

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:)
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GUANTANAMO BAY DETAINEE)
LITIGATION)
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Misc. No. 08-mc-0442 (TFH)

DECLARATION OF JAMES R. CLAPPER JR.

Pursuant to 28 U.S.C. § 1746, I, James R. Clapper Jr., hereby declare:

1. I currently serve as the Undersecretary of Defense for Intelligence (USDI). I was confirmed by the Senate on April 11, 2007. In prior positions within the Department of Defense, I have served as the National Geospatial-Intelligence Agency director from September 2001 to June 2006. I retired from the United States Air Force as a lieutenant general in 1995, after a 32-year career. My last military assignment was as Director of the Defense Intelligence Agency. My earlier assignments included a variety of intelligence-related positions such as assistant chief of staff, intelligence, Headquarters U.S. Air Force, during Operations Desert Shield/Desert Storm, and as director of intelligence for three war-fighting commands: U.S. Forces, Korea; Pacific Command; and Strategic Air Command.

2. The USDI serves as the advisor to the Secretary and Deputy Secretary of Defense regarding intelligence, counterintelligence, security, sensitive activities, and other intelligence-related matters (hereafter referred to as "intelligence, counterintelligence, and security" matters). In this capacity, the USD(I) exercises the Secretary of Defense's authority, direction, and control over the Defense Agencies and DoD Field Activities that are Defense intelligence, counterintelligence, or security Components and exercises planning, policy, and strategic

oversight over all DoD intelligence, counterintelligence, and security policy, plans, and programs.

3. The "Privilege Review Team" is made of Department of Defense personnel who are tasked with reviewing correspondence and written materials that are created by Guantanamo detainees for use by their attorneys in ongoing habeas corpus proceedings in federal court. Because the court's Protective Order directed the detainee's counsel to treat all information that the counsel learned from a detainee, including any oral and written communications with a detainee, as classified information, the Privilege Review Team was authorized to review these "presumptively SECRET" detainee communications and determine if any of detainee's letters or conversations with his counsel met the criteria to be classified under Department of Defense classification guidance.¹

4. Notwithstanding the process described above, the Privilege Review Team is not and never has been authorized to review documents created by the United States government.

Accordingly, the Privilege Review Team is not authorized to conduct classification reviews or declassification reviews of these documents or the information within these documents.

5. It is my understanding that the documents the Privilege Review Team was processing for transmission to the detainee contained both classified information from United States government documents and the derivative classification markings from those documents. When this material was provided to a Guantanamo detainee, the result was that an uncleared individual (the detainee) was provided classified material.

¹ For detainees considered "high value detainees", the information a counsel learns from the detainee is treated as presumptively classified at a higher level than SECRET and the DoD Privilege Review Team is supplemented by a security official from the Central Intelligence Agency, who reviews these detainee-created materials utilizing CIA classification guidance.

6. The Privilege Review Team is not authorized to permit individuals without a security clearance to receive information marked as classified by United States government agencies. An individual may have access to classified material only if (1) a favorable determination of eligibility for access has been made by an agency head or the agency head's designee; (2) the person has signed an approved nondisclosure agreement; and (3) the person has a need-to-know the information. (Section 4.1 of Executive Order 12958, as amended). Decisions about whether an individual is eligible for access to classified material are made appropriate officials within executive branch agencies, as are decisions about which individuals with a security clearance have a need-to-know certain classified information. The Privilege Review Team is not and has never been authorized to make eligibility or need-to-know decisions on behalf of the United States government, including the Department of Defense.

7. As part of the Department of Defense's ongoing effort in the habeas corpus litigation pending in federal court, a robust process is underway to declassify materials for use by detainees and their counsel in the court cases. Currently, over 80 Department of Defense personnel from various original classification authorities are assigned to work these issues full-time, and they are reviewing thousands of Department of Defense documents for potential declassification; over 3,000 documents have already been declassified by this effort, while over 8,000 Department of Defense documents have been cleared for release to the court at current classification. When information is declassified through that process, that information can be provided to detainees for use in the habeas litigation pursuant to the terms of the court's protective order.

8. Following this review, there may be circumstances under which a determination is made by an original classification authority that the detainee's own statements remain classified and therefore not releasable to the detainee, and related to intelligence activities (including special

activities), intelligence sources or methods, or cryptology as specified under E.O. 13292 Sec. 1.4. There is often significance from an intelligence perspective in what is documented in an intelligence report following a detainee interview, and also in how it is written, and those issues may prevent the statements from being declassified at this time. For example, the fact that a report records specific details from an interview, but ignores others, may be enough to indicate the unique value of what the detainee may have considered trivial information. Until the original classification authority has an opportunity to review the statements and balance those equities, those statements remain classified and cannot be provided to individuals who do not possess the proper security clearance.

I declare under penalty of perjury under the laws of the United States of America that the forgoing is true, accurate, and correct to the best of my knowledge.

Dated: February 13, 2009



JAMES R. CLAPPER JR.