NIMJ BRIEFS ON THE GUANTÁNAMO MILITARY COMMISSIONS

Classified Evidence

Rulings:

- *United States v. Hamdan*, 1 M.C. 49 (2008) (On Reconsideration Ruling on Motion for Stay and for Access to High Value Detainees)
- *United States v. Khadr*, 1 M.C. 165 (2007) (Protective Order #001: Protection of "For Official Use Only" or "Law Enforcement Sensitive" Marked Information and Information with Classified Markings)
- *United States v. Khadr*, 1 M.C. 168 (2007) (Protective Order #002: Protection of Identities of Intelligence Personnel)
- *United States v. Khadr*, 1 M.C. 169 (2007) (Protective Order #003: Protection of Identities of Intelligence Personnel)
- *United States v. Khadr*, 1 M.C. 177 (2008) (Ruling on Defense Motion for Relief from the Terms of Protective Order #001)
- *United States v. Khadr*, 1 M.C. 179 (2008) (Order Under Seal Authorizing Alternatives to Discovery of Specified Items of Classified Information)
- *United States v. Khadr*, 1 M.C. 182 (2008) (Ruling on Defense Notice of Motion to Compel Production of Interrogators)
- *United States v. Mohammed et al.*, 1 M.C. 265 (2008) (Protective Order #3: Protection of Classified Information at Arraignment and Other Pretrial Proceedings)

The issue of classified evidence arises in the context of the military commissions in several ways. A common problem occurs when counsel seek relief from a protective order to facilitate communication with respect to classified information between counsel who may not have the clearances to receive such information, or between counsel and their clients or witnesses. For national security reasons, the government seeks to avoid the release of classified information to persons who are not cleared to have access to it. In many instances, this has proved an immense challenge to communication among all the actors involved.

Executive Order 12,958 (April 17, 1995) §1.1(c) generally defines "classified information" as any information that "require[s] protection against unauthorized disclosure." Section 1(a) of the Classified Information Procedures Act ("CIPA") of 1980 limits such protection to "reasons of national security." In tandem, these laws provide the baseline for the unilateral determinations made by government agencies that result in the "classification" of information under their control. Once the proper authority has classified and categorized the information (i.e., confidential, secret, top secret, etc.), only individuals in possession of the appropriate clearance level and a certified "need to know" may subsequently access it.

Classified *information* becomes classified *evidence* when it is brought to court by the parties or through the nature of the case. Most civilian courts rely on the provisions of the CIPA to guide them in the proper handling of such evidence. A bird's-eye view of the extensive body of jurisprudence developed over the last thirty years since passage of the CIPA shows that

civilian courts are loathe to exclude evidence simply on the basis of its classified character. Classifying authorities who object to disclosure shoulder the burden of showing that the potential damage to national security outweighs constitutional due process guarantees favoring disclosure.

The cases in Guantanamo necessarily involve some amount of classified information. The Military Commissions Act ("MCA") of 2006 references the definitions of classified evidence contained in the CIPA, as well as the provisions that allow for adequate forms of substitution of evidence when disclosure is not possible. The MCA also follows the practice of the Military Rules of Evidence ("M.R.E.") through Military Commission Rule of Evidence ("M.C.R.E.") 505. However, the MCA is generally less detailed in terms of statutory prescriptions on procedures prior to disclosure, continuing duties to disclose, and lacks any express standards.

In *U.S. v. Hamdan*, 1 M.C. 49 (2008), the defense requested access to several "high-value" detainees, individuals who were being protected under a higher level of security because of their alleged connections to the inner circle of the al Qaeda leadership. *Id.* at 49. Hamdan argued that these leaders could testify that his involvement with al Qaeda constituted nothing more than the performance of routine driver duties and that he had no knowledge of the actual operational plans. *Id.* Judge Allred ruled that, while Hamdan's counsel should be allowed access as a part of the discovery process, the access would have to be supervised by a government security officer ("GSO"). *Id.* at 50. Specifically, "[t]he Commission ha[d] circumscribed the permissible areas of questioning, and required a [GSO] to review the questions posed to, and the answers provided by, each witness." *Id.* Further, "[t]he [GSO] may forward the questions, after his and the Linguist's review, to other [GSOs] and authorities in Guantanamo Bay, or to other JTF officers or representatives there who are not aligned with, and who will not communicate with the Prosecution…" *Id.* at 51-52. The GSO was also authorized to delete a detainee's reply in its entirety, excise certain parts, or summarize the answers if the GSO suspected that the detainee was attempting to communicate a message to a colleague through his replies. *Hamdan*, at 52. This, according to Judge Allred, "adequately protects the Government's interests in preventing disclosure of classified or sensitive information…" *Id.* at 50.

Several rulings in *U.S. v. Khadr* offer further insight into how *sui generis* tribunals like the military commissions deal with classified evidence. The protective ordersenjoin members of both defense and prosecution from divulging any classified information to individuals who do not have the requisite clearances and need to know. *See, e.g., U.S. v. Khadr*, 1 M.C. 168 (2007). This includes the accused, other members of the defense or prosecution team, and legal support staff. Moreover, the protective orders expressly recognize the authority of the Department of Defense ("DoD") to regulate classification and access.

The problem with this can best be seen in the complaints that many of the seasoned lawyers who have been involved in the military commissions process have registered, including the anomaly perceived in having trial proceedings dictated to a large degree by executive agents. In the commission hearings an individual, referred to as the "court security officer," sits in the courtroom, dressed in civilian attire. Using a signaling mechanism that specifically alerts the judge, the officer may, at any point during the hearing, stop the proceedings to "advise" the judge if testimony must be halted or if the proceeding must be closed.

On the other hand, the *sui generis* nature of these military commissions is also a justification for erring on the side of caution. The military judges have been very conservative in interpreting the statutes, cognizant as they are of the competing interests between justice and national security. In *U.S. v. Mohammed, et al.*, 1 M.C. 265 (2008), Judge Kohlmann took pains to list the various documents upon which he based his ruling. In the absence of a clearer mandate from the MCA itself, the judge's resort to M.C.R.E. 505, previous protective orders, and various guidelines and authorizations issued by the Department of Defense and the Central Intelligence Agency constituted an effort to minimize the amount of discretion the judge needed to exercise. *Id.* at 266.

This case was also an attempt to prescribe prior?? procedures for granting an individual access to classified information during proceedings. *Id.* at 267. These include the granting of clearances through the DoD or the Department of Justice, the signing of a memorandum of understanding to comply with the protective order, and the determination of a "need to know" by the original classification authority. *Id.*

One last point concerns the presumption of classification used in the commissions. In case of doubt as to a document's classification, such document is presumed classified and placed under seal with the senior security advisor of the commission. *Id.* at 268. This is a remarkable departure from the practice of federal courts under the CIPA, which clearly requires the government to show that a document – even if classified – justifies the sacrifice of a defendant's due process rights. The commissions' presumption is a stricter version of the rule in M.C.R.E 505, which contains an express standard that, if met, requires disclosure in any instance where the information is relevant and necessary to the defense.

Congress is currently considering inserting CIPA-like language in the amendments of the MCA. In testimony before both the Senate and the House, the Judge Advocates General (TJAGs) for each of the services recommended using the CIPA as a guidepost, if not the authority, for procedures related to classified information. The TJAGs stated that the greater depth of case law the CIPA provides would avoid "confusion" regarding the admission of classified materials, thus ensuring greater reliability of trial decisions upon review.