MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. **ABD AL-RAHIM HUSSEIN MUHAMMED ABDU AL-NASHIRI**	**AE 400N** **RULING** **7 November 2019**

1. **Procedural Background.**

a. On 16 April 2019, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) vacated all "all orders issued by Judge Spath on or after November 19, 2015…."[1] On 9 July 2019, the Commission issued AE 400, directing the parties to state their preferences with regard to the motions impacted by the D.C. Circuit ruling.

b. On 8 August 2019, the Government filed AE 400G, reaffirming many of its motions impacted by the D.C. Circuit ruling. In particular, the Government reaffirmed and requested reconsideration of the over 30,000 pages of motions underlying 30 vacated M.C.R.E. 505(f) rulings. These rulings related to Government *ex parte* requests to provide in discovery various summaries and substitutions in lieu of the underlying classified documents. The rulings and underlying motions are listed at Attachment A of this ruling. On 28 July 2019, the Defense filed AE 402, requesting that "defense counsel holding the necessary clearances be present at all *in camera* presentations made pursuant to Military Commission Rule of Evidence … 505(f)(2)(A)." That motion remains pending.

2. **Findings of Fact.** The Commission makes the following findings of fact:

a. The Accused, Abd Al Rahim Hussayn Muhammad Al Nashiri, was charged on 15 September 2011 with multiple offenses under the Military Commissions Act of 2009 (MCA). The

[1] *In re Al-Nashiri*, 921 F.3d 224, 241 (D.C. Cir. 2019).

case was referred to this Commission as a capital case on 28 September 2011. On 9 November 2011 the Commission convened for its initial session, at which the Government announced they were ready to proceed to trial on 2 February 2012 but did not object to a Defense request for continuance to no earlier than 9 November 2012.[2]

b. The Defense has objected, virtually since the inception of these proceedings, to the procedure by which summaries and substitutions have been produced and approved pursuant to M.C.R.E. 505(f)(2). *See* AE 024, AE 043. In Appellate Exhibit 024, the Defense argued, *inter alia*, that particularly in light of the unique provision of the MCA disallowing Defense requests for reconsideration of orders permitting summaries and substitutions (M.C.R.E. 505(f)(3)), the Defense should be heard regarding the adequacy of proposed summaries and substitutions prior to the Commission's approval of same. While the motion was granted in part,[3] the request to further participate in the summary and substitution process was denied as "not consistent with the reg[ulation] or, quite frankly, the intent of the statute."[4] The Defense has availed itself on multiple occasions of the opportunity to present its theory of the case *ex parte.*

c. The Central Intelligence Agency's (CIA's) Rendition, Detention and Interrogation (RDI) Program has been the subject of extensive litigation before this Commission and of voluminous *ex parte* requests and corresponding orders under M.C.R.E. 505(f). *See generally* the AE 120 series. A significant portion of the orders were vacated by the D.C. Circuit. As to those orders, the Government has requested the Commission reaffirm them based on the motions as they currently stand.[5] The Government did, however, indicate that they request *ex parte* oral conferences as to

[2] Unofficial/Unauthenticated Transcript of the *U.S. v. Abd al Rahim Hussein Muhammed Abdu al Nashiri* Motions Hearing Dated 9 November 2011 at pp. 170–171.
[3] The Defense was permitted to submit an *ex parte* theory of its case.
[4] Transcript of 18 January 2012 hearing at pp. 517–518.
[5] AE 400G, p. 3.

certain of those submissions.[6] The Government further asserted that they would seek to supplement discovery previously provided to the Defense in 2017.[7]

d. A great preponderance of RDI discovery litigation flowed from AE 120, a Motion to Compel Discovery filed by the Defense on 24 September 2012. The Government replied on 9 October 2012 in AE 120A that the Defense was requesting information that "(i) already has been produced, (ii) is not discoverable, or (iii) is not in the possession, custody or control of the U.S. Government."[8] The Government went on to aver that it had produced "or will produce, all statements and treatment-related information of the accused, all of the accused's medical records in the possession of the U.S. Government, and other discoverable information," concluding, "Indeed, the government has complied with its discovery obligations."[9] The Commission disagreed with the Government's view of its discovery obligations and issued AE 120C on 14 April 2014, which was revised upon reconsideration on 24 June 2014 in AE 120AA. Neither of those orders were vacated by the D.C. Circuit opinion. Since the Government's announcement in 2012 that it had complied with its discovery obligations, tens of thousands of pages of documents have passed through the *ex parte* M.C.R.E. 505(f) process based on a handful of declarations by various Original Classification Authorities (OCAs). On 13 November 2017, the Commission found that the Government had "met its burden outlined in AE 120AA" subject to the Government's continuing discovery obligation.[10] That ruling was vacated by the D.C. Circuit opinion.

e. The aforementioned RDI program was the subject of a report of the Senate Select Committee on Intelligence dated 9 December 2014.[11] That report included a redacted and declassified Executive Summary consisting of nearly 500 pages and a full report consisting of some

[6] *Id.* at p. 2.
[7] *Id.*
[8] AE 120B at p. 1.
[9] *Id.* at 2.
[10] AE 120YYYYYYY at p. 1.
[11] Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, S. Report 113-288 (9 December 2014) (hereinafter "SSCI Report").

6,700 pages,[12] which was, according to the Committee Chairperson, based on over six million pages of CIA materials.[13] The SSCI report was extremely critical of the CIA and contained findings that the CIA had, *inter alia,* misrepresented the brutality of its interrogations,[14] misrepresented the harshness of detainees' confinement conditions,[15] repeatedly provided inaccurate information to the Department of Justice,[16] actively avoided or impeded congressional oversight,[17] impeded effective White House oversight,[18] and released inaccurate classified information to the media in an attempt to steer public opinion.[19] While the CIA filed a response to the report and undoubtedly disputes some if not all of these findings, it goes without saying that the report casts the CIA in a negative light, such that its reputation has been impacted by the RDI program and the investigations thereof. The same SSCI report and the underlying CIA information figured prominently in the litigation surrounding the AE 120 series and many of the M.C.R.E. 505(f) requests currently before the Commission pursuant to declarations purporting to invoke privilege by CIA officials.

f. The Defense has come into possession of several CIA cables recently obtained by the National Security Archive at George Washington University through the Freedom of Information Act (the FOIA cables). The Defense avers and the Government does not dispute that these same cables were produced to the Defense in the form of summaries and substitutions pursuant to M.C.R.E. 505(f) (the 505 cables). Comparison of the FOIA cables and the 505 cables suggests that the M.C.R.E. 505(f) process has, at least on these occasions, produced deletions that could fairly be characterized as self-serving and calculated to avoid embarrassment; indicative of a minimalist view of what is "noncumulative, relevant and material;" and/or at best indicative that classification

[12] *Id.* at vi.
[13] *Id.* at viii.
[14] *Id.,* at xii.
[15] *Id.* at xiii.
[16] *Id.*
[17] *Id.* at xiv.
[18] *Id.* at xv.
[19] *Id* at xvii.

standards have eased significantly since the original release of the summarized cables to the Defense in discovery. In any event, the comparison undermines any contention the redactions are narrowly tailored to a legitimate need to protect national security.[20]

g. The Commission has independently reviewed the declarations underlying the Government's assertion of the classified information privilege in this case.[21] The declarations range between two and seven years old. None contain a particularized showing that access to the redacted information by any particular cleared defense counsel, many of whom were not assigned to the case at the time the declarations were made, would currently pose a substantial risk to national security. Furthermore, while the declarations do an admirable job of demonstrating why particular information is classified—in some instances at the highest levels—the bases for withholding said information from cleared defense counsel could fairly be characterized as broad assertions that Defense Counsel have no "need to know" and therefore whatever risk may be attendant to their access is untenable.

h. Handling and marking guidance for RDI information has changed since this case entered abatement. This handling and marking guidance has previously and frequently been cited by the Government among the bases for the Commission to maintain their M.C.R.E. 505(f) motions *ex parte* and under seal.

i. The over 30,000 pages of M.C.R.E. 505(f) summaries and substitutions as to which the Government has requested reconsideration consist generally of motions with attachments consisting of three copies of the subject discovery: one of the un-redacted original, a second "redline" version showing the proposed deletions and substitutions, and a third version representing the discovery as

[20] The Government points out that the FOIA cables relate to M.C.R.E. 505(f) cables not covered by the D.C. Circuit's order of vacatur. These cables nonetheless indicate the extent to which the *ex parte* M.C.R.E. 505(f) process, at least as it has been employed to date, can undermine confidence that it has been employed in accordance with its underlying purposes.

[21] AE 022, Attachment A; AE 120F, Attachment 1; AE 120JJJJJJ, Attachment E; AE 374, Attachment B.

proposed for disclosure to the Defense. The Defense versions are in many instances unattributed, undated,[22] and significantly redacted.

3. **Law.**

a. "The military judge may specify the time, place and manner of discovery and may prescribe such terms and conditions as are necessary to the interests of justice, the protection of national security, and the safety of witnesses." R.M.C. 701(a)(3). Upon request, the Government is required to permit the Defense to examine several classes of materials which are "within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial." R.M.C. 701(c)(1)–(3).

b. "This materiality standard normally 'is not a heavy burden,' rather, evidence is material as long as there is a strong indication that it will 'play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.'" *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (quoting *United States v. Felt*, 491 F. Supp. 179, 186 (D.C. Cir. 1979)) (internal citations omitted). "There must be some indication that the pretrial disclosure of the disputed evidence would [enable] the defendant significantly to alter the quantum of proof in his favor." *Lloyd*, 992 F.2d at 351 (citing *United States v. Caicedo-Llanos*, 960 F.2d 158, 164 n.4 (D.C. Cir. 1992)).

c. "[A] defendant is entitled to obtain from the Government documents and objects that are 'within the government's possession, custody, or control' if they are 'material to preparing the defense' or will be used by the Government in its case-in-chief at trial." *United States v. Scully*, 108 F. Supp. 3d 59, 123 (E.D.N.Y. 2015). Discovery may only be compelled if the information to be

[22] Specific dates are generally changed to a range of several months such as "early 2003."

sought "is both relevant and material—in the sense that it is at least helpful to" the defense. *Al Odah v. United States*, 559 F.3d 539, 544 (D.C. Cir. 2009).

d. Defense Counsel in a capital case have a duty to make all reasonable efforts to investigate mitigation evidence. *Wiggins v. Smith*, 539 U.S. 510, 538 (2003). The Defense is entitled to evidence which "might preclude a jury from finding [the accused] eligible for the death penalty." *United States v. Moussaoui*, 365 F.3d 292, 298 (4th Cir. 2004); *see United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004). The sentencing authority must be given a full opportunity to consider all mitigating circumstances in capital cases. *Lockett v. Ohio*, 438 U.S. 586, 602 (1978); *see also Brown v. Sanders*, 546 U.S. 212, 216-17 (2006); *Kansas v. Marsh*, 548 U.S. 163, 171 (2006); *Graham v. Collins*, 506 U.S. 461, 475 (1993); *Mills v. Maryland*, 486 U.S. 367, 368 (1988); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Loving v. United States*, 68 M.J. 1, 8–9 (C.A.A.F. 2009).

e. "*National Security Privilege.* Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security." R.M.C. 701(f). "To withhold disclosure of information otherwise subject to discovery under this rule, the military judge must find that the privilege is properly claimed under Mil. Comm. R. Evid. 505 and 506 as applicable." R.M.C. 701(f)(1).

> Once such a finding is made, the military judge shall authorize, *to the extent practicable*: … the deletion of specified items of classified information from documents made available to the defense; … the substitution of a portion or summary of the information for such classified documents; … the substitution of a statement admitting relevant facts that the classified information would tend to prove.

R.M.C. 701(f)(2) (emphasis added).

f. "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…. The declaration shall be signed by a knowledgeable United States official possessing authority to classify information." M.C.R.E. 505(f)(1)(A).

g. Where the Government asserts national security privilege, disclosure is inappropriate "absent a showing of materiality." *United States v. Yunis*, 867 F.2d 617, 622 (D.C. Cir. 1989). Stated differently, an accused becomes entitled to disclosure of classified information upon a showing that the information "is relevant and helpful to the defense ... or is essential to a fair determination of a cause." *Moussaoui*, 365 F.3d at 307–08 (quoting *Roviaro v. United States*, 353 U.S. 53, 60–61 (1957)); *see United States v. Smith*, 780 F.2d 1102, 1107–10 (4th Cir. 1985) (en banc); *United States v. Fernandez*, 913 F.2d 148, 154 (4th Cir. 1990) (explaining that "*Smith* requires the admission of classified information" once the defendant has satisfied the *Roviaro* standard). In making this determination, the military judge may consider whether access by Defense Counsel would better facilitate review. *Al Odah*, 559 F.3d at 545-47. "A court applying this rule should, of course, err on the side of protecting the interests of the defendant. In some cases, a court might legitimately conclude that it is necessary to place a fact in context in order to ensure that the jury is able to give it its full weight. For instance, it might be appropriate in some circumstances to attribute a statement to its source, or to phrase it as a quotation. As the Court said in *Old Chief,* '[a] syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it.'" *United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998) (citing *Old Chief v. United States,* 519 U.S. 172, 189 (1997)).

h. Before the Defense has access to any of the evidence, they "cannot be required to show materiality with the degree of specificity that applies in the ordinary case." *Moussaoui*, 365 F.3d at 308 (citing *United States v. Valenzuela–Bernal*, 458 U.S. 858, 870–71 (1982)). A "plausible showing" of materiality is sufficient. *Id*. "Information that is exculpatory, that undermines the reliability of other purportedly inculpatory evidence, or that names potential witnesses capable of

providing material evidence may all be material." *Al Odah,* 559 F.3d at 546. The MCA adds the additional requirement that the information be "noncumulative." 10 U.S.C. § 949p-4(a)(2).

i. *Yunis,* the leading case in the D.C. Circuit on discovery under CIPA, noted a possible third step after analyzing relevance and materiality: "that is the balancing of the defendant's interest in disclosure against the government's need to keep the information secret…." 867 F.2d at 625. While recognizing that two other circuits have employed this third criterion and that it was suggested by *Roviaro*, the court's reversal, based on its finding that the trial court erred by failing to properly apply the "helpful to the defense" test, obviated the need to decide its applicability.

j. M.C.R.E. 505(f) provides a mechanism whereby the Government can employ alternative means to provide relevant and material matters to the Defense if a substitution exists that would "provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." *Moussaoui*, 365 F.3d at 313; *see United States v. Mejia*, 448 F.3d 436, 456 (D.C. Cir. 2006); *Rezaq*, 134 F.3d at 1143; *Yunis*, 867 F.2d at 623.

k. When the *Yunis* standard is met, it is appropriate for the military judge to order production of the evidence and let the Government choose whether to comply. *Moussaoui*, 365 F.3d at 310. If the Government refuses to produce the information at issue—as it may properly do—the appropriate sanction is that which is least severe while still serving the interests of justice. *Id.* at 313. "Since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." *Jencks v. United States,* 353 U.S. 657, 670–71 (1957). "The burden is the Government's, *not to be shifted to the trial judge*, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession." *Moussaoui*, 365 F.3d at 311 (quoting *Jencks*, 353 U.S. at 672) (emphasis in original).

l. "The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness." *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 7 (1986) (*Press-Enter. II*). This right extends to pretrial hearings, which are "an integral part of a criminal prosecution." *In re Washington Post Co*., 807 F.2d 383, 389 (4th Cir. 1986). Openness enhances the basic appearance of fairness so essential to public confidence. *Press-Enter. Co. v. Superior Court,* 464 U.S. 501, 508 (1984) (*Press-Enter. I*) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569–571 (1980)). "[P]ublic proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct." *Press-Enter. I* at 508–09. A public trial ensures that judge and prosecutor carry out their duties responsibly. *United States v. Ortiz*, 66 M.J. 334, 338 (C.A.A.F. 2008) (citing *Waller v. Georgia*, 467 U.S. 39, 46 (1984)).

m. Although the right to a public trial is not absolute, there is a strong presumption in its favor, as "judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." *Ortiz*, 66 M.J. at 338. "Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like a fiat and requires rigorous justification." *Hicklin Eng'g, L.C. v. Bartell & R.J. Bartell & Assocs*., 439 F.3d 346, 348 (7th Cir. 2006).

n. It is settled law that the accused in a court-martial has both statutory and constitutional rights to a public trial. *See Ortiz*, 66 M.J. at 338. In *Ali*, the United States Court of Military Commission Review (U.S.C.M.C.R.) recognized, as to ongoing pretrial military commission hearings, a clear and indisputable right to a public trial pursuant to 10 U.S.C. § 949d and R.M.C. 806. *Abdul-Aziz Ali v. United States*, __F.Supp.3d __, 2019 WL 3334382, at *3 (U.S.C.M.C.R. June 28, 2019) ("military commissions shall be publicly held"); *see also Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). The core value at issue is public confidence in and respect for the military commissions. *Id*. at *18.

o. Similar reasoning supports limiting the use of *ex parte* presentations. In the context of *ex parte* proceedings relating to discovery, the Seventh Circuit has held, "the district court in exercising its discretion must bear in mind that *ex parte* communications are disfavored. They should be avoided whenever possible and, even when they are appropriate, their scope should be kept to a minimum." *United States v. Napue,* 834 F.2d 1311, 1318 (7th Cir. 1987). The court continued:

> *Ex parte* communications between the government and the court deprive the defendant of notice of the precise content of the communications and an opportunity to respond. These communications thereby can create both the appearance of impropriety and the possibility of actual misconduct. Even where the government acts in good faith and diligently attempts to present information fairly during an ex parte proceeding, the government's information is likely to be less reliable and the court's ultimate findings less accurate than if the defendant had been permitted to participate.

Id. at 1318-19 (citing *In re Taylor,* 567 F.2d 1183, 1188 (2d. Cir. 1977)). "An ex parte communication between the prosecution and the trial judge can only be 'justified and allowed by compelling state interest.'" *United States v. Barnwell*, 477 F.3d 844, 850 (6th Cir. 2007) (citing *United States v. Minsky,* 963 F.2d 870, 874 (6th Cir. 1992)). "However impartial a prosecutor may mean to be, he is an advocate, accustomed to stating only one side of the case." *Haller v. Robbins*, 409 F.2d 857, 859 (1st Cir. 1969). "An ex parte proceeding 'places a substantial burden upon the trial judge to perform what is naturally and properly the function of an advocate.'" *Napue*, 834 F.2d at 1319 (citing *United States v. Solomon*, 422 F.2d 1110 (7th Cir. 1970)).

p. The Government's assertion "on its own authority and without explanation, that the petitioner does not have a 'need to know' 'information pertaining to individuals other than the detainee' cannot end the inquiry." *Al Odah*, 559 F.3d at 545. When the Government invokes the national security privilege, "there is a need to scrutinize closely the government's reasons for wanting to hold a closed session." *Ali*, 2019 WL 3334382, at *15. The Government must show a "substantial probability" of harm to national security. *Id*. at *16 (citing *Press-Enter. II*, 478 U.S. at 14); *see also Dhiab v. Obama*, 70 F. Supp. 3d 465, 468 (D.D.C. 2014) (stating the Government bears

the "burden of establishing a substantial probability of prejudice to a compelling interest"). Speculation and bare argument are insufficient; the Government must "provide more than just an expression of concern to justify closure." 2019 WL 3334382, at *17 (citing *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 709 (6th Cir. 2002)). The Government "should provide concrete examples of the 'what' and the 'why' underlying its concerns so that the commission can assess the reasons and make the appropriate, specific factual findings on whether to take certain testimony in closed session." *Id*.

> [T]roubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, we are equally troubled by the notion that the judiciary should abdicate its decision-making responsibility to the executive branch whenever national security concerns are present. History teaches us how easily the spectre of a threat to "national security" may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse.

In re Wash. Post Co., 807 F.2d at 391–92.

4. **Analysis.**

a. The Government's various requests under M.C.R.E. 505(f) raise several questions. Some overriding observations serve to place these questions in the proper context. First among these is that the information as to which the Government seeks relief has come into the possession of the Prosecution in the course of their efforts to fulfill their discovery obligations and has been identified by the Prosecution as containing discoverable information. Secondly, Defense Counsel have been granted security clearances at the highest levels. Third, the Government's choice to employ the M.C.R.E. 505(f) process has consumed countless man-hours and contributed significantly to the years of delay in bringing this case to trial. Finally, the information the Government seeks to protect is generally between ten and fifteen years old, if not older.

b. The seminal questions that flow from these observations are whether the relief requested (at least on the massive scale on which the process has been employed and is proposed to be re-employed) is: 1) required by statute and/or applicable rules; 2) necessary to protect national security; and/or 3) a prudent reconciliation of the competing needs to conduct a fair trial and to protect national security. For the reasons which follow, the Commission answers all three in the negative.

Required by Statute or Rule

c. As R.M.C. 702(a)(3) states, the Commission generally has discretion to manage the discovery process in order to serve "the interests of justice, the protection of national security, and the safety of witnesses." The breadth of this grant is similar to that of a Federal District Court, which enjoys, in addition to the authorities contained in Federal Rule of Criminal Procedure 16, inherent authority to manage pretrial discovery.[23]

d. Accepting the general proposition then that the Commission has broad discretion in managing discovery, the question becomes whether and how the MCA's hybrid CIPA implementation limits that discretion. In making this interpretation, the Commission is mindful that, "In the absence of a clear indication, whether express or implied, the Supreme Court has 'resolve[d] ambiguities [in the statute or rule at issue] in favor of that interpretation which affords a full opportunity for . . . courts to [act] in accordance with their traditional practices.'" *Armstrong v. Guccione*, 470 F.3d 89, 102 (2d Cir. 2006). "Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982).

e. Thus, looking to the statutory/regulatory scheme at play, several factors weigh in favor of the Commission retaining its broad discretion. First, R.M.C. 701(f) requires the military judge to determine whether the privilege is properly claimed and only provides for the exercise of the

[23] *See United States v. Grace,* 526 F.3d 499, 516 (9th Cir. 2008).

M.C.R.E. 505(f) substitution process "to the extent practicable." This is consistent with the permissive "may" found in the first sentence of CIPA § 4[24] and imported into MCA § 949p-4(b)(1).[25] On the other hand, MCA § 949p-4(a)(2) appears to limit discretion with a "may not"[26] and paragraph (b)(3) states that the military judge "shall grant the request of the trial counsel to substitute…," but the "shall" only becomes operative "if the military judge finds that the summary … would provide the accused with substantially the same ability…." The Commission does not find this seemingly random mixture of the permissive, the mandatory, and the prohibitory as a clear repudiation of the Commission's authority to manage the discovery process. In fact, in light of the legislative history indicating that a chief aim of the 2009 MCA amendments was to incorporate the relatively well-settled body of CIPA case law,[27] it would seem Congress left undisturbed the conclusion that "CIPA leaves the precise conditions under which the defense may obtain access to discoverable information to the informed discretion of the [trial] court." *In re Terrorist Bombings of the U.S. Embassies in East Africa v. Odeh,* 552 F.3d 93,122 (2d. Cir. 2008).

f. In the *Terrorist Bombings* case,[28] as in *El-Mezain*[29] and *Moussaoui*,[30] the trial court struck the balance by requiring disclosure only to individuals (including Defense Counsel) with an appropriate security clearance. On the other hand, the Commission is mindful that, "There are too

[24] "The court, upon a sufficient showing, may authorize the United States to delete…."
[25] "The military judge, in assessing the accused's discovery of or access to classified information under this section, may authorize…."
[26] "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 …."
[27] *See generally, Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War,* S. Hrg 111–90, July 1, 2009.
[28] "We now hold that CIPA authorizes district courts to limit access to classified information to persons with a security clearance…." *Id.* at 122.
[29] "The defendants themselves had access to declassified summaries of thousands of the intercepted calls that were pertinent to the intelligence investigation, all of the calls that the government intended to use at trial, and the entire contents of four of the FISA intercepts. The calls to which the defendants lacked access were available to defense counsel." *United States v. El-Mezain*, 664 F.3d 467, 523 (5th Cir. 2011).
[30] "[T]he Government *produced* the evidence, in accordance with the Protective Order, to defense counsel…." *United States v. Moussaoui*, 591 F.3d 263, 287 (4th Cir. 2010), as amended (Feb. 9, 2010).

many leaks of classified information—too much carelessness and irresponsibility in the handling of such information—to allow automatic access to holders of the applicable security clearances." *United States v. Daoud,* 755 F.3d 479, 494 (7th Cir. 2014). In other words, Defense Counsel are not automatically entitled to classified information by virtue of their clearances. Instead, the Commission should be mindful of its responsibility to employ its discretion to appropriately balance the interests of national security and a fair trial.

g. Thus, the Commission reads the permissive "may" in §949p-4(b)(1) consistent with "to the extent practicable" in R.M.C. 701(f) to vest the Commission with discretion in deciding whether and on what scale to allow the Government to employ the summary and substitution process. The prohibitory "may not" in § 949p-4(a)(2) is not raised by the present motions, because the present motions deal with documents the Prosecution has already identified as discoverable, i.e. "noncumulative, relevant and helpful." Finally, the mandatory "shall" in section (b)(3) is, in the first instance, not triggered until and unless the Commission determines that the Government "may" employ the summary and substitution process; and, in the second instance, not truly mandatory in that it is predicated upon a discretionary finding that the materials place the Defense in substantially the same position as the originals. This interpretation gives full effect to the words Congress chose without limiting the Commission's ability to effectively manage discovery with the ultimate aim of bringing the case to trial within a reasonable time.

h. The first predicate to the use of the M.C.R.E. 505(f) process is a valid assertion of privilege. The Commission finds the stale declarations used to support the Government's assertion of privilege, in many instances pre-dating the Government's motions purporting to assert privilege by years, insufficient to assert the National Security Privilege.[31] The present tense requirement of a declaration by an individual "possessing" original classification authority is simply not met. The

[31] In many instances, the authors of the declarations, some of whom are widely known to no longer be employed by the U.S. Government, no longer exercise original classification authority.

Commission does not see how a general declaration predating a proposed disclosure can meet the requirement of "setting forth the damage to the national security that the discovery of or access to *such information* reasonably could be expected to cause." M.C.R.E. 505(f)(1)(A) (emphasis added). The clear import of the M.C.R.E. 505(f) scheme seems to be an assertion of privilege by a designated OCA as to the specific information the Government seeks to protect; not broad classes of information the trial counsel may subsequently decide is not "non-cumulative, relevant or necessary." Furthermore, in light of the passage of time, the changes in personnel and the Government's ongoing obligation pursuant to M.C.R.E. 505(a)(3) to continually seek to declassify information to the greatest extent possible, the motions underlying the vacated M.C.R.E. 505(f) orders simply cannot stand as a valid assertion of privilege.

i. Additionally, the Government's intention to submit supplemental requests based on ongoing declassification efforts represents a wholly inefficient and impracticable approach. Clearly, the Government does not require the Commission's blessing to provide the Defense with the summaries they already have. The Commission therefore declines to review voluminous submissions now, to only be required to revisit them at some unspecified future date when the Government or their equity partners decide more can be released.

Necessary to Protect National Security

j. Should the Government choose to reassert privilege as to these matters, any declaration should contain specific information as to why access to the particular Defense team (or some subset thereof) presents something more than a theoretical threat to national security. While it is laudable that members of the intelligence community have an expansive understanding of all of the ways in which adversaries could make use of classified information, that potential for abuse does not equate to a "reasonable expectation" that these particular Defense Counsel would so use it or that they would somehow unwittingly enable others to do so. To the extent the Government seeks to pursue an argument that every person to whom the information in question is disclosed presents an additional,

untenable risk, the Government should be prepared to document how many Government attorneys, paralegals, and support staff have had to access the information in order for the Government to prepare the voluminous redactions and summaries submitted to the Commission to date and articulate why their access is less of a threat than that by a handful of Defense Counsel.

Balancing of Interests

k. Should the Government so choose and thereafter succeed in invoking the privilege, the question must turn to whether employment of the M.C.R.E. 505(f) process is "practicable" and, if so, on what scale. This requirement brings to mind the balancing contemplated in *Yunis* between the Government's interest in protecting the information and the Defense's need for it. While the test has not been formally adopted in the D.C. Circuit, its application by the trial court judge in *Yunis* was not repudiated, and the *Yunis* court specifically acknowledged that it seems to be called for by *Roviaro*. This Commission finds the application of the test necessary as the only framework within which to afford appropriate weight to the interests of the Accused and his alleged victims in ultimately seeing justice done—as the second decade since occurrence of the offenses draws to a close. In that context, the words of Chief Justice Roberts, albeit in a different context, ring true: "If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case." *DOC v. New York,* 139 S. Ct. 2551, 2576 (2019).

l. Several factors are relevant to the question of the "necessity" to protect classified information.

(1) **Clearance of counsel**. *Moussaoui* demonstrates the viability of involving cleared defense counsel in pretrial discovery matters, subject to a protective order preventing them from disclosing classified information to their client. The Government has expended significant resources to investigate counsel and has granted them clearances based on a determination of trustworthiness to hold some of the nation's most closely-guarded secrets. Furthermore, as a prerequisite to obtaining any classified information, all parties have signed non-disclosure agreements clearly

delineating the grave criminal and civil penalties associated with any unauthorized disclosure. One would certainly anticipate as well that an attorney who flouted a protective order would have to answer to her licensing authority. Given these factors, at a minimum, it would seem incumbent upon the Government to articulate a substantial probability that Defense Counsel will abandon their professional integrity and risk their livelihood, their assets, and their freedom by ignoring the terms of their non-disclosure agreements and any protective orders the Commission may fashion.

(2) **Impact on speedy trial**. As stated above, in determining practicability as guided by the balancing test contemplated in *Yunis*, one consideration would have to be the significant cost relative to the values enshrined in the speedy trial right. While other factors have also contributed to the pace of litigation in this case, the Government's decision to pass tens of thousands of pages of discovery through the M.C.R.E. 505(f) process has impacted the shared interests of the Accused, the victims and their family members, and the public in a swift resolution of these charges. While the M.C.R.E. 505(f) process is well-suited to consideration of minimal redactions or revisions of certain highly-sensitive documents, at present scale it becomes unwieldy, especially in light of the facts that the materials can only be viewed in in a Secured Compartmentalized Information Facility in either the National Capital Region (NCR) or aboard NSGB by a Military Judge is not assigned to the NCR. The time required for one person to travel to the NCR and review binder upon binder of redactions produced by teams of prosecutors and their paralegals working seven days a week for over two years[32] seems inconsistent with any notion of a speedy trial.

(3) **Sensitivity of the information**. Certainly some classified matters are more sensitive than others, as evidenced by the different classification levels employed. Arguments that every additional person with access represents an unacceptable risk ring hollow with respect to

[32] "CP [BG Martins]: … Since June of 2014, we have been working seven days a week to try to comply with the ten categories in the commission's order, and we have done that, including all holidays, and have been treating it in our office as if it's a deployment." Transcript of 9 September 2016 hearing, at p. 6,495.

documents classified at lower levels and/or transmitted to stakeholders across the intelligence and operational communities. Furthermore, while non-cumulativeness is a statutory prerequisite to the Commission's ability to order access to discovery, the cumulativeness standard is nebulous and subject to abuse and/or misapplication depending on one's view of what is cumulative. It is in this context that the perspective of the prosecutor and that of the defense attorney probably differ most starkly, rendering the caution from *Napue* and cases cited therein most salient. While a prosecutor may consider one account of a particular fact or incident to render all further evidence on the topic cumulative, a defense attorney may seek to understand or exploit subtle differences among varying accounts. In terms of protecting classified information, cumulativeness and necessity analytically pull in opposite directions. If evidence is cumulative (i.e. the proverbial cat is out of the bag), the necessity to withhold subsequent iterations of it would diminish unless the subsequent iterations added some additional indicia of credibility, in which case they would not be truly cumulative. Any other reading would nullify the required end state: that the Defense be in substantially the same position they would have occupied had the original discovery been provided. So conceived, the "non-cumulative" requirement is best understood as relieving the Government of the obligation to provide information, the provision of which would be unduly onerous in light of its minimal tendency to be helpful to the Defense. To employ the even-more-onerous M.C.R.E. 505(f) process on the basis of cumulativeness seems counter-intuitive, especially as to portions of documents the Government has themselves identified as discoverable.

Substantially Same Position

m. Having reviewed the Government's proposed summaries, the Commission registers concerns that many of the summaries are so significantly altered that they seem insufficient to meet the requirement that they place the defense in substantially the same position as would discovery of the underlying documents. While limited redactions of certainly highly-sensitive information may make sense, wholesale paraphrasing and obfuscation is not only extraordinarily onerous, it impacts

reliability and usability. The wholesale use of "syllogism" and "naked proposition," as *Rezaq* cautioned, could eliminate necessary context. Similarly, the boiling down of accounts produced in real time and transmitted through prescribed systems to identifiable addressees into "desiccated statements of material fact" not only deprives the defense of "narrative integrity," but renders the documents largely useless as a basis for follow-on investigation, for impeaching or refreshing recollection of a witness or even for satisfying such basic pre-requisites of authentication as when the statements were made, by whom, to whom and for what purpose. The Government should be prepared to specifically justify modifications that alter the structure and nature of the underlying discovery to the detriment of these uses.

Relevance/Helpfulness

n. Relevance and helpfulness are often in the eye of the beholder. As *Al Odah* points out, the universe of matters helpful to the Defense is not limited to that which could be used at trial, but includes such matters as the names of potential witnesses to interview. Also, the Prosecution's limited understanding of the Defense's theory presents a multi-faceted danger. First, the likelihood that the Prosecution will simply miss discoverable information is heightened; second, any corrective action dictated by the Commission will tend to reveal a part of the *ex parte* theory; third, at the scale of tens of thousands of pages, the chance that the Prosecution and the Commission may both miss something increases and finally any shift in the Defense theory could necessitate a wholesale reevaluation of matters considered to date. This reality, overlaid with the extraordinarily broad scope of capital discovery and the entreaty to err on the side of disclosure, one would expect to render the universe of information unavailable to the Defense small and the bases for their exclusion rare.

5. **Markings.** According to guidance provided by the Government, many of the documents are no longer properly marked. That the documents have re-entered the "working environment" and are no longer "at rest" would seem self-evident based on the Government's request that they be reconsidered and subjected to additional review and comment by the Commission.

6. **Ruling.** Considering the factors listed above, the Commission finds the Government has failed to adequately assert the Classified Information privilege. While the Government is free to reassert privilege, the Commission expects that any subsequent submission address the concerns stated herein. As to the matters listed in Attachment A, the Government's underlying motions are **DENIED.**

7. **List of Attachment:**

A. Listing of Motions at Issue

So **ORDERED** this 7th day of November, 2019.

//s//
LANNY J. ACOSTA, JR.
COL, JA, USA
Military Judge

Attachment A

Attachment A – Listing of Motions at Issue

AE Number	Type of Filing	Date Filed	Underlying Base Motion(s)
092W	Order	1-Sep-16	AE 092T
120RRRRRR	Order	28-Mar-17	AE 120CCC; AE 120CCC Amend
120SSSSSS	Order	28-Mar-17	AE 120LLLLL
120UUUUUU	Order	7-Apr-17	AE 120FFFFF
120VVVVVV	Order	10-Apr-17	AE 120KKKKKK
120VVVVVV (Amend)	Order	24-Apr-17	AE 120KKKKKK (Amend)
120WWWWWW	Order	4-May-17	AE 120EEE
120XXXXXX	Order	17-May-17	AE 120DDDDDD
120YYYYYY	Order	18-May-17	AE 120UUUUU; AE 120ZZZZZ
120ZZZZZZ	Order	24-May-17	AE 120DDD
120AAAAAAA	Order	30-May-17	AE 120III; AE 120III (Amend)
120BBBBBBB	Order	22-Jun-17	AE 120SSSSS; AE 120SSSSS (Amend); AE 120YYYYY
120CCCCCCC	Order	7-Aug-17	AE 120LLLLLL
120DDDDDDD	Order	11-Aug-17	AE 120AAA
120EEEEEEE	Order	11-Aug-17	AE 120GGG; AE 120GGG (Amend); AE 120GGG (2nd Amend); AE 120GGG (3rd Amend)
120FFFFFFF	Order	24-Aug-17	AE 120XXXXX
120GGGGGGG	Order	24-Aug-17	AE 120KKKKKK[33]
120HHHHHHH	Order	24-Aug-17	AE 120WWWWW
120IIIIIII	Order	24-Aug-17	AE 120QQ; AE 120QQ (Amend)
120JJJJJJJ	Order	7-Sep-17	AE 120DDDDDD (Amend)
120KKKKKKK	Order	7-Sep-17	AE 120CC
120UUUUUUU	Order	26-Oct-17	AE 120LLLLLL
120VVVVVVV	Order	27-Oct-17	AE 120JJJJJJ; AE 120JJJJJJ (Amend)
275A	Order	19-Nov-15	AE 275
303A	Order	11-Aug-17	AE 303; AE 303A
363D	Order	14-Nov-17	AE 363C
374A	Order	30-Mar-17	AE 374
374C	Order	26-May-17	AE 374B; AE 374B (Amend)
382B	Order	31-Aug-17	AE 382A
382C	Order	15-Nov-17	AE 382

[33] The underlying motion related to AE 120GGGGGGG was mistakenly documented by the Commission in AE 400 as AE 120KKKKK when in fact it was AE 120KKKKKK. This error was carried forward by the Government in AE 400A. The actual underlying order, however, was clearly understood notwithstanding this typographical error.