MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **KHALID SHAIKH MOHAMMAD;** **WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH;** **RAMZI BINALSHIBH;** **ALI ABDUL AZIZ ALI;** **MUSTAFA AHMED AL HAWSAWI**	**AE 266A** **Government Response** To Defense Motion for Order to Protect the Right to a Fair Trial 5 February 2014

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1. Timeliness

This Response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.c.(1).

2. Relief Sought

The prosecution respectfully requests that this Commission deny the defense motion. However, as trial approaches, the prosecution requests that the Military Judge consider issuing a protective order under R.M.C. 806(d), binding on all parties and witnesses and limiting statements made outside of court that present a substantial likelihood of material prejudice to a fair trial by impartial members.

3. Burden of Proof

As the moving party, the defense must demonstrate by a preponderance of the evidence that its requested relief is warranted. R.M.C. 905(c)(1)-(2).

4. Overview

The defense motion in AE 266 (WBA) seeks a protective order addressing five issues. First, counsel for Mr. Bin 'Attash seek terms in a protective order to enforce the disclosure and discovery obligations of the prosecution. As set forth in detail below, the prosecution is fully aware of its discovery obligations and has complied with them to date, and a protective order is neither warranted nor appropriate in this regard.

Second, counsel for Mr. Bin 'Attash seek a protective order to prevent what they term as over-classification and compliance with the "M.C.R.E. 505 process." As set forth in detail below, the prosecution has only utilized M.C.R.E. 505 in a lawful manner. The prosecution dutifully complies with its statutory obligation to "work with the original classification authorities for evidence that may be used at trial to ensure that such evidence is declassified to the maximum extent possible, consistent with the requirements of national security." While vested with authority as the presiding officer to ensure a fair trial, a military judge may "[u]nder no circumstances . . . order the release of classified information to any person not authorized to

receive such information." As such, a protective order is neither warranted nor appropriate in this regard.

Third, counsel for Mr. Bin 'Attash state that a protective order, binding only upon the prosecution, is necessary to prevent dissemination of information that they claim is undermining the presumption of innocence, materially prejudicing proceedings, and tainting the pool of prospective panel members. AE 266 at 19-24. This defense argument mistakes the state of the facts and badly misconstrues the law. Defense counsel's proposed order also lacks necessary balance and ignores the interest of the public and the government in the fair administration of justice.

Fourth, counsel for Mr. Bin 'Attash claim that such a protective order, again binding only on the prosecution, is necessary "to prevent dissemination of information actually or impliedly unlawfully influencing proceedings." *See* AE 266 at 24. This bare allegation is nothing more than that, and with it the defense fails even to make the prima facie case necessary to place a burden on the prosecution to prove an absence of unlawful influence.

Fifth, counsel for Mr. Bin 'Attash seek a protective order to prevent unlawful influence over testimony of witnesses. Counsel seek this protective order without even a proffer of evidence that the prosecution has attempted or actually influenced any prospective witnesses, which, of course, it has not done. The prosecution is following the Military Judge's Orders in AE 036C and AE 036D, and seeking clarification as appropriate, to ensure that defense witnesses are relevant and necessary prior to approving funding for their travel. As such, a protective order is neither warranted nor appropriate in this regard.

The Commission should deny the defense motion and enforce its 24 January 2014 deadline for signing of the MOU. *See* AE 013CCC. However, as trial approaches, the prosecution respectfully requests that the Military Judge consider issuing a protective order under R.M.C. 806(d), binding on all parties and witnesses and limiting statements made outside of court that present a substantial likelihood of material prejudice to a fair trial by impartial members.

5. Facts

On 31 May 2011 and 25 January 2012, pursuant to the Military Commissions Act of 2009 ("M.C.A."), charges in connection with the 11 September 2001 attacks were sworn against Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi. These charges were referred jointly to this capital Military Commission on 4 April 2012. The accused are each charged with Conspiracy, Attacking Civilians, Attacking Civilian Objects, Intentionally Causing Serious Bodily Injury, Murder in Violation of the Law of War, Destruction of Property in Violation of the Law of War, Hijacking an Aircraft, and Terrorism.

I. Classified Discovery and the Memorandum of Understanding

On 26 April 2012, the government filed a Motion To Protect Against Disclosure of National Security Information, and requested the Military Judge to issue a protective order pursuant to Military Commission Rule of Evidence ("M.C.R.E.") 505(e). *See* AE 013.

On 2 May 2012, the American Civil Liberties Union and the American Civil Liberties Union Foundation (collectively, the "ACLU") filed a Motion for Public Access to Proceedings and Records, challenging the government's proposed protective order. *See* AE 013A. The defense also filed objections to the proposed order. *See* AE 013E; AE 013G.

On 17 October 2012, the Military Judge entertained oral argument on the government's Motion To Protect Against Disclosure of National Security Information (AE 013) at Guantanamo Bay, Cuba. Trial counsel, counsel for the accused, the press, and the ACLU all participated in the proceeding. *See United States v. Khalid Shaikh Mohammad et al.*, Unofficial/Unauthenticated Transcript ("Tr.") at 670-814. On 6 December 2012, the Military Judge issued a Ruling on Government Motion To Protect Against Disclosure of National Security Information (AE 013O) and entered Protective Order #1 (AE 013P). In his 6 December 2012 ruling, the Military Judge made certain findings as required by law, *see* AE 013O at 3-5, including that the information classified by the government was, as a matter of law, "properly classified by the executive branch pursuant to Executive Order 13526, as amended, or its

predecessor Orders, and [was] subject to protection in connection with this military commission."

In Protective Order #1, the Military Judge also made certain findings; namely, that "this case involves classified national security information . . . the disclosure of which would be detrimental to national security." AE 013P at 1. Protective Order #1 established procedures applicable to all persons who have access to, or come into possession of, classified information regardless of the means by which those persons obtained that classified information. AE 013P ¶ 1.a. Specifically, Protective Order #1 required that members of the defense obtain a security clearance prior to accessing classified information; that the defense is precluded from disclosing classified information without prior authorization; that they provide notice of intent to disclose classified information during any pretrial or trial proceeding in accordance with M.C.R.E. 505(g); and that the Commission could order the closure of proceedings to the public when necessary to protect against the disclosure of classified information. Those procedures "apply to all aspects of pre-trial, trial, and post-trial stages in this case, including any appeals." AE 013P ¶ 1.a.

On 9 February 2013, after considering certain defense motions to amend Protective Order #1, the Military Judge issued a Supplemental Ruling on the Government's Motion To Protect Against Disclosure of National Security Information (AE 013Z) and entered Amended Protective Order #1 (AE 013AA). Amended Protective Order #1 modified (1) paragraph 2.k. (defining "[u]nauthorized disclosure of classified information") and (2) paragraph 8.a.(1) (setting forth notice requirements in military commission proceedings) of Protective Order #1. *See* AE 013AA.

After the issuance of Amended Protective Order #1, the press and the ACLU each filed a petition for a writ of mandamus with the U.S. Court of Military Commission Review ("C.M.C.R."). Counsel for Mr. Ali also filed a motion for leave to intervene in the press petition. On 27 March 2013, the C.M.C.R. summarily denied both writs and the motion for leave to intervene.

On 13 February 2013, the Military Judge had a colloquy with defense counsel regarding the Memorandum of Understanding ("MOU"), in which the claimed justification for not signing the MOU was ongoing litigation regarding the terms of the protective order. Tr. at 2303.

As the February 2013 hearings concluded, the Military Judge advised defense counsel that their failure to sign the MOU prevented them from receiving classified discovery:

> MJ [COL POHL]: But I will tell defense that if you think you have some legal basis not to follow, sign the MOU or follow the order, raise it to me now rather than later, because, again, you can't get the classified discovery without it, and if you can't get the classified discovery without it, it raises questions of whether or not you can competently represent the accused in this case.

Tr. 2713. By the commencement of the June 2013 hearings, only one defense team had signed the MOU. On 21 June 2013, the Military Judge informed defense counsel that the suspense for signing the MOU was the August 2013 hearings:

> MJ [COL POHL]: Yes. Okay. Let's put it this way: If you have a legal basis -- and I'm always willing to listen to argument -- of why you don't have to sign the MOU, I'm just speaking to the four who have not signed it, and you have a legal basis for that, you are to file such a motion; otherwise, I expect compliance with the order by the next session or, again, I'm always willing to listen why you are not going to do it. So if there is a suspense on that suspense at the next hearing to be resolved.

Tr. 4136-4137. On 12 August 2013, counsel for Mr. Bin 'Attash filed a defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture. *See* AE 200 (MAH, RBS, WBA). On the first day of the August 2013 sessions, the Military Judge inquired whether defense counsel had signed the MOU:

> MJ [COL POHL]: I will do this sequentially, and understand if you have a legal reason I will entertain it, but that order was signed in January and basically by failing to sign the MOU you are not raising, to my knowledge, the legal objection to not signing it -- you've basically prevented the government from providing you with the discovery. So my question to each of them is do you have a legal reason of why you don't sign the MOU to get the classified information?

Tr. 4226. Defense counsel for Mr. Bin 'Attash advised the Military Judge that the only impediments to them signing the MOU were resolution of the outstanding AE 013 series of motions and AE 200. *See* Tr. 4247, 4257-4258.

On 17 December 2013, this Commission denied the defense requested relief in AE 200. *See* AE 200II.

On 17 December 2013, this Commission issued an amended protective order and ordered the defense to sign the MOU by 24 January 2014. *See* AE 013CCC; AE 013DDD.

On 28 January 2014, the prosecution was informed by the Chief Security Officer that counsel for Mr. Bin 'Attash had not executed the MOU as ordered by the Commission in AE 013CCC. Apart from counsel for Mr. Ali, *see* AE 013JJJ (AAA), the prosecution has not received any correspondence from the defense indicating otherwise.

On 29 January 2014, the prosecution reiterated its request that this Commission adopt a trial scheduling regime consistent with the prosecution's filing in AE 175, to include deadlines for motions and court sessions lasting more than a week at a time. *See* AE 263A. In that filing, the prosecution informed the Commission that it has produced more than 250,000 pages of unclassified discovery so that the parties can advance to trial. *See* AE 263A at 3. The prosecution also informed the Commission that counsel for Mr. Ali has received more than 2,300 pages of classified discovery, to include the contents of an entire hard drive. See AE 263A at 3.

II. Pending Defense Visit to the Detention Facility

On 18 July 2012, the defense submitted a request to Joint Task Force-Guantanamo ("JTF-GTMO") to examine each accused's current cell, adjoining cells, the utility room, the recreational area, the media room, and medical facilities at the detention facility. This submission included a defense request to take photographs.

On 26 November 2012, the defense notified the prosecution of its intent to file a motion seeking to examine the confinement conditions of the accused. *See* AE 108A, Attachment B.

On 27 November, 2012, the prosecution responded to the defense notice and informed the defense that the prosecution was working to accommodate the defense request to examine the detention facility. *See* AE 108A, Attachment B.

On 5 December 2012, counsel filed AE 108 seeking access to conduct examinations of the past and current confinement conditions for the accused being held at the detention facility on board U.S. Naval Station Guantanamo Bay, Cuba. The defense cited R.M.C. 701(c)(1) as its legal basis for the request, further acknowledging that "aspects of Camp 7 are classified." AE 108 at 7.

On 29 January 2013, this Commission heard oral argument on AE 108.

On 19 February 2013, the Commission granted defense access to the detention facility, subject to specified conditions. *See* AE 108J. Among these conditions was the requirement that all defense team members who will be examining the detention facility have the requisite security clearance. *See* AE 108J. To date, members of Mr. Ali's defense team—the only defense team to sign the MOU—has visited the detention facility, pursuant to AE 108J.

On 19 November 2013, counsel for Mr. Bin 'Attash filed AE 108U, seeking to visit the detention facility without complying with the MOU provision of the protective order. On 22 November 2013, the prosecution filed its response. *See* AE 108V.

On 22 January 2014, counsel for Mr. Bin 'Attash filed AE 266, which in part used the issues presented in AE 108U as justification for the requested relief.

III. Extrajudicial Statements by the Parties

On 20 September 2013, in Guantanamo Bay, Cuba, and on 2 October 2013, in the metropolitan D.C. area, the chief prosecutor was interviewed on the topic of the military commissions system by *60 Minutes* correspondent Lesley Stahl. The program airing portions of the two interviews was televised on 3 November 2013. *See* Attachment B (DVD of program); Attachment C (transcript of program). In the program, the first substantive comment by the chief prosecutor was that in the military commissions system "the accused is presumed innocent." Attachment C. His last comment to correspondent Stahl was that "[t]he law requires, and justice requires, the prosecution must present proof beyond a reasonable doubt before we hold someone guilty." *Id.*

In between, when confronted by correspondent Stahl with the accusation that military commission rules allow for reliance upon coerced statements on the rationale that no post-coercion statements can ever be voluntary, the chief prosecutor summarized the relevant provision of the M.C.A. bearing upon this issue. That provision, 10 U.S.C. § 948r, clearly contemplates some post-coercion statements may be admissible, provided they are found by the judge to be voluntary under a totality of the circumstances and admission is in the interests of justice. In another part of the program, when asked who activated the red light in the courtroom during a session in January 2013, he answered, "I don't know," not knowing the name of the person(s) who activated the light and desiring the correspondent to refer to the judicial record that had already been made in open court on the matter. Attachment C. In that record, the Judge had noted that neither the Judge nor the Court Security Officer activated the light and had made clear that no one outside the courtroom would have authority to do so in the future. Tr. at 1720-21. While reflecting the involvement of the intelligence community to support the Judge in his statutory responsibilities to prevent compromise of classified information while also upholding the prohibition against *ex parte* communications, neither the official and public record on the matter nor the Rules of Court include the naming of any individuals or the referencing of any specific original classification authority by the Military Judge or the prosecution. *See* Tr. at 1305-1781 (transcript of Jan. 2013 proceedings); Rule of Court 10.

In still another part of the *60 Minutes* program that aired on 3 November 2013, when correspondent Stahl confronted the chief prosecutor with accusations—by unnamed defense counsel—that control over the proceedings is being exercised from the outside, he stated, "We are going to do these trials fairly. All these allegations they can raise and we have a process to sort that out." Attachment C. At no point in the program did he mention accused Bin 'Attash or any other accused. At no time in the *60 Minutes* program or any other contact with the media has the chief prosecutor made any statement or furnished any information for the purpose of influencing the outcome of accused Bin 'Attash's or any other accused's trial.

On many occasions during the pendency of these proceedings, defense counsel have spoken to the media about their representation of the accused Bin 'Attash. A sample of these occasions, and the extrajudicial statements made, appears at Attachment D. Meanwhile, and extending back to the commencement of modern military commission proceedings, there has been abundant commentary by private advocacy groups and in the media asserting that those proceedings are inherently unfair, that their law and procedures are unsettled, that the many unknowns about how they operate serve to corrode the openness essential to the legitimacy of criminal prosecutions in a democracy, that their law of war character sets loose an unbounded threat to civil liberties, that due to the availability of federal civilian courts they are unnecessary, and that, in sum, they are un-American.

The persistent criticisms of the forum, despite reforms enacted into law and subjecting the proceedings to judicial review, create a steady demand for a governmental explanation regarding various legal standards applicable to military commission proceedings. This demand is expressed, in part, in numerous requests to the Office of the Secretary of Defense for spokespersons to answer sometimes detailed procedural questions and respond to the public concerns about the forum that have been stimulated by commentary in the media. While senior officials in government occasionally serve this role—as when the Attorney General defended the fairness of "revised military commissions" in a March 2012 address in Chicago[1]—the purpose of further informing the public on these matters of intense interest has been served primarily through improvements to the military commissions website and greater efforts to facilitate observation of proceedings. Secondarily, a portion of the public demand for information has been served by making available a prosecution representative, on limited occasions and with the focus upon reinforcing the centrality of the actual courtroom process.

Though only a small fraction of these requests by private organizations, educational institutions, and the media can be granted, the chief prosecutor or a designee, work permitting,

[1] Att'y Gen. Eric H. Holder, Jr., Remarks at Northwestern University School of Law (Mar. 5, 2012), *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html.

attempts to provide an overview of commissions procedures and answer systemic questions for one such entity per month. In addition, because commission sessions at Guantanamo tend to gather interested observers there and at the judge-approved closed-circuit viewing sites in the continental United States, the chief prosecutor makes an attempt during the weeks of these sessions to address chronic areas of public concern regarding military commissions and related laws and procedures. He does so by making available prepared remarks that, while stressing the presumption of innocence with regard to any individual facing charges under the system, also point observers to court filings and transcripts relevant to their areas of concentration, defer to the commissions themselves on any matters under judicial consideration, and inform those family members of victims who are in attendance or observing remotely that their interest in the proceedings is welcome and that government representatives will seek to respond to any queries they may have promptly and with compassion. He also answers questions, declining to discuss particular accused or evidence on the merits of specific cases and deferring to any pending or issued judicial rulings when asked about specific legal or procedural motions.

6. Law and Argument

I. The Defense Misunderstands Its Classified Discovery Obligations

The defense motion is riddled with misunderstandings. For example, counsel argue that "the use of a Memorandum of Understanding as additional protection against a disclosure of classified information is at best superfluous." AE 266 at 9. But counsel in AE 013III contend that they have an ethical obligation to review and discuss classified discovery with the accused. That position demonstrates a clear misunderstanding of the rules, regulations, and statute governing the handling of classified information. As such, the MOU cannot be construed as "superfluous" as the defense contends, because counsel fail to understand their obligations in protecting against unauthorized disclosure of classified information. Therefore, the MOU requirement in this case is actually the antithesis of "superfluous"—the MOU is crucial.

A. The Prosecution Is Fully Aware of Its Discovery Obligations in this Case and Has Satisfied Them to Date

Before referral, counsel for Mr. Bin 'Attash submitted an omnibus request for discovery. Some of the requested items appear to require a classified response. In fact, the pre-referral request is similar to materials requested by counsel for Mr. Mohammad and Mr. Hawsawi. *See, e.g.*, AE 260A. Because none of those defense teams has signed the MOU, the prosecution is prohibited from producing classified information to them. Nor will the prosecution highlight for the defense that which is classified by simply responding to the unclassified portions of the request. However, while the prosecution may not have responded in writing to the defense requests, it has disclosed nearly 250,000 pages of unclassified discovery responsive to the defense request. In conjunction with this Commission's Order in AE 245, however, the prosecution stands ready to provide a detailed response to the defense requests within a reasonable time of counsel signing the MOU. But as the prosecution noted in AE 260A, the Trial Conduct Order should not serve as an end-around for counsel to receive classified information without signing the MOU.

Tellingly, counsel's cited examples of alleged unethical discovery practices relate to a discovery request submitted during the pre-referral phase of these proceedings and a report that the prosecution agreed to produce, despite a determination that the report is cumulative to other materials. *See* AE 266 at 10-14. Perhaps even more telling is the fact that the pre-referral discovery request and the report both include classified information. Therefore, the prosecution is prohibited from producing classified information until counsel complies with the Second Amended Protective Order #1 (AE 013DDD). The prosecution is fully aware of its discovery obligations in this case, and has satisfied them to date. The Military Judge has not set a deadline for the provision of discovery in this case as of the date of this filing. Furthermore, classified information will be provided, as it has been provided to Mr. Ali's counsel, once counsel sign the MOU. The prosecution should not be compelled to dignify the defense request in AE 266 for a protective order and memorandum of understanding for the prosecution to sign, as such a request

mocks this Commission's valid and legal orders, decries the seriousness of these proceedings, and has no basis in law.

B. The Prosecution Is in Compliance with the Military Judge's Order in AE 108 as a Visit to the Detention Facility Will Expose the Defense to Classified Discovery Under R.M.C. 701

In AE 108U, and again in AE 266, the defense argues that the prosecution is preventing counsel from visiting the detention facility. Counsel specifically accuse the prosecution of "hid[ing] 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." AE 266 at 8. This characterization is incorrect.

As a preliminary matter, the prosecution is not preventing counsel from visiting the detention facility. And neither is JTF-GTMO. Pursuant to this Commission's Order in AE 108J, both the prosecution and JTF-GTMO stand ready to facilitate counsel's visit. The only impediment standing in the way of counsel's requested relief is their own refusal to sign the MOU pertaining to classified discovery.

As further evidence of counsel's misunderstanding of the protective order and MOU, the defense has apparently abandoned its previous position that the detention facility visit is part of classified discovery. Instead, counsel seeks to create a novel third category of discovery where the information may be classified, but is not governed by the protective order. This contrasts with counsel's original position. In AE 108, counsel's legal basis was that "[u]nder R.M.C. 701(c)(1), the defense must be permitted to examine buildings or places which are within the control of the Government." AE 108 at 5. The defense further noted that it "understands that aspects of Camp 7 are classified." AE 108 at 7; *see also* AE 108U ("Criminal discovery is not a game.") (internal quotation marks omitted).

By citing R.M.C. 701 and noting the classified aspect of the information, counsel clearly recognize that the detention facility visit falls under the purview of classified discovery. The prosecution, for its part, noted in AE 108A that "[u]pon the Defense signing of a memoranda of

understanding to adhere to the protective orders in this case, the Prosecution fully intends to comply with all of its discovery obligations." AE 108A at 9. Moreover, the Commission issued the Second Amended Protective Order #1 pursuant to authority, among others, granted under 10 U.S.C. § 949 p-1 to p-7 and R.M.C. 701. *See* AE 013DDD. Therefore, this Commission also recognized that the provisions of the Second Amended Protective Order #1 pertain to classified discovery. *See* AE 013DDD at 2 ("This Protective Order applies to *all* information . . . .") (emphasis added). Yet the defense has taken the untenable position that it is entitled to classified discovery, but yet can simply ignore the MOU provision of the protective order. This position is belied by the rules, regulations, statute and protective orders governing the handling of classified information.

The Military Judge must ensure compliance with the applicable provisions of the M.C.A., R.M.C. 701-703, and M.C.R.E. 505. This includes ensuring compliance with the protective order. Therefore, the defense must comply with the protective order. *See, e.g.*, R.T.M.C., Figure 9.2; 10 U.S.C. § 949c(b)(3)(E); *see also* R.T.M.C. 18-1.a; M.C.R.E. 505(e). Moreover, the prosecution is prohibited from the very protective order it sought from producing classified discovery where the defense is not in compliance with the order. *Id*. Here, the detention-facility visit is unquestionably part of the classified discovery process. As such, the "discovery and disclosure obligations" for the site visit are not independent of the MOU, as counsel contend (AE 266 at 8), but rather the "discovery and disclosure obligations" go part-and-parcel with the statutory obligations of the prosecution, defense counsel, and the Military Judge.

On 26 April 2012, the prosecution sought the protective order it needed to ensure the protection of all classified discovery. *See* AE 013. As the examination of the detention facility ("a building") squarely fits under R.M.C. 701(c)(1) ("Discovery"), a visit to a classified building that would expose the defense to classified government information falls directly under the protective order the prosecution sought for the protection of classified discovery. *Id*. Protective Order #1, as well as the First Amended Protective Order #1 and the Second Amended Protective Order #1, all require the defense to sign a MOU for the receipt of classified information, which

none of the defense teams, save the defense team for Mr. Ali, have done to date. Protective Order #1, issued on 6 December 2012, was in effect when the prosecution, on 9 December 2012, responded to the defense motion to examine the detention facility by agreeing to allow for a defense visit. Had it believed that this detention facility visit inexplicably fell outside of the discovery process, the prosecution would have never agreed to facilitate an inspection of the detention facility, as it did in AE 108A (as agreeing to do so would have been contrary to the protection of classified information the prosecution sought in the protective order).

The Military Judge's Order in AE 108J (the "Order") clearly contemplated that classified information would be exposed on this facility visit as it required all team members who would take the visit to the detention facility to have security clearances. *See* AE 108J, Findings, ¶ 2.a.(5). The Order, dated 19 February 2013, was issued more than two months after the Military Judge's Protective Order #1, issued on 6 December 2012, and must be read in concert with that order and the subsequent amended protective orders in this case.

Protective Order #1, and its two amendments, all state that without authorization of the government, no member of the defense, including defense witnesses, shall have access to classified information in connection with this case, unless that person has "signed the Memorandum of Understanding Regarding Receipt of Classified Information (MOU) attached to this Protective Order, agreeing to comply with the terms of this Protective Order." AE 013P ¶ 5.a.(2); AE 013AA ¶ 5.a.(2); AE 013DDD ¶ 5.a.(2). The Military Judge's Order to examine the detention facility, portions of which explicitly recognized the requirement for a security clearance, is clearly also governed by the previous order that protects all classified information.[2] As such, the Military Judge's Order must be read to require the defense to sign the MOU prior to having access to the information.

The fact that the Military Judge's Order regarding the detention facility is silent on this issue is of no moment, as logic and reason dictate that access to a classified building in

[2] Recognizing that Protective Order #1 has been subsequently amended twice, but none of the amendments impacted the relevant provisions at issue in AE 266.

preparation of the defense is "classified discovery" governed by the Protective Order #1, which requires the defense to sign the MOU prior to receipt of classified information. This is not only a reasonable interpretation of the Military Judge's Order in 108J, but it is the only valid legal interpretation. If the Military Judge's Order intended to exclude this discovery from his prior orders, then his order in AE 108J would have explicitly done so (and the prosecution would have certainly filed motions to amend the order in order to protect classified information). Of course, it did not. Therefore, the prosecution is in complete compliance with the Military Judge's orders in this case by denying access at this time until the defense follows the Military Judge's Second Amended Protective Order #1, but the prosecution will, of course, facilitate such a visit once the MOU is signed.

Even counsel's characterization of the MOU as "prosecution-drafted" is misunderstood. As in all cases involving classified information, the prosecution moved that the Military Judge issue a protective order, pursuant to M.C.R.E. 505(e) and 10 U.S.C. § 949p-3. Pursuant to the rule and statute, "[u]pon the motion of the trial counsel, the military judge *shall* issue an order to protect against the disclosure of any classified information." M.C.R.E. 505(e) (emphasis added); 10 U.S.C. § 949p-3 (same).[3] Through the adversarial process, the defense asserted its position and proposed language on multiple occasions over the course of two years. The Military Judge, as an independent, impartial body, ultimately issued Protective Order #1, subsequently amending it twice. As such, neither the MOU nor the protective order requiring the signing of the MOU can be construed as "prosecution-drafted." The MOU provision is more correctly construed as a judicial order that four defense teams simply refuse to follow. Although it appears at this stage

[3] The requirement of appropriate protective orders is substantially identical to that enforced in federal civilian criminal trials involving classified information. *See* Section 3 of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 6 ("Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.").

to be unlikely, in the event the four defense teams sign the MOU, the prosecution and JTF-GTMO will facilitate the detention-facility visit, as it already has for Mr. Connell's team.

II. The Defense Request for a Protective Order To Prevent Over Classification and Enforce Compliance with M.C.R.E. 505 Misapprehends the Law Governing Classified Information

Just as the defense misunderstands its own obligations governing the handling of classified information, *see, e.g.*, AE 013III, counsel also misunderstand the broader law on the subject when they seek a protective order with language that states, "[t]he 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." *See* AE 266, Attachment B.

Created by Congress in the National Security Act of 1947 and implemented by Executive Order, an original classification authority ("OCA") is charged with the protection and proper classification of information which reasonably could be expected to result in damage to the national security. The determination whether to classify information, and the proper classification thereof, is a matter committed solely to the Executive Branch. *See, e.g.*, *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) ("The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief."). The Supreme Court has recognized this broad deference to the Executive Branch in matters of national security, holding that "it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of subtle and complex facts in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." *CIA v. Sims*, 471 U.S. 159, 180 (1985). OCAs are responsible for determining whether to classify, and the proper classification thereof, and there is absolutely no precedent that the defense has cited for dictating the manner in which they perform those duties.

As set forth above, the prosecution does not have the authority to classify or declassify information; only an OCA may take such actions. Moreover, the prosecution dutifully complies

with its statutory obligation to "work with the original classification authorities for evidence that may be used at trial to ensure that such evidence is declassified to the maximum extent possible, consistent with the requirements of national security." 10 U.S.C. § 949p-1(c). While vested with authority as the presiding officer to ensure a fair trial, *see* 10 U.S.C. § 948j, a military judge may "[u]nder no circumstances . . . order the release of classified information to any person not authorized to receive such information." 10 U.S.C. § 949p-1(a); M.C.R.E. 505(a)(1) (stating that "[t]his rule applies to all stages of the proceedings"). In fact, "[a] decision not to declassify evidence . . . shall not be subject to review by a military commission or upon appeal." M.C.R.E. 505(a)(3). Therefore, a protective order from a Military Judge ordering the OCA to refrain from over-classifying material, or the prosecution from derivately over classifying material, would be a nullity.

The prosecution and original classification authorities are well aware of their obligations under applicable law governing classified information. Pursuant to M.C.R.E. 505(f), the prosecution must submit a declaration invoking the classified information privilege that sets forth the damage to national security that the discovery or access to such information could reasonably be expected to cause. As such, the rules ensure the fidelity of classified information while inherently preventing its over-classification.

In fact, the defense examples of "over-classification" (*i.e.*, presumptive classification, classification of the OCA, classification of titles of pleadings) are often examples of the prosecution working with original classification authorities to ensure that information is declassified to the maximum extent possible, consistent with the prosecution's affirmative obligations under M.C.R.E. 505(a)(3). Because a fact is later declassified does not make its original classification incorrect or unlawful. There may be more instances in the future of this litigation where the prosecution is able to work with original classification authorities to declassify information that is currently classified. This process highlights a continued focus on ensuring information is properly classified and fails to demonstrate an abuse of the Executive Order.

Counsel for Mr. Bin 'Attash's claim that the prosecution's "misuse" of the M.C.R.E. 505 process is an example of over-classification is also incorrect. A defense notice pursuant to M.C.R.E. 505(g) that simply indicates an accused may testify, without more specific information about the nature of his testimony or what motion the testimony is intended to support, is clearly insufficient notice under the rule. *See* M.C.R.E. 505(g). M.C.R.E. 505(g) requires that the notice must be particularized, setting forth specifically the classified information the defendant believes to be necessary to his defense. *See* M.C.R.E. 505(g), Discussion (citing *United States v. Collins,* 720 F.2d 1995, 1999 (11th Cir. 1983)). The more particularized the notice, the easier it is for the prosecution to determine if the information is indeed classified. The defense's adherence to this rule is not only required, but it is necessary to ensure the "M.C.R.E. 505 process" is employed efficiently and as Congress intended. The less particularized the notice, the more difficult it is for the prosecution to determine if the information is indeed classified, and the less efficient the process will be for the defense and the Commission.

Furthermore, the purpose of an M.C.R.E. 505(h) hearing is for the Military Judge to make a determination concerning the use, relevance, and admissibility of classified information. *See* M.C.R.E. 505(h)(1)(a). It is not possible to determine use, relevance, or admissibility of information without context as to what motion or legal issue the noticed testimony is intended to support. If the M.C.R.E. 505(g) notice is insufficient, a hearing under M.C.R.E. 505(h) should not be held. The only reason the parties are required to hold an M.C.R.E. 505(h) hearing is to discuss the use, relevance, and admissibility of specific classified information that is actually noticed by either party. Objection to an M.C.R.E. 505(h) hearing without proper notice under M.C.R.E. 505(g) is not an abuse of the M.C.R.E. 505 process, but rather an example of adherence to it.

The accused are entitled to testify about factual issues, which may include classified information, only if those issues are properly brought before the Commission. Consistent with federal court practice, however, this Commission is not a soapbox for any accused. In particular, the accused in this Commission—self-declared enemies of the United States who continually

attempt to spread their propaganda in support of al Qaeda—are not entitled to simply speak about whatever topic they desire, especially in a case where they have been exposed to classified information, the protection of which is critical to the national security of the United States.

The defense argues that "over-classification" causes "needless delay." AE 266 at 18. This assertion, while unfounded, also completely ignores the fact that the only delay in the discovery process stems from the defense's refusal to sign the MOU. In fact, once the defense complies with the protective order, counsel will receive a multitude of classified materials, with more set for production once the theories of the defense(s) are presented to the Military Judge and the Military Judge finds adequate substitutes for discovery pursuant to M.C.R.E. 505. Any argument to the contrary is a futile attempt to re-characterize the reality of this past year's litigation.

III. While Prosecution Statements to Media Have Properly Emphasized the Presumption of Innocence in the Military Commissions System and Have Maintained that Cases Should Be Tried in the Courtroom Rather than in the Media Forums Preferred by Defense Counsel, as Trial Approaches, the Judge Should Consider Issuing a Protective Order Limiting Extrajudicial Statements by All Parties and Witnesses

The topics of trial publicity and extrajudicial statements[4] are important ones for any judge presiding over a high profile criminal proceeding to consider. In a case of this renown, the importance is heightened still further. The application of pertinent rules and professional standards regarding these topics demands sound judgment and commitment to preserving the calm, deliberate, and detached decision-making to be undertaken by judge and panel.

Apparently conceding that efforts by the prosecution to provide basic information to a public generally unfamiliar with the military commissions system violates no rule of this court, the defense team for Mr. Bin 'Attash hopes the Military Judge will look past its own prolific advocacy in the media to issue an order prohibiting only its governmental adversary from making extrajudicial statements. The Commission should promptly dash these hopes. Still, now

[4] An extrajudicial statement is "[a]ny utterance made outside of court." BLACK'S LAW DICTIONARY 665 (9th ed. 2009).

that the matter has been raised, there is merit in giving it a level of thoughtful and balanced treatment rarely present in the defense brief and in considering whether some form of the protective order, binding upon all parties, is appropriate as trial grows nearer.

A. Controlling Guidance on the Question Is Within the Military Judge's Discretion To Provide

The rules of practice before this Commission contain no specific standing provision regulating out-of-court statements by parties, but those rules nevertheless contain relevant guidance. All parties are bound to perform their duties faithfully, 10 U.S.C. § 949g, and such duties require each to uphold the presumption of innocence and other protections necessary for a fair trial under law. *See, e.g.*, 10 U.S.C. §§ 949l(c), 949a, 948r. Attorneys must adhere to professional responsibility rules in their jurisdictions of normal practice, R.M.C. 109(b), some of which bear upon trial publicity and extrajudicial statements as analyzed below. As presiding officer, the Military Judge has the responsibility and authority to ensure that proceedings are conducted in a fair manner, R.M.C. 801, and he may issue rules of court to further that and other purposes consistent with the sound administration of justice. R.M.C. 108. The Military Judge in this case has issued such rules. *See* TRIAL JUDICIARY RULES OF COURT (June 4, 2013).

One rule of court provides that "[t]he rights of all parties must be protected while affording public access and adhering to the requirements of national security" and that "[c]onsistent with these responsibilities and competing interests, the Military Judge will ensure all Commission proceedings are as open and transparent as possible." Rule of Court 6.1. Another rule states that except for classified information or papers under seal, "[a]ll motions, responses, replies, supplemental filings, and judicial orders shall be released to the public." Rule of Court 6.3.a. To implement this judicial policy of open and transparent proceedings—and the legal requirement for same[5]—the Commission has issued an order in this case facilitating access for members of the public and for victim family members via closed-circuit television transmission to remote locations. *See* AE 007B.

[5] R.M.C. 806.

Though none has been issued in this case, the Military Judge also "may, upon request of any party or sua sponte, 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***." R.M.C. 806(d) (emphasis added). Such an order, the accompanying discussion to the rule cautions, is not to be resorted to without considering alternatives:

> A protective order may proscribe extrajudicial statements by counsel, parties, and witnesses that might divulge prejudicial matter not of public record in the case. Other appropriate matters may also be addressed by such a protective order. Before issuing a protective order, the military judge must consider whether other available remedies would effectively mitigate the adverse effects that any publicity might create, and consider such an order's likely effectiveness in ensuring an impartial military commission panel. A military judge should not issue a protective order without first providing notice to the parties and an opportunity to be heard. The military judge must state on the record the reasons for issuing the protective order. If the reasons for issuing the order change, the military judge may reconsider the continued necessity for a protective order.

R.M.C. 806(d), Discussion. The default rule in military courts is thus ***not*** to regulate extrajudicial statements. This contrasts with some other courts, where standing rules place limits on such speech. *See, e.g.*, Attachment E (United States District Court for the Eastern District of Virginia, Local Criminal Rule 57.1). The military commission rule on this issue is identical to Rule for Courts-Martial ("R.C.M.") 806(d), as is the discussion accompanying that court-martial rule. The official analysis provided by the Joint Service Committee on Military Justice suggests an explanation for the standing absence of judicial regulation. While "[i]nforming the public about the operations of the criminal justice system is one of the 'core purposes' of the First Amendment," applicable to civilian or military proceedings, MANUAL FOR COURTS-MARTIAL ("M.C.M."), App. 21-49, R.C.M. 806(d) (2012 ed.), the public interest is arguably heightened where a lack of knowledge about basic rules of procedure is more prevalent in the community. *Cf. id.* (emphasizing that "[t]he public has a legitimate interest in the conduct of military justice proceedings" and noting that "[t]he opportunity to be heard [prior to issuance of any R.C.M. 806(d) order] may be extended to representatives of the media in the appropriate case").

B. The Supreme Court in the Gentile *Decision Shed Light on the "Substantial Likelihood of Material Prejudice" Standard Now Contained in R.M.C. 806(d)*

The leading case on the "substantial likelihood of material prejudice to a fair trial" standard contained in R.M.C. 806(d) is the 1991 Supreme Court decision in *Gentile v. State Bar of Nevada,* 501 U.S. 1030 (1991). In that case, defense attorney Gentile called a press conference after indictment of his client on criminal charges and six months before trial, during which conference he proceeded to read a prepared statement and answer questions that delved into descriptions of contracts and other evidence. His comments also included a remark that potential state witnesses in the case were "known drug dealers and convicted money launderers" and his accusation that the police department lead detective was a more likely person than his client to have committed the crime. *Gentile,* 501 U.S. at 1059.

In reversing disciplinary action by the Nevada Bar, the Supreme Court compared the "substantial likelihood of material prejudice" standard to the "clear and present danger" test of First Amendment jurisprudence:

> Interpreted in a proper and narrow manner, for instance, to prevent an attorney of record from releasing information of grave prejudice on the eve of jury selection, the phrase substantial likelihood of material prejudice might punish only speech that creates a danger of imminent and substantial harm.

Gentile, 501 U.S. at 1036. The Court further reasoned that the standard "requires an assessment of proximity and degree of harm," *id.* at 1037, and noted that the American Bar Association originators of the language thought the formulation "incorporates a standard approximating clear and present danger by focusing on the likelihood of injury and its substantiality." *Id.* (quoting A.B.A. ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 243 (1984)).

Applying the test to attorney Gentile, the Court found that his extrajudicial statements in context were "innocuous," rejecting notions that exposure to such statements six months prior to trial would prejudice the jury venire while acknowledging that a statement "on the eve of *voir dire* might require a continuance or cause difficulties in securing an impartial jury, and at the very least could complicate the jury selection process." *Gentile*, 501 U.S. at 1044. Commenting upon the media coverage of Gentile's press conference, the Court also assessed responsive

statements defending the lawfulness of the indictment by prosecutor and police department in the same news reports as "no more likely to result in prejudice than were [Gentile's] statements." *Gentile*, 501 U.S. at 1046. In holding that the "substantial likelihood of material prejudice" standard incorporated into Nevada's rule on extrajudicial statements was constitutional, the Court reasoned:

> The restraint on speech is narrowly tailored to achieve [the objectives of the Arizona Bar]. The regulation of attorneys' speech is limited—it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys' comments until after the trial. While supported by the substantial state interest in preventing prejudice to an adjudicative proceeding by those who have a duty to protect its integrity, the Rule is limited on its face to preventing only speech having a substantial likelihood of materially prejudicing that proceeding.

Gentile, 501 U.S. at 1076. The Court's analysis and holding are instructive in the circumstances now facing this Commission.

C. Though Defense Counsel's Media Appearances Venture Closest, Both Parties' Extrajudicial Statements to Date Fall Short of the R.M.C. 806(d) Line Demanding Judicial Intervention at this Juncture

Thus illuminated by *Gentile* and by materials giving meaning to the identically worded rule for courts-martial, *see, e.g.*, M.C.M., App. 21-49, R.C.M. 806(d) (citing *Gentile*), it is clear that the extrajudicial statements complained of by counsel for accused Bin 'Attash come nowhere near the line drawn by R.M.C. 806(d). During the *60 Minutes* program with correspondent Stahl, the chief prosecutor never mentions a specific accused and makes only brief comments defending military commissions procedures in response to various allegations of unfairness. Airing more than a year prior to assembly of the military commission panel—even assuming that the prosecution motion for *voir dire* to begin in January 2015 were to be granted over the defense request for further delay—his statements make no mention of particular evidence, express no opinion as to guilt or innocence in any case, and recount no itemized allegations contained in any charges sworn by his office. His opening and closing comments, faithfully captured in what was otherwise a heavily edited and produced fourteen-minute

program, stress the presumption of innocence and the requirement that the prosecution must prove guilt beyond a reasonable doubt.

Notably, it was the defense counsel for accused Bin 'Attash whose appearance in a separate interview with correspondent Stahl introduced her client into the subject matter of the program and who ventured nearest to areas of traditional concern regarding influence upon a jury venire and prejudice to the outcome of a criminal trial.[6] Specifically, counsel commented:

> It's like Alice going down the rabbit hole, right? You torture him for three years. You keep him in captivity after you stop torturing him in a place like Guantanamo Bay. And then you send in agents from the same government that tortured him for three years to take statements. And then if you're Gen. Martins, you say, "Well, those are now clean." Guess what? They're not.

Attachment C. Whereas the chief prosecutor had been careful to stay away from discussion of any particular accused, counsel for accused Bin 'Attash here publicly suggested not only that the government intended to introduce statements made by her client following instances of coercion, but also that her client was the victim of official misconduct beginning with torture and extending to the taking and introduction of tainted evidence.

In speaking on the topic of statements to authorities, defense counsel went down a rabbit hole of her own digging. Contrast her approach with that of the chief prosecutor, who while responding to what he believed was a generalized criticism of commissions rules of evidence pointedly avoided individual cases and sought to summarize what those rules actually say and why authoritative sources deem them justified. His comment that "[i]t is possible for a voluntary statement to be made after a passage of time at—in a different location perhaps with different questioners," Attachment C, happened to be a fair and nontechnical restatement of 10 U.S.C. §

[6] The drafters of A.B.A. Model Rule of Professional Conduct 3.6 commented that there are certain subjects "that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration." A.B.A. MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. para. 5. Among these are "the existence or contents of any confession, admission, or statement given by a defendant" and "any opinion as to the guilt or innocence of a defendant or suspect in a criminal case." A.B.A. MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. paras. 5(2), 5(4).

948r and the Supreme Court's holding in *Oregon v. Elstad*.[7] And his comments that "[t]he 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. . . . Justice requires that you look deeper. . . .," Attachment C, were a reasonable and good faith summary of *Nix v. Williams* and *Nardone v. United States*, additional Supreme Court decisions on the topic area being pursued by the correspondent.[8]

Even with defense counsel's foray into a matter potentially prejudicial to a fair trial by impartial jurors, it still required heavy editing and a manufactured juxtaposition of interview snippets to create any impression that the chief prosecutor might have been directly responding to accused Bin 'Attash's counsel in these segments. He was not. The narrated transitions of correspondent Stahl alluding to a "loophole" and "a so-called 'clean team'"—characterizations nowhere endorsed by the chief prosecutor—further tended to link defense counsel's client with a discussion that she might, in retrospect, have preferred to keep him out of. Still, any appearances of linkage were the creations of defense counsel and of *60 Minutes* producers rather than of statements by the chief prosecutor.

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[7] 470 U.S. 298 (1985).

[8] In *Nix v. Williams*, the Court opined:

> The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred.

Nix v. Williams, 467 U.S. 431, 443 (1984). In *Nardone v. United States*, the Court endorsed a statement it had made in an earlier case, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), that the facts obtained following illegal conduct do not thereby become "sacred and inaccessible." The *Nardone* Court also said:

> In practice this generalized statement [by the Court in *Silverthorne*, referring to facts not becoming "sacred and inaccessible"] may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained [illegally] and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint.

Nardone v. United States, 308 U.S. 338, 341 (1939).

Notwithstanding the fact that defense counsel for accused Bin 'Attash, during the *60 Minutes* program, ventured far closer than did the prosecution to the line drawn in *Gentile* and R.M.C. 806(d), the prosecution does not allege that defense counsel demonstrably crossed that line or that immediate regulation on that basis would be wise. Nor have other statements by defense counsel, such as those sampled in Attachment D, clearly crossed the R.M.C. 806(d) line. While several of such statements addressed subjects squarely under the Commission's consideration without even so much as mentioning the need for deference to it, none comes close, so many months before trial, to "present[ing] a substantial likelihood of material prejudice" as that standard is authoritatively interpreted. And even in light of additional obligations of the government to safeguard the trial process from improper influences, *see* A.B.A. MODEL RULES OF PROF'L CONDUCT R. 3.8(f), nothing in other statements of the chief prosecutor that is inappropriate, let alone crosses the R.M.C. 806(d) line. To the contrary, the statements attached by the defense to its motion and other similar statements note the importance of referring to numbered filings of the Commission or to Commission proceedings and transcripts, defer to the methodical, thoughtful, and independent resolution of issues taken up by the Military Judge, extend appropriate courtesies to visiting or viewing victim family members, and stress that any charges mentioned in specific cases are only allegations unless and until proven guilty beyond a reasonable doubt.[9]

D. Ethics Rules Also Incorporate the R.M.C. 806(d) "Substantial Likelihood of Material Prejudice" Standard and Thus Have Not Been Exceeded

Defense references to the A.B.A. Model Rules of Professional Conduct establish that the government's extrajudicial statements are as compliant with the governing professional responsibility rule as they are with R.M.C. 806(d) and other military commission rules. The

[9] *See* A.B.A. MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. para. 5(6) (noting that a statement "that a defendant has been charged with a crime" is more likely than not to have a material prejudicial effect "unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty").

standard in A.B.A. Model Rule of Professional Conduct 3.6, also incorporated into the Rules of Professional Conduct for Lawyers in the military, *see, e.g.*, U.S. Dep't of the Army, Regulation 27-26, Rule 3.6 (1992), is the "substantial likelihood of material prejudice" standard analyzed in *Gentile* and established above as clearly ***not*** exceeded by any of the statements under consideration here.[10] And while Justice Department regulations regarding extrajudicial statements by departmental employees are a respected source of nonbinding guidance for military counsel, defense counsel selectively cite them, omitting the important qualifier that there will be circumstances besides those specified, in which statements will not be prejudicial under the circumstances. In such cases, requests should be made for senior departmental clearance "in the interest of the fair administration of justice." 28 C.F.R. § 50.2(b)(9). Moreover, the basic prohibition in Justice Department regulations against "furnish[ing] any statement or information for the purpose of influencing the outcome of a defendant's trial" or any such statement or information that "may reasonably be expected to influence the outcome of a pending or future trial" is not even colorably at issue here, as the chief prosecutor's purposes and effects have been and remain to support the fair adjudication of military commission charges by the Commission itself. 28 C.F.R. § 50.2(b)(2).

Defense counsel likewise misfire in suggesting that the chief prosecutor violated an obligation of candor toward the Commission. AE 266 at 19, 22. The statements of the prosecution to the Commission regarding involvement of original classification authorities in the safeguarding of classified information have all been truthful. Similarly, the observations of the Joint Detention Group Commander about conditions in the camp and the stresses on the guards

[10] Note that some bars have adopted different formulations, such as the "will create a serious and imminent threat of material prejudice" standard used in District of Columbia Rule of Professional Conduct 3.6. Such a standard is arguably even less restrictive of extrajudicial statements.

present absolutely no unfairness or prejudice and involve systemic issues of public concern far broader than those under the purview of the Commission.[11]

Defense counsel for accused Bin 'Attash—during these many months of intermittent pre-trial, judge-alone sessions on non-evidentiary and procedural motions long before assembly of a panel—seek to reserve to themselves the prerogative of criticizing through extrajudicial statements virtually any provision of the M.C.A., the Manual for Military Commissions, the Regulation for Trial by Military Commission, and procedures by which these authorities are implemented. Some of these criticisms are merely accusations that the system is incapable of achieving justice. *See, e.g.*, Attachment D, item 18 (extrajudicial statement of defense counsel regarding *voir dire* of the Military Judge under R.M.C. 902 that "Judge Pohl admittedly does not have the knowledge nor the expertise to handle this kind of litigation, and as we go forward in this case that's going to become apparent."); item 5 ("'Their entire scheme here, meaning the U.S. government, has been to collect intelligence,' [defense counsel] said. 'The system was designed to do that and prosecution was an afterthought.'"). According to defense counsel's proposed "Fair Trial" order, however, the government must refuse to answer any questions about or address any prevalent gaps in knowledge regarding the commissions system or even detention

[11] The cases cited by the defense underscore the weakness of its position. *See Berger v. United States*, 295 U.S. 78 (1935) (ordering a new trial because the prosecutor, in front of the jury, had repeatedly misstated facts and represented that witnesses had said things confirmed by the record to be false); *Napue v. Illinois*, 360 U.S. 264 (1959) (reversing conviction because testimony of principal state witness known by prosecutor to be false had been introduced); *Irvin v. Dowd*, 366 U.S. 717 (1961) (vacating judgments of lower courts because "intensively publicized" official press releases stated defendant "had confessed to the six murders" for which he had been charged in adjacent rural Indiana county); *Rideau v. Louisiana*, 373 U.S. 723 (1963) (reversing conviction because film of a jailhouse interview between the sheriff and the defendant—in which the sheriff asked leading questions, and the defendant admitted in detail that he had committed the robbery, kidnapping, and murder—was televised three times to tens of thousands of people in a parish with a population of 150,000); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (reversing denial of prisoner's habeas petition because Ohio community was saturated before and during trial with massive one-sided news coverage involving matters about defendant never presented in court, skewing public opinion sharply against him). These cases fail to support the defense claims, as there have been no false representations by the prosecution and no one-sided saturation of news coverage skewing public opinion against the accused.

operations because these "'new laws' themselves are the subject of litigation in the instant case." AE 266 at 23.

E. The Defense's Proposed "Fair Trial" Order Ignores the Public Interest in the Fair Administration of Justice

Among the obvious problems with this conveniently myopic and one-sided view is that it ignores the typical coverage of R.M.C. 806(d) protective orders over ***all*** "parties and witnesses." Another is that it overlooks the permissibility in ethics rules of "statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose."[12] Still another problem is that such an order would create perverse incentives for the defense to file motions alleging defects in order to rule legal provisions and general operational procedures out of bounds for government explanation regardless of their lack of proximity or potential influence on a proceeding. Without endeavoring to counter specific allegations lodged by defense counsel out of court, officials serve an important function in outlining the legal authority for government actions. Many of the preliminary matters being attacked by defense counsel involve such actions that, while certainly subject to the Judge's authority where necessary to ensure a fair trial, also implicate broader public interests. On legal and procedural questions that may overlap with matters under consideration of the Commission, but are not raised in precisely the manner and for purposes of seeking the particular relief being

[12] A.B.A. MODEL RULES OF PROF'L CONDUCT R. 3.8(f). Even within one of the nonbinding references selectively cited by the defense, there is a similar exception for statements deemed as serving "the interest of the fair administration of justice and the law enforcement process." 28 C.F.R. § 50.2 (b)(9). Note that misleading defense interpretive moves in employing this respected but nonbinding source include asserting the Justice Department's rule for its line prosecutors that "[d]isclosures should include only incontrovertible, factual matters, and should not include subjective observations" must be applied to all manner of statements made out of court by government officials. Rather, its inclusion only within the specific subparagraph of the regulation enumerating four inherently prejudicial categories of information relating to a specific suspect or accused (*i.e.*, name, substance of charge, investigating agency, circumstances of arrest) reflects that the "incontrovertible facts" requirement applies to ***disclosures*** Justice Department officials make within those four permissible categories and not to general information about a law or about how officials undertake to carry it out. *See* 28 C.F.R. § 50.2(b)(3).

weighed by the Judge, there is no interference with the process caused by responsible, non-inflammatory comments that remain deferential at all junctures to what the Commission has decided or will decide. And there is benefit, not harm, in encouraging all who ask questions about specific proceedings to "read the pleadings of all parties and any orders of the judge," which has consistently been the refrain of all government spokespersons since before the start of this case.

While prevalent legal reasoning on the subjects of trial publicity and extrajudicial speech includes a doctrine of permissible response to prejudicial statements made out of court by opposing counsel or other persons, such a doctrine should not be regarded as the emphasis of the government position here. One common formulation of the response-to-prejudicial-statement-about-client doctrine provides:

> Notwithstanding [the general rule prohibiting extrajudicial statements that a lawyer participating in litigation knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter], ***a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client.*** A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

A.B.A. MODEL RULES OF PROF'L CONDUCT R. 3.6(c) (emphasis added). Soundly reflecting the value of neutrality that was part of the Supreme Court's analysis of permissible regulations on speech in *Gentile*, but is nowhere to be found in defense counsel's motion, the response doctrine is nevertheless difficult for a judge to police in practice. Disputes can erupt over whether publicity being responded to is "undu[ly] prejudicial" in its effects and, if found to be thus, whether it is "substantially" so. Then there is the determination of whether a response is not merely meritworthy or legitimately provoked but "required to protect a client" and, assuming this is in good faith subjectively believed by the attorney, whether a reasonable attorney would have objectively believed a response to be necessary. The prosecution does not urge the Judge to go down this road, even though the prosecution could conceivably argue, for instance, that by

accusing the government of torture and alleging that the military commission system and rules are engineered to cover up the torture, defense counsel are sending a signal to potential jurors that honorable members of the armed forces should come to court on a mission to follow what the defense depicts to be a path of conscience rather than to follow the admitted evidence and the law. We also note that the government does not desire to keep track of attacks by defense counsel and it would have had no interest in gathering for response or other purposes any of the defense team's frequent and incendiary statements had it not been for the filing of this motion.

Nor is the government here urging on the Commission the doctrine, espoused in some jurisdictions, of a permissible public response to a public attack on one's ethics as an attorney or to an allegation of unlawful conduct. One such jurisdiction explains:

> Nothing in this Comment, however, is intended to suggest that a prosecutor may not inform the public of such matters as whether an official investigation has ended or is continuing, or who participated in it, and the prosecutor may respond to press inquiries to clarify such things as technicalities of the indictment, the status of the matter, or the legal procedures that will follow. ***Also, a prosecutor should be free to respond, insofar as necessary, to any extrajudicial allegations by the defense of unprofessional or unlawful conduct on the part of the prosecutor's office***.

DISTRICT OF COLUMBIA RULES OF PROF'L CONDUCT R. 3.8 cmt. para. 3 (emphasis added). Although allegations of unprofessional or unlawful conduct are no doubt matters to be taken seriously, such a justification for responding is again difficult for a judge presiding over a trial to regulate, particularly when counsel may be irresponsibly (but only unintentionally) suggesting such misbehavior while focusing on the zealous defense of her client.

The portion of the ethics rule drafters' note quoted but not emphasized immediately above, however, illuminates a public policy rationale for not prematurely limiting a category of speech that is responsible and deferential to court processes while also suggesting why a member of the prosecution can be legitimately sought out for comment at Guantanamo during a week of sessions. There is an important public interest served by learning upon query to the chief prosecutor, for instance, that sworn charges may not be referred without the legal advisor to the

convening authority having found probable cause, that a trial cannot occur until after the prosecution provides discovery that is required by law, that military commission proceedings are open to public and media but not televised, and other matters that are both technical and systemic. Information that there is still an ongoing whole-of-government effort to investigate and interdict a continuing threat to community safety is also undeniably of public interest. And learning these and similar things from a prosecutor rather than from a nonlawyer government spokesperson before or after a week of pre-trial motions is appropriate because the benefit of public information is gauged by authoritativeness and timeliness as well as by content. As the Supreme Court noted in *Gentile*, characteristics of lawyers' speech arising "from its persuasiveness, from their ability to explain judicial proceedings, or from the likelihood that the speech will be believed" are not characteristics that can validate restrictions.[13] Moreover, the legitimate demand for statements in this category tends to persist even if the lawyer himself is a reluctant and otherwise unlikely spokesperson, as is surely the case with the current chief prosecutor.

F. In a Law-of-War Context, There Is a Beneficial Role for Responsible and Tempered Statements that Stress Deference to In-Court Processes

In systems with jurisdiction to try offenses against the law of war, historical precedent supports leaving unregulated out-of-court attorney statements that serve the interests of justice by affirming a time-honored purpose of war crimes courts—that of transcending vengeance through compliance with law. Precisely because the alleged crimes can be so notorious and the accused so condemned by the public as part of "the enemy," there is a role for responsible statements that consistently invoke the law and remind all of the importance in creating space and time for the Commission to do its work methodically, rigorously, and thoughtfully. This is particularly true with audiences harboring outrage and impatience that captives publicly understood from prior worldwide interest to have committed egregious acts with impunity are receiving a presumption

[13] *Gentile*, 501 U.S. at 1057.

of innocence, full counsel rights, the requirement that individual criminal responsibility be established beyond a reasonable doubt, and other robust legal protections.

More than 120 "Special Releases" by the Office of the Chief of Counsel for War Crimes between 1946 and 1948 provide a model of tempered, informative, and law-governed statements about twelve joint trials comprising 185 German defendants held in Nuremberg under Control Council Law Number 10, a law-of-war system about which Americans were ignorant at the outset but provided deference to over time.[14] Those releases continued a tradition of probity begun before the trial of 22 so-called major Nazi war crimes defendants in 1945 by Chief Prosecutor Robert Jackson, whose statements included a lengthy published report in the Department of State Bulletin of June 1945, one month following his appointment, and whose periodic out-of-court remarks continued through the beginning of trial in November of that year and even to the conclusion of the prosecution's presentation of its case on the merits in early 1946.[15]

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[14] *See, e.g.*, Special Release No. 54, Office Chief Counsel for War Crimes (Oct. 25, 1946), *in* National Archives at College Park, Record Group 153, A1 Entry 145, Box 8 (informing the public that the legal bases for the Nuremberg subsequent proceedings were "the four-power London Agreement of August 1945, Law No. 10 enacted by the Allied Control Council in Berlin in December 1945, and Military Government Ordinance No. 7, promulgated yesterday, which establishes the zonal military tribunals"); Special Release No. 68, Office of Chief Counsel for War Crimes (Dec. 4, 1946), *in id.* (providing pertinent details regarding the commencement of the "Medical Case," including the legal authorities for the trial, the number of defendants, and the names and backgrounds of the American presiding judges); Special Release No. 72, Office of Chief Counsel for War Crimes (Dec. 7, 1946), *in id.* (explaining the differences between the International Military Tribunal and the Nuremberg subsequent proceedings, such as the fact that only American judges would preside over the Medical Case); Special Release No. 108, Office of Chief Counsel for War Crimes (Feb. 15, 1947), *in id.* (stating that the Military Governor of Germany had appointed three judges and one alternate judge to sit on Military Tribunal III and providing brief biographies of those judges). An exception to the measured, law-governed press statements of Chief of Counsel Telford Taylor was a Feb. 24, 1948 press release in which he commented on criticisms being levied by foreign newspapers on the judgment in the High Command Case. *See* Press Release, Office Chief Counsel for War Crimes (Feb. 24, 1948), *in* National Archives at College Park, Record Group 238, NM-70 Entry 164, Box 1.

[15] *See, e.g.*, Press Release, Office of Chief of Counsel (May 28, 1945), *in* National Archives at College Park, Record Group 238, PI-21 Entry 51, Box 26 (furnishing "background information on the trial of war criminals" for "the guidance of the press" regarding the Moscow