[NOT SCHEDULED FOR ORAL ARGUMENT]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MAJID KHAN, Petitioner	)	
v.	)	No. 07-1324
ROBERT M. GATES, Respondent.	)	

OPPOSITION TO THE MOTION OF THE NEW YORK TIMES COMPANY, THE ASSOCIATED PRESS AND USA TODAY TO UNSEAL CLASSIFIED DOCUMENTS

The pending motion asks this Court to disclose to news organizations, and through them the world at large, classified information in the Court's custody whose public disclosure threatens exceptionally grave damage to the nation's security. This demand is unprecedented. To our knowledge, no court has ever deliberately disclosed classified filings to the public. To the contrary, courts have consistently undertaken to protect classified information through sealing orders and other protective orders – as this Court has done in this case and others arising under the Detainee Treatment Act (DTA).

Neither the First Amendment nor the common law entitles news organizations to obtain and publish classified information that has been placed under seal by a court to preserve its secrecy. The qualified right of access to judicial proceedings created by the First Amendment is confined to criminal proceedings and does not extend to civil proceedings in general or to proceedings under the DTA in particular. Moreover, even if the news organizations enjoyed a First Amendment right of access to DTA proceedings, that right does not extend to the inspection and publication of classified filings. The common law does not provide a right of access to classified information either, for federal common law operates only in the absence of federal legislation, and Congress has repeatedly exercised its legislative authority to prohibit the disclosure of classified information to the public.

Demands for public disclosure of classified filings are unfounded in any

context, but they are particularly misconceived in the context of litigation over the detention of enemy combatants under the DTA. The information being sought by the news organizations in this case was provided by an important military prisoner in time of war, and the news organizations are seeking it because they believe that it discloses details about techniques used to gather wartime intelligence. The information has been classified at the TOP SECRET//Sensitive Compartmented Information (SCI) level because its disclosure risks exceptionally grave damage to our nation's security. The Supreme Court has specifically recognized that "discovery into military operations would * * *intrude on the sensitive secrets of national defense." *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (plurality opinion). The classified information in Khan's filings squarely implicates these concerns.

The news organizations suggest that the government bears a "heavy burden" (Mot. 12) to justify the continued sealing of the classified information in Khan's filings. To the contrary, this Court has held that it will extend great deference to the government's classification decisions and will sustain them as long as they are reasonable and legitimate. Here, the reasons provided by the CIA are not only reasonable and legitimate, they are compelling. In short, if the Court releases Khan's statements, the media will able to reveal highly classified details of key CIA programs relating to high value detainees. Accordingly, the material sought by the news organizations is properly classified, and they have no right to obtain it.

STATEMENT

The news organizations seek to obtain, and presumably publish, "unredacted copies of all papers" filed in support of Khan's two pending motions. Mot. 7. In particular, they seek two declarations that they claim detail Khan's allegations about the detention and interrogation of him and others by the CIA. *Ibid.*

These declarations are currently under seal in this Court because CIA professional intelligence experts have determined that disclosure of them might reveal "the locations of CIA intelligence activities overseas, the assistance provided by certain foreign governments * * *, and the conditions of confinement and interrogation methods used by the CIA." Hilton Decl. ¶ 11 (attached). This is because Khan and "other[s] * * * formerly held in CIA custody * * * have been exposed to [these] intelligence sources and methods." *Ibid.*; see *id.* ¶¶ 14, 17, 23. The release of such "information to which [Khan] has been exposed reasonably could be expected to cause exceptionally grave damage to the national security" by damaging our "relationships with foreign intelligence and security services" and "degrad[ing] the CIA's ability to effectively question terrorist detainees and elicit information necessary to protect the American people." *Id.* ¶ 12.

The CIA is currently engaged in a paragraph-by-paragraph review to determine whether the declarations include any information that does not require classification and that can be made public. As soon as that review process is completed, the

government will submit redacted versions of the declarations for filing on the Court's public docket. As a result, the only issue posed by the pending motion is whether the news organizations are entitled to information in the declarations that *is classified* and whose disclosure reasonably could be expected to cause exceptionally grave damage to national security.

REASONS FOR DENYING THE MOTION

I. Neither the First Amendment Nor the Common Law Provides News Organizations with Any Right of Access to Classified Materials

A. The news organizations have no First Amendment right to receive and publicly disclose classified information filed in this Court under a protective order. In this Circuit, the qualified First Amendment right of access to judicial proceedings applies only to criminal proceedings and does not extend to civil proceedings like this case. See *Center For National Security Studies* v. *U.S. Dep't of Justice*, 331 F.3d 918, 935 (D.C. Cir. 2003) (*CNSS*) ("[n]either the Supreme Court nor this Court" has recognized a constitutional right of public access "outside the context of criminal judicial proceedings"). While a few other Circuits have extended a qualified First Amendment right of access to some civil cases (see Mot. 9)), this Court has continued to adhere to the Supreme Court's narrower view. See *Flynt* v. *Rumsfeld*, 355 F.3d 697, 704 (D.C. Cir. 2004); *CNSS*, 331 F.3d at 934 (no controlling case has "ever *indicated* that it would apply [the right of access cases] to anything other than

criminal judicial proceedings"). The case on which the news organizations principally rely (Mot. 9, 12), *Washington Post Co.* v. *Robinson*, 935 F.2d 282 (D.C. Cir. 1991), involved access to a sealed plea agreement in a *criminal* case, and hence offers no support for a First Amendment right of access in civil litigation.

1. Even if the First Amendment right of access were not confined to criminal proceedings, it would not extend to judicial review proceedings under the DTA, much less to classified information filed under seal in these proceedings. Before a First Amendment right of access will attach to a proceeding, the entity seeking access must make two showings: first, that "the place and process" to which access is sought "have historically been open to the press and general public," and second, that "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 8-9 (1986). A failure to make either showing is fatal to a First Amendment access claim. *United States* v. *El-Sayegh*, 131 F.3d 158, 161 (D.C. Cir. 1997); *In re Reporters Committee*, 773 F.2d 1325, 1332 (D.C. Cir. 1985). Here, neither showing has been made.

There is no tradition of public access to judicial proceedings for review of military determinations of enemy combatant status, much less a tradition of access to classified information in such proceedings. While the Supreme Court held in *Rasul v. Bush,* 542 U.S. 462 (2004), that the habeas statute as then written extended to aliens held at Guantanamo, there is no tradition of judicial proceedings at all in these

circumstances, much less open proceedings, given limitations on the territorial jurisdiction of the writ that existed until 1973. *Id.* at 478-79 (explaining that in 1973, a "decision[] of this Court" first "filled the statutory gap" and allowed persons "detained outside the territorial jurisdiction of [a] federal district court" to seek habeas review); see *El-Sayegh*, 131 F.3d at 161 ("There can hardly be a historical tradition of access to the documents accompanying a procedure that did not exist until * * * 1991."). At most, there is a tradition of *closed* proceedings that relate to aliens who are not in the United States. *North Jersey Media Group v. Ashcroft*, 308 F.3d 198, 211 (3d Cir. 2002) (recognizing that "since the 1890s, when Congress first codified deportation procedures, '[t]he governing statutes have always expressly closed *exclusion* hearings'").[1] The lack of any history of public access contrasts sharply with the history of criminal trials, which have been open to the public from "the days before the Norman Conquest." *Press-Enterprise*, 478 U.S. at 8. And while military tribunals themselves are generally open, that policy has never extended to classified information. To the contrary, the military procedures for identifying enemy combatants, which were cited with approval in *Hamdi*, 542 U.S. at 538 (plurality opinion), provide that "[p]roceedings shall be open except for * * * matters which

[1] In deportation cases, there is also no tradition of public access to material that may form the basis of habeas proceedings. Cf. *id.* at 211, 221 (acknowledging the right to seek habeas review of deportation proceedings, but finding an "insufficient tradition of openness to support the right" to access immigration proceedings).

would compromise security if held in the open." Army Reg. 190-8, § 1-6(e)(3).

Public access also does not and would not "play[] a significant positive role in the functioning of the particular process in question." *Press-Enterprise*, 478 U.S. at 8. First, there has been no determination by this Court that the information submitted by Khan is relevant or related to the civil litigation authorized by the DTA. As the government has explained, Khan's "CSRT was not presented with any statements made by petitioner, or any other detainee, while in CIA custody," making it unlikely that Khan's treatment while in custody will be relevant. Opp. to Mot. for Preservation Order at 5 n.4. Publicly releasing irrelevant information would contribute nothing to the DTA process. *Cf. United States v. Gonzales*, 150 F.3d 1246, 1261 (10th Cir. 1998) (even in criminal context, no right to access materials that do not "relate to the core proceeding – the determination of guilt or innocence of the defendant").

Further, "to gauge accurately whether [the] role [of public access] is positive, the calculus must perforce take account of the flip side -- the extent to which openness impairs the public good." *North Jersey Media Group*, 308 F.3d at 217. Here, the public good would be severely impaired, because public disclosure of classified information would cause severe damage to national security. The Supreme Court has recognized this potential harm in the context of enemy detainees in the war against al Qaeda, *Hamdi*, 542 U.S. at 532; this Court has likewise recognized the

harm in DTA cases generally by entering a detailed protective order sealing classified material; *see Bismullah v. Gates*, 531 F.3d 178, 194-204 (D.C. Cir. 2007), *petition for cert. pending*; and the potential harm to national security is particularly great in this case, which involves TOP SECRET//SCI information. Hilton Decl. ¶ 27. This Court recognized as much in the protective order entered in this case, which is more stringent than the order entered in *Bismullah*.

At the same time, the rules and procedures governing this case already provide the public with broad access to the proceeding, with public unclassified briefs, open oral arguments, and published opinions. These comprehensive procedures are sufficient to inform the public how DTA cases are decided and to satisfy the "'citizen's desire to keep a watchful eye on the workings of'" this Court. Mot. 10 (quoting *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 597-98 (1978)). Moreover, Khan's counsel has access to the classified information that has been placed under seal. In sum, the process is served by the procedures currently in place that seal the classified material filed in this Court.

The news organizations argue that there is a "compelling [public] interest" in knowing whether the government's intelligence-gathering efforts "violat[e] international law or constitutional rights[,] as Khan contends." Mot. 16. That argument ignores the unrelated purpose of this Court's DTA review, which is to gauge Khan's status as an enemy combatant rather than investigate the CIA's

detention program. It also assumes that any factual assertions by Khan about his treatment are truthful, which is hardly a safe assumption when terrorists are trained to lie about the conditions of their detention. See Gov't Exs. 158, 1677-T, introduced into evidence in *United States v. Bin Laden*, No. S(7) 98 Cr. 1023 (LBS) (S.D.N.Y.) (excerpt from al-Qaeda training manual stating that captured "brothers must insist on proving that torture was inflicted upon them by State Security" and "[c]omplain * * * of mistreatment while in prison").[2]

This Court has recognized the propriety of denying access to classified material in litigation even when access is being sought by a party to the suit rather than, as here, members of the public who are non-parties. See, *e.g.*, *Holy Land Foundation v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003); *People's Mojahedin v. Dep't of State*, 327 F.3d 1238, 1242 (D.C. Cir. 2003); *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004). The Court has likewise declined to allow counsel for a former federal employee to access classified information from his client. *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003). And the Court has frequently crafted protective orders to allow the parties to litigate disputes involving classified information while ensuring that such information remains under seal. *See, e.g.*, *Northrop v. McDonnell Douglas*,

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[2]The Executive Branch has allowed Khan's lawyers to provide a classified briefing to Congress on Khan's claims, thereby further serving the public interest in government oversight. See http://ccrjustice.org/newsroom/press-releases/ccr-attorney-gives-unprecedented-classified-briefing-senate-intelligence-com.

751 F.2d 395, 401 (D.C. Cir. 1984). If it is permissible to limit the access of private litigants and their counsel to classified information that bears on their claims, it follows *a fortiori* that withholding access does not violate the First Amendment rights of non-party news organizations.

B. The news organizations are similarly mistaken in asserting a common law right of access to classified documents in civil cases. Although federal common law creates a qualified right of access to public records in general, see *Washington Legal Foundation* v. *U.S. Sentencing Comm'n*, 89 F.3d 897, 906 (D.C. Cir. 1996), the countours of the right are "largely controlled by the second of the First Amendment criteria-the utility of access as a means of assuring public monitoring of judicial or prosecutorial misconduct." *El-Sayegh*, 131 F.3d at 161. Those criteria are not satisfied here because the filings have not been determined to be relevant to this action; their public release is not essential to the functioning of the judicial process; and their release would harm national security. See *supra* pp. 7-9.

More fundamentally, neither this Court nor any other court has ever extended that common law right to classified information. The common law right of access to public records, like other federal common law rights, "is subject to the paramount authority of Congress," and "[w]hen Congress addresses a question previously governed by * * * federal common law[,] the need for such an unusual exercise of lawmaking by federal courts disappears." *City of Milwaukee* v. *Illinois*, 451 U.S. 304,

314 (1981) (internal quotation marks omitted). Here, Congress has made the policy judgment that classified information should not be disclosed to the public and has embodied that judgment in legislation. Thus, the Freedom of Information Act exempts from disclosure those matters that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and * * * are in fact properly classified pursuant to such Executive order." 5 U.S.C. 552 § (b)(1)(A)-(B); *see also* 18 U.S.C. § 793; 50 U.S.C. §§ 421, 783 (criminal provisions related to release of classified information); 18 U.S.C. App. § 6(e)(1) (Classified Information Procedures Act).

Taken together, these provisions embody a broad Congressional policy against unauthorized disclosure of classified information, including disclosure to the public. That policy precludes the creation of a conflicting common law right of access, for the courts may not "continue to rely on federal common law by judicial[] decree[] * * * when Congress has addressed the problem." *City of Milwaukee*, 451 U.S. at 315.

II. The Material Sought is Properly Classified.

A. For the foregoing reasons, the news organizations do not have a right to obtain the classified material filed under seal. But even if this Court construed the motion as seeking review of the underlying classification decision, the decision is not properly reviewed in this litigation. Instead, the Freedom of Information Act (FOIA) is the appropriate avenue to seek review of whether the Executive Branch has

improperly or erroneously classified material. *See El-Sayegh*, 131 F.3d at 163 (when a party seeks information to "evaluat[e] the performance of" the government "in [its] dealings with" an individual, the person is not evaluating "the judicial function" and the "appropriate device" for obtaining the information is not a request for "access to the records of the judiciary" but "a [FOIA] request addressed to the relevant agency").[3]

B. In any event, the CIA properly classified the material. The news organizations argue that this Court should unseal the classified filings unless the government carries the "heavy burden" of showing a "'compelling interest'" in keeping the information under seal (Mot. 12). That argument seriously misstates the standard of review. Far from requiring the government to bear a "heavy burden," both the Supreme Court and this Court have held that the Executive Branch's classification determinations warrant great deference from the courts.

This Court has repeatedly declined to second-guess classification decisions. See, *e.g.*, *Students Against Genocide v. Dept. of State*, 257 F.3d 828, 835 (D.C. Cir. 2001). As this Court observed most recently in *Bismullah*, "consistent with our rule

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[3]The availability of FOIA also undermines the news organizations' claim to the extent they assert a First Amendment or common law right to obtain review of the classification decision by intervening in this litigation. Cf. *Washington Legal Foundation*, 89 F.3d at 899 ("access under the common law should be denied" when there is a statutory regime governing access because "the availability of a legislatively prescribed route to documents tips the second-step balancing test against their judicially prompted release").

of deference, '[i]t is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role.'" 501 F.3d at 187-88. Instead, "[t]he assessment of harm to intelligence sources, methods and operations is entrusted to the Director of Central Intelligence, not to the courts." *Fitzgibbon v. C.I.A.* 911 F.2d 755, 766 (D.C. Cir. 1990).

Importantly, this case concerns *access* to classified information, rather than preventing the *release* of classified information by someone already in possession of it. Here, Khan has not sought to release classified information. Instead, the news organizations are seeking to access the classified information Khan has provided to his attorneys. If Khan sought release of classified information, this Court could address the issues that would arise at that time. When disclosure is being pursued by an entity that already possesses classified information and is predicated on recognized First Amendment interests, the government's classification decisions are still entitled to a significant measure of deference. See *McGehee* v. *Casey*, 718 F.2d 1137, 1147-49 (D.C. Cir. 1983). Here, were Khan to seek to release information in his possession, his status as an alien abroad who is being held as a military prisoner in wartime would preclude his reliance on the First Amendment. See *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904); *Cuban-American Bar Ass'n v. Christopher*, 43 F.3d 1412, 1428-29 (11th Cir. 1995). Cf. *Thornburgh v. Abbott*, 490

U.S. 401 (1989) (speech of prisoners held in the United States may be restricted if there is a legitimate penological interest).[4] In sum, judicial deference is warranted *a fortiori* here, where the case concerns access, not release, of classified information and there is no First Amendment right of access in the first instance. See *McGehee*, 718 F.2d at 1147.

C. Under this deferential standard of review, this Court should sustain the CIA's reasonable, good faith explanation for classifying the redacted portions of Khan's filings. The information in Khan's filings is classified because the United States has confirmed that Khan "may have come into possession of the very information about the CIA program that the U.S. Government seeks to protect, including the locations of detention facilities, the identities of cooperating foreign governments, and the conditions of confinement and interrogation techniques." Hilton Decl. ¶ 23. He has also "been exposed to intelligence sources and methods" protected by the National Security Act, 50 U.S.C. § 403-1(i). *Id.* ¶ 11. While "many of the allegations" made by Khan are not true, he "is in a position to provide accurate and detailed information

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[4]The government may "act[] to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment." *Stillman*, 319 F.3d at 548 (quoting *Snepp v. United States*, 444 U.S. 507, 510 n.3 (1980)). That "government interest[]" is obviously compelling in circumstances like these, where an enemy combatant has come into possession of classified information in conjunction with his detention. Accordingly, it is entirely appropriate to impose restrictions on Khan to protect classified information. Cf. *United States* v. *El-Hage*, 213 F.3d 74, 81-82 (2d Cir. 2000).

about the CIA's detention program." *Id.* ¶ 24.

If the Court were to release the true details of the program – including the locations of his detention, the governments that cooperated, and the details of interrogation methods – there would be "exceptionally grave damage to the national security." *Id.* ¶¶ 12, 18. With respect to cooperation with foreign governments, they "have provided critical assistance to CIA counterterrorism operations * * * under the condition that their assistance be kept secret." *Id.* ¶ 14. If the "United States demonstrates that it is * * * unable to stand by its commitments [of secrecy] to foreign governments, they will be less willing to cooperate * * * on counterterrorism activities" and could "cease cooperating with the CIA" in the detention program. *Ibid.* This risk is not "merely conjectural" – "specific assurances" were made to "protect [the] cooperation" in this program and a leak of information about the program has caused "one particular liaison partner [to] reduce[] its cooperation" causing "incalculable" damage. *Id.* ¶¶ 15-16.

With respect to classified interrogation methods, public disclosure "could be expected to cause exceptionally grave damage to national security by making it more difficult for the CIA to obtain the information it needs to help protect the American people." *Id.* ¶ 17. Disclosure of these interrogation methods "would allow al Qaeda and other terrorists to more effectively train to resist such techniques, which would result in degradation in the effectiveness of the techniques." *Id.* ¶ 21.

The President has confirmed the importance of the CIA detention program. See *id.* ¶ 18. It is "one of the most useful tools in combating terrorist threats" that has "led to the disruption of terrorist plots" such as the "plot to fly a plane into the tallest building in Los Angeles." *Id.* ¶ 19. It has also "provided initial leads to the locations of al Qaeda operatives that led to their capture." *Id.* ¶ 20. Accordingly, releasing information about the program would "result in exceptionally grave damage to the national security." *Id.* ¶ 18.

Moreover, because it has been publicly acknowledged that Khan has had access to classified information regarding the program, the CIA cannot adequately protect this classified information by either declining to classify any statements made by Khan about the program or by classifying only those statements he makes which are actually true. *Id.* ¶ 26. Either rule, once established, would enable Khan to easily reveal the scope and details of the classified program. Of course, because Khan has been exposed to the classified program, if the government declined to classify any of Khan's statements, he could directly reveal "the very information about the CIA program that the U.S. Government seeks to protect." *Id.* ¶ 23. If, on the other hand, the government were allowed to classify only Khan's statements concerning the program that were *true*, Khan and other former CIA detainees could nonetheless reveal "accurate, highly classified information about the program" by "making multiple allegations" that would allow others to figure out the correct information "through a

simple process of elimination." *Id.* ¶ 25. Khan and other detainees "with knowledge of classified facts could easily manipulate the rule to reveal those classified facts." *Ibid.* For example, to reveal the identity of a cooperating government, he could name several governments, and by process of elimination, an analyst could determine the identity of the government that was redacted. *Ibid.* In sum, protecting the classified programs "depends as much on concealing what * * * methods are *not* approved as it does on concealing what methods are approved." *Ibid.*; see *Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978) (intelligence gathering is "akin to the construction of a mosaic" whereby "bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate").

It is of no moment that news reports and individuals have made public statements claiming knowledge of some of the facts that are classified. *See* Mot. at 16-18 (citing news reports and statements by Khaled El-Masri and Khan's father). Rather, it is well established that news reports and other unconfirmed statements by individuals do not vitiate the classified nature of information. *Fitzgibbon*, 911 F.2d at 765 (because of the "critical difference between official and unofficial disclosures," information may be released under FOIA only if the "specific" information "has been 'officially acknowledged"); see *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007); *Phillippi v. CIA*, 546 F.2d 1009, 1015 (D.C. Cir. 1976) (agency may properly protect "greater '(o)fficial acknowledgment of the involvement of specific United States

Government agencies'"); see also *El-Masri v. U.S.*, 479 F.3d 296, 308 (4th Cir.), *cert. denied*, 128 S. Ct. 373 (2007). In fact, the protective order entered by this Court here addressed this issue by providing that even when "classified information enters the public domain," counsel is not free to confirm that information because it remains classified. See Khan Protective Order, § 5(O).[5]

Beyond speculation, there is no reason to believe that the sources of those reports actually had access to the classified information in question. Here, on the other hand, the United States has confirmed that Khan was detained by the CIA and "may have come into possession of the very information about the CIA program that the U.S. Government seeks to protect, including locations of detention facilities" and "interrogation techniques." Hilton Decl. ¶ 23 Thus, while foreign governments can ignore allegations made by most people about CIA conduct, they would view disclosure in these circumstances as a breach of secrecy agreements. *Id.* ¶ 14. While the audience is very different, the result is similar with respect to statements concerning interrogation techniques: statements that Khan has or might make, in conjunction with the acknowledgment that he has been exposed to classified

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[5]The government also does not waive the classified status of information relating to a subject by releasing or acknowledging other information related to the subject. See *Assassination Archives and Research Ctr. v. C.I.A.*, 334 F.3d 55, 60 (D.C. Cir. 2003) (to warrant release of material, "agency's previous disclosure [must] 'appear[] to duplicate' the material sought, *i.e.*, that the disclosure is 'as specific as' and 'match[es]' the sought material") (citations omitted).

information regarding the CIA program, will necessarily provide al Qaeda with more reliable information regarding the range of techniques employed by the CIA, thereby allowing "[t]errorists * * * [to] exploit such disclosures to improve their counter-interrogation training." *Id.* ¶ 23.

Indeed, this Court has allowed the government to prevent ex-employees from divulging classified information. See *McGehee*, 718 F.2d at 1147-49. In that context, which is much more fraught with First Amendment implications, a key basis for allowing the government to prevent disclosure is the fact that there is a degree of official confirmation that the ex-employee had access to classified information. See *Stillman*, 319 F.3d at 548. If the news organizations' theory was correct, the government would never be able to preclude former employees from disclosing potentially classified information; instead, the government would have to resort to refusing to confirm or deny the accuracy of that information once released. The gravamen in both cases is that the United States has confirmed that the individual has had access to classified information and has a "substantial government interest[]" in protecting that information. *Ibid.*

The news organizations are also incorrect in arguing that the government's determination that Khan's allegations are classified is illogical and "presumes that Khan will never be released." Mot. 6. There is nothing unusual about preventing a prisoner or detainee in custody from revealing classified materials or national security

information even though the person may eventually be released. For example, the government may restrain convicted terrorists, or those charged as terrorists, from communicating with the public prior to trial even though the trial may result in acquittal. See, *e.g.*, *El-Hage*, 213 F.3d at 81-82 (sustaining Special Administrative Measures by the Attorney General, including requirements limiting communication, imposed upon a pre-trial detainee accused of plotting a terrorist bombing); *Yousef* v. *Reno*, 254 F.3d 1214, 1219 (10th Cir. 2001).

Because the news organizations have failed to establish that they have any right to classified information filed under seal in this Court, this Court need not balance the public's interest in disclosure against the government's interest in protecting classified material from disclosure. Even if balancing were appropriate, however, this Court should not unseal the classified information. There is little public interest in releasing the declarations. See *supra* pp. 7-9. The government's interest, on the other hand, is extraordinary: the protection of national security is perhaps the highest duty of the federal government. *Haig* v. *Agee*, 453 U.S. 280, 307 (1981) ("no governmental interest is more compelling than the security of the Nation").

CONCLUSION

For the foregoing reasons, this Court should deny the news organizations' Motion To Unseal.

Respectfully submitted,

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MARCH 28, 2008

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2008, I served the foregoing by email and by causing copies to be sent by regular mail to:

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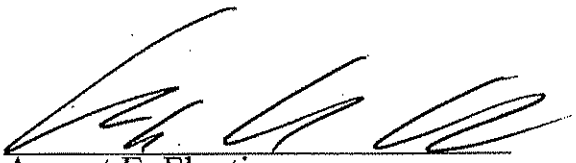

August E. Flentje

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MAJID KHAN,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 07-1324
	)	
	)	
ROBERT M. GATES,	)	
	)	
Respondent.	)	
	)	

DECLARATION OF WENDY M. HILTON
ASSOCIATE INFORMATION REVIEW OFFICER
NATIONAL CLANDESTINE SERVICE
CENTRAL INTELLIGENCE AGENCY

I, WENDY M. HILTON, hereby declare and say:

1. I am an Associate Information Review Officer (AIRO) for the National Clandestine Service (NCS) of the Central Intelligence Agency (CIA). I was appointed to this position in March 2007. I have held a variety of positions in the CIA since I became a staff officer in 1983.

2. The NCS is the organization within the CIA responsible for conducting the CIA's foreign intelligence and counterintelligence activities; conducting special activities, including covert action; conducting liaison with foreign intelligence and security services; serving as the repository for foreign counterintelligence information; supporting

clandestine technical collection; and coordinating CIA support to the Department of Defense. Specifically, the NCS is responsible for the conduct of foreign intelligence collection activities through the clandestine use of human sources.

3. As AIRO, I am authorized to assess the current, proper classification of CIA information based on the classification criteria of Executive Order 12958, as amended,[1] and applicable CIA regulations. As part of my official duties, I ensure that determinations such as the release or withholding of information related to the CIA are proper and do not jeopardize CIA interests, personnel, or facilities, and, on behalf of the Director of the CIA, do not jeopardize CIA intelligence activities, sources, or methods. I am able to describe, based on my experience, the damage to the national security that reasonably could be expected to result from the unauthorized disclosure of classified information.

4. Section 6.1 of Executive Order 12958 defines "national security" as "the national defense or foreign relations of the United States;" and defines "information" as "any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, that is owned by, produced by

[1] Executive Order 12958 was amended by Executive Order 13292. See Exec. Order No. 13292, 68 Fed. Reg. 15315 (Mar. 28, 2003). All citations to Exec. Order No. 12958 are to the Order as amended by Exec. Order No. 13292. See Exec. Order No. 12958, 3 C.F.R. 333 (1995), reprinted as amended in 50 U.S.C.A. § 435 note at 187 (West Supp. 2007).

or for, or is under the control of the United States Government."

5. Section 1.1(a) of the Executive Order provides that information may be originally classified under the terms of this order only if the following conditions are met:

> (1) an original classification authority is classifying the information;
>
> (2) the information is owned by, produced by or for, or is under the control of the United States Government;
>
> (3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and
>
> (4) 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.

Exec. Order 12958, § 1.1(a).

6. Section 1.3(a) of the Executive Order provides that the authority to classify information originally may be exercised only by the President and, in the performance of executive duties, the Vice President; agency heads and officials designated by the President in the Federal Register; and United States Government officials delegated this authority pursuant to section 1.3(c) of the Order. Section 1.3(c)(2) provides that TOP SECRET original classification authority may be delegated only by the President; in the performance of executive duties,

the Vice President; or an agency head or official designated pursuant to section 1.3(a)(2) of the Executive Order.

7. In accordance with section 1.3(a)(2), the President designated the Director of the CIA as an official who may classify information originally as TOP SECRET.[2] Under the authority of section 1.3(c)(2), the Director of the CIA has delegated original TOP SECRET classification authority to me. Section 1.3(b) of the Executive Order provides that original TOP SECRET classification authority includes the authority to classify information originally as SECRET and CONFIDENTIAL. I am authorized, therefore, to conduct classification reviews and to make original classification and declassification decisions regarding national security information.

8. Section 102(A)(i) of the National Security Act of 1947, as amended, 50 U.S.C. § 403-1(i), requires the Director of National Intelligence (DNI) to protect intelligence sources and methods from unauthorized disclosure. As explained below, petitioner Majid Khan has been exposed to intelligence sources and methods that the DNI is required to protect from unauthorized disclosure. For this reason, the DNI authorized me to take all necessary and appropriate measures in this case to ensure that intelligence sources and methods are protected from

[2] Order of President, Designation under Executive Order 12958, 70 Fed. Reg. 21,609 (Apr. 21, 2005), *reprinted in* U.S.C.A. § 435 note at 199 (West Supp. 2007).

public disclosure. Under this authorization of the DNI and in accordance with section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C.A. § 403g, and sections 1.3(a)(5) and 1.5(h) of Executive Order 12333, the DCIA is responsible for protecting CIA sources and methods from unauthorized disclosure.

9. I make the following statements based upon my personal knowledge and information made available to me in my official capacity.

10. Through the exercise of my official duties, I am generally familiar with this case. I understand that Petitioner has filed a Petition under the Detainee Treatment Act (DTA) challenging the determination by the Department of Defense (DOD) that Petitioner should continue to be detained as an enemy combatant at Guantanamo Bay, Cuba. I also understand that a protective order was entered by the Court on 12 October 2007. I have reviewed in their entirety Petitioner's Motion for Preservation of Torture Evidence and Motion to Declare Interrogation Methods Applied Against Petitioner Torture and all accompanying exhibits to these motions. I understand that The New York Times Company, the Associated Press, and USA Today have filed a motion to unseal certain classified filings made in this case. The purpose of this declaration is to describe for the Court the damage to the national security that reasonably could

be expected to result if the classified information in these filings is unsealed.

11. Petitioner and the fifteen other high-value detainees at Guantanamo Bay formerly held in CIA custody (HVDs)[3] have been exposed to intelligence sources and methods. In addition to being protected from disclosure under the National Security Act of 1947 and the Central Intelligence Agency Act of 1949, these sources and methods also are classified information the disclosure of which reasonably could be expected to result in exceptionally grave damage to the national security. Specifically, the locations of CIA intelligence activities overseas, the assistance provided by certain foreign governments in furtherance of those activities, and the conditions of confinement and interrogation methods used by the CIA are all properly classified intelligence sources and methods. Part I of this declaration describes the intelligence activities implicated in this case and the exceptionally grave damage to national security that reasonably could be expected to result if Petitioner's classified statements about these intelligence sources and methods are publicly disclosed. Part II of this declaration describes the extraordinary measures the U.S. Government has taken to ensure that the classified information

[3] On September 6, 2006, the President announced that fourteen detainees who had been held in CIA custody had been transferred to Department of Defense custody at Guantanamo Bay, Cuba. Two additional detainees were later transferred to Guantanamo Bay from CIA custody.

to which the HVDs have been exposed is protected against unauthorized disclosure.

I. Damage to National Security Resulting from Public Disclosure of Petitioner's Statements about CIA Intelligence Activities

12. Public disclosure of the classified information to which Petitioner has been exposed reasonably could be expected to cause exceptionally grave damage to the national security. Specifically, disclosure of such information is reasonably likely to damage the CIA's relationships with foreign intelligence and security services and thereby degrade the CIA's ability to effectively question terrorist detainees and elicit information necessary to protect the American people.

A. Damage to Foreign Relations

13. Among the most critical sources and methods in the collection of foreign intelligence are the relationships that the United States maintains with the intelligence and security services of foreign countries. Through these intelligence liaison relationships, the CIA can collect intelligence and provide to U.S. national security and foreign policy officials information that is critical to informed decision making; information that the CIA cannot obtain through other sources and methods.

14. In this case, foreign governments have provided critical assistance to CIA counterterrorism operations,

including but not limited to hosting of foreign detention facilities, under the condition that their assistance be kept secret. Statements from Petitioner and other HVDs acknowledged to have been in the CIA's detention program about the specific foreign detention locations and other critical assistance that foreign countries have provided to the CIA's counterterrorism operations would damage the CIA's relations with these foreign governments and could cause them to cease cooperating with the CIA on such matters. If the United States demonstrates that it is unwilling or unable to stand by its commitments to foreign governments, they will be less willing to cooperate with the United States on counterterrorism activities.

15. The damage to national security that could result if Petitioner and other HVDs were permitted to discuss their knowledge about foreign cooperation is not merely conjectural. Just prior to the President's 6 September 2006 speech announcing the transfer of HVDs to DOD custody, the CIA provided certain foreign partners specific assurances that the CIA would protect their cooperation. These liaison partners expressed their deep appreciation and highlighted that their continued cooperation was conditioned on the CIA's commitment and ability to keep their assistance strictly confidential.

16. Specifically, one particular liaison partner reduced its cooperation with the CIA when its role in the terrorist

detention program leaked to a third country whose national had been detained within the program. The liaison partner lost the trust and cooperation of that third country in matters of their own national security. Repair of the CIA's relationship with this liaison partner came only through the senior-level intervention of the CIA Director personally apologizing for the leak. Despite this significant effort, to this day the damage this one incident has caused to the CIA's relationship with the liaison partner is incalculable, as the CIA can never be sure to what extent the liaison partner is withholding vital intelligence necessary to the national security of the United States. Accordingly, Petitioner's and other HVDs' disclosures concerning foreign cooperation would have a lasting negative impact by frustrating CIA efforts to obtain vital national security information required to protect the American people.

B. Damage to CIA Intelligence Activities

17. Petitioner and other HVDs have been exposed to classified intelligence methods, including the CIA's methods of questioning, conditions of confinement while in CIA custody, and certain intelligence disclosed during the course of questioning. Public disclosure of such information reasonably could be expected to cause exceptionally grave damage to national security by making it more difficult for the CIA to obtain the information it needs to help protect the American people.

18. As the President has acknowledged in his speech of September 6, 2006 announcing the transfer of the HVDs to Guantanamo Bay, the CIA is authorized to use alternative procedures in the questioning of certain terrorist detainees. He also stated, however, that the details of their confinement and the methods of their interrogation could not be divulged and that he intended that the CIA program continue. Unauthorized disclosures regarding the specifics of the detention and interrogation program, including the techniques the CIA uses to elicit information, are likely to degrade the program's effectiveness and therefore result in exceptionally grave damage to the national security.

19. The CIA's detention program has provided the U.S. Government with one of the most useful tools in combating terrorist threats to the national security. It has shed light on probable targets and likely methods for attacks on the United States, and has led to the disruption of terrorist plots against the United States and its allies. For example, information obtained through the program thwarted a plot to fly a plane into the tallest building in Los Angeles. Additional plots that were disrupted included hijacking passenger planes to fly into Heathrow Airport and the Canary Wharf in London and attacking the U.S. consulate in Karachi, Pakistan, using car bombs and motorcycle bombs.

20. Additionally, information obtained through the program also has played a vital role in the capture and questioning of additional senior al Qaeda operatives. For example, interrogations of detainees produced information that provided initial leads to the locations of al Qaeda operatives that led to their capture. In addition, the United States gained valuable information that explained previously unknown details of al Qaeda, such as its organization, financing, communications, and logistics.

21. The U.S. Government is aware that al Qaeda and other terrorists train in counter-interrogation methods. Public disclosure of the methods used by the CIA would allow al Qaeda and other terrorists to more effectively train to resist such techniques, which would result in degradation in the effectiveness of the techniques in the future.

C. Allegations Regarding the CIA Detention Program by Persons other than High-Value Detainees

22. I am aware of media speculation about the supposed locations of CIA detention facilities and the techniques that the CIA is allegedly authorized to use during the interrogation of terrorist detainees. I also am aware that persons other than Petitioner and the HVDs at Guantanamo Bay, Cuba, have made allegations about detention and mistreatment by the CIA and foreign governments assisting the CIA. In none of those cases,

however, has the U.S. Government acknowledged whether the information in the media is correct or whether such persons were ever held in the CIA detention program.[4]

23. In contrast, the U.S. Government has acknowledged publicly that Petitioner and the other HVDs were held in the CIA's detention program and that at least some were subjected to alternative interrogation techniques. The U.S. Government has acknowledged, therefore, that the Petitioner and other HVDs may have come into possession of the very information about the CIA program that the U.S. Government seeks to protect, including the locations of detention facilities, the identities of cooperating foreign governments, and the conditions of confinement and interrogations techniques. If the U.S. Government allows anything Petitioner says about the program to be publicly disclosed, then Petitioner and other HVDs will be in a position to make truthful unauthorized disclosures about such activities. Terrorists could then rely on such disclosures by Petitioner and other HVDs and would exploit such disclosures to improve their counter-interrogation training. Additionally, allowing such

[4] Media speculation about details of detainee interrogations does not thereby render the information unclassified. In terms of the potential impact upon the intelligence activities and foreign relations of the United States, there is a critical distinction between unsubstantiated information circulating in the press and official government release or acknowledgement of such information. The U.S. Government must be able to maintain the distinction between media reports--which may or may not be accurate--by individuals not authorized to speak on behalf of the United States, and official disclosures. Unauthorized public statements do not affect the status of properly classified information.

disclosures by Petitioner would violate our secrecy agreement with foreign countries, making them less willing to assist the CIA with this program and other counterterrorism operations.

D. False Allegations by High-Value Detainees

24. I recognize that many of the allegations that Petitioner has made about the CIA's detention program are untrue. Notwithstanding this, Petitioner and each of the HVDs is in a position to provide accurate and detailed information about the CIA's detention program. As already stated, the disclosure of such details reasonably could be expected to result in exceptionally grave damage to national security.

25. False or exaggerated allegations by the detainees about the classified details of the program, however, also must be treated as classified information because a different rule would have the effect of allowing accurate, highly classified information about the program to be revealed by Petitioner and other HVDs. If a rule to redact only truthful statements were established, a detainee with knowledge of classified facts could easily manipulate the rule to reveal those classified facts. Thus, for example, if the United States redacted only Petitioner's true allegations regarding locations of CIA detention facilities, the true locations of these facilities could be revealed by making multiple allegations as to location, through a simple process of elimination. The same is true with

respect to conditions of confinement and interrogation methods. If only true statements about such conditions and techniques are redacted, detainees who have access to classified information regarding actual conditions and techniques could paint a picture of those conditions and techniques used and not used by making repeated allegations about conditions of confinement and interrogation techniques. In sum, the continued success of the interrogation program depends as much on concealing what interrogation methods are not approved as it does on concealing what methods are approved.[5]

26. A rule that allows Petitioner and other HVDs to speak freely about the CIA program will allow them to directly reveal the classified information about the program that the Government must protect. A rule that redacts only true statements that Petitioner makes about the program allows Petitioner and other detainees to manipulate the rule to reveal the true details of the program. Therefore, in order to protect the classified facts at issue here--the details of the CIA terrorist detention and interrogation program--the U.S. Government must treat all allegations by Petitioner and the other HVDs regarding the program as classified.

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[5] Recently the Director of the CIA publicly acknowledged that the CIA has used waterboarding as an interrogation technique. Section 3.1(b) of Executive Order 12958, as amended, authorizes certain Executive officials to determine whether the need to protect classified information is outweighed by the public interest in disclosure.

II. U.S. Government Measures Taken to Protect this Information

27. Recognizing the damage to national security that reasonably could be expected to result if this information were publicly disclosed, the U.S. Government has instituted extraordinary security arrangements for the protection of this information. Information relating to the CIA terrorist detention and interrogation program has been placed in a tightly compartmented TOP SECRET//SCI Program in order to minimize the number of people who have access to the information and thereby lessen the risk of unauthorized disclosure.[6]

28. Several additional requirements also have been established since the detainees arrived at Guantanamo Bay, Cuba. These requirements, although burdensome and expensive for the U.S. Government, are necessary for the protection of national security. First, all U.S. Government personnel who have substantive contact with the HVDs must possess appropriate

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[6] Under Executive Order 12958, as amended, the anticipated severity of the damage to the national security resulting from disclosure determines which of three classification levels is applied to the information. Thus, if an unauthorized disclosure of information reasonably could be expected to cause *damage* to the national security, that information may be classified as CONFIDENTIAL; *serious damage* may be classified as SECRET; and *exceptionally grave damage* may be classified as TOP SECRET. Section 4.3 of Executive Order 12958, as amended, provides that specified officials may create special access programs upon a finding that the vulnerability of, or threat to, specific information is exceptional, and the normal criteria for determining eligibility for access applicable to information classified at the same level are not deemed sufficient to protect the information from unauthorized disclosure. Special access programs relating to intelligence activities or intelligence sources or methods are called Sensitive Compartmented Information (SCI) Programs.

security clearances.[7] Second, all work done by U.S. Government personnel that relates to information provided by the HVDs must be conducted on approved secure computer systems. Third, all documents derived from the statements of HVDs must be treated as classified and handled and stored appropriately. Fourth, HVD mail is monitored and redacted for national security purposes before it is released from Guantanamo Bay, Cuba. And finally, individuals interviewing the detainees, including law enforcement personnel, DOD personnel associated with the Combatant Status Review Tribunal Process, and counsel for detainees have been required to obtain a TOP SECRET//SCI security approval before being allowed access to the HVDs.

III. Conclusion

29. I have determined that Petitioner has been exposed to sensitive national security information that is classified at the TOP SECRET//SCI level. Due to the President's public acknowledgement that Petitioner was previously held by the CIA, his statements regarding the CIA terrorist detention and interrogation program must continue to be protected from public disclosure. For the reasons described above, details regarding the operation of the CIA program remain classified at the TOP SECRET//SCI level.

[7] Pursuant to Department of Defense policy, the International Committee of the Red Cross has had access to the HVDs because the ICRC works confidentially with the U.S. Government.

* * * *

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of March, 2008.

Wendy M. Hilton

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Associate Information Review Officer
National Clandestine Service
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