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**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

<p><b>UNITED STATES OF AMERICA</b></p> <p>v.</p> <p><b>KHALID SHAIKH MOHAMMAD; WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH; RAMZI BINALSHIBH; ALI ABDUL AZIZ ALI; MUSTAFA AHMED ADAM AL HAWSAWI</b></p>	<p><b>AE 524JJJ (GOV)</b></p> <p><del>(U)</del> <b>Government Response</b> To Mr. Ali’s Motion to Compel Production of Witnesses Whose Testimony is Relevant and Necessary to Address the Legality of Protective Order #4 in AE 524RR (AAA Sup) and AE 524TT (RBS Sup)</p> <p>15 March 2019</p>
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**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**

~~(U)~~ The Prosecution respectfully requests that this Commission deny the requested relief set forth in AE 524HHH (GOV), Mr. Ali’s Motion to Compel Production of Witnesses Whose Testimony is Relevant and Necessary to Address the Legality of Protective Order #4 in AE 524RR (AAA Sup) and AE 524TT (RBS Sup), without oral argument.

**3. ~~(U)~~ Overview**

~~(U)~~ The witness testimony the Defense seeks to compel in the present motion will serve no useful purpose. What is presently at issue and still pending with the Military Judge in AE 524NN (GOV) is whether Protective Order #4 inappropriately prevents the Defense from conducting investigation and ultimately presenting relevant information regarding the Central Intelligence Agency’s former Rendition, Detention and Interrogation (RDI) Program, and whether the former Military Judge’s extreme sanction of suppression of statements made by the accused to the Federal Bureau of Investigation after the Military Judge issued the Protective Order was appropriate. In AE 524RR (AAA Sup) and AE 524TT (RBS Sup), the Defense raised

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issues with how two witnesses were contacted by the United States, but fail to mention the Government successfully located, notified, and arranged successful interviews of both individuals for the Defense, and both indicated their willingness to meet with the Defense for subsequent interviews.

~~(U)~~ Unfortunately, the Defense continue with their practice of baselessly disparaging counsel for the United States, claiming the “government’s representation regarding the positions of the UFI witnesses have been inconsistent and misleading” and that “the contradictions between the government’s representations and the witnesses’ statements are partly due to either information being modified before trial counsel receive it, or factual modifications made by trial counsel in the process of litigation.” AE 524HHH (AAA) at 4. Any suggestion that the Government intentionally misled counsel or the Commission is categorically false.

~~(U)~~ Instead of focusing on conducting subsequent interviews and preparing to defend their client at trial for his actions that led to deaths of nearly 3,000 Americans nearly two decades ago, the Defense desires to call over a dozen witnesses in what will amount to hours of useless testimony unhelpful to the Military Judge to resolving the important matters before the military commission. While heading down this rabbit hole will serve the Defense purpose of indefinitely delaying this important trial, it does not serve the interests of justice and should be rejected.

#### 4. ~~(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).

#### 5. ~~(U)~~ **Facts**

~~(U)~~ The Prosecution incorporates by reference the facts as stated in AE 524DDD (GOV) and AE 524FFF (GOV).

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~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~**6. ~~(U)~~ Law and Argument****I. ~~(U)~~ No Party Can Compel the Production of Testimony That Is Neither Relevant Nor Necessary**

~~(U)~~ The Military Commissions Act of 2009 (hereinafter “M.C.A.”) provides the accused a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense. *See* 10 U.S.C. § 949j. The Secretary of Defense, in turn, promulgated the Manual for Military Commissions (hereinafter “the Manual”), which contains the Rules for Military Commissions (hereinafter “R.M.C.”). The procedures contained in the Manual are based upon the procedures for trial by general courts-martial under Chapter 47 of Title 10 (the Uniform Code of Military Justice). *See* 10 U.S.C. § 948b(c), R.M.C. 102(b).

~~(U)~~ Among the rules issued by the Secretary of Defense in the Manual is R.M.C. 703 (Production of Witnesses and Evidence). R.M.C. 703 is directly patterned after Rule for Courts-Martial 703, the rule followed in courts-martial practice by the United States military. R.M.C. 703(b) provides that “[e]ach party is entitled to the production of any available witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.” R.M.C. 703(b)(1). The procedures set forth by R.M.C. 703 as to non-expert witnesses comport with military law and provide the Accused in this case with the same safeguards afforded to members of our Armed Forces. *See* AE 036C, Ruling, at 4–6 (citing *United States v. Arias*, 3 M.J. 436 (C.M.A. 1977); *United States v. Williams*, 3 M.J. 239, 243 (C.M.A. 1977); *United States v. Dixon*, 8 M.J. 858 (N.M.C.M.R. 1980)). R.M.C. 703(c)(2) requires the Defense to give the trial counsel a written list of witnesses they want and to provide contact information as well as a synopsis of the expected testimony sufficient to show each witness’ relevance and necessity. *See* AE 036C at 4–5. The applicable rules, however, require more than providing a topic of the witnesses’ testimony. *See United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999) (“[T]he requirement of R.C.M. 703(c)(2)(B)(i) for a synopsis of expected testimony is not satisfied by merely listing subjects to be addressed; rather, it must set out what the witness is expected to say about those subjects.”). The Prosecution takes its obligations

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seriously under R.M.C. 703 and will produce Defense witnesses upon an adequate showing of relevance and necessity pursuant to the Rule.

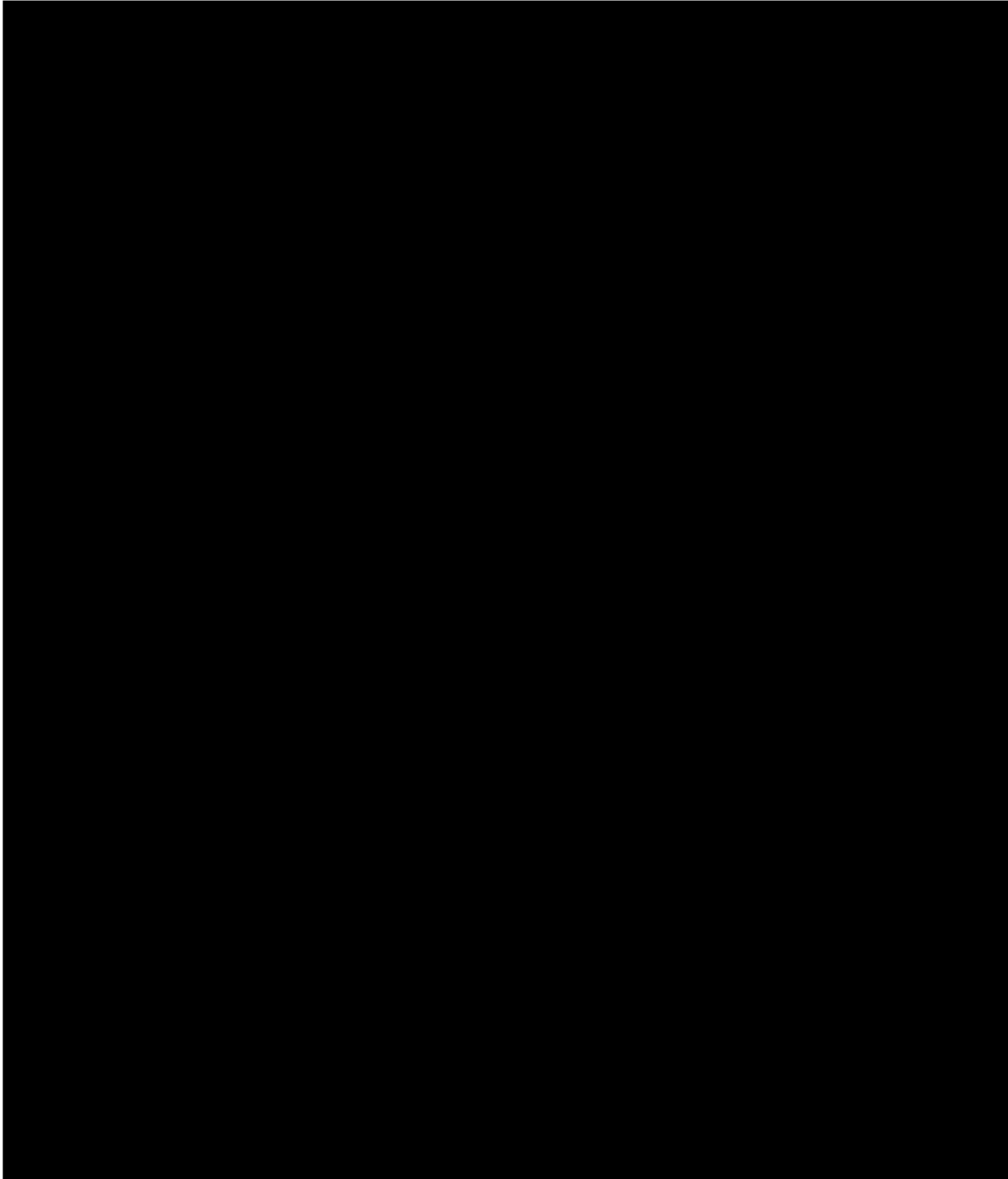
~~(U)~~ Testimony is relevant “when a reasonable person would regard the evidence as making the existence of any fact that is of consequence to the determination of the commission action more probable or less probable than it would be without the evidence.” M.C.R.E. 401. Military jurisprudence has further recognized that relevant testimony is only necessary “when it is not cumulative and when it would contribute to a party’s presentation in some positive way on a matter in issue.” R.C.M. 703(b)(1), Discussion; *see also* R.M.C. 703(f)(1) (“[s]ubject to § 949j(c) and R.M.C. 701, each party is entitled to the production of evidence which is relevant, necessary and noncumulative”); M.C.R.E. 403 (“the military judge shall exclude any evidence the probative value of which is substantially outweighed . . . by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.”).

~~(U)~~ The Accused has no right to compel the attendance of a witness whose testimony would be cumulative with other evidence already available to the Defense and that would better and more directly address the interlocutory question at issue. *See Williams*, 3 M.J. at 243; *see also United States v. Harmon*, 40 M.J. 107, 108 (C.M.A. 1994); *Wagner v. United States*, 416 F.2d 558, 564–65 (9th Cir. 1969), *cert. denied*, 397 U.S. 1015 (1970); *Thompson v. United States*, 372 F.2d 826, 828 (5th Cir. 1967); *United States v. Tangpuz*, 5 M.J. 426, 429 (C.M.A. 1978) (identifying numerous factors that may be considered in determining whether the accused is entitled to the attendance of a witness, including whether the testimony of the witness would be “merely cumulative”); *United States v. Allen*, 31 M.J. 572, 610–11 (N.M.C.M.R. 1990).

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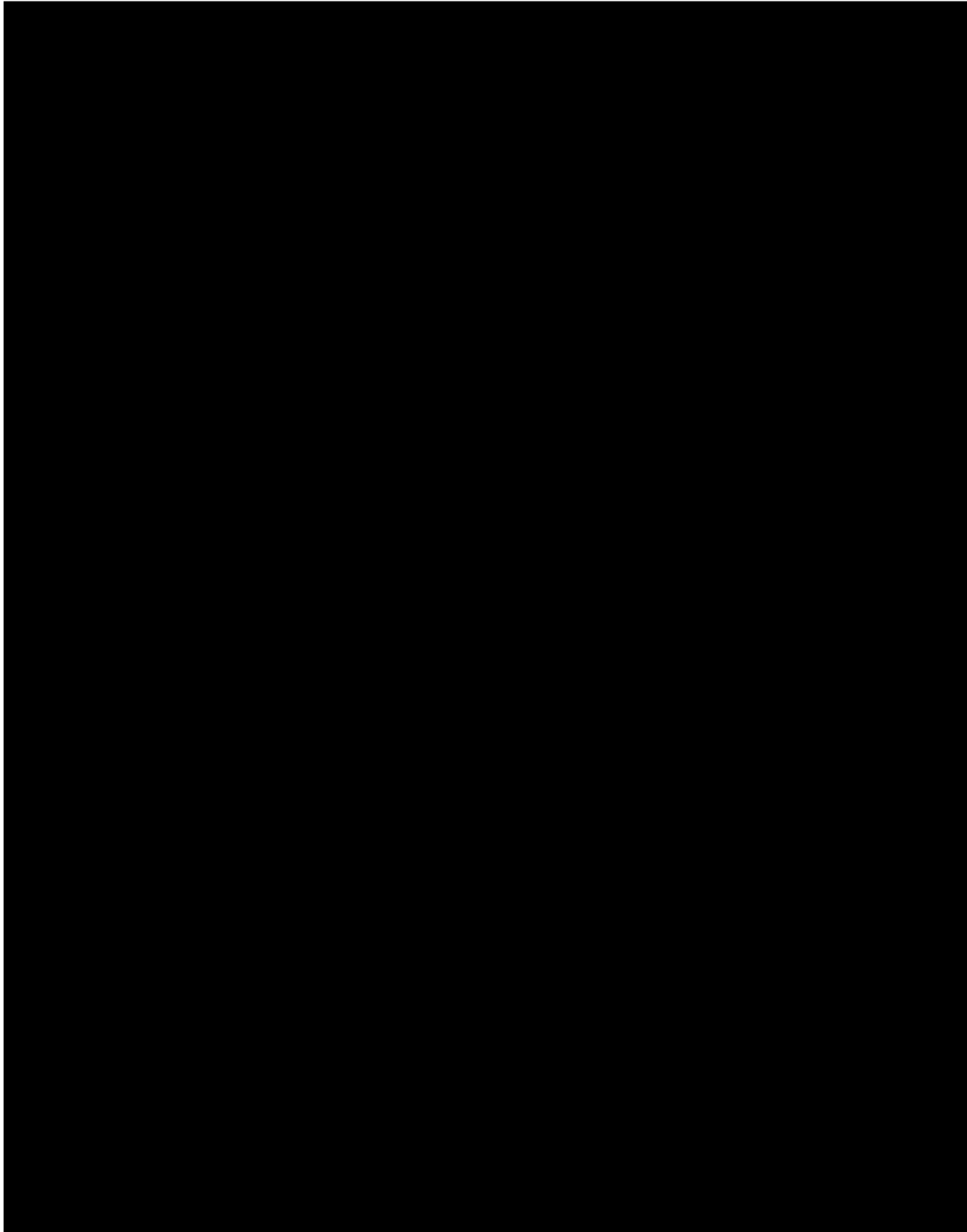
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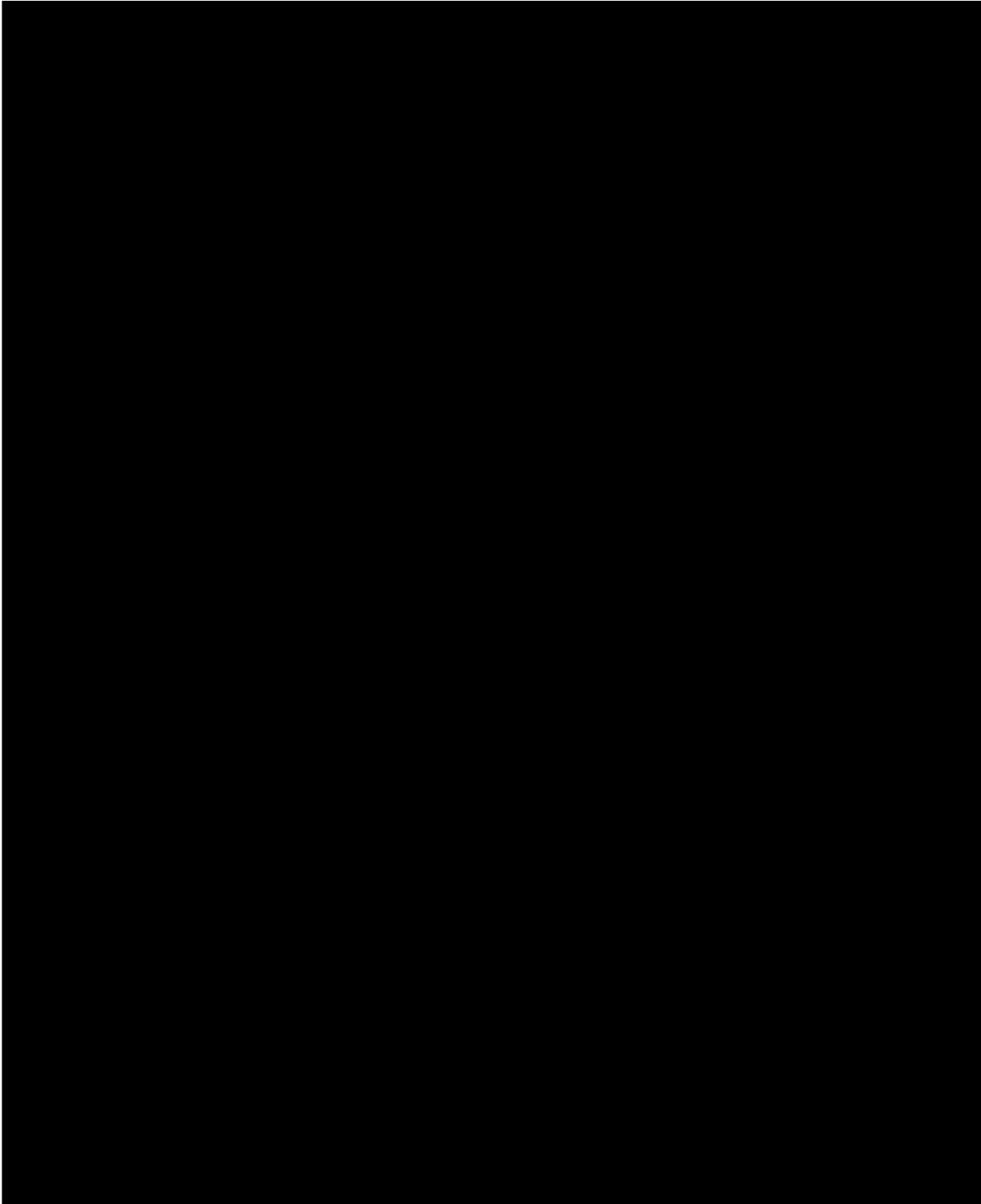
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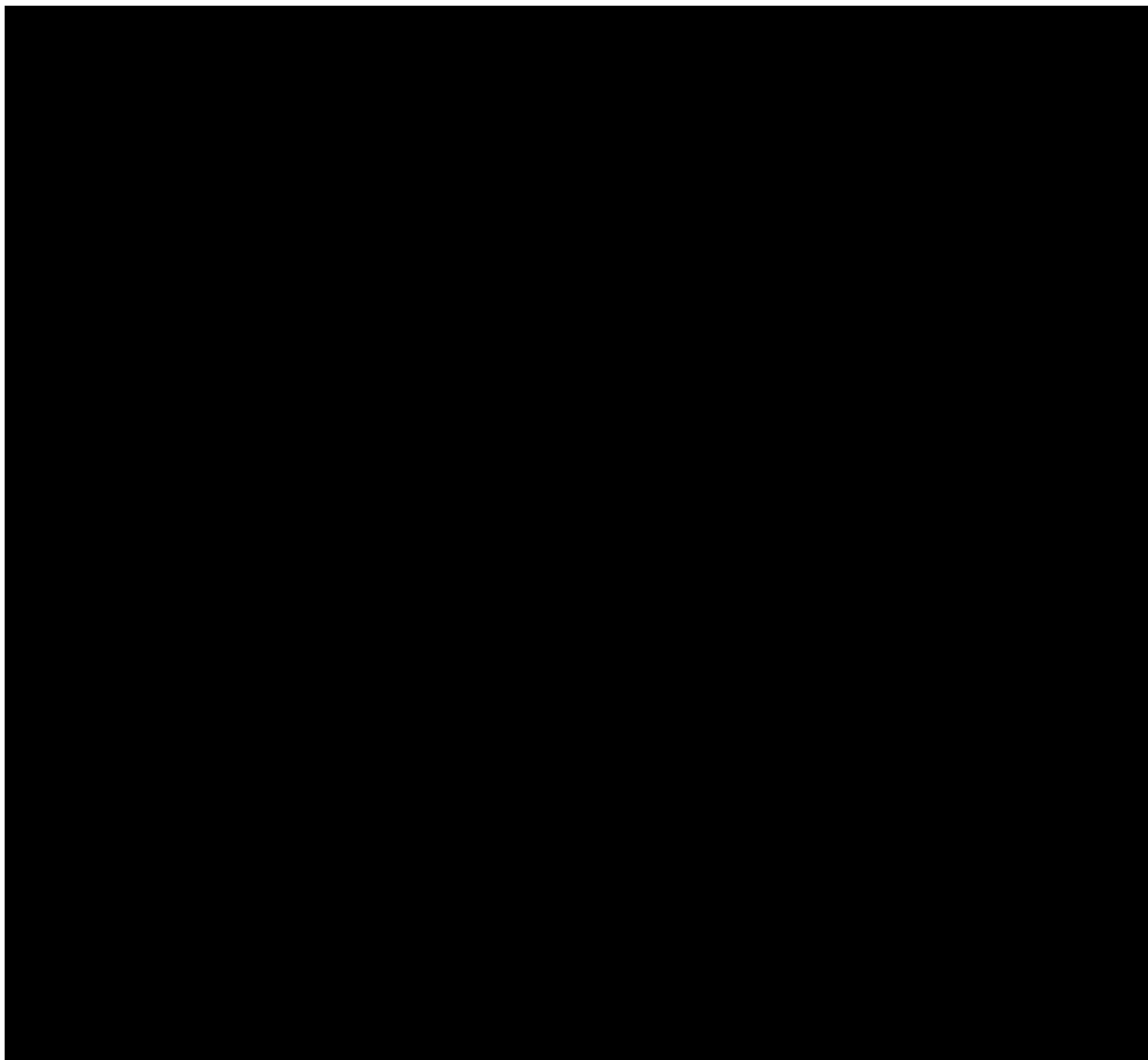
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7. ~~(U)~~ **Conclusion**

~~(U)~~ For the reasons stated above, the Prosecution respectfully requests that this Commission deny the requested relief set forth in AE 524HHH (GOV), Mr. Ali's Motion to Compel Production of Witnesses Whose Testimony is Relevant and Necessary to Address the



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Legality of Protective Order #4 in AE 524RR (AAA Sup) and AE 524TT (RBS Sup), without oral argument.

**8. ~~(U)~~ Oral Argument**

~~(U)~~The Prosecution does not request oral argument. The Commission should dispense with oral argument as the facts and legal contentions are adequately presented in the material now before the Commission and argument would not add to the decisional process. However, if the Military Commission decides to grant oral argument to the Defense, the Prosecution requests an opportunity to respond.

**9. ~~(U)~~ Witnesses and Evidence**

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

**10. ~~(U)~~ Additional Information**

~~(U)~~The Prosecution has no additional information.

**11. ~~(U)~~ Attachments**

A. ~~(U)~~Certificate of Service, dated 15 March 2019

~~(U)~~Respectfully submitted,

\_\_\_\_\_  
//s//  
Jeffrey Groharing  
Trial Counsel

Christopher Dykstra  
Major, USAF  
Assistant Trial Counsel

Mark Martins  
Chief Prosecutor  
Military Commissions

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# ~~(U)~~ ATTACHMENT A

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~~(U)~~ CERTIFICATE OF SERVICE

~~(U)~~ I certify that on the 15th day of March 2019, I filed AE 524JJJ (GOV), Government Response To Mr. Ali's Motion to Compel Production of Witnesses Whose Testimony is Relevant and Necessary to Address the Legality of Protective Order #4 in AE 524RR (AAA Sup) and AE 524TT (RBS Sup) with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

*//s/*

\_\_\_\_\_  
Christopher Dykstra  
Major, USAF  
Assistant Trial Counsel

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