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	AE342(WBA) **Defense Motion** to Compel Discovery Related to Defense Access to Witnesses Date Filed: 30 January 2015

1. Timeliness: This motion is timely filed.

2. Relief Sought:

Mr. bin 'Atash requests that the Commission compel discovery of all notes memorializing oral communication between and amongst any members of Joint Task Force Guantanamo Bay (JTF-GTMO) and the Office of the Chief Prosecutor (OCP) regarding defense access to and interviews of witnesses and potential witnesses. Alternatively, the Commission should direct the Prosecution to provide the materials in question to the Commission for *in camera* review.

3. Overview:

On 2 December 2014, Mr. bin 'Atash requested that the Prosecution provide in discovery "all notes of oral communications between members [of] OCP and JTF-GTMO regarding defense access to witnesses." The Prosecution refused to provide the requested discovery. The Prosecution did not deny the materiality of the requested information; instead, the Prosecution invoked, as the sole basis for its denial, the "deliberative process privilege."

Notes memorializing communication between and amongst members of the Office of the Chief Prosecutor (OCP) and Joint Task Force-Guantanamo Bay (JTF-GTMO) and pertaining to defense access to witnesses are material to the preparation of the defense. Materiality is construed broadly and is not limited to evidence admissible at trial. In this case, the discovery is material because Government interference with defense access to witnesses raises grave due process and unlawful influence concerns. Concerns arise where the Government suggests that a witness should not speak with the defense, where the Government insists that a witness or potential witness speak with the defense only in the presence of a Government representative, or where the Government seeks to influence the nature and scope of the defense interview. The materiality of such evidence strikes directly at Mr. bin 'Atash's ability to present a defense.

The concern in this case is concrete; the information requested in discovery is material to the defense's preparation of numerous motions already pending before the Commission. The defense's concern has been heightened in recent months by the Government's refusal to identify or permit interviews of potential witnesses with relevant information concerning a variety of issues. The defense's concern is exacerbated by discovery provided by the Prosecution and contained in Attachment C, wherein the Prosecution misrepresents the law with respect to defense access to witnesses and wherein it appears that members of OCP and JTF-GTMO have attempted to exert unlawful influence over defense interviews. These newly-heightened concerns make the discovery sought in this instance all the more material to the preparation of the defense.

The Prosecution does not deny materiality but instead objects solely on the basis of what it claims is "deliberative process privilege." This assertion of privilege is without basis in law or fact. It is firmly-established that the deliberative process privilege does not exist where

Government misconduct or Government intent is at issue. *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997) (noting that the deliberative process privilege "disappears altogether when there is any reason to believe government misconduct occurred."). Here, Mr. bin 'Atash has put forth a credible case of Government misconduct – Government interference with defense access to witnesses – and it would make little sense to permit a party to the alleged misconduct (the Government) to utilize a qualified privilege to shield evidence of its own wrongdoing.

The Government's invocation of the deliberative process privilege fails substantively, and it also fails procedurally. Because the privilege is a powerful tool and a source of potential abuse, courts require that the privilege be invoked by the agency head (or by a senior policy-making official who has received specifically-delegated authority from the agency head). Proper invocation of the privilege must also include a description of the materials withheld and an "assessment of the consequences of disclosure of the information." *Northrop Corp v. McDonnell Douglas Corp.*, 751 F.2d 395, 405 n.11 (D.C. Cir. 1984). The privilege may not be invoked by line-level attorneys with an interest in the litigation at issue – individuals who might make decisions based upon "a desirable litigation strategy" rather than "the exigencies of executive management." *Deseret Management Corp. v. United States*, 76 Fed. Cl. 88, 97 (2007). In this case, the Government has not made an appropriate invocation of the privilege. Rather than a detailed affidavit from a senior policy-making official invoking the privilege and setting forth with specificity the materials at issue and the harm that would result from disclosure, the Prosecution provides a single line in a discovery response. This attempted invocation fails to pass muster by any standard, and it must be rejected by this Commission.

Even if the privilege had been properly invoked here, and even if the *per se* Government misconduct exception were inapplicable, the deliberative process privilege, like all executive

privileges, is qualified and may be overcome based upon a showing of need. The need for such materials is particularly strong in a criminal (and capital) case where a "generalized interest in confidentiality" cannot "prevail over the fundamental demands of due process of law in the fair administration of criminal justice." *United States v. Nixon,* 418 U.S. 683, 713 (1974). This factor, the "seriousness of the litigation," plays heavily into a balancing test that also includes factors such as "the role of the government" and the "possibility of future timidity by government employees." *In re Sealed Case,* 121 F.3d at 738.

In the present case, all factors weigh in favor of disclosure. The Commission should compel discovery of all notes memorializing oral communication between and amongst any members of Joint Task Force Guantanamo Bay (JTF-GTMO) and the Office of the Chief Prosecutor (OCP) regarding defense access to and interviews of witnesses and potential witnesses. While *in camera* review is not necessary in this case because the Government does not contest the materiality of the requested documents and because the deliberative process privilege is inapplicable, Mr. bin 'Atash alternatively requests that the Commission conduct an *in camera* review of the requested discovery in order to determine those materials that should be released to the defense.

4. Burdens of Proof:

As to the materiality of the requested documents, the defense bears the burden of persuasion; the standard of proof is a preponderance of the evidence. R.M.C. 905(c)(1). With respect to the Government's invocation of the deliberative process privilege, the Government bears the burden of demonstrating that the documents in question are protected by the privilege. *See, e.g. Animal Legal Defense Fund, Inc. v. Dept. of Air Force,* 44 F. Supp. 2d 295, 299 (D.D.C. 1999); *Confidential Informant 59-05071 v. United States,* 108 Fed. Cl. 121, 130 (2012)

("[i]nvocation of the deliberative process privilege is a three-step process, and the burden is on the government to show that the privilege protects the documents that it seeks to withhold from discovery."); *In re Grand Jury Subpoena Dated Jan 4., 1984*, 750 F.2d 223, 224 (2d Cir. 1984) ("[i]t is axiomatic that the burden is on a party claiming the protection of a privilege to establish those facts that are the essential elements of the privileged relationship."); *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 110 F.R.D. 511, 515 (M.D.N.C. 1986) ("[a] failure of proof as to any element [of a privilege] causes the claim of privilege to fail.").

5. Facts:

A. On 2 December 2014, Mr. bin 'Atash served the Prosecution with DR-189-WBA, a discovery request seeking, *inter alia*, "all notes of oral communications between members [of] OCP and JTF-GTMO regarding defense access to witnesses." Attachment B.

B. On 16 January 2015, the Prosecution gave its final response to DR-189-WBA. Attachment C. The Prosecution provided the defense with a bench brief filed by the Prosecution in *United States v. Hadi al Iraqi*, which the Prosecution described as "the policy of the Office of the Chief Prosecutor regarding witness access." *Id.* at 2. The Prosecution provided additional materials responsive to other requests within DR-189-WBA, but the Prosecution declined to provide notes of oral communications between members of OCP and JTF-GTMO regarding defense access to witnesses. The Prosecution did not deny the existence of the notes or their materiality; the Prosecution simply objected that the notes were "privileged as part of the deliberative process."

6. Law and Argument:

A. Information Requested is Material to Preparation of Defense

The Prosecution has both constitutional and statutory disclosure and discovery obligations. Under the Military Commissions Act of 2009, 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." R.M.C. 701(c)(1). Materiality is a low threshold well below evidentiary relevance; evidence is material "as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (internal quotation marks and citation omitted); *see also United States v. Libby*, 429 F. Supp. 2d. 1, 7 (D.D.C. 2006); *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004) (the scope of materiality is broad and is "not focused solely upon evidence known to be admissible at trial" but includes evidence used in formulating defense strategy); *United States v. George*, 786 F. Supp. 56, 58 (D.D.C. 1992) (demonstrating materiality is "not a heavy burden"). Material evidence includes negative or inculpatory evidence because it is "just as important to the preparation of a defense to know its potential pitfalls as it is to know its strengths." *United States v. Marshall*, 132 F.3d 63, 67 (D.C. Cir. 1998). That evidence is "cumulative" is not a valid objection to a defense discovery request in a criminal case. *See United States v. McGrady*, 508 F.2d 13, 18 (8th Cir. 1984) ("[w]hile the court has wide discretion in excluding proffered evidence at trial on the ground that it is merely cumulative, we find no authority for the proposition that it may quash a subpoena duces tecum in a criminal case on that ground…the appellant ought to have been given the opportunity to examine the material himself to see if it was truly cumulative."); *Compare* Fed. R. Civ. P. 26(b)(2)(C)(i) (permitting courts hearing civil matters to limit "cumulative or duplicative" discovery) *with* R.M.C. 701(c) (containing no "cumulative or duplicative" limitation for discovery at military commissions).

Brady v. Maryland, 373 U.S. 83, 87 (1963), requires the Prosecution to disclose "evidence favorable to an accused" that is "material either to guilt or to punishment." *See also* 10 U.S.C. § 949j(b)(1)-(4) (expanding upon *Brady* and requiring disclosure of exculpatory evidence that tends to negate guilt, reduce the degree of guilt, impeach a prosecution witness, or mitigate a sentence). The duty to provide such evidence includes the duty to search for evidence, where the evidence may be maintained by another Government agency. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). In a capital case, *Brady* material includes evidence in mitigation "in that it may justify a sentence of life imprisonment as opposed to death." *United States v. Feliciano*, 998 F. SUpp. 166, 170 (D. Conn. 1998); *see also United States v. Beckford*, 962 F. Supp. 804, 811 (E.D. Va. 1997) (holding that evidence relevant to a statutory mitigating factor is "favorable" evidence pertaining to punishment under the *Brady* standard).

The notes requested in discovery in the present case easily surpass the low "materiality" threshold. Mr. bin 'Atash has a right to interview witnesses, including Government witnesses, as part of his investigation and case preparation. R.M.C. 701(j) ("[e]ach party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence."). Prosecutorial interference with defense access to witnesses raises grave due process concerns. *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) ("[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.").

Due process concerns arise where the Government suggests that a witness should not speak with the defense or where the Government suggests that the witness speak to the defense only in the presence of a Prosecutor or other Government official. *See, e.g, Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966) ("we know of nothing in the law which gives the prosecutor the right to interfere with the preparation of the defense by effectively denying defense counsel access to the witnesses except in his presence."); *United States v. Linder*, 2013 WL 812382 at 45 (N.D. Ill. 2013) ("when the government's actions substantially impair a witness's decision to testify, such as by threat, coercion, interference or intimidation, and the witness's free decision to testify is hampered, the government has denied the defendant of his Fifth Amendment right to due process of law and his Sixth Amendment right to compulsory process of witnesses in his favor, and the proper remedy for such misconduct may be the dismissal of the indictment."); *United States v. Enloe*, 35 C.M.R. 228, 232 (C.M.A. 1965) ("the great weight of authority in this country sustains the contention of counsel for the accused that, absent special circumstances, the right to a pretrial interview…encompasses the right to an interview free from insistence by the Government upon the presence of its representative."); *United States v. Irwin*, 30 M.J. 87, 94 (C.M.A. 1990) ("in light of the provisions of the Manual

and the Code regarding equality of access to witnesses and evidence and the lack of need for the consent of opposing counsel to pretrial interviews of witnesses, it is beyond the authority of the United States to interpose itself between the witness and the defense counsel and require, as a condition of granting such interviews, that a third party be present.").

Additionally, at courts-martial and before military commissions, prosecutorial interference with defense access to witnesses may implicate unlawful influence. *See, e.g.*, *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 (C.M.A. 1986) ("[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.").

Concern regarding defense access to witnesses in the instant case is not merely hypothetical; the information requested in discovery is material to the preparation of the defense on numerous motions that remain pending before the Commission. *See, e.g.*, AE008AA(AAA), Attachment D (prospective Government witness's refusal to consent to pretrial interview); AE266(WBA), Attachment F (prospective Government witness's refusal to consent to pretrial interview); AE254Y(WBA) at 30-33 (documenting repeated refusal of JTF-GTMO officials to engage in pretrial interviews with respect to use of female guards). In AE036F(WBA), Mr. bin 'Atash raised concerns with respect to unlawful government interference with the production of voluntary defense witnesses. In AE266(WBA), Mr. bin 'Atash requested that the Commission enter a protective order that would, *inter alia*, "direct[] 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.”).

Concern with respect to defense access to witnesses has been heightened in recent months by the Government’s steadfast refusal to allow access to or even reveal the identities of witnesses relevant to the AE254 series of motions. In *United States v. Hadi al Iraqi*, a separate Military commission at Guantanamo Bay, the Accused raised claims similar to those asserted by Mr. bin ‘Atash with respect to the use of female guards during transport. When counsel for Mr. al Iraqi attempted to interview JTF-GTMO staff concerning the female guards policy, a member of the OCP “specifically stated that there was a policy from the JTF staff that witnesses don’t talk to defense counsel.” *United States v. Hadi al Iraqi*, Tr. at 173; *see also Id.* at 185 (Trial Counsel admits that he was informed by a JTF-GTMO Assistant Staff Judge Advocate that “there was a policy that JTF personnel did not speak to defense counsel”). While this policy was later rescinded or “clarified,” it had a “chilling effect” on counsel’s ability to access relevant witnesses. *Id.* at 187-88 (Commission observed that “if the assistant SJA of the JTF is under this misapprehension…it wouldn’t be surprising that maybe people at the lower levels of operations of JTF might be under the same misapprehension….If a lawyer working for the JTF is under the misapprehension that defense counsel can’t talk to people, to prospective witnesses in the JTF, that’s a problem.”).

The Commission in *United States v. Hadi al Iraqi* directed the Prosecution to prepare a bench brief outlining its position with respect to defense access to witnesses. The bench brief, in addition to various emails between JTF-GTMO and OCP concerning defense access to witnesses, were later provided to Mr. bin ‘Atash in discovery. *See* Attachment C. The

Prosecution's positions set forth in the bench brief (which the Prosecution represents are the "policy of the Office of the Chief Prosecutor regarding witness access" in Mr. bin 'Atash's case), in addition to the emails provided to the defense, raise additional concerns that make the documentation requested in the instant motion all the more material to the preparation of the defense.

The Government's *Hadi al Iraqi* bench brief, contained in Attachment C to the instant motion, is rife with inaccuracy and misrepresentation. For example, the Government cites the Department of the Army's *Touhy* regulations to justify "maintaining control over the disclosure of official information" by witnesses in a criminal case. Attachment C, Government Bench Brief at 7. However, the Prosecution's assertion misstates the law: T*ouhy* regulations have no application to the instant case. "The Supreme Court's holding in *Touhy* is applicable only in cases where the United States is not a party to the original legal proceeding." *Alexander v. F.B.I.*, 186 F.R.D. 66, 70 (D.D.C. 1998) (declining to enforce DoD's *Touhy* regulation because "*Touhy* simply holds that a subordinate government official will not be compelled to testify or to produce documents in private litigation, in which the federal government or any of its agencies are not a party…"); *see also Houston Business Journal, Inc. v. Office of Comptroller of Currency, U.S. Dept. of Treasury*, 86 F.3d 1208, 1211 (D.C. Cir. 1996) ("[w]hen a litigant seeks to obtain documents from a *non-party* federal governmental agency, the procedure varies depending on whether the underlying litigation is in federal or in state court.") (emphasis added); *Exxon Shipping Co. v. U.S. Dept. of Interior*, 34 F.3d 774, 776 n.4 (1994) ("[w]hen the government is named as a party to an action, it is placed in the same position as a private litigant, and the rules of discovery in the Federal Rules of Civil Procedure apply."); DoD Directive 5405.2, Release of Official Information in Litigation and Testimony by DoD Personnel as

Witnesses (July 23, 1985), § 2.2.1 (noting that DoD's *Touhy* regulation does not apply in Agency internal matters such as "[b]efore courts-martial convened by the authority of the Military Departments."); Army Regulation 27-40, Litigation (September 19, 1994), ¶¶ 7-8 through 7-12 (distinguishing between requests for information in private litigation and requests for information in the course of litigation in which "the United States Has an Interest").

In addition to the Government's unlawful reliance on *Touhy* regulations, the circumscribed set of emails provided by the Prosecution raise concerns that necessitate an order that the notes be tendered in the instant case. Documents provided by the Prosecution include an email from JTF-GTMO's Chief of Litigation Support wherein the Prosecution indicates that it will insist that "interviews of JTF personnel will include an [Assistant Staff Judge Advocate] and an SSO…" Attachment C, MEA-DR189-WBA-000034; *see also Id.* at MEA-DR189-WBA-000076 (member of OCP opines that "the SJA or Government rep should be present [during defense interviews]…to avoid any attempts by the Defense to conduct a mini-interrogation on the substance of the motion."). The documents also include emails wherein it appears that OCP is attempting to impermissibly shape the nature and scope of witness statements to conform to its own theories. *See, e.g,* Attachment C, MEA-DR-189-WBA-000071 (member of OCP informs JTF-GTMO Staff Judge Advocate in advance of interviews of guards by defense team members for Mr. al Iraqi that "[t]he guards obviously cannot speak to policy determinations, or resource/manning decisions. As to the 8 Oct FCE, the guards already provided sworn statements and defense has now seen the video, making further information cumulative…Defense wants to get into decisions regarding use of FCE, but that is in the SOP, not properly addressed to the guards, and not material or relevant to the discussion…").

The *Hadi al Iraqi* bench brief and emails included with Attachment C, combined with counsel's many failed attempts to interview Government witnesses on a variety of subjects, provide ample reason to believe that the notes of oral communications denied by the Prosecution will contain information material to the preparation of the defense. Such information could include impermissible shaping of witness testimony and/or impermissible witness tampering.

Additionally, the notes are material to the preparation of the defense because they likely contain evidence of bias. The notes undoubtedly relate to and memorialize communications by individuals either Mr. bin 'Atash or the Government have requested as witnesses. These witnesses include the Staff Judge Advocate and Assistant Staff Judge Advocates, members of the guard force, Joint Detention Group Commander, and Camp 7 Officer in Charge. *See, e.g,* AE254SS(WBA); AE254T(WBA) (defense motions to compel production of witnesses). Evidence that these and other witnesses refuse to engage with the defense, or discussion with the Prosecution regarding limiting defense access to witnesses or shaping the scope of defense interviews, is evidence of bias. *See, e.g., United States v. Crouch,* 478 F. Supp. 867 (E.D. Cal. 1979) ("a witness' refusal to talk to counsel may be brought out in trial in that it may be evidence which relates to the witness' possible bias."); *United States v. Linton,* 502 F. Supp. 871, 876 (D. Nev. 1980) ("[c]ooperation by a witness in permitting a pre-trial interview may result in his testimony having more credibility with the trier of fact. This is because a witness' refusal to talk to counsel may be brought out in trial as evidence relevant to the witness' possible bias.").

Evidence of a witness' bias is always relevant and may be introduced either on cross-examination or by means of extrinsic evidence. *See generally United States v. Ribonson,* 530 F.2d 1076 (D.C. Cir. 1976). Demonstration of bias impacts the credibility of Government witnesses. "Nondisclosure of evidence affecting credibility" of Government witnesses

implicates *Brady*. *Giglio v. United States*, 405 U.S. 150, 154 (1972). This evidence must be disclosed "at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case…" *United States v. Pollack*, 534 F.2d 964 (D.C. Cir. 1976). Additionally, the Prosecution's notes undoubtedly contain statements of witnesses and prospective witnesses concerning the subject matter of their testimony. Such statements are always discoverable.

B. Deliberative Process Privilege Inapplicable

The Prosecution does not contest the materiality of the notes of oral communications requested by the defense, but it claims that the notes are "privileged as part of the deliberative process." However, the deliberative process privilege is inapplicable in this instance.

The deliberative process privilege is a form of executive privilege, closely related to but more limited in scope than the presidential communications privilege. *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997) ("[w]hile the presidential communications privilege and the deliberative process privilege are closely affiliated, the two privileges are distinct and have different scopes. Both are executive privileges designed to protect executive branch decisionmaking," however "judicial negation of the presidential communications privilege is subject to greater scrutiny than denial of the deliberative privilege…"); *see also Id.* at 746 (noting that the presidential communications privilege is "more difficult to surmount."). The privilege, which is most-frequently invoked in FOIA cases under Exemption 5, is designed to protect the quality of government agency decisions by ensuring that agencies are not "forced to operate in a fishbowl." *Wolfe v. Dept. of Health and Human Svcs.*, 839 F.2d 76 8, 773 (D.C. Cir. 1988).

In order to gain protection, materials must be "both predecisional and deliberative." *Mapother v. Dept. of Justice,* 3 F.3d 1533, 1537 (D.C. Cir. 1993). Thus, purely factual information may not be withheld, except in the rare case in which disclosure would "expose an agency's policy deliberations to unwarranted scrutiny." *Id.*; *see also In re Sealed Case,* 121 F.3d at 737 ("[t]he deliberative process privilege does not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual…"). The limitation to predecisional materials arises because "it is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached…" *N.L.R.B. v. Sears, Roebuck & Co.,* 421 U.S. 132, 150 (1975). Predecisional materials are ones that reflect the "agency 'give-and-take' leading up to a decision." *Access Reports v. Dept. of Justice,* 926 F.2d 1192, 1195 (D.C. Cir. 1991) (quoting *Coastal States Gas Corp. v. Dept. of Energy,* 617 F.2d 854, 866 (D.C. Cir. 1980)). "A key feature under both the 'predecisional' and 'deliberative' criteria is the relation between the author and recipients of the document. A document from a junior to a senior is likely to reflect his or her own subjective opinions and will clearly have no binding effect on the recipient. It would not be privileged. By contrast, a communication moving from senior to junior is far more likely to manifest decisionmaking authority and to be the denouement of the decisionmaking rather than part of its give-and-take." *Id*

Importantly, the deliberative process privilege, as with other executive privileges, is a qualified privilege and may be "overcome by an adequate showing of need." *In re Sealed Case,* 121 F.3d at 745; *see also Nixon v. Sirica,* 487 F.2d 700, 716 (D.C. Cir. 1973) (finding that executive privilege is not "absolute" and that the privilege "depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure

in a particular case."). As opposed to a civil or FOIA case, a defendant and the public's interest in disclosure may be particularly strong in a criminal case. For example, in *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court considered a case arising from the prosecution of various White House officials and involving the related but much-stronger presumptive privilege in presidential communications. The Administration sought to quash a subpoena for tapes and other materials documenting meetings between the President and the defendants, citing executive privilege. In upholding the subpoena, the Supreme Court noted that even a presumptive privilege in the communications of the President "must be considered in light of our historic commitment to the rule of law." *Id.* at 708. The Court specifically observed that, in a criminal trial, a "generalized interest in confidentiality" could not "prevail over the fundamental demands of due process of law in the fair administration of criminal justice," and thus "[t]he generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial." *Id.* at 713; *see also Id.* at 707 ("[t]he impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts…"); *Id. at* 709 ("[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts…To ensure that justice is done, it is imperative the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.").

As with other qualified privileges, courts apply a balancing test to determine the applicability of the deliberative process privilege. *In re Sealed Case,* 121 F.3d at 737 (noting that "need determination is to be made flexibly on a case-by-case, ad hoc basis."). Factors to be

considered include "the relevance of the evidence," "the seriousness of the litigation," the role of the government," and the "possibility of future timidity by government employees." *Id.* at 738 (quoting *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992)). In the instant case, the factors weigh heavily in Mr. bin 'Atash's favor. As noted *supra*, the fact that this is a criminal case (and a capital case) militates strongly in favor of disclosure. This is not a FOIA request regarding the decision-making of the Federal Reserve. This is capital prosecution where the very individuals who may have impermissibly tampered with witnesses or obstructed defense access to witnesses are the same individuals now cloaking themselves in privilege to hide the evidence of their actions. The Government is a party to the instant litigation and the role of the Government, and the behavior of executive branch officials, is a pervasive theme throughout the case. This is particularly true with regard to motions presently on the Commission's docket that involve allegations of unlawful influence or impermissible conditions of confinement. Demonstrating unlawful influence without being able to delve into deliberative, pre-decisional matters is an impossible task. The purpose of the deliberative process privilege, avoiding the "possibility of future timidity by government employees," has no application to this capital prosecution. Members of the Prosecution and JTF-GTMO, handling one of the highest-profile and most heavily-scrutinized cases in U.S. history, are already living in the "fishbowl." These individuals should rightly expect to have their actions carefully scrutinized at every level, including by the defense in this capital case.

While Mr. bin 'Atash has demonstrated need sufficient to overcome any claimed Government interest in confidentiality, here the Commission need not even reach the balancing test. It is firmly-established that the deliberative process privilege does not exist where Government misconduct or Government intent is at issue, and Government misconduct is exactly

what is at issue with respect to the instant discovery request. The deliberative process privilege "disappears altogether when there is any reason to believe government misconduct occurred." *In re Sealed Case*, 121 F.3d at 746; *see also In re Subpoena Duces Tecum Served on Office of Comptroller of Currency,* 145 F.3d at 1424 ("[i]f the plaintiff's cause of action is directed at the government's intent…it makes no sense to permit the government to use the [deliberative process] privilege as a shield. For instance, it seems rather obvious to us that the privilege has no place in a Title VII action or in a constitutional claim for discrimination."); *Alexander,* 186 F.R.D. at 177 ("[t]he Department of Defense's legal argument – that a 'close reading' of the caselaw shows that a balancing test must still be undertaken, even in the face of identifiable government misconduct – is incorrect."); *Dominion Cogen, D.C., Inc. v. District of Columbia,* 878 F. Supp. 258, 268 (D.D.C. 1995) (deliberative process privilege inapplicable where "the deliberative process itself [is] directly in issue."); *Convertino v. U.S. Dept. of Justice,* 674 F. Supp. 2d 97, 102 (D.D.C. 2009) ("[t]he balancing test…typically applied to the privilege, is not needed when one of two exceptions apply; (1) the government's intent is squarely at issue or (2) there is any evidence of governmental misconduct."); *In re Franklin Nat. Bank Securities Litigation,* 478 F. Supp. 577, 582 (E.D.N.Y. 1979) ("when the public's interest in effective government would be furthered by disclosure, the justification for the privilege is attenuated. Thus, for example, where the documents sought may shed light on alleged government malfeasance, the privilege is denied."). In the present case, Mr. bin 'Atash has put forth a credible case of Government misconduct – interference with and denial of access to witnesses and unlawful influence in violation of the Military Commissions Act of 2009 and the Fifth and Sixth Amendments – and the discovery at issue is material to the allegation of misconduct.

Thus, the Commission should find the privilege inapplicable on this ground alone, without finding it necessary to advance to the balancing test.

C. Prosecution Fails to Properly Invoke Privilege

In addition to failing any substantive review, the Prosecution's invocation of the deliberative process privilege also fails procedurally. Where documents are withheld pursuant to a claim of executive privilege, "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *see also Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 405 n.11 (D.C. Cir. 1984) ("[a]ssertion of the deliberative process privilege, like the state secrets privilege, requires a formal claim of privilege by the head of the department with control over the information. That formal claim must include a description of the documents involved, a statement by the department head that she has reviewed the documents involved, and an assessment of the consequences of disclosure of the information."). This requirement is "not merely technical" and is "intended to ensure that the privilege is invoked by an informed executive official of sufficient authority and responsibility to warrant the court relying on his or her judgment." *Yang v. Reno*, 157 F.R.D. 625, 632 (M.D. Pa. 1994). In the D.C. Circuit, the requirement that the privilege be invoked personally by the agency head has been tempered somewhat, as "[i]nsistence on an affidavit from the very pinnacle of agency authority would surely start to erode the substance of 'actual personal' involvement." *Landry v. F.D.I.C.*, 204 F.3d 1125, 1135 (D.C. Cir. 2000) (allowing Memphis Regional Director of FDIC to invoke deliberative process privilege on behalf of FDIC); *see also Tuite v. Henry*, 98 F. 3d 1411 (D.C. Cir. 1996) (allowing Counsel to Justice Department's Office of Professional Responsibility to invoke privilege on behalf of Attorney General).

While the D.C. Circuit may permit limited delegation of the deliberative process privilege to other high-ranking agency officials, this leeway does not extend to line-level attorneys with no policy-making authority – particularly prosecutors with an interest at stake in the underlying litigation. In *Marriott International Resorts, L.P. v. United States,* 437 F.3d 1302, 1308 (Fed. Cir. 2006), the Court permitted delegation where the agency head issued a formal delegation order with specific instructions to an individual holding a "senior position within the Agency" who was "responsible for planning, administering and evaluating the Agency's disclosure policies and procedures." The Court concluded that this formal delegation, to a senior official not involved in the underlying litigation, was "consistent with the majority rule outlined in *Landry*." *Id.* The Court of Federal Claims observed that "[t]he Federal Circuit's approach in *Marriott* is consistent with the rationale in other cases holding that counsel are not permitted to invoke the privilege, that is, to ensure that the privilege is invoked as a result of an executive decision about the exigencies of executive management, rather than as a result of trial counsel's decision about a desirable litigation strategy." *Deseret Management Corp. v. United States*, 76 Fed. Cl. 88, 97 (2007).

In the instant case, the Prosecution's claim of deliberative process privilege is designed to advance a "desirable litigation strategy" rather than the legitimate requirements of Agency management. The invocation consists of a single sentence in a discovery response, without any accompanying privilege log or explanation of the materials withheld, without any formal delegation of authority, without any affidavit explaining the need for confidentiality in the withheld materials, and without any "assessment of the consequences of disclosure." Given the highly-circumscribed nature of the privilege and the potential for abuse, particularly in a criminal

(and capital) case with the Government as a party, this is a deficient and unacceptable invocation of the privilege.

Moreover, even if the Commission were to find an acceptable delegation of authority to Trial Counsel, this would still not vitiate the other *Reynolds* requirements – including a detailed affidavit outlining the documents at issue and the potential harm from disclosure. These are requirements that the Prosecution in this case made no effort to fulfill. The Commission should refuse to recognize the invocation of the deliberative process privilege in this case, or it should it at minimum demand that the Prosecution provide an affidavit from a senior Agency official with policy-making authority, formally invoking the privilege, describing the materials at issue, and describing the harm that would result from disclosure.

D. Conclusion

For the foregoing reasons, the Commission should compel discovery of all notes memorializing oral communication between and amongst any members of Joint Task Force Guantanamo Bay (JTF-GTMO) and the Office of the Chief Prosecutor (OCP) regarding defense access to and interviews of witnesses and potential witnesses. As the Prosecution has not indicated that the requested information is not material or otherwise discoverable, and because the Prosecution's invocation of the deliberative process privilege fails both procedurally and substantively, *in camera* review is not necessary in this case. However, Mr. bin 'Atash requests in the alternative that the Commission conduct an *in camera* review to determine those materials that should be released to the defense.

7. Oral Argument: The defense requests oral argument.

8. Witnesses: Mr. bin 'Atash reserves the right to request production of witnesses on this motion at a later date.

9. Conference with Opposing Counsel: The Government opposes the relief requested herein.

10. Attachments:

A. Certificate of Service
B. Discovery Request dtd 2 December 2014
C. Prosecution's Final Response dtd 16 January 2015 and Discovery MEA-DR189-WBA-000001 to MEA-DR189-WBA-000070

//s//
CHERYL T. BORMANN
Learned Counsel

//s//
JAMES E. HATCHER
LCDR, USN
Defense Counsel

//s//
MICHAEL A. SCHWARTZ
Capt, USAF
Defense Counsel

//s//
TODD M. SWENSEN
Maj, USAF
Defense Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on 30 January 2015, I electronically filed the attached **Defense Motion to Compel Discovery Related to Defense Access to Witnesses** with the Trial Judiciary and served it on all counsel of record by e-mail.

//s//
CHERYL T. BORMANN
Learned Counsel

Attachment B

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

OSD-OGC-OCDC 2 December 2014

MEMORANDUM FOR Office of the Chief Prosecutor, Office of Military Commissions

SUBJECT: Request for Discovery – OCP Instructions to Witnesses

1. Pursuant to R.M.C. 701, 10 U.S.C. § 949j, the Fifth, Sixth, and Eighth Amendments to the United States Constitution, and international law, Mr. bin 'Attash requests that the Government provide the following information in discovery. Failure to provide the requested information will deny Mr. bin 'Attash his rights to the due process of law, to the effective assistance of counsel, a fair, speedy, and public trial, and to be free from cruel and unusual punishment.

2. Mr. bin 'Atash requests that the Office of the Chief Prosecutor (OCP) produce the following books, papers, documents, photographs, video recordings or other tangible objects which are within the possession, custody, or control of the Government and which are material to the preparation of the defense:

A. All written communications in any format, including email, between OCP and JTF-GTMO regarding defense access to witnesses, including communications between the JTF-GTMO Staff Judge Advocate and OCP.

B. All notes of oral communications between members OCP and JTF-GTMO regarding defense access to witnesses.

C. All records and documentation, including SOPs, meeting notes, and emails regarding policies and practices, formal and informal, related to JTF-GTMO personnel's interaction with defense team members, including advice/instruction to prevent defense counsel from learning the names of JTF-GTMO personnel and advice/instruction to prevent defense counsel from learning facts related to the conditions of confinement and/or the disciplinary status and physical handling of any detainees charged before a military commission.

D. All records and documentation regarding the written OCP Witness Instructions referenced in *United States v. al-Iraqi*,[1] including the Instructions, date of promulgation of said Instructions, author, and all communication regarding development and implementation of said Instructions. This request includes but is not limited to any such Instructions currently or formerly used in the instant case or any other military commissions case.

[1] Tr. at 191-202.

DR-189-WBA

OSD-OGC-OCDC
SUBJECT: Request for Discovery – OCP Instructions to Witnesses

3. Points of contact for this discovery request are the undersigned at [redacted], [redacted], [redacted], and [redacted].

//s//
CHERYL T. BORMANN
Learned Counsel

//s//
JAMES E. HATCHER
LCDR, USN
Defense Counsel

//s//
MICHAEL A. SCHWARTZ
Capt, USAF
Defense Counsel

//s//
TODD M. SWENSEN
Maj, USAF
Defense Counsel

Attachment C

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

OFFICE OF THE
CHIEF PROSECUTOR

16 January 2015

MEMORANDUM FOR Defense Counsel for Mr. bin 'Attash

SUBJECT: Prosecution Final Response to 2 December 2014 Request for Discovery (DR-189-WBA)

1. The Prosecution received the Defense request for discovery on 2 December 2014. The Prosecution hereby responds to the Defense request.

2. The Defense requests that the Prosecution produce the following books, papers, documents, photographs, video recordings or other tangible objects which are within the possession, custody, or control of the Government and which are material to the preparation of the defense.

A. All written communications in any format, including email, between OCP and JTF-GTMO regarding defense access to witnesses, including communications between the JTF-GTMO Staff Judge Advocate and OCP.

Attached please find responsive documents.

B. All notes of oral communications between members OCP and JTF-GTMO regarding defense access to witnesses.

The Prosecution respectfully declines to produce this information as it privileged as part of the deliberative process.

C. All records and documentation, including SOPs, meeting notes, and emails regarding policies and practices, formal and informal, related to JTF-GTMO personnel's interaction with defense team members, including advice/instruction to prevent defense counsel from learning the names of JTF-GTMO personnel and advice/instruction to prevent defense counsel from learning facts related to the conditions of confinement and/or the disciplinary status and physical handling of any detainees charged before a military commission.

Attached please find responsive documents.

D. All records and documentation regarding the written OCP Witness Instructions referenced in United States v. al-Iraqi, including the Instructions, date of promulgation of said Instructions, author, and all communication regarding development and implementation of said Instructions. This request includes but is not limited to any such Instructions currently or formerly used in the instant case or any other military commissions case.

Attached, please find the bench brief filed by the Prosecution in United States v. al-Iraqi. The legal positions herein are the policy of the Office of the Chief Prosecutor regarding witness access.

Respectfully submitted,

//s//

Nicole A. Tate
Assistant Trial Counsel

Clay Trivett
Managing Deputy Trial Counsel

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL HADI AL-IRAQI**	**AE 029A** **Government Bench Brief** On Defense Access to Witnesses 3 December 2014

1. Timeliness

The Government timely files this Bench Brief pursuant to the Military Commission's oral ruling during the 18 November 2014 session. *See* Unauthenticated/Unofficial Transcript ("Tr.") at 230.

2. Overview

In response to the Commission's request (Tr. at 230), the Government submits this Bench Brief on Defense Access to Witnesses ("Bench Brief") to outline the law governing such access and to provide proposed protocols.

Defense access to witnesses arises in two contexts under the Military Commissions Act of 2009 ("M.C.A."): (1) in the pretrial/discovery stage in the form of witness interviews, and (2) as testifying witnesses at hearings and trial on the merits.

As to the former, the M.C.A. treats access to witnesses for pretrial interviews as a matter of discovery. *See* Rule for Military Commissions ("R.M.C.") 701(j) ("Each party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence."). The rule allows the Defense the opportunity to request such interviews, but it does not guarantee an interview as a matter of right. The potential witness is always free to decline the interview. *See United States v. Morris*, 24 M.J. 93, 95 (C.M.A. 1987) (holding "a witness has no obligation to submit to a pretrial interview") (citing *United States v. Killebrew*, 9 M.J. 154 (C.M.A. 1980)).

The protocols by which a potential witness receives the Defense's initial request for a pre-trial interview are not delineated explicitly in R.M.C. 701. However, other authority, as well as practical realities, dictates that the protocols include measures to protect official government and classified information from improper disclosure. *See generally* 5 U.S.C. § 301 (implementing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1952) (holding departments and agencies within the United States Government may promulgate regulations that restrict how, when, and under what conditions government employees may be compelled to disclose official government information)); 10 U.S.C. § 949p-1 (protecting classified information throughout military commissions proceedings). Thus, the protocols will, as they must, vary depending on the type of witness and the type of information the witness possesses. To that end, the protocols proposed herein range from the least restrictive for witnesses who hold neither official nor classified information, to considerably more restrictive when considering contact with covert government employees.

As to the second circumstance in which access to witnesses might arise: witness testimony during hearings or trial on the merits is governed by R.M.C. 703. Where the Defense requests Government assistance in securing the presence of a witness, R.M.C. 703 requires the Defense to provide a synopsis of the expected testimony of each witness to show relevance and necessity. R.M.C. 703(c)(2)(B)(i). Because R.M.C. 703(c)(2)(B)(i) is modeled on its Rules for Courts-Martial ("R.C.M.") counterpart, the protocol for ensuring Defense witnesses' presence at hearings or trial on the merits will be largely the same as that employed under R.C.M. 703, accounting of course for added measures necessary to protect official government information (*see generally Touhy*, 314 U.S. at 468) and classified information (*see* Military Commissions Rule of Evidence ("M.C.R.E.") 505) from unauthorized disclosure.

3. <u>Facts</u>

On 2 June 2014, the Convening Authority referred non-capital charges against the Accused. On 18 June 2014, the Commission arraigned the Accused.

The Accused is charged with Denying Quarter, Attacking Protected Property, Use of Treachery or Perfidy, Attempted Use of Treachery or Perfidy, and Conspiracy to Commit Offenses Triable by Military Commission. These serious charges arise out of the Accused's decade-long role as a senior member of the al Qaeda terrorist network. *See* Referred Charge Sheet. As alleged in the Referred Charge Sheet, during the course of his conspiracy with members and associates of al Qaeda, the Accused's leadership roles took many forms, including commanding an al Qaeda terrorist training camp in Afghanistan; commanding al Qaeda guesthouses in Afghanistan; serving on al Qaeda's senior advisory council(s) during which he assisted in setting the terrorist policies and objectives of al Qaeda, which included killing Americans and other civilians; serving as a key al Qaeda liaison to the Taliban; commanding the al Qaeda insurgency in Afghanistan and Pakistan following Operation Enduring Freedom; and aiding al Qaeda's insurgency in their second theater in Iraq following Operation Iraqi Freedom. The nature of these allegations is of particular note to this Bench Brief, as they provide context for the Government's continued efforts to diligently monitor witness safety issues, as well as the Government's responsibility to manage the significant intersection between the facts of the case and sensitive government information and national-security concerns.

At a session before the Commission on 18 November 2014, the Military Judge requested that both parties provide "Bench Briefs" addressing the issue of access to witnesses by the Defense. *See* Tr. at 230.

4. <u>Law and Proposed Protocols</u>

Defense access to witnesses arises in two contexts: (1) in the pretrial/discovery stage in the form of witness interviews, and (2) as testifying witnesses during hearings or trial on the merits. As to the former, the M.C.A. treats access to witnesses for pretrial interviews as a matter of discovery. Specifically, R.M.C. 701(j) states, "Each party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness

or evidence." Thus, such access must be assessed through the lens of the rules governing discovery in military commissions.

Access to witnesses for testimony at a hearing or at trial on the merits is governed by R.M.C. 703. That rule is modeled on the procedures applicable in courts-martial, which require the Defense to request production of witnesses *via* the Government by providing a synopsis of the expected testimony of each witness to show relevance and necessity. R.M.C. 703(c)(2)(B)(i).

The former seems to be the origin of the Military Judge's request for briefing; nonetheless, this memorandum addresses both in turn.

I. R.M.C. 701—Access to Potential Witnesses for Pretrial Interviews as a Means of Discovery

The Defense is entitled to ask potential witnesses whether they are amenable to a pretrial interview. To the extent the Defense seeks the Government's assistance in such matters—which they should for all matters involving official government or classified information—the Government is prepared to accommodate all such requests that meet the discovery standard, and that are conducted in a manner that adequately protects official government information (*see generally* 5 U.S.C. § 301 (implementing *Touhy*, 340 U.S. 462))[1] and classified information (*see* 10 U.S.C. § 949p-1 *et seq*.).

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[1] The definition of what constitutes "official government information" is relatively consistent across the federal government. For example, in its regulations implementing *Touhy*, the Department of Justice defines "official information" as:

> Information regulated by 28 C.F.R. 16.21 et seq., falls into the following categories:
>
> A. Any material contained in the files of the Department;
> B. Any information relating to material contained in the files of the Department; or
> C. Any information acquired by an employee of the Department as a part of the performance of that employee's official duties or because of the employee's official status.

U.S. Attorneys Manual, Ch. 1-6.100. Similarly, the U.S. Army's *Touhy* regulations define "official information" as follows:

> All information of any kind, however stored, that is in the custody and control of the Department of Defense, relates to information in the custody and control of

There is likely little disagreement between the parties concerning the protocols for Defense pretrial access to potential witnesses who possess neither official government nor classified information. Indeed, the Government believes the typical courts-martial practice to which the Defense is accustomed likely will govern. But where the Defense seeks access to official government or classified information by way of an interview, the Government, and possibly the Commission, must be more involved in the process.

A. The Discovery Rules Are the Starting Point for Determining Defense Access to Potential Witnesses for Pretrial Interviews Concerning Official or Classified Information

The M.C.A. addresses pretrial witness access under the rubric of the discovery process. R.M.C. 701 states, in relevant part, "Each party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence." *See* R.M.C. 701(j).[2] Although the Defense characterizes such interviews as a matter of "independent investigation," where the Defense seeks to learn official or classified information, such requests are simply another way of seeking disclosures (albeit oral disclosures) akin to those made through the discovery process. Thus, such Defense requests are subject to the basic discovery rules applicable to military commissions.

> the Department, or was acquired by DoD personnel as part of their official duties or because of their official status within the Department while such personnel were employed by or on behalf of the Department or on active duty with the United States Armed Forces.

U.S. Dep't of the Army, Regulation 27-40 ("AR 27-40"), at 53.

[2] R.M.C. 701(j) is similar, but not identical to Rule for Courts-Martial ("R.C.M.") 701(e). R.C.M. 701(e) states: "Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence." The baseline obligation on the part of the Government is the same: the Government shall not unreasonably impede access to a witness or a piece of evidence. Indeed, the Discussion to R.M.C. 701(j) provides as follows:

> Convening authorities, commanders and members of their immediate staffs should make no statement, oral or written, and take no action which could reasonably be understood to discourage or prevent witnesses from testifying before a military commission, or as a threat of retribution for such testimony.

To the extent the Defense seeks pretrial access to witnesses to gather information it might otherwise request in discovery, the Government must first determine whether the witness and the information meets the applicable discovery standard. That is, the Government must determine whether the witness and the information are "material to the preparation of the defense" (R.M.C. 701(c)), meaning they are noncumulative and actually relevant, necessary, and helpful to the material preparation of the defense. *See* R.M.C. 701(c), Discussion (citing *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) ("[C]lassified information is not discoverable on a mere showing of theoretical relevance.")). Information "material to the preparation of the defense" includes potentially exculpatory information that reasonably tends to (a) negate the guilt of the accused, (b) reduce the degree of guilt of the accused, or (c) reduce the punishment. *See* 10 U.S.C. §§ 948a(b)(2)(A) and 949j(b); R.M.C. 701(e)(1); *see also Brady v. Maryland*, 373 U.S. 83, 88 (1963). Information "material to the preparation of the defense" also includes information that reasonably tends to impeach the credibility of a witness the Government intends to call at trial, or evidence that reasonably may be viewed as mitigation evidence at sentencing. *See* 10 U.S.C. § 949j(a); R.M.C. 701(e)(2)-(3); *see also Giglio v. United States*, 405 U.S. 150, 154-55 (1972).

Assuming the witnesses for which the Defense seeks pretrial access meet these standards, the Government must then assess what steps it must take to ensure that all official and classified information to which the Defense is not entitled is adequately protected during those interviews.

B. Unfettered, Unilateral Defense Access to Potential Former and Current Government Witnesses for Discovery Interviews Involving Official Information Would Vitiate Applicable Rules Governing the Disclosure of Official Information

To the extent the Defense seeks access to potential witnesses who possess official information, the law does not contemplate unfettered, unilateral Defense access to such witnesses as a means to acquire official information to which they are not otherwise entitled under the discovery rules.

It is axiomatic that the discovery rules are designed to be the means by which an accused acquires official government information, even if such information is in a form other than an official government document. *See generally* R.M.C. 701 (establishing the rules dictating what, how, and when information is disclosed to an accused in a military commission); Fed. R. Crim. P. 16 (establishing the same in federal civilian criminal trials). Indeed, federal courts routinely hold that an accused is foreclosed from attempting to circumvent the discovery rules to gain access to official information by other means. For example, criminal defendants may not use Freedom of Information Act ("FOIA") requests as a substitute for, or to enlarge, the scope of discovery of official information beyond Federal Rule of Criminal Procedure 16. *See, e.g.*, *United States v. U.S. Dist. Ct., Cent. Dist. of Cal., Los Angeles, Cal.*, 717 F.2d 478, 481-82 (9th Cir. 1983) (citing *Fruehauf Corp. v. Thornton*, 507 F.2d 1253 (6th Cir. 1974) (finding that FOIA was not "intended to serve as a substitute for criminal discovery")); *United States v. Murdock*, 548 F.2d 599, 602 (5th Cir. 1977) (holding FOIA was not intended "to enlarge the scope of discovery" in criminal matters); *see also NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (holding FOIA does not replace the traditional rules of discovery).

The government has an important interest in maintaining control over the disclosure of official information. As the Supreme Court stated in *Touhy*,

> When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, *indeed the necessity*, of centralizing determinations as to [how information is disclosed] is obvious.

340 U.S. at 468 (emphasis added). To that end, many government agencies have implemented regulations—often referred to as *Touhy* regulations—that govern how and when a party may compel testimony or acquire evidence or other official information from a witness who acquired such evidence or information in the context of their government employment.[3] *See* 5 U.S.C. § 301 (implementing *Touhy*).

[3] Courts have held that *Touhy* regulations apply in the context of criminal litigation. *See, e.g.*, *United States v. Soriano-Jarquin*, 492 F.3d 495, 504-05 (4th Cir. 2007); *United States v. Allen*, 554 F.2d 398, 406 (10th Cir. 1977). *Compare United States v. Barringer*, No. 5:12-MJ-

For example, the Department of Defense ("DoD") has promulgated, the "Housekeeping Statute," pursuant to 5 U.S.C. § 301, which regulates its employees' ability to respond to third-party subpoenas and provide testimony. *See* 32 C.F.R. §§ 97.1-97.6 n.1. These *Touhy* regulations apply to present and former military personnel and are applicable to all pretrial, trial, and post-trial stages of all existing, or reasonably anticipated, judicial or administrative actions, hearings, investigations, or similar proceedings before civilian courts, commissions, boards, or other foreign or domestic tribunals. 32 C.F.R. § 97.3(c). The *Touhy* regulations are likewise applicable to responses to formal or informal requests by attorneys or others in situations involving litigation. *Id*.

The Army's *Touhy* regulation is found at AR 27-40. It "governs the release of official information and the appearance of present and former DA [Department of the Army] personnel as witnesses in response for interviews, notices of depositions, subpoenas, and other requests or orders related to judicial or quasi-judicial proceedings." AR 27-40 at 7-1. The Army's *Touhy* regulation requires present and former DA personnel who receive a request for an interview related to actual or potential litigation, which appears to seek disclosures of official information, to immediately advise the appropriate SJA [Staff Judge Advocate] or legal advisor. *Id*. at 7-2(c). Section III of Chapter 7 addresses DA personnel as witnesses in private litigation. "Present DA personnel will refer all requests for interviews and subpoenas for testimony in private litigation through their supervisor to the appropriate SJA or legal advisor." *Id*. at 7-8(c).[4]

Such regulations, and the processes outlined therein, could be implicated as the Defense seeks the disclosure of official information in this Commission during witness interviews

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1803-RJ-1, 2013 U.S. Dist. LEXIS 25454, at *6 (W.D.N.C. Feb. 22, 2013) (stating in the context of the Army's *Touhy* regulations that "[n]either the authorizing statute, 5 U.S.C. § 301, nor the Department of Army regulations, 32 C.F.R. § 97.6, impose any such limitations), *with Alexander v. F.B.I.*, 186 F.R.D. 66, 70 (D.D.C. 1998) (stating, in the context of a *civil* case, that "[t]he Supreme Court's holding in *Touhy* is applicable only in cases where the United States is not a party to the original legal proceeding").

[4] The *Touhy* regulation for the Department of Defense, which AR 27-40 implements, is DoD Directive 5405.2 (July 23, 1985), *reprinted in* 32 C.F.R. pt. 516, app. C (2014).

whether the Defense seeks to interview potential witnesses on its own or with the Government's assistance. Simply invoking the phrase "independent investigation" is not a viable means to circumvent the various rules and procedures governing the disclosure of official information during criminal litigation. While the Defense, on their own, may identify present and former government employees who hold official information of some interest to the Defense, and may independently ask those individuals to submit to an interview about that information, the Defense should not be surprised if such tactics prove particularly unfruitful in light of the rules regulations described above. For example, the Defense cannot expect to receive discovery of official information by walking into the J. Edgar Hoover Building in downtown Washington, D.C., and announcing that they would like to review certain official files related to an accused, as well as interview all FBI agents involved in the investigation. The same is true of other government entities, including JTF-GTMO. Further, to the extent the Defense seeks Government assistance in identifying such individuals and facilitating pretrial discovery interviews, the Government, consistent with responsible practice, will advise those potential witnesses to seek proper counsel prior to disclosing any official information.

C. Unfettered, Unilateral Defense Access to Potential Witnesses for Discovery Interviews Involving Classified Information Would Vitiate Applicable Rules Governing the Disclosure of Classified Information

As the Commission is aware, this case involves a substantial volume of classified information. *See* AE 013D. To the extent the Defense seeks access to potential witnesses who possess classified information, the law does not contemplate granting the Defense unfettered, unilateral access to such witnesses as a means to acquire classified information to which they are not otherwise entitled under the rules of discovery. Indeed, doing so could lead to an unauthorized disclosure of classified information, a result specifically in conflict with the M.C.A. *See* 10 U.S.C. § 949p-l(a) (stating "[c]lassified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security");

AE 013D (this Commission's protective order governing the disclosure of classified information at each stage of the proceedings).

Classified information can never be subject to "open-file" discovery practices. Classified information—including Defense interviews designed to obtain such information—can only be disclosed in discovery if the information is noncumulative and actually relevant, necessary, and helpful to (i) a legally cognizable defense, (ii) rebuttal of the Government's case, or (iii) sentencing. *See* 10 U.S.C. § 949p-4(a) (2); M.C.R.E. 505(f)(l)(B); *Yunis*, 867 F.2d at 623 (observing "classified information is not discoverable on a mere showing of theoretical relevance."); *see also United States v. Abu-Jihaad,* 630 F.3d 102,142 (2d Cir. 2010) (holding where the Government invokes the classified-information privilege, even otherwise discoverable information need not be disclosed where it is, for example, "cumulative of information already provided to [the accused] in the course of discovery"); *United States v. Mejia,* 448 F.3d 436 (D.C. Cir. 2006) (applying *Yunis*); *United States v. Smith,*780 F.2d 1102, 1109-10 (4th Cir. 1985) ("A district court may order disclosure only when the information is at least essential to the defense, necessary to his defense, and neither merely cumulative or corroborative, nor speculative."). Similarly, otherwise discoverable information need not be produced if it fails to counter the Government's case or bolster a defense. *See United States v. Stewart,* 590 F.3d 93, 131 (2d Cir. 2009); *United States v. Aref,* 533 F.3d 72, 79 (2d Cir. 2008); *United States v. Bhutani,* 175 F.3d 572, 577 (7th Cir. 1999).

Even where the Government determines that classified information is discoverable, it may exercise its statutory right to produce substitutions, summaries, or statements admitting relevant facts instead of disclosing the original underlying information. *See* 10 U.S.C. § 949p-4(b)(l). Where the Government has proposed a substitution for discoverable classified information, the relevant question is whether the portion of the underlying documents that is not included in the substitution is helpful or material. *See, e.g., In re Terrorist Bombings of U.S. Emb. in E. Afr.*, 552 F.3d 93, 124-25 (2d Cir. 2008). Application of this standard is consistent with the underlying principles of Executive Order No. 13,526, which provides a

person may have access to classified information only if "the person has a need-to-know the information." Exec. Order No. 13,526, 3 C.F.R. 298, 314 (2009). That standard applies even if the person has an appropriate security clearance. *See* Exec. Order 13,526. Further, in many instances, the potential witness the Defense seeks to interview will not have the independent authority, or necessary background and context, to determine whether the Defense has a "need to know" certain classified information without further guidance.

These rules apply equally to pretrial discovery interviews of potential witnesses, not just information disclosed in paper form. Litigants cannot make an end-run on these rather rigorous standards by simply asking to interview an individual who happens to know the classified information. To do so would vitiate the entirety of the law governing the handling of classified information during litigation, as well as the Commission's Amended Protective Order #1. AE 013I.

Where the Defense seeks to interview a potential witness about classified information, the Defense should submit to the Government a general description of the classified subject matter it seeks from the potential witness.[5] To the extent the Government agrees that the potential witness and the subject matter meet the applicable discovery standard, the Government will employ the appropriate protocol (described in Part I.F. below) to inquire whether the potential witness is amenable to a Defense interview. If the parties cannot agree on whether a particular witness or piece of information is relevant, it would be appropriate for the Commission to determine whether the witness and information are noncumulative and actually relevant, necessary, and helpful to the material preparation of the defense. If so, the Commission may then have to consider whether a Government-proposed substitution, stipulation, or other relief places the Accused in substantially the same position as the interview, just as the Commission does with other classified information pursuant to 10 U.S.C. § 949p-4.

[5] This is not unlike an ordinary discovery request the Defense routinely provides the Government, which describes the type of information the Defense seeks.

This process is both necessary and consistent with the process employed in cases under the Classified Information Protection Act ("CIPA"), 18 U.S.C. App. §§ 1-16, in federal district court.[6] For example, in *United States v. Moussaoui*, the defendant "moved for access to Witness A, asserting that the witness would be an important part of his defense." 382 F.3d 453, 458 (4th Cir. 2004). The district court found Witness A was "a national security asset," but nonetheless granted Moussaoui's request for pretrial access. *Id.* While the government's appeal from the district court's order was pending, the U.S. Court of Appeals for the Fourth Circuit stayed the government's appeal and remanded the case with instructions for the district court to give the government "an opportunity to propose substitutions for the classified information authorized to be disclosed . . . ." *United States v. Moussaoui*, No. 03-4162, 2003 WL 1889018, at *1 (4th Cir. Apr. 14, 2003) (citing Section 6 of CIPA). Thus, where the Defense seeks pretrial access to a witness to gather classified information, the Commission must grant the Government the opportunity, consistent with M.C.R.E. 505, to seek appropriate relief.[7]

There is no authority that grants the Defense unfettered, unilateral access to interview witnesses to discuss classified information. To do so would contravene an entire body of law

[6] As the Commission's protective order reflects, 10 U.S.C. § 949p-1 *et seq*. and M.C.R.E. 505 are modeled on CIPA. *See* AE 013D. Indeed, the M.C.A. provides CIPA is "authoritative in the interpretation" of the M.C.A's provisions governing discovery of classified information, except where the M.C.A. is expressly inconsistent with CIPA. *See* 10 U.S.C. § 949p-1(d); *see also* 10 U.S.C. § 949p-4(a)(2) (requiring judges to apply "standards generally applicable to discovery of or access to classified information in Federal criminal cases").

[7] Similar procedures were crafted in *United States v. Gowadia*, No. CR. NO 05-00486, 2010 U.S. Dist. LEXIS 33325 (D. Haw. Apr. 2, 2010), where the defendant moved for leave to contact potential witnesses in foreign countries. *Id*. at *1. After the leave was granted by the court, the defendant filed a supplemental notice pursuant to Section 5 of CIPA, as the witnesses the defendant sought to interview held classified information. *Id*. The defendant filed the Section 5 notice to seek clarification as to how and about what he could interview the potential witnesses. *Id*. at *3. As most of these witnesses were in foreign countries, the proposed contact was to be by telephone, video-conference, facsimile, or other electronic means, and not in person. *Id*. at *2. In crafting its detailed order laying out the parameters of contacting the foreign witnesses, the court stated, "While it is not clear that § 5 was designed to govern pretrial witness interviews, this court finds the procedure helpful to the matter at hand and adopts it for purposes of resolving the issue of defense contacts with potential witnesses in foreign countries who may have received classified information without authorization." *Id*.

central to discovery practice in national-security cases, and it would render significant portions of the M.C.A. meaningless.

D. While the Defense May Seek To Interview a Potential Witness, Those Witnesses Are Under No Obligation To Consent

The law is well-settled: the Defense is not entitled to a compulsory pretrial interview as a matter of right. Mere desire to speak with a potential witness pretrial does not create an absolute right to do so. *See Morris*, 24 M.J. at 95 (holding "a witness has no obligation to submit to a pretrial interview").

The same is true in federal district court.[8] *See, e.g.*, *United States v. Bryant*, 655 F.3d 232, 239 (3d Cir. 2011) (finding "no right of a defendant is violated when a potential witness freely chooses not to talk; a witness may of his own free will refuse to be interviewed by either the prosecution or the defense") (quoting *Kines v. Butterworth*, 669 F.2d 6, 9 (1st Cir. 1981)); *United States v. Medina*, 992 F.2d 573, 579 (6th Cir. 1993) ("[A] defendant's right to access is tempered by a witness' equally strong right to refuse to say anything."); *United States v. Pinto*, 755 F.2d 150, 152 (10th Cir. 1985) (concluding the right to accept or deny an invitation to be interviewed belongs to the witness); *United States v. Bittner*, 728 F.2d 1038, 1041 (8th Cir. 1984) ("Although the prosecution and the defense have an equal right to interview witnesses in a criminal proceeding, the defendant's right of access is not violated when a witness chooses of her own volition not to be interviewed."); *United States v. Rice*, 550 F.2d 1364 (5th Cir. 1977) ("All that a defendant is entitled to is *access* to a prospective witness); *United States v. Savage*, Nos. 07-550-03, 07-550-04, 07-550-05, 07-550-06, 2013 U.S. Dist. LEXIS 9363, at *7 (E.D. Pa. Jan. 23, 2013) ("There is no constitutional guarantee granted to a defendant to interview a witness."). Indeed, this is a point of law about which there is no credible debate.[9]

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[8] While not squarely found in the text of R.M.C. 701, access to witnesses for discovery/investigative purposes should be the same as that in criminal proceedings in federal district court. *Cf.* R.M.C. 703, Discussion ("The 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.")

[9] At the Military Commission session on 18 November 2014, the Commission confirmed this is the well-settled the rule. *See* Tr. at 198.

A due-process violation occurs only "[if] the prosecution impermissibly interferes with the defense's access to a witness" and such conduct "undermines the fundamental fairness of the proceeding." *Bryant*, 655 F.3d at 238. The Government's conduct in this Commission is, has always been, and will remain well-within the applicable law.

E. Consistent with the Law, as Well as the Obligations of Prosecutors When Consulting with Victims and Witnesses, the Government Properly Advises Potential Witnesses of Their Rights Concerning Pretrial Interviews

Consistent with all governing authority, the Government routinely advises potential witnesses of their respective rights regarding pretrial interviews by both the Government and the Defense.

The reality is, most witnesses who elect to be interviewed by the Government do so during the investigation stage of a case, which often occurs months—sometimes years—before someone is charged with a crime and before defense counsel enters into an attorney-client relationship with the accused. Even during these early stages, it is commonplace for potential witnesses to ask about their rights and obligations with respect to speaking to the media, a defense team, or even the Government. It is standard practice to respond to such inquiries with the neutral advice described herein. Indeed, the Government has done so consistently in this case orally, in writing, or both. *See* Attachment B, Email to Potential Witness Concerning His/Her Rights and Obligations Regarding Pretrial Interviews.

The attached advice-of-rights letter is an example of the lawful, neutral advice the Government provides to potential witnesses. In at least three different places in the attached advice-of-rights letter, the Government makes clear it is "entirely [the witness's] choice to speak or not speak with anyone about this matter, including the Prosecution." *See* Attachment B. The Government also properly advises the witness that he/she is free to ask questions of the persons contacting him/her about an interview, and advises the witness that he/she can determine the

time, place, and manner of the interview.[10] *See id.* This is meant to empower the witness to engage in a dialogue with the Defense and ask questions rather than summarily dismissing the request. This dialogue gives the Defense an opportunity to assuage the potential witness' concerns about such interviews. Finally, the Government properly advises witnesses to seek counsel from their respective agencies as to what, if any, obligations they have with respect to disclosing official or classified information. *See id.*

There can be little doubt that this is responsible advice, as it is standard practice in federal criminal litigation throughout the United States and has been blessed repeatedly by reviewing courts.[11] For example, in *United States v. Pinto*, 755 F.2d 150 (10th Cir. 1985), the defendant argued that he was denied a fair trial because the victim of his assault refused to talk to the defense investigator. *Id.* at 152. When the defense investigator came to the victim's home to attempt a pretrial interview, the victim informed him that the U.S. Attorney's Office told her that she had the right to speak or not to speak with anyone from the defense. *Id*. The Tenth Circuit found informing the victim/witness of her right to speak or not to speak to anyone "did not impermissibly interfere with the victim/witness' choice." *Id*. Similarly, in *United States v. Rice*, 550 F.2d 1364 (5th Cir. 1977), the government's case depended, in large part, on the testimony of an unindicted co-conspirator, William Kilgore, who was in protective custody and appeared at trial under a grant of "informal" immunity. *Id.* at 1367. On appeal, the defendants argued the district court erred by refusing to compel Kilgore to submit to a pretrial interview by defense counsel. *Id*. at 1374. In that case, the government made Kilgore available to the defendants for an interview, but he refused to answer any questions about the case. *Id*. During litigation over

[10] Notifying the potential witness of his/her right to be accompanied by a personal representative, counsel, or even the prosecutor at the sole discretion of the witness does not suffer the same infirmity as that found in *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966) (holding that a prosecutor's advice that witness should not talk to anyone unless the prosecutor was present is a violation of due process).

[11] At the session on 18 November 2014, the Defense seemed to be unaware of this practice and expressed surprise that the Government informs all potential witnesses of their respective rights and obligations concerning interviews by both the Government and the Defense. *See* Tr. at 203.

the issue, Kilgore told the district court that the government advised him that he could talk to defense counsel and that the matter was "strictly up to him." *Id*. The Fifth Circuit found Kilgore's decision was his own and rejected the defendants' argument. *Id.* Numerous other courts have held similarly. *See, e.g.*, *United States v. Tipton*, 90 F.3d 861, 889 (4th Cir. 1996) (holding "there is no right to have witnesses compelled to submit to interview, hence no violation by a prosecutor's advising the witnesses to that effect"); *United States v. Black*, 767 F.2d 1334, 1337-38 (9th Cir. 1985) (agreeing with all other circuits that merely informing a witness that he/she may decline a defense interview request is not improper); *United States v. White*, 454 F.2d 435, 439 (7th Cir. 1971), *cert. denied*, 406 U.S. 962 (1972) (holding the fact that the government informed potential witnesses of their right not to submit to an interview did not deny the defendant a fair trial).

What is more, such advice is *mandated* by statutes concerning the rights of victims and witnesses.[12] The Department of Defense, for example, implemented specific regulations governing the right of victims and witnesses. *See* U.S. DEP'T OF DEF. DIR. 1030.1, VICTIM AND WITNESS ASSISTANCE (Apr. 13, 2004) ("DoDD 1030.01") and U.S. DEP'T OF DEF. DIR. 1030.2, VICTIM AND WITNESS ASSISTANCE (Jun. 4, 2004) ("DoDD 1030.2"). This is of particular note for the Commission, as the Regulations for Trial by Military Commission ("R.T.M.C.") adopt DoDD 1030.01 and DoDD 1030.02. *See* R.T.M.C. at ¶ 16-1.

Each branch of the military has implemented DoDD 1030.01 and DoDD 1030.02 through various regulations. For example, the Army implemented U.S. Army Regulation 27-10 ("AR 27-10"), LEGAL SERVICES, Chapter 17 (Oct. 3, 2011), which states, in relevant part, "This chapter . . . establishes policy, designates responsibility, and provides guidance for the assistance and treatment of those persons who are victims of crime and those persons who may be witnesses in criminal justice proceedings." AR 27-10, ch. 17-1. Chapter 17 "is intended to

[12] It should be noted that many of the potential witnesses in this case are also victims. Many potential witnesses were the subject of the attacks in which the Accused is alleged to have had some role. Some were injured, while others witnessed death and injury to their colleagues.

apply to all victims and witnesses in U.C.M.J. or Federal court proceedings or investigations." *Id*. at 17-3. The objectives of the policies and procedures contained in this Chapter are "[t]o ensure that victims of crimes and witnesses *are advised of and accorded the rights* described in this chapter . . . ." *Id*. at 17-4 (emphasis added). Section IV of Chapter 17 discusses witness services and imposes on the trial counsel, the victim-witness liaison, or other Government representative a number of duties with respect to notifying witnesses of their various rights. *Id*. at 17-17a. Specifically, "[w]itnesses should be advised of the stages in the military criminal justice system, the role that they can be expected to play in the process, and how to obtain additional information concerning the process and the case." *Id*. at 17-17(b). It is important to note that this directive, as well as the other service directives, places affirmative obligations on government officials, including trial counsel, to advise witnesses in criminal cases of their various rights.

Similar regulations govern victim and witness rights in federal civilian courts. *See* 18 U.S.C. § 3771 (The Crime Victims' Rights Act). Indeed, advising potential witnesses of their right to speak or not speak with those who might inquire has become so fundamental that many U.S. Attorney's Offices have posted some version of the advice found in Attachment B on their websites for any and all victims and witnesses who may have questions.[13]

Thus, the advice of rights the Government provided, and will continue to provide in the future, is sound practice.

[13] *See, e.g.*, "Coming to Court," The United States Attorney's Office for the Western District of Louisiana, http://www.justice.gov/usao/law/vicwit/vns_comingtocourt.pdf (last visited Dec. 2, 2014); "Victim-Witness Program Witness Information," The United States Attorney's Office for the Western District of Washington, http://www.justice.gov/usao/waw/Programs/Victim%20Witness/victim_witness_witnessinfo.html (last visited Dec. 2, 2014); "Victim Witness—Coming to Court," The United States Attorney's Office for the Eastern District of Wisconsin, http://www.justice.gov/usao/wie/vicwit/coming_to_court.html (last visited Dec. 2, 2014).

F. Protocols for Providing the Defense With Access to Potential Witnesses for Pretrial Discovery Interviews

As noted above, the universe of potential witnesses, and the information they hold, span a continuum of sensitivity. Thus, the Government crafted protocols for Defense access to potential witnesses for pretrial discovery interviews that reflect the law and the relative sensitivity of each type of witness.[14] The five general categories (moving from least restrictive access to the most restrictive) are the following: (1) potential witnesses who do not possess official or classified information; (2) potential witnesses who possess official and/or classified information, but are not, and were not, otherwise employed in sensitive positions; (3) potential witnesses who possess official and/or classified information who are, or were, employed in sensitive positions; (4) potential witnesses who are, or were, employed in a covert capacity; and (5) potential foreign witnesses who do not reside in the United States. The Government offers protocols for Defense access to each in turn below.

1. Potential Witnesses Who Do Not Possess Official or Classified Information

The Defense is free, at their discretion, to approach any witness who does not possess official or classified information and inquire whether they are willing to consent to a pretrial interview. To the extent the Defense seeks Government assistance with contact information for those witnesses, the Government will attempt to provide it so long as the witnesses meet the discovery standard.[15] The Defense will find that this category of witness allows for the type of

[14] Each of these protocols presumes that the Government agrees the witness in question and the information the Defense seeks meets the discovery standard articulated above, or that the Commission has entered an order holding as much, and that the Government has had an opportunity to pursue all relief it seeks pursuant to M.C.R.E. 505.

[15] The Commission's Protective Order #3 To Protect Against Disclosure of Sensitive But Unclassified Information in Discovery and During Military Commission Proceedings (AE 014A) specifically addresses the names of potential witnesses, but it does not specifically address witnesses' contact information or other personal identifying information ("PII"), as the Government does not routinely disclose PII in discovery.

Given the nature of this case, however, the Government will seek a protective order, if necessary, restricting the Defense from providing the Accused, the media, or anyone outside of specific members of the Defense team with any witness contact information. Because the disclosure of such information actually could have a chilling effect on a potential witness's

unfettered access to which they are accustomed in typical courts-martial practice involving crimes that do not have official government information or classified information at issue. Aside from attempting to provide necessary contact information, and properly protecting that information from inappropriate disclosure, the Government expects to have very little involvement in this process.[16]

2. Potential Witnesses Who Possess Official and/or Classified Information But Are Not, and Were Not, Otherwise Employed in Sensitive Positions

For witnesses who are not currently nor previously employed in sensitive positions, the Government's primary obligation is to ensure that any potential interviews do not improperly disclose official or classified information beyond that to which the Defense is entitled.

Once it has been established that the witness is noncumulative and actually relevant, necessary, and helpful to the material preparation of the defense, and the proper parameters of the interview have been established through the relevant procedures before the Commission (M.C.R.E. 505 or other applicable means),[17] the Government will provide the Defense with the appropriate contact information for the potential witness (governed by an appropriate protective order), and it will not seek to preclude the Defense from attempting to contact the potential witness to inquire whether he/she is amenable to an interview.

Should the potential witness elect to speak with the Defense, the Government will request that the Defense join them in informing the witness prior to the interview of the parties' agreement, or the Commission's ruling, regarding the proper subject matter of the interview, and

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willingness to speak with the Defense, the Government is hopeful that a measure limiting disclosure of contact and/or PII information will not generate additional contested litigation.

[16] Because the Government already advised many of these witnesses about their rights concerning these interviews, the Government will not need to contact the witness again to provide that advice. If upon being contacted by the Defense, however, the potential witness contacts the Government and inquires about their rights, the Government will provide them with the same lawful advice provided in the past.

[17] Litigation on these issues will be unnecessary where the parties agree to the scope of what information is relevant to the interview.

remind the potential witness to seek proper advice from his/her relevant government agency as to how to properly handle official and/or classified information during the interview.

3. Potential Witnesses Who Possess Official and/or Classified Information Who Are, or Were, Employed in Sensitive Positions

In addition to possessing official and classified information, some potential witnesses may work in sensitive government positions, or did so during the period about which the Defense seeks to interview them. These sensitivities can take on a variety of forms.

Once it has been established that the witness is noncumulative and actually relevant, necessary, and helpful to the material preparation of the defense, and the proper parameters of the interview have been established through the relevant procedures, the Government will contact the witness, or the witness's relevant agency, and advise the witness as follows, or provide the relevant agency with the following suggested advice of rights:

> In the matter of *United States v. Abd al Hadi al-Iraqi*, a case currently being prosecuted in a military commission at U.S. Naval Station Guantanamo Bay, Cuba, the Defense team for Mr. Hadi has identified you as an individual they would like to interview. Please know that your status is only that of a potential witness.
>
> I am contacting you to inform you of the request, inform you of some of your rights and obligations with respect to that request, and to ask you whether you are willing to make yourself available for a telephone call from the Defense team during which they will make the request themselves and answer any questions you may have.
>
> Regarding the request for an interview, you have the absolute right to participate in an interview by Mr. Hadi's Defense team. You also have an equal right not to do so, if you choose. That said, I encourage you to agree to at least an initial telephone call with Mr. Hadi's Defense team to afford them the opportunity to inquire about the interview themselves.
>
> During the initial telephone call, you are free to ask the Defense team questions about the subject matter of the interview, who will attend on their behalf, and any other questions you believe will assist you in making a decision whether to ultimately consent to an interview. You also may have an attorney join the call if you choose. You can retain an attorney, or you can ask that an attorney from the relevant agency join you in the interview. Again, the choice is yours to make.
>
> Please note that participating in such an interview might aid the matter by expediting the proceedings to trial on the merits—a result favorable to the

> Defense and the Government alike. We encourage you to bear that in mind when making your decision.
>
> I reiterate, you have the absolute right to speak or not speak with Mr. Hadi's Defense team. The choice is yours alone. If you would like to speak with an attorney, including an attorney with the relevant agency, prior to making your decision, you are free to do so.

For those potential witnesses who decline to take even the initial telephone call from the Defense, the Government will dutifully report their response. For those potential witnesses who agree to speak with the Defense by telephone,[18] and ultimately agree to be interviewed, the Government will provide the following advice to the witness, or provide the relevant agency with the following suggested advice of rights:

> You have the right to place conditions on the interview if you would like. Such conditions could include requiring that the interview be conducted in person, over the telephone, or even via email. You may elect to have someone present during the interview. This can be a support person, an attorney who represents you, or even a member of the Prosecution and/or the investigative agents assigned to this matter, if you choose.
>
> Through the course of the litigation of this matter, the Government has produced a number of relevant reports and other materials to Mr. Hadi's Defense team. This may include reports and materials that you generated or that otherwise relate to your work or your employment. You may request to review any such materials prior to the interview, if possible.
>
> Significantly, this interview might involve official or classified information. If you have any questions concerning your obligations that pertain to the disclosure of such information, please contact the appropriate person within the relevant government agency and seek counsel on such matters.
>
> Finally, to the extent this interview may involve classified information, it will have to be conducted in a properly-rated secure facility or over a properly-rated secure communications system. The Government will assist in making these resources available.

The Government then will assist the Defense, if needed, to arrange for a properly rated secure facility or properly rated secure communications system.

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[18] If the level of sensitivity allows, and the potential witness is amenable, the Government is willing to ask the potential witness to meet with the Defense in person to hear their initial request for an interview.

As noted above, there may be instances where a representative of the relevant agency advises the witness. On those occasions, the foregoing language may vary to account for, among other things, agency specific obligations with respect to official government or classified information. Where possible, a law enforcement agent will accompany the person giving the advice of rights to serve as a witness to the events.

4. Potential Witnesses Who Are, or Were, Employed in a Covert Capacity

Should the Defense request a pretrial interview of a potential witness who is currently, or was previously, employed in a covert capacity, the measures accompanying that request will necessarily have to be more restrictive.

First, the national-security implications of inadvertently revealing the identity of a covert employee are so great that the Government will insist upon closely reviewing whether the witness is noncumulative and actually relevant, necessary, and helpful to the material preparation of the defense, as well as considering all processes available under M.C.R.E. 505 to seek substitutes, stipulations, or other relief. It is the Government's expectation that pretrial access to such witnesses will be in only the exceptional circumstance.

If after all necessary litigation, the Commission determines there is no adequate substitution, stipulation, or other relief that can provide the Defense with the information to which they are entitled, the Government then will have to assess whether the interview can occur without jeopardizing national-security matters beyond an acceptable level.

If the Government determines that such an interview can occur with an acceptable level of risk, the Government will take the following steps to attempt to make the potential covert witness available for a telephone interview.[19] As an initial matter, the Government will notify the appropriate government agency that the Defense has requested a pretrial interview of one of

[19] It is unlikely that the witness will be able to be interviewed in person or even over video-conference.

its present or past covert employees. In doing so, the Government also will provide the agency with the following suggested advice of rights for the potential covert witness:[20]

> In the matter of *United States v. Abd al Hadi al-Iraqi*, a case currently being prosecuted in a military commission at U.S. Naval Station Guantanamo Bay, Cuba, the Defense team for Mr. Hadi has identified you as an individual they would like to interview. Please know that your status is only that of a potential witness. I am contacting you to inform you of their request, inform you of some of your rights and obligations with respect to the request, and to ask you whether you are amenable to such an interview.
>
> You have the absolute right to participate in an interview with Mr. Hadi's Defense team if you so choose. You also have an equal right not to do so. Please note that participating in such an interview might aid the matter by expediting the proceedings to trial on the merits—a result favorable to the Defense and the Government alike. We encourage you to bear that in mind when making your decision. Nevertheless, the choice to participate in such an interview is yours alone.
>
> Your identity has not been disclosed to the Defense team. If you choose to be interviewed, such an interview likely would take place over a secure telephone line. During the interview, you will be designated by a pseudonym. In any event, no matter the means of the interview, your identity and location will not be disclosed.
>
> If you choose to be interviewed, you can elect to have your own attorney present. You can retain an attorney, or you can ask that an attorney from your respective agency join you in the interview. You also may ask that the Prosecutor and/or the investigative agents assigned to this matter be a part of the interview. Again, the choice is yours to make.
>
> Through the course of the litigation of this matter, the Government has produced a number of relevant reports and other materials to Mr. Hadi's Defense team. This may include reports and materials that you generated or that otherwise related to your work or your employment. You may request to review any such prior reporting or other relevant materials prior to the interview, if possible.
>
> Significantly, this interview likely will involve official and/or classified information. If you have any questions concerning your obligations that pertain to the disclosure of such information, please contact an appropriate person within the relevant government agency and seek counsel on such matters.

[20] As above, the representative agency may provide language with variations to account for, among other things, agency specific obligations with respect to official government or classified information. Also as above, where possible, a law enforcement agent will accompany the person giving the advice of rights to serve as a witness to the events.

> Finally, to the extent this interview may involve classified information, it will have to be conducted over a properly rated secure communications system. If you elect to participate in this interview, the Government will make arrangements for such a communications system to be available.
>
> I reiterate, you have the absolute right to speak or not speak with Mr. Hadi's Defense team. The choice is yours alone. If you would like to speak with an attorney prior to making your decision, you are free to do so.

The Government dutifully will report the potential covert witness's response. For those potential covert witnesses that ultimately consent to an interview, the Government will assist the Defense by arranging for properly rated secure communications systems.

5. Potential Foreign Witnesses

This case might include testimony and other evidence from foreign naturals who reside outside of the United States. The Government anticipates the Defense might seek pretrial interviews of these foreign nationals. Because these foreign nationals are outside of the compulsory processes of the Commission and any other U.S. court, the Government has no power to compel these witnesses to be available for a pretrial interview. *See generally Mejia*, 448 F.3d 436 (holding the government is not obliged to exercise its treaty powers to seek information for a defendant). If the Defense, nonetheless, seeks to interview a foreign national in that witness's respective country of residence, the Defense should be aware of all applicable rules.

Typically, governments require foreign visitors to declare the purpose of their visit upon entry. If the Defense intends to travel to a foreign country to conduct an investigation, they would enter that country for a purpose other than tourism. Governments often have special requirements for foreign visitors entering for purposes other than tourism. The Defense should avail themselves of the resources available at the Department of State ("DoS") for assistance in such matters. Specifically, the DoS website offers guidance on international judicial assistance

for attorneys (other than those who represent the United States) through the Letters Rogatory process.[21]

In addition to assistance with Letters Rogatory, the DoS offers guidance to "U.S. Federal officials"[22] traveling abroad on judicially related official business. Specifically, the DoS has promulgated the following rules:

> Travel of U.S. Federal, State, and local government officials traveling abroad on judicially-related official business (such as interviewing witnesses, taking depositions, or conducting investigations or inspections) requires not only post country clearance as described in 2 FAM 116, but also host country clearance. This usually means a diplomatic note must be sent to the Ministry of Foreign Affairs explaining the purpose of the travel and requesting permission for the U.S. official to conduct the judicial assistance related activity.

Travel Abroad of U.S., State, and Local Government Officials, 7 Department of State Foreign Affairs Manual, at b (2012) ("7 FAM 941"). The manual further states:

> Most host governments regard the conduct of such business by foreign authorities as a violation of sovereignty unless cleared in advance through diplomatic channels. Travel without prior clearance can result in the arrest, detention, expulsion, or deportation of the official and can negatively affect U.S. policy interests and future attempts to gain host country assistance.

7 FAM 941 at d. Further, for members of the DoD traveling on official orders to foreign countries, there are additional requirements to facilitate foreign travel clearance as outlined in the Department of Defense Foreign Clearance Guide ("DoD FCG").[23] The DoD FCG provides

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[21] *See* http://travel.state.gov/content/travel/english/legal-considerations/judicial.html (last visited Dec. 2, 2014).

The Government's recitation of these regulations is not meant to serve as a substitute for the Defense's own research and analysis into their obligations when seeking to travel internationally to represent the Accused.

[22] While the Defense is not representing the United States in this matter, both attorneys are officers in the U.S. military and are acting in that capacity as they represent the Accused. The Government raises these issues not to dictate Defense actions, but to alert them to potential issues so that they do not run afoul of any rules or regulations inadvertently.

[23] *See* https://www.fcg.pentagon.mil/fcg.cfm (last visited Dec. 2, 2014) ("Since the DoD FCG is directive in nature for all DoD and DoD-sponsored travel abroad, travelers must ensure they comply with this Guide.").

necessary information for all DoD personnel who travel to foreign countries, as well as general information on foreign locations.

The Government does not purport to identify all proper visa or other requirements the Defense might need before seeking to interview foreign nationals in this case.

If, on the other hand, the Defense seeks to speak with any foreign nationals *via* telephone, video-conference, or some other electronic means, the Government is willing, where possible, to pass such requests directly to the relevant foreign officials directly to see if those governments are amenable to facilitating defense interviews.[24]

II. R.M.C. 703—Production of Witnesses and Evidence for Testimony at Pretrial Hearings or at Trial on the Merits

The Accused has the right to present evidence, cross-examine witnesses, and compel the attendance of witnesses in his defense. *See* 10 U.S.C. §§ 948a(b)(2)(A), 949j(a)). R.M.C. 703 governs the production of witnesses and evidence at hearings, trials on the merits (including sentencing), and on interlocutory questions. *See* R.M.C. 703(a), (b)(1)-(2). The process by which the Defense seeks witnesses for testimony at hearings, trial on the merits, and on interlocutory matters is fairly well-defined in the M.C.A., and it requires no additional protocols beyond those established by the rule.

R.M.C. 703 is modeled on the procedures applicable in courts-martial. Like R.C.M. 703, R.M.C. 703 grants both the Defense and the Government equal right to "the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary." R.M.C. 703(b). Also like R.C.M. 703(c)(2), R.M.C. 703(c)(2) requires the Defense to provide the Government with a written list of requested witnesses (*see* R.M.C. 703(c)(2)(A)), and to include a "synopsis of the expected testimony" of each witness "sufficient to show its relevance and necessity." *Id.* at (B)(i). After reviewing the synopsis submitted by the Defense:

[24] The Government can only pass these requests informally where authorized by both the United States Government and the relevant foreign government.

> [T]rial counsel shall arrange for the presence of any witness listed by the defense unless the trial counsel contends that the witness' production is not required under this rule . . . . If the trial counsel contends that the witness' production is not required under this rule, the matter may be submitted to the military judge . . . .

Id. at (2)(D).

Courts-martial have long used these same procedures, and their legality is beyond debate. *See, e.g.*, *United States v. Breeding*, 44 M.J. 345, 352 (C.A.A.F. 1996) (holding the defense must justify the relevance and materiality of a trial witness to enable the court to determine properly which witnesses are cumulative and unnecessary and that such processes are constitutional); *United States v. O'Neil*, 2008 CCA LEXIS 220, at *35-36 & n.15 (N-M. Ct. Crim. App. June 19, 2008) (holding R.C.M. 703 is constitutional and the exclusion of witnesses whose testimony was found irrelevant under R.C.M. 703 does not violate the rights to due process or compulsory process under the Fifth and Sixth Amendments).

Unlike in federal civilian courts, the Government is responsible for compelling the presence of Defense witnesses before the Commission. At its core, witness production under R.C.M. 703 (the R.M.C. 703 corollary) is a function of the Government's subpoena power applied in a military court context. *See* Manual for Courts-Martial ("M.C.M."), 1984, Analysis of Rules for Court-Martial, App. 21-32. In relevant part, the M.C.M. states:

> The procedure for obtaining witnesses under Fed. R. Crim. P. 17 is not practicable in courts-martial. Under Fed. R. Crim. P. 17, witnesses are produced by process issued and administered by the court. In the military trial judiciary, no comparable administrative infrastructure capable of performing such a function exists, and it would be impracticable to create one solely for that purpose. The mechanics and costs of producing witnesses are the responsibility of the command which convened the court-martial… Note, however, that any dispute as to production of a witness is subject to a judicial determination. *Experience has demonstrated that these administrative tasks should be the responsibility of trial counsel.*

Id. (emphasis added). Stated simply, if the Government agrees with the Defense as to the relevance and necessity of a requested witness, the Government issues the subpoena. If not, the Defense may bring the matter to the military judge to determine whether the Government shall

issue the subpoena. *See United States v. Sweeney*, 34 C.M.R. 379, 382 (C.M.A. 1964) (holding any "disagreement" between defense counsel and the government about the "necessity" of a requested witness "should be referred in writing to the court, together with a synopsis of the expected testimony").

As with discovery, the Government must protect both official and classified information from improper disclosure during witness testimony. *See, e.g.*, 5 U.S.C. § 301; 10 U.S.C. § 949p-1; M.C.R.E. 505(g) (requiring the Accused to notice the Government and the Commission if he reasonably expects to disclose classified information during a hearing or at trial on the merits); M.C.R.E. 505(h) (outlining the procedures for a hearing on the "use, relevance, or admissibility of classified information"); *see also United States v. Rosen*, 518 F. Supp. 2d 798 (E.D. Va. 2007) (outlining the procedural steps and various notices a defense team must undertake in order to compel trial testimony that implicates both *Touhy* regulations and CIPA).

Thus, to compel a witness's testimony before the Commission, the Defense must submit a list of witnesses containing contact information for the witnesses, if known, and a synopsis of expected testimony demonstrating relevance and necessity in accordance with R.M.C. 703(c)(2). Then, to the extent such testimony might involve official or classified information, the Commission likely will have to hold a hearing (and must do so if classified information is involved (*see* M.C.R.E. 505h)) and issue orders dictating the scope of permissible testimony from a given witness. Timing is of particular importance given the logistical challenges dictated by the location of the Military Commission, because the Government must have reasonable time either to produce the witness or to litigate the relevance or necessity of the witness sufficiently in advance of the scheduled hearing for which the witness is requested, so as to avoid unnecessary delay.

5. Conclusion

The protocols and procedures outlined above are consistent with all governing authority. Moreover, they provide for an orderly means of granting the Defense that to which they are entitled while adequately protecting official and classified information.

6. Oral Argument

The Commission already has ruled that it did not intend to hear oral argument on this matter. *See* Tr. at 230.

7. Witnesses and Evidence

The Government does not intend to rely upon witnesses or evidence except for the attachment to this filing.

8. Additional Information

The Government has no additional information.

9. Attachments

A. Certificate of Service, dated 3 December 2014.

B. Email to Potential Witness Concerning His/Her Rights and Obligations Regarding Pretrial Interviews.

Respectfully submitted,

//s//

Mikeal M. Clayton
Trial Counsel
LTC David J. Long, JA, USA
Assistant Trial Counsel
Office of the Chief Prosecution
Office of Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 3rd day of December, 2014, I filed **AE 029A, Government Bench Brief On Defense Access to Witnesses**, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//
Mikeal M. Clayton
Trial Counsel
Office of the Chief Prosecutor
Military Commissions

ATTACHMENT B

From: [redacted]
Sent: Monday, September 15, 2014 12:27 PM
To: [redacted]
Subject: VWAP notification

Good Afternoon,

We are approaching our next court hearing in *United States v Abd al Hadi al-Iraqi*. This hearing will be largely limited to working out various protective orders concerning evidence released to the Defense prior to the trial. After the protective orders are in place, we will begin turning over evidence to the Defense. This evidence will include the names of witnesses. Part of the protective orders is to prevent the public release of witnesses' names prior to the trial.

It is possible the Defense may attempt to contact you as part of their investigation, so we wanted to ensure that you are informed of your rights concerning contact with the Defense, the media, and even the Prosecution.

If you are approached by any person and asked to speak with them you are entitled to do the following:

- You may ask as many questions as you like about who the person is and to which organization they belong.
- You may choose to speak or not speak with anyone at any time, including the Prosecution. Should you choose to speak, you may place conditions on the interview if you would like. Such conditions could include requiring that the interview be in person, on the phone, or via email.
- You may also elect to have someone present for the interview. This could be a support person, an attorney who represents you, or even a member of the Prosecution, if you choose.

The most important thing to remember is that it is entirely your choice to speak or not speak with anyone about this matter, including the Prosecution.

One reminder. If you do speak to anyone concerning this case please be conscious of any conditions of employment or regulations, such as classified information or other restrictions, as to what you can discuss about your work. If you are unsure you should contact the organization that holds the privilege.

If you have any questions or concerns please let me know.

Very Respectfully,

Kristy Milton
Major, U.S. Marine Corps
Prosecutor
Office of the Chief Prosecutor
[redacted]

From: [redacted]
To: [redacted]
Subject: Defense interviews
Date: Friday, November 28, 2014 11:43:40 AM

[redacted]

We're working through some commissions defense counsel requests to interview JTF witnesses. One of the conditions we're insisting upon is that interviews of JTF personnel will include an ASJA (likely myself) and an SSO to identify when discussions are heading into classified territory. Who would be the likely SSO representative for such meetings?

v/r
[redacted] Maj, USAF
Chief, Litigation Support
JTF-GTMO/OSJA
[redacted]

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From: [redacted]
To:
Subject: FW: Motion for conference (UNCLASSIFIED)
Date: Tuesday, November 04, 2014 3:43:38 PM
Attachments: Discovery Request (Hadi 4 Nov 14).docx

Classification: ~~UNCLASSIFIED~~
Caveats: ~~NONE~~

Sir,

FYSA. The only policy that prohibits defense counsel from soliciting information from JTF personnel is SOP #11. Paragraph 11-3(d) reads "at no time are counsel permitted to solicit information on camp operations or other aspects of JTF-GTMO operations from guards or other JTF personnel. Any attempt by counsel to solicit information will be immediately reported to JTF-GTMO OSJA."

v/r

[redacted]
CPT,US Army
Assistant Staff Judge Advocate
JTF-GTMO/OSJA
[redacted]

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-----Original Message-----
From: Long, David J LTC USARMY OSD OMC OCP (US)
[mailto [redacted]
Sent: Tuesday, November 04, 2014 12:06 PM
To: [redacted]
Subject: FW: Motion for conference

Hi [redacted]

Another day, another defense request. I explained to LtCol. Jasper how I was inacurrate in describing the JTF policy last Friday before this filing. So they are aware what is written here is not ground truth, they are also aware from other defense counsel that a policy exists concerning discussions with defense counsel.

I will send you the original defense discovery requests for access to

witnesses. We hope to hear from your office on what we can communicate to DC regarding access to witnesses.

Thank you.

V/r
LTC Long

From: Jasper, Thomas F LtCol OSD OMC [redacted]
Sent: Tuesday, November 04, 2014 9:26 AM
To: 'DAVIDJL5'; Stirk, Robert B Maj OSD OMC; Long, David J LTC USARMY OSD OMC OCP (US); Clayton, Mikeal Off-site contact; [redacted] SSGT USMC (US)
Cc: Spitler, Lindsey Off-site; JAMESAF; Stirk, Robert B Maj OSD OMC
Subject: RE: Motion for conference

Good Morning LTC Long--

Attached is an additional defense discovery request related to witness interview access.

V/R
Tom F. Jasper
Lieutenant Colonel, USMC
Office of the Chief Defense Counsel (Military Commissions)
[redacted]

-----Original Message-----
From: DAVIDJL5 [mailto [redacted]
Sent: Monday, November 03, 2014 1:51 PM
To: Stirk, Robert B Maj OSD OMC; Long, David J L[redacted]C; Clayton, Mikeal Off-site contact; Jasper, Thomas F LtCol OSD OMC; [redacted] SSgt OSD OMC Defense
Cc: Spitler, Lindsey Off-site; JAMESAF
Subject: RE: Motion for conference

Thank you Maj. Stirk,

Your instinct has not failed you, and your presumption is correct.

The motion you conferenced is correct as drafted, the government opposes this motion.

V/r,
Dave

David J. Long
LTC, JA
Deputy Trial Counsel

-----Original Message-----
From: Stirk, Robert B Maj OSD OMC [mailto [redacted]
Sent: Monday, November 03, 2014 8:31 AM

To: Long, David J LTC OSD OMC; DAVIDJL5; MIKEALC; Jasper, Thomas F LtCol OSD OMC; [redacted]SSgt OSD OMC Defense
Cc: LINDSERS; JAMESAF
Subject: Motion for conference

Good morning prosecution team, we hope all is well with Mikeal. Here is a motion to dismiss charge V for conference, which I strongly assume you will oppose.

v/r, rbs

Major Ben Stirk
Defense Counsel
Office of Military Commissions
[redacted]

Classification: ~~UNCLASSIFIED~~
Caveats: ~~NONE~~

MEA-DR189-WBA-000037

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

November 4, 2014

From: Defense Counsel for Abd Al Hadi al Iraqi (ISN 10026)

To: Trial Counsel

Ref: (a) Military Commissions Act, 10 U.S.C. § 949j(a)
(b) Rules for Military Commissions
(c) Military Commissions Rules of Evidence
(d) U.S. Const., Amend. 5
(e) U.S. Const., Amend. 6
(f) U.S. Const., Amend. 8
(g) Strickland v. Washington, 466 U.S. 668 (1984)
(h) *Beck v. Alabama*, 447 U.S. 625 (1980)
(i) *Lockett v. Ohio*, 438 U.S. 586 (1978)
(j) *Woodson v. North Carolina*, 428 U.S. 280 (1976)
(k) Common Article 3 to the Geneva Conventions
(l) Art. 75, Additional Protocol I, to the Geneva Conventions

SUBJ: SUPPLEMENTAL REQUEST FOR DISCOVERY ICO UNITED STATES v. ABD AL HADI AL-IRAQI

The accused, Abd al Hadi al Iraqi, by and through his detailed defense attorney, hereby requests that the government produce and permit the defense to inspect, copy, or photograph each of the items listed in the sections below. This request includes a demand that the government preserve all information that may fall within the scope of discovery sought below but that the government either does not intend to produce or that the government believes is not discoverable. The defense further request that the government notify the defense in writing which specific items or requested information or evidence will not be provided and the reason for denial of discovery.

The specific items listed below are examples, not limitations, of the items requested under a cited provision. The requested evidence is relevant, material to the preparation of the defense both in findings and potentially in mitigation, and/or is exculpatory. Defense counsel cannot properly provide effective assistance of counsel, nor prepare for trial, without production of the documents and items requested.

The requested information is known, or should, with the exercise of due diligence, be known to the United States or its agents. If the government does not intend to provide defense with copies of documents or tangible objects, then the defense requests reasonable opportunity to inspect, photograph and photocopy such documents or objects.

1. A copy of any policies/procedures regarding rules or regulations prohibiting JTF personnel communicating with defense counsel.

Defense counsel was informed orally by trial counsel that there is a policy in place at JTF-GTMO that personnel will not communicate with defense counsel. I will be onboard GTMO and available to interview witnesses and view evidence from 8 November and through the scheduled 17 November hearings.

The defense reserves the right to make additional discovery requests.

//s//
THOMAS F. JASPER, Jr.,
Lieutenant Colonel, U.S. Marine Corps
Detailed Defense Counsel

From: [redacted] CPT USARMY NG RIARNG (US)
To: [redacted] LTCOL USAF SOUTHCOM SC-CC (US)
Subject: FW: NDA Pre-Interview Statement ~~(UNCLASSIFIED)~~
Date: Friday, December 06, 2013 9:46:29 AM
Attachments: NDA Pre-Interview Statement.docx

Classification: ~~UNCLASSIFIED~~
Caveats: ~~NONE~~

Good Morning Sir:

As discussed

V/R

CPT [redacted]
[redacted]

Classification: ~~UNCLASSIFIED~~
Caveats: ~~NONE~~

NDA Pre-Interview Statement:

1. Your experience in GTMO may have exposed you to classified information. You may have signed a Non-Disclosure Agreement (NDA) barring you from discussing certain classified information in the future. I do not intend to ask about classified information, and if you feel you cannot answer a question without divulging classified information or violating your NDA, simply let me know and I will respect that. I do not know what is contained in your NDA. Your recollection of its contents shall be respected during this interview.

2. You are not under investigation. You are not suspected of a crime. If you would like to speak to an attorney, CPT [redacted], your Acting Staff Judge Advocate, has been briefed on this interview and can assist you in obtaining an appropriate attorney to answer any questions.

3. This interview is voluntary. I am not your superior and am not ordering you to answer anything you are not comfortable answering.

4. Any information you provide about present and former detention personnel or other U.S. Government personnel (including their names, locations or assignment history) is protected by military commissions protective order and cannot be shared with GTMO detainees.

From: [redacted]LTCOL USAF SOUTHCOM SC-CC (US)
To: [redacted]CPT USARMY NG RIARNG (US)
Subject: RE: NDA Pre-Interview Statement ~~(U//CLASSIFIED) [U]~~
Date: Friday, December 06, 2013 11:50:00 AM

CLASSIFICATION:~~UNCLASSIFIED~~

CPT [redacted] -

Thanks for speaking with me this morning. As we discussed, I called because USSOUTHCOM got notified about the upcoming military commissions defense counsel interviews of RI Natl Guard soldiers who served as guards at GTMO. SOUTHCOM got brought into this discussion yesterday evening by the military commission's prosecutor's office. SOUTHCOM is responsible for overseeing how JTF-GTMO operates the detention facility, so ensuring that classified or other sensitive information is properly protected is one of our concerns.

Based on what you told me (in part, that the soldiers involved were there in the 2006-2007 timeframe), I spoke with the guy on our staff who was there at the time. His guards came from other sources, and not RI. So we don't know where or what NDA they might have signed. Given the short timeframe left before the interviews start, I don't think we'll have any success in seeing the NDAs. Seems like the approach you were taking before I called you this morning is a prudent one. Good luck.

[redacted] Lt Col, USAF
Chief, Detention Law
HQ USSOUTHCOM/SCSJA
[redacted]

-----Original Message-----
From: [redacted]CPT USARMY NG RIARNG (US)
Sent: Friday, December 06, 2013 9:46 AM
To: [redacted]LTCOL USAF SOUTHCOM SC-CC (US)
Subject: FW: NDA Pre-Interview Statement ~~(UNCLASSIFIED)~~

Classification: ~~UNCLASSIFIED~~
Caveats: ~~NONE~~

Good Morning Sir:

As discussed

V/R

CPT [redacted]

Classification: ~~UNCLASSIFIED~~
Caveats: ~~NONE~~

CLASSIFICATION:~~UNCLASSIFIED~~

MEA-DR189-WBA-000043

From: [redacted]CPT USARMY JTFGTMO/SJA
To: "Long, David J LTC USARMY OSD OMC OCP (US)"
Subject: RE: Protective Order and Communication with JTF personnel ~~(UNCLASSIFIED)~~
Date: Monday, November 03, 2014 4:47:18 PM

Classification: ~~UNCLASSIFIED~~
Caveats: ~~NONE~~

Acknowledged. Thank you, sir.

v/r

[redacted]
CPT,US Army
Assistant Staff Judge Advocate
JTF-GTMO/OSJA
[redacted]

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-----Original Message-----
From: Long, David J LTC USARMY OSD OMC OCP (US)
[mailto [redacted]
Sent: Monday, November 03, 2014 4:42 PM
To: [redacted]CPT USARMY JTFGTMO/SJA
Subject: FW: Protective Order and Communication with JTF personnel
~~(UNCLASSIFIED)~~

Resent message.

From: Long, David J LTC USARMY OSD OMC OCP (US)
Sent: Monday, November 03, 2014 3:06 PM
To: [redacted]CPT USARMY JTFGTMO/SJA
Subject: RE: Protective Order and Communication with JTF personnel
~~(UNCLASSIFIED)~~

Thank you [redacted]

That is helpful and I appreciate the response, I apologize for the delay. In providing an answer to the defense regarding access to witnesses, in response to their motion to compel discovery, I would like to pass along these policies to the DC attention along with JTF/SOUTHCOM procedures for access to witnesses. I think the policies are easily defensible in court, and I think it important DC are aware there is a process/procedure in place to accommodate defense access to witnesses. In other words, defense cannot just show up and expect people to be available. I would like a copy of Admiral Butler's order for our information if possible, however I do not believe based on what you stated that it is relevant or material to our case.

I understand DC will be on island again next week and would like to speak with witnesses involved in the 8 Oct incident involving Hadi. Please let me know what process or procedure is in place to facilitate defense access to witnesses. Is there a form, or format, or rationale required in writing? We understand due to security and operational concerns an SSO may be involved from JTF, or other measures to prevent spillage or OPSEC violations. I would be happy to pass along those procedures to DC to facilitate access to witnesses. We intend to communicate to defense their discovery request was passed to JTF and we are awaiting response.

Obviously, I am working to avoid the conversation with the MJ in which the government accused of delay in responding to the defense request for access, and then compeled to provide access and defend the government's lack of responsiveness. The equity review for documents being delayed is understandable, however I think a lack of our responsiveness regarding access to witnesses is more difficult to defend. Thanks for your help.

I look forward to hearing from you.

V/r,

LTC Long

From: [redacted] CPT USARMY JTFGTMO/SJA
[redacted]
Sent: Friday, October 31, 2014 3:27 PM
To: Long, David J LTC USARMY OSD OMC OCP (US)
Subject: Protective Order and Communication with JTF personnel
~~(UNCLASSIFIED)~~

Classification: ~~UNCLASSIFIED~~
Caveats: ~~NONE~~

LTC Long,

After looking over the various commissions protective orders, it appears that I was incorrect in stating that the protective orders prohibits defense counsel from speaking to JTF personnel. It is JTF policy that defense attorneys not ask the guard force about current military operations while they are being screened in and out of their legal meetings. Additionally, the OSJA has taken a position to not discuss policy with defense counsel. It is our position that if defense has an issue with a JTF policy, then they must take it up to SOUTHCOM. I apologize for my inaccuracies. If you still would like me to produce the Admiral Butler Order, I can, but even that order does not contemplate defense counsel's communication with JTF personnel. If you have any other questions regarding this, please let me know. Thank you.

v/r

[redacted]

CPT,US Army

Assistant Staff Judge Advocate

JTF-GTMO/OSJA

[redacted]

[redacted]

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Classification: [redacted]

Caveats: ~~NONE~~

Classification: ~~UNCLASSIFIED~~
Caveats: ~~NONE~~

MEA-DR189-WBA-000047

From: [redacted] CDR USSOUTHCOM JTFGTMO
To: [redacted] Col USAF SOUTHCOM SC-CC (US); [redacted] CIV OSD OGC (US)
Subject: RE: U.S. v. Abd al Hadi - Draft Bench Brief re: Defense Access to Witnesses [FOUO] (UNCLASSIFIED)
Date: Tuesday, December 02, 2014 10:40:21 AM

Classification: ~~UNCLASSIFIED~~
Caveats: ~~FOUO~~

Language used to brief potential JTF witnesses is pasted below. This language was run up/down the chain of command over the past week and weekend. All interested players were given the opportunity to comment, edit, instruct, advise. If this language is offense to anyone, then we have done ourselves a collective disservice. Ten potential witnesses (as identified by Hadi defense counsel) were read this script last night by a JTF ASJA. Following that brief, defense spoke with those who elected to meet. Several declined to meet.

Here is the language:

In the near future, you are going to be contacted by LTC Thomas Jasper, military defense counsel for Hadi al-Iraqi in his case before the Military Commission. LTC Jasper wishes to interview you as part of his preparation for hearings in the case. He will also be speaking to you individually about his role and why he hopes to interview you.

The decision as to whether to grant him an interview is yours alone. You have the option to agree to an interview or to refuse an interview. Your identity would not be disclosed by virtue of participating in an interview. Whatever you decide, please notify our office regarding your decision. If you agree to an interview, we will help arrange a time and place. If you so choose, a JTF assistant staff judge advocate will be present as well.

If you agree to an interview, your obligation is to answer questions truthfully to the best of your knowledge. Agreeing to an interview does not mean that you will become a witness in the case of United States v. Hadi al-Iraqi. Do you have any questions?

Vr/[redacted]

CDR [redacted] JAGC, USN
Staff Judge Advocate
JTF-GTMO/SJA
[redacted]

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DEPARTMENT OF DEFENSE
UNITED STATES SOUTHERN COMMAND
9301 NW 33RD STREET
MIAMI, FLORIDA 33172-1217

REPLY TO
ATTENTION OF

SCSJA 9 Dec 13

MEMORANDUM FOR RECORD

SUBJECT: Military Commissions Defense Counsel Interviews of [redacted] National Guard

1. On 5 Dec 13, CAPT Ed White, OMC-P, contacted us with a concern. He had learned that the defense in a military commissions case was going to interview former guards at JTF-GTMO. The witnesses were part of the [redacted] National Guard. He was concerned about the approval process that had been used to arrange these interviews, issues of classification, and other matters. Col Dan Lecce, SCSJA, agreed that this office would look in to the matter.

2. On 6 Dec 13, I contacted CPT [redacted] a legal advisor to the [redacted] National Guard (phone: [redacted]; email: [redacted]. He had been working on the arrangements for this for several weeks and shared many of the same concerns we did. The interviews were scheduled for the weekend drill for the unit [redacted] on 7-8 Dec 13. According to CPT [redacted] the members of the unit to be interviewed were guards at GTMO in the 2006-2007 timeframe, but he did not know which camp they worked at. CPT [redacted] stated that the interviews would be conducted in a room that was cleared for secret collateral information. The interviewer was an Army CID agent working for the defense team. Members [redacted] stated they had signed non-disclosure agreements, but did not have a copy of the agreement and were therefore concerned about what they were allowed to reveal. CPT [redacted] stated he had already worked out an arrangement with the CID agent that the agent would read a script before the start of each interview. In relevant part, that script stated: "I do not intend to ask about classified information, and if you feel you cannot answer a question without divulging classified information or violating your NDA, simply let me know and I will respect that."

3. I stated that I would look in to the non-disclosure agreement matter. I spoke with Mr. [redacted] who was the Camp 7 commander when it opened in 2006. He was certain the [redacted] National Guard did not work at Camp 7 during that time, therefore we could not figure out what non-disclosure agreement might be an issue. Based on my conversations with Col Lecce, Mr. [redacted] and Capt [redacted] I concluded that the interests of OMC-P. SOUTHCOM, and JTF-GTMO were adequately addressed by the process in place and there were no further issues.

[redacted], Lt Col, USAF
Chief, Detention Law

~~FOR OFFICIAL USE ONLY~~

Advisement provided to potential witnesses orally by ASJA on 2 Dec 14 to witnesses in 8 Oct 14 Hadi al-Iraqi movement and FCE:

In a moment, you are going to be swpeaking with LTC Thomas Jasper, military defense counsel for Hadi al-Iraqi in his case before the Military Commission. LTC Jasper wishes to interview you as part of his preparation for hearings in the case. He will also be speaking to you individually about his role and why he hopes to interview you.

The decision as to whether to grant him an interview is yours alone. You have the option to agree to an interview or to refuse an interview. Your identity would not be disclosed by virtue of participating in an interview. Whatever you decide, please notify our office regarding your decision. If you agree to an interview, we will help arrange a time and place. If you so choose, a JTF assistant staff judge advocate will be present as well.

If you agree to an interview, your obligation is to answer questions truthfully to the best of your knowledge. Agreeing to an interview does not mean that you will become a witness in the case of United States v. Hadi al-Iraqi. Do you have any questions?

MEA-DR189-WBA-000050

JDG SOP #11
COUNSEL MEETINGS AND LEGAL PHONE CALLS WITH DETAINEES
5 August 2014

REFERENCES

STP 19-31E1-SM (Soldiers Manual MOS 31E Internment and Resettlement Specialist Skill Level 1)
STP 19-31E24-SM (Manual MOS 31E Internment and Resettlement Specialist Skill 2/3/4 Soldier's Manual and Trainer's Guide)
SOP #10 (Escort Procedures)
SOP #27 (General Guidelines for Camp Operations)
SOP #33 (Restraint Procedures)
SOP #40 (Detainee Programs)
SOP #41 (Detainee Mail Handling)

11-1. PURPOSE. To establish meeting procedures between counsel and detainees within the Joint Detention Group (JDG) area of operation.

11-2. APPLICABILITY. This Standard Operating Procedure (SOP) applies to all assigned, attached, or operationally controlled personnel working for the Joint Task Force Guantanamo (JTF-GTMO), Guantanamo Bay, Cuba.

11-3. GENERAL.

a. The Commander, Joint Detention Group (CJDG) retains authority to modify meetings and phone calls due to operational or security needs. Counsel will be advised of these modifications as soon as possible.

b. "Counsel", as used herein, are individuals within the litigation team, including, but not limited to: co-attorneys, interpreters, translators, paralegals, investigators, medical professionals, consultants (expert or otherwise), and any other personnel or support staff authorized and engaged in, or employed to, assist the litigation team. This term applies to habeas personnel and personnel in the Office of the Chief Defense Counsel (OC-D) teams, Office of the Chief Prosecutor (OC-P), and Personal Representatives and Private Counsel representing detainees before the Periodic Review Board process. Medical professionals within the litigation team may perform functions required of a defense consultant, but may not provide medical treatment to a detainee without a court order authorizing or the written permission of the CJDG.

c. Camp Echo, when used within this SOP, refers to both Camp Echo 1 and Camp Echo 2.

d. At no time are counsel permitted to solicit information on camp operations or other aspects of JTF-GTMO operations from guards or other JTF personnel. Any attempt by counsel to solicit information will be immediately reported to the JTF-GTMO

Office of the Staff Judge Advocate (OSJA). See attached.

e. Counsel will comply with the attached releasable SOP.

11-4. LEGAL REPRESENTATION: DETAINEE REQUESTS.

a. If a detainee makes a request to see his legal representation, the guard force will:

(1) Notify the JOC immediately.

(2) Ensure that the request is annotated in the Detainee Information Management System-Fusion (DIMS-Fusion).

b. The JOC will:

(1) Ensure that the JTF-GTMO OSJA receives the request as soon as practicable.

(2) Annotate in DIMS-Fusion when JTF-GTMO OSJA has received the attorney request.

11-5. LEGAL MEETINGS: REQUESTS AND SCHEDULES.

a. The JTF-GTMO OSJA is responsible for coordinating all counsel meetings. Commissions counsel will submit requests for detainee meetings, changes, and cancellations in writing directly to the JTF-GTMO OSJA. Habeas counsel will submit requests for detainee meetings, changes, and cancellations in writing to the Office of General Counsel who will coordinate with JTF-GTMO OSJA. The JOC will evaluate requests to modify a previously approved meeting based on whether there will be significant impact on JTF-GTMO operations. Any issues, questions, or concerns raised by Counsel on island will be submitted in writing to the JTF-GTMO OSJA. The guard force may contact the JTF-GTMO OSJA [redacted] with any questions or concerns.

b. Meetings will be scheduled Monday through Friday. Meeting hours change during daylight savings in order to accommodate Islamic prayer times. Between November and March, meetings are scheduled from 0900-1130 and 1230-1630. Between March and November, meetings are scheduled from 0900-1230 and 1330-1630. These times are subject to change based upon operational and logistical requirements.

c. Meetings are not normally allowed on Saturdays, Sundays, federal holidays, or outside of the times set forth above. Meetings on Saturdays, Sundays, and federal holidays are considered a special request and are based on the CJDG approval however, commissions counsel may schedule visits the weekend before and after a

Commissions session. Counsel must submit special requests in writing to the OSJA and include the justification for the visit and detail any harm that will occur if the request is not granted. The request is then forwarded for consideration to the CJDG via the JOC.

d. Counsel are expected to arrive on time. Counsel must arrive at Camp Echo no earlier than 30 minutes prior to or 30 minutes after, a scheduled meeting. Entry inspections will begin no earlier than 30 minutes prior to the scheduled meeting and conclude no later than 30 minutes after the scheduled meeting. Counsel's failure to arrive within this time frame will result in the cancellation of the meeting. If the morning meeting is canceled due to counsel's failure to appear, counsel will still be permitted to keep a previously scheduled afternoon meeting, subject to operational and logistical considerations.

e. When counsel has a morning and afternoon meeting with the same detainee on the same day, counsel or detainee may take a one-hour break for lunch or prayer at the request of counsel or detainee, or they may continue the meeting through lunch. If counsel or detainee requests a break for lunch, the lunch break will occur between 1130 and 1230 hours between November and March and 1230 and 1330 hours between March and November. If the counsel or detainee break for lunch, the camp to which the detainee belongs will be responsible for delivering the requested meal to the meeting location. At any time during a morning or afternoon meeting, counsel or detainee may take a break for prayer at the request of the counsel or detainee.

f. As long as at least one counsel or legal-team member has arrived on time for a scheduled meeting and as long as at least one counsel or legal-team member remains with the detainee (except for the lunch break), other counsel or legal-team members may screen in and out of a legal meeting during the normal visit times.

g. Any issues, questions, or concerns raised by counsel on island will be submitted in writing to the JTF-GTMO OSJA.

11-6. LEGAL MEETINGS: DETAINEE NOTIFICATION, ACCEPTANCE, AND REFUSAL.

a. The detainee will be notified of legal meetings in advance. The guard force will notify a detainee of a scheduled legal meeting a minimum of 24 hours prior to the scheduled meeting. Regardless of prior notifications, on the day of the scheduled meeting the guard force will notify the detainee of the scheduled legal meeting no later than one hour prior to the scheduled meeting. If the detainee refuses or demonstrates behavior tantamount to a refusal, the guard force will allow the detainee fifteen minutes to reconsider. After the fifteen minute reconsideration period, the guard force will again notify the detainee of the scheduled meeting. If the detainee continues to refuse or demonstrates behavior tantamount to a refusal, the guard force will then notify the JOC [redacted] that the detainee refused the scheduled visit. The JOC [redacted] will notify the JDG Movements Team and the OSJA. Behavior tantamount to a refusal

includes, but is not limited to, stalling, failing to comply with guard force instructions, or refusing to provide a clear "yes" or "no" as to whether the detainee will attend a scheduled legal meeting. An interpreter should be utilized if there is any question about the detainee's ability to understand the nature of the meeting.

b. When the detainee is scheduled for both morning and afternoon legal meetings on the same day, the guard force will notify the detainee of both meetings at the same time. Upon notification of the morning and afternoon meetings, the detainee must choose one of four options: 1) the detainee can accept both meetings; 2) the detainee can accept the morning meeting and refuse the afternoon meeting; 3) the detainee can accept the afternoon meeting and refuse the morning meeting; or 4) the detainee can refuse both the morning and afternoon meetings. If the detainee refuses the morning meeting and accepts the afternoon meeting, the detainee may be permitted to keep the afternoon meeting subject to operational and logistical concerns. If the detainee refuses both the morning and the afternoon meeting, the detainee will not be given another opportunity to accept the afternoon meeting and the afternoon meeting will be canceled.

c. [redacted] The JOC OIC will immediately be notified if any manning issues or discrepancies are noted. Once the JDG Movements Team is on site and the detainee who previously accepted a meeting stalls or otherwise delays the movement, the meeting is considered refused by the detainee. The guard force will then notify the JOC [redacted] that the detainee refused the scheduled visit. The JOC [redacted] will notify the OSJA.

d. Camp leadership will ensure DIMS-Fusion entries are made when the detainee is notified of the legal appointment, when escorts arrive to initiate the movement, and any significant actions by the detainee (such as stalling, etc.).

e. With respect to habeas counsel, if a detainee refuses a habeas legal meeting, habeas counsel may submit an unprivileged note asking the detainee to reconsider to an OSJA representative. The OSJA representative will deliver the note to the detainee. In this circumstance, if the note is written in English and the OSJA representative determines it is simply a note from the habeas counsel asking the detainee to reconsider, the OSJA may take the note directly to the detainee and, if necessary, bring a camp interpreter to provide translation for the detainee. If the note includes matter in a language other than English, the OSJA representative must confirm with a camp interpreter the English translation before delivery to the detainee. If operationally supportable, the detainee may have the legal meeting if the detainee reconsiders after receiving the note from his habeas counsel. Generally, if the habeas counsel has both a morning and afternoon meeting with the detainee, the detainee will be permitted to have his afternoon meeting but his morning meeting will still be considered refused or canceled. If the habeas counsel does not have an afternoon meeting with the detainee, and if other dates and times are not feasible, the detainee will have his morning meeting with the habeas counsel if the delayed movement is operationally supportable. Whether

that morning meeting may be extended is considered on a case-by-case basis, for good cause shown, and if operationally supportable.

11-7. LEGAL MEETINGS: CONDUCT OF COUNSEL, LOCATION, AND CONDITIONS.

a. Counsel must follow the instructions and directions of JTF personnel while at JTF-GTMO. Failure to follow their instructions or directions may result in removal from the camp and/or a denial of further visitation privileges. Counsel is expected to act in a professional manner. Counsel will refrain from using profanity and should keep their voices at a conversational level when speaking to staff, detainees, and other visitors. Counsel is required to dress in a manner appropriate for a detention environment. Military counsel will be in their service uniform of the day unless permitted to wear civilian clothing by their Commander, who will provide that authority in writing. Civilian counsel will not wear shorts, see through clothing, tank tops, any clothing that reveals a mid-riff area, miniskirts, or clothing which may impede identification, such as large hats, scarves, or hoods. All visitors are required to wear shoes. Sandals, flip flops, and shower shoes are not permitted.

c. Counsel may not possess recording or communication devices where restricted. This limitation includes cameras, cellular or satellite telephones, personal digital assistants (PDAs), laptops, netbooks, or tablet computers, MP3 players, portable electronic devices of any kind, such as Google Glasses or watches that possess the same or similar functionality as an iPod, iPad, or smart phone, any Wi-Fi capable devices, USB flash drives, and related equipment. If any such devices are brought into a restricted area, JTF-GTMO personnel will confiscate the device and turn it in to the CJDG for appropriate disposition.

d. Counsel must adhere to the JTF-GTMO and Naval Station Guantanamo photograph policies. Generally, counsel may not take any photographs nor make any recordings of any type while at JTF-GTMO.

e. Camp Echo is the only authorized location for detainee legal visits.

[redacted]

11-8. LEGAL MEETINGS: PROCESSING, INSPECTIONS, AND SCREENINGS.

a. A representative from JTF-GTMO OSJA should be present at Camp Echo for counsel in-screening. Camp Echo guard force are responsible for screening counsel prior to meetings, escorting counsel to the meeting rooms, inspecting and screening counsel after meetings, and escorting counsel back to the screening room for rescreening.

b. All counsel and their possessions are subject to search/inspection by the guard force upon arrival and prior to departure. All searches/inspections will take place at Camp Echo.

c. Prior to each meeting, the guard force will perform [redacted] a cursory review of documents. Legal material will not be reviewed for content, but will be inspected for proper markings (i.e. stamp from either habeas or the commissions PRT) and in a sealed envelope to ensure that only previously approved items are brought into a legal meeting and that those items are free of contraband. If contraband is discovered during the inspection, security personnel will notify the camp leadership and JTF-GTMO OSJA.

d. Counsel may only bring legal material cleared and stamped by the respective Habeas or Military Commissions Privilege Team, writing utensils, and blank paper into a meeting. [redacted]

e. Counsel are authorized to bring food, Zam Zam water, Miswak, and cologne into detainee meetings; however, all such items must be consumed during the visit and will be removed from the detention facility by counsel at the conclusion of the meeting. Camp personnel will inspect the items being brought into the meeting. The camp personnel or guard force may refuse to allow any specific food item or packaging into the meeting area. Camp personnel or guard force have been delegated the authority to determine whether the proposed items constitute a hazard or other security concern including the discretion to prohibit any coolers, large cases or purses, or other storage containers from entering meetings. Counsel must ensure that all items, including debris, are collected prior to departing each scheduled meeting. Counsel must notify the guards if a detainee keeps and/or refuses to return any item brought into a meeting by counsel. Counsel may lose the privilege to bring food or other items into future meetings should counsel fail or refuse to collect the items prior to departing or fail to inform the guard force of any item the detainee refuses to return.

f. Counsel may bring appropriate commercial DVDs into the meeting that do not contain prohibited information, or otherwise present force-protection or security issues. A DVD is commercial in nature if its authenticity is readily apparent upon cursory

examination of the DVD case and printing on the DVD itself. Burned, replicated, or otherwise copied DVDs are not deemed to be commercial in nature and require additional processing. Non-legal, Non-U.S., non-English, and non-commercial DVDs will not be permitted unless previously screened and approved by JTF-GTMO. Non-commercial DVDs that contain lengthy material or otherwise require extensive screening, such as a copied full-length movie, will not normally be screened due to resources limitations at JTF-GTMO. DVDs that counsel seek to bring into a meeting because of its applicability to a detainee's legal case must be submitted to the respective Privilege Team for review pursuant to the relevant protective order. Counsel may not leave DVDs with the detainee at the conclusion of the meeting. DVDs may be forwarded to the detainee via the legal or non-legal mail, as appropriate. Counsel who wish to play a DVD during a meeting will notify the OSJA when scheduling the meeting, or as soon as possible upon learning that a DVD player will be necessary. DVDs which are retained by a detainee will be properly marked as "Other Case-Related Material".

g. The following items are not authorized to be brought into any detention facility by Habeas or Commissions Counsel:

(1) Weapons or items that can be easily converted into a weapon.

(2) Photography or recording devices of any kind and all electronic equipment

(NOTE: JTF-GTMO has DVD players cleared for use during detainee visits conducted in Camp Echo.)

(3) Prescription/non-prescription drugs.

(4) Forks and knives of any type.

(5) Flowers.

(6) Balloons.

(7) Paper clips, staples, binder clips, or any kind of metal paper fastener.

(8) Extra clothing (except light jackets, shawls, sweaters, and similar outer clothing to keep warm in air conditioned spaces or, in the case of female visitors, to cover skin during the visit).

(9) Spiral-bound notepads.

(10) Any item that can be fashioned or utilized as a weapon (i.e. belts and ties).

(11) Playing cards of any type.

(12) Rubber bands.

(13) Any item that may pose a safety or security concern.

(14) Prohibited information as defined in relevant protective orders or JTF-GTMO regulations.

h. At the conclusion of each meeting, the guard force will perform screenings for possession of contraband by counsel [redacted] by visually scanning documents as noted in section 11-8.b.-d.

i. At the conclusion of Habeas meetings, counsel may not retain notes in their possession when they leave the meeting. If notes are needed for an afternoon meeting with the same detainee, counsel may leave their notes in the meeting room or seal their notes in an envelope in the presence of the OSJA legal representative. The OSJA representative will place the sealed envelope in a container located in the Camp Echo screening area. The notes will be returned to the counsel at the afternoon meeting. During the out-processing, after the last meeting for the day in the presence of the OSJA legal representative, habeas counsel will seal their notes in an envelope and mark the envelope to include the detainee's ISN; habeas counsel's name, e-mail, mailing address, fax number; the number of pages placed in the envelope, and "Attorney-Detainee Meeting Documents for Delivery to Counsel" or "Attorney-Detainee Communications." The OSJA representative will submit the sealed envelope to the Privilege Team-Forward.

11-9. LEGAL MEETINGS: DOCUMENTS AND NON-LEGAL MATERIALS SUBMITTED BY COUNSEL.

a. Counsel who wish to leave books, magazines, and non-legal commercial DVDs intended for entertainment or recreation for the detainee may do so with OSJA personnel. These items are considered donations to the Detainee Library and will be processed pursuant to JTF-GTMO Detainee Library procedures.

b. Items that are not approved for inclusion in the Detainee Library will be returned when practicable, offered via donation to the MWR Library at NAVSTA GTMO, submitted to the Defense Language Institute, or disposed of in a manner deemed appropriate by JTF-GTMO.

11-10. LEGAL PHONE CALLS FOR NON-HVD'S: REQUESTS AND SCHEDULES.

a. Requests for a legal phone call must be submitted to the Department of Defense Office of General Counsel (DoD OGC) at least 15 days in advance of any requested phone call date. All legal phone call requests must be submitted to the JTF-GTMO OSJA at least seven days in advance of any requested date. If the request is approved, OSJA will advise the requesting entity. Phone call requests made inside of seven days will only be granted if JTF-GTMO can operationally support them. Requests for expedited phone calls must include written justification for the urgency.

b. All requests for legal phone calls will include, at a minimum, the detainee's ISN, the date(s) of the proposed call, the time and duration of the proposed call, and participants of the proposed call. Reasonable efforts will be made to accommodate specific date requests. All counsel must have a valid security clearance of Secret or higher, must be authorized to represent the detainee to who they seek access, and must have signed a Memorandum of Understanding acknowledging the relevant protective order or their phone call request will be denied. By submitting the phone call request to the OSJA, DoD OGC confirms that counsel possesses the requisite security clearances and authorizations.

c. Standard legal phone call hours are the same for legal meetings as noted above.

d. The JTF-GTMO OSJA is responsible for coordinating all JTF-GTMO assets for attorney legal phone calls. If counsel wishes to change their legal phone call date, time, and/or duration, these changes must be submitted in writing to the JTF-GTMO OSJA via the appropriate DoD/DOJ channels. Requests to modify a previously approved legal phone call will only be granted if the CJDG or his designee determines that the modification can be supported and there will be no significant impact on JTF-GTMO operations.

[redacted]

g. The time/date of a legal phone call may be changed or cancelled by JTF-GTMO for operational needs, security concerns, conflicting or emergency requests for secure/unsecure telephone calls from other counsel, and court imposed obligations. Neither the existence of the legal phone call process nor the scheduling of a secure/unsecure call creates any enforceable right for counsel, detainee, or any other person.

h. The detainee will be notified of a legal phone call in advance. The guard force will notify a detainee of a legal phone call a minimum of 24-hours before the scheduled call. Regardless of prior notifications, on the day of the scheduled legal phone call, the guard force will notify the detainee of the appointment no later than one hour prior to the scheduled call. If the detainee verbalizes a refusal or demonstrates behavior tantamount to a refusal, the guard force will allow the detainee 15 minutes to reconsider. After 15 minutes, the guard force will again notify the detainee of the scheduled call. If the detainee continues to refuse or demonstrates behavior tantamount to a refusal, the detainee will be deemed to have refused the phone call. A refusal or behavior tantamount to a refusal includes, but is not limited to, stalling or failing to comply with guard-force instructions. If the detainee refuses, the guard force will notify JOC [redacted] that the detainee refused the scheduled phone call. JOC

[redacted] will notify the JDG Movements Team and the OSJA. An interpreter should be used if there is any question about the detainee's ability to understand the nature of the move.

i. Camp leadership will ensure DIMS-Fusion entries are made when the detainee is notified of the legal appointment, when escorts arrive to initiate the movement, and any significant actions by the detainee such as stalling.

11-11. LEGAL PHONE CALLS: CONTENT.

a. Counsel's oral communication with a detainee will not include the following:

(1) Information relating to any ongoing or completed military, intelligence, security, or law-enforcement operations;

(2) Investigations, arrests, or the results of such activities, by any nation or agency or current political events in any country that are not directly related to the counsel's representation of that detainee;

(3) Security procedures at GTMO including, but not limited to, names of U.S. Government personnel and the layout of camp facilities;

(4) The status of other detainees; or

(5) Any other content deemed inappropriate by the Privilege Team Forward.

(NOTE: It is the responsibility of the PRT to report any infraction by a detainee.)

b. Counsel's oral communications with the detainee petitioner will be governed by the appropriate protective order entered in the detainee petitioner's habeas case.

11-12. LEGAL PHONE CALLS: LOCATION.

a. Detainee legal phone calls occur in Camp Delta [redacted] Building.

b. JDG Escorts are responsible for transporting the detainee to the call room and must remain in [redacted] Building to provide security until completion of the phone call. JDG personnel may not participate in, listen to, or assist the Privilege Team Forward with the call itself.

c. Under no circumstances will any non-HVD legal phone call occur in [redacted] Building when that building is being used for a particular HVD commissions legal visit.

d. Only one non-HVD is permitted in [redacted] Building at any one time for a habeas legal phone call.

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[redacted]

[redacted]

Encl
JDG SOP #11 (RELEASABLE)

DAVID E. HEATH
COL, MP
Commanding

~~[redacted]~~

JDG SOP #11 (RELEASABLE)
COUNSEL MEETINGS AND LEGAL PHONE CALLS WITH DETAINEES

I. PURPOSE. The following policies, procedures, and rules are intended to provide counsel with information and instructions to facilitate legal meetings and phone calls with detainees, ensure the safety and security of camp operations and JTF-GTMO personnel, and minimize disruption to camp operations. Counsel must comply with the following policies, procedures, rules, and memoranda or orders incorporated by reference. Counsel who fail to comply may or otherwise create a disturbance at the detention facility and also have their visitation or phone call privileges restricted or suspended.

II. APPLICABILITY. The following policies, procedures, and rules apply to all counsel. Counsel, as used herein, is defined as all individuals within the litigation team including, but not limited to, co-attorneys, interpreters, translators, paralegals, investigators, medical professionals, consultants, expert or otherwise, and all other personnel or support staff authorized and engaged in or employed to assist the litigation team. This term applies to Habeas, Office of the Chief Defense Counsel (OCD) teams, and Office of the Chief Prosecutor (OCP) teams.

III. GENERAL.

a. The Commander, Joint Detention Group (CJDG) retains authority to modify meetings and phone calls due to operational or security needs.

b. Counsel must follow the instructions and directions of JTF-GTMO personnel while at JTF-GTMO. Failure to follow instructions or directions may result in removal from the camp or denial of further visitation or other privileges.

c. Counsel will not ask questions or make statements to JTF-GTMO personnel that are likely to elicit personal information about current or former JTF-GTMO guard force members or other U.S. Government personnel. Personal information includes, but is not limited to, name, date or place of birth, current or former place of residence, assignment history, military training or studies, level and location of academic study, civilian employment, and family.

[redacted]

e. Camps Echo I and II are the only authorized locations for detainee legal visits. Counsel are not permitted access to any other JTF-GTMO area without prior written Approval from the Commander, JTF-GTMO (CJTF).

f. Counsel may not possess recording or communication devices where restricted. This limitation includes cameras, cellular or satellite phones, personal digital assistants (PDAs) (i.e. laptops, netbooks, or tablet computers), MP3 players, portable electronic devices of any kind (i.e. Google Glasses or wrist watches that possess the same or similar functionality as an iPod, iPad, or smart phone), any Wi-Fi capable devices, USB flash drives, and related equipment. If any such devices are brought into a restricted area, the device must be surrendered or it will be confiscated by JTF-GTMO personnel.

g. Counsel must adhere to the JTF-GTMO and Naval Station Guantanamo photograph polices. Generally, counsel may not take any photographs or make recordings of any type while at JTF-GTMO. Exceptions to this policy may be granted only by advance written approval of the CJTF.

IV. LEGAL MEETINGS; REQUESTS AND SCHEDULES

a. Commissions counsel will submit requests for detainee meetings, changes, and cancelations in writing directly to the JTF-GTMO OSJA. Habeas counsel will submit requests for detainee meetings, changes, and cancelations in writing to the Office of General Counsel (OGC) who will coordinate with JTF-GTMO OSJA.

b. Meetings are scheduled Monday through Friday. Meeting hours change during daylight savings to accommodate the Islamic prayer schedule. Between November and March, meetings are scheduled from 0900-1130 and 1230-1630. Between March and November, meetings are scheduled from 0900-1230 and 1330-1630.

c. Meetings are not normally allowed on Saturdays, Sundays, federal holidays, or outside the times set forth above. Commissions counsel but may schedule visits the weekend before and after a Commissions session. Counsel who desire a meeting outside normal meeting periods must submit a special request in writing to the JTF-GTMO OSJA that includes a justification why the visit is required outside normally scheduled time periods and why counsel is not able to schedule a meeting during normal scheduled times. The justification should also explain any harm that would occur should the special request be denied.

d. When counsel has a morning and afternoon meeting with the same detainee on the same day, counsel or detainee may take a one hour break for lunch at the request of counsel or detainee. Between November and March, the lunch break will occur between 1130 and 1230 hours. Between March and November, the lunch break will occur between 1230 and 1330 hours. At any time during a morning or afternoon meeting, counsel or detainee may take a break for prayer at the request of counsel or detainee.

e. When the detainee is scheduled for both morning and afternoon legal meetings on the same day, the guard force will notify the detainee of both meetings at the same time. If the detainee refuses both the morning and the afternoon meeting, the detainee will not be given another opportunity to accept the afternoon meeting, and the afternoon

meeting will be canceled. Despite a previously scheduled afternoon legal meeting, a cancelation or refusal of a scheduled morning legal meeting may limit the ability of the JDG to operationally support a movement of the detainee to the afternoon meeting.

f. Any issues, questions, or concerns raised by counsel on island will be submitted in writing to the JTF-GTMO OSJA.

V. LEGAL MEETINGS: PROCESSING, INSPECTIONS, AND SCREENINGS

a. Counsel is expected to arrive on time. Counsel must arrive at Camp Echo no earlier than 30 minutes prior to, nor no later than 30 minutes after the scheduled meeting start time for both the morning and afternoon meetings. Entry inspections will begin 30 minutes prior to, and end 30 minutes after, the scheduled meeting start time.

b. Failure to arrive within 30 minutes of the scheduled meeting start time will result in the cancelation of the meeting. If the morning meeting is canceled due to counsel's failure to arrive in a timely manner, counsel will still be permitted to keep the previously scheduled afternoon meeting, subject to operational and logistical concerns.

c. Habeas counsel must be ready for pickup at the time and place specified by the Habeas driver. Due to the need to transport other counsel to their attorney meetings, the Habeas driver will not wait for counsel who fail to appear at the time and location designated. Therefore, counsel who fail to be available must arrange for their own transportation to their meeting.

d. Counsel and their possessions are subject to search and/or inspection by the guard force upon arrival and prior to departure. Documents are subject to cursory review by the guard force, JTF-GTMO OSJA, and the Privilege Team Forward. Only previously approved items and documents may be taken into the meeting. During the screening process, counsel must produce and make available to the guard force and JTF-GTMO OSJA all items and documents for inspection, screening, and cursory review.

e. Counsel may bring into a meeting legal material cleared and stamped by the respective Habeas or Military Commissions Privilege Team, writing utensils, and blank paper. [redacted]

f. Counsel will not bring contraband into meetings. Contraband includes, but is not limited to, weapons, photography equipment, paper fasteners (staples, paper clips, binder clips, rubber bands), or any item containing metal (such as a spiral notepad), money, stamps, cigarettes, chemicals, prescription and non-prescription drugs, vitamins, writing instruments, books, newspapers, playing cards, magazines, and documents that have not been approved by the Privilege Team. If counsel has questions regarding authorization of a particular item, they are encouraged to seek clarification prior to their arrival to their meeting.

g. Counsel may bring approved commercial DVDs into a meeting with the detainee; however, under no circumstance is counsel permitted to leave the DVD with the detainee.

h. Counsel may bring approved cologne, Zam Zam, Miswak, food, and beverage items into their meetings with detainees. All items are subject to inspection by the guard force. Items taken into a meeting will be carried in plastic, paper, or cloth bag without compartments capable of being sealed or closed. Camp personnel or guard force may refuse to allow any specific food item or packaging into the meeting area. Coolers, large cases, backpacks, and purses that present a hazard may be refused from entering the meeting area by the Guard Force.

i. Counsel are prohibited from leaving items with the detainee. Counsel are responsible for collecting all items, including debris, from the detainee prior to departing the meeting room. Counsel must notify the guard force if a detainee keeps or refuses to return any items brought into the meeting by counsel. Counsel's failure to retrieve items or notify the guard force may result in the counsel's loss of privileges to bring items into future meetings.

j. At the conclusion of Habeas meetings, including breaks for lunch or prayer, counsel may not retain any notes or documents in their possession. If notes are needed for an afternoon meeting with the same detainee, counsel may leave their notes in the meeting room or seal the notes in an envelope in the presence of the OSJA legal representative. The notes will be returned to counsel at the afternoon meeting. During the out-screening process after the last meeting for the day, in the presence of the OSJA legal representative, counsel will seal their notes in an envelope and mark the envelope annotating the detainee's ISN, counsel's name, e-mail, mailing address, fax number, the number of pages placed in the envelope, and "Attorney-Detainee Meeting Documents for Delivery to Counsel" or "Attorney- Detainee Communications."

VI. LEGAL MEETINGS: CONDUCT OF COUNSEL, LOCATION AND CONDITIONS

a. Counsel are expected to act in a professional manner. Counsel will refrain from using profanity and will keep their voice at a conversational tone when speaking with staff, detainees, and other visitors.

b. Counsel are required to dress in a manner appropriate to a detention environment. Military counsel will be in their service uniform of the day unless permitted to wear civilian clothing by their Commander, who will provide that authority in writing. Counsel will not wear shorts, see through clothing, tank tops, miniskirts, any clothing that reveals a mid-riff area, or other clothing which may impede identification, such as large hats and scarves or hoods. All visitors are required to wear shoes. Sandals, flip-flops, and shower shoes are not permitted.

c. Camps Echo I and II are the only authorized locations for detainee legal visits. Counsel are not permitted access to any other JTF-GTMO secure areas without

permission from the CJTF [redacted]

d. Medical professionals within the litigation team may perform functions required of a defense consultant, but may not provide medical treatment to a detainee without written permission from the CJDG. This does not preclude a medical professional from providing emergency medical treatment in the event of an emergency.

e. Counsel will comply with the relevant federal or Military Commissions order governing communications and counsel access to detainees involved in habeas litigation or Military Commissions.

VII. LIBRARY DONATIONS: BOOKS AND DVDs. Counsel who wish to leave a detainee any books, magazines, and non-legal commercial DVDs intended for entertainment or recreation may do so with the OSJA personal representative. These items are considered donations to the Detainee Library. Items that are not approved for inclusion in the Detainee Library will be returned to counsel when practicable, or offered via donation to the NAVSTA library, submitted to the Defense Language Institute, or destroyed.

VIII. LEGAL PHONE CALLS: REQUESTS AND SCHEDULES

a. Requests for legal phone calls must be submitted to the Department of Defense Office of General Counsel (DoD OGC) 15 days in advance of the requested date. If the request is approved, the OGC will advise the requesting entity. Phone call requests made inside of seven days must include written justification for the urgency and will only be granted if JTF-GTMO can operationally support them.

b. All requests for legal phone calls will include, at a minimum, the detainee's ISN, the date(s) of the proposed call, the time and duration of the proposed call, and participants in the proposed call. Reasonable efforts will be made to accommodate specific date requests. All counsel must have a valid security clearance of SECRET or higher, must be authorized to represent the detainee to whom they seek access, and must have a signed Memorandum of Understanding acknowledging the relevant protective order, or their phone-call request will be denied.

c. Standard legal phone call hours are the same as for legal meetings as noted above.

d. If counsel wish to change their legal phone call date, time, or duration, any request to do so must be submitted in writing to the JTF-GTMO OSJA via the appropriate DoD/DoJ channels. The time or date of a legal phone call may be changed or canceled by JTF-GTMO for operational needs, security concerns, conflicting or emergency requests for secure or unsecure telephone calls from other counsel, or court imposed obligations. In such an event, every effort will be made to reschedule the call

at the earliest possible opportunity. Neither the existence of the legal phone call process, nor the scheduling of a secure or unsecure call creates any enforceable right for counsel, detainee, or other person.

e. Counsel's oral communication with the detainee will be governed by the relevant protective order and JTF-GTMO policies and procedures, which generally prohibit the following:

(1) Information relating to any ongoing or completed military, intelligence, security, law-enforcement operations.

(2) Investigations, arrests, or results of such activities by any nation or agency or current political events in any country that are not directly related to counsel's representation of that detainee.

(3) Security procedures at GTMO including, but not limited to, names of U.S. Government personnel and the layout of camp facilities.

(4) The status of other detainees or any other content deemed inappropriate by the Privilege Team.

(NOTE: At no time may a call be permitted that may involve information above the SECRET classification level.)

DAVID E. HEATH
COL, MP
Commanding

JDG SOP #11
COUNSEL MEETINGS AND LEGAL PHONE CALLS WITH DETAINEES
Last Semi-Annual review (31 July 2014)

CHANGE:

11-3. GENERAL.

b.
Office of Military Commissions Defense is referred to as Office of the Chief Defense Counsel
Office of Military Commissions Prosecution is referred to as Office of the Chief Prosecutor

11-5. LEGAL MEETINGS: REQUESTS AND SCHEDULES. READS:

e. When Counsel has a morning and afternoon meeting with the same detainee on the same day, Counsel or detainee may take a one-hour break for lunch or prayer at the request of Counsel or detainee, or they may continue the meeting through lunch. If Counsel or detainee requests a break for lunch, however, the lunch break will occur between 1130 and 1230 hours between November and March, and 1230 and 1330 hours between March and November. If Counsel of detainee break for lunch, the camp to which the detainee belongs will be responsible for delivering the requested meal to the meeting location. At any time during a morning or afternoon meeting, Counsel or detainee may take a break for prayer at the request of Counsel or detainee.

ADDED:

f. As long as at least one counsel or legal-team member has arrived on time for a scheduled meeting and as long as at least one counsel or legal-team member remains with detainee (except for the lunch break), other counsel or legal-team members may screen in and out of a legal meeting during the normal visit times.

ADDED:

11-6. LEGAL MEETINGS: DETAINEE NOTIFICATION, ACCEPTANCE, AND REFUSAL.

a. The detainee will be notified of legal meetings in advance. ~~When feasible,~~ the guard force will notify a detainee of a scheduled legal meeting a minimum of 24 hours before the scheduled meeting. Regardless of prior notifications, on the day of the scheduled meeting the guard force will notify the detainee of the scheduled meeting no later than one hour prior to the scheduled meeting. If the detainee refuses or demonstrates behavior tantamount to a refusal, the guard force will allow the detainee fifteen minutes to reconsider. After the fifteen-minute-reconsideration period, the guard force will again notify the detainee of the scheduled meeting. If the detainee continues

to refuse or demonstrates behavior tantamount to a refusal, the guard force will then notify the JOC [redacted] that the detainee refused the scheduled visit. The JOC [redacted] will notify the JDG Movements Team and the OSJA. Behavior tantamount to a refusal includes, but is not limited to, stalling, failing to comply with guard force instructions, or refusing to provide a clear "yes" or "no" as to whether the detainee will attend a scheduled legal meeting. A linguist should be utilized if there is any question about the detainee's ability to understand the nature of the meeting.

e. With respect to habeas counsel, if a detainee refuses a habeas legal meeting, habeas counsel may submit to an OSJA representative an unprivileged note asking the detainee to reconsider. The OSJA representative will deliver the note to the detainee. In this circumstance, if the note is written in English and the OSJA representative determines it is simply a note from the habeas counsel asking the detainee to reconsider, the OSJA may take the note directly to the detainee and, if necessary, bring a camp interpreter to provide translation for the detainee. If the note includes matter in a language other than English, the OSJA representative must confirm with a camp interpreter the English translation before delivering to the detainee. If operationally supportable, the detainee may have the legal meeting if the detainee reconsiders after receiving the note from his habeas counsel. Generally, if the habeas counsel has both a morning and afternoon meeting, with the detainee, the detainee will be permitted to have his afternoon meeting but his morning meeting will still be considered refused or canceled. If the habeas counsel does not have an afternoon meeting with the detainee, and if other dates and times are not feasible, the detainee will have his morning meeting with the habeas counsel if the delayed movement is operationally supportable. Whether that morning meeting may be extended is considered on a case-by-case basis, for good cause shown, and if operationally supportable.

11-7. LEGAL MEETINGS: CONDUCT OF COUNSEL, LOCATION, AND CONDITIONS. ADDED:

c. Counsel may not possess recording or communication devices where restricted. This limitation includes: cameras, cellular or satellite telephones, personal digital assistants (PDAs), laptops, netbooks, or tablet computers, MP3 players, portable electronic devices of any kind, such as Google Glasses or watches that possess the same or similar functionality as an iPod, iPad, or smart phone, any Wi-Fi capable devices, USB flash drives, and related equipment. If any such devices are brought into a restricted area, JTF-GTMO personnel will confiscate the device and turn it into the CJDG for appropriate disposition.

11-8. LEGAL MEETINGS: PROCESSING, INSPECTIONS, AND SCREENINGS. ADDED:

c. Prior to each meeting, the guard force will perform [redacted] a cursory review of documents. Legal material will not be reviewed for content, but will be inspected for proper markings (i.e. stamp from either habeas or the commissions

PRT) and in a sealed envelope to ensure that only previously approved items are brought into a legal meeting and that those items are free of contraband. If contraband is discovered during the inspection, security personnel will notify the camp leadership and JTF-GTMO OSJA.

f. Counsel may bring appropriate commercial DVDs into the meeting that do not contain prohibited information, or otherwise present force-protection or security issues. A DVD is commercial in nature if its authenticity is readily apparent upon cursory examination of the DVD case and printing on the DVD itself. Burned, replicated, or otherwise copied DVDs are not deemed to be commercial in nature and require additional processing. Non-legal, Non-U.S., non-English, and non-commercial DVDs will not be permitted unless previously screened and approved by JTF-GTMO. Non-commercial DVDs that contain lengthy material or otherwise require extensive screening, such as a copied full-length movie, will not normally be screened due to resources limitations at JTF-GTMO. DVDs that counsel seek to bring into a meeting because of its applicability to a detainee's legal case must be submitted to the respective Privilege Team for review pursuant to the relevant protective order. Counsel may not leave DVDs with the detainee at the conclusion of the meeting. DVDs may be forwarded to the detainee via the legal or non-legal mail, as appropriate. Counsels who wish to play a DVD during a meeting will notify the OSJA when scheduling the meeting, or as soon as possible upon learning that a DVD player will be necessary. DVDs which are retained by a detainee will be properly marked as "Other Case-Related Material".

g.

(10) Any item that can be fashioned or utilized as a weapon (i.e. belts and ties);

11-12. LEGAL PHONE CALLS: LOCATION. ADDED:

c. Under no circumstances will any non-HVD legal phone call occur in [redacted] Building when that building is being used for a particular HVD commissions legal visit.

d. Only one non-HVD is permitted in [redacted] Building at any one time for a habeas legal phone call.

From: Long, David J LTC USARMY OSD OMC OCP (US)
To: [redacted] DR USSOUTHCOM JTFGTMO
Cc: [redacted] CPT USARMY JTFGTMO/SJA; [redacted] aj USAF JTFGTMO/SJA; [redacted] LT USN USSOUTHCOM JTFGTMO / SJA; [redacted] LTC USSOUTHCOM JTFGTMO
Subject: RE: Witness Interview Requests for AE021 [FOUO] (UNCLASSIFIED)
Date: Friday, November 28, 2014 11:17:45 AM

[redacted]

Understood, and I will remain flexible as will defense counsel as to timing. I explained the logistics and resource challenges next week to defense counsel which is why I favored the election phone call this week, to determine who may elect an interview to allow time for logistics and scheduling. Defense opted to inquire in person next week, I defer to you on how/when that may occur. I was thinking Monday afternoon/evening however again I defer to you on operational impact. As to Maj [redacted] point below, I already explained to defense the presence of the ASJA and SSO at interviews. I will reiterate that to LtCol Jasper for next week.

However, I think a neutral location/environment would best serve the purpose of the initial conversation regarding electing to be interviewed to avoid the appearance of taking "action which could reasonably be understood to discourage or prevent witnesses from testifying..." IAW RMC 701(j). In the event a guard elects to be interviewed, that ends the initial conversation and the chain of command is notified to set up that interview when/where the ASJA/SSO are present. I have no problem with all potential witnesses understanding that two-step procedure and I think it perfectly defensible. Thoughts?

As to scope of interview and protecting government/classified information, for next week I favor a discussion prior to any interview between the defense and ASJA/SSO to understand the parameters of the interview which are specific to the incidental contact made by female guards during detainee movement, demonstrating the impracticality of changes as requested by defense. The guards obviously cannot speak to policy determinations, or resource/manning decisions. As to the 8 Oct FCE, the guards already provided sworn statements and defense has now seen the video, making further information cumulative, unless there is new information which is unlikely. Further, the MJ determined the FCE was incidental to the presence of female guards and not at issue in the relevancy determination for witness access. Defense wants to get into decisions regarding use of FCE, but that is in the SOP, not properly addressed to the guards, and not material or relevant to the discussion of impact on removing qualified/cleared guards from the escort [redacted] I noted to defense that interviewing every guard for every FCE would amount to harassment; further the [redacted] FCE is off the table as not responsive to the commissions narrow order regarding legal meetings and commissions hearings only.

In the draft LTC [redacted] declaration for 9/11, which I am pursuing as a supplemental declaration in the Hadi case, it describes what I observed during a typical detainee movement, which was the incidental contact [redacted] Please review that for accuracy pursuant to your SOP. [redacted]

MEA-DR189-WBA-000071

[redacted]

Finally, as you can imagine I am remiss in not pursuing further testimony (evidence) after living through last week, so I am pursuing the same however understand there are many interests being juggled. Put another way, I am in it to win it, but you are stuck with me (as of now!) at the tip of the spear, and I will only be as sharp as preparation and your assistance allows.

Thanks [redacted]

From: [redacted] CDR USSOUTHCOM JTFGTMO
[redacted]
Sent: Thursday, November 27, 2014 7:29 AM
To: Long, David J LTC USARMY OSD OMC OCP (US)
Cc: [redacted] CPT USARMY JTFGTMO/SJA; [redacted] Maj USAF JTFGTMO/SJA; [redacted] LT USN USSOUTHCOM JTFGTMO / SJA; [redacted] LTC USSOUTHCOM JTFGTMO
Subject: RE: Witness Interview Requests for AE021 ~~[FOUO] (UNCLASSIFIED)~~

Classification: ~~UNCLASSIFIED~~
Caveats: ~~FOUO~~

Dave,

This week will be a challenging one from a logistics/scheduling standpoint. Will need to coordinate time, locations and access to personnel as well as balance equities associated with Camp operations. The meeting line up given the fact that just about every defense team wants to meet with their respective detainee is going to make this evolution, that is, access to Camp guard force difficult. We will do what we can, but all need to understand that this issue is not the only one being worked from an operational perspective this coming week.

[redacted]

CDR [redacted] JAGC, USN
Staff Judge Advocate
JTF-GTMO/SJA
[redacted]

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

From: [redacted] Maj USAF JTFGTMO/SJA
Sent: Wednesday, November 26, 2014 6:29 PM
To: 'Long, David J LTC USARMY OSD OMC OCP (US)'
Cc: [redacted] CPT USARMY JTFGTMO/SJA; [redacted] LT USN USSOUTHCOM JTFGTMO / SJA; [redacted] CDR USSOUTHCOM JTFGTMO
Subject: RE: Witness Interview Requests for AE021 ~~[FOUO] (UNCLASSIFIED)~~

Sir,

On the witness issue, the list from LTC Jasper is everyone involved in the FCE. [redacted] Are we pushing back that the current list is out of bounds from what the judge has said is relevant on the motion?

v/r
Maj [redacted]

-----Original Message-----
From: Long, David J LTC USARMY OSD OMC OCP (US)
[mailto [redacted]
Sent: Wednesday, November 26, 2014 3:36 PM
To: [redacted] Maj USAF JTFGTMO/SJA; [redacted]
Cc: [redacted] LT USN USSOUTHCOM JTFGTMO / SJA
Subject: RE: Witness Interview Requests for AE021 ~~[FOUO] (UNCLASSIFIED)~~

Maj [redacted]

You are right on. I defer to CDR [redacted] who is our discovery/touhy/CIPA/classification guru and much more versed in this topic. He is often heard making a very similar argument in our building. I think going forward we can work out those specifics, however the challenge is in preparing the SSO in the short term to address need-to-know and parameters of the interview for potential interviews next week.

As mentioned briefly on the phone, a pre-interview meeting with defense counsel would be well advised, to set those ground rules for interview parameters and what would constitute need-to-know information relevant to the female guard issue already determined by the judge. I imagine that would also greatly assist the SSO in knowing when to step into the fray. I defer to CDR [redacted] ho I anticipate will be back in Friday.

V/r,
LTC Long

_____

From: [redacted] Maj USAF JTFGTMO/SJA
[redacted]
Sent: Wednesday, November 26, 2014 10:52 AM
To: [redacted]
Cc: Long, David J LTC USARMY OSD OMC OCP (US); [redacted] LT USN USSOUTHCOM JTFGTMO / SJA
Subject: RE: Witness Interview Requests for AE021 ~~[FOUO] (UNCLASSIFIED)~~

Sir,

We're trying to map out our vision for this process. While defense counsel are cleared for classified information, we're trying to think through the

mechanics of the need-to-know determination. There is a process with documentary evidence, and intuitively it seems like there should be a similar process for discussing operational or national security matters with JTF witnesses that would require some advance determination of the permissible scope of interviews. Can you give us a call to talk through how the need to know determinations are taking place on the documentary side?

v/r
Maj [redacted]
[redacted] Maj, USAF
Chief, Litigation Support
JTF-GTMO/OSJA
[redacted]

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-----Original Message-----
From [redacted]
Sent: Tuesday, November 25, 2014 5:53 PM
To: [redacted] CDR USSOUTHCOM JTFGTMO; '[redacted] Col USAF SOUTHCOM SC-CC (US)'
Cc: MIKEALC; [redacted] Maj USAF JTFGTMO/SJA; [redacted] CPT USARMY JTFGTMO/SJA
Subject: RE: Witness Interview Requests for AE021 ~~[FOUO] (UNCLASSIFIED)~~

[redacted]

We have a form that was read into the record that we can forward to you. I suggest giving the form to the potential witness and then answering any questions they may have. Ultimately if you reiterate that they are under no obligation to talk to the prosecution or defense and that the Government and JTF is indifferent to their decision you have done all you can.

We have also discussed how the election should be made. OCP and SouthCom have agreed the election should be done with the Defense present or on the phone. I would give the Defense Counsel an office somewhere and allow each potential witness to come to the office and make the election. We have discussed who should be present for the Government, if anyone. My thought is to have the SSO present to ensure what information is being disseminated and to arrange for a meeting if someone wants to talk with Defense Counsel, since the SSO will have to be present anyway for any future meetings. The Defense may whine about that but it is the best I can come up with.

If anyone elects to be interviewed; I would remind you that case law has never rewarded the Government when it insists upon sitting in on Defense pre-trial interviews. I know I mentioned having an SJA present during the interviews to protect against Touhy questions but ultimately the remedy for that is to simply object to the question. Classified information on the other hand cannot be unheard. So if anyone elects to talk with the Defense, the SSO MUST be present. If the Defense asks a question that would reveal classified information then the interview has to be terminated until it is determined that the Defense has a need-to-know the answer. I doubt there are any GLOMAR questions where the mere acknowledgement of a question would reveal classified information, but the SSO may want to think that through before any interviews start.

I would be happy to discuss. Hope this finds you well.

Best Regards and V/r

[redacted]

-----Original Message-----
From: [redacted] CDR USSOUTHCOM JTFGTMO
[redacted]
Sent: Tuesday, November 25, 2014 3:01 PM
To: [redacted] Col USAF SOUTHCOM SC-CC (US)'; [redacted]
Cc: MIKEALC; [redacted] Maj USAF JTFGTMO/SJA; [redacted] CPT USARMY JTFGTMO/SJA
Subject: RE: Witness Interview Requests for AE021 ~~[FOUO] (UNCLASSIFIED)~~

Classification: ~~UNCLASSIFIED~~
Caveats: ~~FOUO~~

JTF concurs.

Will need additional info to set up these interviews.

Time/location/duration on 3/4 Dec.

JTF SJA and SSO will sit-in on each interview.

Desire is that JTF not be used as the source to advise/inform guard force members of their right to/not to interview.

[redacted]

CDR [redacted] JAGC, USN
Staff Judge Advocate
JTF-GTMO/SJA
APO AE 09522-9998
[redacted]

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-----Original Message-----
[redacted] Col USAF SOUTHCOM SC-CC (US)
[redacted]
Sent: Tuesday, November 25, 2014 2:23 PM
To: [redacted]
Cc: MIKEALC; [redacted] DR USSOUTHCOM JTFGTMO; [redacted]
[redacted] Maj USAF JTFGTMO/SJA; [redacted] CPT USARMY JTFGTMO/SJA
Subject: RE: Witness Interview Requests for AE021 ~~[FOUO]~~

CLASSIFICATION: ~~FOR OFFICIAL USE ONLY~~

As we discussed on the phone, SOUTHCOM concurs.

[redacted] Col, USAF
Chief, Detention Law
HQ USSOUTHCOM/SCSJA
[redacted]

-----Original Message-----
From: [redacted]
Sent: Tuesday, November 25, 2014 2:21 PM
To: [redacted] Col USAF SOUTHCOM SC-CC (US)
Cc: MIKEALC; [redacted]
Subject: RE: Witness Interview Requests for AE021 ~~[FOUO]~~

COL,

I think there is a preference (here at OCP) for a face-to-face meeting between the defense attorney and the potential witness. The witnesses would be advised that there is no requirement for them to speak to either the Defense or Prosecution nor is there a Government preference their election.
I think the SJA or Government rep should be present mostly to witness the election and to avoid any attempts by the Defense to conduct a mini-interrogation on the substance of the motion. If someone elects to make themselves available then the SJA and SSO would be present during those interviews to avoid "Touhy" and Security issues.

Let me know how you would like to proceed. Hope this finds you well and Happy Thanksgiving.

V/r

[redacted]

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Caveats: ~~FOUO~~

Classification: ~~UNCLASSIFIED~~
Caveats: ~~FOUO~~

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