

THE PROTECTIVE ORDER ON KHADR'S INTERROGATORS AND THE JOHN ADAMS PROJECT

In addition to the bombshell that Omar Khadr's military commission will start Wednesday, less than a day after lawyers in the case will have received the thick manual laying out the rules for the newfangled military commissions, Gitmo released one more thing today: the protective order covering "intelligence identities" that applied to Khadr's old-fangled military commission. (h/t Carol Rosenberg)

Given the witch hunt launched against the John Adams project (in which detainee lawyers employed investigators to figure out the identity of detainees' torturers, in response to which the CIA has been demanding the lawyers be charged with violating the Intelligence Identities Protection Act), I'm particularly interested in this language (assuming, of course, that these protective orders are fairly standard).

2. Accordingly, IT IS HEREBY ORDERED:

a. Names or other identifying information of intelligence personnel that have been or may, from time to time, be disseminated to or obtained by the Defense Counsel for the accused, may be disclosed to members of the Defense team, such as paralegals, investigators, and administrative staff, with an official need to know. However, such information shall not be disclosed to the accused or to anyone outside of the Defense team other than the Military Commission panel subject to the limitations below;

b. Unless disclosure has been authorized by the Military Judge, names or other identifying information of any intelligence personnel shall not be disclosed in open court or in any unsealed filing. Any mention of the name or other identifying information of intelligence personnel must occur in closed session and any filing to the Military Commission panel that includes such information shall be filed under seal.

First, let's read a: "Names or other identifying information of intelligence personnel that have been or may, from time to time, be disseminated to or obtained by the Defense Counsel for the accused"—note they don't explain why those intelligence personnel would have been disclosed to defense counsel. And they also describe both "names" and "identifying information"—which would presumably include photographs (the CIA is particularly pissed that pictures of interrogators have been passed among detainees at Gitmo).

It goes on: "However, such information shall not be disclosed to the accused." I'm curious what you lawyers think about this? Is there a parallel in civilian trials? In any case, the protective order makes it clear that the government is trying to protect these identities, first of all, from disclosure to those who were abused by said intelligence personnel.

Then there's part b: "Unless disclosure has been authorized by the Military Judge, names or other identifying information of any intelligence personnel shall not be disclosed in open court or in any unsealed filing." Call me picky, but this seems to be sloppy writing here. Since this passage does not refer explicitly back to part a, it would seem that the prohibition on disclosing "such information" would not be limited to information "disseminated" to lawyers for the accused. And in any case, part a

includes language about information “obtained by” lawyers for the accused.

What is the significance of this for lawyers who, in an attempt to get information not disseminated (and therefore witnesses who may have exonerating information not produced) have gotten investigators to find out the identities of those who tortured their clients?

Furthermore, note that the protective order doesn’t qualify the limit of those whose identities are protected here at all. What happens if a defense lawyer doesn’t know if someone is an intelligence professional but has a suspicion that the person might have been the guy who tortured his client, and in any case is probably a contractor? Does showing the client a picture count as disclosing identifying information, even if the only one who can confirm that the person in question is affiliated (however loosely) with US intelligence is your client?

In any case, this protective order only calls for sanctions, not the IIPA charges that CIA seems to be clamoring for. And this protective order appears to have been operative in 2007, not necessarily 2009 and 2010. I’m not a lawyer, but if the CIA is trying to equate this with security agreements in order to criminally charge defense attorneys, I’m skeptical it’ll work.

But it does give one snapshot of how Kafkaesque the Bush-era military commission process was (as distinct from how Kafkaesque the Obama-era one day rule cramming is).