

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

AE523 (AAA)

v.

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

Mr. al Baluchi's Motion to Compel
Production of Identities of Witnesses Referred
to by Pseudonym in Discovery

25 September 2017

1. **Timeliness:** This motion is timely filed.
2. **Relief Sought:** Mr. al Baluchi respectfully requests the military commission compel the production of the identities, including but not limited to full names, addresses, phone numbers, and email addresses, of those persons the government has hidden with so-called Unique Functional Identifiers (UFIs) or other pseudonyms in discovery to date. Specifically, Mr. al Baluchi seeks the identities of the UFIs and other pseudonyms contained within Discovery Request DR-333-AAA, filed on 13 July 2017, for potential personal jurisdiction hearing witnesses.
3. **Overview:** The government must provide Mr. al Baluchi with the identities of witnesses it has previously masked in discovery through the use of UFIs and other pseudonyms. Because those identities are relevant and helpful to his defense, Mr. al Baluchi's interest in knowing those identities overcomes the government's national security privilege and the government must produce them to the defense or accept sanctions.
4. **Burden of Proof:** The defense bears the burden of persuasion on the motion to compel to show by a preponderance of the evidence that the requested discovery is relevant and helpful to the preparation of his defense. Assuming that the information requested is properly classified and the government is able to invoke its national security privilege under Rules of Military Commission (R.M.C.) 701(f), Mr. al Baluchi must also show that the classified information would

be “noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution’s case, or to sentencing, in accordance with standards generally applicable to discovery of or access to classified information in Federal criminal cases.”¹

5. Facts:

a. Mr. al Baluchi was transferred into the custody of the U.S. Central Intelligence Agency (CIA) in late April 2003. Mr. al Baluchi remained exclusively in CIA custody until early September 2006. During that period, Mr. al Baluchi was transferred to various so-called black sites—secret facilities operated by the CIA or its partners for purposes of torture and interrogation outside of the United States. There he was subjected to torture and cruel, inhuman, and degrading treatment while undergoing interrogation. During his time in CIA custody, he was interrogated and/or debriefed by numerous CIA employees or contractors; his health was monitored and he was kept alive for purposes of further interrogation by several CIA medical personnel.

b. On 31 May 2017, the military commission ordered briefings and hearings on whether the military commission has personal jurisdiction over Mr. al Baluchi.²

c. In connection with that order, on 13 July 2017, Mr. al Baluchi requested discovery as to, *inter alia*, the identities—including full names, addresses, phone numbers, and email addresses—of individuals whose identities the government masked through the use of UFIs and other pseudonyms in produced discovery. Mr. al Baluchi believes, based on that same discovery, these individuals are relevant to the question of whether the military commission has personal jurisdiction over Mr. al Baluchi.³ The government has also indicated that it will rely on Mr. al

¹ Military Commissions Rules of Evidence (M.C.R.E.) 505(f)(1)(B).

² AE502I Ruling on Defense Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities.

³ Attachment B.

Baluchi's statements from his period in U.S. government custody to support the assertion that Mr. al Baluchi participated "in hostilities against the United States as a member of al Qaeda."⁴

d. The government has yet to provide the identities requested in DR-333-AAA.

e. Instead, in a letter dated 6 September 2017, the government directed defense counsel not to make any efforts to identify or contact current or former CIA employees, regardless of whether they are or were overt or covert employees, because those efforts might somehow disclose classified information.⁵ The government offered to contact current and former CIA employees on behalf of Mr. bin 'Attash and allow them to choose whether to be interviewed by counsel for Mr. bin 'Attash, subject to government-prescribed limitations on the scope of those conversations.

f. On 13 September 2017, counsel for Mr. al Baluchi objected to the government's directive not to investigate the case, and proposal to interfere with defense interviews of CIA witnesses.⁶

6. Law and Argument:

Pursuant to its authority to regulate discovery, the military commission should order the government to reveal the full identities of individuals whose Identity the government has masked through the use of UFI's, or otherwise denied to Mr. al Baluchi. The military commission should order the government produce these individuals' identities because (A) Mr. al Baluchi is entitled to these witnesses' identities as they are relevant and helpful to his defense; and (B) the government's national security privilege with respect to these witnesses' identities must give way in light of their materiality. The same result obtains under the Due Process Clause and M.C.R.E. 507.

⁴ *Id.* at 10.

⁵ Attachment C.

⁶ Attachment D.

Mr. al Baluchi is entitled to the identities of those witnesses listed by pseudonym in discovery request DR-333-AAA, or whose identities are otherwise unknown to Mr. al Baluchi, because those identities are derived from documents that are within the custody or possession of the government and they are material, or relevant and helpful, to the preparation of his defense.⁷ According to the Rules for Military Commissions, something is material to the preparation of a defense if it is helpful to the defense of the accused.⁸ Importantly, information need not be favorable in the *Brady*⁹ sense to be helpful and, therefore, material.¹⁰

*Roviaro v. United States*¹¹ established the standard for production of witness identities. In *Roviaro*, the Court considered whether a defendant charged with selling and trafficking heroin, whose arrest derived from a transaction with an informer, could discover the identity of the informer. There, the Court ruled that the so-called informer's privilege¹² must give way when "the

⁷ R.M.C. 701(c)(1).

⁸ R.M.C. 701(c)(1) at discussion (citing *United States v. Yunis*, 867 F.2d 617, 625 ("We recognize that that term [materiality] is drawn directly from the Supreme Court's language in *Roviaro* and *Valenzuela-Bernal*. However, in practical application of the test, the frequent confusion of the terms 'materiality' and 'relevance' in evidentiary law leads us to the conclusion that the Supreme Court's alternate phrasing of 'helpful to the defense of an accused,' provides more guidance in this context.")).

⁹ *Brady v. Maryland*, 373 U.S. 83 (1963).

¹⁰ *United States v. Mejia*, 448 F.3d 436, 457 (D.C. Cir. 2006); *United States v. Stewart*, 590 F.3d 93, 130-131 (2d Cir. 2009). In addition, the defendant has a right to the production of evidence that is relevant, necessary, and noncumulative, subject to the discovery limitations provided in M.C.R.E. 505 and 506.

¹¹ *Roviaro v. United States*, 353 U.S. 53 (1957).

¹² The so-called informer's privilege is the "[g]overnment's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of the law," *Roviaro*, 353 U.S. at 59.

disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful¹³ to the defense of an accused, or is essential to a fair determination of a cause."¹⁴

The D.C. Circuit applies the *Roviaro* standard to the production of classified evidence.¹⁵ The government must produce the identities of relevant witnesses whenever their "testimony may be relevant and helpful to the accused's defense."¹⁶ The analysis "must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."¹⁷

The witness identities Mr. al Baluchi seeks are material because they would be helpful in preparing his defense. The government has indicated that it intends to rely on statements it attributes to Mr. al Baluchi in order to demonstrate both the existence of hostilities and Mr. al Baluchi's participation therein.¹⁸ The statements on which the government intends to rely were supposedly made in the presence of, or as a result of the actions of individuals whose identities the government has masked with so-called UFI's, or otherwise hidden from Mr. al Baluchi. That alone makes these witness identities material to Mr. al Baluchi's defense.¹⁹

¹³ The same standard for production of evidence found in M.C.R.E. 505 and *Yunis*, 867 F.2d at 625.

¹⁴ *Roviaro*, 353 U.S. at 60-61.

¹⁵ *United States v. Yunis*, 867 F.2d 617, 622 & n.9 (D.C. Cir. 1989).

¹⁶ *Roviaro*, 353 U.S. at 61-62.

¹⁷ *Id.* at 62.

¹⁸ AE502O(GOV) Government Consolidated Response to AE 502L (MAH), Mr. Hawsawi's Witness List for the August 2017 Hearings, and AE 502J (AAA), Mr. Ali's List of Potential Witnesses for Personal Jurisdiction Hearing, at 10 (characterizing statements attributed to Mr. al Baluchi as "highly probative of the fact that [Mr. al Baluchi] is, and was, an alien unprivileged enemy belligerent . . . and that he was engaged in hostilities against the United States as a member of al Qaeda during all relevant time periods").

¹⁹ *Cf. United States v. Libby*, 429 F. Supp. 2d 1, at *12-*14 (Dist. D.C. 2006).

These individuals are the only persons other than Mr. al Baluchi who have direct knowledge of Mr. al Baluchi's treatment from May 2003 to September 2006. They have direct knowledge of the government's campaign to induce learned helplessness in Mr. al Baluchi, which bore fruit in the January 2007 interrogations the government seeks to use.²⁰ These witnesses are critical to lay the foundation for suppression of the January 2007 statements under the Due Process Clause and 10 U.S.C. § 948r.

The limited, blurred discovery the government has produced thus far demonstrates the relevance and helpfulness of the witnesses.²¹ Indeed, for many witnesses, the government has explicitly conceded the relevance and helpfulness of the witnesses' testimony in its 505 substitutes. In *Yunis*, the D.C. Circuit, quoting the Supreme Court's decision in *United States v. Valenzuela-Bernal*,²² has emphasized that articulating "the events to which a witness may testify, and the relevance of those events to the crime charged, may well demonstrate either the presence or absence of the required materiality."²³ Not only is Mr. al Baluchi able to point to individuals who are uniquely positioned to provide information to amplify or contradict the evidence the government intends to use—as was the case in *Roviaro*—he is able to describe the events to which they may testify and the relevance of those events to the crime charged, surmounting the hurdle that prevented the defendants in *Yunis* and *Valenzuela-Bernal* from meeting the materiality standard of the unidentified witnesses they sought.²⁴

²⁰ AE502O(GOV).

²¹ See AE502J (AAA) Mr. al Baluchi's List of Potential Witnesses for Personal Jurisdiction Hearing at Witnesses 93-131.

²² *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982).

²³ *Id.*

²⁴ See *United States v. Moussaoui*, 382 F.3d 453, 472 (4th Cir. 2004) (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982)) ("Because Moussaoui has not had—and will not receive—direct access to any of the witnesses, he cannot be required to show materiality with the

Under D.C. Circuit law, the showing of relevance and helpfulness is sufficient to overcome the assertion of government privilege, whether framed as classified information privilege or informer's privilege.²⁵ Even if the military commission were to employ the balancing test used in the Fourth and Ninth Circuits, Mr. al Baluchi would overcome the government's privilege. In the Fourth and Ninth Circuits, the government's privilege is overcome only on a showing that the defendant's interest in otherwise privileged information is greater than the government's interest in the privilege. Here, as always, the government's interest in the national security privilege is its interest in preventing the *public disclosure* of classified information.²⁶ But, in this case, that risk is already substantially mitigated. All of Mr. al Baluchi's attorneys possess top secret clearances and, therefore, are subject to criminal penalties for the unauthorized disclosure of classified information. They have all signed multiple, mandatory non-disclosure agreements, subjecting them to additional civil penalties for unauthorized disclosure of classified information. They have also signed memoranda of understanding forswearing the disclosure of classified information related to this case specifically. And, they are subject to multiple protective orders and trial conduct orders designed to prevent disclosure of case-related classified information. Finally, the

degree of specificity that applies in the ordinary case. . . . Rather, it is sufficient if Moussaoui can make a 'plausible showing' of materiality.").

²⁵ *United States v. Mejia*, 448 F.3d 436, 456 (D.C. Cir. 2006); *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989); *see also Al Odah v. United States*, 559 F.3d 539, 545-545 (D.C. Cir. 2009)(adopting the *Yunis* standard to the context of *habeas corpus* for individuals detained at Guantanamo Bay, Cuba). The same is true in the Second Circuit. *United States v. Aref*, 533 F.3d 72, 79 (2d Cir. 2008). In the Fourth and Ninth Circuits, however, the court must balance the government's interest in protecting the classified information from disclosure against the defendant's right to prepare a defense, taking into account the particular circumstances of each case. *United States v. Abu Ali*, 528 F.3d 210, 247 (4th Cir. 2008) (quoting *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985)).

²⁶ *E.g.*, *United States v. Abu Ali*, 528 F.3d 210, 245-246 (4th Cir. 2008). *See also United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (cautioning, that "[t]hings that did not make sense to the District Judge would make all too much sense to a foreign counter-intelligence specialist").

military commissions proceeding themselves are geographically remote, their public sessions are subject to a prophylactic forty-second delay, and many sessions are simply closed and classified. Thus, in this case, the government's interest in preventing public disclosure is substantially satisfied by the numerous preventive measures in place already.

On the other hand, Mr. al Baluchi's interest in the otherwise privileged information is substantial, touching on his core Sixth Amendment rights to conduct a full investigation, and to prepare and present a defense.²⁷ In light of the existing protections against the disclosure of classified information in this case, allowing the government to cut off Mr. al Baluchi's investigation by refusing to unmask the identities of UFI-labeled witnesses, or reveal the true identities of the other witnesses whose identities the government has hidden from him, would impermissibly impinge on his Sixth Amendment rights. It would also deny him access to the only witnesses able to impeach the reliability and voluntariness of statements the government intends to rely on to convict Mr. al Baluchi and send him to his death. Thus, even were the military commissions to balance Mr. al Baluchi's interest in these witness identities against the government's acknowledged national security interest in preventing the disclosure of classified information, the government's privilege must give way.²⁸

The closest case in the D.C. Circuit is *United States v. Celis*.²⁹ In that non-capital narcotics trafficking case, defendants appealed on the basis that the district court violated their Sixth

²⁷ *E.g.*, *United States v. Nixon*, 418 U.S. 683, 709 (1974).

²⁸ *Cf. United States v. Moussaoui*, 382 F.3d 453, 474 (4th Cir. 2004) ("In all cases of this type—cases falling into 'what might loosely be called the area of constitutionally guaranteed access to evidence,' . . . the Supreme Court has held that the defendant's right to a trial that comports with the Fifth and Sixth Amendments prevails over the governmental privilege [to prevent the disclosure of classified information].") (citations omitted).

²⁹ *United States v. Celis*, 608 F.3d 818 (D.C. Cir. 2010).

Amendment Confrontation Clause rights by allowing witnesses to testify under pseudonyms. Analyzing the defendants' claims under the *Roviaro* framework, the D.C. Circuit emphasized, in particular, that the witnesses merely *testified* under pseudonyms for safety³⁰ but that their identities were in fact known to defendants and, as a result, defendants were able to independently investigate the witnesses in order to fully examine the pseudonymous witnesses.³¹

The military commission should reach the same conclusion under M.C.R.E. 507—the Secretary of Defense's implementation of *Roviaro* in the military commissions—as under the Due Process Clause. Although the informer's privilege available to the government in federal court is tied to law enforcement,³² M.C.R.E. 507's definition is not necessarily so circumscribed—it appears to embrace any person “who has furnished information . . . relating to . . . a possible violation of law to a person whose official duties include the discovery, investigation, or prosecution of a crime.”³³ Interrogators, debriefers, linguists, or even medical personnel present at location where Mr. al Baluchi was interrogated seem to fall within M.C.R.E. 507's definition because they would all have—through official reporting—provided information relating to a possible crime to persons whose official duties included investigation of alleged terrorist plots (i.e., crimes).

³⁰ The defendants were alleged to be involved with the FARC. *Id.* at 825-826. Prior to trial, the FARC threatened generally anyone who cooperated against one of the defendants and also “directly threatened to kill at least two cooperating witnesses.” *Id.* at 832.

³¹ *Id.* at 833. Although defendants were not informed of the pseudonymous witnesses true identities until seven days before trial, the court evinced a willingness to allow the defendants as much time as necessary to fully investigate the pseudonymous witnesses for eventual cross examination. *Id.* at 830.

³² *Cf. Roviaro*, 353 U.S. at 59 (defining the informer's privilege as the “[g]overnment's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of the law”)(emphasis added).

³³ M.C.R.E 507(a)(1).

The government must produce the witness identities under M.C.R.E. 507. M.C.R.E. 507(c)(2) instructs the military commission to determine whether “an informant may be able to give testimony necessary to the accused’s defense on the issue of guilt or innocence” after, like *Roviaro*, “taking into consideration the offense charged, the possible defense, the possible significance of the informant’s testimony, and other relevant factors.”³⁴ The military commission may also “decline to extend the privilege” if doing so “would adversely affect the integrity or fairness of the proceedings.”³⁵ In light of the government’s intent to rely on statements it attributes to Mr. al Baluchi in proving personal jurisdiction, denying him access to the witnesses who are able to testify to the reliability and voluntariness of those statements would of course adversely affect integrity or fairness of the military commissions by denying Mr. al Baluchi the ability to oppose evidence presented against him. As a result, Mr. al Baluchi’s need for these witness identities overcomes the government’s privilege under M.C.R.E. 507, and the military commission should order the government to reveal these witnesses’ identities.

Because Mr. al Baluchi is entitled to them, the commission must order the government to turn over the identities of the UFI witnesses to Mr. al Baluchi under *Roviaro/Yunis* due process analysis as well as under M.C.R.E. 505 and 507. The government need not comply with the order, but must accept sanctions if it chooses to withhold the identities of relevant and helpful witnesses.

7. **Request for Oral Argument:** Requested.

8. **Conference with Opposing Counsel:** The government did not respond to a request for position sent 20 September 2017. The government did not respond to DR-333-AAA, sent 13 July 2017.

³⁴ M.C.R.E. 507(c)(2).

³⁵ M.C.R.E. 507(c)(3).

9. **Attachments:**

- A. Certificate of Service
- B. DR-333-AAA, DEFENSE REQUEST FOR DISCOVERY, Potential personal jurisdiction hearing witnesses (**Classified**)
- C. MEMORANDUM FOR Defense Counsel, Index related to CIA RDI Discovery
- D. MEMORANDUM FOR Trial Counsel, dated 13 September 2017
- E. MTC Identities Addendum (**Classified**)

Very respectfully,

//s//
JAMES G. CONNELL, III
Detailed Learned Counsel

//s//
STERLING R. THOMAS
Lt Col, USAF
Detailed Military Defense Counsel

//s//
ALKA PRADHAN
Defense Counsel

//s//
JASON R. WAREHAM
Maj, USMC
Defense Counsel

Counsel for Mr. al Baluchi

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 25th day of September, 2017, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//

JAMES G. CONNELL, III

Learned Counsel

Attachment B

United States v. KSM et al.

APPELLATE EXHIBIT 523 (AAA)

(Pages 15 - 20)

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Attachment B

APPELLATE EXHIBIT 523 (AAA) is located in the classified annex of the original record of trial.

**POC: Chief, Office of Court Administration
Office of Military Commissions**

United States v. KSM et al.

APPELLATE EXHIBIT 523 (AAA)

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

6 September 2017

MEMORANDUM FOR Defense Counsel for Khallad Bin 'Attash

SUBJECT: Index related to CIA RDI Discovery

1. (U) This letter is to explain the discovery provided herewith on this disc that is Bates Stamped "MEA-10018-00008543-MEA-10018-00008562."
2. (U) Over the course of many months, the Military Judge has reviewed, and ultimately approved, Defense summaries of certain classified information related to the CIA RDI program submitted by the Prosecution in numerous *ex parte* classified filings. The attached document is an index of the discovery provided by the Prosecution to date related to the Central Intelligence Agency's former Rendition, Detention, and Interrogation (RDI) Program. The Military Judge approved summaries that omit certain information, including the dates of reports, names of CIA employees or contractors, and information regarding the locations where the accused were held.
3. (U) The index lists discovery provided by the Prosecution in chronological order of the event that is documented in the materials. In some cases, the information in the original materials was undated and the Prosecution provided its best estimate of when the event documented in the materials took place. Where applicable, the Prosecution provided a location – identified by location number – where the event took place. Because of the nature of the involvement of certain individuals in the CIA RDI Program, and specifically the nature of contact with the accused, the Government assigned those individuals a unique functional identifier (UFI) (e.g. "Interrogator A1C"). The index identifies when particular individuals were present for events documented in the discovery materials, using the UFIs.
4. (U) The Prosecution understands that the Defense may want to contact individuals identified in the discovery materials. To the extent that the Prosecution has identified an individual with a UFI, the Prosecution is willing to facilitate Defense requests to interview that person. To facilitate any Defense requests, an officer of the CIA, with an FBI special agent present, will contact each requested individual and notify the individual that defense counsel for the Accused have identified him or her as someone they would like to interview. The CIA officer will make clear that any interview is completely voluntary – the individual has an absolute right to participate in an interview if they so choose, but an equal and absolute right not to do so. This arrangement will ensure that

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[REDACTED]

each individual is informed of his or her rights and obligations with respect to the Defense request and will seek to learn whether each individual is amenable to being interviewed. If any individual agrees to speak with the Defense, the Prosecution will follow up with a letter setting out further information regarding the logistical arrangements for any interview and the scope of the agreed-to questioning. Be advised that in the event these individuals agree to meet, you will be limited in what may be discussed outside the areas identified in this follow up letter; to ensure a productive process, it would be helpful for the Defense to identify in its interview request topics or documents that the Defense would like to discuss.

5. ~~(S)~~ The Defense may also want to make a request to interview other current or former CIA employees and contractors. The Government is prepared to facilitate requests in the same manner as described in paragraph (4), provided that at all times Defense the requests are conducted in a manner that adequately protects official government information, including classified information. *See generally* 5 U.S.C. § 301 (implementing *United States v. Touhy*, 340 U.S. 462). Any such requests must include a reasonably detailed description of the information sought to be discussed during the interview. 32 C.F.R. § 1905.4(d); *see generally* AE 502J.
6. ~~(S)~~ The Defense should make no independent attempt to locate or contact any current or former CIA employee or contractor, regardless of that individual's cover status. In many cases, the CIA employee or contractor's affiliation with the CIA is covert. Moreover, "[i]nformation regarding CIA personnel or contractors involved in the former RDI Program" including "any ... identifying information" remains classified. *See* 13RRR Att. B at 3; AE 13BBBB 2(g)(4)(c) (incorporating Att. B into Third Amended Protective Order No. 1). Thus, even well-intentioned efforts to locate CIA employees and contractors have the likely consequence of disclosing classified information. These necessary restrictions on Defense efforts are critical to protecting very sensitive classified information and must be followed. To the extent that you have any questions regarding the procedures required to contact current or former CIA employees and contractors, the Defense should contact the undersigned at [REDACTED] or jeffredg [REDACTED]. Be mindful of the classification of the materials that you have received and confer with your defense security officer prior to sending any request via unclassified means. We are happy to make appropriate arrangements to enable the Prosecution to process the Defense requests for discovery in a manner that adequately protects classified information.

//s//

Jeff Groharing
Trial Counsel
Office of the Chief Prosecutor

Attachment D



DEPARTMENT OF DEFENSE
MILITARY COMMISSIONS DEFENSE ORGANIZATION
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

13 September 2017

MEMORANDUM FOR Trial Counsel

FROM: James G. Connell, III, Defense Counsel for Mr. al Baluchi

SUBJECT: Response to Memorandum Directing Defense Counsel Not to Investigate

1. This letter memorializes our objections to your 6 September 2017 memorandum not to investigate the case in *United States v. al Baluchi*, and your proposed interference with Mr. al Baluchi's right to investigate and interview witnesses. To be clear, counsel for Mr. al Baluchi decline both your directive and your proposal, and inform you that proceeding as you propose would violate Mr. al Baluchi's rights under the Fifth and Sixth Amendment to the Constitution, and 10 U.S.C. § 949j.
2. Your direction to "make no independent attempt to locate or contact any current or former CIA employee or contractor, regardless of that individual's cover status," if honored, would violate core principles of the adversarial process. I direct your attention to AE441A (AAA), which explains the authorities mandating independent defense investigation of witnesses and evidence.
3. Your proposed witness procedure would interfere with Mr. al Baluchi's access to witnesses you have acknowledged are relevant and helpful, and violate Mr. al Baluchi's right to obtain witnesses and evidence. The proper procedure is laid out in Mr. al Baluchi's memoranda DR-333-AAA and DR-335-AAA, dated 13 July 2017 and 21 July 2017, respectively.
4. Counsel for Mr. al Baluchi do not understand your memorandum to invoke the procedures under 10 U.S.C. § 949p-4 or M.C.R.E. 505. You have not sought a protective order to prevent defense investigation as you have done in the past. If you intend your directive or proposal to have binding effect, through invocation of classified information privilege or otherwise, you will need to seek an appropriate order from the military commission. Otherwise, your letter is simply an unconstitutional attempt to chill defendants' investigative and mitigation efforts.
5. I am available to discuss this matter at [REDACTED] or james.connell2 [REDACTED]

Best regards,

//s//

James G. Connell, III
Counsel for Mr. al Baluchi

Attachment E

United States v. KSM et al.

APPELLATE EXHIBIT 523 (AAA)

(Pages 27 - 29)

CLASSIFIED

Attachment E

APPELLATE EXHIBIT 523 (AAA) is located in the classified annex of the original record of trial.

**POC: Chief, Office of Court Administration
Office of Military Commissions**

United States v. KSM et al.

APPELLATE EXHIBIT 523 (AAA)