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 523P (GOV)** **Government Response** To Mr. Ali's Motion to Reconsider AE 523L, Protective Order #5, and AE 523M, Ruling 26 April 2019

1. (U) Timeliness

(U) The Prosecution timely files this Response pursuant to Military Commissions Trial Judiciary Rule of Court ("R.C.") 3.7.

2. (U) Relief Sought

The Prosecution respectfully requests that this Commission deny the requested relief set forth within AE 523N, Mr. Ali's Motion to Reconsider AE 523L, Protective Order #5, and AE 523M, Ruling.

3. (U) Burden of Proof

(U) As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. *See* R.M.C. 905(c)(1)–(2).

4. (U) Facts

On 25 September 2017, Defense counsel for Mr. Ali filed AE 523 (AAA), a Motion to Compel Production of Identities of Witnesses Referred to by Pseudonym in Discovery. In doing so, the Defense specifically sought "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." *See* AE 523 (AAA) at 1.

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(U) On 10 October 2017, the Prosecution filed AE 523B (GOV), Government Response to Mr. Ali's Motion to Compel Production of Identities of Witnesses Referred to by Pseudonym in Discovery. *See* AE 523B (GOV).

(U) On 12 October 2017, the parties delivered oral argument on the AE 523 motion series. *See* Unofficial/Unauthenticated Transcript ("Tr.") at 17024–48.

On 30 March 2018, the Commission issued AE 523F (ORDER-SPECIFIED ISSUE), Mr. Ali's Motion to Compel Production of Identities of Witnesses Referred to by Pseudonym in Discovery, and requested the parties brief: ". . . under what authority did the Government use pseudonyms in lieu of the true identity of witnesses in discovery materials provided to the Defense as identified in AE 523C (AAA) that was not an approved substitution by the Commission pursuant to 10 U.S.C. § 949p-4 and Military Commission Rule of Evidence (M.C.R.E.) 505." *See* AE 523F.

(U) On 6 April 2018, the Prosecution filed AE 523G (GOV), Government Response to AE 523F, Order-Specified Issue, Mr. Ali's Motion to Compel Production of Identities of Witnesses Referred to by Pseudonym in Discovery. *See* AE 523G (GOV).

On 13 April 2018, Defense counsel for Mr. Ali filed AE 523H (AAA), their Response to AE 523F, Order – Specified Issue. *See* AE 523H (AAA).

On that same day, Defense counsel for Mr. Bin 'Attash filed AE 523I (WBA), Defense Reply to AE 523G (GOV), Government Response to AE 523F, Order-Specified Issue, Mr. Ali's Motion to Compel Production of Identities of Witnesses Referred to by Pseudonym in Discovery. *See* AE 523I (WBA)

(U) On 17 August 2018, the Commission issued AE 523J (ORDER), Mr. Ali's Motion to Compel Production of Identities of Witnesses Referred to by Pseudonym in Discovery. *See* AE 523J (ORDER). As stated within the order:

> 5. **Ruling**. Mr. Ali's motion to compel is **GRANTED IN PART** as provided in this Ruling.

6. **Order**.

a. Unless the Government invokes a privilege under M.C.R.E. 505 or 506, the Government will provide the Defense with the names, military email addresses, and military telephone numbers for all persons identified by pseudonym in the Accuseds' medical records provided in discovery. If the Government cannot locate the identifying information for any of these individuals it will notify the Commission. The Government will (1) invoke a privilege under M.C.R.E. 505 or 506, or (2) provide the identifying information to the Defense, or (3) otherwise notify the Commission it cannot locate the identifying information, not later than **90 days** from the issuance of this Order.

(U) AE 523J at 10.

(U) In compliance with the Commission's order, on 12 November 2018, the Prosecution filed AE 523K (GOV), a classified, *ex parte*, *in camera*, and under seal pleading. *See* AE 523K (GOV).

On 17 December 2018, Defense counsel for Mr. Ali inquired into the status of the Government's compliance with AE 523J (ORDER), and the Prosecution responded:

In AE 523K, filed *ex parte* and *in camera* on 12 November (notice of which was provided to the Defense), the Prosecution invoked privileges under M.C.R.E. 505 and M.C.R.E 506 over persons identified by pseudonym. Should the Prosecution's relief requested in AE 523K be granted, the Prosecution will then provide the information to the Defense in accordance with the protective order that the Military Judge issues."

Attach. B.

On 2 April 2019, the Commission issued AE 523M (RULING), Defense Access to Current and Former Joint Task Force-Guantanamo Medical Providers, granting, in part, the Government's request for relief in AE 523K. *See* AE 523M (RUL). The Commission stated:

(U) 3. **Findings**.

a. In AE 523K (GOV), the Government provided the Commission with several attachments, and incorporated by reference evidence contained in prior filings, as well as witness testimony taken during previous sessions of the Commission.

b. The Government attached a signed declaration (523K (GOV), Attach. B)) and incorporated a declaration by reference. [*Citing* AE 014 (GOV), Attach. B, Declaration of General Douglas M. Fraser, Commander of U.S. Southern

Command, dated 24 October 2011 (filed in camera and under seal).] These declarations properly invoke the United States' classified (M.C.R.E. 505) and sensitive information (M.C.R.E. 506) privileges and set forth the damages to national security and the public interest that discovery of, or access to, the underlying classified and sensitive information reasonably could be expected to cause. [*See* 10 U.S.C. §§ 949p-4(a)(1) and 949p-6(d)(4); *see also* M.C.R.E. 506(c).]

c. The declarations were signed by knowledgeable United States officials possessing the authority to classify information. [*Id*.]

[. . .]

f. The Government's proposed substitutions of [Unique Medical Identifiers] UMIs in place of true names for current and former JTF-GTMO personnel identified by pseudonym in the Accused's medical records are an adequate alternative to discovery of that classified information to the Accused.

(U) g. The disclosure of all known true names and contact information for current and former JTF-GTMO medical providers associated with detainee care, given only to cleared Defense team members via sealed and classified discovery, will provide the Accused with substantially the same ability to make a defense as would the Accused's direct access to the underlying classified information. [*See* 10 U.S.C. §§ 949p-4(b)(3) and 949p-6(d)(2).]

h. In instances where the parties hold names or contact information of medical providers in such a way that they are *not* associated with any detainee, the use of additional administrative protective measures is necessary. The additional administrative protective measures will protect the identities and prevent the accidental disclosure of government information privileged from disclosure.

i. Current and former JTF-GTMO medical providers associated with detainee care are potential witnesses who possess knowledge of classified and sensitive official government information belonging to the Department of Defense and have signed non-disclosure agreements. These potential witnesses learned this classified and sensitive information in the course of their official duties. The Government retains an important interest in maintaining control over the disclosure of such information, and will be afforded an opportunity to advise these current and former government employees of their rights and responsibilities as potential witnesses and holders of classified and sensitive official information prior to disclosure to the Defense.

[. . .]

k. Informing the potential witnesses of rights and responsibilities, as contained in the Commission's Modified Advisement, appropriately protects the flow of classified and sensitive information without unreasonably impeding Defense access to witnesses or evidence. [*See* R.M.C. 701(j).]

l. The classified disclosure of identifying medical personnel information, the assignment and use of UMIs, and the advisement of potential witnesses in accordance with the Modified Advisement, will give the parties an adequate opportunity to prepare their cases.

4. **Ruling**. Having considered the Government's motion, proposed substitutions, the theories of defense, and any materials that may be incorporated by reference or otherwise attached, the Commission rules that AE 523K (Gov) is **GRANTED IN PART** as provided in this paragraph.

a. The Government may assign UMIs to all JTF-GTMO personnel associated with the Accused's medical records. The assigned UMIs will be used in place of true names in all future unclassified commission filings, commission proceedings, and during client discussions.

b. The Commission authorizes the Government to convey the rights and responsibilities, as articulated in the Modified Advisement, to current and former JTF-GTMO medical providers associated with detainee care.

c. Within 21 days after being afforded an opportunity to convey the rights and responsibilities (as articulated in the Modified Advisement) to a current or former JTF-GTMO individual associated with an Accused's medical records, the Government is ordered to produce that individual's true name and contact information to the Defense in a classified spreadsheet, along with the assigned UMI. The classified spreadsheet will be handled in accordance with Protective Order #1 and is ordered to be sealed.

AE 523M at 6–8.

(U) On 2 April 2019, the Commission issued AE 523L, Protective Order #5, Defense Access to Current and Former Joint Task Force-Guantanamo Medical Providers, to be applied "in tandem with the Commission's Ruling in AE 523M (Ruling)." *See* AE 523L at 1.

(U) On 12 April 2019, Mr. Ali filed AE 523N (AAA), a Motion to Reconsider AE 523L Protective Order #5 and AE 523M Ruling. In so doing, Mr. Ali stated:

a. [Mr. Ali] respectfully requests the military commission to reconsider its ex parte AE523M Ruling and AE523L Protective Order #5.

(U) b. Upon reconsideration, the military commission should hold an adversarial hearing as required by 10 U.S.C. § 949p-6(d)/MCRE 505(h)(4) when the government seeks a non-substitution protective order following an order for production.

(U) c. Upon reconsideration, the military commission should inquire into the basis for the government's representation that the identities of medical

witnesses are classified when associated with a detainee, and modify Protective Order #5 as appropriate.

(U) d. On the base motion or upon reconsideration, the military commission should order the government to produce the identities of the non-UFI, non-medical witnesses at issue in the original motion.

(U) e. Upon reconsideration, the military commission should decline to authorize the government to send a letter to the medical witnesses regarding anticipated defense interviews. In the alternative, if the military commission does authorize such a letter, it should replace the letter attached to AE523M Ruling with the letter at Attachment D.

AE 523N (AAA) at 1–2.

On 7 April 2019, government investigators sent the Modified Advisement Form (and individual UMIs), ordered in AE 523M, Attachment A, to the vast majority of current and former JTF-GTMO medical providers (hereinafter, "medical providers") who were identified by pseudonym in discovery, located by government investigators, and who possessed military contact information.[1]

On 19 April 2019, the Prosecution produced a classified spreadsheet with the true names, pseudonyms, UMIs, and military contact information[2] for medical providers who were identified by pseudonym in discovery, located by government investigators, possessed military contact information, and (with a small number of exceptions)[3] were sent the Modified Advisement Form ordered in AE 523M, Attachment A.

(U) [1] One former medical provider was sent the Modified Advisement Form (and UMI) on 18 April 2019, because there was difficulty locating that person's military contact information. Ultimately, the Modified Advisement Form (and UMI) was sent to that individual, using civilian contact information, on 18 April 2019.

[2] Including the former medical provider with civilian-only contact information, noted in footnote 1, *supra*.

[3] On 22 April 2019, the Prosecution identified a small number of medical providers who had not been sent the Modified Advisement Forms (or UMIs) ordered in AE 523M. Those individuals were sent the Modified Advisement Forms (and UMIs) on 24 April 2019. The additional medical providers located by the government, but not yet listed will be turned over in discovery via an updated classified spreadsheet wel from 24 April 2019.

5. ~~(U)~~ Law and Argument

~~(U)~~ The Prosecution adopts the standard for reconsideration stated by the Commission (and cited by the Defense) in AE 526J Ruling, Motion to Reconsider AE 526C (Rul) Emergency Defense Motion to Prevent Removal of MRI Scanner From USNS Guantanamo Pending Consideration of Funding Request for Additional Services, dated 9 May 2018. Additionally, the Prosecution incorporates AE 523B (GOV) and AE 523G (GOV), by reference.

I. ~~(U)~~ National Security Obligations are Defined by Statute

~~(U)~~ The statutory provisions of 10 U.S.C. §949p-4 control the Prosecution's request for discovery relief in AE 523K (GOV). Such provisions state the following:

~~(U)~~ §949p–4. Discovery of, and access to, classified information by the accused

(a) ~~(U)~~ LIMITATIONS ON DISCOVERY OR ACCESS BY THE ACCUSED.—

(1) [redacted] DECLARATIONS BY THE UNITED STATES OF DAMAGE TO NATIONAL SECURITY.—In any case before a military commission in which the United States seeks to delete, withhold, or otherwise obtain other relief with respect to the discovery of or access to any classified information, the trial counsel shall submit a declaration invoking the United States' classified information privilege and setting forth the damage to the national security that the discovery of or access to such information reasonably could be expected to cause. The declaration shall be signed by a knowledgeable United States official possessing authority to classify information.

(2) ~~(U)~~ STANDARD FOR AUTHORIZATION OF DISCOVERY OR ACCESS.—Upon the submission of a declaration under paragraph (1), the military judge may not authorize the discovery of or access to such classified information unless the military judge determines that such 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. If the discovery of or access to such classified information is authorized, it shall be addressed in accordance with the requirements of subsection (b).

(b) [redacted] DISCOVERY OF CLASSIFIED INFORMATION.—

(1) [redacted] SUBSTITUTIONS AND OTHER RELIEF.—The military judge, in assessing the accused's discovery of or access to classified information under this section, may authorize the United States—

(A) [redacted] to delete or withhold specified items of classified information;

(B) (U) to substitute a summary for classified information; or

(C) (U) to substitute a statement admitting relevant facts that the classified information or material would tend to prove.

(2) (U) EX PARTE PRESENTATIONS.—The military judge shall permit the trial counsel to make a request for an authorization under paragraph (1) in the form of an ex parte presentation to the extent necessary to protect classified information, in accordance with the practice of the Federal courts under the Classified Information Procedures Act (18 U.S.C. App.). . . .

(3) (U) ACTION BY MILITARY JUDGE.—The military judge shall grant the request of the trial counsel to substitute a summary or to substitute a statement admitting relevant facts, or to provide other relief in accordance with paragraph (1), if the military judge finds that the summary, statement, or other relief would provide the accused with substantially the same ability to make a defense as would discovery of or access to the specific classified information.

(c) (U) RECONSIDERATION.—An order of a military judge authorizing a request of the trial counsel to substitute, summarize, withhold, or prevent access to classified information under this section is not subject to a motion for reconsideration by the accused, if such order was entered pursuant to an ex parte showing under this section.

(U) 10 U.S.C. § 949p-4; *see also* M.C.R.E. 505(f). In this case, the Prosecution properly invoked the above provisions to seek withholdings and partial substitutions of classified information in advance of discovery to the Defense.

II. (U) An Improper Request for an Adversarial Hearing is Not Grounds for Reconsideration.

The Defense assertion that the Prosecution sought "a non-substitution protective order" is incorrect. *See* AE 523N (AAA) at 1. As noted in the Commission's ruling of AE 523M, the Prosecution requested relief under 10 U.S.C. §§ 949p-4(a)(1), 949p-4(b)(1)(A-C), and Military Commission Rule of Evidence ("M.C.R.E.") 505(f)(1)–(2) to withhold certain information and give partially-substituted discovery to the Accused by providing UMIs in place of true names for medical providers identified by pseudonym in the Accused's medical records. *See* AE 523M at 1–3. The Military Commissions of Act 2009 (hereinafter "M.C.A.") expressly authorizes the Prosecution to move for approval of withholdings and substitutions *ex parte* and *in camera*, stating:

> The military judge shall permit the trial counsel to make a request for an authorization [to delete, withhold, or substitute a summary for classified information] in the form of an *ex parte* presentation to the extent necessary to protect classified information, in accordance with the practice of federal courts under the Classified Information Procedures Act (CIPA) (18 U.S.C. App.).

(U) 10 U.S.C. §§ 949p-2(b) and 949-4(b)(2); *see also* M.C.R.E. 505(f)(2)(B).

(U) Moreover, federal courts interpreting CIPA consistently recognize the validity of *ex parte*, *in camera* presentations relating to the discovery of classified information. *See, e.g.*, *United States v. Aref*, 533 F.3d 72, 80–81 (2d Cir. 2008) (rejecting "Aref's contention that the district court improperly held *ex parte* hearings with the Government when evaluating the classified material"); *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261-1262 (9th Cir. 1998) (approving the trial court's *ex parte* and *in camera* hearings to review the Government's claim of privilege under CIPA §4, despite the fact that CIPA §4 only provides for *ex parte* written submissions); *United States v. Yunis*, 924 F.2d 1086, 1094–95 (D.C. Cir. 1991) (noting the court's *ex parte in camera* review of Government material and approving discovery withholdings and substitutions); *United States v. Sarkissian*, 841 F.2d 959, 965–66 (9th Cir. 1988) (considering the legislative history of CIPA and discussing that "'since the government is seeking to withhold classified information from the defendant, an adversary hearing with defense knowledge would defeat the very purpose of the discovery rules.'" (citation omitted)); *United States v. Pringle*, 751 F.2d 419, 427 (1st Cir. 1984) (dismissing a defense argument that the government was obligated to proceed under the adversarial process of CIPA § 6, and noting that the government properly invoked the *ex parte* process of CIPA §4 when the defendants "were seeking classified information which the government sought to protect."); *United States v. Abu-Jihaad*, No. 07-CR-57, 2007 WL 2972623, at *31 (D. Conn. Oct. 11, 2007) (determining that district court "acted well within its discretion in reviewing [CIPA] submissions *ex parte* and *in camera*").

As with CIPA, the *ex parte* process of 10 U.S.C. § 949p-4 is vital to the protection of national security information precisely because it allows the Prosecution to know the length,

breadth, and depth of discovery implications prior to actually releasing classified information. The provisions of § 949p-4(b)(2) authorized the *ex parte* process used in this case because the Government has a compelling national security interest in the underlying classified information and needs to know how that information will be protected in advance of disclosure. *See Pringle*, 751 F.2d at 427 (discussing the history and purpose of CIPA and noting that "[p]rior to CIPA, the government had no way of evaluating the gravity of the danger to national security should the prosecution continue and the information be disclosed."); *see also Yunis*, 867 F.2d at 623 (recognizing that "[t]he government has a compelling interest in protecting . . . the secrecy of information important to our national security" (quoting *CIA v. Sims*, 471 U.S. 159, 175 (1985))); *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (finding that the government has a "'compelling interest' in withholding national security information from unauthorized persons").

(U) The *ex parte* process also allows the Government to protect its national security interests contained in declarations that set forth damage to national security that could reasonably result if certain information is discovered. *See* 10 U.S.C. §9 49p-4; *see also* 10 U.S.C. § 949p-6(d)(4) ("[t]he trial counsel may . . . submit to the military judge a declaration . . . certifying that disclosure of classified information would cause identifiable damage to the national security . . . If so requested by the trial counsel, the military judge shall examine such declaration during an ex parte presentation."). As noted by the Commission in AE 523M, the Prosecution availed itself of the *ex parte* process to submit a declaration in support of its request for discovery relief. *See* AE 523M at 6 (referencing AE 523K, Attach. B, and citing AE 014 (GOV), Attach. B; 10 U.S.C. §§ 949p-4(a)(1) and 949p-6(d)(4); M.C.R.E. 506(c)). In this case, the Prosecution was entitled to proceed *ex parte* with its entire submission for the protection of classified information in advance of discovery.

(U) Neither is the Government's right to proceed *ex parte* under 10 U.S.C. § 949p-4 impacted by the Commission's reference to or application of other provisions of 10 U.S.C. § 949p in its orders. The Commission is not restricted by the organization of 10 U.S.C. §§ 949p-1–949p-7 from crafting, approving, or applying "alternative procedures" or granting "other

relief" (to include the use of UMIs and the Modified Advisement form ordered in AE 523M) that effectuate the specific protections required under 10 U.S.C. § 949p-4. *See* 10 U.S.C. § 949p-4; *c.f.* 10 U.S.C. § 949p-6. The Commission's use of this authority is necessary in this instance to achieve the overarching purpose of the statute and rules related to the protection of classified information. *See United States v. La Rouche Campaign*, 695 F. Supp. 1282, 1288 (D. Mass. 1988) (ruling that procedural tools from different sections of CIPA are not stove-piped and may be applied at any stage of a prosecution because a "manifest objective of CIPA is that classified information should not be disclosed to anyone needlessly" . . . and therefore "the court must consider whether defendants' rights can be fully protected by an alternative procedure that does not result in disclosure of classified information"); *see also United States v. Marzook*, 435 F. Supp. 2d 708, 746 (N.D. Ill. 2006) (applying CIPA §4 framework to "both the testimony and documents at issue" in a pretrial suppression hearing as a "'suitable action' for ensuring Defendant's right to a fair suppression hearing and protecting the classified information at issue" (citing *La Rouche Campaign*, 695 F. Supp. at 1287-88)); M.C.R.E. 505(h)(3)(A) ("Upon request of the trial counsel . . . the military judge shall conduct a classified in camera pretrial hearing concerning the admissibility of classified information. The court shall hold such conference *ex parte* to the extent necessary to protect classified information from disclosure, in accordance with the practice of the Federal courts under [CIPA] (18 U.S.C. App)"); 18 U.S.C. App. 3, §§ 4, 6.

Both statute and case law strongly illustrate that the Prosecution is authorized to use *ex parte* proceedings to seek discovery and other relief under 10 U.S.C. §§ 949p-4 and 949p-6(d)(4), and is not bound to a hearing like that outlined in 10 U.S.C. § 949p-6(d)(3)/M.C.R.E. 505(h)(4)(A). *See also* M.C.R.E. 505(f)(2)(B) and 505(h)(4)(D). It is worth noting that the Defense does not cite any case law (and the Prosecution is not aware of any) to support the assertion that the Prosecution is barred from proceeding *ex parte* to protect classified information in discovery. In this case, the Prosecution's *ex parte* request for relief under 10 U.S.C. § 949p-4

was a proper and necessary step to ensure the protection of classified information before its disclosure to the Defense.

To the extent that the Defense appears to have gathered on their own, and outside of the discovery process, classified information related to the medical providers at issue in AE 523, 10 U.S.C. § 949p-6 describes a comparable process for relief where the Defense has and intends to disclose classified information. The Commission's order granting relief in AE 523M may, by necessary implication, impact a future Defense request to disclose classified information within the context of 10 U.S.C. § 949p-6, but it does not improperly impede that process. As the procedural tools in the M.C.A.'s version of the CIPA process are similarly "not stove-piped," the alternative procedures for disclosure of classified information may be used even when the situation is, at its core, a discovery scenario supplemented by a protective order concerning the use and disclosure limits of classified information provided in discovery. Thus, the mere fact that relief provided for in § 949p-6 may be referenced in crafting a workable request for discovery relief under § 949p-4 does not transform the Prosecution's proper *ex parte* request for such discovery relief into a situation requiring an adversarial hearing regarding presumed future Defense requests on the proposed use of minor pieces of that classified information it already possesses. As a "manifest objective of CIPA is that classified information should not be disclosed to anyone needlessly," *La Rouche Campaign*, 695 F. Supp. at 88, and as "an adversary hearing with defense knowledge would defeat the very purpose of the discovery rules," *United States v. Mejia*, 448 F.3d 436, 457 (D.C. Cir. 2006), the Commission's ruling and order in AE 523L and AE 523M are entirely correct. Thus, while the precise mechanisms for protecting classified information in discovery may vary as justice requires, the Prosecution's right to proceed *ex parte* in this instance is unassailable and does not constitute grounds for reconsideration.

Similarly, Defense complains of the Commission's recognition of privilege under M.C.R.E. 506. But the Prosecution requested *ex parte* relief under 10 U.S.C. § 949p-4/M.C.R.E. 505(f), not just M.C.R.E. 506. The Defense does not cite to any authority, and the Prosecution is

not aware of any authority, that requires the Prosecution to forego the vital protections afforded to classified information under M.C.R.E. 505, simply because aspects of the information at issue also happen to be privileged under M.C.R.E. 506 when in a different form or context. As such, and where the Prosecution properly sought *ex parte* relief under 10 U.S.C. § 949p-4/M.C.R.E. 505, the Defense is not permitted to seek reconsideration of AE 523M or AE 523L. *See* 10 U.S.C. §949p-4(c).

III. (U) Defense Objection to the Government's Classification of Medical Provider Information is Not Grounds for Reconsideration.

(U) The Defense mistakenly asserts that "[t]he military commission erred in ordering that medical witness identity is classified when associated with a detainee." *See* AE 523N (AAA) at 16. The Defense error stems from a fundamental misunderstanding of the Government's role in the classification of its own information. Created by Congress in the National Security Act of 1947 and implemented by Executive Order, an original classification authority ("OCA") is charged with the protection and proper classification of information which reasonably could be expected to result in damage to national security. As such, the determination whether to classify information, and the proper classification thereof, is a matter committed solely to the Executive Branch. *See Egan*, 484 U.S. at 527 ("The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief."); *United States v. Smith*, 750 F.2d 1215, 1217 (4th Cir. 1984) ("It is apparent, therefore, that the Government [] may determine what information is classified. A defendant cannot challenge this classification. A court cannot question it."); *see also United States v. Moussaoui*, 65 Fed. App'x 881, 887 n.5 (4th Cir. 2003); *United States v. Aref*, 2007 WL 603510, at *1 (N.D.N.Y. 2007); *United States v. Musa*, 833 F.Supp. 752, 755 (E.D. Mo. 1993). The Government's prerogative to classify its own information is also recognized in the M.C.R.E.:

> When conducting a review pursuant to [M.C.R.E.] 505(f), the military judge does not conduct a de novo review of the classification. Rather, the military judge should verify that appropriate officials within the agency concerned conducted an authorized review in accordance with governing regulations. The review is to

> verify the existence of a legal basis for the invocation of the privilege, not to review the factual accuracy of the agency assertion. This initial review by the trial judge is not for the purpose of conducting a de novo review of the propriety of a given classification decision. All that must be determined is that the material in question has been classified by the proper authorities in accordance with the appropriate regulations.

(U) M.C.R.E. 505(f)(discussion) (citing *Brockway v. Department of the Air Force*, 518 F.2d 1184 (8th Cir. 1975)).

(U) The Supreme Court has also recognized this broad deference to the Executive Branch in matters of national security, holding that "it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of subtle and complex facts in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." *Sims*, 471 U.S. at 180. OCAs are responsible for determining whether to classify information, and the proper classification of that information.

(U) While vested with authority as the presiding officer to ensure a fair trial, *see* 10 U.S.C. § 948j, a military judge is not authorized to make a ruling as to whether or not material is properly classified. In this case, the Commission properly determined that the Prosecution had invoked the national security privilege, and that it had relied upon two declarations that were signed by appropriate officials having authority to classify information. *See* AE 523M at 6. Faced with the authoritative classification determinations of appropriate United States officials, the Commission properly acknowledged those classification decisions and enforced them in AE 523L and AE 523M.

(U) It should be noted that the Defense correctly characterizes the Declaration of General Douglas M. Fraser, in that the identifying information of medical providers was determined within the declaration to be sensitive but unclassified. *See* AE 014 (GOV), Attach. B. However, General Fraser's declaration is silent on the appropriate classification of medical provider information when associated with a detainee, and, admittedly, does not describe the proper classification of the compiled information. This has led to irregularities in the past, including

those indicated in the Defense motion. Nevertheless, to the extent there is any remaining uncertainty over what information is now classified, the Commission's protective order, based on a signed declaration by an OCA, lays all doubt to rest:

> (U) The Government represented to the Commission in AE 523K (GOV) that any information that identifies a current or former JTF-GTMO medical provider and then associates that provider with a detainee is classified. Consequently, in all instances where the name or contact information of a current or former JTF-GTMO medical provider is associated with a detainee, such information shall be protected under Protective Order #1.
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> [. . .]
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> The Government represented to the Commission in AE 523K (GOV) that any information that identifies but does not associate a current or former JTF-GTMO medical provider with a detainee is government information privileged from disclosure. The Government has effectively claimed the Government Information Privilege under M.C.R.E. 506 in order to protect this information. Consequently, in all instances where the name or contact information of a current or former JTF-GTMO medical provider is not associated with any detainee, such information shall be protected under Protective Order #2.

(U) AE 523L at 2 (citations omitted). Moreover, to the extent that preexisting material may be held inconsistently with the Commission's Protective Order #5, the parties are on notice as to the adjustments in classification and handling that must be implemented and applied going forward.[4]

(U) Although the Defense may chafe at its inability to attack an OCA's classification determination, AE 523L properly describes for all parties what information is classified and how it must be handled. Even if the Commission were to entertain the Defense objections, it would be powerless to change the classification of the underlying information. *See, e.g.,* AE 400L (RULING) Press and Defense Motion to Unseal 30 October 2015 Transcript of Public Proceedings, dated 3 October 2016 (citing Regulation for Trial by Military Commission ¶¶ 19-3.b–c) ("While the Commission is expressly given authority to resolve questions as to whether certain unclassified information may be designated as 'protected,' and thus withheld from the

(U) [4] The Prosecution has taken the additional step of alerting appropriate classification and review authorities within the Department of Defense for any additional action that may be necessary.

public, classification decisions of appropriate executive officials 'are not subject to review by the military judge.'"); *see also* 10 U.S.C. §949p-1(a) ("Under no circumstances may a military judge order the release of classified information to any person not authorized to receive such information."). Thus, the Defense objection to the classification of the medical provider information is an improper ground for reconsideration.

IV. (U) Restating Arguments for the Release of Identities That Were Withheld Following a Request for M.C.R.E. 505 Relief is an Improper Ground for Reconsideration.

(U) The Prosecution incorporates by reference its law and argument from AE 523B (GOV) concerning the prohibition against reconsideration. *See* 10 U.S.C. § 949p-4(c). In AE 523N (AAA), the Defense renews its request for "(1) Camp 7 witnesses; (2) some MEM witnesses; (3) XYM witnesses; and (4) BOP witnesses" and asserts that Mr. Ali is entitled to the identities of these individuals (whose existence is implied through discovery), and, lacking a Commission-approved unique functional identifier (UFI), they are not protected from disclosure. However, the presence of a Commission-approved UFI in a document is not necessary in every instance to protect classified information (*e.g.*, when a document's author is not named, there is no need to substitute a UFI for the non-existent information). In general, when the Prosecution requests relief under M.C.R.E. 505, it seeks a determination that certain withholdings or substitutions satisfy its discovery obligation with regard to that information and that all relevant, helpful, and non-cumulative material is provided to the Defense via the substitution. The Prosecution has done this for the four categories of individuals re-listed by the Defense in AE 523N (AAA).[5]

(U) Additionally, as the Defense seeks information beyond what the Prosecution was ordered to provide in AE 397F, the Prosecution incorporates by reference AE 397 (GOV), including the law and arguments defining "relevant" information subject to discovery. *See* AE

(U) [5] *See* AE 516B (Order) (pertaining to "Camp 7 witnesses" and "XYM witnesses"); AE 308OOOO/AE 497B (Order) (pertaining to "BOP witnesses"); AE 112PP (Order) (pertaining to "some MEM witnesses").

397 (GOV) Government Proposed Consolidation of Motions to Compel Information Relating to the CIA's Former Rendition, Detention, and Interrogation Program; *see also* AE 397F (TRIAL CONDUCT ORDER), Government Proposed Consolidation of Motions to Compel Information Relating to the CIA's Former Rendition, Detention, and Interrogation Program (describing the Government's discovery obligations under the ten-category construct).

(U) Because the Defense motion for reconsideration is improper in the first instance (*see* AE 523B (GOV)), and because the specific information is neither relevant nor helpful according to numerous orders of the Commission granting M.C.R.E. 505(f) relief (*see* FN. 5, *supra*), the four categories of information requested by the Defense are not proper grounds for reconsideration. *See* 10 U.S.C. § 949p-4(c).

V. (U) Use of the Modified Advisement Form Ordered in AE 523M was Authorized to Protect Classified Information, and the Immaterial Edits Proposed by the Defense are Improper Grounds for Reconsideration.

(U) The Prosecution notes that, as of 24 April 2019, government investigators completed sending the Modified Advisement Form approved in AE 523M to all current and former medical providers who could be located, had military contact information, and were identified by pseudonym in discovery (including one former medical provider who had non-military contact information). In AE 523M, the Commission accurately described the Government's need for this specific advisement procedure:

> (U) Current and former JTF-GTMO medical providers associated with detainee care are potential witnesses who possess knowledge of classified and sensitive official government information belonging to the Department of Defense and have signed non-disclosure agreements. These potential witnesses learned this classified and sensitive information in the course of their official duties. The Government retains an important interest in maintaining control over the disclosure of such information, and will be afforded an opportunity to advise these current and former government employees of their rights and responsibilities as potential witnesses and holders of classified and sensitive official information prior to disclosure to the Defense.

(U) AE 523M at 7. Pursuant to R.M.C. 701(l)(1), the Commission may "specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just."

Specifically, the Commission is empowered to craft appropriate remedies that are dictated by the circumstances of discovery:

> ~~(U)~~ [U]pon a sufficient showing by either party, the military judge may at any time order that the discovery or examination be denied, restricted, or deferred, *or make such other order as is appropriate*. Upon motion by a party, the military judge may permit the party to make such showing, in whole or in part, in writing to be inspected only by the military judge.

~~(U)~~ R.M.C. 701(l)(2). In consonance with the authority under R.M.C. 701, the Modified Advisement Form ordered in AE 523M is a "procedure" that is necessary to limit the "disclosure of specific classified information", and it was written in a manner that ensures the Accused maintains "substantially the same ability to make his defense." *See* 10 U.S.C. § 949p-6(d); *see also* 10 U.S.C. § 949p-4. The Commission acted well within its authority by implementing the advisement procedure in advance of discovery to Defense. *See* AE 523M at 8 (citing R.M.C. 701(j)) ("Informing the potential witnesses of rights and responsibilities, as contained in the Commission's Modified Advisement, appropriately protects the flow of classified and sensitive information without unreasonably impeding Defense access to witnesses or evidence.").

~~(U)~~ It should be noted that the Defense objection to the Modified Advisement Form authorized in AE 523M does not identify a single factual or legal error contained within the original document approved by the Commission. *See* AE 523N (AAA) at 24–25. Most importantly, a close examination of the "redline" proposal reveals that the Defense edits are largely stylistic, and would not materially alter the information given to potential witnesses (this includes a proposed Defense edit that merely expands on subtopics of "treatment" and "observations" that were referenced as approved categories for potential witness disclosure in the original). *See* AE 523N (AAA), Attach. E at 3. Regardless of Defense assertions as to the best method of approaching a potential witness for interview, the Government retains a compelling interest in conveying the approved information to those medical providers before further interviews are conducted. *See Yunis*, 867 F.2d at 623; *Egan*, 484 U.S. at 527; AE 523M at 7, quoted *supra*.

[redacted]Importantly, the Modified Advisement Form serves to facilitate – not discourage – interviews. If medical providers are approached without first being given their UMI (provided and explained in the Modified Advisement Form), they could find it difficult to even conduct an interview in an unclassified setting. The Modified Advisement Form also serves to inform the medical providers that they are authorized to conduct interviews, and even authorizes them to release classified information on relevant topics (so long as the classified information is conveyed in a classified setting).

[redacted] Therefore, the continued use of the Modified Advisement Form is a necessary tool to inform future medical providers whose information may be subject to discovery under AE 523J. Through the use of the approved Modified Advisement Form, the Commission effectively protected classified information while facilitating the Accused's ability to "make his case." *See* 10 U.S.C. §§ 949p-4(b), 949p-6(d); AE 523M at 7–8; *see also Roviaro v. United States*, 353 U.S. 53, 62 (1957) (describing how a court must balance "the public interest in protecting the flow of information against the individual's right to prepare his defense").

[redacted]The Defense also notes that it has conducted several interviews of medical providers who did not voice concerns for their safety. *See* AE 523N (AAA) at 24–25. This information is entirely irrelevant to the applicable inquiry, because a medical provider's personal opinion (or lack of opinion) about his or her safety has little impact on the Government's assessment of its own national security interests. As noted above, unless an individual is an OCA with responsibility to classify the information at issue, that person is not permitted to make his or her own determination as to whether something is "really" classified and should be protected as such. A non-OCA's opinion as to any underlying basis for classification of information is completely irrelevant.

[redacted]For all the reasons articulated above, neither the Defense objection to the use of the Modified Advisement Form, nor the immaterial edits proposed by the Defense, are proper grounds for reconsideration.

6. [redacted] Conclusion

[redacted] As set forth above, the Defense has failed to demonstrate any basis for reconsideration because (1) the Prosecution was entitled to request *ex parte* discovery relief under 10 U.S.C. § 949p-4; (2) the Government properly asserted a privilege over accurately-classified information; (3) preexisting orders granting relief under M.C.R.E. 505 render the identities sought by the Defense irrelevant and not helpful, such that reconsideration is barred by 10 U.S.C. § 949p-4(c); and (4), the Modified Advisement Form is a necessary and effective "procedure" that effectuates the discovery relief sought by the Government under 10 U.S.C. § 949p-4 while facilitating "substantially the same ability [for the Accused] to make a defense". *See* 10 U.S.C. § 949p-4(b)(3). Therefore, the Commission should decline to re-till the litigation ground in the AE 523 motion series, and should deny the Defense motion for reconsideration.

7. [redacted] Witnesses and Evidence

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

8. [redacted] Additional Information

[redacted] The Prosecution has no additional information.

9. ~~(U)~~ Attachments

A. [redacted] Certificate of Service, dated 26 April 2019.

B. [redacted] Government response to Defense email, dated 17 December 2018.

C. [redacted]

Respectfully submitted,

//s//
Clay Trivett
Managing Trial Counsel

Benjamin A. Mills
Major, USMC
Assistant Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

(U) ATTACHMENT A

(U) CERTIFICATE OF SERVICE

I certify that on the 26th day of April 2019, I filed AE 523P (GOV), Government Response To AE 523N, Mr. Ali's Motion to Reconsider AE 523L, Protective Order #5, and AE 523M, Ruling, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

_____//s//_____
Benjamin A. Mills
Major, USMC
Assistant Trial Counsel

~~(U)~~ ATTACHMENT B

~~(U)~~ [Non-DoD Source] RE: Request for position
~~(UNCLASSIFIED)~~

~~(U)~~ [Non-DoD Source] RE: Request for position

~~(U)~~ CLAYTOGT [clay]

~~(U)~~ **Sent:** Monday, December 17, 2018 5:58 PM

~~(U)~~ **To:** Connell, James G III CIV (USA);]; Banks, Jesus G SSgt USMC OSD OMC OCP (USA); Swann, Robert Lee CIV OSD OMC OCP (USA); Chris M. Dykstra [CHRISMD8 ; Clay Trivett (clayton.trivett); CLIFFODJ [CLIFFODJ]; Cox, Dale J (John) CIV OSD OMC OCP (US); DALEJC [dalejc]; Dastoor, Neville F CPT USARMY OSD OMC OCP (US); Dykstra, Christopher M Maj USAF OSD OMC OCP (US); EDWARDR [edwardr]; Furr, Jeffery C SSgt USMC OSD OMC OCP (US); Gibbs, Rudolph P Jr CIV OSD OMC OCP (US); Groharing, Jeffrey D CIV OSD OMC OCP (US); A CTR OSD OMC OCP (US);]; C CIV OSD OMC OCP (US); Jeff Groharing (jeffrey.groharing ; JEFFERCF [JEFFERCF]; JEFFREDG [jeffredg ; Johnson, Clifford D Jr SSgt USMC OSD OMC OCP (USA); SSG USARMY (US); BENJAMM3 [BENJAMM3]; Martins, Mark S BG USARMY OSD OMC OCP (US);]; Mike Warbel (Michael.warbel); Mills, Benjamin A Maj USMC OSD OMC OCP (US); HARIDIVT [HARIDIVT]; Thravalos, Haridimos V CIV DLSA (US); NEVILLFD [NEVILLFD]; NICOLEAT [nicoleat]; O'Sullivan, Michael J CIV OSD OMC OCP (US); Tavarez-Patin, Pascual A CIV OSD OMC OCP (USA); PASCUALT [pascualt]; Passwater, Juanita K PO1 USN OSD OMC OCP (US); ROBERTLS [robertls]; (Ron) LTC USARMY OSD OMC OCP (US); RUDOLPPG [rudolppg]; Ryan, Ed (USANCW) [Ed.Ryan]; Ryan, Edward R CIV (US); JESUSB [JESUSB]; Tate, Nicole A CIV (US); Capt USAF OSD OMC OCP (US); Trivett, Clayton G Jr CIV (US); Zelnis, Charles R CIV OSD OMC OCP (US)

~~(U)~~ **Cc:** OSD NCR OMC List MCDO Team Al Baluchi; OSD NCR OMC List MCDO Team Bin Attash; OSD NCR OMC List MCDO Team Hawsawi; OSD NCR OMC List MCDO Team Mohammad; OSD NCR OMC List MCDO Team RBAS; RSS dd - Al Baluchi [10018]

~~(U)~~ Mr. Connell,

~~(U)~~ In AE 523J, Judge Pohl ordered the Government to disclose to the Defense the names, military email addresses, and military telephone numbers of all persons identified by pseudonym in the Accused's medical records or, if appropriate, invoke a privilege under M.C.R.E. 505 or 506. In AE 523K, filed ex parte and in camera on 12 November (notice of which was provided to the Defense), the Prosecution invoked privileges under M.C.R.E. 505 and M.C.R.E 506 over persons identified by pseudonym.

~~(U)~~ Should the Prosecution's relief requested in AE 523K be granted, the Prosecution will then provide the information to the Defense in accordance with the protective order that the Military Judge issues.

~~(U)~~ Regards,

~~(U)~~ Clay Trivett

~~(U)~~ -----Original Message-----
~~(U)~~ From: Connell, James G III CIV (USA) <james.g.connell7 >
~~(U)~~ Sent: Monday, December 17, 2018 4:54 PM
~~(U)~~ To: >; Banks, Jesus G SSgt USMC OSD OMC OCP (USA) <jesus.g.banks >; Swann, Robert Lee CIV OSD OMC OCP (USA) <robert.l.swann4 >; Christopher M. Dykstra <CHRISMD8 >; Clay Trivett (clayton.trivett) <clayton.trivett >; CLAYTOGT <claytogt >; CLIFFODJ <CLIFFODJ >; Cox, Dale J (John) CIV OSD OMC OCP (US) <dale.j.cox.civ >; DALEJC <dalejc >; Dastoor, Neville F CPT USARMY OSD OMC OCP (US) <neville.f.dastoor >; Dykstra, Christopher M Maj USAF OSD OMC OCP (US) <christopher.m.dykstra4 >; EDWARDR <edwardr >; Furr, Jeffery C SSgt USMC OSD OMC OCP (US) <jeffery.c.furr >; Gibbs, Rudolph P Jr CIV OSD OMC OCP (US) <rudolph.p.gibbs >; Groharing, Jeffrey D CIV OSD OMC OCP (US) <jeffrey.d.groharing >; A CTR OSD OMC OCP (US) >; >; CIV OSD OMC OCP (US) >; Jeff Groharing (jeffrey.groharing) <jeffrey.groharing >; JEFFERCF <JEFFERCF >; JEFFREDG <jeffredg >; Johnson, Clifford D Jr SSgt USMC OSD OMC OCP (USA) <clifford.d.johnson47 >; JUANPAS <JUANPAS >; KIERSTJK <KIERSTJK >; kiersten.korczynski ; SSG USARMY (US) >; BENJAMM3 <BENJAMM3 >; Martins,

~~(U)~~ Mark S BG USARMY OSD OMC OCP (US) <mark.s.martins[redacted]>; MICHASW6 <MICHASW6[redacted]>; Mike Warbel (Michael.[redacted]) <Michael.warbel[redacted]>; Mills, Benjamin A Maj USMC OSD OMC OCP (US) <benjamin.a.mills12[redacted]>; HARIDIVT <HARIDIVT[redacted]>; Thravalos, Haridimos V CIV DLSA (US) <haridimos.v.thravalos[redacted]>; NEVILLFD <NEVILLFD[redacted]>; NICOLEAT <nicoleat[redacted]>; O'Sullivan, Michael J CIV OSD OMC OCP (US) <michael.j.osullivan14[redacted]>; Tavarez-Patin, Pascual A CIV OSD OMC OCP (USA) <pascual.a.tavarez-patin[redacted]>; PASCUALT <pascualt[redacted]>; Passwater, Juanita K PO1 USN OSD OMC OCP (US) <juanita.k.passwater[redacted]>; ROBERTLS <robertls[redacted]>; [redacted] LTC USARMY OSD OMC OCP (US) [redacted]>; RUDOLPPG <rudolppg[redacted]>; Ryan, Ed (USANCW) <Ed.Ryan[redacted]>; Ryan, Edward R CIV (US) <edward.r.ryan20[redacted]>; JESUSB <JESUSB[redacted]>; Tate, Nicole A CIV (US) <nicole.a.tate4[redacted]>; [redacted] Capt USAF OSD OMC OCP (US) [redacted]>; Trivett, Clayton G Jr CIV (US) <clayton.g.trivett[redacted]>; Zelnis, Charles R CIV OSD OMC OCP (US) <charles.r.zelnis[redacted]>
Cc: OSD NCR OMC List MCDO Team Al Baluchi <osd.ncr.OMC.list.mcdo-team-al-baluchi[redacted]>; OSD NCR OMC List MCDO Team Bin Attash <osd.ncr.OMC.list.mcdo-team-bin-attash[redacted]>; OSD NCR OMC List MCDO Team Hawsawi <osd.ncr.OMC.list.mcdo-team-hawsawi[redacted]>; OSD NCR OMC List MCDO Team Mohammad <osd.ncr.OMC.list.mcdo-team-mohammad[redacted]>; OSD NCR OMC List MCDO Team RBAS <osd.ncr.OMC.list.mcdo-team-rbas[redacted]>; RSS dd - Al Baluchi <10018[redacted]>
Subject: Request for position ~~(UNCLASSIFIED)~~

~~(U)~~ CLASSIFICATION: ~~UNCLASSIFIED~~

~~(U)~~ CLASSIFICATION: ~~UNCLASSIFIED~~

~~(U)~~ Trial Counsel:

~~(U)~~ Can you please advise of the status of your efforts to comply with AE523J?

~~(U)~~ Thank you and happy holidays,

~~(U)~~ James Connell

~~(U)~~ CLASSIFICATION: ~~UNCLASSIFIED~~

~~(U)~~ CLASSIFICATION: ~~UNCLASSIFIED~~

~~(U)~~ ATTACHMENT C