

Appendix A

INTEREST OF AMICUS CURIAE AMERICAN BAR ASSOCIATION

The American Bar Association (“ABA”) is the leading national membership organization of the legal profession. The ABA’s membership of more than 400,000 spans all 50 states and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and law students.¹

The ABA’s mission is to serve “our profession and the public by defending liberty and delivering justice as the national representative of the legal profession.” Among the ABA’s goals is to “[a]dvance the Rule of Law” by “increase[ing] public understanding of and respect for the law, the legal process, and the role of the legal profession.”² As the voice of the legal profession, the ABA has a special interest and responsibility in protecting the rights guaranteed by the Constitution, safeguarding the integrity of our legal system, and ensuring the sanctity of the rule of law.

The ABA has sent a representative to observe Military Commission proceedings at Guantanamo Bay since August 2004 as one of the five original organizations invited by the Office of the Secretary of Defense. The ABA joins this brief because it believes that PO 007 is overbroad and impermissibly restricts the right to a fair and public trial in violation of the Military Commissions Act of 2006 and the Constitution of the United States.

¹ Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

² See ABA Mission and Goals (August 2008) at <http://www.abanet.org/about/goals.html>.

Appendix B

INTEREST OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU was founded in 1920, largely in response to the curtailment of liberties that accompanied America’s entry into World War I, including the prosecution of political dissidents and the denial of basic due process rights for non-citizens. In the intervening eight decades, the ACLU has frequently appeared before the Supreme Court of the United States during other periods of national crisis when concerns about security have been used by the government as a justification to abridge individual rights. This case raises those issues once again. The military commission procedures call into question both our nation’s commitment to fair process, even for those accused of war crimes, and to the right of public access to criminal proceedings. The ACLU therefore has a significant interest in the proper resolution of this issue.

Appendix C

INTEREST OF AMICUS CURIAE HUMAN RIGHTS FIRST

Human Rights First is a non-profit, nonpartisan international human rights organization based in New York and Washington D.C. To maintain our independence, we accept no government funding.

Human Rights First was founded in 1978 as the Lawyers Committee for International Human Rights to promote laws and policies that advance universal rights and freedoms. We exist to protect and defend the dignity of each individual through respect for human rights and the rule of law.

We fight for equality and for freedom of thought, expression, and religion;
We support people who struggle to promote these principles within their own societies;
We work to hold accountable under the law those who violate these principles;
We strive to ensure the security of individuals and to protect against the arbitrary exercise of state power;
We confront human rights challenges with strategic responses that do not compromise our integrity; and
We are committed to building a global movement of people who share these principles.

Human Rights First believes that building respect for human rights and the rule of law will help ensure the dignity to which every individual is entitled and will stem tyranny, extremism, intolerance, and violence.

Human Rights First protects people at risk: refugees who flee persecution, victims of crimes against humanity or other mass human rights violations, victims of discrimination, those whose rights are eroded in the name of national security, and human rights advocates who are targeted for defending the rights of others. These groups are often the first victims of societal instability and breakdown; their treatment is a harbinger of wider-scale repression. Human Rights First works to prevent violations against these groups and to seek justice and accountability for violations against them.

Human Rights First is practical and effective. We advocate for change at the highest levels of national and international policymaking. We seek justice through the courts. We raise awareness and understanding through the media. We build coalitions among those with divergent views. And we mobilize people to act.

Human Rights First has consistently worked to close Guantanamo and to end the Military Commissions. Human Rights First has monitored nearly every military commission hearing and has published several reports related to the prosecution of terrorism cases, including *Analysis of Proposed Rules for Military Commissions Trials*; *Tortured Justice: Using Coerced Evidence to Prosecute Terrorist Suspects*; and *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*.

Appendix D

INTEREST OF *AMICUS CURIAE* HUMAN RIGHTS WATCH

Human Rights Watch (HRW) is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, HRW seeks to raise the cost of human rights abuse and build pressure upon offending governments and others to end abuses. Human Rights Watch's terrorism and counterterrorism program documents abuses committed by terrorist groups and their supporters, and monitors counterterrorism laws, policies, and practices that infringe upon basic human rights. HRW has been observing the proceedings of the Guantanamo Bay military commissions since 2004.

Appendix E

STATEMENT OF AMNESTY INTERNATIONAL

1. While Amnesty International (AI) has not formally joined the amicus brief, the organisation supports the broadest possible access to criminal and other legal proceedings by trial observers, in no event to be less fulsome than that contemplated by international standards. Such openness is recognised as a key element of the fairness of proceedings by international law. While some international instruments recognise limited exceptions, such exceptions are strictly drawn and narrowly construed. Amnesty International, too, therefore calls for rescission of Protective Order 007, dated 18 December 2008, as the same substantive aspects that are highlighted in the joint brief render it inconsistent with international standards. Relevant standards are set out below.

2. Article 10 of the Universal Declaration of Human Rights (UDHR), adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, states:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

3. Article 11(1) of the UDHR states:

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

4. Article 14(1) of the International Covenant on Civil and Political Rights, 1966 (ICCPR), ratified by the United States in June 1992, provides:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the

opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

5. The strict limits on the concept of 'national security' as grounds for exclusion of the public from trials, under the ICCPR and other instruments, were explicated by international legal experts in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, annexed to the Report of the UN Special Rapporteur on Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/1996/39, 22 March 1996, include the following:

[Principle 1(d)]

No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the government.

[Principle 1.2]

Any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest.

[Principle 1.3]

To establish that a restriction on freedom of expression or information is necessary to protect a legitimate national security interest, a government must demonstrate that:

- (a) the expression or information at issue poses a serious threat to a legitimate national security interest;
- (b) the restriction imposed is the least restrictive means possible for protecting that interest; and
- (c) the restriction is compatible with democratic principles.

[Principle 2]

(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.

(b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

6. The right of individuals and associations to observe trials and to draw public attention to failures to respect human rights in that and other contexts, was specifically recognised and promoted by the United Nations General Assembly in adopting the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms in 1999 (resolution 53/144).

- a. Article 6 of the Declaration states:

Everyone has the right, individually and in association with others:

(a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems;

(b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms;

(c) To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters

- b. Article 9(3) of the Declaration further states in part:

[E]veryone has the right, individually and in association with others, *inter alia*:

...

(b) To attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments;

c. Article 17 of the Declaration states:

In the exercise of the rights and freedoms referred to in the present Declaration, everyone, acting individually and in association with others, shall be subject only to such limitations as are in accordance with applicable international obligations and are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Appendix F

UNITED STATES OF AMERICA	)	PROTECTIVE ORDER # 7
	)	
	)	
	)	
	)	
v.	)	Protection of Classified Information
	)	Throughout All Stages of Proceedings
	)	
KHALID SHEIKH MOHAMMED,	)	
WALID MUHAMMAD SALIH MUBARAK	)	
BIN ATTASH,	)	
RAMZI BINALSHIBH,	)	
ALI ABDUL AZIZ ALI,	)	
MUSTAFA AHMED ADAM AL HAWSAWI	)	
	)	18 December 2008

1. This Protective Order is issued pursuant to the authority under the Military Commissions Act (MCA) (10 U.S.C. §948a, *et seq.*) and the Manual for Military Commissions (MMC), to include, but not limited to:

- a. Rules for Military Commissions (RMC) 701(f)(8) and (1)(2);
- b. Military Commission Rule of Evidence (MCRE) 505;
- c. Regulation for Trial by Military Commission (DoD Trial Reg), Sec. 1703.

2. The Commission has considered the following matters prior to issuing this order:

- a. Prosecution Motion for Omnibus Protective Order, dated 23 Oct. 2008.
- b. Prosecution Proposed Protective Order #, dated 18 Dec. 2008.
- c. Declaration by the Director, Central Intelligence Agency, dated 30 May 2008.
- d. Declaration by Deputy Director, National Clandestine Service, Central Intelligence Agency, dated 11 Aug. 2008.
- e. Declarations by Associate Information Review Officer, National Clandestine Service, Central Intelligence Agency, dated 21 Jul. 2008 and 10 Nov. 2008.

This order will be attached to the record at trial. The appellate exhibits referenced above will be sealed.

3. The Commission finds that this case involves information that has been classified in the interests of national security as set forth by MCRE 505(b)(1) and (2) as well as by Executive Order 12958, as amended. The storage, handling, and control of this information will require

special precautions mandated by statute, executive order, and regulation, and access to which requires appropriate security clearances and a need to know. The Commission further finds that this case involves “protected information” that is unclassified but which remains sensitive and should be protected from dissemination outside the defense.

4. The purpose of this Order is to establish procedures that must be followed by all defense counsel of record, defense paralegals, defense translators and all other persons assisting the Defense (hereinafter the “Defense”) as well as any other person who comes into possession of classified information and protected information as a result of their participation in this case.

5. The procedures set forth in this Protective Order, and MCRE 505 and 506, will apply to all stages in this case, including discovery and disclosure of classified information subject to modification by further Order. This Order does not abrogate Protective Order #3 – Protection of Classified Information at Arraignment and Other Pretrial Proceedings, nor revises any protections contained within any previous Protective Order issued in this case.

6. As used herein, the term Classified Information shall mean:

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

b. Any document or information which has been classified as “SECRET – Releasable to Sheikh Mohammed, Bin Attash, Binalshibh, Aziz Ali, Hawsawi.”

c. Any document or information, regardless of physical form or characteristics, now or formerly in the possession of the Defense, private party or other person, which has been derived from United States government information that was classified, including any document or information that has subsequently been classified by the government pursuant to Executive Order 12958;

d. Any document or information that the Defense knows or reasonably should know, contains Classified Information; or

e. Any document or information as to which the Defense has been notified orally, or in writing, that such document or information contains Classified Information, or protected information, or implicates sources, methods or activities of the United States to acquire such information if those sources, methods and activities remain classified.

f. Presumptively Classified Information, including any statements made by the accused, and any verbal classified information known to the accused or Defense.

g. Any document or information, regardless of place of origin, and including documents classified by a foreign government, that could reasonably be believed to contain classified information, or that refers to or relates to national security or intelligence matters. Any document or information including but not limited to any subject referring to the Central Intelligence Agency, National Security Agency, Defense Intelligence Agency, Department of State, National Security Council, Federal Bureau of Investigation, or intelligence agencies of any foreign government, or similar entity, or information in the possession of such agency, shall be presumed to fall within the meaning of "classified national security information or document" unless and until the SSA or Prosecution advises otherwise in writing.

h. This provision shall not apply to documents or information which the Defense obtains from other than classified materials, or documents provided by the Prosecution with a marking to indicate that the document has been "declassified." While information in the public domain is ordinarily not classified, such information may be considered classified, and therefore subject to the provisions of MCRE 505 and this Order, if it is confirmed or denied by any person who has, or has had, access to classified information and that confirmation or denial tends to corroborate or tends to refute the information in question. Any attempt by the Defense to have such information confirmed or denied at trial or in any public proceeding in this case shall be governed by MCRE 505 and all provisions of this Order.

i. The words "documents" and "information" shall include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, conforming copies and non-conforming copies (whether different from the original by reason of notation made on such copies or otherwise), handwritten notes, or any electronic storage on any electronic storage media or device of any documents or information or information acquired orally, including but not limited to papers, correspondence, memoranda, notes, letters, reports, summaries, photographs, maps, charts, graphs, inter-office communications, notations of any sort concerning conversations, meetings or other communications, bulletins, teletypes, telegrams, and telefascimilies, invoices, worksheets and drafts, alterations, modifications, changes and amendments of any kind to the foregoing; graphic or oral records or representations of any kind, including but not limited to photographs, charts, graphs, microfiche, microfilm, videotapes, sound recordings of any kind and motion pictures; electronic, mechanical or electric records of any kind, including but not limited to tapes, cassettes, disks, recordings, films, typewriter ribbons, word processing or other computer

tapes, disks, or thumb drives and all manner or electronic data processing storage; and Classified Information acquired orally.

7. All Classified Documents and other matters and the Classified Information contained therein shall remain classified unless the documents bear a clear indication that they have been declassified by the agency or department that is the originator of the document or the information contained therein (hereinafter, the "Original Classification Authority").

8. As used herein, the term Protected Information shall mean:

a. Protected information that is unclassified but otherwise privileged, such as Law Enforcement sensitive (LES) information or information For Official Use Only (FOUO), which does not warrant a national security classification but nonetheless requires limitation in dissemination and/or disclosure.

9. The Prosecution will provide the classified discovery for each of the Accused to the Senior Security Advisor (SSA) on compact disks (CD's) that are properly marked with the security classification level. The SSA will ensure that the material is delivered to each of the Accuseds' respective Defense teams together with a copy of this Order and will verify that the person receiving the materials has the appropriate security clearances and has otherwise complied with this Order and Protective Order #3. The person receiving the materials on behalf of each Defense team will be responsible for ensuring that access to and storage of the CD's is in accordance with this Order and Protective Order #3. Pending the establishment of storage facilities and procedures for the materials at the Accuseds' detention facility, Defense counsel are responsible for the appropriate handling and storage of the classified material.

10. Any and all discovery materials are to be provided to the Defense, and used by the Defense, solely for the purpose of allowing the Accused to prepare their defenses and that none of the discovery materials produced by the Prosecution to the Defense shall be disseminated to, or discussed with the media or any other individual or entity outside the

defense team. This provision does not prohibit the media from obtaining copies of any items that become declassified public exhibits at any hearing, trial or other proceeding.

11. The Defense is prohibited from disclosing classified information or information they know or reasonably should know is classified to the Accused absent a specific Order from this Commission.

12. Persons subject to this Order are advised that all information to which they obtain access by this Order, or any previous protective order issued by the Commission, is now and will forever remain the property of the United States Government. The Defense shall return all materials that may have come into their possession for which they are responsible because of such access upon demand by the Prosecution or SSA.

13. The Defense shall comply with MCRE 505(g) prior to any disclosure of Classified Information during any proceeding in this case. The Defense is required to notify the Prosecution in writing of any intention to disclose, or cause the disclosure of, classified information in any manner at any stage of the proceedings. The Defense notice must be particularized and set forth the specific classified information sought to be disclosed. The Defense notice must be provided to the Prosecution with sufficient time for the Prosecution to respond and seek relief under MCRE 505(h) prior to the proceeding in which the disclosure is expected to occur.

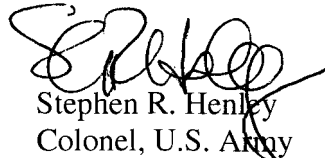
14. Any pleading or other document filed or transmitted by the Defense, which the Defense knows or has reason to know contains Classified Information in whole or in part, believes may be classified in whole or in part, or implicates information, sources, methods or activities of the United States Government which the Defense knows or has reason to know contains Classified Information, or which concern or relate to national security or

intelligence matters (as defined in paragraph 6 above), shall be filed UNDER SEAL with the SSA in the case of a filing and shall be transmitted in an appropriate manner, commensurate with its classification status.

15. Any breach of this Protective Order may result in disciplinary action or other sanctions.

16. Persons subject to this Order are further admonished that they are obligated by law and regulation not to disclose any national security classified information in an unauthorized fashion and that any breach of this Order may result in the termination of their access to classified information. In addition, they are admonished that any unauthorized disclosure of classified information may constitute violations of the United States criminal laws, including without limitation, the provisions of 18 U.S.C. §§ 371, 641, 1001, 793, 794, 798, 952, and 1503; 50 U.S.C. §§ 421 (the Intelligence Identities Protection Act) and 783; and that a violation of this Order or any portion hereof may be chargeable as a contempt of this Commission.

17. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it warranted.


Stephen R. Henley
Colonel, U.S. Army
Military Judge