UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	)	Misc. No. 08-0442(TFH)
GUANTANAMO BAY DETAINEE LITIGATION	)	Civil Action Nos.:
	)	02-cv-0828, 04-cv-1136, 04-cv-1164, 04-cv-1194, 04-cv-1254, 04-cv-1937, 04-cv-2022, 04-cv-2035, 04-cv-2046, 04-cv-2215, 05-cv-0247, 05-cv-0270, 05-cv-0280, 05-cv-0329, 05-cv-0359, 05-cv-0392, 05-cv-0492, 05-cv-0520, 05-cv-0526, 05-cv-0569, 05-cv-0634, 05-cv-0748, 05-cv-0763, 05-cv-0764, 05-cv-0877, 05-cv-0883, 05-cv-0889, 05-cv-0892, 05-cv-0993, 05-cv-0994, 05-cv-0998, 05-cv-0999, 05-cv-1048, 05-cv-1189, 05-cv-1124, 05-cv-1220, 05-cv-1244, 05-cv-1347, 05-cv-1353, 05-cv-1429, 05-cv-1457, 05-cv-1458, 05-cv-1487, 05-cv-1490, 05-cv-1497, 05-cv-1504, 05-cv-1505, 05-cv-1506, 05-cv-1509, 05-cv-1555, 05-cv-1592, 05-cv-1601, 05-cv-1602, 05-cv-1607, 05-cv-1623, 05-cv-1638, 05-cv-1639, 05-cv-1645, 05-cv-1646, 05-cv-1678, 05-cv-1704, 05-cv-1971, 05-cv-1983, 05-cv-2010, 05-cv-2088, 05-cv-2104, 05-cv-2185, 05-cv-2186, 05-cv-2199, 05-cv-2249, 05-cv-2349, 05-cv-2367, 05-cv-2370, 05-cv-2371, 05-cv-2378, 05-cv-2379, 05-cv-2380, 05-cv-2381, 05-cv-2384, 05-cv-2385, 05-cv-2386, 05-cv-2387, 05-cv-2444, 05-cv-2479, 06-cv-0618, 06-cv-1668, 06-cv-1684, 06-cv-1690, 06-cv-1758, 06-cv-1759, 06-cv-1761, 06-cv-1765, 06-cv-1766, 06-cv-1767, 07-cv-1710, 07-cv-2337, 07-cv-2338, 08-cv-0987, 08-cv-1085, 08-cv-1101, 08-cv-1104, 08-cv-1153, 08-cv-1185, 08-cv-1207, 08-cv-1221, 08-cv-1223, 08-cv-1224, 08-cv-1227, 08-cv-1228, 08-cv-1229, 08-cv-1230, 08-cv-1231, 08-cv-1232, 08-cv-1233, 08-cv-1235, 08-cv-1236, 08-cv-1237, 08-cv-1238, 08-cv-1310, 08-cv-1360, 08-cv-1440, 08-cv-1733, 08-cv-1805, 08-cv-2083, 08-cv-1828, 08-cv-1923, 08-cv-2019, 09-cv-0031, 09-cv-745

PETITIONER'S RESPONSE TO GOVERNMENT'S MOTION TO AMEND SEPTEMBER 11, 2008 PROTECTIVE ORDER AND COUNSEL ACCESS PROCEDURES AND JANUARY 9, 2009 TS/SCI PROTECTIVE ORDER AND COUNSEL ACCESS PROCEDURES

Summary of Argument

The government's Motion to Amend the Protective Order should be denied because this Court's orders on January 15 and 30, 2009 interpreting the protective order did not allow the "disclosure" of classified or protected information, because one cannot "disclose" information to the source of that information. In the intelligence field, the term "disclosure" is not, and has never been, used to describe the repeating back of information to the source of that information. It does not become "disclosure" based upon the nature of the information in question. It does not become "disclosure" because only part of the information is repeated back to the source. Contrary to the government's strange assertion that this would constitute "disclosure" of information, it is an indisputable fact that obtaining information from sources necessarily requires repeating information back to that source, frequently in a selective fashion: this technique is referred to as "asking follow-up questions." This Court's orders of January 15 and 30, 2009 did nothing more than recognize, and comport with, that reality. As a result, the government's motion to amend the protective order is unjustified and unwarranted.

Procedural and Factual History

On January 6, 2009, counsel for petitioner Tariq Alsawam had a trip to Guanatanamo Bay, Cuba, scheduled for February 3, 2009. Though the classified and unclassified factual returns had been filed (on October 20, 2008 and December 12, 2008, respectively), the government had not yet declassified her client's statements. Upon inquiry of the government, she was told that they could not commit to having her client's statements declassified in time for her to review them with her client during her visit to Guantanamo Bay. Believing that it was important to discuss with her client what the government claimed her client had told them, she consulted with the privilege review team

("PRT") to confirm her understanding that the protective order allowed her to review her client's statements (contained in classified documents) with him, and that it did not constitute "disclosure" of classified information to do so. Based upon those discussions and at the suggestion of the PRT, she created a document which contained only her client's statements. A member of the PRT then reviewed this document to ensure that it contained only her client's statements, marked it "SECRET," and planned to have it sent to Guantanamo Bay via the courier for classified materials for counsel's use during her planned legal visit. Later, the PRT advised her that government counsel had contacted the PRT and taken the position that the PRT could not authorize counsel to review a detainee's statements with that detainee. Based on this assertion by the government, the PRT informed counsel it would not send the document to Guantanamo Bay as planned. Counsel for Mr. Alsawam filed a motion to allow her to review the document she had created with her client.

Upon referral from the merits judge, on January 15, 2009 this Court held that it would be appropriate for counsel to share with her client his alleged statements. To ensure that only the client's statements would be shared with the source of the statements (*i.e.*, the detainee), this Court's order adopted the procedure initially proposed by the PRT. Specifically, the PRT would review the document created by counsel to be certain that it contained only the detainee's statements, mark it as "classified," and have it shipped in a secure fashion to Guantanamo Bay so that it could be reviewed with the detainee.

The government filed a motion to vacate this Court's order and sought to stay its application. The government indicated, among other things, that the declassification process was now complete, and offered the substitution of the declassified statements for the document collecting the statements that counsel had created. On January 30, 2009, this Court denied that request.

On March 11, 2009, the government filed the Motion to Amend the Protective Order that is

the subject of this Response. The government argued that the Court's orders of the 15th and the 30th allow for the "disclosure" of classified or protected information (the detainee's own statements) to the detainee. In support of this Motion, the government submitted three declarations. The first and second of these declarations[1] claim that repeating information back to the source of that information constitutes "disclosure" of that information. These declarations further allege that it is "disclosure" of classified or protected information to reveal to the sources of those statements what the agents chose to record, because it may reveal what portions of the complete statements were believed by the agents to be important.

Law and Argument

In the September 11, 2008 Protective Order entered by this Court in the consolidated Guantánamo detainee cases, paragraph 29 plainly entitles habeas counsel to disclose to their clients classified information originating from that client:

> *Petitioners' counsel shall not disclose to a petitioner-detainee classified information not provided by that petitioner-detainee*. Should a petitioner's counsel desire to disclose classified information not provided by a petitioner-detainee to that petitioner-detainee, that petitioner's counsel will provide in writing to the privilege review team . . . a request for release clearly stating the classified information they seek to release. . . .

Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantánamo Bay, Cuba, September 11, 2008, at ¶ 29 (emphasis added). As the Protective Order recognizes, any statement or information provided by the petitioner himself must already have been known to the petitioner, regardless of whether Respondents deem the information classified. This

[1] The third declaration, by Wendy Hilton, Associate Information Review Officer for the National Clandestine Service of the Central Intelligence Agency, cannot be addressed by petitioners because it has been filed *ex parte* and *in camera*. 1:08 cr 0442, dkt. 1685, March 11, 2009.

Court recognized that it would make no sense to forbid counsel to "disclose" to a petitioner information that originated from that petitioner, and the Protective Order does not do so. The Protective Order applies the same common sense rule to "protected" information:

> *Petitioner's counsel shall not disclose protected information not provided by a petitioner detainee to that petitioner-detainee* without prior concurrence of government counsel or express permission of the Court.

Id. at ¶ 39 (emphasis added). The government now seeks to amend the protective order to prevent counsel from reviewing classified or protected information with petitioners even when that petitioner is the source of that information, with an exception for statements made by petitioners to counsel.

Essentially, the government's Motion to Amend the Protective Order is built upon one argument: that repeating a detainee's statement back to that detainee after the statement has been memorialized in a report and marked classified constitutes the unauthorized "disclosure" of classified information.[2] For a number of reasons, the government is fundamentally wrong in this assertion. First, and most obviously, this position is inconsistent with the commonly understood definition of "disclose." Disclose is defined as "to make known." *See, e.g.*, http://www.merriam-webster.com. The disclosure of information does not include repeating the information back to the source of the information. Nothing is "made known" to a petitioner by repeating his statements back to him.

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[2] The government's brief raises a series of reasons why "disclosure" in this fashion may be problematic: for example, separation of powers concerns regarding the judiciary treading upon executive prerogative in foreign affairs, and the PRT's lack of authority to declassify information. *See, e.g.*, Motion to Amend, 2-3, 5, 18-21. These arguments fail for the central reason given above, namely that repeating information back to its source does not constitute "disclosure" of that information. Thus the judiciary is not intruding on executive prerogative, because the Court is not ordering the disclosure of classified information. Likewise the PRT is not declassifying information.

Unsurprisingly, the government's motion does not cite to any case in which a court held that one can "disclose" information to the source of that information. A diligent search by undersigned counsel has discovered no case in which repeating information back to its source was characterized as "disclosure" of that information.

Attached to this response are two declarations from intelligence experts, both of which confirm that even within the intelligence field, "disclosure" is still defined in a common sense manner, and does not include repeating information back to its source. The first is by Arthur Brown, a twenty-five year veteran of the Central Intelligence Agency (CIA) whose experience includes "personally conduct[ing] interviews of various types of foreign sources and prepar[ing] at least 800 reports based on these interviews," as well as reviewing "at least 10,000 'raw' or unfinished reports prepared by CIA, the Defense Intelligence Agency (DIA), and military services 'collectors' reflecting 'human intelligence' (HUMINT)." ¶1, Brown Declaration. Mr. Brown's declaration makes it clear that repeating statements back to the source of those statements is never considered "disclosure" in the intelligence field:

> Repeating a source's statements back to him/her was never considered a matter of "disclosure" of classified information under any scenario no matter what the content of those statements. In fact, it is normal in almost all intelligence interviews of consequence to repeat the source's prior substantive statements to ensure the fullness of your understanding. This is in fact necessary in scenarios where language and cultural differences can cause misunderstandings and, if left uncorrected, the basis for error. I have personally done so and have directed subordinates to do the same, and have never considered such an action "disclosure" despite the fact that the initial report of those statements may have been classified. . . .

¶2, Brown Declaration (emphasis added).

The content of the source's original statement is irrelevant to the issue of whether repeating that statement back to the source constitutes "disclosure." *Id.* For example, even if the detainee's statements involved allegations of illegal interrogation techniques which the government considers

"classified," that does not change the fact that it is not "disclosure" to repeat the detainee's statements concerning those techniques back to him.

Mr. Brown is similarly clear that it is not considered "disclosure" even when only parts of the source's statements are selectively repeated back to him. On the contrary, the effective gathering of human intelligence requires this to happen every day:

> The normal HUMINT collection process routinely utilizes a series of follow-up questions based on subsequent analysis of the source's prior statements or information. It is, by nature, focused on those statements the intelligence community deems significant. I have never met, nor heard of, a foreign intelligence source who possessed a US Government classified security clearance. Accordingly, if the selective repetition of the source's statements back to the source were considered to be "disclosure" of US Government classified information, the HUMINT process would grind to a halt. You cannot conduct meaningful HUMINT operations without the ability to reference previous source statements and ask follow-up questions.
>
> . . .
>
> There has been an argument that by revealing the fact that we noted some, but not all, of a source's statements may indicate some unique value we place on a particular statement. Selectiveness in follow-up questions was probably true in almost every source interview I conducted but at no time was my follow-up questioning constricted because of a potential "disclosure" issue based on that selectivity. It is simply not "disclosure" to repeat verbatim a source's statement back to him/her in any scenario I know from twenty-five years of actual practice.

¶¶ 3-4 Brown Declaration (emphasis added).

In short, Arthur Brown, a twenty-five year veteran of the CIA, who was previously the Senior Agency Representative in Asian capitals and the CIA's East Asia Division Chief, is unequivocal in his rejection of the foundational argument upon which the Government's Motion to Amend the Protective Order is based, and instead states in his declaration that it is not considered "disclosure" to repeat statements back to the source of those statements.

Petitioners also offer the declaration of Lieutenant Colonel (Ret.) Stephen Abraham, whose service in military intelligence spans two decades. Lt. Col. (Ret.) Abraham's declaration indicates

his experience also leads him to the common sense conclusion that repeating statements back to the source of those statements is not considered "disclosure":

> Specifically, the use of the term "disclosure" to refer to the repeating back of a detainee's statements to him, without the addition of anything else, is a misuse of that term. Simply put, giving a detainee his own statements is not a "disclosure."
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> * * *
>
> Disclosure, as the term has been used during my 26 years of experience in the US Army Intelligence Corps, has meant the communication of information by one person (or entity) to another other than the source of the information.
>
> * * *
>
> [T]he presentation to [a detainee] of only his own words, without comment, should not constitute a "disclosure", whether of classified or sensitive information or otherwise.

¶¶ 6-8, Abraham Declaration. Combining the Abraham declaration and the Brown declaration, it is clear that the government's assertion that repeating a detainee's statements to him would constitute "disclosure" of those statements to him is completely inconsistent with the manner in which military and civilian intelligence agencies use the term "disclosure."

The government attempts to use the Wells and Clapper declarations to bluster past the obvious point that one does not "disclose" information by repeating it back to its source. Neither of these declarations addresses whether it is considered "disclosure" to repeat information back to its source. Instead, both declarations avoid the topic by ambiguously raising the possibility that repeating a detainee's statements back to him might reveal <u>something</u> to the detainee. For example, the Wells declaration makes claims regarding "possible" compromising of "legitimate law enforcement and criminal investigation interests" because these reports "may" focus only on limited details from the interrogation:

> The manner by which CITF gathers information from detainees is sensitive and

> release of that information could jeopardize pending law enforcement proceedings, risk national security, and/or interfere with future judicial proceedings. Disclosure of the information contained with CITF interview reports, even if limited to detainees own statements, would permit detainees who are interviewed on future occasions to modify their prior statements or activities to take into account the information that law enforcement have focused upon in their reports. CITF interviews with detainees frequently cover a wide range of topics, but the interview reports memorializing those interviews may focus on limited details and topics of particular interest to criminal investigators. Allowing a detainee to see this information, absent review by CITF in the first instance, risks compromising CITF's legitimate law enforcement and criminal investigation interests.

¶ 6, Wells Declaration.

Similarly, the Clapper declaration makes the nebulous claim that there is "often significance" contained in "what is documented":

> 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 prevent the statements from being declassified...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.

¶5, Clapper Declaration.

Neither these declarations nor the government's Motion actually asserts that any of the reports in the instant cases actually <u>are</u> incomplete versions of detainee statements and that there is intelligence value that could be gleaned from studying what was not written down. Regardless, the government's argument that repeating back only a portion of the information to the source of that information constitutes a second kind of improper "disclosure" also ignores reality. In the real world, agents repeat back only selected portions of a source's information to them all the time in course of gathering information. ¶¶ 3-4, Brown Declaration. This is referred to as "asking follow-up questions." If this were prohibited, an agent would never be able to refer back to something a source said during a previous interview, because it would "disclose" that the agent thought that piece of

information was significant. As the Brown Declaration notes, the gathering of intelligence from human sources would "grind to a halt" if the government's definition of "disclosure" were correct. Unsurprisingly, this absurd result is inconsistent with standard practice in the intelligence field. Interrogators routinely cover the same ground over the course of multiple interrogations, as well they should for obvious reasons. The Brown Declaration puts it succinctly as follows:

> You cannot conduct meaningful HUMINT operations without the ability to reference previous source statements and ask follow-up questions.

¶ 3, Brown Declaration.

It also should be noted that this Court unquestionably has authority to review the adequacy of a government declaration filed in support of a classification determination, and to reject that declaration where it lacks reasonable detail and specificity, fails to account for contrary record evidence, or is filed in bad faith. *See Campbell v. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998) (rejecting declaration). In addition, while courts frequently defer to government declarations concerning likely harm, "deference is not equivalent to acquiescence." *ld.*; *see also Gavin v. DIA*, 330 F. Supp. 2d 592, 601 (E.D. Va. 2004) (quoting *Coldiron v. Dep't of Justice*, 310 F. Supp. 2d 44, 53 (D.D.C. 2004) ("No matter how much a court defers to an agency, its review is not vacuous. An agency cannot meet its burden of justifying non-disclosure simply by invoking the phrase national security.")).

Further, it should be noted that interpreting the Protective Order to allow for attorneys for a detainee to discuss with him his own statements is entirely consistent with the law that governs classification of information. The Executive's authority to classify information derives specifically from the National Security Act, 50 U.S.C. § 401 *et seq.*, and generally from the limited powers vested in the President by the Constitution and laws of the United States. The Executive's

classification authority is currently governed by Executive Order 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003) (amending Exec. Order 12,958). Section l.l(a) of Executive Order 13,292 provides that information may be classified only where the information fits one of the possible categories and "the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage." The information ordered "disclosed" by the Court's interpretation of the protective order thus falls squarely outside the requirements of Executive Order 13,292 because "disclosing" statements to the detainees who uttered them could not "reasonably be expected to result in damage to the national security." Exec. Order 13,292 §§ 1.1(4).

Requiring a detainee's own statements to be declassified before they may be "disclosed" to him is also directly contrary to the Supreme Court's explicit order in *Boumediene* that "the costs of delay may no longer be bourne by the petitioners." *Boumediene v. Bush*, ___ U.S. ___, 128 S.Ct. 2229, 2275 (2008). The Supreme Court and this Court have repeatedly recognized that the Writ of Habeas Corpus is meant to provide a rapid evaluation of the legality of detention by the Executive. *See*, *e.g.*, *Peyton v. Rowe*, 391 U.S. 54, 63 (1968) (holding that "[a] principal aim of the writ is to provide for swift judicial review of alleged unlawful restraints on liberty"). If this Court requires that a detainee's own statements must be declassified before they can be discussed with him, the "principle aim" of the great writ, "swift judicial review," will be further thwarted by needless procedural obstacles.[3]

[3] This has already occurred in at least one case before this Honorable Court, in which petitioner has been waiting for several months for the process of declassification of his own statements to be complete so that he may review them with counsel, with no end in sight. *Anam v. Obama*, 04-cv-1194, dkt. 456 (Status Report, attached as Ex. C.).

In addition, denying petitioners the ability to review their own statements is flatly inconsistent with the meaningful habeas review mandated by the Supreme Court in *Boumediene* because it effectively deprives the merits judges of critical evidence: at the very least, a judge should know whether a petitioners admits or denies the statements attributed to him. This cannot be squared with the Supreme Court's holding in *Boumediene* that the Combatant Status Review Tribunals ("CSRTs") were not an adequate substitute for habeas review. In enumerating the defects of the CSRT proceedings, the Court noted that the detainee "may not be aware of the most critical allegations that the Government relied upon to order his detention." *Id.* at 2269. If a detainee may not review his own alleged statements that are used to justify his detention, then these habeas proceedings will suffer the same defects as the CSRTs.[4]

Conclusion

In sum, the government's Motion to Amend the Protective Order should be denied. This Court's orders on January 15 and 30, 2009 interpreting the protective order did not allow the "disclosure" of classified or protected information, because one cannot "disclose" information to the source of that information.

[4]If this Court does accept the government's proposition that it would constitute "disclosure" of classified information to repeat a detainee's statements back to him, it should further make clear that the government may not use a detainee's statements to defend its detention of him unless that detainee has the opportunity to review those statements, so as to allow him to "rebut the factual basis" for his detention. *Boumediene*, 128 S.Ct. at 2269.

May 11, 2009

Respectfully submitted,

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On behalf of Petitioners with consent **

** Reserving objections to the requirement to file a single consolidated brief.