MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD; WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH; RAMZI BINALSHIBH; ALI ABDUL AZIZ ALI; MUSTAFA AHMED ADAM AL HAWSAWI	AE 342A (GOV) **Government Response** To AE 342 (WBA) Defense Motion to Compel Discovery Related to Defense Access to Witnesses 13 February 2015

1. Timeliness

This Response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court ("R.C.") 3.7.

2. Relief Sought

The Prosecution respectfully requests this Commission deny without oral argument the requested relief in AE 342 (WBA).

3. Burden of Proof

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. Rule for Military Commissions ("R.M.C.") 905(c)(1).

4. Overview

The Prosecution has provided defense counsel for Mr. Bin 'Attash with all discoverable documents memorializing communications between members of Office of the Chief Prosecutor ("OCP") and members of Joint Task Force Guantanamo Bay ("JTF-GTMO") concerning access to, and interviews of, witnesses and potential witnesses, to the extent such notes exist. Furthermore, the Prosecution has properly asserted the deliberative process privilege, and hereby asserts the work-product privilege, over any other such documents, to the extent such documents exist.

Contrary to defense claims, the deliberative process privilege protects the Prosecution's communications. *See, e.g.*, *United States v. Edelin*, 132 F. Supp. 2d 59, 89 (D.D.C. 2001) (denying a defendant's request for prosecution communications in a capital trial on the basis of deliberative process privilege). Further, prosecutor notes concerning witness preparation, interviews, and preparation for a hearing are protected by the work-product privilege.

There is no evidence of prosecutor misconduct that might vitiate these privileges, as the prosecution has identified its standard policy for advising witnesses of the defense's desire to speak with them pretrial (*see* AE342, Attachment C), such policy was found to be entirely consistent with the law by the Military Commission in *United States v. Abd Al Hadi Al-Iraqi* (*see* AE 029B, Ruling on Access to Witnesses, *United States v. Abd Al Hadi Al-Iraqi*), and there is no evidence that any member of the Prosecution ever provided any advice inconsistent with that policy.

For these reasons, the Prosecution has fully discharged all discovery obligations arising out of Mr. Bin 'Attash's underlying request. Thus, the Defense Motion is moot.

5. <u>Facts</u>

On 16 January 2015, the Prosecution responded to a Defense request for documents, and provided the Defense approximately 44 pages of emails (between and amongst the Office of the Chief Prosecutor, JTF-GTMO, and SOUTHCOM), as well as additional correspondence and witness advisements relating to access to potential JTF witnesses. This discovery further included SOP #11, in unclassified format, which governs attorney meetings with detainees, and the bench memo filed in *United States v. Hadi al Iraqi*, which articulated the Office of the Chief Prosecutor's policies on witness access.

In the same response, the Prosecution declined to produce certain other materials, asserting privilege over notes of certain communications between OCP and JTF-GTMO as being part of the Prosecution's deliberative process.

6. Law and Argument

As noted above, the Prosecution has provided the Defense with all discoverable materials. To the extent the Defense seeks any further materials, and such materials exist, they are protected by the well-recognized deliberative process privilege, as well as the work-product privilege, and the Prosecution has done nothing to vitiate the protections of these privileges.

I. It Is Well-Settled that the Deliberative Process Privilege Protects Prosecution Communications of the Type the Defense Seeks; Moreover, the Work-Product Privilege Protects Prosecution Notes Concerning Witness Preparations

The Defense claim that the deliberative process privilege is inapplicable to military commissions is erroneous. The Military Commission Rules of Evidence ("M.C.R.E.") specifically contemplate such privileges being invoked. In particular, M.C.R.E. 501 states that a person may claim a privilege so long as such a privilege is recognized by "the principles of common law generally recognized in the trial of criminal cases in the United States district courts . . . ." M.C.R.E. 501(a)(4). The deliberative process privilege, as applied in this instance, is such a privilege.

The United States Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit"), the Federal appellate court that that has review authority over this Commission under the Military Commissions Act of 2009, has recognized that while the deliberative process privilege is most commonly encountered in Freedom of Information Act ("FOIA") litigation, "it originated as a common law privilege." *In re Sealed Case*, 121 F.3d 729, 737-38 (D.C. Cir. 1997); *see also Landry v. F.D.I.C.*, 204 F.3d 1125, 1135 (D.C. Cir. 2000). Even more specifically, the D.C. Circuit has applied the deliberative process privilege in denying a defendant's request in a capital trial. *See, e.g.*, *Edelin*, 132 F. Supp. 2d at 89 (relating to capital defendant's contention of selective prosecution); *see also United States v. Taylor*, 608 F. Supp. 2d 1263 (D.N.M. 2009) (in selective prosecution case, capital defendant was denied request for correspondence pertaining to death-penalty determination based on deliberative process privilege); *United States v. Fernandez,* 231 F.3d 1240, 1246–47 (9th Cir. 2000). For the same

reasons, M.C.R.E. 501(a)(4) provides authority for the deliberative process privilege to be invoked in military commissions.

As to substance, the deliberative process privilege specifically allows the Prosecution to withhold documents and other materials that would reveal "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *In re Sealed Case*, 121 F.3d at 737; *see also Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc), *overruled on other grounds* (common law deliberative process privilege protects creative debate and candid consideration of alternatives within an agency, and protects the integrity of the decision-making process); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 325-26 (D.D.C. 1966), *aff'd sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir. 1967). Put simply, the deliberative process privilege relates to materials that are pre-decisional and deliberative. *See In re Sealed Case*, 121 F.3d at 737; *see also Loving v. Dep't of Defense*, 550 F.3d 32, 38 (D.C. Cir. 2008).

Additionally, the prosecutor is qualified to invoke the deliberative process privilege. Invocation of the privilege is not limited to the head of an agency, as the defense incorrectly argues. *See* AE 342(WBA) at 3. It also has been applied, for example, to lower-level heads of governmental divisions and departments. *See*, *e.g.*, *Landry*, 204 F.3d at 1135. Furthermore, M.C.R.E. 501(c) defines a "person" pursuant to the privilege exceptions as "an appropriate representative of the Federal Government, a State, or political subsection thereof, or any other entity claiming to be the holder of a privilege." As the trial counsel in a military commission, all deliberative discussions are protected.

Furthermore, the requested documents and materials would further be protected as attorney work-product, also a recognized common law privilege. In *Taylor*, the court directly addressed the applicability of the attorney work-product privilege to criminal proceedings:

> The work-product privilege, in contrast, protects the attorney's mental processes. *Klamath Water Users Protective Ass'n,* 532 U.S. at 8, 121 S.Ct. 1060. The Supreme Court has held that this doctrine applies to criminal, as well as civil, litigation. *United States v. Nobles,* 422 U.S. 225, 236-38, 95 S.Ct. 2160, 45

> L.Ed.2d 141 (1975). As the Supreme Court explained, "The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case." *Id.* at 238, 95 S.Ct. 2160. The attorney work product privilege "clearly applies to memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy." *Sears, Roebuck & Co.,* 421 U.S. at 154, 95 S.Ct. 1504. Federal Rule of Criminal Procedure 16(a)(2) recognizes the work product privilege, exempting from disclosure "reports, memoranda, or other internal government documents made by an attorney for the government . . . in connection with investigating or prosecuting the case." *See* Fed.R.Crim.P. 16(a)(2); *Fernandez,* 231 F.3d at 1247; *U.S. v. Edelin,* 128 F. Supp. 2d 23, 39 (D.D.C. 2001).

Taylor, 608 F. Supp. 2d at 1268. Prosecutor notes—the subject of the Defense Motion—are equally protected by the work-product privilege.

The Prosecution recognizes that these privileges are not absolute and can be pierced in certain circumstances. The Defense has not presented such circumstances here. The Defense seeks production of documents directly relating to the pre-decisional and deliberative process, as well as the work-product of the prosecutor, and they have not demonstrated a sufficient showing. *See In re Sealed Case*, 121 F.3d at 737-38. In order to overcome the deliberative process privilege, the Commission is required to take into account the relevance of the evidence and availability of other evidence, as well as possible future timidity by government employees and the role of government. *See In re Sealed Case*, 121 F.3d at 737-38. Here, the Defense already has access to relevant communications. *See* AE 342(WBA) 9-12. For the reasons described below, the Defense has not overcome its burden for piercing the deliberative process veil.

II. There Is No Evidence that the Prosecution Has Acted in Any Manner that Might Vitiate the Deliberative Process Privilege, as the Prosecution Advises All Potential Witnesses in a Manner Consistent with the Law

The issue underlying the instant motion is the Defense claim that there may exist some documentary evidence—in the form of attorney notes—showing the Prosecution improperly discouraging witnesses from participating in pretrial interviews with the Defense. No such information exists. Indeed it is, and has always been, the policy of OCP that the Defense is

entitled to inquire whether potential witnesses are amenable to a pretrial interview, and it is entirely within the discretion of that potential witness to determine whether he/she wants to participate in such an 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").[1] A due-process violation would occur only "[if] the prosecution impermissibly interferes with the defense's access to a witness" and such conduct "undermines the fundamental fairness of the proceeding." *United States v. Bryant*, 655 F.3d 232, 238 (3d Cir. 2011). The Prosecution's conduct in this Commission is, and always has been, well-within the applicable law. Thus, there are no discoverable documents that reflect Prosecution attempts to improperly discourage witnesses, and the Prosecution has not acted in any manner that vitiates its privileges in this area, nor will it do so at any time in the future.

a. The Rules of Discovery Govern Defense Access to Information During Witness Interviews Equally

The Prosecution's process for making witnesses available to the Defense for pretrial interviews is governed by 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

[1] 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."). Here, an accused's access to witnesses pretrial is identical to that in federal district court. The same is true in federal district court. *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.").

unreasonably impede the access of another party to a witness or evidence." *See* R.M.C. 701(j).[2] Where the Defense seeks to learn official or classified information through pretrial interviews, such requests are simply another way of seeking disclosures (albeit oral disclosures) akin to those made through the discovery process.

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

[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.

(1978) (holding FOIA does not replace the traditional rules of discovery). Thus, such Defense requests are subject to the basic discovery rules applicable to military commissions.[3]

i. The Prosecution Has a Duty To Protect Official Information Including Oral Disclosures of Official Information

The Supreme Court has expressly recognized that the Government has an important interest in maintaining control over the disclosure of official information. As the Court stated in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1952):

> 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.

Id. 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. *See* 5 U.S.C. § 301 (implementing *Touhy*).

The Defense challenges the Prosecution's reliance on *Touhy*, 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), and its implementing regulations.

[3] 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).

AE 342(WBA) at 11-12. However, the Defense critique misstates the law and ultimately misses the mark.

The Defense relies on a civil case, *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"), and other civil cases to support its position. However, the Defense ignores entirely the body of *criminal* cases which specifically apply *Touhy* regulations in criminal matters. *See, e.g.*, *United States v. Soriano-Jarquin*, 492 F.3d 495, 504-05 (4th Cir. 2007) (specifically holding that *Touhy* applies in criminal cases); *United States v. Allen*, 554 F.2d 398, 406 (10th Cir. 1977); *United States v. Rosen,* 520 F. Supp. 2d 802, 809 (E.D. Va. 2007) (same); *see also United States v. Springer,* 444 F. App'x 256, 263-64 (10th Cir. 2011) (upholding trial court's decision to quash a defendant's subpoena for failure to follow Department of Justice *Touhy* requirements); *United States v. Wallace,* 32 F.3d 921, 928-29 (5th Cir. 1994); *United States v. Bizzard,* 674 F.2d 1382, 1387 (11th Cir. 1982) (same). This hardly seems like oversight, as many of these cases were cited in the Prosecution's Bench Brief provided to, and quoted by, the Defense. *See* AE 342(WBA) at 11.

Moreover, the Defense ignores the fundamental tenant of *Touhy*: that the Government is allowed to exert control over its own information in the context of litigation. Most notably in this instance, the Government may do so by implementing measures that ensure that only discoverable information is disclosed during an interview.

ii. The Prosecution Has a Duty To Protect Classified Information

The Prosecution must also take all necessary steps to ensure that all official government or classified information is adequately protected throughout these proceedings (*see* 10 U.S.C. § 949p-1), including during interviews. 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). Further, the Government may seek a ruling from this Commission to determine the scope of classified information that is subject to disclosure during a pretrial interview to ensure both that the interview includes all relevant topics and that it excludes any irrelevant topics. Absent some guidance by this Commission or another proper authority, many potential witness 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. The Government must be given the opportunity to establish the proper boundaries. The Government cannot be deprived of this critical step by simply allowing unfettered Defense interviews of government employees who have not had the benefit of some guidance.

In sum, as the Military Commission in *United States v. Abd Al Hadi Al-Iraqi* impliedly found by endorsing the Prosecution's plan for access to witnesses, the Defense may not circumvent the rules of discovery simply by conducting interviews of government employees, because to do so would allow the exception to swallow the whole of the rules of discovery.

b. The Prosecution Advises All Potential Witnesses in a Manner Consistent with the Law

Where the Defense seeks to acquire official government or classified information through oral disclosures during interviews, the Prosecution is prepared to accommodate all such requests that meet the discovery standard, so long as the witness is willing, and the interview is conducted in a manner that adequately protects official government information and classified information. *See* 10 U.S.C. § 949p-1.

Once 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. [INSERT ACCUSED'S NAME]*, a case currently being prosecuted in a military commission at U.S. Naval Station Guantanamo Bay, Cuba, the Defense team for [ACCUSED] 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 [ACCUSED]'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 [ACCUSED]'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 [ACCUSED]'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 Prosecution will dutifully report their response. For those potential witnesses who agree to speak with the Defense by telephone to hear the Defense request personally,[4] 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

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

> 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 [ACCUSED]'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.

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.

The Military Commission in *United States v. Abd Al Hadi Al-Iraqi* is the context in which the issue of defense access to potential JTF-GTMO personnel has been addressed most clearly. There, the Military Commission specifically found that the procedure outlined above is consistent with all governing law. *See* AE 029B, *United States v. Abd Al Hadi Al-Iraqi*. Indeed, through this procedure, the defense team in that case successfully interviewed five potential witnesses prior to the hearing on the matter at issue (each witness who ultimately testified and one additional person who did not ultimately testify). The prosecutors in that case were not

present during any of the interviews, and the Government representatives who were present during the interviews did so at the witness's request. Moreover, those Government representatives were only there to provide advice to the witness as requested by the witness, as well as to ensure that the disclosure of any relevant classified or sensitive government information took place in a secure environment.

The Prosecution in this case has conducted itself, and will continue to conduct itself, consistent with the law. Thus, there is no merit to the Defense claim that the Prosecution has acted in a manner that might vitiate its deliberative process privilege. The Defense motion for additional materials should be denied.

7. Conclusion

As always, the Prosecution takes very seriously its discovery obligations pursuant to R.M.C. 701 as well as its obligations to provide appropriate pretrial access to witnesses. The Prosecution has provided the Defense with all discoverable materials. To the extent the Defense seeks any further materials, and such materials exist, they are protected by the well-recognized deliberative process and the work-product privileges. The Prosecution has done nothing to vitiate the protections of the privilege. Thus, the Defense motion is mooted because there is no further unprivileged discovery to be had.

8. Oral Argument

The Prosecution does not request oral argument, and posits that this issue should be resolved by the Commission on the parties' submissions alone, and that no oral argument need be granted. If the Military Commission decides to grant oral argument to the Defense, the Prosecution requests an opportunity to respond.

9. Witnesses and Evidence

The Prosecution will not rely on any witnesses or additional evidence in support of this motion.

10. Additional Information

The Prosecution has no additional information.

11. Attachments

A. Certificate of Service, dated 13 February 2015

Respectfully submitted,

_____//s//_____
Clay Trivett
Managing Deputy Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 13th day of February 2015, I filed AE 342A (GOV) the **Government Response** To AE 342 (WBA) Defense Motion to Compel Discovery Related to Defense Access to Witnesses with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

_____//s//_____
Clay Trivett
Managing Deputy Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions