

UNCLASSIFIED//FOR PUBLIC RELEASE
**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY**

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD,
WALID MUHAMMAD SALIH MUBARAK
BIN 'ATTASH,
RAMZI BIN AL SHIBH,
ALI ABDUL AZIZ ALI,
MUSTAFA AHMED ADAM
AL HAWSAWI

AE266(WBA)

Defense Motion for Order to Protect the Right
to a Fair Trial

Date Filed: 22 January 2014

1. Timeliness:

This filing is timely pursuant to Military Commissions Trial Judiciary Rule of Court 3.7(b) and Rule for Military Commissions (R.M.C.) 905.

2. Relief Sought:

Mr. bin 'Attash requests that the Commission issue the attached proposed Protective Order to protect the right to a fair trial in the instant case.

3. Overview:

R.M.C. 701(f) permits the Commission to enter protective orders "as may be required in the interests of justice." In the instant case, such an order is necessary to protect multiple aspects of Mr. bin 'Attash and his co-accused's right to a fair trial. Without a protective order, Mr. bin 'Attash cannot be assured of that "fundamental fairness" that is "essential to very concept of justice." *Lisenba v. People of State of California*, 314 U.S. 219, 236 (1941).

Any protective order to protect Mr. bin 'Attash's right to a fair trial must address prosecution disclosure and discovery obligations. The sources of prosecution discovery

obligations are numerous and range from Constitutionally-mandated disclosures (for example, *Brady* disclosures) to obligations mandated by the Military Commissions Act of 2009, Rules for Military Commissions, and Military Commissions Rules of Evidence. Despite the weight of disclosure and discovery obligations resting upon the shoulders of the Government, the prosecution continues to deny and withhold discovery on the basis of various defense teams' failure to sign a Memorandum of Understanding that was hand-crafted by the prosecution and that is at best duplicative of requirements already imposed upon the defense by the Commission and by the U.S. Government. Even where classified information is not involved, the prosecution has been less than forthcoming – for example, failing to respond to a discovery request submitted by Mr. bin 'Attash more than two years ago.

The prosecution cannot stall the release of unclassified discovery, and it cannot withhold arguably-classified discovery on the basis of a Memorandum of Understanding. The Military Commissions Act of 2009, Military Commissions Rules of Evidence, Rules for Military Commissions, and other applicable law do not authorize such a practice. By continuing to withhold discovery, the prosecution is ignoring not only constitutionally-mandated requirements, but it is also ignoring its ethical obligations, including the ethical obligation to make timely and diligent efforts to comply with all defense discovery requests and to provide exculpatory and impeaching information to the defense. Should the prosecution wish to withhold classified information from the defense on the basis of the national security privilege, the correct approach is not to invoke the Memorandum of Understanding but rather to promptly submit such classified information to the Commission for review under the M.C.R.E. 505 process in order to determine whether it may be lawfully withheld.

Any protective order to protect the right to a fair trial must also address over-classification and misuse of classification standards. Both the courts and the Executive have recognized the ever-present danger of over-classification, particularly improper classification used to “conceal violations of law, inefficiency, or administrative error” or “prevent embarrassment to a person, organization, or agency.” Executive Order 13526, 75 FR 707 (December 29, 2009) at Section 1.7(a)(1)-(4). Despite prohibitions on over-classification and the incorrect application of derivative classification markings, the prosecution in the instant case has a history of questionable decision-making with respect to classification. Perhaps the most obvious example is the recurrent and now-discredited concept of “presumptive classification,” but other examples abound, including Trial Counsel’s initial (and false) insistence that the nature and source of the disruption to the Commission’s public feed that occurred on 28 January 2013 was classified information. Beyond misusing classification guidance itself, the prosecution has also misused and misinterpreted the M.C.R.E. 505 process, including by failure to provide notice of the classified information at issue prior to M.C.R.E. 505(h) hearings.

Mr. bin ‘Attash’s proposed protective order also addresses the continuing problem of prejudicial extrajudicial statements made by members of the prosecution and by affiliated entities. While all attorneys have ethical and legal duties of candor to the tribunal, prosecutors have a special duty to prevent the dissemination of information to the public that might prejudice an ongoing proceeding. Because of the danger involved in a prosecutor’s comments to the public, the Department of Justice counsels that prosecutors should offer comment only on “incontrovertible, factual matters” and should not “include subjective observations.” 28 C.F.R. § 50.2(b)(2). Despite a clear ethical duty to comment only on matters beyond any dispute (such as the time and date of upcoming hearings, or motions on the docket), the prosecution and affiliated

entities in the instant case time and time again have gone far afield with comments to the national media, including recent misleading and inaccurate comments on the television program “60 Minutes.”

The prosecution’s pretrial publicity offensive is not only at odds with widely-accepted ethical norms, but it also raises the specter of “unlawful influence.” 10 U.S.C. § 949b((a)(2)(A)-(C) prohibits any person from attempting to coerce or influence a military commission, its members, or counsel. Public statements that might prejudice potential panel members are one source of potential unlawful influence (which may be actual or implied). Another source of potential unlawful influence is the Office of Military Commissions’ website, which includes amongst other questionable content a “Legal System Comparison” chart with inaccurate and misleading comparisons between military commissions and article III procedure. The defense’s proposed order mandates that the chart be removed.

The proposed protective order also addresses critical matters of witness production and access to witnesses that have been the subject of ongoing dispute. With respect to access to witnesses, multiple witnesses and potential witnesses (particularly from the Office of Military Commissions) have been reluctant or declined to speak with the defense prior to their testimony. While a witness should be free to choose whether or not to speak with a party prior to his or her testimony (unless the Commission orders that the witness be made available for interview), it is a clear ethical violation for a prosecutor to discourage a witness from speaking with the defense. In addition to amounting to an ethical violation, prosecution obstruction of access to witnesses is also a violation of due process and impedes the effective assistance of counsel. The proposed protective order prohibits the prosecution from encouraging witnesses and potential witnesses not to speak with the defense.

With respect to witness production, the Commission upheld the R.M.C. 703 witness production procedure in AE036C, but in upholding the production procedure it did not address matters of fundamental fairness or significant practical differences between courts-martial and commissions practice that might counsel in favor of a system in conformity with article III practice. Since AE036C, the witness production procedure has once again become the subject of dispute due to the prosecution's attempted power-grab over the "production" of voluntary defense witnesses (AE036E). The proposed protective order helps to settle persistent questions over the fairness of the current system by imposing reciprocal obligations upon the prosecution – requiring the prosecution to provide in advance of a witness's testimony a synopsis of the testimony sufficient to show the witness's relevance and necessity. Such a system would increase both fairness and efficiency by permitting the defense to file appropriate motions in advance of testimony, including motions in limine to exclude cumulative, irrelevant, and otherwise impermissible evidence.

Mr. bin 'Attash requests that the Commission enter the attached proposed Protective Order (Attachment B) and require all members of the prosecution to file the accompanying Memorandum of Understanding with the Commission prior to further participation in this case.

4. Burden of Proof:

As the moving party, the defense bears the burden of persuasion; the standard of proof is a preponderance of the evidence. R.M.C. 905(c)(1).

5. Facts:

- a. Charges in this case were referred for trial before a capital military commission on 4 April 2012.

- b. On 26 April 2012, the prosecution requested that the Commission enter a Protective Order to Protect Against Disclosure of National Security Information. The Commission entered the Protective Order on 6 December 2012 (AE013P). The Protective Order was subsequently modified by AE013AA on 9 February 2013 and AE013DDD on 16 December 2013.
- c. The Protective Order requires, as condition precedent to the receipt of classified information from the Government, that each member of the defense team sign a Memorandum of Understanding (MOU) and file the MOU with the Chief Security Officer, Office of Special Security.
- d. For those defense teams that have not signed the MOU, the Government has refused to provide classified discovery or constitutionally and statutorily mandated disclosures. The Government has also failed to comply with existing orders of the Commission, citing the MOU. *See, e.g.* AE108V (Government refused to comply with Commission's order in AE108J regarding access to the confinement facility, citing Memorandum of Understanding).
- e. The Government has indicated that it has a "tremendous amount of [classified] information and discovery" that it will not disclose until defense team members sign its MOU. Unofficial/Unauthenticated Transcript at 7294.

6. Law and Argument:

In AE013, the prosecution sought and received a Protective Order to Protect Against Disclosure of National Security Information. R.M.C. 701(f), pertaining to protective orders issued to protect the national security privilege, notes that "[n]othing in this rule prevents the military judge from issuing additional protective orders, unrelated to classified matters, as may

be required in the interests of justice.” In the instant case, the prosecution’s prejudicial extrajudicial statements, interference and acts of unlawful influence with respect to defense witnesses, failure to provide constitutionally and statutorily mandated disclosure and discovery, and misuse of classification guidance and classified information procedures all counsel in favor of a Protective Order to Protect the Right to a Fair Trial.

Mr. bin ‘Attash requests that the Commission enter the attached proposed Protective Order (Attachment B) and require each member of the prosecution to file an executed Memorandum of Understanding with the Commission prior to further participation in this case.

a. Protective Order Necessary to Enforce Constitutionally and Statutorily Mandated Disclosure and Discovery Obligations

The prosecution in the instant case has failed to make timely disclosure of required information, instead using its MOU as a shield to prevent the disclosure of exculpatory and mitigating evidence to the defense. Under R.M.C. 701(c)(1), the prosecution must permit the defense to examine information within the possession, custody, or control of the Government that is “material to the preparation of the defense.” 10 U.S.C. § 949j(a) mandates that “[t]he opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the Constitution.” In addition to evidence material to the defense that must be made available upon request, the prosecution must unilaterally disclose exculpatory and mitigating evidence to the defense. Under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the prosecution is required to disclose “evidence favorable to an accused” that is “material either to guilt or to punishment.” *Brady* material includes material that may be used to impeach a prosecution witness. *Giglio v. United States*, 405 U.S. 150 (1972). The duty to provide such information includes the duty to search

for such information where it is, for example, known only to an investigator but not to the prosecutor. *Kyles v. Whitley*, 514 U.S. 438 (1995). 10 U.S.C. § 949j(b)(1)-(4) expands upon *Brady* by requiring disclosure of exculpatory evidence that reasonably tends to negate guilt, reduce the degree of guilt, impeach a prosecution witness, or mitigate a sentence. In addition to *Brady* obligations and obligations under the Military Commissions Act, pursuant to the Jencks Act, 18 U.S.C. § 3500, after a prosecution witness testifies and on motion of the defense, the prosecution must produce “any statement...of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.”

Despite numerous disclosure and discovery obligations, the prosecution continues to hide material and exculpatory evidence behind a curtain of secrecy, citing time and time again the various defense teams’ failure to sign the prosecution-drafted Memorandum of Understanding. In addition, the prosecution has expanded its abuse of the MOU to include use of the document to thwart existing orders of the Commission. *See, e.g.* AE108V (prosecution refused to facilitate Commission’s order to provide counsel for Mr. bin ‘Attash with access to the confinement facility, citing MOU).

The prosecution ignores the fact that its discovery and disclosure obligations are independent of an MOU the need for which was artificially created by the prosecution itself. The Military Commissions Act of 2009, the Military Commissions Rules of Evidence, and the Rules for Military Commissions contain no mention of a prosecution-drafted MOU as a prerequisite for the receipt of classified information. All members of the defense team that will handle classified discovery have TS//SCI security clearances and have signed multiple nondisclosure agreements with the United States Government as part of their inprocessing and indoctrination. The D.C. District Court has recognized that, where counsel have security

clearances and are bound by a court's protective order, the use of a Memorandum of Understanding as additional protection against the disclosure of classified information is at best superfluous. *In re Guantanamo Bay Detainee Continued Access to Counsel*, 892 F.Supp.2d 8, 16 (D.D.C. 2012) (“[t]he Protective Order has been in place for nearly four years and there is no record that its provisions have threatened classified information or caused any harm to the military's operation of the Guantanamo Bay Naval Base. The Government itself argues that the MOU and the Protective Order provide essentially the same protections. In the first instance, this raises the question of why the Government felt it necessary to promulgate the MOU at all.”). This Commission has also agreed that the MOU “may not add much to...pre-existing obligations.” Unofficial/Unauthenticated Transcript at 6556; *see also* Unofficial/Unauthenticated Transcript at 7154 (“[n]ow, it's been discussed many times, all defense counsel here are cleared. All defense counsel here, they have not signed the MOU, I got that, but they know the responsibility of handling classified information. They know, regardless of the protective order, they're not allowed to give classified information to their client.”).

As defense counsel in the instant case meet the only true legal requirements for the receipt of classified information, the prosecution may not continue to deny access to constitutionally mandated discovery on the basis of its MOU. In doing so, the prosecution is ignoring its independent ethical obligation to make timely disclosure and discovery. *See, e.g. ABA Standards for Criminal Justice: Prosecution and Defense Function* (3d ed., 1993) (hereinafter “*ABA Standards*”), Standard 3-3.11 (“[a] prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged...A prosecutor should not fail to make a reasonably diligent effort to comply with a

legally proper discovery request.”); *ABA Model Rules of Professional Conduct*, Rule 3.8. The prosecution is also ignoring those tools available to it under M.C.R.E. 505 that it may lawfully use to limit the defense’s access to classified information, should the prosecution believe that such limitation is warranted. Such tools include the use of judicially-authorized substitutions, deletions, and redactions under M.C.R.E. 505(f)(2)(A) and M.C.R.E. 505(h)(4) or even the complete withholding of classified information under M.C.R.E. 505(h)(6). In sum, the prosecution has multiple tools to lawfully limit disclosure and discovery of classified information, but where disclosure and discovery is constitutionally or statutorily mandated the prosecution must immediately make the required disclosures or submit to the M.C.R.E. 505 process in order to ensure that classification does not burden an accused’s ability to make a complete defense. In the instant case, the prosecution has elected a third route consisting of stalling discovery on the basis of the MOU.

The prosecution has abused the fact that counsel have ethical concerns about signing the MOU, and it has used those ethical concerns to withhold classified evidence material to the preparation of the defense. Egregious as that abuse is, the record also reflects that the prosecution has been less than forthcoming with respect to unclassified disclosures and discovery – matters entirely unrelated to the MOU. Examples of the prosecution’s failure to provide information material to the defense are numerous and support the instant request for a protective order.

More than two years ago, on 20 September 2011, Mr. bin ‘Attash submitted to the prosecution his first request for discovery. AE008(WBA), Attachment P. As noted in the discovery request, the request was made at the earliest possible opportunity in order to avoid unnecessary delay. The request was also made at an early date in an attempt to garner crucial

evidence to support Mr. bin 'Attash's pre-referral mitigation submission to the Convening Authority. The opportunity for pre-referral mitigation submissions afforded by the Convening Authority is analogous to the Department of Justice's "pre-authorization mitigation submission" procedure. *See* Department of Justice, *United States Attorneys' Manual* at § 9-10.120 ("[n]o final decision to seek the death penalty shall be made if defense counsel has not been afforded an opportunity to present evidence and argument in mitigation."). The pre-referral or pre-authorization mitigation submission has been referred to as "undoubtedly a pivotal and enormously important moment in any criminal prosecution" that can "literally lead to a determination of life or death." *United States v. Pena-Gonzalez*, 62 F.Supp.2d 358, 364 (D.P.R. 1999). Due process rights are "inherent" at the death penalty certification stage just as they are inherent at, for example, a hearing to determine whether a juvenile should be tried as an adult. *Id.*; *see also* *Kent v. United States*, 383 U.S. 541, 557 (1966) (Supreme Court found due process violation where access to "social records and probation or similar reports" denied at waiver of jurisdiction stage in juvenile court).

Rather than providing counsel for Mr. bin 'Attash with those items requested and necessary to support an effective mitigation submission, or even denying specific requested items based upon particularized objections, the prosecution instead responded on 7 October 2011 with a single page letter denying any discovery and stating that "you should already be in the possession of a significant amount of the discovery you seek based on the previous disclosure made by this office...during the proceedings of [the 2008 iteration of *United States v. Mohammed, et al.*]" AE008(WBA), Attachment Q. In a case based upon events occurring in foreign countries over multiple decades, in which the independent ability of defense counsel to access the accused and investigate the evidence is already tightly controlled and restricted behind

layers of security and classification, the failure of the prosecution to provide any pre-referral discovery (classified or unclassified) amounted to a due process violation during a critical stage of the proceedings. On 12 October 2011, counsel for Mr. bin ‘Attash wrote the prosecution to complain that mere reference to 25,000 pages of discovery tendered during the 2008 prosecution was inadequate given the elapsed time, difference in charges, turnover in counsel, and need to ensure completeness with respect to the requested documents. The prosecution still refused to provide any additional discovery or even an index of discovery provided in 2008.

While the prosecution refused to provide any discovery prior to referral, it did insist that, “[s]hould the charges currently sworn against your client be referred to trial, [the prosecution] will consider your first request for discovery dated 20 September 2011 at that time.”

AE008(WBA), Attachment Q. However, even after the charges in the instant case were referred for trial, the prosecution failed to respond in any way to the initial discovery request. To date, the prosecution has never responded to the request submitted on 20 September 2011. The prosecution’s failure to respond not only contradicts its own assurance that it would consider the discovery request following referral, but it also directly violates multiple provisions of the Rules for Military Commissions and Military Commissions Rules of Evidence. For example, the 20 September 2011 discovery request included a request for “[a]ll handwritten, typed, or recorded statements by the Accused, his alleged co-conspirators or potential witnesses in connection with the investigation of this case.” R.M.C. 701(b)(1)(C) dictates that the prosecution must provide such evidence to the defense “[a]s soon as practicable after service of charges.” M.C.R.E. 304(c)(1) further dictates that “prior to arraignment, the prosecution shall disclose to the defense the contents of all relevant statements, oral, written, or recorded, made or adopted by the accused, that are within the possession, custody or control of the Government...” Such

statements include not only evidence that the prosecution intends to use at trial (for example, FBI interviews conducted in 2006) but also any statements that are “material to the preparation of the defense” (which would necessarily include pre-2006 statements relating to the charged offenses). At a typical court-martial, the prosecution would *sua sponte* provide expansive discovery of such statements as part of “Section III Disclosures” made prior to arraignment. In the instant case, material statements have been withheld in violation of R.M.C. 701(b)(1)(C) and M.C.R.E. 304(c)(1) despite specific request of the defense. Even if some portions of the statements were arguably classified, there is no evidence that the prosecution promptly submitted the statements to the M.C.R.E. 505 process in order to comply with its obligations.

In another example of the prosecution’s failure to provide material evidence responsive to a defense discovery request, on 8 April 2013 Mr. Hawsawi requested pursuant to R.M.C. 701 that the prosecution produce unredacted versions of four CIA reports pertaining to 9/11 and Al Qaeda financing. AE167(MAH), Attachment B. On 16 April 2013, the prosecution responded denying production of all four unredacted reports. With respect to a report entitled “11 September: The Plot and the Plotters,” the prosecution denied production claiming that “the redacted portions relating to this case are cumulative with statements and evidence that the Prosecution will disclose to the Defense.” AE167(MAH), Attachment C. That evidence is “cumulative” is not an appropriate objection to a discovery request. The applicable discovery standard is materiality rather than relevance or admissibility. *See* R.M.C. 701(c)(1); R.C.M. 701(a)(2)(A); Fed. R. Crim P. 16(a)(1)(E) (universally requiring production or examination of evidence “material” to the preparation of the defense); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (capital defendant entitled to obtain evidence that is “*material* either to guilt or to punishment”) (emphasis added); *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004) (accused entitled

to obtain material evidence whether or not admissible at trial). It is difficult to imagine a scenario in which a report entitled “11 September: The Plot and the Plotters” would be immaterial in a case in which the co-accused are charged with being the plotters that plotted 9/11. In fact, the prosecution ultimately agreed to produce the report in largely unredacted form, but it did so only after the defense was forced to expend time and resources filing a motion to compel discovery. The remaining three reports were ordered disclosed by the Commission. AE167B. While there may exist good faith disagreements over certain discovery requests, the prosecution’s failure to produce a clearly discoverable document on the basis that the information contained in the document was “cumulative” raises serious questions regarding the prosecution’s commitment to complying with its discovery obligations.

Because disclosure and discovery obligations under the MCA, *Brady*, *Giglio*, and the Jencks Act trump a purposeless MOU crafted by the prosecution, and because the prosecution has failed to comply with its duties even with respect to unclassified evidence, the defense’s proposed protective order reiterates the Government’s disclosure and discovery obligations and requires the Government to comply with its obligations in a timely manner or submit to the M.C.R.E. 505 process, without regard to any Memorandum of Understanding. The proposed protective order will protect Mr. bin ‘Attash and his co-accused’s access to vital evidence in defense, extenuation, and mitigation, and it will ensure that, with respect to disclosure and discovery, the prosecution’s actions are in keeping with widely-accepted ethical norms.

b. Protective Order Necessary to Prevent Over-classification and Enforce Compliance with M.C.R.E. 505

While the defense acknowledges the danger in disclosing classified national security information to the public, Congress, the courts, and the Executive have also focused on the

dangers of over-classification and the misuse of classification standards. Executive Order 13526, 75 FR 707 (December 29, 2009), governing classified information, states at Section 1.7(a)(1)-(4) that classification may not be used to “conceal violations of law, inefficiency, or administrative error” or “prevent embarrassment to a person, organization, or agency” or “prevent or delay the release of information that does not require protection in the interest of the national security.” *See also* Army Regulation 380-5, Department of the Army Information Security Program, Para. 2-15. The prohibition on over-classification applicable to original classification authorities is equally applicable to those applying derivative classification, such as counsel in the instant case, and the Executive Order mandates that individuals applying derivative classification markings receive training at least every two years with a special emphasis on avoiding over-classification. *Id.* at Section 2.1(d). Congress has also stated with respect to over-classification that, “[t]he 9/11 Commission and others have observed that the over-classification of information interferes with accurate, actionable, and timely information sharing, increases the cost of information security, and needlessly limits stakeholder and public access to information.” Reducing Over-Classification Act, PL 111-258, Section 2(2).

In *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971), the Supreme Court noted that “[t]he word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.” Despite explicit guidance to avoid over-classification, courts have recognized that the Government’s actions with respect to classification have not always lived up to our highest ideals. In *Halperin v. Kissinger*, 606 F.2d 1192, 1204 n.77 (D.C. Cir.

1979), the D.C. Circuit observed the “well-documented practice of classifying as confidential much relatively innocuous or noncritical information.”

In the present case, the prosecution also has a well-documented practice of abusing and misusing classification standards and representing unclassified material as classified. Of particular note is the discredited yet recurrent concept of “presumptive classification.” In its original request for a protective order, the Government indicated that “any and all statements by the Accused are presumptively classified until a classification review can be completed.” AE013 at 6. Such concept is contrary to the foundational principle in Executive Order 13526 that only certain designated authorities may classify information. Only after numerous pleadings and months of protestations by the defense regarding the illegality and unconstitutionality of the presumptive classification regime did the Government abruptly reverse course and offer a new protective order eliminating presumptive classification “[w]ithout conceding that the [original] proposed order placed unduly burdensome restrictions upon defense counsel.” AE013L at 6. Even after eliminating the concept of presumptive classification from the Protective Order, presumptive classification remained in the Office of Military Commissions Sensitive Compartmented Information (SCI) Briefing for High Value Detainees, Defense Counsel Members Form (required to be signed by all counsel) until the defense expended significant additional time and resources to compel the Government to modify the form in an attempt to finally purge the specter of presumptive classification from this Commission.

In another example of over-classification and misuse of the M.C.R.E. 505 process, in AE198 Mr. bin ‘Attash notified the Government that he expected to disclose what might be classified information (his and his co-accused’s locations and dates of capture) at an upcoming hearing. Rather than responding by requesting an M.C.R.E. 505(h) hearing to determine the use,

relevance, and admissibility of the classified information, if any, at issue, the prosecution responded by challenging the fact that Mr. bin 'Attash did not identify a particular motion in his M.C.R.E. 505(g) notice, despite the fact that the Rule's plain language does not require identification of a particular motion. Even after a M.C.R.E. 505(h) hearing on the subject motion was set, the prosecution failed to identify the classified information at issue as required by M.C.R.E. 505(h)(2)(A). After repeatedly using M.C.R.E. 505 to obstruct Mr. bin 'Attash's use of the noticed information in AE198, it was revealed during the 505(h) hearing that the noticed information was in fact unclassified. Had the prosecution promptly notified the defense that no classified information was at issue in AE198, rather than mounting a challenge to the verbiage of the 505(g) notice, the time wasted in hearing AE198 might have been avoided entirely.

In yet another example, on 28 January 2013, during an unclassified session of the Commission, the audio and video feeds were cut by a then-unknown entity when counsel for Mr. Mohammad stated on the record the unclassified title of the unclassified pleading AE080, Joint Defense Motion To Preserve Evidence of Any Existing Detention Facility. Unofficial/Unauthenticated Transcript at 1445. When the Commission inquired of Trial Counsel as to the source of the interruption, Trial Counsel responded that "[w]e can address it in 505(h)." *Id.* at 1446. After further inquiry, Trial Counsel again responded that "I can provide additional explanation at the 505(h) hearing." Despite Trial Counsel's repeated insistence during the subsequent M.C.R.E. 505(h) hearing that the nature and source of the external audio and video disruption was classified information, the fact that an original classification authority had a direct feed to and a "kill switch" on the Commission was the following day revealed to be unclassified. The Commission noted on 29 January 2013 that the prosecution's new guidance indicating the unclassified nature of the information was "different than what [the prosecution] said yesterday."

Id. at 1485. The Commission went on to read the prosecution's new and unclassified guidance regarding an OCA "kill switch" into the record. *Id.*

As with the prosecution's refusal to properly respond to AE198, the prosecution's misrepresentation of the classified nature (or lack thereof) of the OCA kill switch was later corrected by the Commission. However, valuable time and resources were once again expended litigating the classification status of unclassified information. Moreover, with respect to the OCA kill switch, the over-classification of the information, even if only for a single day, hampered other aspects of defense strategy. For example, during a press conference on the evening of 28 January, at a time when the media and public's attention was focused on the audio and video disruption in the Guantanamo courtroom that had occurred earlier that same day, counsel was prohibited by incorrect guidance from discussing an OCA's external involvement in the proceedings. Such prohibition hampered counsel's effective representation of Mr. bin 'Attash.

Over-classification in the instant case is a tremendous concern for multiple reasons. The prosecution has failed to make timely disclosure and discovery of classified information, threatening Mr. bin 'Attash and his co-accused's ability to mount an effective defense. Over-classification and the misuse of classification procedures also causes needless delay and waste of resources, inhibits the public's right to information, causes unnecessary disruption to and closure of the proceedings, and raises questions regarding the fairness of this Commission. For these reasons, the attached proposed protective order for the prosecution mandates with respect to classification 1) that the prosecution not represent unclassified material as classified 2) that the prosecution alone or in conjunction with original classification authorities refrain from overclassifying material or applying inappropriate derivative classification, and 3) prior to any

M.C.R.E. 505(h)(1) hearing, that the prosecution promptly notify the defense of the classified information, if any, that is at issue.

c. Protective Order Necessary to Prevent Dissemination of Information Undermining Presumption of Innocence, Materially Prejudicing Proceedings, and Tainting Pool of Prospective Panel Members

R.M.C. 806(d) authorizes this Commission to, upon request of either party, “issue an appropriate protective order, in writing, to prevent parties and witnesses from making extrajudicial statements that present a substantial likelihood of material prejudice to a fair trial by impartial members.” In terms of false and misleading information presented before the Commission, prosecutors have a special duty not to mislead witnesses or the tribunal and to affirmatively correct the record where false or misleading information has been presented. *See, e.g. Berger v. United States*, 295 U.S. 78, 84 (finding that prosecutor “overstepped the bounds of...propriety and fairness” by “misstating the facts in his cross-examination of witnesses” and by “putting into the mouths of such witnesses thing which they had not said”); *Napue v. People of State of Ill.*, 360 U.S. 264, 269 (1959) (“it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment...”); ABA Model Rule 3.3(a)(1) (a lawyer shall not knowingly “make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer”); *ABA Standards*, Standard 3-5.6(a) (“[a] prosecutor should not knowingly offer false evidence, whether by document, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.”).

In terms of prejudicial statements made in extrajudicial forums, prosecutors “should not make or authorize the making of an extrajudicial statement that a reasonable person would

expect to be disseminated by means of public communication if the prosecutor knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.” *ABA Standards*, Standard 3-1.4(a); ABA Model Rule 3.6. Just as the prosecutor himself must not make prejudicial extrajudicial statements, the prosecutor also has a duty to prevent his staff, including investigators, law enforcement personnel, and others, from doing the same. *Id.* at Standard 3-1.4(b). In addition to model rules of conduct adopted by most jurisdictions, the Department of Justice has promulgated regulations governing the conduct of prosecutors with respect to criminal proceedings. The regulations dictate that “[a]t no time shall personnel of the Department of Justice furnish any statement or information for the purpose of influencing the outcome of a defendant’s trial, nor shall personnel of the Department furnish any statement or information which could reasonably be expected to be disseminated by means of public communication, if such a statement or information may reasonably be expected to influence the outcome of a pending or future trial.” 28 C.F.R. § 50.2(b)(2). Disclosures by prosecutors “should include only incontrovertible, factual matters, and should not include subjective observations.” *Id.* Moreover, “[b]ecause of the particular danger of prejudice resulting from statements in the period approaching and during trial, they ought strenuously to be avoided during that period.” *Id.* at § 50.2(b)(5).

Courts have also weighed in on the question of unfair pretrial publicity and found that, “[d]ue process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused...where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue

the case until the threat abates...” *Sheppard v. Maxwell*, 384 U.S. 333, 362-363 (1966); *see also* *Irvin v. Dowd*, 366 U.S. 717 (1961) (“the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, “indifferent” jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.”). In certain instances, pervasive pretrial publicity can rise to the level where change of venue is constitutionally mandated. *See, e.g. Rideau v. State of La.*, 373 U.S. 723 (1963). At courts-martial, “[t]he defense may raise the issue of unfair pretrial publicity by demonstrating either presumed prejudice or actual prejudice.” *United States v. Simpson*, 58 M.J. 368, 376 (C.A.A.F. 2003). Presumed prejudice is established when the pretrial publicity “(1) is prejudicial, (2) is inflammatory, and (3) has saturated the community.” *Id.*

In the instant case, extrajudicial remarks of the Chief Prosecutor and others have delved deeply into inappropriate subjective observations concerning the merits of ongoing litigation and have raised a substantial risk of material prejudice to the proceedings, such that a protective order is warranted under R.M.C. 806(d). In recent days, the public has witnessed both the Chief Prosecutor and the Commander of Joint Task Force Guantanamo’s Joint Detention Group make inappropriate, misleading, and inaccurate comments regarding these proceedings on national television. In an episode of CBS News 60 Minutes aired on 3 November 2013, the Chief Prosecutor opined with respect to a central issue in the present case regarding the admissibility of statements made due to torture that “people do not forfeit their chance for accountability because someone may have crossed a line or have coerced or subjected to harsh measures somebody who is in custody...The point that I reject and that the law rejects is that there can be no voluntary statements following an instance of coercion. Justice requires that you look deeper, that you determine if the statement – even though there had been a prior instance – was nevertheless

voluntary.” CBS News 60 Minutes, *Inside Guantanamo*, <http://www.cbsnews.com/news/inside-guantanamo/>. This prejudicial, misleading argument regarding a fundamental legal principle at issue in the instant case was broadcast to millions of Americans, likely including potential panel-members in this case, on “prime time” television.

In the same interview, but even more alarming, with respect to the closure of proceedings on 28 January 2013 caused by the Central Intelligence Agency, the Chief Prosecutor indicated unequivocally that he did not know who caused the closure. *Id.* The Chief Prosecutor’s statement that he was unaware who caused the closure on 28 January is at best misleading given that the Commission had previously noted on the record based upon information provided by the prosecution that the closure was caused by an original classification authority.

Unofficial/Unauthenticated Transcript at 1485. Moreover, the Chief Prosecutor himself also acknowledged the original classification authority’s responsibility in a 10 February 2013 statement in which he referenced the OCA and stated that monitoring by the OCA was a “prudent way both to protect sources and methods and to maximize openness of the proceedings if such officials are immediately available to provide the Judge and the Court Security Officer a classification review of the real-time transmission to enable operation of the 40-second delay.” Attachment C at 2.

The ABA Standards for prosecutors also caution against inappropriate extrajudicial statements made by those affiliated with the prosecution function, including law enforcement. On an episode of CBS News 60 Minutes aired on 17 November 2013, COL John Bogdan, the Commander of JTF-GTMO’s JDG (the entity overseeing all aspects of the incarceration of the co-accused) and a frequent witness in these proceedings, observed that “the incidents of PTSD [amongst the JTF-GTMO guard force] is almost twice that seen from regular aligned forces.”

COL Bogdan went on to claim that “here on a 12-hour shift, a 12-hour time in the camps, you’re in enemy contact for 12 straight hours.” CBS News 60 Minutes, *Life at GITMO*, <http://www.cbsnews.com/news/life-at-gitmo/>. COL Bogdan’s remark regarding the rate of PTSD amongst JTF-GTMO guards was inaccurate and required a retraction by COL Greg Julian, the Public Affairs Chief for United States Southern Command. COL Bogdan’s statement with respect to his guard force being in “enemy contact” with pretrial detainees not convicted of any offense was also inappropriate and would tend to materially prejudice prospective panel members.

In response to repeated criticism concerning the “public relations” efforts of the prosecution, the Chief Prosecutor suggested that OCP’s public relations offensive was warranted given a “general lack of knowledge or understanding about military commissions” and was comparable to U.S. Attorneys’ efforts to engage the public “to support new laws and seek community support for prosecution priorities.” Attachment C at 5. Such comparison is itself inaccurate and misleading, as OCP’s offensive delves deeply into the specifics of a single, ongoing case and presents the public with repeated argument in relation to ongoing litigation rather than simple, factual observations as to the status of the case. Nothing about the Chief Prosecutor’s own remarks over the months are comparable to generic efforts to support new laws or seek support for crime-fighting priorities, particularly when one considers that the “new laws” themselves are the subject of litigation in the instant case. The Chief Prosecutor’s statements are replete with examples of argument concerning all manner of ongoing litigation, from legal mail procedures and protections for the attorney-client privilege (Attachment C) to procedures for closing the proceedings to the public (Attachment D) to argument in support of differences in evidentiary and other rules between military commissions and article III courts that the defense

has argued place this Commission out of compliance with the Geneva Conventions (Attachment E at 7-8).

Given OCP's continued inappropriate remarks to the public that tend to materially prejudice these proceedings, the attached proposed protective order constrains OCP's statements, and the statements of those affiliated with the prosecution function, to those subjects deemed acceptable by the Department of Justice. Specifically, OCP and its affiliated entities will be permitted to state only "incontrovertible factual matters" such as the current procedural posture of the case, motions on the docket, and the date and time of upcoming hearings. Limitation to incontrovertible factual matters will eliminate any possibility of material prejudice in this capital military commission resulting from the statements of the Chief Prosecutor and others affiliated with his office.

d. Protective Order Necessary to Prevent Dissemination of Information Actually or Impliedly Unlawfully Influencing Proceedings

The public relations efforts of the Chief Prosecutor and those affiliated with his office would be unacceptable by any civilian or military standard for their disregard of ethical obligations and tendency to materially prejudice the proceedings and influence potential panel members. Before military commissions, such efforts may also constitute prohibited "unlawful influence."

10 U.S.C. § 949b(a)(2)(A)-(C) provides that no person may attempt to coerce or influence "the action of a military commission...or any member thereof, in reaching the findings or sentence" or "the action of any convening, approving, or reviewing authority with respect to their judicial acts" or "the exercise of professional judgment by trial counsel or defense counsel." Unlawful influence (known as unlawful command influence or UCI in the military) has long

been referred to as “the mortal enemy of military justice.” *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). The defense bears the initial burden of raising the issue of unlawful influence by demonstrating “facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings.” *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999). Once unlawful influence has been raised by the defense, the burden shifts to the Government to demonstrate beyond a reasonable doubt that there was no unlawful influence or that unlawful influence did not taint the proceedings. *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002). Analysis of unlawful influence is similar to analysis of court members during voir dire in that the unlawful influence may be actual or it may be implied. *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991) (“the appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial.”). Implied unlawful influence, like implied bias of court members, is “judged objectively, through the eyes of the community.” *Stoneman*, 57 M.J. at 42.

It is well settled that public statements concerning policy positions may constitute unlawful command influence. *See, e.g. United States v. Kirkpatrick*, 33 M.J. 132 (C.M.A. 1991), *Simpson*, 58 M.J. 368. Of particular concern in this regard are not only the statements of the Chief Prosecutor and his staff and affiliated entities but also certain information published on the Office of Military Commissions website, <http://www.mc.mil>. The “Legal System Comparison” chart available at <http://www.mc.mil/ABOUTUS/LegalSystemComparison.aspx> constitutes at a minimum implied unlawful influence which would lead a reasonable observer to question the fairness of these proceedings. The lawfulness of numerous aspects of the Military Commissions system ranging from the M.C.R.E. 505 process (AE164) to aspects of the witness production and

expert appointment procedures (AE036) to the co-accused's presence for classified proceedings remain the subject of ongoing litigation. Just as the Chief Prosecutor should not offer what he couches as generic support for "new laws" when those laws themselves are the subject of ongoing proceedings in a criminal case, nor should the Convening Authority or the Office of Military Commissions. Despite ongoing litigation, the Comparison Chart incorrectly suggests, for example, that a commissions' accused is entitled to be present at trial "unless removed for persisting in disruptive or dangerous conduct," ignoring entirely the fact that an accused may be removed from critical pretrial sessions involving the discussion of classified information. On other matters, the Comparison Chart is notably silent, for example, concerning crucial differences in witness production procedures between article III courts and military commissions. On hearsay evidence, the Chart glosses over the dramatic differences between well-settled article III and courts-martial hearsay rules and what the Chart generously refers to as the "more flexible hearsay analysis" used before military commissions.

As huge disparities between article III and commissions practice are revealed in the course of pretrial proceedings, a reasonable observer would have no choice but to question the objectivity of those that maintain the Chart ostensibly as an objective comparison. Moreover, the Chart has the potential to cause actual unlawful influence upon the Commission by suggesting, for example, that more reliable forms of non-hearsay evidence may not be available to the prosecution because of the impact of "ongoing armed conflict."

For the foregoing reasons, the attached proposed protective order directs that the prosecution and affiliated entities not engage in any form of extrajudicial communication that might tend to unlawfully influence the proceedings, that the Government remove the "Legal System Comparison" chart found at <http://www.mc.mil>, and that the Government remove the

disputed motto of “Fairness, Transparency, Justice” from the <http://www.mc.mil> website and any other Office of Military Commissions publications.

e. Protective Order Necessary to Prevent Unlawful Influence Over Testimony of Witnesses

Just as the oral and written communications of prosecutors and Government officials may constitute unlawful influence over a military commission, so too can interference with witness testimony. In AE036F, Mr. bin ‘Attash challenged the Government’s continued interference with defense witness production, particularly with respect to voluntary defense witnesses able to testify at *de minimis* expense to the United States, as constituting unlawful influence. Where unlawful influence is aimed at silencing defense witnesses, it implicates both due process and the effective assistance of counsel. *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998) (“[i]f unlawful command influence is directed at prospective witnesses to intimidate them from testifying, it violates an accused’s right to have access to favorable evidence in violation of the Sixth Amendment...”); *United States v. Thomas*, 22 M.J. 388, 393 (“[i]f directed against prospective defense witnesses, [unlawful influence] transgresses the accused’s right to have access to favorable evidence...If directed against defense counsel, it affects adversely an accused’s right to effective assistance of counsel.”).

In addition to the prohibition on unlawful influence, prosecutors also have a widely-accepted ethical duty not to “discourage or obstruct communication between prospective witnesses and defense counsel.” ABA Standards, Standard 3-3.1(d). Of particular concern in the instant case is the prospect that trial counsel may encourage a witness either to not testify or to not speak with members of the defense in advance of his or her testimony. Such concern is not merely hypothetical, as in conjunction with prior litigation in this case certain witnesses from the

Office of the Convening Authority have declined or been reluctant to speak with members of the defense. *See, e.g.* AE008AA (AAA), Attachment D; *see also* Attachment F. Such concerns are heightened by the fact that many witnesses may already be reluctant to testify due to pretrial publicity and the nature of the charges against the co-accused.

Beyond ethical and unlawful influence concerns, due process demands that the Government not interfere with an accused's access to witnesses. *See, e.g. Kines v. Butterworth*, 669 F.2d 6, 9 (1st Cir. 1981) (“[t]he equal right of the prosecution and the defense in criminal proceedings to interview witnesses before trial is clearly recognized by the courts...when the free choice of a potential witness to talk to defense counsel is constrained by the prosecution without justification, this constitutes improper interference with a defendant's right of access to the witness.”); *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966 (referencing “elemental fairness and due process” and finding that “[w]itnesses, particularly eye witnesses, to a crime are the property of neither the prosecution nor the defense.”); *United States v. Walton*, 602 F.2d 1176, 1179-80 (4th Cir. 1979) (“[a] witness is not the exclusive property of either the government or a defendant; a defendant is entitled to have access to any prospective witness, although in the end the witness may refuse to be interviewed.”); *Lambert v. Blackwell*, 387 F.3d 210, 260 (3d Cir. 2004), *cert. denied*, 544 U.S. 1063 (2005) (“[i]ntimidation or threats from the government that dissuade a potential witness from testifying may infringe a defendant's Fourteenth Amendment right to due process and Sixth Amendment right to compulsory process.”).

For the foregoing reasons, the attached proposed protective order directs the prosecution and affiliated entities, including law enforcement, to not intimidate or threaten a witness or prospective witness not to speak to the defense or suggest to the witness or prospective witness

for any reason that the witness should not speak with the defense. If questioned regarding the opportunity to speak with the defense, the prosecution and affiliated entities should be directed to indicate to the witness or potential witness simply that it is the witness's own choice whether to speak with anyone in advance of his or her testimony. Nothing in this proposed protective order should impact those witnesses that the Commission directs be made available for interview by the defense.

f. Protective Order Necessary to Enact Constitutionally-Mandated Reciprocal Disclosure Requirements With Respect to Witness Production

In AE036 and AE036B, the defense argued that the witness production procedures contained in R.M.C. 703 are unconstitutional and contrary to the dictates of the Military Commissions Act of 2009 in part because they require unilateral notice of a defense witness's expected testimony be provided to the prosecution without placing any reciprocal disclosure requirements on the Government. *See, e.g. Wardius v. Oregon*, 412 U.S. 470, 472 (1973) (finding that the "Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants."). While the Commission in AE036C upheld the R.M.C. 703 witness production procedures as constitutional on the basis that the procedures are similar to long-standing military practice, the Commission failed to address the significant differences between courts-martial and Commissions practice (briefed in AE036F) or issues of fundamental fairness raised by imposing no reciprocal duties upon the Government. Since the Commission's Order in AE036C, the Government has continually sought to expand its control over defense witness production, including the production of voluntary defense witnesses (AE036E).

Because of the Government's continued abuse of the Commission's witness production procedures, and to bring the procedures into compliance with the *Wardius* reciprocal discovery requirement, the attached proposed protective order directs the prosecution to provide to the defense a list of witnesses whose testimony the prosecution considers relevant and necessary on the merits or on an interlocutory question. Such list should include the name, telephone number, address or location if known, and a synopsis of the expected testimony of the witness sufficient to show the witness's relevance and necessity. The list should be submitted to the defense in time to reasonably permit the defense to review the synopsis of expected testimony, determine whether the witness is necessary and relevant, and if warranted seek relief from the Commission to include a possible motion in limine to exclude cumulative, irrelevant, or otherwise impermissible testimony.

The proposed protective order will not only bring the witness production procedures employed by this Commission into compliance with *Wardius*, but it will also ensure that the trial is conducted on a level playing field, in a fundamentally fair manner, and with respect for due process. *See, e.g. Lisenba*, 314 U.S. at 236 (“[a]s applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice.”); *Spencer v. State of Tex.*, 385 U.S. 554, 563-64 (1967) (“the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial.”). Amongst the most fundamental of due process rights is the right to confront and cross-examine Government witnesses. *See, e.g. Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (“[t]he rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.”); *Giles v. Schotten*, 449 F.3d 698 (6th Cir. 2006).

g. Conclusion

The prosecution in the instant case has failed time and time again to meet its legal and ethical obligations with respect to disclosure and discovery and has used its Memorandum of Understanding to hide potentially exculpatory, mitigating, or impeaching evidence. Just as the prosecution has hidden behind its Memorandum of Understanding, it has hidden behind a wall of false and misleading classification guidance and abused the M.C.R.E. 505 process to further obstruct access to evidence. In addition to obstructing access to evidence, the prosecution has obstructed defense access to witnesses and required the defense to submit detailed discovery regarding witness testimony without providing any reciprocal information to the defense. Finally, the prosecution and affiliated Government entities have made extrajudicial statements and produced extrajudicial materials that tend to materially prejudice and unlawfully influence the proceedings and taint the pool of prospective panel members.

For these reasons, the defense requests that the Commission enter the attached proposed Protective Order to Protect the Right to a Fair Trial and require all members of the prosecution to file the accompanying Memorandum of Understanding with the Commission prior to further participation in this case.

- 7. Oral Argument:** The defense requests oral argument.
- 8. Witnesses:** None at this time. The defense reserves the right to add witnesses to this list.
- 9. Conference with Opposing Counsel:** The Government opposes the relief sought herein.
- 10. Attachments:**
 - A. Certificate of Service
 - B. Proposed Protective Order and Memorandum of Understanding
 - C. Remarks of Chief Prosecutor 10 February 2013
 - D. Remarks of Chief Prosecutor 25 October 2013
 - E. Remarks of Chief Prosecutor 20 December 2013
 - F. E-Mail from CDR Joseph Romero dtd 16 December 2013

//s//

CHERYL T. BORMANN
Learned Counsel

//s//

JAMES D. HATCHER
LCDR, USN
Defense Counsel

//s//

MICHAEL A. SCHWARTZ
Capt, USAF
Defense Counsel

//s//

TODD M. SWENSEN
Capt, USAF
Defense Counsel

CERTIFICATE OF SERVICE

I certify that on 22 January 2014, I electronically filed the attached **Defense Motion for Order to Protect the Right to a Fair Trial** with the Trial Judiciary and served it on all counsel of record by e-mail.

//s//

CHERYL BORMANN

Learned Counsel

Attachment A

ATTACHMENT B

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY**

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD,
WALID MUHAMMAD SALIH MUBARAK
BIN 'ATTASH,
RAMZI BIN AL SHIBH,
ALI ABDUL AZIZ ALI,
MUSTAFA AHMED ADAM
AL HAWSAWI

AE _____

PROTECTIVE ORDER

To Protect the Right to a Fair Trial

Date Filed: _____

Upon consideration of the submissions of the defense regarding the defense's motion for a protective order to protect the right to a fair trial in this case, the Commission finds that a protective order is necessary to protect defense access to exculpatory, mitigating, and impeaching evidence, to prevent over-classification and enforce prosecution compliance with M.C.R.E. 505, to curtail extrajudicial statements that present a substantial likelihood of material prejudice to a fair trial, to curtail extrajudicial statements that present a substantial likelihood of actual or implied unlawful influence, to protect defense access to witnesses, and to enforce reciprocal discovery of witness information. Accordingly, pursuant to R.M.C. 701(f), R.M.C. 806(d), and the general judicial authority of the Commission, for good cause shown, the following Protective Order is entered.

1. SCOPE

This Protective Order establishes procedures applicable to the pre-trial, trial, and post-trial stages of this case, to include any appeals, subject to modification by further order of this

Commission or orders issued by a court of competent jurisdiction. Counsel are responsible for advising their clients, translators, witnesses, experts, consultants, support staff, and all others involved with the defense or prosecution of this case, respectively, of the contents of this Protective Order.

2. DEFINITIONS

a. The term “defense” includes any counsel for an accused in this case and any employees, contractors, investigators, paralegals, experts, translators, support staff, defense security officers, or other persons working on the behalf of an Accused or his counsel in this case.

b. The term “prosecution” includes any counsel for the United States in this case and any employees, contractors, investigators, paralegals, experts, translators, support staff, or other persons working on the behalf of the United States or its counsel in this case.

3. PROSECUTION DISCOVERY AND DISCLOSURE OBLIGATIONS

a. The prosecution shall comply with all disclosure and discovery obligations imposed by statute, law, or regulation, including but not limited to obligations under 10 U.S.C. § 949j(a), 10 U.S.C. § 949j(b)(1)-(4), R.M.C. 701, M.C.R.E. 304, *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and the Jenks Act, 18 U.S.C. § 3500.

b. The Second Amended Protective Order #1, AE013DDD, shall be modified to remove the requirement in paragraph 5(a)(2) and 5(b) the defense sign a Memorandum of Understanding Regarding Receipt of Classified Information as condition precedent to the defense having access to classified information, including classified disclosures and discovery.

c. The prosecution shall not use classification as a means to conceal evidence that is subject to disclosure or discovery obligations. If the prosecution invokes the national security

privilege with respect to any evidence subject to disclosure or discovery obligations, the prosecution will immediately supply the evidence in whole as well as any proposed deletions, substitutions, or other modifications to the Commission for review under M.C.R.E. 505(f).

d. The prosecution shall make reasonably diligent efforts to comply with all discovery requests and shall provide all required disclosures and discovery to the defense at the earliest feasible opportunity.

4. CLASSIFIED INFORMATION PROCEDURES

a. The prosecution alone or in conjunction with an Original Classification Authority (OCA) shall refrain from over-classifying material or derivatively classifying material that does not meet the standards for classification under Executive Order 13526. Classification shall not be used to conceal violations of law, inefficiency or administrative error, to prevent embarrassment to a person, organization, or agency, or to prevent or delay the release of information that does not require protection in the interest of the national security.

b. The prosecution shall use reasonably diligent efforts to accurately determine the classification status of material and shall not represent unclassified material as classified.

c. Prior to a hearing conducted pursuant to M.C.R.E. 505(h)(1), the prosecution shall promptly comply with M.C.R.E. 505(h)(2)(A) and provide notice of the classified information at issue. If the prosecution determines that information provided by the defense in a M.C.R.E. 505(g) notice is unclassified, the prosecution will promptly notify the defense of the unclassified nature of the information.

5. EXTRAJUDICIAL STATEMENTS

a. In statements to the public, whether oral, written, or by any other means of communication, the prosecution may state only incontrovertible factual matters. Incontrovertible

factual matters are matters which are beyond dispute. Such matters do not include argument as to the merits of ongoing litigation. Examples of incontrovertible factual matters include a list of motions on the Commission's docket or the dates and times of upcoming sessions.

b. The prosecution shall not engage in any form of extrajudicial communication in an attempt to coerce or influence the action of this Commission in reaching findings or sentence, the actions of convening, approving, or reviewing authorities with respect to their judicial acts, or the exercise of professional judgment by defense counsel. The prosecution shall further refrain from any extrajudicial communication that tends to cause the appearance of unlawful influence as judged objectively through the eyes of the public.

c. The Office of Military Commissions, in conjunction with the prosecution, shall remove the chart found at <http://www.mc.mil/ABOUTUS/LegalSystemComparison.aspx>.

d. The Office of Military Commissions, in conjunction with the prosecution, shall remove the motto of "Fairness, Transparency, Justice" from the <http://www.mc.mil> website and from any other Office of Military Commissions publications.

6. WITNESS PROCEDURES

a. The prosecution shall not intimidate or threaten any witness or prospective witness not to speak to the defense or suggest to any witness or prospective witness for any reason that the witness should not speak with the defense. If questioned regarding the opportunity to speak with the defense, the prosecution shall indicate to the witness or prospective witness that it is the witness's own choice whether to speak with anyone in advance of his or her testimony. The prosecution shall take reasonable measures to ensure that affiliated entities, including law enforcement personnel, follow the same procedures. The provisions of this paragraph are not

applicable to those witnesses that the Commission directs be made available for interview by the defense.

b. The prosecution shall provide to the defense a list of witnesses whose testimony the prosecution considers relevant and necessary on the merits or on an interlocutory question. The list will include the name, telephone number, address or location if known, and a synopsis of the expected testimony of the witness sufficient to show the witness's relevance and necessity. The list will be submitted to the defense in time to reasonably permit the defense to review the synopsis of expected testimony, determine whether witness is necessary and relevant, and if warranted seek relief from the Commission prior to the witness's testimony.

7. MEMORANDUM OF UNDERSTANDING

a. Prior to further participation in this case, each member of the prosecution shall execute the attached MOU and file a copy with the Commission. With the exception of counsel of record for the prosecution, the MOU may be filed under seal.

8. SURVIVAL OF ORDER

a. The terms of this Protective Order and any signed MOU shall survive and remain in effect after the termination of this case unless otherwise determined by a court of competent jurisdiction.

b. This Protective Order is entered without prejudice to the right of the parties to seek such additional protections or exceptions to those stated herein as they deem necessary.

So ORDERED this _____ 2014.

JAMES L. POHL
COL, JA, USA
Military Judge

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY**

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD,
WALID MUHAMMAD SALIH MUBARAK
BIN 'ATTASH,
RAMZI BIN AL SHIBH,
ALI ABDUL AZIZ ALI,
MUSTAFA AHMED ADAM
AL HAWSAWI

**Memorandum of Understanding Regarding
Protective Order to Protect the Right to a
Fair Trial**

I, _____ [print full name], have been provided a copy of and have read the Protective Order to Protect the Right to a Fair Trial, relating to defense access to evidence and witnesses, protections against over-classification, and protections against prejudicial extrajudicial statements.

I agree to comply with all discovery and disclosure obligations mandated by statute, law, or regulation, to make reasonably diligent efforts to comply with all discovery requests, and to provide all required disclosures and discovery to the defense at the earliest feasible opportunity. I will refrain from over-classifying material (including through the application of inappropriate derivative classification) and I will not represent unclassified material as classified. I will promptly comply with all obligations under M.C.R.E. 505, including but not limited to the notice requirement in M.C.R.E. 505(h)(2)(A).

In statements to the public regarding this case, whether oral, written, or in any other form, I agree to state only incontrovertible factual matters that are beyond dispute. I will also avoid

extrajudicial statements aimed at causing or that tend to cause the appearance of unlawful influence over the Commission, its members, the Convening Authority, or the defense.

I will not intimidate or threaten any witness or prospective witness not to speak to the defense or suggest to any witness or prospective witness for any reason that the witness should not speak with the defense. I understand that prior to the testimony of any prosecution witness, the defense must be provided with the information set forth in the Protective Order, including a synopsis of the expected testimony of the witness sufficient to show the witness's relevance and necessity.

I understand that failure to comply with this Memorandum of Understanding Regarding the Protective Order to Protect the Right to a Fair Trial could result in sanctions or other consequences. I understand that the terms of this Memorandum of Understanding shall remain in effect after the termination of this case, and that any termination of my involvement in this case prior to its conclusion will not relieve me from the terms of this Memorandum of Understanding.

I make the above statements under penalty of perjury.

Signature

Date

Witness

Date

Witness

Date

ATTACHMENT C

Filed with TJ
22 January 2014

Appellate Exhibit 266 (WBA)
Page 42 of 66

UNCLASSIFIED//FOR PUBLIC RELEASE
CHIEF PROSECUTOR MARK MARTINS
REMARKS AT GUANTANAMO BAY
10 FEBRUARY 2013

Tomorrow is the first of four scheduled days of pre-trial sessions in the case of United States versus Khalid Shaikh Mohammad and four co-accused who stand charged with plotting the attacks of September 11, 2001. The charges allege that the accused and their fellow plotters—including Usama Bin Laden, as well as four individuals who had received pilot training and fifteen so-called muscle hijackers:

- forged identify and travel documents and fraudulently opened bank accounts;
- found sanctuary in ungoverned regions and forbidding terrain;
- trained participants in camps and safe-houses;
- coordinated operations and recruited participants via the internet and email;
- leveraged off-the-shelf technologies such as global positioning system receivers;
- hid among civilian travelers and secreted weapons in carry-on bags;
- practiced operational security while studying security lapses by authorities;
- rehearsed their attacks and precursor actions to eliminate shortcomings.

Such preparations culminated in the hijacking and crashing of civilian airliners into buildings in New York, Washington, D.C., and a field in Pennsylvania, killing nearly 3,000 persons. I emphasize that the charges are only allegations, and that each of the five accused is presumed innocent unless and until proven guilty beyond a reasonable doubt.

The Military Judge's order providing the sequence of motions he will hear is available on the military commissions website (Appellate Exhibit 115B), as are all of the parties' pleadings for the issues the Judge has scheduled for consideration this week. The emergency defense motion to abate the proceedings (Appellate Exhibit 133), which was prepared on an accelerated timetable, is also represented on the website, with the main pleadings available there providing important information that should be read and considered by anyone taking an interest in that motion. We have supplemented the binders with hard copies of these very recently-filed pleadings in case members of the media and non-governmental organizations attending the sessions in Guantanamo did not have the chance to pull them down from the website prior to traveling here. We are also working to ensure the public and media viewing sites in the United States have hard copies of these new filings.

To all, while the temptation to focus upon the courtroom drama of the day is understandable, please also do not lose sight of the methodical movement that is taking place toward trial on the merits. Yesterday, the Judge issued a ruling on the outstanding issues associated with the classified information protective order that he signed in December (Appellate Exhibit 13 Series), which clears the way for the defense teams to sign their memoranda of understanding committing them to comply with that protective order, and enabling them to receive classified discovery materials. To date, nearly

100,000 unclassified documents have been previously provided to the defense, comprising much of our affirmative discovery obligations. This progress in discovery is only one of many reminders that only a fraction of complex capital litigation occurs during courtroom proceedings.

To date, the parties have briefed over 84 motions and have argued 23 motions, and the Judge has ruled on more than 25 motions. Another five motions have been withdrawn, and some nine further motions have been mooted or dismissed as moot.

Alleged Intrusion Into Attorney-Client Discussions in the Courtroom and Elsewhere

On the 28th of January, the audio and visual transmission from the courtroom was briefly interrupted. Many of you were viewing the proceedings at that time. I am encouraged by the fact that some of you did more than just follow what was literally a bright and shiny object—the red flashing light which signaled to all that the transmission had been cut. The media accounts that ensued dutifully reported the cutting of the feed, the judge’s surprise, the prompt release of the 105 words unheard by the public due to the interruption, and the judge’s clear ruling that he and only he would henceforth approve any interruptions of the transmission. But some of the media coverage also soon began to provide additional context.

It became more widely known that the Judge himself had issued standing Rules of Court directing his Court Security Officer to serve as primary security liaison between the trial judiciary and intelligence entities on all security matters, while also observing the prohibition on *ex parte* communications except as authorized by the Military Commissions Act or the Manual for Military Commissions. More people came to appreciate that in a publicly available executive order on protecting national security information, the President has delegated “original classification authority” to responsible and accountable officials in the executive branch who are trained in proper classification and declassification. Despite the concerns initially raised, the public came to understand that it is a prudent way both to protect sources and methods and to maximize openness of the proceedings if such officials are immediately available to provide the Judge and the Court Security Officer a classification review of the real-time transmission to enable operation of the 40-second delay.

Moreover, it became more widely known that the military judge is the sole authority in law on any closure of commission proceedings to the public (see Rule for Military Commission 806), that he is the presiding officer of the military commission (see Military Commissions Act at 10 U.S.C. § 948j), and that he is thus an officer of the United States who like federal judges and all other officers has a non-delegable and corresponding responsibility to safeguard the classified information that protects the public from harm. *See* 10 U.S.C. § 948p-1 (a).

Some have speculated that this public conversation about an aspect of these trial proceedings that had previously gone unnoticed was a regrettable distraction from the pursuit of justice. I respectfully disagree. Although the vast majority of citizens support

the protection of genuine sources and methods by which intelligence is gathered on terrorist groups to prevent future attacks, secrecy must always be accountable within a free and open society and must always be subject to checks and balances within a democratically elected government. These pre-trial proceedings reflect such checks and balances, and their openness and sharply adversarial nature have ensured that we would go no further until concerns over attorney-client confidentiality raised by defense counsel following the interruption could be allayed with additional scrutiny and information.

Today and tomorrow, you can review the results of the additional scrutiny directed by the judge, as well as the information gathered through the discovery and interviews resulting from the Defense Emergency Motion to Abate (Appellate Exhibit 133). I urge you to please take some time with the declarations attached to the Government Response Brief to that motion. My staff and I spent a full week diligently running every rumor to ground, and I can say unequivocally that no entity of the United States Government is listening to, monitoring, or recording communications between the five accused and their counsel at any location. If, due to forgetfulness of the warnings prominently posted near each courtroom microphone, inadvertent utterances by counsel or accused into unmuted mikes are overheard by court reporters, such communications are fully protected from disclosure to the Prosecution, which is in any case ethically bound to actively avoid contact with such utterances.

The attorney-client privilege is fundamental to the effective assistance of counsel and to our system of justice. Any suggestion that privileged communications might be infringed is taken very seriously. As the Judge pointed out during hearings last week in another case, however, the viewing and even interruption of a transmission by an OCA says nothing in itself about the capability or existence of audio monitoring of attorney-client discussions. And now, in an abundance of caution to reassure all parties, we have done our best to prove a negative.

Attorney-Client Mail

The Judge has also scheduled this week the Government's motion for a communications management order that would maintain protection of privileged writings and documents while also ensuring security of classified information and safety of the guard force (Appellate Exhibit 18). Procedures for delivery of legal mail were fully litigated last year in the case of *United States v. Al Nashiri*, and the order the Government seeks is identical to the one issued by the judge in that case.

Note that the prosecution is not involved in review of legal mail of any detainee, does not communicate with Joint Task Force Guantanamo personnel concerning the review of materials, and is not privy to the information contained in legal mail. Case-related material that may not necessarily be privileged, such as discovery, is subject only to a cursory review for physical contraband, such as paper clips or staples, not substantive content. The review for physical contraband is conducted by a "privilege team" of professionals who are completely walled off from the prosecution. These procedures are

essentially identical to the procedures used throughout the United States in our federal prisons to ensure the safety of both prisoners and guards.

The procedures requested by the Government are the result of a reflective process that began in May 2008, when the Joint Task Force Guantanamo Commander issued a Visitation Practices Guide governing, among other things, communications between military commission defense counsel and their clients. The Guide required defense counsel to place their initials or signature on the top right corner of each page of their legal communications and authorized Joint Task Force personnel, in the presence of the detainee, to conduct a cursory security inspection of materials being sent by defense counsel into the detention facilities. Attorneys in the Office of the Staff Judge Advocate were responsible for conducting those reviews, and the inspections were authorized pursuant to the Joint Task Force Commander's responsibility to maintain safe and secure facilities, to maintain good order and discipline, and to protect national security.

The Joint Task Force Commander determined that the 2008 Visitation Practices Guide needed to be revised in order to better screen all materials that were being introduced into the detention facility by military commission defense counsel. A number of documents had been introduced into detainee cells that did not contain the required initials or signature of a defense counsel, or were marked in a manner not contemplated by the Guide.

Because of the inconsistent way that such materials were marked, the Joint Task Force wanted to create a "privilege team" that would inspect all incoming attorney-client material, to ensure it was uniformly marked with a stamp indicating that the material was introduced into the facility by defense counsel. These uniform rules would help ensure that guards conducting cell inspections would be able to easily identify documents that were attorney-client materials and thus are not subject to content review. The Commander was also concerned about contraband materials, including incendiary magazines, that were discovered within the detention facility and which appeared not to have undergone the screening process.

We are making available to all who are interested in this important topic an exchange between the President of the American Bar Association (ABA) and the Commander of United States Southern Command, the higher headquarters of Joint Task Force Guantanamo. This exchange grew out of the ABA President's concerns regarding protection of the attorney-client privilege, which concerns he expressed in a letter to the Secretary of Defense in December of 2011 during litigation on the topic in the *Al Nashiri* case. As context for this week's litigation, I suggest that you review this correspondence, which sheds significant light on how and why the procedures that are in place were established.

Facilitation of Attorney-Client Relationships

Although some may suggest otherwise, the government has made every effort to facilitate effective relations between defense counsel and their clients in this case. The accused are represented by multiple able counsel, including by learned counsel, as well as paralegals and other staff, all at government expense. The government has made numerous regular flights available to defense counsel to visit their clients, and there have been many hundreds of visitation days on which the defense could have visited their clients. I refer you to the pleadings in the defense motion alleging defective referral (Appellate Exhibit 8) to see for yourselves how many flights the defense have taken and how many they have not taken, and how many client meetings have actually taken place in comparison to how many could have taken place. Note that these figures are some nine months old, and there have been many additional opportunities since that time.

Moreover, the government has committed to fully funding mitigation specialists for the accused, in order to permit them to present a mitigation case regarding the potential capital punishment they face. This is all as it should be. The accused in our adversarial justice system, like any other criminal defendants, are receiving the sort of zealous advocacy that these serious charges require. The accused, if convicted, will have a full opportunity to present that mitigation case during the penalty phase of trial. That is the appropriate time and place for the accused's mitigation arguments.

Conclusion

Finally, it has been suggested that providing information about the military commissions system is mere "public relations," and that federal prosecutors do not engage the public in this way because they need not attempt to bolster their legitimacy. Such criticisms are misguided. In fact, U.S. Attorneys do consistently appeal to publics across the United States to support new laws and seek community support for prosecution priorities. They engage the media to inform a broader audience about changes in law and to correct misperceptions that may arise. Federal law enforcement agencies also maintain resourced community relations offices to foster dialogue and forge bonds that yield better understanding of government.

Given the general lack of knowledge or understanding about military commissions, these educative efforts are all the more important. The idea that practitioners in this proud and reformed system of military justice should be silent in the face of misinformed commentary or single-minded advocacy is a disservice to the balanced discussion that our people need and deserve on vital issues.

In closing, please allow me to introduce an always-important perspective to that discussion by thanking and recognizing the Coastguardsmen, Sailors, Soldiers, Airmen, and Marines of the Joint Task Force Guantanamo for their daily professionalism.

ATTACHMENT D

Filed with TJ
22 January 2014

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**CHIEF PROSECUTOR MARK MARTINS
REMARKS AT GUANTANAMO BAY
25 OCTOBER 2013**

Good evening. This week, the Military Commission convened to try the charges against Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi considered pre-trial issues raised by the defense and the prosecution. The Judge examined the parties' written briefs, heard oral argument, and, on some issues, took witness testimony.

In nearly 21 hours of fully open proceedings, the Commission considered 21 motions and heard from two witnesses comprising nearly four hours of testimony. Three of five Accused were present during all proceedings, while one Accused was held by the Judge to have knowingly, voluntarily, and intelligently waived his right to be present on Wednesday, and another Accused to have so waived his right to be present on Thursday and Friday. The Commission has now received more than 60 hours of testimony from a total of 20 witnesses to assist it in deciding pre-trial motions. The parties have briefed 129 substantive motions, and have orally argued some 58 motions. Of the 129 substantive motions briefed, 8 have been mooted, dismissed, or withdrawn; 37 have been submitted for decision; and 62 have been ruled on by the Judge. Motions argued, once ruled upon, will settle outstanding disputes regarding, among other issues, the charges against the Accused and will continue to move the case forward toward trial. Below is a summary of the motions litigated this week:

- The Judge heard oral argument on Appellate Exhibit 200, a defense motion to dismiss the case because, according to the defense, Amended Protective Order #1 violates the Convention Against Torture. The Judge took the motion under advisement.
- The Judge heard oral argument on Appellate Exhibits 073 and 156, the government's motions and memoranda for protective orders to safeguard national security information pursuant to section 949p-4 of the Military Commissions Act of 2009 and Military Commissions Rule of Evidence 505. The Judge took the motions under advisement.
- The Judge heard oral argument on Appellate Exhibit 164, a defense motion to stay the government's provision of classified discovery to the defense based on the allegation that the procedures (specifically 10 U.S.C. § 949p-4(c) and M.C.R.E. 505(f)(3)) are unconstitutional and a violation of the Uniform Code of Military Justice and the Geneva Conventions. The Judge took the motion under advisement.
- The Judge granted the government's motion, unopposed by the defense, to supplement Appellate Exhibit 120, the government's motion to make minor conforming changes to the charge sheet so as to reflect that while conspiracy has been and remains a theory of liability for completed law of war offenses, it is not a separate and standalone offense in this case.

- The Judge noted that he continues to have under advisement Appellate Exhibit 108L, a defense motion regarding discovery of International Committee of the Red Cross communications with the United States.
- The Judge took testimony regarding three defense motions: one seeking dismissal due to alleged resource shortages experienced by the defense before the case's referral (Appellate Exhibit 008); one seeking dismissal due to alleged unlawful influence exerted by political figures and others (Appellate Exhibit 031); and one challenging the alleged invasion of confidential and privileged defense communications by JTF-GTMO staff (Appellate Exhibit 032). The testimony also bears on Appellate Exhibit 144, a government notice of an ongoing command investigation pertaining to the removal of suspected contraband by JTF-GTMO guard staff from the legal bins of three of the Accused in this case in February, when a pen refill and other contraband were found as a result of a detention-facility search.
- The Judge addressed a host of discovery, administrative, representation support, and other issues described in Appellate Exhibits 149, 158, 161, 167, 168, 175, 182, 183, 184, 195, 206, and 209, resolving some matters and deferring others to the next session of the Commission in December.

I will not comment on the specifics of any of these motions or other motions pending before the Commission. But I will discuss three broader issues regarding military commissions that have been the subject of recent questions by interested observers.

The Judge Is the Sole Arbiter of Closure in These Proceedings

Acquiring intelligence can be like fitting together pieces of a complex puzzle. Just by looking at one piece, neither we nor a group intent upon harm can tell what the image will look like. But if one fits together enough pieces of the puzzle, the image begins to emerge. The presiding judge has the primary responsibilities of interpreting—and resolving disputes over—the law; assessing the evidence presented; and ensuring a fair trial. And in cases involving national security in federal civilian courts and military commissions alike, a judge also has the non-delegable responsibility to protect classified information from disclosure, if disclosure would be detrimental to national security. 10 U.S.C. § 948p-1(a). Because this is not his sole or primary responsibility, the judge does not necessarily have the full picture before him. To fulfill his responsibility to safeguard classified information, he is assisted by those who do.

In a publicly available executive order, the President delegated “original classification authority” to responsible and accountable officials in the executive branch who are trained in analyzing and keeping close track of information that could be expected to harm national security. (Their functions, responsibilities, and accountability mechanisms are detailed in Executive Order No. 13,526.) Further, under the Rules of Court issued by the Judge, the Court Security Officer (CSO) serves as the principal security advisor to the Judge and formally liaises with the classification authorities on procedural matters relating to information security. *See* Trial Judiciary Rule of Court 10. While certain pieces of information might not seem critical to us, classification authorities are required to recognize any such pieces that are significant, such as

those that—if acquired and assembled into a fuller picture by a hostile group—could compromise troop movements, other operational details, or methods by which such a group is being pursued by the United States and our allies. Like the public, classification authorities can watch the proceedings on closed-circuit television at sites approved by the Judge (which he has deemed extensions of the courtroom), and they do so in order to assist the CSO and the Judge in preventing the sorts of harmful inadvertent disclosures that otherwise could stem from sharply adversarial litigation.

If these proceedings took place in secret, none of these efforts would be necessary. But because they function in the open—in part through audio-visual transmission of the proceedings to the public on a forty-second delay—the Judge must supervise when and how the requirement to protect classified information might result in closure of the courtroom. Situations can occur in which a critical piece of information is inadvertently mentioned by a participant, and there must be a manner by which to prevent that information from becoming compromised through public dissemination. Errors of recognition can also occur, causing someone in the safeguarding process to believe, incorrectly, that classified information may have been or may imminently be uttered and that stopping proceedings before forty seconds have elapsed is needed so as to prevent compromise.

In a widely reported incident on January 28, 2013, the audio-visual transmission from the courtroom was briefly interrupted as a result of this information-security process. The media reported several aspects of this incident: the interruption of the transmission, the expression of surprise by the Judge at having not himself directed it, and the prompt subsequent release by the Judge of the 105 words unheard by the public due to the interruption.

The concern regarding control of the courtroom this event aroused is understandable, but the Judge has made clear that only he or the CSO at his side in the courtroom may intentionally suspend the transmission. There is nothing preventing a judge from authorizing classification authorities to suspend the transmission of the proceedings pending the judge's decision on actual closure (through sealing of any statements made in court during the period of seconds following a suspension of transmission), but all now know that is not how the Judge in this case will handle things. The classification authorities are to liaise with the CSO and the Judge on security matters; but the Judge is both the sole arbiter of closure in these proceedings and the decider on the suspension of transmission. These information security rules exist not to hinder public access, but rather to maximize it through measures that are less restrictive than closing the courtroom entirely.

While the judge has discretion in the specific mechanics of the information security process, the concern that such a process be effective is not an idle one. Disclosure of classified or otherwise sensitive information in past criminal prosecutions has harmed national security. In prosecuting Omar Abdel Rahman and others for their role in the 1993 World Trade Center bombing, the government was compelled—as it is in cases where it charges the accused with conspiracy—to turn over a list of unindicted co-conspirators to the accused. That list included the name of Usama bin Laden. As no protective order had been emplaced, that list soon reached bin Laden in Khartoum, informing him that his connection to the 1993 bombing had been learned by the United States. In a separate example, in the trial of Ramzi Yousef for his role in

the same 1993 World Trade Center bombing, seemingly innocuous testimony about the delivery of a cell-phone battery was enough to help terrorists learn that one of their communications links had been compromised. That link was immediately shut down, and the government lost valuable intelligence.

The procedures described here reflect a genuine commitment to open and accountable government and, at the same time, the protection of classified and otherwise sensitive information while enabling an accused to meaningfully confront the charges against him. No part of the justification for these procedures is grounded in preventing disclosure that would lead to embarrassment or reveal violations of law.

Rule 505(h) Hearings Are Not Closed Sessions

Some have imprecisely referred to Rule 505(h) hearings as “closed sessions.” It is important to keep in mind the distinction between a *hearing* and a *session*. If the Judge grants a party’s request to hold an in-camera *hearing* under Military Commission Rule of Evidence 505(h), the parties will not litigate the merits of the underlying motions themselves—that will take place in a session later, and such sessions will be as open as possible. As the Judge explained this week, judges hold a Rule 505(h) hearing to determine issues of use, relevance, and admissibility and thus determine whether a closed session under Rule for Military Commissions 806 is necessary and, if so, how to minimize the amount of closure. Unofficial/Unauthenticated Transcript at 6592-6593 (Oct. 23, 2013) (available at www.mc.mil/). The Judge noted that “[t]his is standard procedure.” These procedures for handling classified information mirror those used in Article III courts under the Classified Information Procedures Act, and these types of hearings frequently take place with counsel together in judge’s chambers.

On Tuesday, the Judge held a five-minute Rule 505(h) hearing with all counsel, after which he “determined there was no need to close the session” because “there was no need for the disclosure of classified information to be discussed on [Appellate Exhibit 200]” Unofficial/Unauthenticated Transcript at 6592 (Oct. 23, 2013). To date, the Judge has held only one closed session under Rule 806, and that involved an interlocutory matter rather than the presentation of any evidence relating to the charges in this case. That session lasted 34 minutes, and, within days, the Commission made a redacted transcript publicly available. Unofficial/Unauthenticated Transcript at 4329-4359 (Aug. 19, 2013). The unredacted transcript is fully preserved for use on appeal. To date, over 99% of the sessions in this case have been open to the public.

The Attorney-Client Privilege Is Respected in Military Commission Proceedings

I reject as false the suggestion of some that the government excuses infringements upon the attorney-client relationship so long as the prosecution does not view the content of privileged communications. To be clear: the United States respects and upholds the confidential attorney-client relationship of a criminal suspect or defendant and works diligently to support and protect that relationship. It does so with the recognition that this privileged attorney-client communications are fundamental to the effective assistance of counsel and to our system of justice. I note that although many of us in government strive daily to implement Congress’s

stated intent in the Military Commissions Act of 2009 to ensure adequacy of the defense function for accused individuals, it is important to remember that in our justice system, an accused cannot be compelled to be represented by an attorney. He may knowingly and voluntarily waive counsel, if the judge has comprehensively advised him of his right to counsel and of the possible adverse consequences of self-representation.

Illustrating its commitment to the privilege, the government has moved the Commission for a communications management order that would maintain the protection of privileged writings and documents, while also ensuring the security of classified information and safety of the guard force (Appellate Exhibit 018). Procedures for delivery of legal mail were fully litigated last year in *United States v. Al Nashiri*, and the order the government seeks here is identical to the one issued by the Judge in *Al Nashiri*. These procedures are nearly identical to the procedures used throughout the United States in our federal prisons to ensure the safety of both prisoners and guards.

Further, no entity of the government is listening to, monitoring, or recording attorney-client communications at the detention facility in Guantanamo Bay. As many of you have shown great interest in the matter, I draw your attention to a recent ruling in the *Al Nashiri* case. After holding an evidentiary hearing regarding defense allegations of government monitoring of attorney-client communications, the Judge, in the context of that case, found “that no monitoring has occurred for at least the prior two years from the date of the hearing, well beyond the 15 September 2011 date of referral charges in this case.” *Al Nashiri*, Appellate Exhibit 149K. The Judge further found no extrinsic evidence relevant to establish the existence of monitoring at the Guantanamo Bay detention facility before that date. *Id.* The Commanding Officer of the Joint Detention Group, JTF Guantanamo has “agreed to permit limited inspections of the attorney-client meeting rooms to reassure the attorneys and the accused that no monitoring capability has been established or reestablished in the rooms.” *Id.* And as I mentioned on Monday, in *United States v. Mohammad, et al.*, the Judge found that “[n]o evidence supports the Accuseds’ concern the purported loss of data or problems with communication were the result of any attempt by the Prosecution or DoD to compromise Defense files or encumber Defense efforts to represent their respective clients.” Appellate Exhibit 155II. The government takes very seriously both the effective representation of counsel and the attorney-client privilege that is central to such representation.

And now, I’ll be happy to take questions.

* * * * *

In closing, I commend the Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen of Joint Task Force Guantanamo for their professionalism in supporting these proceedings. While trained and competently led to perform their assigned duties, some of them are young adults early in their military service. And in this connection I want to remember Patrick “Paddy” Brown, one of the fallen first responders in the September 11th attacks who, earlier in his life, had been a newly enlisted young Marine and who, soon after putting on the uniform of his

country's armed forces, deployed to Vietnam. Following his military service, Paddy served for 24 years in the Fire Department of New York, rising to the rank of Captain. There, he combined extensive knowledge of firefighting with innovation, quick thinking, and personal courage to rescue people in danger and to protect his men. We honor the memory of Captain Paddy Brown.

ATTACHMENT E

**CHIEF PROSECUTOR MARK MARTINS
REMARKS AT GUANTANAMO BAY
20 DECEMBER 2013**

Good afternoon, and warm tidings during this holiday season—a deeply meaningful season for so many peoples around the globe—to all of you. For us to be here over winter solstice on the shortest weekday of our year in the northern hemisphere, and when many we know are using every minute of that short day in order to set aside time for loved ones in family meals and community celebrations over the coming fortnight, is noteworthy in itself. We prosecutors, defense attorneys, and commission personnel are of course obligated to spend as much time here as necessary, with the judge and supervisors capable of requiring all to remain on site once proceedings in a case have begun. And certainly in recent years military personnel are often away from home over holidays. But for those of you who have chosen to travel long distances in order to observe or report on this pre-trial legal process, to be here this week has inevitably caused you to forego other things you might wish to be doing, and to forego those other things while in an environment that is more austere and less convenient than that to which you are accustomed. From this soldier's point of view, the fact that you are willing to do so is heartening, because even as our legal system can be both exhaustive and exhausting to watch, the stakes in this case could not be higher for much that we hold dear.

In particular, we are privileged to have been joined here this week by a survivor of the September 11th attack on the Pentagon, as well as by family members of four who were killed that day in the World Trade Center towers. Their stories are heart wrenching, and yet their journeys to this place and time also nevertheless inspiring. Gina Cayne met Jake Cayne on a blind date in 1986 at a Baskin-Robbins ice cream store in Marlboro, New Jersey, and married him four years later. She recalls how they dedicated their lives to their three precious daughters and were surrounded by family and friends. On September 11th, Jake, a bond trader at Cantor Fitzgerald, began his day, like any other, at his desk on the 104th floor of the North Tower when the first plane hit. He was 32. Gina's best friend. Her first boyfriend. Her beloved husband. The father of her children. And now, twelve years later, Gina and her father—as well as five others still mourning their own personal losses on 9/11—are here, demanding justice under law, with dignity and with resolve.

Summary of Twenty-One Commission Rulings and Other Proceedings Reveal Substantial Progress This Week

This week, the Military Commission convened to try the charges against Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi continued its consideration of various pre-trial issues raised by the defense and the prosecution. The Judge examined the parties' written briefs, heard oral argument, took witness testimony, and issued numerous written rulings.

The Commission considered four motions and heard from two witnesses comprising some four hours of testimony. Since the arraignment in May 2012, the Commission has now received nearly 66 hours of testimony from a total of 21 witnesses to assist it in deciding pre-trial motions. The parties have briefed 137 substantive motions and have orally argued some 36

substantive motions. Of the 137 substantive motions briefed, 8 have been mooted, dismissed, or withdrawn; 30 have been submitted for decision; and 76 have been ruled on by the Judge. Motions argued, once ruled upon, will settle outstanding disputes regarding, among other issues, the charges against the Accused and will continue to move the case forward toward trial. Below is a summary of the orders issued and motions litigated this week:

- The Judge issued Appellate Exhibit 200II (1) denying the defense motion to dismiss the charges and remove the death penalty as a possible punishment on the ground that Amended Protective Order #1 violates the Convention Against Torture; (2) denying the defense motion to strike paragraphs 2(g)(3) and 2(g)(4) of Amended Protective Order #1; and (3) granting the defense motion to strike paragraph 2(g)(5) of Amended Protective Order #1 as superfluous to another provision already in the protective order.
- The Judge issued Appellate Exhibit 013DDD, the Second Amended Protective Order #1 to protect against disclosure of national security information.
- The Judge issued Appellate Exhibit 013CCC, a second supplemental ruling regarding the government motion to protect against disclosure of national security information. In it, the Judge
 - ordered defense counsel to execute the Memorandum of Understanding attached to the Second Amended Protective Order by January 24, 2014, “[i]n order to be provided access to classified information in connection with this case”;
 - granted an unopposed defense motion to amend the protective order to clarify control over the courtroom (AE 013CC);
 - granted an unopposed defense motion to amend the protective order regarding defense team information (AE 013DD);
 - granted an unopposed defense motion to amend the protective order to clarify the “secure area” requirement (AE 013FF);
 - denied a defense motion to amend the protective order to protect materials of the International Committee of the Red Cross (AE 013GG);
 - granted in part and denied in part the defense motion to amend the protective order to secure privileged classification review (AE 013HH);
 - granted in part and denied in part the defense motion to amend the protective order to clarify open-source handling requirements (AE 013II);

- granted in part and denied in part the defense motion to amend the protective order regarding the accused's participation in his defense (AE 013JJ);
 - granted the defense motion to amend the protective order to make conforming changes (AE 013KK);
 - determined that the defense motion to compel the production of the author of a memorandum regarding open-source handling requirements is moot (AE 013MM); and
 - denied the defense motion to dismiss based upon inhibitions placed on seeking alternative sources of mitigation information (AE 200).
- The Judge issued Appellate Exhibit 164C denying the defense motion to stay all review under 10 U.S.C. § 949p-4 and to declare 10 U.S.C. § 949p-4(c) and Military Commission Rule of Evidence ("M.C.R.E.") 505(f)(3) unconstitutional and in violation of the Uniform Code of Military Justice and the Geneva Conventions.
 - The Judge issued Appellate Exhibit 206I denying Mr. Mohammad's motion to recuse the Judge from hearing and deciding defense motion Appellate Exhibit 206 to cease daily searches.
 - The Judge issued Appellate Exhibit 200HH denying Mr. Aziz Ali's motion to compel discovery of communications with the governments of Kuwait and Pakistan.
 - The Judge issued Appellate Exhibit 034B determining that the defense motion to compel the production of Jose A. Rodriguez to testify at the June 12-15, 2012 sessions is moot.
 - The Judge issued Appellate Exhibit 073J/AE 156J permitting the defense to submit their theory of defense to the Judge *ex parte* by February 7, 2014.
 - The Judge issued Appellate Exhibit 186A determining that the emergency defense motion to issue a court order governing the classification review of privileged attorney-client materials is moot.
 - The Judge issued Appellate Exhibit 152H granting a government motion for inquiry into Ramzi Binalshibh's mental capacity to stand trial pursuant to Rule for Military Commissions 706.
 - The Judge issued Appellate Exhibit 209E denying a defense motion requiring JTF-GTMO to facilitate attorney-client meetings or phone calls after every R.M.C. 802 conference.

- The Judge issued Appellate Exhibit 167B granting a defense motion to compel discovery of un-redacted copies of four CIA reports obtained through the Freedom of Information Act.
- The Judge issued Appellate Exhibit 248C regarding a motion filed by Mr. Hawsawi *ex parte* and under seal.
- The Judge heard oral argument on Appellate Exhibit 046C, a defense motion to reconsider Appellate Exhibit 046 (defense motion to compel witnesses in support of Appellate Exhibit 031, which is a defense motion to dismiss for alleged unlawful influence). The Judge denied the motion.
- The Judge heard oral argument on Appellate Exhibit 029C, a defense motion to reconsider Appellate Exhibit 029 (a defense motion to compel a witness in support of Appellate Exhibit 008, which is a defense motion to dismiss the charges for alleged defective referral). The Judge denied the motion.
- The Judge heard oral argument and took witness testimony on Appellate Exhibit 254, a defense motion regarding attorney-client meetings.
- The Judge heard oral argument on Appellate Exhibit 008, a defense motion to dismiss the charges for defective referral. In August 2013, the Judge took testimony from two witnesses regarding Appellate Exhibit 008.

Also, on Monday the Judge held an *in camera* M.C.R.E. 505(h) hearing to make a determination regarding the use, relevance, or admissibility of classified information the defense or prosecution sought to discuss during a future session on the merits of a particular motion. This hearing was not a “secret session,” as some mistakenly reported. Rule 505(h) hearings typically occur in the judge’s chambers, but because the number of parties in this case makes a chambers location logistically infeasible, the hearing took place in the courtroom itself. Once the judge grants a request to hold a Rule 505(h) hearing about classified material that may relate to a motion to be litigated later, the parties will not litigate the merits of the underlying motions themselves—that takes place in a session later, and such sessions are to be as open as possible.

After holding the *in camera* hearing, the Judge issued Appellate Exhibits 008GGG and AE 031SS, denying Mr. Mohammad’s requests to disclose classified information during a session in which the parties will litigate the merits of the underlying motions. The Judge determined that the classified information Mr. Mohammad’s defense counsel seeks to disclose “is not relevant and is unnecessary for a fair determination of the issue before the Commission.” The Judge also issued Appellate Exhibits 32BBB, 008FFF, 108Y, 070B, 133LL, and 133KK, ordering supplemental argument in a closed session on Appellate Exhibits 008, 018, 031, 032, 108, 133AA, and 133J. The Judge determined that closing a portion of the proceedings to the public is necessary—and will be narrowly tailored—to protect only information the disclosure of which could reasonably be expected to damage national security. The Judge ordered a transcript

of the closed session to be provided, excising only classified national security information. To date, less than 1% of the case proceedings have been closed to the public.

I will not comment on the specifics of any of these or other motions pending before the Commission. But I will discuss three broader issues regarding military commissions that have been the subject of recent questions by interested observers.

An Inquiry into an Accused's Mental Capacity To Stand Trial Under Rule 706 Is Sometimes a Prudent Course

The Rules for Military Commissions carefully guard an accused's right to a fair trial. Rule 706, for example, imposes an obligation on the parties, including the government, to notify the Commission if "it appears . . . that there is a reason to believe that an accused . . . lacks the capacity to stand trial." This is not a high threshold. When a party so notifies the Commission, the Commission may order an inquiry into the mental capacity of the accused. Yesterday, the Judge granted a government motion for an inquiry into the mental capacity of Ramzi Binalshibh. AE 152H.

Although an accused is presumed to be competent to stand trial, when a good-faith basis exists to question an accused's competency, halting the proceedings pending an inquiry into the accused's mental capacity is the most prudent way to proceed. Fundamental to our adversarial system of justice is the requirement that each accused whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial. Proceeding without an inquiry to confirm competency could thus interpose a serious legal error.

Federal Courts and Military Commissions Have Been and Will Be Successful in Incapacitating and Punishing Terrorists

Congress established military commissions under the M.C.A. as an important part of our justice and counterterror institutions. The commissions are not a substitute for civilian trials. Rather, they provide a forum for a narrow but critically important set of cases within the broader category of national security cases the government prosecutes. By law, military commissions have jurisdiction only over (1) non-citizen (2) "unprivileged belligerents" who are (3) captured abroad and (4) chargeable with violations of the law of war. Since 2002, twenty (20) persons who have satisfied all four of these criteria have been convicted—thirteen (13) in federal courts, and seven (7) in military commissions. Some commentators point to a much larger number of convictions than 13 for federal courts, citing nearly 500 terrorism-related convictions. *See, e.g.,* <http://www.humanrightsfirst.org/wp-content/uploads/DOJ-Terrorism-Related-Convictions.pdf> (invoking the number of 494 terrorism-related convictions contained in Dep't of Justice, Nat'l Sec. Div. Statistics on Unsealed Int'l Terrorism and Terrorism-Related Convictions (June 6, 2012)). But, as I explained in detail this past June, while every successful federal conviction is commendable, **only 13** over the relevant time period satisfy all four criteria and thus fall within the narrow jurisdiction Congress granted to commissions.

Sometimes Article III courts and military commissions have concurrent jurisdiction over

a case, including cases against suspected terrorists. In those cases, the decision to prosecute the case in an Article III court or a military commission may turn on the same type of strength of interest and efficiency factors that prosecutors use to guide them in choosing a forum where two federal courts, or a federal court and state court, have concurrent jurisdiction.

But for trials of Guantanamo detainees, military commissions have been the only legally available forum since 2011. Important partners in justice and counterterrorism, federal courts and military commissions have served the American people well by successfully incapacitating and punishing convicted terrorists under the rule of law. Although the numbers of convictions may seem small, and much more remains to be done, the record of these twenty trials reflects favorably on the American justice system, as such trials often involve difficult issues and complicated measures to balance sometimes competing values.

Even when confronted with the correct number, some commentators still favor civilian trials, claiming the sentences of those tried in commissions are more lenient than those tried in federal courts. The data do not support this conclusion, particularly when supplemented with information from still ongoing proceedings. Since 2011, seven additional Accused have been arraigned before military commissions. One of these Accused has already pleaded guilty for an aiding and abetting role in a terrorist attack that killed 11 persons. He agreed to cooperate in future prosecutions in return for a sentence of confinement that will run another 19 to 25 years from the date he was convicted. Mr. Al-Nashiri and those accused of plotting the September 11th attacks are facing capital charges.

The sentences and potential sentences before military commissions are comparable to those in federal court. For example, among the 13 persons convicted in federal court, the effective sentences of five who have been released must be taken into account. One of those five is Wesam al Delaema, who was convicted of conspiring to kill Americans in Iraq and sentenced to 25 years in prison. He was then extradited to the Netherlands because he was a Dutch citizen, and a Dutch court decided to commute his sentence. Other examples are Mohammed Al-Moayad and Mohammed Zayed, who received sentences of time served and were deported to Yemen after pleading guilty to providing material support for terrorism by raising money for al Qaeda, and Muhammed Afridi, who served his sentence of 57 months for plotting to trade drugs for four Stinger missiles for al Qaeda.

Beyond the 13 federal convicts who could have been tried by military commission, one can also look to the 67 individuals captured abroad and convicted of terrorism offenses in federal court to see that the notion of stiffer sentences in federal court is mistaken, and I encourage fair-minded observers to study, in particular, the punishments that were meted out to the 31 of those 67 who have now been released after serving their sentences. An honest and careful study of the numbers actually shows that purported *differences* between military commission and federal court trials are overborne by their *similarities*.

Moreover, facile contrasts based on mere numbers of convictions do not and cannot convey the relative size and complexity of trials involving members of al Qaeda, the scale and magnitude of the crimes, the effects the crimes have had on the victims and our society, or the procedures found by the judge to be necessary in conducting the trials. The present commissions

cases deal, in many respects, with unprecedented alleged network crimes of enormous complexity that would take time to prosecute in any court.

The facile and apparently selective data-mining by some private advocacy groups also ignores important facts. For instance, while federal courts have relentlessly pursued accountability for the deaths of some 234 innocent persons inflicted by al Qaeda, military commissions have and continue to pursue accountability for at least 3,012 such deaths.

Clearly, setting the 494 federal court convictions up against the progress of military commissions is not a fair, apples-to-apples comparison. Treating it as such does a disservice to both federal courts and military commissions. The data, fairly analyzed and properly understood, make clear that federal courts and military commissions, working in concert, have both been successful in incapacitating and punishing alleged terrorists.

Narrow, but Important, Evidentiary Differences Between Military Commissions and Civilian Courts Make the Former an Important Forum Option for National Security and Justice

I have previously noted that the procedural similarities between military commissions and civilian courts are more numerous and striking than the differences. And yet the narrow procedural differences can nevertheless be decisive in certain circumstances. To quote at length from one recent and distinguished commentator:

While some details in the shape of commissions continue to be challenged, today commissions satisfy the fundamental fairness guarantees of the Geneva Conventions and the structural commands of the Constitution.

* * * * *

After an intense review [the President] concluded in 2009 that commissions were useful and necessary, and he charged his administration with improving their legitimacy. In his speech [at the National Defense University in May of this year], the President insisted that suspected terrorists can be prosecuted in either civilian courts or military commissions, and he announced that he had asked the Department of Defense to designate a site in the United States for commission trials. On the heels of his speech, news reports suggest that the administration plans to use commissions to prosecute new detainees not already in Guantanamo Bay.

President Obama obviously did not embrace military commissions lightly. He did so because, as he explained in May 2009, they “allow for the protection of sensitive sources and methods of intelligence-gathering; they allow for the safety and security of participants; and for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in federal courts.” Commissions have jurisdiction over a narrow class of defendants: non-citizen “unprivileged belligerents” who are captured abroad and charged with violations of the laws of war. In acknowledgment that the special nature of the defendants

and the circumstances of their alleged crimes create practical evidentiary difficulties at trial, commissions depart from the usual civilian court procedures a bit for issues like hearsay, disclosure of sources and methods of intelligence-gathering, and the admissibility of confessions. These small but real differences are consonant with—and indeed, more defendant-friendly than—analogue departures from civilian standards in international criminal courts or in U.S. military commissions historically.

Moreover, the differences with civilian trials are swamped by the similarities. These similarities include, among many other things, the presumption of innocence, the requirement to prove guilt beyond a reasonable doubt, the right to counsel and to be present during proceedings, the right to be free from self-incrimination, the right to cross-examine government witnesses, the right to compel the witnesses for one's defense, the right to see exculpatory evidence, the right to an impartial decisionmaker, the right to the suppression of unreliable or non-probative or unduly prejudicial evidence, the right to self-representation, protection against double jeopardy and ex post facto laws, and the right to appeal.

Jack Goldsmith, *The Continuing Importance of Military Commissions* (June 14, 2013), available at <http://www.advancingafreesociety.org/the-briefing/the-continuing-importance-of-military-commissions/>.

Some who are distant from the trials and lack familiarity with how evidence has been and is being gathered claim that the differences in procedure enable improperly obtained evidence to be admitted in commissions. This claim is mistaken, and the open proceedings witnessed in the months ahead will demonstrate that these small but important differences properly and lawfully enable the best evidence from circumstances of armed conflict to be put before judge and jury.

And now, I'll be happy to take questions.

* * * * *

Strong procedural safeguards and court sessions that are as public and open as possible ensure that justice, regardless of the forum providing it, is done consistent with our values and in accordance with the rule of law. And all of the instruments of our national power and authority, including fair and open trials, must be used to confront modern, irregular, nonstate threats that purposely attack civilian populations and evade traditional means of holding them accountable. As Justice Robert Jackson once said, "Where crime leaves the beaten path, the law must be strong enough to follow."

I commend the Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen of Joint Task Force Guantanamo for the hard work, logistical support, and daily professionalism they exhibit throughout these proceedings, often without thanks or recognition.

ATTACHMENT F

-----Original Message-----

From: Romero, Joseph CDR USSOUTHCOM JTFGTMO
Sent: Monday, December 16, 2013 5:53 PM
To: Bormann, Cheryl T CIV OSD OMC Defense; Schwartz, Michael A Capt OSD OMC Defense
Cc: Swensen, Todd M Capt OSD OMC Defense; [REDACTED] SSgt OSD OMC
Subject: RE: Interview re Atty Visits (~~UNCLASSIFIED~~)

Classification: ~~UNCLASSIFIED~~
Caveats: NONE

Ms. Bormann, I completely understand. I was away from my office most of the day, so I did not see the emails or hear the voicemails until later this evening.

I respectfully decline your request to interview me. I believe CDR Massucco's email to Capt Schwartz relaying the finite nature of JDG resources is self-explanatory.

VR,

-----Original Message-----

From: Bormann, Cheryl T CIV OSD OMC Defense [REDACTED]
Sent: Monday, December 16, 2013 5:09 PM
To: Romero, Joseph CDR USSOUTHCOM JTFGTMO; Schwartz, Michael A Capt OSD OMC Defense
Cc: Swensen, Todd M Capt OSD OMC Defense; [REDACTED] SSgt OSD OMC
Subject: RE: Interview re Atty Visits (~~UNCLASSIFIED~~)

CDR Romero,
You are a potential witness that I am requesting to interview. If you have time later tonight or now, I will meet with you. If you don't wish to meet, you need not. I am simply asking for an answer. I am waiting to try to

accommodate you. That is why Capt Schwartz and I have sent numerous emails and left 4 telephone messages. As you might expect, I have other case-related tasks. My time is stretched. I am available to meet if you are. Please let me know when or if you can. I will leave the office now and you can reach my colleagues at [REDACTED] as spelled out below. Thanks.

Cheryl T. Bormann
Counsel for Walid bin 'Attash

Law Office of Cheryl T. Bormann

[REDACTED]

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