2.9.6. Special Access Program Documents. Special Access Program documentation and information may be identified with the phrase "Special Access Required" and the assigned nickname, codeword, trigraph, or digraph.

C5.2.9.7. For Official Use Only. See Appendix 3 for guidance on the marking of For Official Use Only information contained in classified documents.

C5.2.9.8. Other Special Notices. Other requirements for special markings on Restricted Data and Formerly Restricted Data, intelligence and intelligence-related information, COMSEC information, technical documents, NATO-classified information,

C6.2. ACCESS

C6.2.1. Policy. Except as otherwise provided in paragraph C6.2.2., below, no person may have access to classified information unless that person has been determined to be trustworthy and access is essential to the accomplishment of a lawful and authorized Government purpose. DoD 5200.2-R (reference (ss)) contains detailed guidance concerning personnel security investigation, adjudication and clearance. The final responsibility for determining whether an individual's official duties require possession of or access to any element or item of classified information, and whether the individual has been granted the appropriate security clearance by proper authority, rests with the individual who has authorized possession, knowledge, or control of the information and not on the prospective recipient.

C6.2.2. Access by Persons Outside the Executive Branch. Classified information may be made available to individuals or Agencies outside the Executive Branch provided that such information is necessary for performance of a function from which the Government will derive a benefit or advantage, and that such release is not prohibited by the originating Department or Agency. Heads of DoD Components shall designate appropriate officials to determine, before the release of classified information, the propriety of such action in the interest of national security and assurance of the recipient's trustworthiness and need-to-know.

C6.2.2.1. Congress. Access to classified information or material by Congress, its committees, members, and staff representatives shall be in accordance with DoD Directive 5400.4 (reference (gg)). Any DoD employee testifying before a Congressional committee in executive session in relation to a classified matter shall obtain the assurance of the committee that individuals present have a security clearance commensurate with the highest classification of information that may be discussed. Members of Congress by virtue of their elected positions, are not investigated or cleared by the Department of Defense.

C6.2.2.2. Government Printing Office (GPO). Documents and material of all classification may be processed by the GPO, which protects the information in accordance with the DoD/GPO Security Agreement of February 20, 1981 (reference (mm)).

C6.2.2.3. Representatives of the General Accounting Office (GAO). Representatives of the GAO may be granted access to classified information originated by and in the possession of the Department of Defense when such information is

THE SECRETARY OF THE NAVY

SECNAV M-5510.36
JUNE 2006



DEPARTMENT OF THE NAVY

INFORMATION SECURITY PROGRAM



PUBLISHED BY
CHIEF OF NAVAL OPERATIONS (N09N)
SPECIAL ASSISTANT FOR NAVAL INVESTIGATIVE MATTERS
AND SECURITY

Attachment H

all the sources shall be carried forward to the newly created document.

4. Declassification instructions and other downgrading instructions do not apply to documents containing Restricted Data (RD) or Formerly Restricted Data (FRD). Positive action by an authorized person is required to declassify RD or FRD documents. Only a Department of Energy (DOE) designated declassifier can declassify an RD document. Only a designated declassifier in DOE or an authorized DON OCA can make a declassification decision for an FRD document.

6-11 WARNING NOTICES AND ASSOCIATED MARKINGS

1. Warning notices advise document holders that additional protective measures such as restrictions on reproduction, dissemination or extraction are necessary.

2. The following warning notices are authorized for use, when applicable:

a. **Dissemination and Reproduction Notices.** Mark classified documents subject to special dissemination and reproduction limitations, as determined by the originator, with one of the following statements on the face of the document, at the bottom center of the page, above the classification level marking:

"REPRODUCTION REQUIRES APPROVAL OF ORIGINATOR OR HIGHER DOD AUTHORITY."

"FURTHER DISSEMINATION ONLY AS DIRECTED BY (insert appropriate command or official) OR HIGHER DOD AUTHORITY."

b. **RD and FRD.** Per references (c) and (d), mark classified documents containing RD and/or FRD on the face of the document, in the lower left corner, with the applicable warning notice. Note that the RD notice takes precedence over the FRD notice if both RD and FRD information are contained in the document (see exhibits 6A-9 and 6A-10):

"RESTRICTED DATA"—"This material contains Restricted Data as defined in the Atomic Energy Act of 1954. Unauthorized disclosure subject to administrative and criminal sanctions."

"FORMERLY RESTRICTED DATA"—"Unauthorized disclosure subject to administrative and criminal sanctions. Handle as RESTRICTED DATA in foreign dissemination. Section 144.b, Atomic Energy Act, 1954."

Portion mark documents containing RD with the abbreviated form "RD" (e.g., "(TS/RD)") and portions containing FRD with the abbreviated form "FRD" (e.g., "(C/FRD)"). Place the short forms ("RESTRICTED DATA" or "FORMERLY RESTRICTED DATA") on interior pages, after the classification level at the top and bottom of each applicable page (e.g. "SECRET RESTRICTED DATA" or "SECRET FORMERLY RESTRICTED DATA"). Additionally, place these short forms after the classification level at the top left corner on the first page of correspondence and letters of transmittal.

c. **CNWDI**. CNWDI (a subset of RD) is subject to special dissemination controls and marking requirements. In addition to the RD notice, mark the face of a document containing CNWDI in the lower left corner with the following warning notice:

"CRITICAL NUCLEAR WEAPONS DESIGN INFORMATION, DOD
DIRECTIVE 5210.2 APPLIES"

Portion mark RD documents containing CNWDI with the abbreviated form "(N)" (e.g., "(S/RD)(N)"). Mark interior pages containing CNWDI with the short form "CNWDI" after the classification level at the bottom center of each applicable page (see exhibit 6A-10). Place "CRITICAL NUCLEAR WEAPONS DESIGN INFORMATION, DOD DIRECTIVE 5210.2 APPLIES" after the classification level at the top left corner on the first page of correspondence and letters of transmittal. The marking policies and dissemination procedures for CNWDI are contained in reference (d). Note that the RD warning notice is also required on the face of documents containing CNWDI.

d. **NNPI**

(1) Per reference (e), there is national policy prohibiting foreign disclosure of NNPI. There are special distribution control markings used on correspondence and documents containing classified or unclassified NNPI. Requirements for the proper use and placement of these markings are set forth in references (e) and (f) (these markings shall only be used on NNPI documents). Use of the NOFORN marking on NNPI is not to be confused with the NOFORN marking authorized for use as an intelligence control warning notice on classified intelligence information (see paragraph 6-12):

"NOFORN" - NOT RELEASABLE TO FOREIGN NATIONALS;

"SPECIAL HANDLING REQUIRED" - NOT RELEASABLE TO FOREIGN NATIONALS;

"THIS DOCUMENT (or material) IS SUBJECT TO SPECIAL EXPORT CONTROLS AND EACH TRANSMITTAL TO FOREIGN

GOVERNMENTS OR FOREIGN NATIONALS MAY BE MADE ONLY WITH
PRIOR APPROVAL OF THE COMNAVSEASYSKOM"

(2) The paragraph 6-5 requirement for portion marking is waived for documents containing classified NNPI (except for NNPI classified as RD). However, in the case of a document containing both classified NNPI and non-NNPI classified information, the non-NNPI classified portions shall be portion marked as required in paragraph 6-5.

(3) Mark associated markings on the face of a classified NNPI document (except an NNPI document also classified as RD) per reference (e).

(4) Classified NNPI containing RD or FRD information is governed by the provisions of paragraphs 6-5 and 6-10. Classified NNPI not containing RD or FRD information shall include the associated markings set forth in reference (e).

(5) Department of Energy Unclassified Controlled Nuclear Information (DOE UCNI). Mark unclassified NNPI which is also DOE UCNI per reference (e).

e. **SIOP.** Per reference (g), SIOP documents shall be marked in the same manner as any other classified document. SIOP documents released to NATO shall be marked per reference (g). NATO documents that contain details of the type and quantity described in reference (g) will include the following statement on the cover, the title page, and in the letter of promulgation:

"This document contains extremely sensitive information affecting the Single Integrated Operational Plan. Access to this document or the information contained herein shall be strictly limited commensurate with rigorously justified requirements. Use of military-controlled vehicles and two officially designated couriers is mandatory."

f. **SIOP-ESI.** Per reference (g), SIOP-ESI documents (e.g., correspondence, reports, studies, messages and any other media relaying SIOP-ESI) are subject to special dissemination controls. Mark the front and back cover of SIOP-ESI documents, center top and bottom, below the classification level marking, with the indicator "SIOP-ESI Category XX". Additionally, mark the face of SIOP-ESI documents, bottom left, with the following warning notice:

"This (correspondence, memorandum, report, etc.) contains SIOP-ESI Category XX data. Access lists

govern internal distribution."

Messages containing SIOP-ESI shall include the designator "SPECAT" and the indicator "SIOP-ESI Category XX" with the category number spelled out (e.g., SPECAT SIOP-ESI CATEGORY ONE) at the beginning of the message text immediately following the overall message classification, followed by the above warning notice.

g. COMSEC

(1) Per reference (h), the designator "CRYPTO" identifies all COMSEC documents and keying material which are used to protect or authenticate classified or controlled unclassified government or government-derived information. The marking "CRYPTO" is not a security classification.

(2) Mark COMSEC documents and material likely to be released to contractors with the following warning notice on the face of the document, at the bottom center of the page, above the classification level marking:

"COMSEC Material - Access by Contractor Personnel
Restricted to U.S. Citizens Holding Final Government
Clearance."

3. Notices for Controlled Unclassified Information (CUI) are as follows:

a. FOR OFFICIAL USE ONLY (FOUO) and FOR OFFICIAL USE ONLY (Law Enforcement Sensitive) (FOUO-LES)

(1) **Documents containing FOUO.** Per references (i), mark the bottom front cover (if any), interior pages of documents, and on the outside back cover (if any) with "FOR OFFICIAL USE ONLY".

Subjects, titles and each section part, paragraph, and similar portion of an FOUO document requiring protection shall be portion marked. Place the abbreviation "(FOUO)" immediately following the portion letter or number, or in the absence of letters or numbers, immediately before the beginning of the portion. Unclassified letters of transmittal with FOUO enclosures or attachments shall be marked at the top left corner with "FOR OFFICIAL USE ONLY ATTACHMENT". Additionally, mark FOUO documents transmitted outside the DoD with the following notice:

"This document contains information exempt from
mandatory disclosure under the FOIA. Exemption(s)
_____ apply."

(2) **Classified documents containing FOUO.** Per reference

(i), classified documents containing FOUO do not require any FOUO markings on the face of the document; however, the interior pages containing only FOUO information shall be marked top and bottom center with "FOR OFFICIAL USE ONLY". Mark unclassified portions containing only FOUO with "(FOUO)" immediately before the portion (see exhibit 6A-3). Classification markings take precedence over FOUO markings; mark portions that contain FOUO and classified information with the appropriate abbreviated classification designation (i.e., (TS), (S), etc.).

(3) **Documents containing FOUO-LES.** Per reference (i), mark documents containing FOUO Law Enforcement Sensitive (FOUO-LES) in the same manner as documents containing FOUO. Add "Law Enforcement Sensitive" to the FOUO marking, and "LES" to portion markings. Law Enforcement Sensitive information takes precedence over other FOUO information. Documents and portions containing both FOUO and FOUO-LES should be marked with the FOUO-LES markings.

b. DoD Unclassified Controlled Nuclear Information (DoD UCNI).

(1) **Unclassified documents containing DoD UCNI.** Per reference (j), mark the bottom face and the back cover of unclassified documents containing DoD UCNI with "DoD Unclassified Controlled Nuclear Information." Portion mark DoD UCNI unclassified documents with the abbreviated form "(DoD UCNI)" immediately before the beginning of the portion. Mark correspondence and letters of transmittal at the top left corner on the face of the document with "DoD Unclassified Controlled Nuclear Information."

(2) **Classified documents containing DoD UCNI.** Per reference (j), mark classified documents containing DoD UCNI as any other classified document except that interior pages with no classified information shall be marked "DoD Unclassified Controlled Nuclear Information" at the top and bottom center. Portion mark classified documents that contain DoD UCNI with the abbreviated form "(DoD UCNI)" immediately before the beginning of the portion and in addition to the classification marking (e.g., "(S/DoD UCNI)"). Mark correspondence and letters of transmittal at the top left corner on the face of the document with "DoD Unclassified Controlled Nuclear Information."

(3) Additionally, mark the face of documents containing DoD UCNI which are transmitted outside the DoD in the lower left corner with the following notice:

"DEPARTMENT OF DEFENSE UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION, EXEMPT FROM MANDATORY DISCLOSURE (5 U.S.C. 552(b)(3), as authorized by 10 U.S.C. 128)"

c. Drug Enforcement Administration (DEA) Sensitive Information.

(1) **Unclassified documents containing DEA Sensitive Information.** Per reference (i), mark the top and bottom face and back cover of unclassified documents containing DEA Sensitive information with "DEA Sensitive." Portion mark unclassified DEA Sensitive documents with the abbreviated form "(DEA)" immediately before the beginning of the portion. Mark interior pages of unclassified DEA Sensitive documents top and bottom center with "DEA Sensitive."

(2) **Classified documents containing DEA Sensitive Information.** Per reference (i), mark classified documents containing DEA Sensitive information as any other classified document except that interior pages with no classified information shall be marked "DEA Sensitive" at the top and bottom center. Portion mark classified documents that contain DEA Sensitive information with the abbreviated form "(DEA)" immediately before the beginning of the portion and in addition to the classification marking (e.g., "(S/DEA)").

d. Department of State (DOS) Sensitive But Unclassified (SBU) Information. Per reference (i), The DOS does not require that SBU information be specifically marked, but does require that holders be made aware of the need for controls. Mark DON documents containing SBU information in the same manner as if the information were FOUO.

e. NATO and Foreign Government RESTRICTED Information. Mark documents containing NATO and Foreign Government RESTRICTED information per paragraph 6-16.

f. National Geospatial-Intelligence Agency (NGA) LIMITED DISTRIBUTION Information. Mark information or material designated as LIMITED DISTRIBUTION, or derived from such information or material per reference (k), which contains details of policies and procedures regarding use of the LIMITED DISTRIBUTION caveat.

6-12 INTELLIGENCE CONTROL MARKINGS

1. The policy for marking intelligence information is contained in reference (l). Mark classified documents containing intelligence information with all applicable intelligence

control markings on the face of the document, at the bottom center of the page, above the classification level. Mark interior pages containing intelligence information with the short

forms of all applicable intelligence control markings after the classification level at the bottom of each applicable page. Mark portions of intelligence documents with the abbreviated form of all applicable intelligence control markings. Additionally, place the applicable intelligence control marking(s), in its entirety, after the classification level at the top left corner on the first page of correspondence and letters of transmittal (see exhibit 6A-11).

2. Authorized intelligence control markings are as follows:

a. "DISSEMINATION AND EXTRACTION OF INFORMATION CONTROLLED BY ORIGINATOR" ("ORCON" or "OC").

(1) This marking is the most restrictive intelligence control marking and shall only be used on classified intelligence that clearly identifies or would reasonably permit ready identification of intelligence sources or methods that are particularly susceptible to countermeasures that would nullify or measurably reduce their effectiveness. It is used to enable the originator to maintain continuing knowledge and supervision of distribution of the intelligence beyond its original dissemination. This control marking shall not be used when access to the intelligence information will reasonably be protected by its security classification level marking, use of any other control markings specified in reference (1), or in other Director of Central Intelligence Directives.

(2) This information shall not be used in taking investigative action without the advance permission of the originator. The short form of this marking is "ORCON"; the abbreviated form is "OC".

b. "CAUTION-PROPRIETARY INFORMATION INVOLVED" ("PROPIN" or "PR").

(1) Use this marking with, or without, a security classification level marking, to identify information provided by a commercial firm or private source under an expressed or implied understanding that the information shall be protected as a trade secret or proprietary data believed to have actual or potential intelligence value. This marking may be used on U.S. Government proprietary data only when the U.S. Government proprietary information can provide a contractor(s) an unfair advantage such as U.S. Government budget or financial information. The short form of this marking is "PROPIN"; the abbreviated form is "PR".

c. "NOT RELEASABLE TO FOREIGN NATIONALS" ("NOFORN" or "NF").

(1) Use this marking to identify classified intelligence which, per reference (m), the originator has determined may not be disclosed or released, in any form, to foreign governments, international organizations, coalition partners, foreign nationals, or immigrant aliens without originator approval. This marking is not authorized for use in conjunction with the "AUTHORIZED FOR RELEASE TO" ("REL TO") marking. The short form of this marking is "NOFORN"; the abbreviated form is "NF."

(2) Within the DON, only the Director of Naval Intelligence and the Director of Intelligence, United States Marine Corps, may determine what information warrants initial application of the "NOFORN" caveat. The "NOFORN" caveat shall not be applied to non-intelligence information except for NNPI (see paragraph 6-11). There is no other DON authorized use of the "NOFORN" marking on non-intelligence information. If documents marked with the "NOFORN" caveat are used for derivative classification, however, the derivative classifier should assume that the marking is correct until advised otherwise by the cognizant intelligence authority.

6-13 MARKING DOCUMENTS RELEASABLE TO FOREIGN NATIONALS

1. The "REL TO" control marking was previously only for use on intelligence information, but is now authorized for use on all classified defense information deemed releasable through appropriate foreign disclosure channels. Use the marking "RELEASABLE TO USA// (applicable country trigraph(s), international organization or coalition force tetragraph)" ("REL" or "REL TO"), when information has been determined releasable through established foreign disclosure procedures to foreign nationals, international organizations or multinational forces. Further foreign dissemination of the material (in any form) is authorized only after obtaining permission from the originator.

2. The full marking "REL TO USA// (applicable country trigraph(s), international organization or coalition force tetragraph)" shall be used after the classification and will appear at the top and bottom of the front cover, title page, first page and the outside of the back cover, as applicable. "REL TO" must include country code "USA" as the first country code listed. Country trigraphic codes shall be listed in alphabetical order, after the USA, followed by international organization/coalition tetragraphic codes listed in alphabetical order. Country codes shall be separated by a comma and a space with the last country code separated by a space, and followed by two slashes (i.e., TOP SECRET//REL TO USA, EGY, ISR//) (See exhibit 6A-12).

3. The countries do not need to be listed when portion marking,

AP2.1.43. Multiple Sources. Two or more source documents, classification guides, or a combination of both.

AP2.1.44. National Security. The national defense or foreign relations of the United States.

AP2.1.45. Need-To-Know. A determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function.

AP2.1.46. Network. A system of two or more computers that can exchange data or information.

AP2.1.47. Nickname. A nickname is a combination of two separate unclassified words that is assigned an unclassified meaning and is employed only for unclassified administrative, morale, or public information purposes.

AP2.1.48. Original Classification. An initial determination that information requires, in the interest of national security, protection against unauthorized disclosure.

AP2.1.49. Original Classification Authority. An individual authorized in writing, either by the President, or by Agency Heads or other officials designated by the President, to originally classify information.

AP2.1.50. Permanent Historical Value. Those records that have been identified in an Agency records schedule as being permanently valuable.

AP2.1.51. Prospective Special Access Program (P-SAP). A DoD program or activity for which enhanced security measures have been proposed and approved to facilitate security protections prior to establishing the effort as a DoD SAP.

AP2.1.52. Protective Security Service. A transportation protective Service provided by a cleared commercial carrier qualified by the Military Traffic Management Command (MTMC) to transport SECRET shipments. The carrier must provide continuous attendance and surveillance of the shipment by qualified carrier representatives and maintain a signature and tally record. In the case of air movement, however, observation of the shipment is not required during the period it is stored in the carrier's aircraft in connection with flight, provided the shipment is loaded into a compartment that is not accessible to an unauthorized person aboard. Conversely, if the shipment is loaded into a compartment of the aircraft that is accessible to an

The Judge Advocate's Handbook For Litigating National Security Cases

Prosecuting, Defending and Adjudicating National Security Cases

**National Security and Intelligence Law Division (Code 17)
Office of the Judge Advocate General
Department of the Navy
Washington Navy Yard
1322 Patterson Avenue
Washington, D.C. 20374-5066**

is not publicly releasable for some other reason. "(C)" means the paragraph contains information classified up to CONFIDENTIAL. "(S)" means the paragraph contains information classified up to SECRET. "(TS)" means the paragraph contains information classified up to TOP SECRET.

Dissemination controls and handling caveats are not classification markings. They advise the holders of a document of additional protective measures such as restrictions on reproduction, dissemination or extraction. SECNAVINST 5510.36, at 6-11.1. Markings on information such as SENSITIVE, FOR OFFICIAL USE ONLY, NOFORN, ORCON, SPECAT, or a codeword are not classification levels. They are markings that limit the dissemination or handling of information for reasons other than the classification level. Such markings are further defined in Chapter 6 of SECNAVINST 5510.36 and include:

NOFORN - NOT RELEASABLE TO FOREIGN NATIONALS

ORCON - DISSEMINATION AND EXTRACTION OF INFORMATION CONTROLLED BY ORIGINATOR

REL TO - AUTHORIZED FOR RELEASE TO

SPECAT - SPECIAL CATEGORY

PROPIN - CAUTION PROPRIETARY INFORMATION INVOLVED

SAMI - SOURCES AND METHODS INFORMATION

You may see on older document certain dissemination controls or handling caveats that are no longer used. Such markings include:

NOCONTRACT - NOT FOR RELEASE TO CONTRACTORS/CONSULTANTS

WNINTEL - WARNING NOTICE - INTELLIGENCE SOURCES AND METHODS INVOLVED.

E. Classification Authority. A classification authority is an official empowered to determine whether information is classified and so mark it. There are two types of classification authorities: original and derivative.

1. Original Classification Authority (OCA). An OCA is "an individual authorized in writing, either by the President, or by agency heads or other officials designated by the President, to classify information in the first instance." E.O. 12958, § 1.1(g). The only OCAs are the President; agency heads and officials so designated by the President in the Federal Register; and United States Government officials delegated OCA authority. E.O. 12958, § 1.4(a). Such delegations must be in writing, to a position vice a person, and kept to a minimum. E.O. 12958, § 1.4(c). The President and agency heads or officials designated by the President can delegate

Security

**Department of
the Army
Information
Security
Program**

**Headquarters
Department of the Army
Washington, DC
29 September 2000**

UNCLASSIFIED

1995 and marked OADR will be marked:
Derived from: Multiple Sources
Declassify on: Sources marked X2,3,5 and OADR
Date of Source: 10 February 1996

4. The above rules apply to derivatively classified documents when a combination of original classification and derivative sources are used. The term “sources” as used above also includes the classification guides or guidance supplied by the original classifier.

5. With sources having a combination of differing declassification instructions, it is important to determine which is the most restrictive. The most restrictive marking will always be used. This rule applies for all derivative classifications including those in which there is a combination of derivative sources and original classification. A marking that does not provide a definite declassification date will always be considered more restrictive than one with a specific date. For instance, a document that is classified by two sources, one dated 19 August 1994 and marked “OADR” and the other dated 10 December 1995 and marked “Declassify on: 24 May 2004”, will be marked: “Declassify on: Source marked “OADR”, Date of Source: 19 August 1994”. See subportion (3) directly above for an example of a case in which one source is marked OADR and the other is marked with one or more of the exemption categories (X1 through X8) of Executive Order 12958.

4–11. Sources that were created prior to 1976

Chapter 3 provides the policy for marking information contained in records that will be more than 25 years old on 17 October 2001, and have been determined to have permanent historical value under title 44, USC. In summary, under EO 13142, amendment to EO 12958, section 3.4, information more than 25 years old by 17 October 2001, and that is contained in records that have been determined to have permanent historical value under title 44, USC will be automatically declassified starting on 17 October 2001, unless that information is exempted from declassification. The exemption categories, required markings, and the DA policy for handling this program are discussed in chapter 3 of this regulation. This section is not intended to prescribe the policy for addressing the review of that information. That policy is contained in chapter 3. This section prescribes the policy to follow when material, that will be over 25 years old by 17 October 2001, is used as the source for derivatively classifying a newly created document. Commands will consult AR 25–400–2 and local records managers for advice on what constitutes a file determined to have permanent historical value under Title 44, USC. In creating new documents using the old sources that will be over 25 years on 17 October 2001, it will make a difference whether or not the information has already been reviewed to determine if it is in a record that has been determined to have permanent historical value and whether or not it has been reviewed to determine if it will be declassified or exempted from automatic declassification. There are three possible options:

a. The information is determined to be of permanent historical value under title 44, USC, has been reviewed for continued classification, and qualifies under one or more of the exemptions listed in paragraph 3–6e of this regulation (section 3.4 of EO 12958). If it qualifies for exemption, the exemption category and the future date or event for declassification (if one applies) will be shown on the document, file, or record. When one of these documents is used as a source in classifying a derivatively classified newly created document, use the term shown on the document or record that was applied when the information was reviewed. That term will be “25X” followed by the appropriate exemption category that pertains to information exempted from declassification at 25 years and state the new declassification date or event, if one has been determined. For example, “25X3(31 December 2015)” if the information is exempted because it reveals information that would impair U.S. cryptologic systems and now has been determined to be declassified on 31 December 2015. Sometimes there will only be the exemption category with no date or event listed for declassification. For example, “25X1” if the information would reveal the identity of a human intelligence source.

b. The information is contained in a record that has been determined to have permanent historical value under title 44, USC, has been reviewed, and has been determined to not qualify for exemption. This information will have been marked with a declassification date or event on or before 17 October 2001. This date or event will be used as declassification instructions.

c. The information is either in a record that has been determined to not have permanent historical value under title 44 USC; or is in a record that has been determined to have permanent historical value under title 44 USC but has not yet been reviewed for declassification. This information would be subject to declassification 25 years from the date of its origin. Thus, the date of the source document will be placed, as the following, for declassification instructions:
Source marked OADR
Date of Source:(fill in applicable date)

4–12. Warning notices

In certain circumstances, warning notices will be required if the document contains certain categories of information for which the notice applies. In addition to the notices listed below, other notices may be required by other DA regulations. Unless another regulation or authorized administrative publication prescribes different placement, these notices will be placed on the cover (or first page where there is no cover) of the document.

a. *Restricted Data (RD)*. Documents containing RD will be marked: “RESTRICTED DATA” THIS MATERIAL

CONTAINS RESTRICTED DATA AS DEFINED IN THE ATOMIC ENERGY ACT OF 1954. UNAUTHORIZED DISCLOSURE SUBJECT TO ADMINISTRATIVE AND CRIMINAL SANCTIONS.

b. Formerly Restricted Data (FRD). Documents containing FRD, but no Restricted Data, will be marked: "FORMERLY RESTRICTED DATA" "Unauthorized disclosure subject to administrative and criminal sanctions. Handle as Restricted Data in foreign dissemination. Section 144.b, Atomic Energy Act, 1954."

c. Critical Nuclear Weapons Design Information (CNWDI). Messages containing CNWDI will be marked at the beginning of the text as "RD CNWDI." Documents containing CNWDI will be marked: "Critical Nuclear Weapons Design Information DOD Directive 5210.2 applies"

d. Intelligence Information. The policy on the control, dissemination, and marking of warning notices concerning intelligence information is contained in appendix D. Placement of these intelligence control markings will follow the same policy as stated in appendix D.

e. COMSEC Material. The following marking will be placed on COMSEC documents before release to contractors: "COMSEC Material – Access by Contractor Personnel Restricted to U.S. Citizens Holding Final Government Clearance."

f. Reproduction Notices. Classified information that is subject to dissemination or reproduction limitations will be marked with notices that say, in essence, the following: "Reproduction requires approval of originator or higher DOD authority of the originator". "Further dissemination only as directed by (insert appropriate office or official) or higher DOD authority"

g. Special Access Programs (SAPs) Documents. Special Access Programs documents may be identified with the phrase "Special Access Required" and the assigned nickname, codeword, trigraph, or digraph. AR 380–381 contains the Department of the Army policy on marking SAPs material. See appendix I for further information.

h. DODD 5230.24 requires distribution statements to be placed on technical documents, both classified and unclassified. These statements facilitate control, distribution and release of these documents without the need to repeatedly refer questions to the originating activity. The originating office may, of course, make case-by-case exceptions to distribution limitations imposed by the statements. Distribution statements on technical documents will be marked with notices that say, in essence, the following:

- (1) Distribution Statement A — Approved for public release; distribution is unlimited.
- (2) Distribution Statement B — Distribution authorized to U.S. Government agencies only; [reason]; [date]. Other requests for this document shall be referred to [controlling DOD office].
- (3) Distribution Statement C — Distribution authorized to US Government agencies and their contractors; [reason]; [date]. Other requests for this document shall be referred to [controlling DOD office].
- (4) Distribution Statement D — Distribution authorized to the DOD and US DOD contractors only; [reason]; [date]. Other requests for this document shall be referred to [controlling DOD office].
- (5) Distribution Statement E — Distribution authorized to DOD Components only; [reason]; [date]. Other requests for this document shall be referred to [controlling DOD office].
- (6) Distribution Statement F — Further distribution only as directed by [controlling DOD office] or higher DoD authority; [date].
- (7) Distribution Statement X — Distribution authorized to US Government agencies and private individuals or enterprises eligible to obtain export-controlled technical data in accordance with regulations implementing 10 USC 140c; [date]. Other requests must be referred to [controlling DOD office].

i. Documents containing information provided by a foreign government. See section VI of this chapter for complete policy on marking foreign government information in classified DA documents. U.S. classified documents that contain extracts of information provided by a foreign government will be marked with the following warning notice: "FOREIGN GOVERNMENT INFORMATION"

j. Documents containing information provided by a foreign government or international organization. See section VII of this chapter for complete policy on marking information provided by a foreign government or international organization. Examples of an international organization are the United Nations (UN) and the North Atlantic Treaty Organization (NATO). The following example pertains to NATO. The same policy applies to any other international organization by replacing the word "NATO" with the appropriate name or abbreviation for that organization. DA classified documents that contain extracts of NATO classified information will bear a marking substantially as follows: "THIS DOCUMENT CONTAINS NATO CLASSIFIED INFORMATION"

k. The following warning notice must appear on all U.S. Government owned or operated automated information systems:

"THIS IS A DOD COMPUTER SYSTEM. BEFORE PROCESSING CLASSIFIED INFORMATION, CHECK THE SECURITY ACCREDITATION LEVEL OF THIS SYSTEM. DO NOT PROCESS, STORE, OR TRANSMIT INFORMATION CLASSIFIED ABOVE THE ACCREDITATION LEVEL OF THIS SYSTEM. THIS COMPUTER SYSTEM, INCLUDING ALL RELATED EQUIPMENT, NETWORKS, AND NETWORK DEVICES (INCLUDES INTERNET ACCESS), ARE PROVIDED ONLY FOR AUTHORIZED U.S. GOVERNMENT USE. DOD COMPUTER SYSTEMS MAY BE MONITORED, FOR ALL LAWFUL PURPOSES, INCLUDING TO ENSURE THEIR USE IS AUTHORIZED, FOR MANAGEMENT OF THE SYSTEM, TO FACILITATE PROTECTION AGAINST

From:

[REDACTED]

Ms. [REDACTED]

Please pass to Colonel Parrish

Sir,

1. The Prosecution has prepared the Subject SOPs for discovery, but has not yet provided them to the Defense.
2. After filing the request for Protective Order yesterday, the Prosecution paralegal communicated with the Defense paralegal regarding service of these, and other documents, on the Defense. At the time, I had directed the Prosecution paralegal not to provide the documents until the Protective Order was issued or I instructed otherwise. The paralegals agreed that they would affect discovery on Thursday, because of previous work commitments of the Defense paralegal today and Wednesday.
3. The Prosecution is prepared to provide the discovery sooner (as our paralegal previously indicated) than previously agreed if the Defense is prepared to accept it.
4. The Prosecution intended to file a request for extension and/or relief in the event the Military Judge declined to issue the protective order, since our authority to release was contingent on obtaining a protective order.

V/R,

Jeff Groharing
[REDACTED] . Marine Corps

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

COL Parrish has directed the email below be distributed to counsel and other interested parties.

[REDACTED] y

[REDACTED]

[REDACTED] OGC

Subject: FW: U.S. v. Khadr -- Special Request for Relief

1. Trial Counsel: You will respond to the email from defense concerning your alleged failure to comply with the commission's order to produce certain detention SOPs within 10 days. You will respond NLT 1200 hours on 2 July 2008. Your response will address:

- a. Whether the detention SOPs have been produced as ordered by the commission.
- b. If you have produced them, when you produced them.
- c. If you have not produced them as ordered, why not and why there was no request for relief from or extension of the commission imposed deadline.

2. Defense Counsel: If you have a motion, you will file it in proper form so it may be addressed at the next scheduled motions' hearing.

Patrick J. Parrish
COL, JA
Military Judge

[REDACTED]

Ma'am,

1. On 19 Jun 08, the Military Commission granted D-057, a defense motion to compel production of detention facility SOPs. The Military Judge ordered the prosecution to produce the SOPs within ten days.

2. At 1601 on 30 Jun 08, the last possible day on which the Military Commission's order could be deemed to have expired, the prosecution sent an e-mail request to the Military Commission, asking the Military Judge to enter Protective Order # 7, identifying entry of the order as a condition to be met before the prosecution would produce the SOPs to the defense. The

prosecution did not request relief from the Military Commission's 19 Jun 08 order to produce the SOPs within ten days, nor did the prosecution specify any grounds for the request other than its unilateral decision to withhold discovery until the Military Judge entered the requested order.

3. The ten-day period for production specified by the Military Commission on 19 Jun 08 has expired. The prosecution has failed to produce the SOPs or obtain relief from the terms of the order from the Military Judge. The prosecution is therefore in violation of the Military Commission's 19 Jun 08 order. This is not the first time the prosecution has substituted its own calendar for that of the Commission and the defense is dismayed at the prosecution's effort to unilaterally condition its compliance with the terms of the Military Commission's unambiguous order.

4. Moreover, whether styled as a motion or special request for relief, it appears that the defense is entitled, at a minimum, to the opportunity to respond to the prosecution request for entry of Protective Order # 7. This is more than a mere formality. Six protective orders are already in place in this case, which are more than sufficient to deal with whatever security concerns the government may have regarding information contained in the SOPs. These orders govern the dissemination of both classified and unclassified information that is "protected" (e.g., FOUO/LES). The prosecution has provided no grounds whatsoever to justify the entry of yet another protective order, which is largely redundant of Protective Order # 1, to govern unclassified, unprotected information from disclosure in filings or in open court. In view of the prosecution's consistent effort to restrict the flow of information about this case to the defense and to the public, Protective Order # 7 raises serious concerns about undue infringement of Mr. Khadr's right to public trial (see RMC 806).

5. In light of the foregoing, the defense respectfully requests the following:

a. That the Military Judge vacate Protective Order # 7. If the prosecution believes it has grounds to justify the terms of an additional protective order, it may bring a motion (or other request) for appropriate relief, stating a basis other than the will of the government.

b. That the Military Judge appropriately sanction the prosecution for its willful defiance of the Commission's discovery order pursuant to RMC 701(1)(3). As the discovery at issue relates to the defense's ongoing (and repeatedly frustrated) efforts to investigate the circumstances of Mr. Khadr's confinement and interrogation (see para. 6 hereof), the defense respectfully requests that the Military Judge suppress all evidence of statements Mr. Khadr allegedly made to agents of the government that would have been affected or governed by the still undisclosed SOPs. Alternatively, the defense respectfully requests that the Military Judge dismiss all charges and specifications, without prejudice.

6. As a final matter, the defense notes that the prosecution's intransigence in providing discovery is in no way an isolated instance. The attachment to this e-mail is an affidavit prepared by defense counsel, which was to be filed in connection with the U.S. Supreme Court case of *Boumediene v. Bush*, ___ U.S. ___ (2008). The affidavit describes the contents of an interrogation SOP, which was attached to the Schmidt-Furlow (S/F) report. The SOP reveals that the defense effort to investigate the circumstances surrounding Mr. Khadr's interrogations has likely been made more difficult by deliberate government efforts to destroy evidence containing "interrogation information" so that it would not be available in connection with subsequent legal proceedings. The defense was initially provided with limited access to the S/F report -- it was one of a number of documents that the prosecution unnecessarily compelled defense counsel to review in prosecution offices, sometimes in the presence of personnel assigned to the prosecution office, rather than providing the defense with its own copy. After the contents of the affidavit became public, however, the government restricted defense access to the SOP (based on direction from other DoD

officials) to the point where the defense could not provide materials to the Commission relevant to its consideration in connection with a recent defense motion that this Commission denied. While this matter will be the subject of a motion based on unlawful influence, the defense mentions it here to show that the remedy sought in para. 5b is in no way excessive in light of the overall circumstances of this case and the government's history of frustrating defense efforts to obtain information critical to Mr. Khadr's defense. In fact, at an 8 May 08 session of this Commission, the Commission was compelled to threaten abatement in the event the prosecution did not produce discovery materials to the defense by a date-certain. Accordingly, the prosecution is (and has been) on notice of the potential consequences that might result from further dilatory tactics.

V/R

LCDR Kuebler

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR
a/k/a “Akhbar Farhad”
a/k/a “Akhbar Farnad”
a/k/a “Ahmed Muhammed Khali”

D-072

GOVERNMENT’S RESPONSE

To the Defense’s Motion to
Dismiss

28 July 2008

1. **Timeliness:** This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge’s scheduling order of 19 June 2008.

2. **Relief Requested:** The Government respectfully requests that the Defense’s motion to dismiss be denied in full.

3. **Overview:**

a. The Defense essentially argues that coordination among interested components of the Department of Defense prior to release of classified and otherwise protected materials to the Defense is “unlawfully influencing” the Prosecution. The Prosecution has at no point been unlawfully influenced by anyone.

b. Preparation and litigation of a criminal case is a consultative and collaborative process; this is even more so with military commissions, which involve complex issues of national security, classification of documents and testimony, and multiple agencies of the United States Government.

c. The fact that trial counsel may be granted access to documents and other evidence at various stages of investigating and preparing a case does not mean that counsel then have the authority to disclose that material to the defense or the public. Once prosecutors have reviewed the evidence in question, they must—and routinely do—consult with the “owners” of that information, as well as with legal experts in the Department of Defense and elsewhere in government to determine the best approach with the evidence in question, evaluating a range of options that includes refusal/inability to produce, redaction, limited release to the defense but not the accused, seeking a protective order, or outright, unrestricted release. This consultation does not result in “unlawful influence” of the trial counsel and does not warrant any of the relief requested by the Defense.

4. **Burden of Persuasion:** As the moving party, the Defense bears the burden of persuasion. *See* Rule for Military Commissions (RMC) 905(c).¹

¹ The decisions of the military courts interpreting the Uniform Code of Military Justice (“UCMJ”) are not binding on this commission. *See* 10 U.S.C. § 948b(c). To the extent the court looks to the UCMJ for guidance, under court-martial practice, the Defense has the initial burden of producing

5. Facts: The following facts supplement or clarify assertions contained in the Defense motion:

a. The Prosecution allowed the Defense to review the reports in question and instructed the Defense to identify any portions that it would like provided in discovery. At the time of the Defense review, the Prosecution notified the Defense that the Prosecution would have to coordinate release of any of the requested portions of the reports with appropriate components within the Department of Defense and other U.S. Government agencies prior to providing the Defense with any of the documents.

b. As stated in the above paragraph, at the time Defense was permitted to review the reports in question, it was made clear to the Defense that the Prosecution would have to obtain approval from the original classification authorities prior to providing the Defense copies of the documents in question. The “consternation” expressed related to the recognition that trial counsel, acting in good faith and attempting to expedite the Defense request, had allowed the Defense to review the documents in question prior to appropriate coordination. Although not reduced to writing, the policy in place at the Office of Military Commissions – Office of the Chief Prosecutor required Prosecutors to complete necessary coordination through the Office of General Counsel prior to allowing the Defense review of the documents. The Prosecution had not done so with regard to the documents in question.

c. On Tuesday, 22 July 2008, the Prosecution discovered the Schmidt-Furlow report to the Defense, minus one attachment containing ICRC materials.

d. Approval to discover relevant portions of the Church report is pending with the Secretary of Defense. The Prosecution will advise the Defense when any portions of the Church report are approved for discovery.

sufficient evidence to show facts which, if true, would constitute unlawful influence, and that the alleged unlawful influence has a logical connection to courts-martial in terms of its potential to cause unfairness in the proceedings. *See Green v. Widdecke*, 19 U.S.C.M.A. 576, 579, 42 C.M.R. 178, 181 (1970) (“Generalized, unsupported claims of ‘command control’ will not suffice to create a justiciable issue.”). The burden of disproving the existence of unlawful influence or proving that it did not affect the proceeding does not shift to the Prosecution until the defense meets its burden of production. *See United States v. Thomas*, 22 M.J. 388, 396 (C.M.A. 1986), *cert. denied*, 479 U.S. 1085 (1987); *United States v. Rosser*, 6 M.J. 267 (C.M.A. 1979). After the burden shifts to the Prosecution, the Prosecution must address two distinct issues: (1) what must be proven? and (2) what is the quantum of proof required? *See United State v. Biagase*, 50 M.J. 143, 151 (1999) (“The [Prosecution] may carry its burden (1) by disproving the predicate facts on which the allegation of unlawful command influence is based; (2) by persuading the military judge or the appellate court that the facts do not constitute unlawful command influence; (3) if at trial, by producing evidence proving that the unlawful command influence will not affect the proceedings; or (4), if on appeal, by persuading the appellate court that the unlawful command influence had no prejudicial impact on the court-martial.”). Even applying the court-martial burden of persuasion, the Defense clearly has not sustained its burden.

6. **Discussion:**

The Defense has failed to demonstrate any harm resulting from the delay in obtaining the requested information.

a. The Military Commissions Act (MCA) provides that no person may attempt to coerce or by *any unauthorized* means influence the exercise of professional judgment by trial counsel or defense counsel. 10 U.S.C. §949b(a)(2)(c). Of course, implicit within this section of the statute is the recognition that there may be persons who may influence both trial and defense counsel by *authorized* means.

b. As stated above in footnote 1, decisions of courts-martial are not binding on this Military Commission. To the extent the Military Judge wishes to incorporate unlawful command influence analysis under Article 37 UCMJ caselaw, the starting point for any claim is to weigh the Defense allegations and determine whether these allegations, if true, would amount to unlawful command influence.²

c. The Defense must prove a nexus between the actions of attorneys at the Department of Defense Office of General Counsel and some legally cognizable harm to the accused.³ In this case, the acts of the Government were perfectly reasonable, and, in any event, at the time of the filing of this response, the Defense had already been provided the Schmidt-Furlow report (with the exception of one section pending review) and completion of coordination regarding release of the Church Report is expected in the very near future.

d. In the present case, the facts alleged by the Defense, even if presumed true, do not amount to unlawful influence. The acts taken to coordinate review of the requested information are perfectly reasonable considering the importance of protecting the classified and protected information at stake and resulted in no harm to the Defense.

e. The reasonable delay incurred by the Prosecution in conducting appropriate coordination has not put the defense at any disadvantage in this litigation, particularly in light of the Defense efforts to delay proceedings in this case as long as possible and attempt to avoid going to trial.⁴

f. The Defense has failed to demonstrate how they have been harmed by any actions of Prosecutors or attorneys from the Department of Defense Office of General Counsel. Having failed to meet their initial threshold requirement alleging unlawful influence, no

² The burden of disproving the existence of unlawful influence or proving that it did not affect the proceeding does not shift to the Prosecution until the defense meets its burden of production. *See United States v. Thomas*, 22 M.J. 388, 396 (C.M.A. 1986), *cert. denied*, 479 U.S. 1085 (1987); *United States v. Rosser*, 6 M.J. 267 (C.M.A. 1979).

³ *United States v. Reynolds*, 40 M.J. 198, 202 (C.M.A. 1994).

⁴ For a detailed recitation of Defense requests for delay and efforts to obtain a political resolution of this case, see Gov't response to D068 and Gov't Response to D024.

further analysis is necessary to deny this motion.

**The coordination between the Prosecution and members of the
Department of Defense Office of General Counsel
was properly authorized by law.**

g. In the event the Military Judge believes the Defense has met its threshold burden of production, the existence of unlawful influence over these proceedings is easily disproved.

h. The Military Commissions Act, taking into account the unique situation presented by prosecuting alleged unlawful enemy combatants while hostilities are ongoing, provides for unprecedented protection for classified and otherwise protected information. It is not unreasonable, nor unauthorized for attorneys at the Department of Defense Office of General Counsel (acting as the hub for requests for review, release, and declassification of information generated by Department of Defense components) to coordinate the release of information requested related to Military Commission cases.⁵ Although not documented in written procedures, OMC Prosecutors are required to forward requests for release of classified or protected information through the Office of General Counsel, who then identify equity holders throughout the Department of Defense and forward requests through the Department of Defense Joint Staff in order to coordinate with all relevant parties to obtain release authorization.⁶ An action as ministerial as coordinating this review should not be interpreted as unlawfully exerting influence over trial counsel's professional judgment.

i. As part of this process, Department of Defense components may request Prosecutors to obtain additional protection for information prior to dissemination to the Defense, *see, e.g.*, Protective Order #7, or coordinate to prepare an appropriate summary of discoverable information in lieu of providing the original documents. *See generally* MCRE 505(e)(3), MCRE 506 and RMC 701(f).⁷ This is not an unreasonable process and certainly not tantamount to "unlawfully influencing" a Military Commission. To the contrary, this process reflects appropriate efforts by Government officials to safeguard

⁵ The Defense brief cites DoD and Navy regulations regarding handling of classified information, none of which prohibits the type of coordination conducted by the Department of Defense for Military Commission cases.

⁶ The Prosecution notes that the current "Gentlemen's Agreement" regarding coordination with the Department of Defense Office of General Counsel has only relevantly recently been implemented. Prior to that time, Prosecutors coordinated directly with DoD components to review requests for release or declassification of documents.

⁷ The Defense motion acknowledges trial counsel's ability to invoke the national security privilege on behalf of the heads of military and government departments under the Military Commission's Act, but fails to recognize that coordination between the trial counsel and the equity holder is necessary prior to making the decision whether to assert a privilege decision. Under the present facts, absent communication with the appropriate classification authority (via Department of Defense Office of General Counsel), the trial counsel would not have knowledge whether the equity holders desired to assert the national security privilege over any of the requested materials.

classified information.⁸

j. Notwithstanding the allegations in the Defense motion, the Prosecutor's professional judgment has not been challenged. At no point has anyone from the Office of the Chief Prosecutor, Office of General Counsel, or any other entity or organization, told Prosecutors assigned to this case that any information was discoverable or not discoverable. That decision has been properly left to the Prosecution and the coordination efforts described above do not impact that judgment.⁹

k. In the present case, the Prosecutors permitted the Defense to review certain classified and otherwise protected information in order to identify any portions of the subject reports that the Defense wanted released for use in Military Commission proceedings. The Prosecution intended to coordinate review of the particular sections with appropriate equity holders to obtain release once the Defense completed reviewing the documents and identifying sections they sought released, assuming the request identified information the Prosecution agreed was discoverable under the Military Commissions Act. That release has subsequently occurred with the Schmidt-Furlow report and coordination regarding release of the Church report should be completed in the near future.

l. All of the actions taken by Prosecutors assigned to the Office of the Chief Prosecutor and members of the Department of Defense Office of General Counsel were authorized by and consistent with the MCA, the Manual for Military Commissions (MMC), and well established principles of military jurisprudence. None of the actions amounted to unlawful influence over the proceedings of this Commission and/or the professional judgment of trial counsel. The facts in this case overwhelmingly establish that there was no unlawful influence exerted over the Prosecution in this case; therefore, the Defense motion should be denied.

There is not even an appearance of unlawful influence.

m. Having failed to prove actual unlawful influence, the Defense has no basis for asserting apparent unlawful influence. The concept of apparent unlawful influence does not exist in the MCA, the MMC, or any of the regulations promulgated by the Secretary of Defense. To the extent "apparent unlawful influence" exists under UCMJ case law, the Military Commission Act expressly states that such decisions are not binding on this commission. *See* 10 U.S.C. § 948b(c). Moreover, the concerns upon which unlawful command influence are based have little applicability to the context of military commissions being used to prosecute our Nation's enemies. Whereas it may be

⁸ It is certainly understandable for the Department of Defense to ensure documents and information are appropriately protected prior to providing it the Defense. Although not intentional, even after protective orders were in place and parties were reminded not to use witnesses' names in open court, the Defense used a witness' name multiple times on the record during the 13 March proceeding and listed his name on an exhibit displayed to the entire courtroom. *U.S. v. Khadr*, transcript at 190-192.

⁹ The Prosecution has repeatedly made this point to the Defense, including when making the subject documents available for review in the Prosecution offices.

appropriate to find apparent unlawful command influence even in the absence of prejudice to a member of our Armed Forces, such a broad and undefined concept is out of place when it can be used or easily manufactured by those at war with the United States.¹⁰

n. As stated above, the actions of attorneys from the Office of General Counsel were completely proper and not intended to, and did not, exert unlawful influence over trial counsel's professional judgment. Even if "apparent unlawful influence" were an appropriate basis for recovery, none exists in this case and any reasonable observer with full knowledge of the facts would agree. The defense arguments to suggest otherwise are not supported by the facts.

There is no basis for dismissing the charges or suppressing evidence in this case.

o. Even if the facts were as represented by the Defense, they reflect an appropriate structure to coordinate review of information within the Department of Defense and ensure that classified and protected information is properly reviewed and sensitive equities protected prior to providing the information to the Defense in discovery.

p. The conduct complained of by the Defense is certainly not the type of conduct the drafters of the Military Commissions Act were concerned about when enacting legislation to authorize prosecution of alien unlawful enemy combatants while still engaged in hostilities with the same enemy. The established procedures of the Office of the Chief Prosecutor and Department of Defense Office of General Counsel reflect an appropriate approach to handling very sensitive information to ensure that requests can be appropriately coordinated, and classified and otherwise protected information adequately safeguarded to ensure the information does not fall into the hands of our Nation's enemies.

The remedy requested by the Defense offends notions of justice.

q. The accused is charged with conspiring with an international terrorist organization and murdering a United States soldier and attempting to murder many others. Defense counsel claim that the proper remedy for the alleged inappropriate influence is to dismiss the charges with prejudice, or in the alternative suppression of all of the accused statements, in hopes of ensuring that the accused is never tried by the United States for his actions. Were there any cause for relief, it would not warrant such a disproportionate remedy.

r. There are a host of lesser remedies, well developed in military case law, that fall well short of the Draconian measures of dismissal of charges or suppression of all statements of the accused. While none is warranted in this case, the Prosecution would

¹⁰ We note that even in the court-martial context, the burden for proving apparent unlawful command influence is high to guard against baseless allegations. *See, e.g., United States v. Lewis*, 63 M.J. 405, 415 (2006).

urge the opportunity to address such options should the Military Judge find it appropriate to do so.

7. **Oral Argument:** This motion is wholly meritless and should be readily denied. Should the Military Judge orders the parties to present oral argument, the Government is prepared to do so.
8. **Witnesses and Evidence:** All of the evidence and testimony necessary to deny this motion is already in the record.
9. **Certificate of Conference:** Not applicable.
10. **Additional Information:** None.
11. **Submitted by:**

//original signed//
Jeffrey D. Groharing
Major, U.S. Marine Corps
Prosecutor

Keith A. Petty
Captain, U.S. Army
Assistant Prosecutor

John F. Murphy
Assistant Prosecutor
Assistant U.S. Attorney

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

D-072

**Defense Reply
to Prosecution Response
to Defense Motion to Dismiss**

(Unlawful Influence – Church and
Schmidt-Furlow Reports)

11 August 2008

1. **Timeliness:** This reply is filed within the timeframe established by Rule for Military Commission (RMC) 905 and the military judge.¹
2. **Overview:** The defense motion, as well as the prosecution’s arguments in response, raise fundamental questions about the nature of this tribunal and these proceedings. Is this Military Commission a *judicial* body whose rulings have legal force and effect and bind the Executive, or is this (as in the apparent view of the prosecution) effectively an *administrative* tribunal, subject to and bound by the will of the Executive, including the Executive’s written and unwritten (and illegal) “policies” governing the use and disclosure of classified information? A related question is whether trial counsel are really prosecutors, with the authority and obligation to discharge their statutory, regulatory, and ethical duties to provide the defense with access to discovery necessary for a fair trial, or whether they are merely agents of unknown persons within the Executive branch, who can be made to abdicate (or apparently abdicate) their responsibility to exercise independent professional judgment in discharging the government’s discovery obligations under the MCA and MMC. Based on the prosecution’s response, it appears that in addition to the two unambiguous instances of actual unlawful influence described in the defense motion, trial counsel have signed on to an unwritten “agreement” that any reasonable observer would deem an invitation to have their professional judgment influenced (through unauthorized means) by any number of unknown, unnamed persons with the Executive, including lawyers within the DoD General Counsel’s office. This usurpation of the trial counsels’ responsibility and effort to subordinate this Commission to the will of the Executive is contrary to Congressional intent in

¹ The defense will not separately reply to the prosecution responses to D-074 and D-075. The defense notes that the request to depose CPT Petty is, at this point, largely moot, assuming that he will be available to testify at the 13 August 2008 session of the Commission. The prosecution has objected to disclosure of communications between trial counsel and the DoD General Counsel’s office on grounds of work product and attorney-client privilege. Assuming, *arguendo*, these and any other communications sought by the defense motion to compel are privileged, these communications would appear to fall within the scope of the “crime-fraud” exception to the privilege. *See* M.C.R.E. 502(d)(1). This is most certainly true with respect to communications relating to the Schmidt-Furlow report and likely with respect to other communications. At a minimum, the defense requests that these items be gathered by the prosecution and made available for review by the military judge *in camera*. Of course, should the military judge dismiss in response to this motion, it will be unnecessary to conduct further discovery into the extent of the interference with trial counsels’ judgment in connection with discovery in this case.

enacting the MCA. It has likely tainted the entire discovery process in this case and warrants dismissal of all charges and specifications with prejudice.

3. **Reply:**

a. **It is beyond question that interference by lawyers with the DoD General Counsel's office in connection with discovery and use of the Schmidt-Furlow report constitute actual unlawful influence over the discovery process in this Commission.**

(1) While *some* further factual development may be necessary, the prosecution's response essentially acknowledges the facts supporting a finding of unlawful influence in connection with the disclosure of the Schmidt-Furlow report. Upon request, the prosecution provided the defense with the opportunity to "examine" the Schmidt-Furlow report – a document within the possession of the U.S. Government "material to the preparation of the defense,"² and therefore within the scope of the government's discovery obligations under the MCA and MMC. *See* R.M.C. 701(c)(1). When a part of the document containing evidence of potentially criminal misconduct on the part of senior DoD personnel became public, lawyers from the DoD General Counsel's office reached down and *erroneously* informed prosecutors that they lacked "authorization" to disclose the document. As a result, the defense was not permitted to use parts of the document as evidence in support of a motion pending before (and subsequently decided by) the Commission. There could not be a clearer and less ambiguous case of unlawful interference both with respect to the professional judgment of trial counsel and this Military Commission.

(i) With respect to the question of "authorization," it could not be clearer that trial counsel had all the authorization they could possibly need to provide the defense with access to the Schmidt-Furlow report. Although the report is classified, under the applicable DoD regulation, trial counsel were authorized to make their own determination of defense counsels' "need to know" and provide the defense with access. DoD 5200.1-R (Attachment G to Def. Mot. to Dismiss, D-072). It goes without saying that no "agreement" – between "gentlemen" or otherwise – can trump a duly-issued regulation of the DoD governing the use of classified information. An "agreement" with the purpose and/or effect of restricting the availability of evidence to this Commission has another, more appropriate name – a conspiracy to obstruct justice.

(ii) The prosecution's attempt to re-characterize the issue presented in this matter as one of "delay" in discovering the Schmidt-Furlow report should be seen for what it is – an effort at obfuscation and confusion. The prosecution suggests that in providing the defense with access to the report it was somehow doing something other than "discovering" the report to the defense (i.e., allowing the defense to "review" the report), and that it has only

² It is beyond question that trial counsel *correctly* exercised their independent professional judgment in providing the defense with access to the Church and Schmidt-Furlow reports. It is difficult to imagine any two documents more unambiguously "material to the preparation of the defense" than DoD investigations into detainee abuse at (among other places) Bagram and JTF-GTMO in a case that will focus on the abuse of a detainee (Mr. Khadr) at Bagram and JTF-GTMO.

recently discovered the report after “appropriate coordination.” (*See* Govt. Br. at 5.) This is nonsensical and disingenuous. *Of course* trial counsel were discharging their obligation to allow the defense to examine documents material to the preparation of the defense when they allowed defense counsel to “examine” the Schmidt-Furlow report (i.e., “discovering” it to the defense). In fact, trial counsel took the position that they had provided discovery of documents the Commission ordered them to produce to the defense, such as handwritten interrogator notes, by limiting the defense’s access to review of the documents in prosecution spaces. Moreover, there is nothing talismanic about providing the defense with a copy. Trial counsel have no other legal basis on which to share (i.e., allow the defense to examine or review) classified information with defense counsel. If the report is not “material to the preparation of the defense within the meaning of R.M.C. 701 (which, of course, it is), then trial counsel committed a crime by disclosing classified information to persons without a “need to know.” The defense does not believe this is true, but it is the conclusion that necessarily follows from the prosecution’s tortured logic.

b. It is likewise beyond question that direction to trial counsel not to comply with a discovery order of this Commission constitutes yet another instance of unlawful influence.

(1) The prosecution does not directly respond to the claim that someone unlawfully influenced trial counsel and the proceedings of the Commission by directing trial counsel not to comply with a 19 June 2008 order of this Commission to produce detention facility SOPs to the defense. The prosecution merely states that as part of the “process” of “coordination” a DoD component can request prosecutors to obtain additional protection for information (e.g., Protective Order #7). (Govt. Br. at 4.) This may be true, however, unless the prosecution is contending that this Military Commission is subject to the process of “coordination” under the “gentleman’s agreement,” it is completely beside the point. (The brazenness of the prosecution’s conduct in defying the order of the Commission suggests that this may indeed be the government’s position.) This Commission issued an order. The United States Government – the named party to this case – could either (1) comply with the order, (2) seek relief from the terms of the order, or (3) violate the order. The government chose the last option and did so, apparently, because some person influenced the trial counsel not to comply. The case for unlawful influence, and indeed, obstruction of justice, could not be clearer.³

c. The prosecution’s briefing on this matter disturbingly suggests a pattern of unlawful influence over trial counsels’ professional judgment that has fatally undermined the integrity of these proceedings.

(1) Beyond the two unambiguous instances of actual unlawful influence referenced above, once one parses the euphemisms, the prosecution’s response (as well as responses to the companion discovery motions) suggests a disturbing pattern of unlawful

³ As noted in the defense motion, the prosecution has refused to identify the person or persons who directed trial counsel not to comply with the Commission’s order. The defense therefore expects to further develop the factual basis for the motion through the testimony of MAJ Groharing and/or CPT Petty.

influence (probably actual, but at the very least apparent) that has fatally undermined the integrity of these proceedings. A number of points deserve specific comment:

(i) Amazingly, the prosecution suggests that trial counsel lack the “authority” to disclose documents and other evidence to which they may be granted access in the course of investigating and preparing a case. (Govt. Br. at 1.) Not only do trial counsel have the authority, under the MCA (absent invocation of the national security privilege), they have the *duty* to disclose documents and other evidence to which they are granted access if those documents and other evidence fall into one of two categories: (1) exculpatory evidence, *see* MCA § 949j(d); and (2) evidence within the scope of the government’s discovery obligations under the MMC, including, most significantly evidence “material to the preparation of the defense.” *See* R.M.C. 701 (prescribed by the Secretary of Defense pursuant to the delegation contained in § 949j). Consistent with the general practice of vesting prosecutors with the authority to make determinations of what constitutes exculpatory or material evidence (also governed by rules of professional conduct for prosecutors), the MCA specifically vests trial counsel with the authority to make these determinations. *See* MCA § 949j(c) (“With respect to the discovery obligations of *trial counsel* under this section[.] (emphasis added)); § 949j(d) (“As soon as practicable, *trial counsel* shall disclose” (emphasis added)). Recognizing the types of pressures that might otherwise influence trial counsel in the performance of these responsibilities in military commissions under the MCA, Congress went the “extra mile,” specifically safeguarding and prohibiting unlawful influence over the exercise of independent “professional judgment” by trial counsel. MCA § 949b(a)(2)(C). There is no question that Congress intended for trial counsel, and no one else, to be vested with the responsibility of discharging the government’s discovery obligations in military commissions under the MCA. Finally, Congress intended discovery to be broad and to give trial counsel wide-ranging authority to seek out exculpatory evidence that might be in the possession of other agencies of the government. Realizing that trial counsel might not have immediate access to relevant materials, Congress chose to define “evidence known to the trial counsel” to mean “evidence that the prosecution would be required to disclose in a trial by general court-martial under Chapter 47 of this title.” MCA § 949j(d)(2). The prosecution’s obligation to seek out exculpatory evidence in courts-martial is, of course, exacting. Under military case law, prosecutors have a duty to “learn of any favorable evidence known to the others acting on the government’s behalf in the case[.]” *United States v. Romano*, 46 M.J. 269, 273 (C.A.A.F. 1997) (quoting *Kyles v. Whitley*, 514 U.S. 419 (1995)); *see also United States v. Stone*, 40 M.J. 420 (C.M.A. 1994); *United States v. Simmons*, 38 M.J. 376 (C.M.A. 1993).

(ii) Despite these unambiguous statutory commands in favor of broad discovery directed by the trial counsel, trial counsel in this case have apparently been made to subordinate their exercise of independent professional judgment in discovery matters to a host of other actors. This includes a requirement to “consult” with the ostensible “owners” of government information (as if someone other than the U.S. Government actually “owned” the information,” and others who have interests or “equities” in the information (whatever this actually means). Trial counsel are required to forward defense discovery requests to the DoD

General Counsel's office (Govt. Br. at 4)⁴ and once those with "equities" are identified, trial counsel are apparently required to provide these individuals with the opportunity to "review Defense requests prior to releasing the information." (Govt. Br. to Def. Mot. to Compel, D-074, at 2.) This all done in accordance with a "gentleman's agreement," lacking any basis in law or regulation, including regulations governing the handling of classified information, (and specifically contradicting the requirements of the MCA and MMC). It apparently extends not only to classified information, but to merely "protected" information as well. (Govt. Br. at 4.)

(iii) Based on the prosecution's pleadings, it appears that there is a practice of "coordination" under the terms of the "gentleman's agreement" that has unlawfully influenced the course of discovery in this case. This practice has resulted in at least two unambiguous cases of unlawful influence and creates an overwhelming appearance of unlawful influence with respect to all other discovery issues that have arisen in these proceedings. While the prosecution claims that trial counsel's professional judgment has never been unlawfully influenced, the simple fact is that no reasonable outside observer would believe this to be the case. It is clear from the prosecution's pleadings that the forwarding of defense discovery requests to the General Counsel and others with "equities" is a *requirement* of the "gentleman's agreement." And if trial counsel is truly exercising independent professional judgment with respect to determining what is material and/or exculpatory, why would it *ever* be necessary to forward the substance of defense discovery requests to other persons? The mere fact that so many different individuals, with so many different interests are "weighing in" on the government's response to defense discovery requests undermines any confidence one would have in the view that trial counsel are "calling the shots." And with all due respect to trial counsel, following prosecution "coordination" by intelligence personnel, law enforcement agents, war-fighters and lawyers from the DoD General Counsel's office, no reasonable observer is going to believe that it is the O-3 or O-4 lawyer's independent "professional judgment" that is driving the ultimate decision – a conclusion confirmed by the actions of the DoD General Counsel's office in the one apparent instance in which trial counsel got it "wrong."

(iv) Although the scope of the "gentleman's agreement" appears to extend beyond classified information to merely "protected" information (virtually all other information provided in discovery),⁵ the defense recognizes that the MCA and MMC contain "robust" protections for classified information. The problem is that the "gentleman's agreement" appears to be intended to allow the government to circumvent those very protections and substitute an opaque, *ad hoc* process for the procedures available to the government under the MCA and M.C.R.E. 505. If trial counsel is aware of information that is within the scope of the government's discovery obligation, trial counsel has a duty to disclose the information to the defense. If the information is classified, trial counsel may invoke the national security privilege and the procedures of M.C.R.E. 505. Then the *military judge* gets to decide on what the prosecution refers to as the correct "approach" to take, e.g., redaction, limited release, etc., in providing an appropriate substitute for the classified information. (Govt. Br. at 1.) The

⁴ The prosecution attempts to characterize the role of the DoD General Counsel's office as "ministerial." (Govt. Br. at 4.) In light of its ostensibly "ministerial" function, it is difficult to explain direction from OGC lawyers to claw back the Schmidt-Furlow report.

⁵ Almost all of the unclassified documents provided to the defense in discovery are marked "FOUO/LES."

“gentleman’s agreement” appears to be really nothing more than an effort to bypass M.C.R.E. 505 and cut the military judge out of a process that Congress and the Secretary of Defense intended the military judge to superintend. The prosecution seeks to substitute a backroom negotiation between various agents of the Executive branch for a process, controlled by the military judge, and accompanied by a record that can be reviewed on appeal. That the government may view this practice as advantageous does not make it lawful. Congress (and the Secretary) created a privilege for classified information and a process for dealing with discovery of classified information. It is that process that must govern these proceedings.

(v) Trial counsel have suggested that the genesis of the “gentleman’s agreement” was the difficulty military commission prosecutors’ experienced in getting various persons within the Executive to provide information to trial counsel.⁶ This is no excuse. If a government agent will not provide trial counsel with access to information trial counsel needs in order to discharge his statutory, regulatory, and ethical responsibilities, the trial counsel’s recourse is to take the matter up the chain of command and, if ultimately unsuccessful in persuading his “client” to comply with the law, take the issue to his supervisors and/or this Commission. The answer is *not* to enter into an unlawful agreement with government agents to limit or restrict the release of materials trial counsel may otherwise deem discoverable and therefore have a legal duty to disclose. At a minimum, this constitutes an abdication of trial counsel’s responsibilities and appears to be what has happened in this case.

d. The appearance of unlawful influence is a sufficient basis on which to dismiss charges and specifications in this case.

(1) The prosecution suggests that the concept of *apparent* unlawful influence cannot and should not extend to proceedings under the MCA. (Govt. Br. at 6.) There is no basis for this conclusion. First, the prosecution’s view flies in the face of Congress’ decision to *broaden* the prohibition against unlawful influence in military commissions under the MCA, extending (significantly for the purpose of this motion) the prohibition to efforts to interfere with the professional judgment of trial counsel and defense counsel. Second, the rationale supporting the appearance doctrine in these proceedings is even stronger than it is in the court-martial context. These proceedings exist to prosecute and punish our alleged enemies in the War on Terror. Such proceedings, or other proceedings involving “war crimes” allegedly committed by one’s enemies, are particularly likely to be perceived as “victor’s justice” absent robust protections against actual (or apparent) unlawful or political interference. In no event is there any plausible argument for a *less* exacting standard to be applied to these proceedings in resolving claims of unlawful influence.

/s/
William Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Detailed Assistant Defense Counsel

⁶ The defense expects to develop this point through the testimony of MAJ Groharing.