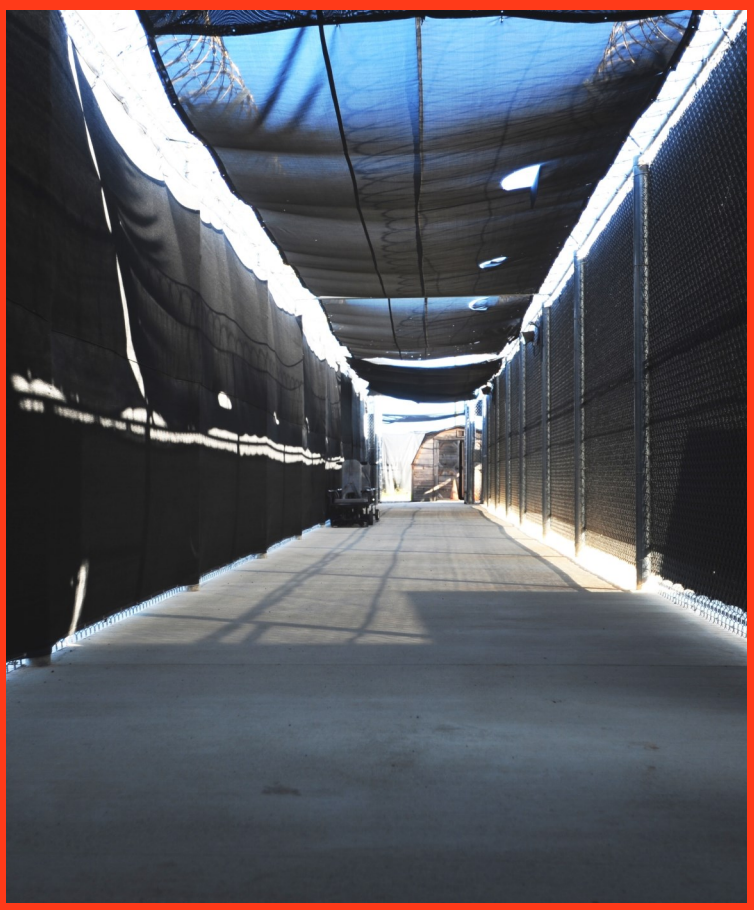
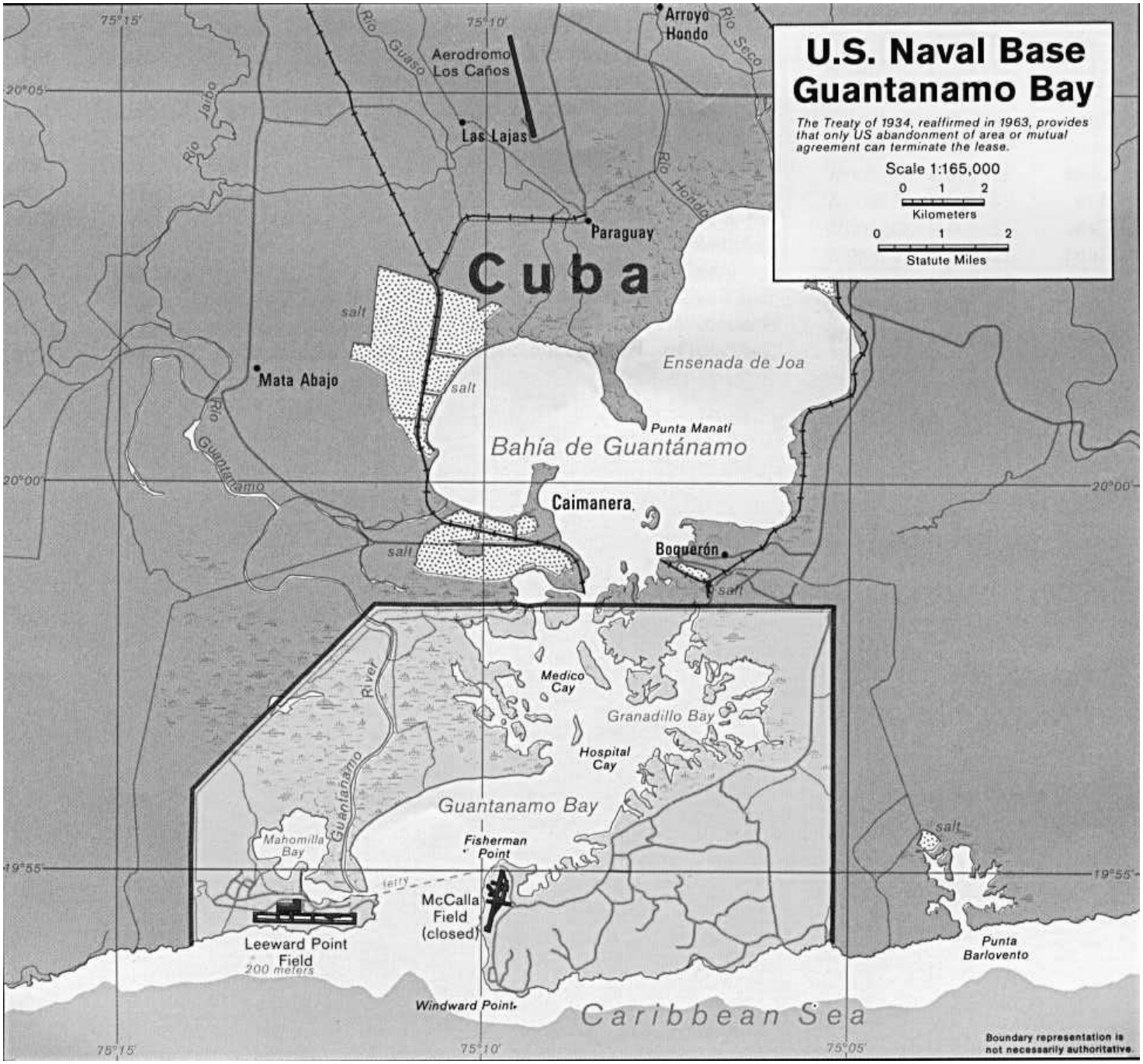
NIMJ Reports from

GUANTÁNAMO

Volume 7



NATIONAL INSTITUTE of MILITARY JUSTICE


U.S. Naval Base
Guantanamo Bay
The Treaty of 1934, reaffirmed in 1963, provides that only US abandonment of area or mutual agreement can terminate the lease.
Scale 1:165,000
0 1 2
Kilometers
0 1 2
Statute Miles
Cuba
Arroyo Hondo
Aerodromo Los Caños
Las Lajas
Paraguay
Mata Abajo
Ensenada de Joa
Punta Manatí
Bahía de Guantánamo
Caimanera
Boquerón
Medico Cay
Granadillo Bay
Hospital Cay
Guantanamo Bay
Fisherman Point
Mahomilla Bay
McCalla Field (closed)
Leeward Point Field
200 meters
Windward Point
Punta Barlovento
Caribbean Sea
salt
Río Guaso
Río Seco
Río Jaibo
Río Honda
Río Guantánamo
Guantanamo River
75°15'
75°10'
75°05'
20°05'
20°00'
19°55'
Boundary representation is not necessarily authoritative.

PREFACE

The National Institute of Military Justice (NIMJ) was founded in 1991 to advance the fair administration of military justice and to foster improved public understanding of the military justice system. Following President George W. Bush's order that authorized military commissions, NIMJ studied and commented on the procedures established to hold and prosecute detainees by the Department of Defense. NIMJ continues to appear regularly as amicus curiae in cases involving detainee issues, to publish reports related to the military commissions, and to educate the public on the military commissions through its website, www.nimj.org.

The Department of Defense invites a few non-governmental organizations to observe military commissions in an effort to satisfy the right to a public trial. As part of this program, NIMJ has been sending observers to the military commissions at the U.S. Naval Base at Guantanamo Bay, Cuba, since 2008. While several other organizations observe the proceedings, NIMJ's observations are unique because of the military justice background of NIMJ board members and fellows. NIMJ's observers attempt to put the proceedings in the appropriate historical, legal, and military context.

Each field report published in this document was written by an NIMJ observer. Each observer provides a personal perspective on the proceedings. The observers included long-time military justice practitioners, academics, and law students—many of whom have since become judge advocates.

NIMJ would like to recognize Ronald Meister, the Chair of the Board of Directors, for his dedicated service to this project. He served as the National Institute of Military Justice's lead on the Guantanamo observer program for more than a decade and oversaw the completion of Volumes 4, 5, and 6 of this series. This project continues because of his energy and dedication to transparency and justice. Thank you. We would also like to thank all of our observers. They donated a significant amount of their personal time to provide oversight of our government's actions in a hidden corner of the world, and their service benefits us all. Last, we would like to thank the many students of the Florida International University College of Law who helped to prepare Volumes 4-7 of these reports.

TITLE XVIII—MILITARY COMMISSIONS

SEC. 1801. SHORT TITLE.

This title may be cited as the "Military Commissions Act of 2009".

SEC. 1802. MILITARY COMMISSIONS.

Chapter 47A of title 10, United States Code, is amended to read as follows:

"CHAPTER 47A—MILITARY COMMISSIONS

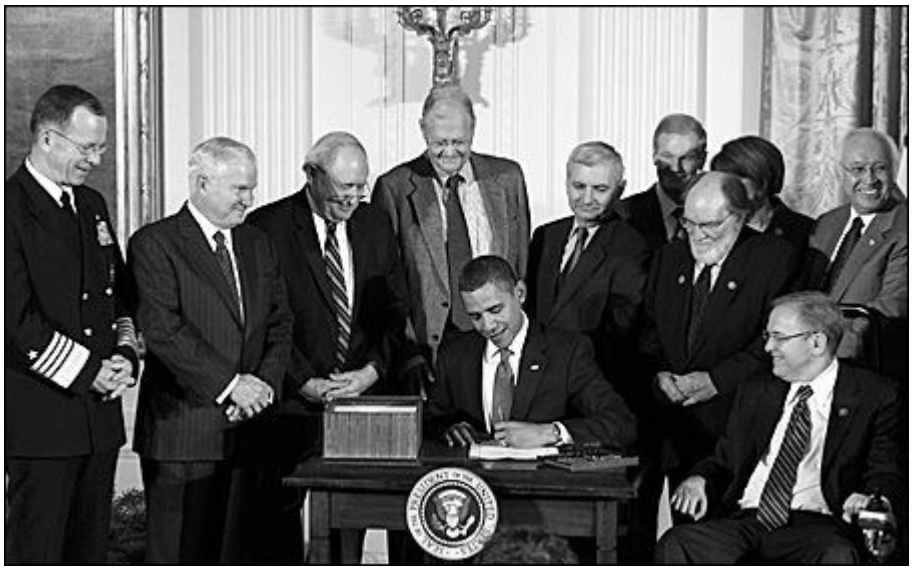
"SUBCHAPTER I—GENERAL PROVISIONS

"§ 948a. Definitions

"In this chapter:

"(1) ALIEN.—The term 'alien' means an individual who is not a citizen of the United States.

"(2) CLASSIFIED INFORMATION.—The term 'classified information' means the following:



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Abd al-Rahim al-Nashiri

2-3 March 2015

ERIC JENSEN

Eric Jensen is a Professor of Law at the BYU J. Reuben Clark Law School. Prior to joining academia, Professor Jensen served for twenty years in the Army as both a cavalry officer and a judge advocate. He is an expert in the law of armed conflict, public international law, national security law, and cyber warfare.

Prosecutor v. Abd al-Rahim Hussein Muhammed Abdu al-Nashiri

Hearing Report

March 2-3, 2015

Primary Issues: Ruling on AE 332, Defense Motion to Dismiss for Unlawful Influence and Denial of Due Process for Failure to Provide an Independent Judiciary.

Overview: Judge Spath specifically found that 10 USC 948(j)(e) and (f) precludes the Convening Authority (CA), Mr. Ary, from taking the actions he did in recommending Change 1 to Department Secretary of Defense Work. This action by the CA, though done in good faith, created the appearance of influencing the judge in this case. The Government did not show that appearance either did not exist or would not affect the proceedings. Therefore, Judge Spath was left to exercise his discretion in crafting a remedy. Dismissal was not appropriate here. Instead, Judge Spath has precluded the existing CA, including his legal advisors, from taking any action on this case. Further, to demonstrate that he has not been influenced by the actions of the CA, he will only hear certain non-evidentiary hearings this week and then truncate the hearings in April to only one week.

Report: Judge Spath called the Commission to Order and proceeded to discuss his upcoming ruling on Defense Motion. He does not have it in final form yet but will have it soon.

Facts: Judge Spath specifically found the following facts (this is not a complete list but the ones I thought most pertinent to the eventual ruling):

Mr. Ary was concerned about the "pace of litigation" and the allocation of resources to the Commissions.

He requested data from the OMC on the number of days of hearings and the number of hours per day of hearings for the various Commissions.

After gathering the data, he formulated Change 1 as a way to "accelerate the pace of litigation."

Mr. Ary did not staff Change 1 with the TJAGs or anyone outside his office before sending it to the Department Secretary of Defense for his approval.

Department Secretary of Defense Work approved Change 1.

During litigation in both the KSM and al-Nashiri case, the defense raised the issue of unlawful influence. Judge Pohl abated proceedings in the KSM case until Change 1 was rescinded.

Department Secretary of Defense rescinded Change 1.

Law: 10 USC 948(j)(e) and (f) precludes the CA from looking at or reviewing specific actions by the military judge (MJ) in Commission cases. The Chief Trial Judge is the only person who details judges to cases—not the CA, TJAGs, or anyone else. CA has no authority to "set the pace of litigation." Art 37 and other precedents from courts-martial provide helpful information concerning the application and remedies of unlawful influence cases. Defense has the burden to raise "some evidence" of unlawful influence. They have met that burden. Prosecution must establish beyond a reasonable doubt that either 1) there was no unlawful influence, or 2) the unlawful influence will have no effect on the proceedings. The government has done neither.

When unlawful influence is found, the MJ may fashion an appropriate remedy. That remedy may include dismissal but only in the most serious cases. The MJ should attempt to cure the proceedings from the unlawful influence.

Discussion: Judge Spath laid out the following conclusions from the law and facts. Change 1 did create the appearance of unlawful influence. The CA knew Change 1 might affect the current detailing and the potential pool of witnesses (Ws) that the TJAGs provided for detailing to the Commissions. However, there is no evidence that the DepSecDef knew of this potential affect. Change 1 was clearly outside the role of the CA under the MCA. The CA's gathering of data on the work of the Kis was inappropriate. "Any disinterested objective observer" would believe that the CA's actions were evidence of an attempt to influence the Commission. There is no doubt that Change 1 was an attempt to influence Judge Spath in this specific litigation. The government proffered no evidence to overcome the unlawful influence or its impact on the case. The rescission of Change 1 only removed some of the apparent unlawful influence from the case—that associated with the pace of litigation.

Remedy: The MJ has broad discretion when selecting a remedy to unlawful influence. Judge Spath acknowledges the rescission of Change 1 and the order that any future changes must be fully staffed, to include the TJAGs. Judge Spath determines that dismissal would not be appropriate in this case. The CA did not act in bad faith, but the apparent unlawful influence remains and cannot be undone. Therefore, Mr. Ary and his legal staff are disqualified from taking any further action in this case. A new CA and staff must be appointed for al-Nashiri. To demonstrate that the MJ is not affected by the unlawful influence to "increase the pace" of proceedings, Judge Spath is delaying all evidentiary proceedings until April and then truncating the April hearings from two weeks to one week.

Other items:

Motion on AE 205 not yet fully decided but should be coming soon.

Motion on AE 205bb and 205ee are both denied.

Motion on AE 272d is denied.

Noon Recess

Some of the motions are naturally delayed based on the ruling from this morning, and others are delayed based on the Government's interlocutory appeal that is before the DC Circuit Court of Appeals. Judge Spath asked counsel to start with motions on hearsay.

AE 331 — Government Motion to amend the Docket

Judge sought argument on his ability to separately deal with the 80ish pieces of hearsay evidence that the Govt is going to try to enter into evidence. The motion is to call the evidence by witness, not by evidentiary applicability. Defense argued that the Govt is simply trying to prove hearsay by hearsay in violation of Idaho *v. Wright*.

Defense argues that no case in recorded history has relied on 80ish pieces of hearsay evidence and that is why the Govt is trying to get it all in by demonstrating its reliability through volume instead of by each individual piece.

Govt acknowledges that the MJ must rule on each individual piece of evidence separately.

Judge Spath confirms that Rule 803 is the proper standard and that *Ohio v. Roberts* is the basic standard.

AE 319J — Defense wants to keep open hearings on hearsay until the Cour of Military Commissions Review (CMCR) rules on the interlocutory appeal. The standard for moving forward is whether the issues are not solely related to the issue on appeal.

AE 319F, AE 319G — Will be taken up in a 505 hearing at the end of the day.

AE 256D, AE 257D — Notice of aggravation about the use of civilians in the attack

Defense argues that if we were at war in 2000, this would make some sense. But the US was not at war.

And there was no "coalition" at the time, as the charge states. The Defense is unclear how the Government is going to prove "terrorizing," and who were the people that were terrorized that belong to the coalition. It appears the Government is arguing that the people throughout the world were terrorized.

Govt recognizes that they must prove the existence of an armed conflict beyond a reasonable doubt.

The terrorizing is about the intent to terrorize more generally.

AE 324, AE 325, AE 326 — Motion seeking pre-admission of evidence.

This evidence was gathered by Yemenis, and

Defense argues that if we were at war in 2000, this would make some sense. But the US was not at war.

the Defense is unclear how the Govt will get this in. If the evidence is pre-admitted, they want to be able to call all of those witnesses back and treat them as hostile. This seems like a big waste of time to the Defense and like they will be litigating everything twice.

The MJ normally does this when the evidence is uncontested. The Govt argues that it will spare the days of presentation of evidence only to have the MJ rule that some of it is inadmissible, requiring an instruction for the members. Also, it preserves the option of an interlocutory appeal.

End of the Day

March 3, 2015

Primary Issue: Went through the remaining non-evidentiary motions.

Overview: The judge made no rulings but heard argument heard on a number of motions concerning pre-admission of evidence, compelling witnesses, and the effect of torture or Cruel, Inhuman, and Degrading Treatment (CIDT) on testimony.

Report:

AE 335 — Motion to compel witnesses.

The real issue here is whether the previous ill-treatment of Mr. Al-Darby that may amount to CIDT or torture taints his current testimony at trial under section 948r. Govt agrees that it will not use any of al-Darby's statements that came from torture or CIDT. Instead, they will call him as a witness to testify. That testimony will be voluntary and subject to cross-examination. Defense wants to suppress al-Darby's testimony, and it wants to have an evidentiary hearing about the potential testimony where it can call witnesses. The taint of the prior torture or CIDT is not removed, and if he testifies, it will likely be because of the previous ill-treatment and potential for similar ill-treatment in the future.

AE 207 — Pre-admission of Evidence

Defense argues to compel a specific witness to testify for its case. The witness was a supervisor over the agents who collected the data at the site of the explosion. The witness is currently incarcerated and represented.

Govt argues that the production of the witness is unnecessary and that he had no direct role in the case.

Senate Torture Report (STR)

Defense wants to ensure that they have all the potentially exculpatory information from the recently released STR. They want the judge to order the Executive Branch to get them a copy that the judge can keep under seal. It was clear from the Defense that once it is here, they will argue that they should have access to it.

Govt opposes the motion. They are currently reviewing it at the Senate. They understand their requirement to provide all the exculpatory evidence they have. They will do so.

AE 319, AE 333, AE 337 — All evidentiary issues with respect to classified information

The MJ will read the briefings and the information and issue a ruling soon.

Noon Recess

AE 248H — Motion to Reconsider

In an earlier ruling, the MJ had limited coverage of the treachery charge to only those who were on the USS Cole. In other words, when the Govt attempts to prove treachery and perfidy in Charge I, they can do so only as it relates to the individuals who were on the USS Cole. In the same ruling, the MJ appeared to similarly limit the use of evidence in Charge IV on terrorism to the same group of people.

The Govt believes that such a ruling is legal error.

The Govt entered evidence to show that there were a number of others, not on the USS Cole but in the harbor and close to the USS Cole, who were also in danger of being injured and that al-Nashiri acted with wanton disregard for human life as to those persons.

Defense responded by arguing that the Govt has entered no new facts of law and that the MJ should deny the motion for reconsideration.

AE 334 — Grooming

The Defense had previously raised a motion arguing that al-Nashiri should be able to groom himself before any meetings with his attorneys and any sessions of court. The Govt did not oppose the motion and thinks the issues will be taken care of by the next session.

The hearings are completed until April.

* * * * *

Julia Williams

Khalid Sheikh Mohammed

25-31 October 2015

Julia Williams is an officer in the Judge Advocate General's Corps of the US Air Force. When she observed the proceedings, she was a student at the University of Oxford and Florida International University College of Law.

The week of October 25, 2015, I traveled to Guantanamo Bay to observe the trial of Khalid Sheikh Mohammed and his alleged co -conspirators. I tried not to expect much, truly, I could not come up with a realistic idea of what the conditions of the trial would be. All I knew, after watching 9/11 happen on television live, seeing the first bombs drop over Baghdad on CNN, and listening to former President Obama detail why Guantanamo Bay needed to be shut down, was that I was deeply curious about what's going on down there.

LENGTH OF TRIAL

The set of hearings that I watched came after an 18-month hiatus. In April 2014, FBI agents approached bin al-Shibh's defense security officer. The FBI questioned the security officer about defense counsel's activities, and then asked him to sign a non-disclosure agreement. The FBI activity was later confirmed, and the Military Judge over the commissions, Colonel James Pohl, halted the proceedings for an investigation determining whether defense counsel was working under a conflict with their own clients. After the year and a half break, the Commission has reconvened, but the panel box, the military equivalent of a jury box, still sat empty. Actually, it was four years since charges were filed against Khalid and the others, but the case was still in the pretrial phase. Defense attorneys may say that justice delayed is a job well done, but other would say four years borders on the realm of justice denied.

In arguments to decide whether the incident created a conflict between the defendants and their counsel, the defense attorney for Ali Abdul Aziz Ali, James Connell, stated that "The FBI Investigation here can be analogized to my best friend telling me that he had an affair with my wife, but that it's over now, so it doesn't matter. However, I would be seriously concerned here and want more information. I would want to know: (1) why, (2) what happened and what don't I know, and (3) how can I ever trust you again?" The military judge then added his own fourth question, "Can we stay married?"

Defense counsel also argued that the close of this investigation does not purge any conflict because the investigation uses the words "no further investigation at this time," which leaves the impression that the investigation can be reopened at any time with no additional facts or allegations. David Nevin, Khalid Sheikh Mohammed's counsel, argues that the government should say that there will be no further investigation instead of saying there is no investigation "at this time."

FEMALE GUARDS

The national attention that this case has garnished seeps into the courtroom itself. The detainees, self-professedly, do not want to be touched by female guards at Guantanamo Bay because it goes against their religious beliefs. As a consequence, Judge Pohl was forced to decide and pick between the rights of women to do their jobs without gender discrimination, and the religious freedom of the detainees. To the chagrin of some, Judge Pohl picked religious freedom and ordered the female guards to not touch the detainees. In a high security prison such as Camp 7, where the KSM defendants live, touching detainees is an integral part of the job. As a result of the order, the 10% of the guard force that consists of women can no longer touch the detainees, and therefore, they can't keep their jobs. In the military, just as in the civilian world, promotions in rank and jobs come from experience. As such, all women in the Army guard are now blocked off from any potential benefits that their male counterparts gain by being guards of Camp 7.

To the chagrin of some, Judge Pohl picked religious freedom and ordered the female guards to not touch the detainees.

The gender-based ban gained national attention. On October 23, 2015, three American senators visited Guantanamo Bay to meet with Camp 7's female guards. Defense attorneys suspect that the female guards discussed their dislike of Judge Pohl's previous order banning them from touching the five detainees. The Commission took two witnesses for a Senator meeting. One was a female guard, testifying under the alias Sergeant Jinx, and the other was the Camp 7 Officer in charge of testifying under the alias Major. Major told Defense counsel that 8-12 female guards have the opportunity to touch the detainees. Defense counsel attempted to elicit testimony about Jinx's conversation with the senators, but Judge Pohl strictly prohibited this. Due to time constraints, defense counsel did not finish examining Major. He will continue in the December session.

TORTURE/BIN AL-SHIBH COMPETENCY

A daily, and almost hourly, subject brought up by defense counsel was the torture detainees suffered at the hands of the United States government. Though the defendants' experiences were all different, it is clear from the Senate Torture Report that the CIA is responsible for grievous wrongdoings. Defendant bin al-Shibh's torture has lead him to such injury that his competency to stand trial has been challenged. Bin al-Shibh believes that his cell in Camp 7 vibrates so much that it constitutes torture. Camp 7 guards deny that his cell vibrates, and there has even been an Army investigation into whether it does. After the investigation turned up negative, bin al-Shibh's counsel argued to the court that a sophisticated governmental third party beyond even the control of the guards could be causing the vibrations. (The vibrations in the cell are an extension of torture. It's possible that someone else besides the guards is messing with bin al-Shibh, including listening in on him. Whoever is messing with him could be super sophisticated and beyond the control of the guards.) Defense counsel would not name this organization, but arguments suggested that an existing unnamed group akin to the FBI or CIA was responsible. The interesting thing about this argument was that the government did not seem to refute the particular claim that there was an unnamed governmental organization involved with the detainees. What the government did argue, though, was that bin al-Shibh should be examined and declared competent so that he can be prosecuted and punished.

ABOUT GTMO

At this point in the proceedings, I was becoming accustomed to life on base at Guantanamo Bay. The escorts that guided me through my trip attempted to show the observers Camp X-Ray. This camp, now closed, is where the first wave of terrorists was held and allegedly tortured at the beginning of the War on Terror. Half way down the road to Camp X-Ray, though, we were held back by a rifle-holding marine who explained that the area was closed for shooting practice. From the road on the drive back, other closed camps were also visible. Camp Iguana, meant for juvenile detainees, sits empty on the rocky seaside. The elusive and hidden Camp 7, however, we would never see. Defense counsel explained to us that in order to visit the detainees at Camp 7, they would be placed in a blacked-out car and driven around for miles on end to distort their sense of direction.

BIN 'ATTASH ATTORNEY

Back at the commission, the court would next conside, bin 'Attash's multifarious issues with representation. In the first week of the October session, bin 'Attash asked the Commission what the process would look like if a defendant continued pro se. Considering that in the civil portion of this trial all defendants were pro se, the Commission spent much time on the topic. In fact, the proceedings were delayed for days of consideration. On Sunday, October 25, the Commission reconvened and reasoned that until a defendant actually requested to continue pro se, there would be no further delay in consideration of the topic. The next day, bin 'Attash himself interrupted the Commission to fire his counsel. In response, the Commission recessed the hearing for another day and a half so that his counsel could fully inform him on the consequences of such an action. Among the considerations is the reality that bin 'Attash, an enemy of the state, cannot access classified documents that may become relevant to his defense.

Motion 380: Pro se

In the first week of commission hearings, bin 'Attash asked the commission what the proceedings would look like if he were to continue pro se. This question caused delay to consider the particular circumstances of a high value detainee at Camp 7, Guantanamo Bay, Cuba, representing himself. Bin 'Attash: (Translation, he spoke in Arabic) "I want to represent myself. I do not need a lawyer. I don't need any more information about why I do need a lawyer. I want a colloquy regarding my pro se rights." Today Ms. Bormann notified the Commission that bin 'Attash would like her to withdraw from his defense team. However, Ms. Bormann has some classified information that neither Maj Schwartz nor bin 'Attash know. Because of this, and the risk of revealing other privileged information, Ms. Bormann recommended that bin 'Attash not state his good cause for removing Ms. Bormann in open court. The Commission took Ms. Bormann's advice and is holding a closed colloquy with bin 'Attash.

CONCLUSION

Though for some the trial of these 9/11 terrorists seems to have no end in sight, Judge Pohl and the prosecution assert that the process of justice here may just need to be slow. Actually, the requirement for a speedy trial does not even appear in the Military Commission Act of 2009. Some estimates do not expect the Commission to start on the substantive issues until 2017. After considering the arguments from the government, victims, human rights advocates, and the

detainees themselves, I am passionately affected. Not many of my countrymen can say they have sat in a courtroom with our nation's enemies. Having viewed these sessions and the zealousness of counsel, I have gained a new profound respect for the American sense of justice. Though the Commission system is internationally subjected to criticism for delay, unfairness, and torture, the mundane reality of the Commission speaks volumes.

Judge Pohl structured breaks around the detainees' Islamic prayer times, complete with considerations of daylight savings adjustments. The detainees, held in one of the most secure and probably most oppressive detention camps in the world, bring their plush prayer mats with them to pray in the courtroom. In court, the detainees chatter with each other, hop on laptop computers, and call for bathroom breaks. In a nation that prides itself on equal opportunity, Judge Pohl still contemplates whether he should deny female soldiers their guard duties based solely on our enemies' religious-based desire not to be touched by women. In all, the Military Commission appears to be doing an admirable job in balancing the interest of justice with the desire to vindicate victims and punish enemies. It is a difficult thing to balance swift action and punishment for crimes so rife with personal loss and national tragedy, while remaining authentic to desire for fairness and tolerance that is so unique to our country.

It needs to end. Finish the trial. It is bias/wrong/whatever. But, we are 15 years after the incident. We know they will never get an impartial trial. Torture cannot be undone. Even if they were found not guilty, they would never be released. Even if they got death sentences, there would be so many motions that they would take years and years to implement. The outcome is going to be the same. So, stop with the farce and money waster.

THE AUDIENCE/FAIRNESS

NGOs, reporters, and family members of the victims. So tangibly an American room, but in Cuba, however, the center of the entire whirlwind are these six Muslim men. Anyone could feel conflicted sitting in this room. A major part of why I joined the military was to correct sexism. Yet, here were these Muslim men arguing that women could not be their guards because they could not stand the touch of women. Even with that, even sitting next to the family members of the victims, I could not ignore the inconspicuous possibility, nay likelihood, of injustice. These men were taken from their homelands and brought to black sights. They were then transferred to a black site prison in Cuba (Camp 7), where the U.S. Constitution does not apply. An entire justice system, the Military Commissions, was set up for the sole purpose of prosecuting them. They are facing the third attempt to try them in 10 years. What else could the U.S. do to them while still keeping the international face of justice? Despite this, the process felt as fair as any other American court. Defense representation was zealous to say the least. The defendants may not have found themselves in a court that they respect, but it nonetheless appears to be fair.

* * * * *

Khalid Sheikh Mohammed

17-18 February 2016

Dru Brenner-Beck

Dru Brenner-Beck is an attorney in private practice in Highlands Ranch, Colorado, who consults and writes on international law and the law of armed conflict, as well as the Guantanamo military commissions.

She graduated from Georgetown University's School of Foreign Service, Boston University's School of Law, and earned an LL.M in military law from the US Army Judge Advocate General's Legal Center and School. She is also a past President of the National Institute of Military Justice.

17 February 2016

Summary:

The Commission convened at 0915 with all defendants present. The MJ announced that the commission would account for parties, advise defendants of their right to be present (and to waive that right) and to identify an ex parte hearing held yesterday under Rule 502f(2)(b). MAJ Seager announced his qualifications and was accepted as detailed-military counsel for Mr. bin 'Attash. CPT Michael Schwartz is now Mr. Schwartz.

The Judge announced that although not required to do so, he was putting on the record that an RMC 505f(2)(A) ex parte hearing was held at the government's request. This rule allows the government to present substitutions or request other relief to protect classified information sought in discovery, and 505f(2)(B) authorizes ex parte presentations to the military commission to rule on the requested relief.

Mr. Connell objected to the ex parte hearing on the basis that it violated the Military Commissions Act (MCA) and the 5th and 6th Amendments. Additionally, he objected to the lack of prior notice to the defense so that they could file appropriate objections to the process. All defense counsel joined in this objection.

Mr. Connell also put several other matters that had arisen from the 802 sessions on Saturday, 14 Feb. 2016 on the record. (1) He objected to the denial of his request to hold the 505h hearing on AE 397C and 402C before holding oral argument on the motion; (2) he informed the commission that he had informed the counsel for the media that the commission intended to address AE 400—the redaction of the 30 Oct. 2016 transcript on the female guard issue, and that the counsel intended to be present; (3) he asked that the letter that bin 'Attash's counsel delivered to chambers be assigned an AE # for the record; (4) he informed the commission that the resource request, which was the subject of AE 407 asking for Convening Authority resourcing of the defense, had been denied on Friday, 13 Feb. 2016; and (5) he informed the

commission that he had received its orders in AE 52II on 14 Feb. 2016 and AE 051D and AE 052HH after that, and he informed the commission that they would be seeking interlocutory relief in the form of mandamus from the CMCR, and ultimately the DC Circuit.

Jim Harrington also informed the Commission that he would have two witnesses available to testify on AE 152 (filed request at 152LL) to substantiate their motion for contempt for the guard personnel who he contended have violated the order not to cause loud noises and vibrations in bin al-Shibh's cell. The MJ asked him for later argument to determine if the definition of contempt in the Manual for Military Commission covered this situation so that the commission could sanction the guard force.

Mr. bin 'Attash asked if they wanted to leave if the guard force would take them back to the camp. The Judge said they had a right to request to leave but that the transportation back depended on the logistical arrangements required for the movement by the guard force. Mr. al Hawsawi's counsel also joined in the request.

At this point, the MJ began a discussion with Mr. bin 'Attash about a letter that the judge had received in his chambers (which was now a sealed exhibit) re-raising his dissatisfaction with his defense attorneys, but this time including Mr. (formerly Captain) Schwartz. The letter corrected certain facts and requested certain relief (almost like a motion). The MJ asked if he was now also unhappy with Mr. Schwartz, and Mr. bin 'Attash responded that he did not want Mr. Schwartz to continue to represent him because he cannot work with someone who cheats him. He had seen MAJ Seager for the first time yesterday and had no problem with him. He objected to the defense team rule that no member of the team could meet with him alone without another team member present. The MJ stated that his letter was "almost like a motion" but that Mr. bin 'Attash was not a lawyer, and therefore, the letter did not contain any legal analysis. The MJ asked if the letter's purpose was to release Mr. Schwartz and Ms. Bormann. In response Mr. bin 'Attash stated he had another letter (in Arabic) that he wanted to give to the MJ, but his translator said that it would take a day to translate it. The MJ tried to get Mr. bin 'Attash to recognize that if he had a lawyer, in this case MAJ Seager, he should submit these matters through the attorney as a motion. Mr. bin 'Attash said he did not believe the lawyers would file such a motion as they had become his opponents. He stated that his two attorneys had become his enemies. He said that Mr. Schwartz presented information to the MJ that was misleading and that he wanted to correct that info. He stated that when the lawyers become his opponents, only the MJ can solve this situation.

The MJ reminded Mr. bin 'Attash that he could not have it both ways. If he has an attorney and wishes to present a legal issue to the commission, it is not the MJ's job to put it in proper legal format, fill in the legal arguments, and then rule on the matter. The MJ said he will not prevent him from presenting things to the court, but that he (the judge) may not do anything with it. The MJ referred to the ex parte discussion and the order in October and reminded bin 'Attash that he could only terminate his legal representation at this stage for good cause. Mr. bin 'Attash asked if the facts that are presented to the MJ are incorrect, how

is he to get that information to the commission.? The MJ replied that he doesn't deal with hypotheticals, that bin-Attash has an attorney, and the attorney is obligated to work in the client's best interests and that he can file a motion to correct any fact. But if the relationship has deteriorated such that you cannot do that, then this may be another issue. The MJ also said that he had to work with his attorneys and could write testimony to be attached to a motion. Mr. bin 'Attash stated that the attorneys would not present a motion to fire themselves. MAJ Seager stated that he would have to evaluate whether the motion was frivolous or not in the client's best interests using his professional judgment. The MJ stated that the ultimate loyalty of an attorney is to the client. Mr. bin 'Attash stated that after he talked to MAJ Seager, he went to consult with Ms. Bormann and Mr. Schwartz, and that there had to be a third person present. If Mr. bin 'Attash wants to fire Ms. Bormann, he does not think that is in his best interests.

Mr. Connell offered that the only case that came close to this situation was *Government of Virgin Islands v. Weatherwax*, 77 F.3d 1425 (3d Cir. 1996). It held that the decision to file a motion is not one of the big 5 decisions a client can make. It is a tactical decision. Both the ABA standards on death penalty and on the administration of justice amply support that view. There is a duty to communicate and generally accept client input on what they want to do.

But here we are dealing with choice of counsel, which is one of the big 5 issues. The legal teams are essentially indivisible, and that makes it difficult for a junior member to file a motion in contravention to a lead counsel decision (although it can be done if lead counsel is being ineffective).

Mr. bin 'Attash stated two points. First, MAJ Seager had stated that if he thought it was not in his best interest, he would not file the motion. Second, Mr. Connell had stated that the decision to file a motion is made by the lawyer, not the client. He said that this results in negative repercussions to him. For anything they don't want to file, the client is the victim. They come from different cultures, religions, and regions; and he did not consent to this court. He is forced to be present, and must be forced to accept everything the lawyer wants. The MJ replied that most defendants are not voluntarily before the court that is trying them.

Mr. Nevin stated that he did not agree with all that Mr. Connell had argued, and the military judge responded that he was taking all input on this matter as advisory.

Mr. Ed Ryan for the Prosecution stated that this is a continuation of the issue from the October 2015 session, and the defendant had more information he wanted to provide the commission and that because this is dealing with the right to counsel, a fundamental right, the information in the second letter should go before the commission. The comments today raise issues of the irretrievable breakdown of the attorney client relationship and must be dealt with prior to continuing with the commission. The current status is

that the client has not shown good cause to sever the relationship, but the letter may do so. Recommendation is to take this one step at a time, see the letter and move forward. The MJ agreed, and directed the letter be sent to chambers and would be translated by the team translator so privilege would be protected. The commission was recessed until tomorrow to allow the translation and MJ consideration. When told by the military judge that if he was not present the issue would be put to the side, Mr. bin 'Attash indicated he would be present.

18 February 2016

Summary:

The Commissions convened at 0936 with Mr. Mohammad, Mr. bin al Shibh, Mr. Ali, and Mr. al Hawsawi present. The Government presented Mr. bin Attash's waiver of presence.

We commenced with the MJ wanting to ask additional questions on AE 396. He asked if para. 1.3e of EO 13526 applied to a situation where the holder of the information knows it is classified but not at which level to classify it (it seems clear that it applies if the holder does not know if it is classified or not). Mr. Connell responded that analytically it was the same determination. In response to the MJ's query on the mechanics of the defense classification review process, he described this process: to use the defense classification process, the defense decides what it needs to submit, then marks it with banner markings as privileged (which does not appear to be appropriate with US Government (USG) generated documents). The defense then double wraps the material, and delivers it to the Office of Special Security, who then takes it to the various OCAs (original classification authorities) who have a stake in the information for a classification determination. After drop-off, the defense has no visibility on the process. The defense normally request that the OCAs highlight classified information by word to allow them to use the information appropriately and to maximize their knowledge of what is not classified. Sometimes they are provided this, sometimes they are not. Usually, the result is an email stating that the information is classified at a particular level, or not. Although the Protective Order expresses the expectation that the agencies will do their best to respect the attorney-client privilege, some agencies maintain special compartments for this, while others do not. The defense raised this lack of protection in AE 013, and the USG responded that the classification review process required agencies to be able to talk to each other.

Mr. Trivett for the Government argued that para 1.3e only applies to the situation when the holder does not know if the information is classified or not. It does not apply to the determination of what level of classification applies. The Government has no responsibility to determine what level the info is classified at. Yes, the Government has the responsibility to classify information properly, but the government has a resource constraint, so the defense should have to submit what they want to use through their system. The MJ inquired that if we assume that these documents (which I have been told can be referred to as "transcripts") will amount to a hypothetical 20,000 pages, how many classified discovery documents does the government intend to turn over when discovery is complete—a ballpark? The response was in the tens of thousands of pages.

The Prosecution stated that if we hoped to get the case done during the lives of living men, then these documents should have to go

through the defense process. Also, the volume and importance make this "not worth the Government's time" to go through the classification review process. The Prosecution claimed that once the MJ sees the documents in the 505h hearing tomorrow he will understand the USG's position.

Mr. Connell responded that one reason the defense interpretation of para. 1.3e is better than that of the Prosecution is that it has to be read in the context of the entire EO. When classifying a document, you have to specify a declassification date; failure to do this would undermine the entire structure designed to ultimately make these documents public. He found the Government's argument that it was not worth their time to classify these documents directly was strange, as they are in a surge posture, having hired 25 new employees for discovery purposes. The Holder of the information makes the need-to-know decision, versus the Prosecution's position is that they make the determination.

Mr. Ruiz added that he challenged and would present conclusive evidence to challenge the Prosecution's statement that all the material in the pages were classified as at least a Secret Not Releasable to Foreign Nationals (NOFORNP) level.

AE 397 Government's Motion to Consolidate Discovery on RDI information (involving AE 112, AE 114, AE114F, AE 190, AE 191, AE 194, AE 195, AE 252, AE 260, AE 286, AE 308, AE 310, AE 350C, and AE 350O). The global aspect of this motion was argued prior to each specific motion to compel.

In response to argument in AE 112 on 11 Dec. 2015, BG Martins, rather than responding substantively to the argument, suggested an alternate procedure whereby all RDI motions to compel be consolidated. The MJ ordered him to file a motion to that effect, and AE 397 is the result.

BG Martins proposed that the commission adopt the ten-category construct that was approved in the al-Nashiri case, listed in AE 308. He argued that the defense requests were overbroad, implicate classified information, and were "far afield" from any real issue in the trial of these men. The first category of Brady material (which must be produced) involved hundreds of thousands of pages, including 600 pages of statements by the accused on the 9-11 attacks and 183 pages on their conditions of confinement.

The Government is committed to providing the information in these ten categories: (a) a chronology where the Accused was held in detention from capture to arrival in Guantanamo in Sep. 2006; (b) a description of how the Accused was transported, including how he restrained and clothed; (c) photos and videos documenting the conditions of confinement at each site and during transportation; (d) the identities of medical personnel, guard force personnel, and interrogators who had direct and substantial contact with the defendants; (e) SOPs, policies, and guidelines on handling, interrogating, treating, and transporting HVDs; (f) employment records of those personnel; (g) training records of those personnel; (h) statements obtained from interrogators, summaries of interrogations, reports produced from interrogations, interrogation logs, and interrogator notes of interrogations of the Accused and all co-conspirators identified in the Charge Sheet; (i) copies of statements and interrogation logs and notes; (j) Copies of documents memorializing decisions (approving or disapproving),with any additional guidance, on requests identified in paragraph (i) to employ Enhanced Interrogation Techniques.

The MJ reemphasized that he saw the ten-category construct in the al-Nashiri case as a starting point (Ed. Note, the MJ here, Judge Pohl, was the judge in the al-Nashiri case when this order was issued).

The US will deliver classified information substitutes for the MJ to review and to determine if the proposed substitutions are adequate, and is aiming at providing the RDI information either to the MJ or the defense directly by 30 Sep 2016. The SOPs listed in subpara. (e) consists of hundreds of pages, hopefully to the MJ by 8 Mar. 2016; the statements of co-conspirators in (h), including all statements of the accused relating to not just the 9-11 attacks, will be presented to the MJ seeking substitutes or other appropriate relief; the conditions of confinement will consist of hundreds of pages, and the qualification and identities of personnel should be done by later summer.

The Government has invoked the Government Classified Information Privilege and has filed the required declaration.

The Government has invoked the Government Classified Information Privilege and has filed the required declaration. The standard, therefore, is not mere relevance but instead requires that the information be non-cumulative, relevant, and helpful to the preparation of the defense. Relevance must be to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing in a capital case. The Government recognizes that this includes use to show mitigation in sentencing, lack of future dangerousness, for claims of outrageous government conduct, and to evaluate the voluntariness of statements.

The Prosecution intends to seek classification substitutes or other relief, which can include a statement of relevant facts. An example of this is in the USG response in AE 112 (the motion to compel White House and CIA RDI information). The Prosecution does not intend to use statements from former RDI detainees in its case in chief (but would not further elaborate in response to query from MJ about use in sentencing or rebuttal). The Prosecution stated that the defense counsel would get discovery on the conditions of confinement for their clients but not the others. They would use a Bruton approach. The MJ asked whether Bruton was the right approach as it was evidentiary approach on admissibility as evidence rather than a discovery standard. The Government has sought to have the majority of conditions of confinement (except for small amounts for two accused) categorized as unclassified for official use only. As for AE 112, the Government has no obligation to search for every document absent a particularized showing of relevance. Of the 72 -76 documents sought in AE 112, the Prosecution is reviewing 32. AE 112 is overbroad or premature on certain points.

Mr. Connell used the slides he used in December 2015 (AE 112J). His team signed the MOU on 19 Feb 2013 and was told in June 2013 by the Government that anticipated discovery is nearly complete. In Dec. 2015, the Prosecution states that granting AE 112 or any other motion to compel would violate CIPA and its analog provisions in the MCA. This was its most aggressive presentation of this argument. The government's pleading in AE 397 is less aggressive that anything in the ten categories is moot. Today the Prosecution presents the discovery plan, which is still less aggressive. There are three questions that are relevant here: (1) what

must the government produce; (2) did they produce it; and (3) are any deletions/redactions/ substitutions adequate to allow the defendant to make the same defense?

The Government here wants to defer answering the first question to the future. The MJ said the ten-category construct does not prevent the defense from raising discovery issues outside those areas.

What have they produced voluntarily to date? 891 pages of RDI information plus one electronic file. The 891 pages consists of 619 pages of unclassified government summaries of intelligence summaries of the defendants' statements; 214 pages of unclassified summaries of medical records; and 59 classified pages of photos. The Government also appears to have backtracked from the al-Nashiri framework because they have added a footnote stating that they will have an FBI or CIA agent contact the government personnel, which appears to be an attempt to avoid providing this information. The MJ clarified with the Prosecution that was not the correct interpretation. They will still provide identifying information

The ten categories also leave out the identities of debriefers, which implicates the 87 binders of statements of the accused that we know exist. Over 150 people came to talk to Mr. Ali. The Judge emphasized that the ten categories were only the starting point for discovery.

Mr. Connell argued from several slides using Venn diagrams on "material to the defense," "relevant, non-cumulative, and helpful," and "material and helpful/Brady" to help analyze how these different categories overlapped each other. The Younis standard for "helpful" is greater that Brady's "favorable standard," so that Brady is subsumed within Younis.

As for the cumulative analysis, only a small amount of material is covered by this. First, it is important to understand that he argued that this is not a discovery limitation. It is founded on the classified information privilege (*United States v. Smith*, 780 F.2d 1102) which equates the showing necessary over the classified info privilege to that in the informant privilege under *Roviaro*. The application of a privilege is a judicial decision, not a prosecutorial decision. It is the MJ who decides (under MCRE 505f2(a)(1)) if the information is cumulative. Mr. Connell then presented an example of how the same statement disseminated on multiple channels is not cumulative, using former CIA General Counsel John Rizzo's book where he claims he did not receive a copy of the John Yoo torture memo (Standards of Conduct for Interrogations)—whether someone read a document is relevant even if sent on multiple channels. He also used the alleged CIA eyewash where false cables were sent to a wider CIA audience, with more true memos sent to a more restricted audience.

Because Younis is an application of privilege that the Judge must decide. The Prosecution cannot strip information as cumulative. The prosecution has a constitutional obligation to produce all Brady material but only has a rule-based obligation to produce non-Brady material. He agreed that the rule 505f(2) draws no distinction between Brady and other classified info. For Mr. Connell, cumulative material was a subset of Brady material.

Mr. Connell argued that the Government has defaulted this motion, as it had provided no basis to deny production of the requested material. The Government's recent statement that it would stipulate that the facts contained in the SSCI Executive Summary was welcome, but it depended on what facts were being stipulated as true. It is valuable as a starting point.

Mr. Nevin argued that cumulative Brady material had to be produced as it was constitutionally required even if cumulative (Mr. Connell had argued that the MJ could determine if Brady material was cumulative and not require its production on that basis). He argued that the statements of all the accused had to be provided to all the defense teams. He also reminded the MJ of the Government's summary of the post-SSCI CIA Classification Guidance that had determined that confinement conditions and EITs as applied are not classified at all.

Ms. Bormann argued that cumulative determinations depend on the theory of the defense and so can only be done by the MJ who has received the theory under seal. This case is different from al-Nashiri's because it involves five alleged co-conspirators so that each defense counsel must look at material that may compromise the right to a fair trial and make a severance decision. She agreed that the MJ must make the cumulative determination, and that the cumulative nature of some of the information may add weight to the outrageous nature of the Government's behavior. We broke for lunch.

Mr. Harrington reminded the court that Brady did not use the term exculpatory but instead used the word "favorable" which is far broader.

The Government responded that it did make a cumulative determination before presenting material to the judge. Therefore, it cannot be the case that they have to present every duplicate.

Mr. Connell then tried to determine where the status of AE 112, with information asked for, already given, committed to give, or not going to give as general categories. He argued again that the Government had defaulted AE 112. The charts showed the Venn diagrams and should be available as AE 387D. These charts are too difficult to describe here but are very good representations of the conceptual issue. The Prosecution has provided documents with FOIA exemption redactions that is a separate process and not criminal discovery. Bottom line, the Prosecution has never produced any reasons the information should not be produced.

BG Martins stated that the redacted material was classified and remains classified. The motion is still premature. They are not reviewing perfunctorily, and the Prosecution does have a role in the cumulative analysis. The MJ suggested that judicial review wouldn't be a problem. The Government claimed that by asking for specific documents using the phrase "including but not limited to," the request was overbroad.

Mr. Connell argued that the discovery request categorically asked for the four categories of information, (which he spend a portion of the Oct. 2015 session laying out the relevance of), and just because the Government hid the mate-

rial for ten years did not make it undiscoverable.

We moved to AE 114, which Mr. Connell argued was also defaulted as the MJ had ordered certain actions on 7 Dec 2014 and the Prosecution had not complied.

AE 190 was the "NO Name Motion" that had not yet had a 505h hearing that had to be done before it could be addressed.

AE 194, the Prosecution had already explicitly conceded this motion and the MJ has issued an order.

AE 195, The Zero Dark Thirty Motion:

Mr. Connell introduced a disk with video clips from the first twenty minutes of the movie Zero Dark Thirty and slides, which are AE 195H (AAA).

In this motion (AE 195), Mr. Ali filed a motion to compel the communications between the director and writer for the movie and the CIA. The movie provided the CIA spin on their RDI interrogation and included their claim that it led to the break on the bin Laden courier, which the SSCI report found to be untrue. Many of the scenes contain information that was accurate as to what happened to Mr. Ali but was not in the public domain at the time of the movie's release,. It was provided over 23 meetings between the CIA and the film makers, as well as other access and information from the CIA. The two CIA agents in the movie are likely CIA Agent A and B in the FOIA-released CIA IG Report on ethical violations by CIA personnel. The motion to compel seeks the unredacted emails on the communications between the CIA and the film makers, the CIA Memo describing meetings between the CIA and the film makers, and the CIA OIG Investigation into ethics violations by CIA officials concerning the movie containing statements by Agent A and B.

Mr. Connell started by quoting a memo from Deputy Counter Terrorism Center Director Philip Mudd on the RDI program stating how the movie would give the CIA the opportunity to spin the RDI program with respect to Congress and the public. This is cited in the SSCI Executive Summary at 502-503.

Mr. Connell then presented four film clips from the first twenty minutes of the movie in which the character Ammar is tortured by the CIA—the Gawker FOIA response provided evidence that "Ammar" was KSM's nephew, sent $5K to one of the 9-11 hi-jackers, and was a co-conspirator with Waleed. All of which are alleged against Mr. Ali. The details, which were undisclosed at the time details of the torture seen in the movie, are: the threat that if he stepped off the mat the CIA agent would hurt him, the use of the ice and the water cooler to water douse Ammar, the use of the tarp when water dousing him. The film also shows the implantation of false memories where the agents provide Ammar with food or drink and tell him he has already provided information during his sleep deprived state. This tells us that the film makers had information that no one else had access to. We know there are responsive documents to this request: some redacted ones were provided to the Gawker and Judicial Watch FOIA litigation. This was a CIA attempt to shape the battlefield on public opinion, and the jury pool. The detailed and unguarded information will be useful in many pretrial motions.

The Prosecution, Mr. Groharing, reiterated that this is a movie, not a documentary. The Government has reviewed the documents and

found no material on communications between the filmmakers and the CIA. The Prosecution reviewed all FOIA materials, which was made available for review. None of the redactions involved material on such "communications."

Mr. Connell reiterated that they know the documents exist; that the "to" and "from" lines are redacted; and that the government is parsing the wording in the request. The defense asked for information about the communications, including but not limited to the communications and the emails, CIA IG Report, and CIA Memo.

Mr. Nevin said that the CIA effort to spin public opinion also goes to outrageous governmental misconduct and could taint a future jury pool.

Mr. Ruiz reiterated that per the rules of the commission, what was produced to one defendant must be produced to all. The MJ agreed, stating that if the Prosecution has an opposition to discovery, it is their responsibility to raise it.

Ms. Bormann stated that if the meetings between Agents A and B and the filmmakers were presumably not classified, then the cumulative analysis discussed earlier did not apply, but it is not cumulative even if the Government gives the RDI information. Subtleties are the basis for impeachment, and different stories that can be evaluated through this information can provide such a basis.

Mr. Harrington stated that this is an example of favorable information that is not exculpatory.

The Prosecution reiterated that none of the redactions involved communications with the filmmakers or were about such communications. The MJ wanted to ensure these are not overly parsed—there are some implied tasks here.

Mr. Connell argued that the Prosecution's parsing of the responsive information was unbelievably close, and that we have only just heard of their "exacto knife" proposals today.

It was very surreal to watch (with a forty second delay) the torture scenes from Zero Dark Thirty while watching the defendants watch (or avoid watching, as most did) the movie clips. The defendants knew this would be argued, but I think it still was a difficult thing for them to sit through in public. All four avoided directly watching the clips but could not have been able to avoid hearing it or watching portions of it.

The Prosecution argued that they were not "parsing close in this instance." If the information were discoverable for some other purpose, they would put it through the process of discovery evaluation.

NOTE: It was very surreal to see (with a forty second delay) the torture scenes from Zero Dark Thirty while seeing the defendants watch (or avoid watching, as most did) the movie clips. The defendants knew this would be argued, but I think it was difficult for them to sit through this in public. All four avoided directly watching the clips but could not avoid hearing it or watching portions of it.

AE 252, is a subset of AE 112. If the MJ grants AE 112, he won't have to rule on AE 252 ,but if he doesn't then he will also have to rule on AE 252.

AE 286 was a motion to compel production of the full SSCI Report. The MJ asked Mr. Connell what his authority was to compel production of a legislative branch document as the commission is not an Article III court. Mr. Connell offered to research that as a homework assignment.

The MJ outlined the way ahead for tomorrow and next week:

Tomorrow they will do the 505h hearing in AE 396, AE 397, AE 254, and AE 018. They will then do AE 397 and all subsets. And he wants to get to the classified portion of AE 254 (female guard issue). Next week they will start with AE 400 (as the counsel in only available Monday morning), do AE 254 motion to reconsider and discovery, and then go back to AE 397. If they need a closed session as a result of tomorrow's 505h hearing, tentatively plan on it being held next Friday. Mr. Harrington informed the MJ that he is working with Mr. Trivett on AE 152. And the MJ would like to get to AE 018 if at all possible, perhaps with an open session now and an open and closed hearing next session. Mr. Connell also asked about AE 365 as it would break a log jam on AE 373. We recessed at approximately 1650.

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Khalid Sheikh Mohammed

24 February 2016

Kelly Borders

Kelly Borders is an officer in the Judge Advocate General's Corps of the US Air Force. When she observed the proceedings, she was a student at the Florida International University College of Law.

Start Time: 9:22 am

Mr. Connell: The linguist had a death in the family so is not present; we are okay proceeding without, just pointing the out the future impact of only having one.

Mr. Swan: Bin 'Attash's valid waiver accepted.

TC: Move to seal 112K, 112L, 112M because they may contain classified information.

Judge: Where do they come from, government provided defense, I understood the FOIA released version.

TC: No, was different than FOIA released materials.

Judge: Was processing here, government is concerned asking us to seal.

TC: We have asked to handle these as classified.

Judge: Info reviewed again, was released by government, was not FOIA redactions. The government looked at it and removed some of the redactions. Two types, FOIA redacted and unredacted FOIA redactions. Is classification dealing with FOIA version or the new doc.

TC: All info is under review, hard to have robust convo, but new doc with unredacted, proper is secret classification. We sent email to defense, seal this too as FOUO.

Mr. Connell: Counsel for government explained 112E, no objection to L, but we do object to K and M.

TC: We need to discuss in detail, closed session.

Connell: Not tracking on what I said was classified.

Judge: You didn't.

Connell: Objection on record (transcript), redaction of public doc from yesterday. Redactions should be done by judge.

Judge: We will discuss in closed session.

Connell: General Baker, should attend closed session hearing, since our flash drive or I did something wrong in argument.

Judge: He does not represent anyone here, just the institution as a whole. Before remediation, let's discuss the issue. We may have to dip into database, might not be the defense counsel but instead the big Government in sky permitted spillage.

Connell: Just to state my client's position, Baker is the highest ranking person, but if he is not there, I am highest ranking person.

Mr. Niven: We can talk about this fully in open session and we should. Public has interest in the way it gets strung up in these claims. We don't have to say a word of classified info.

Mr. Ruiz and Ms. Boreman join.

Judge: Temporarily granted, is closed session but unclassified information will be discussed in open session. Need to get to classified first. If we can we will in open, but 15i, we need the lay of land.

Mr. Niven: We can do this tomorrow.

Mr. Ruiz: After the witness testimony.

Judge: Any copies given to my staff as well will be treated as secret.

Connell: Tomorrow, as an idea, 806 can't go from 505 directly to 806.

Judge: 505(h) session, if we decide it needs 806. Speculative, if time restraints may not have notice tomorrow, not my preferred method, but this will serve as notice. May go into 806 tomorrow.

Connell: Depending on 18, we could do 505(h) today and 806 tomorrow.

Judge: Ending two hours early.

Connell: We would still be working.

Judge: We have a lot on docket. We will talk at lunch. Mr. Harrington, do we have the proper oath worked out?

Harrington: Yes.

The Judge then asked if they have a witness to call. TC stated that the witness was reminded of P03, and to not speak of classified info, but if he needs to speak on classified info, to go to 505. The Judge stated that the current camp conditions are that they can ask leading questions, and that prior treatment is not the issue. Mr. Harrington then gave a brief overview without going into classified information. BG Martins then swore in RBS. Mr. Harrington began questioning in English. The Judge stated that they wanted English to English.

Read the questioning transcript below:

Mr. H: how old are you?

RBS: 43 years old

Mr. H: You are a detainee?

RBS: Yes

Mr. H: Accused of an offense?

RBS: Yes

Mr. H: How long in custody?

RBS: 15 years was taken Sept. 11, 2002.

Mr. H: You were brought to GTMO?

RBS: Yes

Mr. H: you remain here?

RBS: Yes

Mr. H: Camp 7?

RBS: Yes.

Mr. H: And other places?

RBS: Yes.

Mr. H: At the time at other places you had harsh conditions?

RBS: Yes.

Mr. H: Physical, physiological, torture, noise, vibrations? (separate questions combined)

RBS: Yes (to all).

Mr. H: The Senate Intelligence Report, you read them from Sept. 2014?

RBS: Most of them.

Mr. H: Parts talk about you?

RBS: Yes.

Mr. H then put in parts that talk about RBS into the record.

The Judge then stated that it is fine and that they we will repeat it.

Mr. H: You have seen this before?

RBS: Yes.

Mr. H: Pages talk about you?

RBS: Pg. 75, yes.

Mr. H: Docs it describe things done to you?

RBS: Yes.

Mr. H: It is accurate?

RBS: Covers some but not all things done.

Mr. H: Noises against you?

RBS: Yes.

Mr. H: Vibrations against you?

RBS: Yes.

Mr. H: Not in report?

RBS: Yes, other things used that are not in report.

Mr. H: Other noises?

RBS: Yes.

Mr. H: Happened for a long time?

RBS: Yes.

Mr. H: During custody?

RBS: Yes.

Mr. H: Other places, sleep was affected?

RBS: Yes.

Mr. H: Other effects?

RBS: Yes.

Mr. H: What effects?

RBS: Made my life terrible. Turned it upside down, can't pray, can't sleep, can't read, can't focus. It is 24/7 dealing with this.

Mr. H: What kind of noise in Camp 7?

RBS: Different, they change time to time. In 2006, it was banging on walls and back yard of my cell, after about 3 weeks.

Mr. H: When you first got there?

RBS: Banging in cell on the wall and outside cell backyard in the rec.

* * * * *

Kathleen Doty

Abd al-Rahim al-Nashiri

8-10 March 2017

Kathleen Doty is the Director of Global Practice Preparation at the Dean Rusk International Law Center at the University of Georgia School of Law. Previously, she served as Assistant Counsel for International Law and Arms Control at the Department of the Navy, Office of the General Counsel, Strategic Systems Programs. She currently chairs the American Society of International Law's Nonproliferation, Arms Control, and Disarmament Interest Group. She holds a BA from Smith College, a JD from the University of California-Davis School of Law, and is currently an MA candidate in political science and international affairs at the University of Georgia. Doty observed pre-trial hearings in the Al-Nashiri case for the National Institute of Military Justice in 2012 and 2017.

Proceedings held Tuesday, March 8, 2017

Overview:

March 8, 2017 included testimony and motion practice. Testimony was provided by Capt. Huang. Argued were 92hh and 369.

Participants:

AE 338 has list of all parties present during the week.

Daily Report:

At 0904 the Commission was called to order. Present were the same prosecution and the same defense teams. There was a statement of transmission and report that 359 (l), 369 (h), and 369 (i) had been taken up in the closed session Tuesday afternoon. Defense went on the record stating that for the VFM community, the defense is mindful of their PTSD as well.

Testimony of Capt. Huang:

Capt. Henson Huang provided testimony via VTC regarding his involvement in the psych records production process. Capt. Huang testified to the following:

He is an Army JAG, began active duty in 2009, and has been stationed to Ft. Hood, Shaw AFB, JB Lewis-McChord with a deployment to Kandahar, and is currently at Ft. Belvoir with the TCIU. He has been there since 2016.

He had been assigned to ensure that every page of behavior health records were disclosed to the defense.

He had no prior experience as a custodian of records and was not given formal training, but had been given guidance on policy (both verbal and written), conducted independent legal research, and had discussions with Col. Wells.

He had been read onto the relevant SAP in August of 2016.

He had been to GTMO 4 times to complete this mission. He compared hard copy documents to the electronic version. He created a log to track and organize the documents. He asked some pages to be re-scanned because they were not legible. He looked through them chronologically, searching for gaps. He also cross-checked them against the medical records and guard force records. Gaps were encountered in two circumstances: (1) where a psych record was not created because the meeting did not require it (because either al-Nashiri declined the meeting altogether or because the issues discussed did not actually per-

tain to his psychological health) and (2) some 2-page documents had a header in which the date had not been changed, so it makes the second page appear to correspond with the incorrect appointment. He assigned appropriate Bates numbers to these documents and produced the second page.

He believed that he provided the complete set of records that had been produced.

Consultant payment:

After a recess for lunch, Defense brought to the Commission's attention that one of their experts ran out of hours and had not been paid for prior work and travel completed. This expert is supposed to travel next week and if he's not paid for the past work and if the 120 hours needed for next week are not approved he will not come. The expert is Jerry Taylor of Maine, an explosives expert who will consult on handling explosives residue evidence.

Col. Wells for the prosecution said he'd emailed his Deputy Chief Prosecutor to work with the CA to get this done, but that it would be a challenge given "fiscal law realities."

Judge Spath instructed the parties to deal with this. He expressed his frustration: "Wouldn't it be nice to spend a week talking about the Cole."

AE 92hh

This is a motion to compel discovery about the following: there was an order to preserve a specific location; the prosecution filed an ex parte motion for relief. Judge Pohl issued a Secret order to destroy the location. The defense was supposed to be served with the order, but a low-level functionary reportedly made a mistake and didn't serve them. The defense wants to have a hearing and the documents produced about communications related to this error. There were also some discs containing evidence that were destroyed (they discussed these discs broadly in an effort to keep the discussion public).

Maj. Pierson for the prosecution called the Commission to the legal standards relevant to discovery and evidence–particularly 473 U.S. 667, 480 U.S. 39, *US v. Graham* (D.C.Cir.) and MJ cases *US v. Roberts* and *US v. Morris*–reasonable probability standard that if information is not disclosed, a resulting guilty verdict could result in a different outcome.

The defense argued that what's at issue in the inquiry is not directly guilt or innocence, but it goes to the integrity of the proceedings and could be meaningful on appeal.

AE 369:

Motion to compel discovery w/r/t al-Darbi. These were argued first as a group by the defense and then as a group by the prosecution. For more comprehensive reading, I have reorganized them by subpart where possible.

AE 369(b): Prosecution says they're compliant.

AE 369(c): Prosecution says they are working on a filing.

AE 369(d): Defense argued that all items should be produced in unredacted form, classified if necessary, by 20 March.

Prosecution says it's under a classification review and will be produced by 20 March.

AE 369(e): Defense argued that notes produced by FBI agents & interrogators should be produced. As a matter of protocol, all agents are required to keep notes until the case is resolved.

Prosecution says they feel they've been responsive. They are making an effort for 2 sets of FBI and CITDEF agent notes. They've already provided summaries of the notes from the 220 times they were interviewed.

AE 369(g): Defense argued that detention policies at the time where al-Darbi was held should be produced because if these policies weren't followed it will inform the questions they ask. Changes in policy could also inform questioning.

Prosecution says this is still in the due diligence phase; the analyst has finished, but the lawyers haven't had a chance to review.

AE 369(i): Defense argued that medical records from when he was held at Bagram and at Gitmo should be produced. It's common military practice to produce medical records of the assaulter in sexual assault cases. There are many ways this could be useful on cross.

Prosecution says this is still in due diligence phase; the analyst has finished, but the lawyers haven't had a chance to review.

AE 369(j): Defense argued correspondence between the U.S. Chief Prosecutor who negotiated the repatriation agreement with Saudi Arabia should be produced. Part of the reason they have to do the deposition is that al-Darbi is leaving in August.

Prosecution says this is still in due diligence phase; the analyst has finished, but the lawyers haven't had a chance to review.

AE 369(h): Prosecution believes they have been responsive regarding deaths at Bagram, including an allegation of abuse by al-Darbi.

AE 369(k): Prosecution says they believe they have been responsive with responsive imagery.

AE 369(l) and (m): Prosecution says these are 505 filings they're attempting to make.

AE 369(n): Prosecution objects to providing medical info and data; they've reviewed medical but not psych.

AE 369(o): Prosecution argues they have produced a responsive 120 product. This is a 53-page document that is currently undergoing a classification review. Expected by 20 March.

AE 369(p): Prosecution objects to the breadth of the request. They have produced materials–namely diplomatic notes and pretrial agreements in Appendix A. This should be sufficient.

AE 369(q): Defense argued documentation that al-Darbi was threatened in the course of the plea deal isn't privileged and should be produced.

Prosecution argues they don't believe there is any additional responsive material.

AE 369(r) and (s): Defense argued the referral binder should be produced. The prosecution gave this binder to the CA; they must have a copy or be able to get one back from the CA.

AE 369(w): Defense argued that the questionnaire given to al-Darbi by Special Agent Carton, the leading investigator, should come into evidence.

AE 369(x): Defense argued that all material related to torture should be produced. Al-Darbi complained of being kept awake for weeks, hit, and sexually assaulted. The government has only produced one page related to sleep depravation. There should be contemporaneous records kept about a person's status. The goal is not admissibility here, but discovery.

Generally, the defense argued that al-Darbi was the only living, breathing person connecting al-Nashiri to the Cole; other than this, the government's evidence is hearsay. The opportunity to cross examine this person is extremely important. Moreover, rumors have been circulating that al-Darbi isn't actually going anywhere, and there are statements from the new administration that no one is leaving GTMO; requests status update from the government.

Final Discussion:

Defense counsel tells the Commission that Mr. al-Nashiri is not feeling well. There is some discussion of how and whether to proceed if he is not well enough to come to court the next day.

Moreover, rumors have been circulating that al-Darbi isn't actually going anywhere, and there are statements from the new administration that no one is leaving GTMO...

The Commission recessed at 1620.

Proceedings held Thursday, March 9, 2017

Overview:

March 9, 2017 included motion practice. Argued 369.

Participants:

AE 338 has list of all parties present during the week.

Daily Report:

Proceedings called to order at 0903. The accused was not present; witness were brought to testify to the voluntariness of his absence. Judge ruled the absence was knowing and voluntary. There was a statement of transmission, and it was noted that the parties were the same as before. This is the first time Carol Rosenberg of the Miami Herald was observing.

Before argument began, Court asked for a status update on two issues:

Consultants: Rex Plant will be available next week. Defense filed a motion to allow him to be present in the room with the accused. Judge ordered that he will have access to the courtroom. He explained that he has seen no behavior that would lead him to believe that there might be a problem, but that he cannot sit near or talk to the accused. If al-Nashiri starts sharing information or being otherwise unruly the Commission will deal with him just like any other courtroom. The Judge won't put up with any disruption; he'll be shackled, gagged, or even removed.

Issue re: payment for defense consultant has been resolved and he has been approved for 150 hours for next week.

AE 369: Prosecution update on the status of discovery:

(e) Agent did not take notes for 90% of sessions. When she did, she would summarize in a form 440 and destroy handwritten notes.

(q) Do not believe any other records exist.

(r) Referral binder: government has located, reviewed, and will produce by 20 March when classification review is complete.

(s) One doc–9 pages–under review.

(t) Same as (s)

(u) Prosecution believes it has satisfied its obligation; they have produced interviews.

(v) Prosecution believes it has satisfied its obligation; they have produced and don't believe there are other responsive records.

(w) Agent never gave al-Darbi a questionnaire, but he did place one in the case file. However, it's no longer there; Army regulations allow for destruction after 3 years. It was properly disposed of. The interview with the agent has been disclosed to the defense.

(x) Prosecution believes it has responded and there is no other responsive information.

(y) There is 1 outstanding document that's 53 pages; otherwise, it has satisfied the request.

(z) This is imagery under classification review. Will produce by 20 March.

(aa) JTF has this imagery, and it needs to be obtained and go through a classification review. It will likely miss the 20 March production deadline.

(bb)-(ee) Unable to discuss in an open forum. Due diligence is ongoing.

Argument about al-Darbi Deposition (I believe this is also part of 369, but the parties and Commission did not make it clear when they began argument.

Prosecution explains that al-Darbi has been interviewed 224 times by federal law enforcement ,and the defense has been provided with notes and summaries of these interviews, as well as transcript of a deposition from a prior case, and the investigations of 2 deaths at Bagram that go into detail about confinement and detainment practices. Prosecution argues that given that al-Darbi will be transferred back to Saudi Arabia. We need to have his deposition to preserve his testimony for trial. The standard for unavailability is substantial likelihood, which is met here. Defense has had enough time to review these records and the deposition should be done in April.

Defense argues that this is not normal practice where a 120-day rule applies. Part of the obligation is to review all the documents for cross examination. There have been and will continue to be changes to the defense team. Defense argues the prosecution's motion to do the deposition in April is frivolous; the deposition should be taken in July, if taken at all.

Defense also argues that a deposition will never be an adequate substitute for live testimony. Defense walks through three timelines: (1) prosecution strategy of discovery and production, (2) the Darby plea agreement, and (3) the evolution of what they call the "Christmas Eve" motion filed by the prosecution to move this up. The Defense would prefer VTC testimony even after he's transferred: the interests of justice are not served by condoning a trial strategy by the prosecution to delay this to the point that they have no choice but to do a deposition.

Judge Spath asks whether the defense team is willing to take the risk of not doing a deposition and then being left with nothing but prior statements where al-Darbi admits to conspiracy as non-hearsay. The opportunity to cross examine at all will be lost. To not do a deposition deprives the client of confrontation. The defense stands by their argument.

The Commission was adjourned at approximately 15:30 and went into a closed section.

Meeting with Gen. Baker:

In the afternoon we were invited to go to Courtroom 1 to meet with General Baker. He fielded questions from the NGO observers and was very candid. He explained his role as related to the defense strategies and how he makes sure that each team has the resources they need. He noted with relief that his team had just been exempted from the DoD hiring freeze and that he would be growing his teams. He spent quite a bit of time explaining the structure of the Commission in response to NGO questions.

Dinner with Mr. Kamman:

We were invited to join Mr. Kamman for dinner. This was a lively and fun conversation. Mr. Kamman was also very candid about his experiences with the Commissions. He was quite critical of the process, of intelligence interference in the case, and of the prosecution strategy. He asked a skeptic in our group to consider the possibility that Mr. al-Nashiri is innocent and explained the facts that could lead to that conclusion. He told us that in his opinion, "this case is all about torture."

I note for future observers that he did not request a meeting with us initially. We saw him several times at breakfast and said that we would love to meet with him but that he had to send the request. If there are people from either

team that you'd like to talk to, it may take some direct contact because NGO observers cannot directly request a meeting.

Proceedings held Friday, March 10, 2017

Overview:

March 10, 2017 included primarily testimony provided by the former SMO at JTF GTMO.

Participants:

AE 338 has list of all parties present during the week.

Daily Report:

Proceedings were called to order at 0908. All were present including the accused. There was a statement of transmission and a report that defense consultant issues were resolved.

Testimony of SMO (continuation of testimony provided in December):

The Senior Medical Officer (SMO), after stating that he understood he was still under oath and testified to the following:

He is the former SMO. He reviewed his notes and al-Nashiri's medical records to prepare for his testimony. He had not reviewed his prior testimony.

He met with al-Nashiri approximately 6 times while SMO for many issues, including skin rash, muscular/skeletal ailments, and headache.

When he was told he was going to have to testify in the case, he had not treated al-Nashiri for motion sickness. So, he reviewed his medical records looking for a history of motion sickness ("He's got a lot of problems and he complains about everything. I was looking for notes regarding the motion sickness."). He initiated an appointment to discuss this with the accused.

Al-Nashiri's records reflect that he suffers from vertigo and motion sickness. Vertigo is the sensation of movement around him–referred to as dizziness–motion sickness is more specific and people can suffer nausea, light headache, and in extreme cases, vomiting. These symptoms are caused by mixed communication between visual and other receptors.

A person becomes accustomed to motion sickness and symptoms become less severe over time, just like a sailor on a ship.

He does not doubt that al-Nashiri experiences motion sickness.

He was prescribed medicine for the problem: meclizine, an antihistamine that can cause drowsiness, and Zofran for nausea after he has been in the car. Zofran has side effects but is generally effective.

He noted that the prior plan of care gave the accused a drug before he was to be transported. He adjusted the plan of care so that the medicine could be administered the night before to help him sleep (and allow him to skip the Ambien he normally takes to sleep (for anxiety) before days he appears in the Commission). He also arranged for al-Nashiri to get "good" coffee when he arrived at ELC. He indicated

that this change in the medication plan was effective–al-Nashiri was in a good mood and told him that the he felt good after the transit and gave him two thumbs up. This was communicated without a translator.

Nashiri was complaining about drowsiness and possible accumulation of medication, which he informed him was not possible–or very unlikely.

The root causes of motion sickness could be viral or bacterial illnesses, etc. But the root cause of al-Nashiri's motion sickness is transportation in a vehicle from camp to the Commission. This is a set of symptoms, but not a disease.

He had not worked with a psychiatrist in al-Nashiri's treatment, although potentially psychological issues could be a cause. Both the SMO and the psychiatrist could see what the other was prescribing and would consult if medications were counter indicated.

It was his personal choice not to use his name in Court or to tell his patients his name for security reasons. Knowing a doctor's name could contribute to increased trust.

To al-Nashiri, he was an authority figure. If al-Nashiri had learned helplessness, then this would contribute to a lack of communication. Communication is important to treatment.

A history of alleged abuse would not affect the care he provided.

Other treatments for motion sickness besides medication might include closing eyes, an eye mask, or a hood. It would limit the confusion and mixed signals. It would not hurt to black out the windows. Ears do not factor into the cause, and a pillow or neck support doesn't either. Eating a light meal could help, especially if medication would be taken.

On re-direct, he testified that a hood could possibly make things worse if the vehicle was making hard, wide turns.

The solution is to make the signals congruent. In fact, not seeing could make it worse. The very best solution is being able to see out the window and have visuals.

Other witnesses:

Judge Spath asked the defense if they wanted to call additional witnesses. They renewed their request to call Dr. Crosby. The prosecution objects to Crosby because his testimony won't aid in a legal sense except to provide contrasting medical advice, and the case law says that's not permissible.

The parties discussed whether al-Nashiri would testify. Judge Spath said that if the point of his testimony is to convince him that he suffers from motion sickness, it's not necessary because that point has been made. It's only a preponderance standard in any case. They then discussed security, which was more fully argued the day before in a closed session. Judge Spath questioned whether he had the authority to intervene in this question. He stated that he could change the hours, for example start at noon and go until 8:00 p.m., to allow the defense to nap and recover after transport, but he would not get involved in security; there only needs to be a rational security interest.

Other business:

Defense requests lavalier microphones to better engage with evidence and witnesses. Judge said he would ask the Court Reporter to work on that.

Rulings:

All are forthcoming, but notified the parties that:

AE 359(h): Deferring

AE 359: Moot; SMO testified.

AE 359(j): Deny motion for Dr. Crosby to testify

Generally: motion to allow al-Nashiri to be housed at ELC is denied.

There will be 4 days of evidentiary hearings to pre-admit physical evidence from the Cole.

There will be some argument on outstanding issues– ncluding 92 (this will be a closed session)–and 335 (the parties generally explained the issue to the Judge, but neither was prepared so it was very general).

Proceedings Monday will begin at 0900.

* * * * *

Abd al-Rahim al-Nashiri

13 March 2017

Tucker Pryor

Tucker Pryor is a graduate from Florida International University College of Law. He now serves in the US Air Force Judge Advocate General's Corps. He is also a former Division I college baseball player at the University of North Florida.

Shortly before 0900, non-governmental observers and families of the victims of the USS Cole bombing enter a tent, much like the ones we're sleeping in, to pass through security. Military Police check our IDs and our belongings before we pass through and head to the courtroom. We file into the viewing room, separated by soundproof plexi-glass from the rest of the Military Commission and take our assigned seats. No food or drink (water is ok), no classified discussions, no drawing, sketching, or doodling, no sleeping or slouching; those are the rules.

Five Army MPs flank the left side of the courtroom as various individuals with the appropriate security clearances enter the courtroom. Members of the prosecution and the defense start to trickle in, and then he enters. Abd al-Rahim al-Nashiri is surrounded by what appears to be an interpreter and members of his counsel. He seems laid back, as if he understands that this hearing today is just one of many to come, and the actual trial is still a long way away.

There are screens just outside the plexiglass that are centered on the Judge's chair with the seals of the five military branches on the wall behind it: Army, Marines, Navy, Air Force, and Coast Guard. The screens will display the hearing on a 40 second delay in case anything sensitive comes up that we in the observation room aren't privy to hear. We all rise as the Judge enters the courtroom. The Judge sits down and 40 seconds later we see it on the screen.

Court is called to order at 0902. All parties are present, and both the defense and the prosecution have added to their numbers from last week. Before he begins, Judge Spath brings up a matter of concern voiced by the defense. As the defense explains, the prosecution has responded that they have turned over about 1,100 pages of 120 material; however, according to the defense's records, they assert that they have only received about 297 pages. The prosecution approaches the podium and says that they stand by the representation that over 1,000 pages of 120 material has been turned over. Motion practice is certain to come.

Judge Spath grants the prosecution's motion to depose al-Darbi during the July session. Discovery motions are forthcoming. The prosecution is to give discovery on al-Darbi over to the defense by March 20th. There will be an in camera review of behavior mental health records by April 15th. Judge Spath asks the prosecution if they will put forth any voluntariness evidence on al-Darbi or rely solely on what's in their motion. The prosecution

responds that they haven't thought that far ahead, and the Judge is quick to remind them that they bear the burden to show that his statements were voluntary. The defense questions the need to rush the al-Darbi deposition.

Judge Spath appears to be doing an excellent job setting the tone for what's to come. It is clear that he understands the concerns of both parties, but at the same time he recognizes that this case needs to gain some traction. He also makes it clear that he will be pushing to set a trial date in 2018.

At 0913, the prosecution begins to present. What we will see over the course of this week is a presentation of evidence and a detailed timeline from when it was collected until when it was received at the lab in the US. The prosecution will present the timeline through witnesses, each of whom had one of four responsibilities: collectors, custodians, transporters, and receivers. One witness will be brought back multiple times as she had a role in collection, custodianship, and transportation.

It is a unique number given to each piece of evidence for a specific case when arrives in the lab in the US.

FBI Special Agent William Mark Whitworth is the first witness of these proceedings. Here we see how the prosecution will introduce each of its witnesses. The prosecution asks about Withworth's education, background, when he started with the FBI, the different training courses he has taken, his different jobs throughout the course of his career, and finally which office he was based out of at the time of the U.S.S. Cole bombing. Whitworth's role for the prosecution is to explain the process for collecting evidence. The information Whitworth provides sets out the framework for how the rest of the witnesses will be questioned. He provides information on how the evidence was to be collected and how it is identifiable and distinguishable based on labels or markings created upon collection, as well as once the evidence reached the lab. What will be important later is his explanation of what a "Q-number" is. It is a unique number given to each piece of evidence for a specific case when arrives in the lab in the US.

During cross, the defense appears to want specifics from Whitworth. Who was in charge? How many were dispatched to Yemen? What were the responsibilities of the Evidence Response Team (ERT)? Whitworth reveals that it can be very difficult to collect evidence that is explosive. What is important isn't always obvious. The defense appears to be setting a foundation for attacking the way the evidence was collected.

The prosecution returns for redirect. They ask about what guides the ERT in their collection practices. Whitworth calls them "Best Practices," and they come from a publication for post blast procedure from the Department of Justice. Each scene is unique, however, and as such, these are guidelines only.

The defense wishes to recross and hones in on the mention of guidelines. Defense wants to know if there are any standard operating procedures (SOPs) for dealing with explosions. Whitworth explains that SOPs are rigid and must be followed, and because of the nature of explosions, there are no SOPs, only guidelines. SOPs are more suited for a lab environment.

At 1007, Whitworth is done testifying, and Judge Spath gives him an order, which he will give to every witness this week, that he is not to discuss his testimony with anyone.

FBI Special Agent Tom O'Connor is the next witness for the prosecution. Just as with Whitworth, the prosecution walks through his resume. O'Connor was the ERT team leader from the Washington Field Office. He provides testimony about what happened upon landing in Yemen. He reveals that they were held on the tarmac for several hours while being surrounded by members of the Yemeni military holding machine guns. Once allowed off the plane, they spent several hours waiting for their equipment to be run through security. O'Connor's testimo-

ny serves to identify various photos of the U.S.S. Cole. After each photo, the prosecution submits the photos for evidence, and without any objections, each photo is admitted.

After almost an hour and a half of going through photos, Court is in recess from 1144 until 1300 for lunch.

When Court reconvenes, the prosecution goes through a couple more photographs with O'Connor that are admitted as evidence. The next portion of the examination sets out the process for which the chain of custody for 57 pieces of evidence will be introduced through FBI Agent witnesses over the next couple of days.

The witness will be shown a picture of evidence and asked if it looks like the type of evidence they collected from the Cole. They will then be asked to read the "Q-number." The witness will next be handed an evidence bag and asked to confirm that the evidence in the bag is the same as the evidence in the picture. Next, they are asked to identify the "Q-number" on the bag (which would be the same from the picture) and asked to read from the evidence bag the location on the Cole where the evidence was collected. They are then handed a chain of custody form and asked to confirm that it matches the picture that the prosecution has put on the screen. Next, the witness confirms his signature on the chain of custody form, and lastly, the prosecution asks the witness to confirm that the next picture on the screen is an accurate picture of the evidence bag that the witness is holding. Each witness that is brought in for the purposes of the collection portion of the chain of custody goes through this same line of questioning.

It is not immediately clear that this pattern would continue or for what reason this method was implemented, but by the time the prosecution moves on to the custodianship portion of the chain of custody, it makes a bit more sense.

After O'Connor completes this process for about five pieces of evidence, the prosecution has no further questions, and the defense is ready for cross. The focus of the defense during cross-examination seems to be on creating doubt as to whether the ERTs collection methods were proper. The defense first returns to the guidelines that Whitworth introduced and asks O'Connor to explain the guidelines. Next, the defense shifts its focus to the difficulties the FBI Agents had upon landing in Yemen. Defense asks if any of the evidence response equipment was taken from them by Yemeni security. O'Connor denies that any equipment was missing.

On direct, O'Connor mentioned that the galley of the ship was where most of the damage was and where most of the body recovery took place. O'Connor had also explained that one of the difficulties in conducting their jobs was that the crew of the ship was around because they had to work hard to keep the ship afloat. The defense seems to suggest that the appropriate guidelines were hindered by these facts.

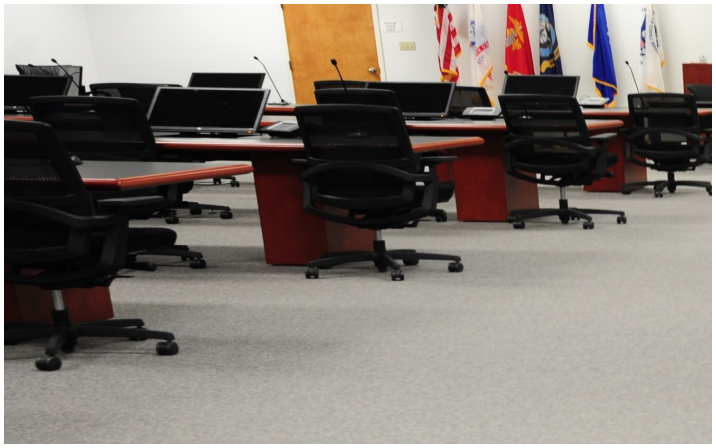
Still on cross, the defense now shifts its focus to the actual collection of evidence. O'Connor is questioned why specific locations were not logged on the collection of evidence. O'Connor explains that in an explosion such as this, what is important is that it is found on the ship and not so much where on the ship. Each question seems to suggest that the ERTs did not conduct themselves properly according to how they were trained. This line of questioning was noticeably upsetting to O'Connor, and his responses were tense, sarcastic, and hostile. The prosecution objects to two questions; first, a line of questions about security checkpoints from the hotel to the dock, which the prosecution claims is not relevant, and before it can be ruled on, the defense quickly withdraws. Second, a line of questions about Yemen denying that this was a terrorist attack. With this second objection, the Judge was short and snarky and sustains the objection on relevance grounds. After about an hour of cross, the Judge orders a fifteen-minute recess. (This series of questioning between the defense and O'Connor was highly adversarial and was the most contentious of the week.)

Returning from recess, before resuming cross-examination, Judge Spath addresses the Com-

mission to let them know that he will allow coffee into the courtroom. Only water was allowed, but he decided that he is in charge, and he will allow coffee. He apologizes to those in the observation room because he has no control over what happens in there (coffee is not allowed). He explains that after six years he's going to allow this and quips, sarcastically, "I'm nothing if not efficient."

Cross-examination resumes, and O'Connor is asked if there are any SOPs from the FBI for evidence recovery from explosions. O'Connor explains that there are only guidelines. There are no SOPs in evidence collection. No further questions, no re-direct.

Former Special Agent Jane Rhodes-Wolfe is the next and final witness for the day. She is one of two witnesses from the New York Field Office. Just like the previous two witnesses, she is asked in-depth about her background.
(Interesting to note, she was in food and wine sales before she joined the FBI).



At the conclusion of going through her education and experience with the FBI, Judge Spath asks her to slow down a bit for the interpreter as she is speaking very fast. At the mention of an interpreter, I am reminded that al-Nashiri is in the room, and I turn my attention to him. At this point he appears relaxed and slouched in his chair with headphones on (for the interpreter).

Rhodes-Wolfe explains the division of labor at the Cole site and says that the Washington Field Office was responsible for the recovery of bodies, and the New York Field Office was responsible for the collection of evidence on the ship. She also mentions that she was viewed as the team leader. Here we also get an explanation of the equipment items that were brought to the scene. Her testimony introduces the evidence collection room that was set up on the ship, as well as where they took the evidence when they left the Cole. Like O'Connor, she explains the difficult conditions they faced in collecting evidence; the presence of victims, 110 -degree weather, security concerns, and limited access to tools. Consistent with O'Connor's testimony, she also explains the procedures that were used to collect evidence.

The first day is getting close to ending at this point. The soldiers that flank the side of the courtroom appear bored, one rubbing her eyes as she reaches for her water. Nashiri is leaning back with one leg over the other. At 1535 the prosecution begins the process for introducing chain of custody that was laid out with O'Connor. Court is called to recess at 1602 and will return for 30 more minutes. Nashiri can be seen laughing.

1616 Court resumes and the prosecution goes through about 10-12 pieces of evidence for identification in the final half-hour. There were a couple of items that Rhodes-Wolfe was unable to identify due to the way the bag was folded, and the Judge noted that they will deal with those tomorrow. 1643 Court concludes for the day.

Al-Nashiri hearing 14 March 2017

Day 2 started much like day 1. We made the short walk from Camp Justice (the tents where we stayed for the week) to the court house, passing through the security tent on the way. The military personnel conducting the security checks were always very friendly and as they became familiar with us, began to test themselves to see if they could match our faces to our names on their list without having to look at our ID badges. Throughout the entire week, every member of the military we came into contact with was incredibly friendly.

As we took our seats in the observation room, I noticed that there were only two Army MPs in the courtroom. It seemed strange considering there were more than double that the previous day, however it made sense once I noticed that al-Nashiri was nowhere to be seen. An Army Judge Advocate took the stand to testify as to al-Nashiri's absence. Judge Spath questioned the JAG as to his belief that al-Nashiri knowingly and voluntarily waived his right to appear, and both the prosecution and defense were satisfied. (This same process would be repeated for the rest of the week. Al-Nashiri did not return.)

Jane Rhodes-Wolfe returned to complete her testimony about the evidence that she could not identify from the day before because of how the evidence bag was sealed. Once again, however, the evidence bags were an issue. After starting at 0900, court was in recess at 0905 so that they could fix this issue. At 0919 the issue was resolved and Rhodes-Wolfe continued to identify evidence until 0928.

Cross-examination began with a different attorney than the previous day. Rhodes-Wolfe was questioned about her training, specifically about the collection and preservation of evidence. According to the witness, what is important is recording when evidence is transferred. She cannot recall if there were any particular protocols that were mandated and is unable to confirm a 12-step process that previous witness discussed on day 1. Mrs. Rhodes-Wolfe also does not remember specific guidelines.

Mrs. Rhodes-Wolfe testified that she and Ms. Better were the only two members from the New York Field Office to travel to Yemen. Rhodes-Wolfe was put in charge of above-deck evidence recovery. Throughout this portion of her testimony, Mrs. Rhodes-Wolfe's memory was put under a microscope. Questions from the defense about specific locations on the ship, procedures, and personnel were met with general responses qualified with the explanation that she could not answer with great confidence.

From her testimony, a broad picture was painted. There was an evidence recovery room somewhere below deck where Rhodes-Wolfe was in charge. Members of the evidence recovery team and sailors would bring evidence in bags and Rhodes-Wolfe and Ms. Better would assess the appropriateness of the evidence. Rhodes-Wolfe did not observe where the evidence was collected. She only relied on the word of those who collected the evidence. She could not recall if there was an evidence log, however she stated that because there was a numerical order of the evidence, she believes there probably was a log. Upon receiving the evidence, she put her name on the evidence bags under "received by." As a result, there is no way to distinguish whether Rhodes-Wolfe actually collected the evidence or if it was brought by others.

The rest of Rhodes-Wolfe's testimony on cross-examination centered around the conditions of the USS Cole and what it was like being in Yemen. She said at the time, the USS Cole site was the most horrifying scene that she had ever witnessed. (She would go on to also work Ground Zero after the attacks on 9/11). It was not ideal to have sailors around during the investigation because they were friends of the fallen and also victims themselves. They were, however, crucial in keeping the ship afloat. She said as long as the USS Cole maintained its buoyancy, it was the place she felt safest in her ten days in Yemen.

It was very interesting to hear her account of what it felt like while she was there. There were still looming threats of terrorist attacks and the possibility of a war. She testified that they were not at all confident in their communications while in the hotel, and that the Ambassador was not at all pleased with the fact that the women were dressing in a way that was disrespectful to the locals. Unable to guarantee safety in the hotel, a decision was made to leave. Rhodes-Wolfe wanted to leave without the Yemeni government knowing because she was worried that they might seize some evidence.

It appeared that the goal of the defense was to demonstrate a lack of confidence in the evidence collected. Although a number of FBI agents testified that the location of where the evidence was collected was not as important as what was collected, this point was central to a number of questions by the defense. They also did a good job in raising questions about who collected the evidence. Although I personally do not know how the evidence collected would ultimately be connected to al-Nashiri, and thus whether the concerns raised by the defense really mattered at all, any observer of Rhodes-Wolfe's testimony should have concerns about the collection process being retold seventeen years after the fact.

On redirect, trial counsel asked more about conditions on the ship, and Rhodes-Wolfe testified that the heat, the fact that the crew were still living on the ship, and the limited space and time pressures limited their ability to do certain things they normally would do. It seems that this is important to establish that any procedural issues were due to circumstance and not incompetence.

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Dru Brenner-Beck

Khalid Sheikh Mohammed

10-11 January 2018

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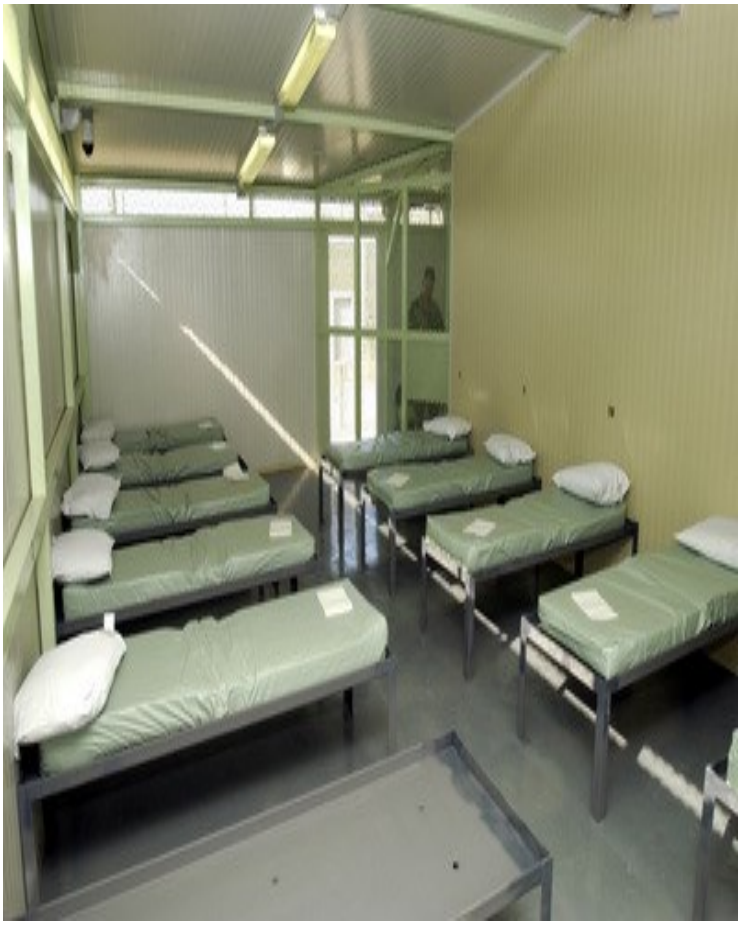
10 January 2018

The commission convened at 0903 with only Mr. Bin 'Atash present. The voluntary waivers of presence were established but with the complication that Mr. Mohammad and Mr. Al Baluchi asked about whether they would be subject to the same search as on Monday. When told that they would be, Mr. Mohammad changed his initial decision to attend, and Mr. Ali only wanted to attend the afternoon session. Mr. Al Hawsawi waived his presence. The SJA representative said that he informed the detainees that their waiver had to be voluntary and they expressed that it was, and in the SJA's opinion, their waiver was voluntary. The SJA representative also clarified that the search on Monday had not included the groin area but had begun at the ankles and risen to the mid-thigh area in the vicinity of just above the cargo pocket on the BDU uniform—he had observed the searches on Monday. Today's search instead started at mid-thigh and went down the ankles, not approaching the groin on either day. The MJ found that the absences were voluntary and knowing, and that the voluntary waiver was not vitiated by the issue of the search change. Mr. Bin 'Atash stated that the search was different today than on Monday. Mr. Harrington stated he had a letter from his client to confirm that his absence was voluntary.

The MJ offered the potential of addressing the search issue (groin), which is now AE 544, expeditiously, although there are benefits to addressing it through the normal briefing cycle, but the status quo will remain in effect (to the March hearings) if not expedited. This could be expedited to be argued next Wednesday. After discussion, Mr. Nevin stated that he was not in a position to argue this motion by next Tuesday because this case involves these changes in procedures that affected detainees who had been subject to years of torture by the US far differently than those who had not been. The effect on these defendants raises issues that are not addressed by the normal case law of searches in confinement facilities—expert testimony may be necessary to fully articulate and comprehend this issue. Secondly, this issue is an example of the constantly changing rules (CCR) that are present here at the detention facility and which were at the heart of the torture program. Mr. Nevin had also requested that one of his team members be allowed to visit with Mr. Mohammad this afternoon at E-2, and he is awaiting a response.

AE 373N, Motion to Compel the Production of Witnesses (classified motion) addressing AE 373 the motion to dismiss because of intrusion into the attorney-client relationship. This mo-

tion involves the JTF guard force's seizure of legally privileged attorney-client work product. These were properly marked DVDs from Mr. Al-Baluchi. AE 373F is the best articulation of the status of this motion as it includes discovery that was produced by the prosecution on this matter after the motion's initial filing. In August 2015, guards seized three DVDs from Mr. Al Baluchi's legal bin. These DVDs were attorney-client privileged material and were properly marked as such. Mr. Connell showed a slide that illustrated what a guard would see with a properly marked DVD, and this leaves no doubt that the material was both privileged and had been properly admitted to the detention facility through the privilege review team. The three DVDs included footage of Mr. Connell's mitigation investigation trips to Kuwait and the UAE. The prosecution's claims in the motion are untrue. There is no justification for the intelligence exploitation review of these attorney-client privileged material. The government produced discovery in AE 365I clearly shows the government hid facts, witnesses, and the chain of custody. In AE 373A, Mr. Al Baluchi moved to compel the return of the disks and identify the involved witnesses as to the seizure and custody of the disks thereafter. The MJ in AE 373L, on 7 Aug 2017, partially granted and partially denied the motion by ordering the provision of all witness information if the basis of the withholding was PII (personally identifying information). On 11 Oct 2017, Mr. Al Baluchi filed a motion to compel witness identification for four witnesses: the declarant, who is a pseudonymous witnesses, SOL 1464 the watch commander, SA Arguelo, and the courier from the trial judiciary. The request for SA Arguelo was withdrawn based on other events, but the remaining three remain important: the declarant makes claims that are not true, and cross examination of him can expose the falsity of these claims; the watch commander can provide information on the lack of basis for the seizure; and the courier can tell what happened to the disks after they left the trial judiciary in July 2015. We expect it will show that the disks were delivered to some intelligence agency for exploitation.



We understand that the MJ has ex parte pleadings in AE 365 and that this may be controlled by the underlying principles decided there but that the underlying motion in AE 373 has not been decided. The MJ has been misled on what's on the disks, what they seized, and what happened after. The declarant's version does not match reality, and that is clearly demonstrated if the MJ compares the declarant's version against the Dubai disk. It will become clear that AE 365 and AE 373 are linked. We are asking for Witherspoon relief and dismissal for intrusion into the defense relationship.

Mr. Ryan responded that the government relied on its pleadings in AE 365/373.

AE 375 (classified motion). In the AE 375 series, Mr. al Hawsawi seeks statements made by himself and other Accused, and original recordings and notes from interrogations of the accused between 2003 and 2006; or, if that evidence has been lost or destroyed, evidence concerning that destruction or loss, to include AE 375M (MAH)–Defense Motion to Reconsider In Part the Commission's Ruling in AE 375L

Maj Wilkinson for Mr. Hawsawi argued that the original motion asked for the production of the original recordings and notes from the interrogations of the defendants at the black sites. The government attempted to provide the MJ with summaries of the interrogations and recommended summaries and substitutions under the Rule 505 process (similar to the CIPA process in federal court), but the MJ resisted because he has to compare the proposed substitutions/summaries/redactions against the original documents, not against summaries of those. In the original discovery request, the original recordings/notes were requested. Finally, the government responded that it had no knowledge of any recordings or transcriptions. In AE 375L, the MJ explicitly relied on these assertions (that there were only written reports, not recordings or transcriptions). Shortly after, the classified discovery called into question these assertions, and Mr. Hawsawi was caught between filing a motion to compel witnesses or a motion to reconsider, and had requested the AE 375M number to file a motion for leave to file a supplement when the order in AE 375L was issued. They asked for reconsideration, and in AE 375O the government responded that the information was not new and therefore inappropriate for a motion to reconsider because the prosecution had known about it previously (but not the defense). The prosecution's response is clearly wrong. We cannot get any real answers to the question of original recordings/ transcriptions because the government has no personal knowledge. They are getting their knowledge from someone else and we need to test this source in a classified hearing. Mr. Connell also has classified argument but nothing at the unclassified level.

Mr. Swann, for the prosecution, states that their responses are in AE 375O (of 25 Aug 2017) and AE 375U (of 14 Nov. 2017), and there are no tapes of their clients and no notes. They underestimate the 505 process.

AE 445 - Defense Motion to Compel Production of Evidence Requested in DR-254-WBA is classified only, as is AE498 - Defense Motion to Compel Documents and Information Regarding the Presence and Involvement of the Intelligence Community at Camp 7. Both can only be argued in the closed 806 hearing.

AE 502J (AAA) - Unclassified Notice Mr. al Baluchi's List of Potential Witnesses For Personal Jurisdiction Hearing (public). This witness request involves witnesses on the issue of hostilities and on the issue of the voluntariness of the statements that the prosecution seeks to use to establish personal jurisdiction for Mr. Al Baluchi. The original request asked for 131 witnesses in these two general baskets, and the prosecution objected to 34 on the sufficiency of the synopsis grounds. In AE 502Y, Mr. Al Baluchi withdrew 6 and added detail on 25 more. The motion is 125 pages drafted to detail the position of the defense for these witnesses, with an additional 111 synopses. There are over 400 pages of detailed explanation and 6000 attached pages of discovery to show the necessity of these witnesses. In October 2014, the defense argued for the necessity of these witnesses, as outlined in the slide deck in the record at AE 502FF. In the December 2014 hearings, the MJ asked the defense to review its witness list to determine who could be presented on paper versus live. The defense complied and also analyzed duplicate witnesses after the government's presentation on direct. The result of this is AE 502J (AAA Supp). The defense is willing to withdraw all but 69 witnesses and attempted to coordinate with those witnesses if they would appear in VTC or live in Guantanamo. There are still some witnesses to whom the defense has not been able to talk.

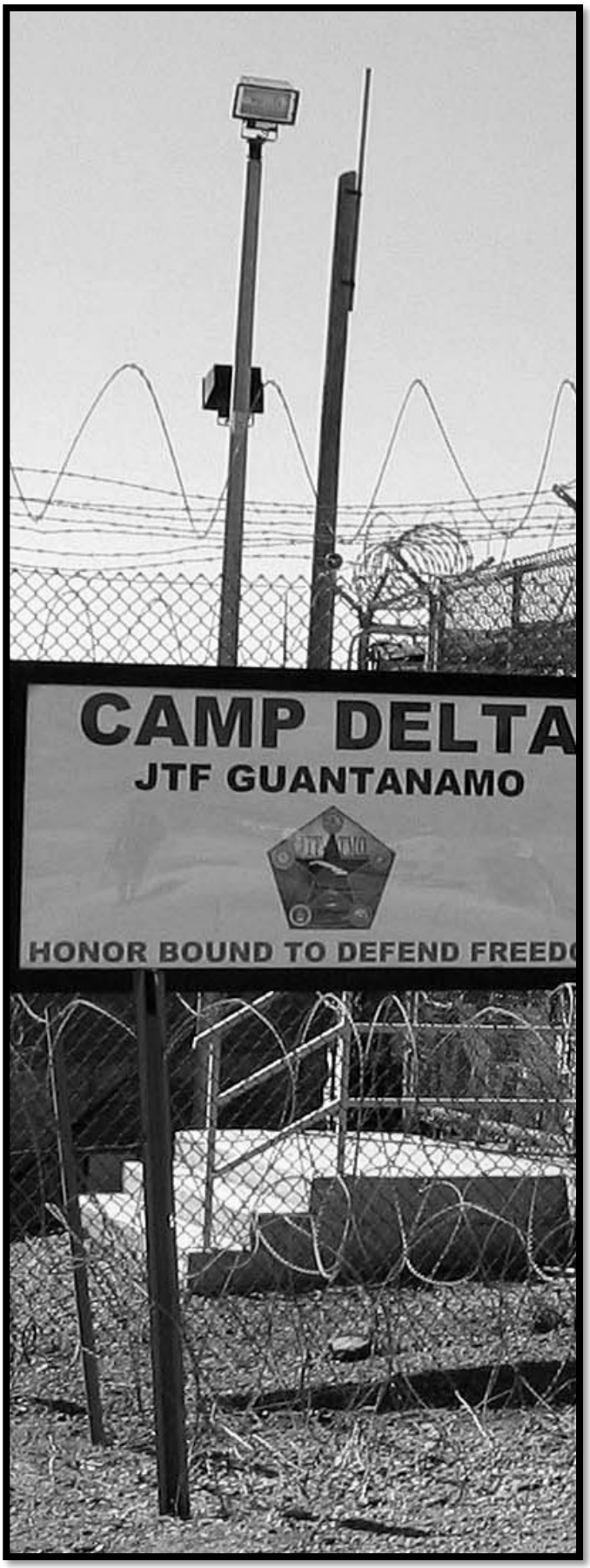
The military commission should order production of those 69 witnesses, and after the order is issued, the defense will coordinate with those

witnesses, propose a schedule, coordinate with the prosecution, and provide the results to the military commission. We have presented a compelling, detailed justification of witnesses and have been more than reasonable in tightening our list in response to requests by the military commission.

The resulting list includes those the government has agreed to provide (about ten) and the rest in the statements basket (which the MJ wants to deal with first), which is roughly a ten to one ratio of operator versus policy witnesses. They will testify about what was done to the defendant on a particular day, to conditions of confinement over a longer period of time, and the intended result of the government's RDI program. They will also testify about the cooperation between the FBI and CIA that will dispel the myth of the FBI "clean team," as well as the goal of learned helplessness that the government exploited in the January 2007 statements. There is not a separate CSRT (combat status review tribunals) statement for Mr. Al Baluchi because there are no inculpatory statements. The prosecution seeks to introduce the January 2007 "clean team" statement, the Islamic Response document, and proof of non-US citizenship. He challenges all aspects of personal jurisdiction. The prosecution has claimed it is not relying on 928a(7)(a) [direct participation in hostilities] as a basis for personal jurisdiction, but is relying on (b) and (c), personal and substantial support for hostilities or "part of Al Qaeda".

The MJ stated to all parties that since the defendants were in CIA (or someone other than DoD) custody from their capture to 2006, it did not seem like it would be difficult to establish a timeline of when and where they were held and what EIT/torture techniques were applied to them. Mr. Connell replied that the reason there was no timeline is that in the response to AE 525, the motion for dates, the government had blurred every date in every document.

The MJ responded that he did not know why the dates were the way they were. The factual predicate for the entire RDI program should be established instead of piecemealing it to death we're going to get there, so let's get there. Mr. Connell agreed and commented that the government has



gone to extraordinary lengths to blur the 505 (CIPA-like) process. Their position on relevance may have changed in the last two years—they originally contended that treatment prior to 2006 was not relevant so no timeline needed.

Mr. Trivett, for the prosecution, argued that the defense is overestimating its leverage on 120 witnesses. The prosecution has agreed to produce ten. There is no motion to suppress. The MJ asked if he should just ignore the legal argument on the voluntariness and attenuation issue. The defense should have filed a motion to suppress. The MJ asked, Isn't it imbedded in the pleading, as the defense has attacked the voluntariness of the statement? Mr. Trivett responded that the defense cannot get two bites at the apple and the defense should have filed a motion to suppress if attenuation is the issue. The MJ asked, Isn't this a continuation of the same interrogation? No, the law is clear on what constitutes a sufficient break. The government is not challenging what Mr. Al Baluchi states happened to him. If it is a verifiable fact, then we will concede it occurred.

The MJ asked why, if that was true, the government did not just say here is a complete timeline of what was done, where, when, and how. Lay it out and then they don't have to call 200 witnesses to describe each day of RDI detention. The defense can show their case by one or 200 witnesses. If a fair trial requires it, then we'll do what is required. The number doesn't matter. Mr. Trivett claimed that they have done that. The government has used an early, mid, and late context through the 505 process. The MJ responded that the RDI issue will come up again and again so shouldn't we just deal with this.

Mr. Trivett responded that the prosecution has conceded ten witnesses involved in taking the LHM (January 2007 "clean team" statement), and has approved SA Perkins, Fitzgerald, Agent MacLean, and three doctors. The prosecution has not been unreasonable. The defense is contesting voluntariness, which is evaluated only at the time of the statement. Absent a motion to suppress, there is a limit in a jurisdictional hearing. The prosecution strongly suggests that the MJ accept the prosecution's concessions and rely on them for the motion.

The prosecution does rely on the "support to hostilities" and part of the al Qaeda components of personal jurisdiction, but it could also rely on the direct participation in hostilities as Mr. Al Baluchi is charged as a principal in the 9 -11 attacks. The government has helped the defense understand how their discovery can be put together into a timeline. These work arounds certainly are possible at the pretrial and trial phases. The prosecution won't use the CSRT statements in this hearing and will be filing a new notice of exhibits that will "clean" up business record declarations, making it easy for the commission. As to the deposition issue, the court should first decide relevance and then, if relevant, they should then file a separate motion for a deposition, articulating the reasons for a deposition. The prosecution does not agree to a lower standard than the government had applied for the 9/11 victims. The 9/11 Report Staff Statement 6 should be all the defense needs for its arguments. We've even agreed to three doctors, who are arguably relevant, and to LTG Neubolt and Vice Admiral Frye on Infinite Reach planning. They are arguably relevant although we don't think required by the Hamdan standard.

Mr. Connell responded that MCRE 304 is clear that there are two ways to raise a claim of voluntariness: by objection or motion to suppress. The prosecution has chosen to introduce statements of Mr. Al Baluchi's interrogation, which brings MCRE 304 into play when it might not be otherwise. It is a rule of admissibility: no statement obtained through torture or CIDT is admissible. There is no equivalent for it in the Federal Rules of Evidence, and the military commission must evaluate voluntariness in MCRE 304, which provides both methods to attack voluntariness, including detailing the specificity of what must be provided and the burden of proof. The rule states that admissibility is not based just the testimony of the person who took the statement—the defendant has the right to present evidence on the involuntariness. The MCRE are very clear, the prosecution

must prove voluntariness and the defense gets to object and introduce evidence. The defense can litigate the issue now as an objection, later in a motion to suppress, and even attack the weight and trustworthiness of any statement before members IAW *Crane v. Kentucky*. Here, the government chose to admit statements as their method of showing personal jurisdiction, and the defense may attack by objection or motion to suppress. They are equivalent legally. The difference is where we are in the process. As a reminder, when AE 488 was filed, we argued that the issue was not ripe as discovery was not complete, but we were told to proceed regardless in AE 502 and that the commission is not waiting on government's disclosures on hostilities and torture.

While there may be a factual (if not a legal) distinction, the burdens are the same. There are three times the defense can raise voluntariness—pretrial, in the personal jurisdiction hearing; pretrial, in a motion to suppress to determine if the statement is to be presented to members; and at trial, to the members on the statement's weight and reliability. There may be principles from the resolution of this objection that will affect other issues in the case. In response to the MJ's question asking if we just go through the same drill again, Mr. Connell responded that we actually go through a much bigger drill later with the motion to suppress. The government has treated the personal jurisdiction motion as an annoyance. There are two constitutional principles requiring more than one opportunity to contest voluntariness: under *Jackson v. Denno*, it is constitutionally required to determine voluntariness during a pretrial, and *Crane* requires it to be argued to the members. The government is also not precluded from relitigating the issue later. We are at this point because of the government's choice of how they wanted to procedurally litigate personal jurisdiction. The more than one bite at the apple issue is a consequence of the government's choice.

Section 948r and MCRE 304, as well as the 5th and 6th Amendments, provide the authority that requires these two different voluntariness determinations.

Mr. Trivett argued that the prosecution had provided the timeline because in providing discovery in the ten category construct, most of the categories were provided in chronological order. There is no right to provide extrinsic evidence on an objection. The defense cannot have three bites at the apple The proper way to do this is to push the jurisdiction hearing back until after the motion to suppress. The prosecution cannot envision a more inefficient process than that advocated by Mr. Al Baluchi.

Mr. Connell stated that the government is completely wrong. MCRE 304 explicitly gives the right to present extrinsic evidence on an objection, and by analogy, the court martial system allows such a challenge in the article 32 pretrial process.

Mr. Ruiz again reminded the MJ of the pending pleading in AE 502N (MAH) Attachment B.

The commission recessed for lunch at 1123 and reconvened at 1303. Both Mr. Bin 'Atash and Mr. Al Baluchi were present.

AE 512 (AAA) – Defense Motion to Compel Information Related to OPERATION INFINITE RESOLVE (classified motion not publicly available). This motion to compel seeks documents on Operation Infinite Resolve, which is the war plan for a war path not taken against Al Qaeda after the East Africa Embassy bombings and is critical to the government's argument whether hostilities existed. It is unclear from public reporting, argued Mr. Connell, if the label 'Infinite Resolve' was the DoD label for the same overall national level planning, while political-military plan Delenda Est was the NSC label. Both described the planning proposal for military strikes against Al Qaeda after the kinetic strikes following the East African Embassy bombings in August 2008 were declared complete by President Clinton. The documents the defense seeks will allow it to describe the decision by the US not to pursue an armed conflict against Al Qaeda. This is an absolute defense to the case. In May 1998, it is clear that the sole role for DoD in counter-terrorism is force protection. After the completion of the response strikes from the African Embassy bombing, on 20 Aug 2008, there was a planning order for more strikes. Both Richard Clarke and Under Secretary of Defense Slocum objected to the plan, and ultimately, a military option against Al Qaeda was rejected. The documents and witnesses are important to detail the conscious decision

of the US not to engage in an armed conflict with Al Qaeda before the 9-11 attacks. Absent the documents, LTG Newbolt's testimony is robbed of its evidentiary support. The lack of hostilities is exculpatory. Although it is not their primary position, the government has articulated that the planning constituted hostilities. However, "planning" is not hostilities. It may be relevant, but only if the plan is executed and actual hostilities result. This was a US decision and not a lack of capacity. We need the documents to add flesh to the bones of the US decision not to employ special forces or additional cruise missile attacks after specifically considering those options. The 9-11 Report Staff Statement 6 is not even the conclusion of the panel. It is a staff working paper. There exists some written Infinite Resolve plan that was never executed. Why the Executive chose not to do so is relevant to the existence of hostilities, particularly in light of the prosecution's hostilities arguments (that hostilities began as far back as 1996 or 1998). We only have a barebones timeline, and the defense needs the details in order to present a fulsome defense.

Mr. Trivett, for the prosecution, argued that the actions of the US that determine whether we are engaged in an armed conflict, not its inactions. There were ten attacks over three years [editorial note, the prosecution tallies these as the East Africa Embassy bombings (2), the Cole bombing (1), the four planes on 9-11 (4), the two world trade centers (2) and the Pentagon (1)]. That is our hostilities argument in a nutshell and we intend to rely on it for this jurisdictional hearing and at trial. Ultimately, this was not a decision not to wage war. There was just nothing to shoot at. All of the documents indicate that the US considered itself at war with Al Qaeda. We have given them 1,300 pages of documents (with Rule 701 redactions). Mr. Connell has all the information he needs to make his argument. The 9-11 Report Staff Statement 6 indicates that the only thing stopping the US from attacking was the lack of actionable intelligence. The MJ asked if he was supposed to consider the 9-11 report as authoritative and admissible in evidence? Shouldn't Mr. Connell be able to consider other expert opinions on that issue? Mr. Trivett responded that the staff gleaned their opinion from the body of evidence considered by the 9-11 commission. We've looked through the relevant evidence and there is no right for the US to have to provide every single document on an argument that we've conceded. There was no kinetic strike before 9-11. We've provided an 80-page opinion brief and a 68-page CENTCOM brief, and have gone back for classification review, seeking the ability to declassify more. We've sent teams to the Clinton and Bush Presidential libraries. We are satisfied with what we've already done

Mr. Connell responded with three points. First, even the prosecution's core argument is wrong. The Staff Statement 6 is not from the 9-11 commission. It is a staff working paper, not the conclusions of the political appointees on the commission. Second, every claim the government just made is a factual claim and should be tested by the evidence. He claims the US thought it was engaged in armed conflict but the evidence is to the contrary. For example, Mr. Schuur will testify that it is not true that the lack of actionable intelligence was the sole restriction on engaging a target. Third, the prosecution has somehow confused Infinite Reach (the missile strikes after the Embassy bombings) with Infinite Resolve (the planning for any future military action against Al Qaeda). If the MJ looks at AE 502Y attachment B, which is the complete set of produced documents, over 98% of it is redacted through the 505 process. This will be described more fully in the classified session.

AE 524 (AAA)–Mr. al Baluchi's Motion to Dismiss or, in the Alternative, to Compel the Government to Produce Witnesses for Interview (classified motion not publicly available). This motion presents a critical question for the military commission. The government has identified a number of witnesses by pseudonym in summaries. It was not done through the 505 process. The witnesses are identified by the statutory language or by a statement that they are relevant, necessary, and non-cumulative. We, as defense in a capital case, must interview

relevant necessary witnesses. It would probably be deficient performance not to interview them. We must resolve this issue before we get to the request to produce witnesses in Mr. Al Baluchi's personal jurisdiction hearing. This base motion in AE 523 asked for identifying information for witnesses so we could interview them and as we argued in December 2017's hearings, under Roviero and Yunis, the identities of these pseudonymous witnesses must be provided so we can investigate and interview them. Their identities must yield when they have relevant information that is helpful to the defense.

This motion is the next step. Instead of producing the information, the prosecution wrote a 16 September 2017 letter to counsel for Mr. Bin 'Atash (in the record as DR 333 and 334) that "the defense should make no independent attempt to locate or contact any CIA employee (which is broadly listed to include employees, former employees or contractors). . . . These restrictions on the defense ability to investigate are necessary to protect [sensitive classified national security information] and must be followed." The letter then threatens criminal prosecution for any such attempt. This directly interferes with the right to investigate and prepare a defense and the untrammeled right of access to witnesses, recognized by the DC Circuit in *US v. Gregory*, 359 F.2d 185 (DC Cir. 1966). It is a sweeping prohibition that reflects the government's position that the defense should not be able to investigate independently and present evidence to this military commission. The government supports this sweeping proposition with two justifications. First, the CIA's Touhy regulations, which have already been resolved against the government. The Touhy regulations are only triggered by a demand under judicial process, and the military judge already ruled in AE 386M, that the Rule 703 process satisfies the Touhy notice requirements. There has been no objection on synopsis grounds. The Touhy regulations do not address requests for interviews outside the judicial process. *McElya v. Sterling Med. Corp*. 129 FRD 510 (WD Tn 1990) that held that neither Touhy nor any other authority authorizes any party to deny a pretrial interview of their witnesses. There is nothing in Touhy that affects this. Secondly, the government asserts that the classified information privilege was not invoked over the 20 witnesses provided in discovery and identified by unique functional identifier (UFI). In AE 308HHH, the government did not ask the MJ to review these substitutions under the 505 process. The MJ has never seen the underlying documents and they are governed by the Roviero/Yunis framework we argued in AE 523. This clearly states that the privilege is clearly overcome as to the identify information when it is relevant and helpful to the defense.

We, as defense in a capital case, must interview relevant necessary witnesses, it would probably be deficient performance not to interview them.

BG Martins argued that this issue is controlled by a series of rulings of the military commission that reflects respect to both the accused rights and Executive and Congressional branch responsibilities to protect national security. These include AE 397F (April 2016 Trial Conduct Order) and AE 386M (Oct 2016). The commission has refused to invalidate the CIA's Touhy requirements, and in AE 308HHHH, in May 2017, the MJ approved the government motion to substitute other relief on the identities of the medical, guard force, and intelligence debriefers under the ten category construct. *Touhy v. Reagan*, 340 US 462 and section 949p6(d) apply to this case. The commission cannot force a witness to interview. The government neutrally informs the witness that he or she is under no obligation to interview. The commission then determines if the testimony is relevant to the issues before it. There are many approaches to getting the commission the needed information. The government is the mailbox. There are sensitive equities to balance here. The defense is cavalier with the requirements of the CIA Touhy regulations, but those regulations allow the government to protect sensitive government information.

Mr. Connell argued that the MJ just heard a general officer in the US Army state that the defense in a capital case should not be investigating this case, and the reasons he advances hold no water whatsoever. First, in AE 308HHHH, despite the prosecution's claims that they asked the MJ to approve the UFI substitutions, they did not request the MJ to review them under 505. They've always treated these witnesses as a carve out from the invocation of the classified information privilege and the 505 process. Second, dates are not in this information, and the so-called government timeline is a single chart in the record at AE 534A attachment B. Third, if we ask to interview witnesses, the government contends that the FBI and CIA will inform the witness and not interfere with the defense investigation. We've asked the government to interview 47 witnesses. Do you know how many have said yes? MJ responded that he knew the answer and Mr. Connell responded that he did not because the government has never responded. Ask the government if they've asked the witnesses and ask them when. The government has already screened these witnesses and determined they are relevant, necessary, and non-cumulative. We have not treated the Touhy regulations cavalierly. The regulations are clear that they are only triggered with a judicial demand for information CFC 1905.4(d) and 1905.3a. If an interview is sought without a demand, then Touhy is irrelevant. The government has previously claimed that DoD witnesses before the commission do not fall under the DoD Touhy regulations. They fall under the court-martial exception. There is no role under Touhy for the government in the interview request step. The 6 September 2017 memorandum applies regardless of the existence of a judicial order, and according to the prosecution's letter, criminal prosecution is a sanction. Attorneys have a duty to investigate. Our main job/core duty is investigating and speaking to these witnesses.

Mr. Nevin wanted to highlight the clear Supreme Court precedent that imposes a duty to investigate. This and other prosecution actions here have imposed barriers to his ability to do so. For example, interferences in investigating in a foreign country. The prosecution also referred to the defense as a private attorney general—we have a right and obligation to investigate. It is not some odd species of desire. The prosecution does not understand their or our obligations.

BG Martins argued that AE 308HHHH does cover the table of pseudonymous witnesses. The MJ asked, doesn't the defense have an independent responsibility to investigate? BG Martins responded they have a duty to zealously advocate but must operate within the rules, not outside of this process—they are trying to enlarge the scope of discovery. BG Martins did concede that the Touhy regulations do not operate outside the realm of a judicial demand.

AE 530 series. On 18 October 2017, attorney-client materials were seized from the defendants by JTF-GTMO. The motions in the AE530 series seek for the materials to be returned, for the attorney-client information to be protected until the materials are returned, and for the proceedings to be abated until the materials are returned.

Mr. Ryan, for the government, argued that the government asks the MJ to rescind the order in AE 149 granting the laptops to the defendants, and to enter an order granting the government authority to conduct a forensic review of the computers, not a content review. The military commission went to the extreme step of giving the defendants laptops with 24/7 access. In the original commissions in 2008/09, when the defendants were pro se, it was in this context of representing themselves and reviewing discovery that the laptops were originally provided. The defendants were arraigned again in 2012. No other detainee including Nashiri a fellow Guantanamo defendant has a right to a laptop. No US Marshall provides such a thing. The events in AE 530 involving the seizure were in good faith, and the evidence has been provided in the guard reports and seized documents. The MJ asked if there was any evidence of an actual alterations made or the risks caused. The government needs to provide evidence: a proffer is not sufficient.

The defendants broke the rules. One of the computers was externally observed to be altered and one paper set of instructions were

seized. If the JDG/JTF guard force and government were to do what they want to do they would conduct a forensic analysis they will do so. The government needs a forensic exam. If the MJ is uncomfortable with extent of the evidence before him, the forensic examination is the next step. One computer has been altered, the status of the other four is unknown. Mr. Al Baluchi handed over a piece of the IT external. This is a bad risk as bad possibilities have already come to pass. Col Gobavics, the JDG commander has some tech background outlines his belief on some risk potentials in his declaration. On 16 Oct 17, after court, the guard force searched the legal bin. The SOP allows searches at the end of every court day. The guard found a paper in Mr. Mohammad's legal bin with Mr. Ali's ISN number that was in violation of CP policy. It was among his ICRC documents. When asked about it, Mr. Mohammad tried to minimize it. He stating it was Mr. Al Baluchi's and to just return it to him. It was on the back of a prayer schedule printed by the JDG dated two months earlier. The document was translated and showed a detailed plan to alter his laptop. Mr. Al Baluchi had already "altered" his lap top (the indication was that it had been opened) in violation of the commission's order in AE 182K. On 18 October 2017, the JTF seized all five computers and also seized a makeshift tool (later testimony showed this to be a piece of wire) and an internal computer component from Mr. Al Baluchi's cell. A search of Mr. Bin 'Atash's cell also resulted in a similar writing. The defense opposes a forensic analysis and wants the return of the laptops. The defense has never explained what the defendants were up to. They have sufficient technological knowledge, ingenuity, and creativity and have used communications as propaganda in the past, referring to the publication of Mr. Mohammad's letter to President Obama. There have been no explanations or apologies. They declined the substitution of newer 2016 computers for the existing 2008 ones, with the exception of Mr. bin al-Shibh. The US Government is entitled to answers. There is Wi-Fi in the containerized housing near the courtroom complex, and T-Mobile is now on the island. The defense objected to Mr. Ryan testifying. The prosecution asks you to rescind your order and order a forensic analysis.

They have sufficient technological knowledge, ingenuity and creativity and have used communications as propaganda in the past, referring to the publication of Mr. Mohammad's letter to President Obama.

Mr. Nevin argued that the answer to the MJ's questions are that nothing happened and there is no risk. There was no evidence that anything was done to Mr. Mohammad's computer. That they need a forensic exam is a similar bare assertion. There is no expert testimony or any technical testimony at all. The Gabovics declaration does not demonstrate any risk. He lists dangers arising from an ability to contact the outside world, which is not the case here. There is no way to communicate with the outside world from within CP 7 or the ELC. AE 182K states that the JDG commander may take appropriate remedial action if the detainee misuses his computer, and it was taken. On this record the prosecution has failed to establish any factual predicate. Further the MJ ordered that the personnel seizing the computers would speak with the defense counsel and explain, and this has not been done. This case is in an unusual posture: the volume of discovery involved; the inability to process or understand it without electronic assistance (searches, keywords) makes it impossible for the defendants to participate in their defense without the computers; and, it is necessary for the defendants to be able to review and understand discovery. This is equivalent to seizing 26 bins of legal material. It is impractical to store that in the detention facility where the defendant has no ability to catalogue/organize the data, or meaningful access to it. This contains extremely sensitive information including their notations and attorney notations. All are stored on the computer. It is equivalent to the search

of a law office. The issue of a right to a computer is a red herring. This case cannot proceed without access to a computer. The Neff case stands for the proposition of having access to a computer. It is a necessity, and there is no indication of an alteration of Mr. Mohammad's computer. As for the propaganda remark by the prosecutor, the publication of the Obama letter was directed by the military commission order, and propaganda is the term used to refer to views you disagree with. Under current procedures, every time a computer is taken back into a camp, it must be certified by defense IT personnel that it is in the correct configuration before it is allowed back into the camp. If not, the defense IT would return it to the correct configuration. There is no evidence of any wireless signals in CP 7. There is a complete failure of expert testimony to show any actual problem here. Many software packages have encryption software as well.

The MJ asked BG Martins for the status of a classification review of a certain document.

Mr. Connell first brought up an issue affecting the transparency of the military commission. When the defense submits slides for publication to the gallery, they are often returned with substantial redactions, but include no explanation, nor any avenue to appeal the often arbitrary and incorrect determinations. Mr. Connell provided examples from the slides he wanted to use for this argument. There must be some mechanism to appeal these arbitrary redactions that interfere with transparency of the military commissions. Many of the redactions are not based on a classification review and are also not done in compliance with Rule 506. Many of the documents have their release to the public changed later. Documents that are marked FOUO are not releasable to the public or to detainees, are not portion marked nor is there any origination authority. That makes it difficult to determine or justify whether the documents fall within exclusions from public release based on TTPs (tactics, techniques, and procedures).

On substance of AE 530, Mr. Connell argued that the reason for the government's minimalist approach to this motion, why they have no expert, no explanation of bios settings, and a description of a 1/16th gauge wire as a "tool" is that the government has the burden of proof in this motion. The prosecution is seeking a forensic exam of the exterior, interior, other hard drives, operating systems, and meta data files. In order to conduct such a broad search of a computer holding attorney-client privileged information, the government must satisfy probable cause, and the crime-fraud exception. Yes, this situation can also be seen as an abuse of a privilege, with a potential sanction of a loss of that privilege. The defense was advised not to accept the 2016 laptops because they were not what they negotiated for.

The prosecution alleges five bases for their motion. First, this is a blatant violation of the commission order in AE 182K. Second, unknown content. Third, unknown software. Fourth, possible use of encryption. Fifth, modification of the bios

As to the violation of AE 182K, the order authorizes the JDG commander to take appropriate remedial action for misuse, and one week of disciplinary status was imposed on Mr. Al Baluchi as a result of this action.

As to the unknown content in Gobavic's declaration, the government will never know what content is on the computer. They have no right to know. For unknown software, only the 2016

laptops have a separate agreement re: software and that is inapplicable for Mr. Al Baluchi's laptop (the government is concerned with PowerPoint for some reason). The government does not control the software on the 2008 computers. As to the two risks that the government articulated (use of encryption and access to the internet), the prosecution seems to claim that the approved software did not have encryption capabilities, but of the 16 approved programs, 8 have organic encryption capabilities at the DES 256 bit level.

For the bios argument: if one takes an analogy of a kitchen light, you have three connections involved, one at the circuit breaker, one at the wall light switch, and one that connects the bulb to the fixture; all three are required in order to have light. These computers don't have a wireless card or a Bluetooth card. That is documented in the 2010 forensic evaluation of these computers, which is far less intrusive than that requested by the prosecution here. The report indicates that there is no evidence this computer has ever been connected to the internet. There were no indications when returned that the bios settings had not been changed as the wireless switch was not enabled. You cannot access the internet without the Bluetooth and wireless cards (hardware). The settings are also disabled. This is the only fear the government articulated, but it doesn't have the hardware capability. There is no probable cause to order this search. As fallback options, the MJ could authorized a search to ensure that the cards are not present. In our brief, AE 530T, we provided extensive information on the law related to searching computers and its intersection with the law for searching legal material. To be sustainable the search must be extremely narrow and tightly constrained. Yes, hypothetically, if this amounted to misuse of a privilege, then the privilege can be taken away and the MJ could condition the return of the privilege to consent to conduct limited examination of the laptop. The government is concerned about what was done. The defense did not challenge the 2010 OSI search because its limited scope did not infringe on the attorney-client privilege. The hypothetical return of the computer on a conditioned limited search might be a compromise to satisfy all.

The commission will address AE 478 Motion for a Trial Scheduling Order tomorrow morning, and then finish AE 530, followed by the closed 806 hearing.

11 January 2018

The commission convened at 0906 with no defendants present. Voluntary waivers of presence were established for all defendants.

The MJ informed all the parties that we would proceed with AE 530, but that he also had some follow on questions about AE 523/524 and a way forward for AE 530G.

AE 530 (laptops):

Mr. Harrington argued that Mr. Bin al-Shibh's position is different than the other defendants, in that he is using the newer 2016 computer and the defense has negotiated a comprehensive protocol of inspection on delivery to the defendant and an accompanying checklist. There are no allegations of any misconduct with his computer by Mr. al-Shibh, and his materials actually contained an exculpatory statement. The defense has heavily relied on this system to exchange discovery information on external hard drives, although attorney-client and discovery information may also be on the computer's internal memory. If we return to a paper discovery system, that will be burdensome and clumsy and require both the involvement of the privilege review team and voluminous amounts of paper records with little room to store or access these documents. The Convening Authority's IT people review the computer and use the checklist and protocol. If the computers are not returned, then the defense asks they be returned to them so the attorney-client privileged information can be protected and so thin that they can determine the status of each of the ongoing projects in the preparation of the defense with the client.

Mr. Ruiz argued that there is zero evidence and no reasonable suspicion that Mr. Hawsawi has done anything inappropriate with his computer. The prosecution's evidence consists of two handwritten notes and one "tool" (piece of wire), none of which involve Mr. Hawsawi. Mr. Ryan's Chicken Little the Sky is Falling argument is lacking. Mr. Hawsawi is a pretrial detainee, and that is a significant legal difference, there is a presumption of innocence (which here often approaches a legal fiction), but the government's motion involves an intrusion into an instrumentality of the defense (the computer). It is at the heart of things used in the defense and it appears that the MJ is seeking a pragmatic solution to the misuse of a privilege, but there was no misuse by Mr. Hawsawi. All of Mr. Ryan's arguments are based on guilt by association and conjecture. He is up to nothing, and the MJ should ask the prosecution what they have as evidence. The answer is also nothing. The computers were seized in mid-October 2017, and the prosecution has had three months to muster additional proof but has offered nothing. If this is the focus of concern in the most secure prison on earth, then we are in trouble. Mr. Hawsawi is a pretrial detainee and presumed innocent. He has an expectation of privacy in his legal materials. The MJ in the PO recognized that after years of litigation on the subject and determined how searches of legal materials are to be handled. The JTF and SJA do not comply with this order. I was not notified of the seizure of his legal materials here, as required. The computer is not kept in the cells 24/7. Access is controlled and it is removed for charging. The prosecution's argument is based

on fiction, not fact. The SJA was not forthright in response to counsel inquiries on this matter, and the protocols in the PO were not followed. What proof is there that a seizure was required? There must be a reasonable suspicion it will bear fruit of some illegality. Nothing is here but conjecture and alarmist argument. The impact on, and hindrance to, the attorney-client relationship is real. You recognized that in your order found in AE 18U. The integrity of the proceedings are at issue here. This is tantamount to seizing 20 legal bins. There is a palpable effect on the attorney-client relationship and the defendant's ability to take part in his own defense. Individualized justice is a battle in this case, and is a focus of our request to sever. Deliver individualized justice to Mr. Hawsawi and return his computer to him. The only evidence is that he followed all your rules. Those not following the rules are the JTF and SJA who should be held accountable.

Ms. Bormann referenced Mr. Bin 'Atash's pleadings in AE 530B & R. She adopted the others' arguments, except that she argued that there is a 6th Amendment right to have a way to access discovery, and here, where it is so voluminous and where there is no law library, such a right must be provided.

The MJ questioned her on an extraneous issue of the submission of all the pleadings on the issue for public display, and there was a colloquy on the requirement to submit documents already approved for public display to the MJ for public display during argument. The MJ reiterated that there must be a classification review, which would be quickened if the documents were clearly marked as already having been reviewed along with a review by the MJ so he can control what occurs in the arguments in the courtroom.

Mr. Ryan, on AE 530, argued that the defense still has not answered what the defendants were up to. There is no need for probable cause to search a law of war detainee, and even if there were, there is probable cause for Mr. Al Baluchi: the note and the misuse. This is a legitimate security concern for the camp. The defense claims that the 4th Amendment and the right to counsel are implicated, but the government purchased and configured these computers. The defendants don't own them. The guard force can conduct a search based on what it sees. The expectation of privacy is less and the security need of the guard force is greater. The MJ said, I understand your argument as to Mr. Al Baluchi, but what about Mr. Hawsawi's guilt by association argument? Mr. Ryan responded that the 2010 OSI report does not show that the computers are not capable of connecting to the internet. We do not know the circumstances. The only way to be sure is to look at the hardware. The MJ asked, Why couldn't you have done so when you gave them the computers? And Mr. Ryan responded, We cannot tell. With great seriousness in his voice. Mr. Ryan argued that there is a significant difference between disabling software and removing cards. We don't know what is in there. We don't disagree with Mr. Connell's argument on the bios settings and the Microsoft programs' encryption capabilities. The problem is that Mr. Al Baluchi is not using that laptop; rather, he is using his own laptop, thereby bypassing the operating system. It is an entire other house in Mr. Connell's light circuit analogy. We are concerned because of the five computers that are in the hands of these five detainees. They are co-conspirator co-defendants in a horrible mass murder. There is a good deal of interconnectedness between them. All of them tried to plead guilty in 2008, and signed the Islamic Response. Three of the five conspired together to violate the order in AE 182K. We cannot show that Mr. Hawsawi was part of it, and we don't know how long it was ongoing. The knowledge exists

on how to do this now and the bell cannot be unrung. It caused enormous concern and the JDG feels it would be a dereliction of duty to allow the computers back in the camp. We should never underestimate these five men and their hatred for the US.

Mr. Connell responded. First, the operating system argument, which the prosecution now addresses, makes no sense. The bios is the same bios on any computer. The capability to install some other operating system is like the light switch and there is not a lot of difference among those. Mr. Ryan said that the Convening Authority (CA) has not indicated what he thinks about security but the CA checklist in AE 530F attachment D applies equally to the 2008 laptops when they reenter a facility. The computer is reviewed by defense IT folks with CA personnel present. The CA signed off on this. There is not wireless card or Bluetooth card. I will represent that when the IT folks say "disabled," they mean there is no card present. If returned, then that can be checked through the normal process of the checklist.

Mr. Harrington clarified that it is attachment d to attachment c in AE 530F.

Mr. Nevin called the assertion that the computers were government property a red herring. There is an expectation of privacy in these circumstances, just as the legal pads given to the detainees to use for physical notes with the ISN number on it that is provided by the government. Mr. Ryan's statement that "nothing shows the computer is not able to be hooked to the internet" inverts the burden of proof. We all understood that there is no way to access the internet without a wireless card. There is no light without a light bulb. We did disable the wireless and Bluetooth cards (they aren't there) when the laptops were given to the detainees.

Mr. Ruiz argued that the query of the probable cause against Mr. Hawsawi remains unanswered. Mr. Ryan also conveniently omitted in his generalized arguments that the notes were to be closely held among only some detainees and not circulated. Mr. Hawsawi was excluded, so you cannot assume he has any forbidden knowledge. Mr. Ryan claims there is no probable cause analysis required because this is a law of war detention facility. But in reality, facts matter. The *Taylor v. Starett* heightened scrutiny applies. This is a capital case and that weighs in the analysis. The government wants to intrude into Mr. Hawsawi's legal materials and the instruments of his defense. AE 18U recognizes that those are treated differently. If Mr. Ryan is right that there is no probable cause requirement, then the legal materials of the defendants are subject to arbitrary search by the guards for any emergency of the day. Return the computer to Mr. Hawsawi. It impacts his ability to participate in his defense.

AE 530G/N informed the MJ that the Government is making the prior assistant SJA (not the one who testified this morning) available for interview on the AE 530 seizure of physical legal material issue.

AE 523/524: The MJ had some questions on the motions from yesterday. He asked BG Martins if the CIA's Touhy regulations were triggered only by a demand (and as defined that meant a judicial demand). Is Touhy triggered by a request for interview? BG Martins finally conceded that was so, but argued that there is more at issue. There is an attempt to gain discovery and discovery of a protected identity. But, if the MJ grants them relief, then that would be a demand.

The MJ asked him about the 6 Sept. 2017 letter that did not appear to have any authority and that he could not rely solely on Touhy. BG Mar-

tins responded that it involved protected identities under CIPA. When asked the source of the criminal sanctions threatened in the letter, he responded that he stood by them. Under the Intelligence Identity Protection Act, they are protected. The MJ asked if the defense counsel wanted to talk to a witness about his involvement or knowledge in the RDI program. Would that violate a criminal statute? You're threatening them with a criminal prosecution. BG Martins responded that if you abandon the order in AE 386M, then the government has its remedies. The letter has no citation to legal authorities except for a reference to Touhy. The MJ asked, What is the legal basis to restrict that type of investigation? BG Martins responded with IIPA, CIPA, and Touhy. There is no absolute right to get witnesses. The MJ asked, Assume that based on a classified summary, a defense counsel wants to interview a person who observed RDI. All the procedural wickets are met and they go through the government to request an interview and the witness declines. Do we call them at trial? BG Martins stated that in that case, the government would have the opportunity to offer substitutes to that testimony, if noncumulative, relevant and helpful to the defense. That does not necessarily preclude calling the witness, but the government has alternatives to present the evidence. The judge asked, What if the defense says we want to flesh out what the summary says? BG Martins responded there are cases that address the dry desiccated argument, and that substitutes are still allowed and the information isprotected.

As to the timeline, BG Martins said we've given them a lot of information about what happened to the defendants, they can submit a timeline to the prosecution and seek concessions from us.

Mr. Connell responded, Yes, if we request interviews Touhy is not triggered. But, if the MJ orders them, then it is triggered. But, Touhy is already satisfied because the 703 notice suffices. The MJ can order current government employees to submit to an interview (that includes CIA, GS, soldiers, etc.) but cannot do so for former employees. Mr. Connell will provide a brief on that authority. When asked what statutes might support a criminal prosecution, Mr. Connell responded, probably the Espionage Act.

The AE 524 issue seems to have come from nowhere, but it is actually a long time in coming. The logical culmination of the government's argument is that no independent defense investigation is authorized, based on the general equities of the US. The government would rather protect classified information than have a criminal prosecution for the 9-11 case. This is mutually exclusive from a criminal prosecution with our adversarial system of justice.

For AE 478, Motion for a Trial Scheduling Order, there may be outstanding replies on this. Mr. Nevin says theirs should have been filed or will be today. That exhausts the open docket. Mr. Swann inserted that two statements and one declaration attached to AE 530G and 530N had been declassified and he had filed them as AE 530KK. He will file a notice clarifying the classification change.

The 806 closed classified hearing will commence after lunch with the AE 373 base motion, AE 373N, AE 375T, AE 475, AE 498, AE 512, AE 524, AE 530B, E, F. and AE 502J. The commission recessed and will reconvene in closed session at 1230, This concludes the open hearing for this session.

On the afternoon of 18 Oct 2018, we attended a press conference: Mr. James Connell and LTC Sterling Thomas from Mr. Al Baluchi's team and Mr. Harrington from Mr. Bin al-Shibh's

team briefed and took questions from the press. Highlights include:

Mr. Connell stated that this hearing showed that the government vision of the defense function does not actually exist. The US Government has threatened to prosecute defense counsel for carrying out their main function: the independent investigation of the case. Investigation is not allowed of members of the CIA for involvement in the torture program. The word for this is not justice, it is inquisition—a one sided inquiry into a set of paper facts and is inconsistent with our American system of justice. He mentioned that today is the 16th anniversary of the opening of CP X-ray at Guantanamo, which showed our attempt to place certain people outside the reach of the rule of law. Our job is to uphold the rule of law wherever the flag flies. When asked about whether he was serious in his comment to the MJ about being read his rights for the ongoing approaches to CIA witnesses, he replied that he was more concerned than he was a week ago when he heard BG Martins, the Chief Prosecutor threaten the defense counsel with criminal prosecution for performing their core duty before the military commission judge. They have made attempts to contact CIA members, as expected by the MJ in this case. The fictional process of sending a CIA agent with a FBI Special agent to "neutrally" inform the potential witness that they were not required to participate in an interview is not a legitimate way to conduct an investigation, particularly in this case. In *Ibrahimi*, in the ED of Virginia, the judge wrote to prospective witnesses advising them of their rights.

This is not the first instance of the prosecution warning the defense attorneys not to do certain investigations. This also occurred in AE 441 (completely classified) and AE 525G, where the prosecution made the recent statement that asking questions overseas premised on a defense

counsel's internal mental belief that a country hosted a black site constitute the unauthorized disclosure of classified information. The defense always asks open-ended questions to avoid any confirmation of classified. Nothing is scarier than being prosecuted for one's internal mental beliefs.

The defense may take the prosecution up on its bizarre suggestion to put together a timeline and ask the government to approve or correct it. This is a ridiculous way to conduct discovery.

In the final 802 session, the MJ made an oblique reference to considering a different path forward on the AE 502 J, personal jurisdiction hearing witnesses motion. He said the parties could expect an order within two weeks.

Mr. Harrington discussed the chilling effect on the lawyers trying to investigate this case. Here we have had actual investigations of defense team members, referrals for security clearance evaluations, and other threats. The prosecution's rhetoric on discovery is fine, but reality is not in accord with the rhetoric. The defense is given discovery without dates, times, places, and names. And the prosecution is asking for a new Protective Order that is even more restrictive that the present one. There is no way to do a rationally organized defense.

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Dru Brenner-Beck

Khalid Sheikh Mohammed

1 March 2018

Dru Brenner-Beck is an attorney in private practice in Highlands Ranch, Colorado, and consults and writes on international law and the law of armed conflict, as well as the Guantanamo military commissions.

She graduated from Georgetown University's School of Foreign Service, Boston University's School of Law, and earned an LL.M in military law from the US Army Judge Advocate General's Legal Center and School. She is also a past President of the National Institute of Military Justice.

The commission convened at 0904 with Mr. Mohammad, Mr. bin al-Shibh and Mr. bin 'Atash present. The MJ determined that Mr. Al Baluchi and Mr. al Hawsawi have knowingly and voluntarily waived their right to be present through the commission's regular procedure (where the CP 7 SJA reads a rights advisement and waiver form to the detainee who signs it, and then that form is admitted with the testimony of the SJA testifying anonymously). Mr. Connell continues to object to anonymous testimony under *Smith v. Illinois*.

The MJ stated that although he had asked the prosecutor to find the webmaster during the session on Monday. He has subsequently re-read the regulation and interpreted it such that "track a," as referred to by Mr. Connell in Monday's argument (requiring the posting of unclassified filings within one business day), did not actually exist, as the regulation required coordination with the DOD Security Classification/Declassification Review Team in para 19-4b of the RTMC (2011 Regulation for Trial by Military Commission) in all cases. Therefore, the one day category in par 19-4c(1) did not actually exist. That simply moved the question to the fifteen business day requirement in para 19-4c(2). Mr. Connell stated that he had contacted the webmaster and his supervisors concurred with the MJ's interpretation of the regulation. He entered the CA's office's email to this effect at AE 551D. Nonetheless, the defense objects to this interpretation of the regulation as contrary to the clear text and scheme established by the DoD to assure a public trial.

AE 534, Motion to Compel Interrogation Document. Ms. Pradhan for Mr. al Baluchi argued that even with the clear ten category construct for discovery on CIA RDI information approved by the military commission in AE 397, the government's discovery delays have damaged the discovery process. The government had over six years to prepare its case before the 2012 arraignment on the current charges, and has consistently moved for a trial date, beginning on 14 June 2013, stating that discovery in the case is nearly complete despite the fact of providing almost no discovery had occurred. In early 2015, the prosecution

again stated that it would complete its discovery obligations for RDI material on 30 September 2016 and did not comply even with that self-imposed deadline. The state-sponsored torture in this case infects nearly everything else and is its nasty center. Of the over 400 discovery requests, a significant number request black site information and most have had to resort to a motion to compel. The government simultaneously characterizes the defense requests for RDI information as a hysterical obsession, while wringing its hands that it has done all it can to produce this sensitive national security information. The CIA is hiding this torture information and the prosecution is carrying its water in this trial, denying cleared defense counsel access to this information.

Although the national security privilege (CIPA-like) provisions of the MCA in section 949p allow masking of some information through the use of redactions, summaries or substitutes, the government's extreme reduction of RDI information has severely inhibited the defense's ability to create a timeline of the 3-1/2-year torture of Mr. al Baluchi in CIA custody. Of the over 6.2 million documents reviewed by the Senate Select Committee on Intelligence (SSCI), the government has produced only 6600 pages by the end of 2016, and only approximately 17,000 today. Most of this information is overgeneralized and contains only general information about the black sites and the personnel who operated them. It makes it almost impossible for the defense to construct a timeline. The government's response to this motion to compel included no additional information on interrogator notes, logs or summaries, but did give a chronology and chart. In January 2018, the military commission asked the prosecution if they are going to get the information on the RDI program anyway. If there is no dispute about what was done to the defendants, why not give them a timeline? [10 January transcript at 18453]. Unfortunately, the chronology provided by the government contradicts other publicly available and often declassified information, and does not link to the chart provided by the government of the personnel identified by unique functional identifier (UFI). Both the chronology and chart were provided to the defense with the 6 Sept 2017 letter prohibiting independent defense investigation of the CIA. The MJ approved the omission of dates, names, and locations under the MCA's section 949p provisions, and the government provided some material that was undated but for which the government took its best guess as to when something occurred. The prosecution also only provided location by number, and the nature of personnel involvement by UFI. The summaries omit the dates of the report, using a date blurring convention of early, mid, late, and then the year. The defense has interpreted this as early: Jan-April, mid: May-Aug; and late: Sep-Dec.

Nonetheless, with these redactions and substitutions, it is impossible to construct any meaningful timeline of our client's 3-1/2 incarceration with the CIA. As to any specific date, we cannot determine what was done to him, where he was, or the personnel involved. There are discrepancies among these documents, the summaries and the chronology and personnel chart, and between these documents and the publicly available documents, to include the SSCI Executive Summary.

The MJ interrupted and asked, aren't you then just asking me to reconsider my approval of the government's substitutions and summaries? Doesn't the MCA prohibit that request for reconsideration? The defense cannot use a motion to compel as a substitute for a motion to reconsider. [This issue was also alluded to in the

Jan.10, 2018 hearing. The approval of the requested relief, in the form of substitutions/ summaries/redactions/stipulations, is also referred to as the "505 process"]

[Editorial note: The CIPA-like provisions in section 949p of the 2009 MCA include a provision (948p-4) that prohibits the defense from requesting the military commission to reconsider its approval of substitutions and summaries done to protect national security information (if the government invokes its national security privilege). This bar to reconsideration is not present in the federal CIPA statute and was litigated in AE I64 (WBA) Defense Motion to Stay all Review Under 10 USC § 949 p-4 and to Declare 10 USC § 949 p-4 and MCRE 505(1)(3) Unconstitutional and in Violation of UCMJ and Geneva Conventions, filed on 15 May 2013, available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE164(WBA)).pdf] where Mr. bin 'Atash challenged this provision as unconstitutional. At the time the government argued that the defense could always file a motion to compel if they felt that additional information was necessary.]

Ms. Pradhan replied that, bottom line, they were asking for all the RDI original documents, as the defense had to have the same due process with the substitutions or summaries as they would have with the original documents. Further, the RDI index and the timeline, and some of the other documents, have not gone through the 505 process. The insufficiency of the 505 summaries only became obvious when they were compared with the conflicting or contrasting information in the Index, timeline and other publicly available documents. The government's approved date-blurring convention specifically prevented the development of a chronology. Exact dates are necessary in the development of witnesses and to corroborate the defendant's own observations that are affected by his torture. Even the date of capture and in whose custody the defendant was in immediately after capture is cast into doubt by the date convention and represents a deliberate obfuscation of the CIA involvement in the initial detention in Pakistan of Mr. al Baluchi.

The MJ asked Ms. Pradhan what remedy she sought, and she replied an order to produce the original documents. The complex discrepancies among the summaries, the documents produced, and the chronology and the personnel index cannot be resolved in any other way. The MJ asked if there was an unclassified pleading on this issue, and Ms. Pradhan replied that there were unclassified portions of the classified pleadings. Examples of the complex discrepancies included the confusion over the CIA involvement in the initial capture and detention of Mr. al Baluchi, and discrepancies on the date of the commencement of his torture and what EIT/torture techniques were used. With all these inconsistencies and contradictions, the defense can only resolve them with access to the original documents.

The MJ asked, Wouldn't this throw the entire 505 process out the window? Isn't it more likely that the contradictions arise from flaws in the original documents? Ms. Pradhan replied that the government intentionally stripped torture information from these documents. Even the SSCI Report providing context shows that this is so. She then cited an example of an SSCI example of Mr. Mohammad's interrogation and interaction with Mr. Paracha that implicates her client but for which no summary under 505 is provided. Nothing describes the torture that induced these statements by Mr. Mohammad.

She continued that the government has wasted valuable time in delaying the production of RDI

information. Key to the defense is the fact of earlier and more pervasive FBI involvement in the torture process that impacts the voluntariness and attenuation of the taint of torture in the January 2007 "clean" team statements taken at Guantanamo.

Mr. Groharing, for the prosecution, argued that the government categorically denied that any edits were made to any document to mislead the defense. The summaries of these voluminous documents were prepared in good faith. The MJ has reviewed and compared the originals and the summaries. As to complaints about the summaries, the government summarizes the documents that we have. Some originals may have errors. As for the failure to provide the information on Mr. Mohammad, the indexes provided are defendant specific. For the date blurring protocol, this was done to protect highly classified information, and the OCA as of yesterday (28 Feb 2018) issued guidance allowing us to add additional dates to the information provided to the defense. The prosecution will update the indexes. It will not trigger a new 505 review.

Ms. Pradhan replied that these are not occasional mistakes or errors. The RDI index was not provided as part of the 505 process. Instead, it was attached to the prosecution's September 2017 prohibition on defense investigation of the CIA. There are over 26 times when the dates in the indexes and the summaries do not match, which is then made worse when the defense tries to assign personnel to the chronology of events. Personnel who were not present according to the government UFI profiles provided by the prosecution are shown as present in the summaries.

Ms. Bormann also added that this motion must be understood in context of prior litigation on AE 164, the motion to declare the provisions of section 949p-4 unconstitutional. In that motion, Ms. Baltes argued for the prosecution that the government understood that circumstances may change over the time of the litigation of the case. The bar to reconsideration does not encompass asking for new documents based on what is relevant later in the case. And the MJ himself asked the defense to present their theories of the defense to him which he could use in making the sufficiency determination under 949p-4. Nothing in the statute bars bringing these new issues that may alter the calculus to the commission's attention. Plus, the commission may reconsider any 949p-4 finding sua sponte. If the original documents contain mistakes, then they must be provided to the defense. The defense can then both impeach the evidence the government seeks to rely upon and claim is not tainted by torture, and use the carelessness of the preparation of the documents itself to undermine the reliability of what is included in these statements. It is critical for the defense to know and highlight such carelessness in the preparation of the documentation in the torture program, as it can diminish the value to be put on anything reported from the relevant CIA personnel if they are routinely that careless. Motions for additional discovery arise because circumstances change.

Mr. Nevin reiterated that he wanted to ensure the military commission that he only used the term "embarrass counsel," as a quote from Holloway, and the way the case uses the term, not the colloquial meaning. The MJ responded he understood, and that what he meant is that a factual predicate was necessary before the court could evaluate any conflict of interest.

Moving to AE 524, Mr. Al Baluchi's Motion to Dismiss, or in the Alternative, to Compel the Government to Produce Witnesses for Inter-

view and AE525 Mr. al Baluchi's Motion to Compel Information Identifying the Locations of Black Sites in Which the United States Imprisoned Mr. al Baluchi, the military judge outlined the new guidance received from the prosecution/OCA on the prohibitions on investigation. [Editorial note: They focus generally on prohibitions on persons and prohibitions on places, and also implicate AE 548 Mr. al Baluchi's Motion to Dismiss for Unlawful Influence over Defense Interview of CIA and Black Site Witnesses, and AE 549 Mr. al Baluchi's Motion to Dismiss for Government Interference with Defense Access to Witnesses, which seek specific relief as a remedy.]

In AE 524I, the government gives notice of 28 Feb. 2018 guidance replacing the 6 Sept. 2017 prohibition on interviewing (CIA) persons, and AE 524M, the 27 Feb 2018 guidance appears to totally replace the November guidance prohibiting overseas investigation. There is a question on whether para. 6 of the 6 Sep. 2017 memorandum still controls. Mr. Groharing clarified that AE 524I/28 Feb guidance is intended to replace paras. 4-6 of the Sept 2017 memorandum (para 1-3 are just descriptive and remain operative). The remainder of this argument will focus on objections to the new guidance.

Mr. Connell argued that there are several categories now covered by the new guidance. But first, there seems to be two overlapping circles shown on slide AE 524J, one with the CIA witnesses, and one with RDI witnesses. Within a subgroup of the overlap are those witnesses the CIA identifies by UFI. The 6 Sep. 2017 letter included two directives: it prohibited independent investigation of CIA witnesses, broadly defined, and it purported to establish a process where the government would send an FBI/CIA agent to talk to the prospective witness to ask for a defense interview.

In response to the MJ question on what was the status quo prior to the 6 Sep. 2017 letter, on 5 Sep. 2017, Mr. Connell replied that the general rule was that the defense could interview any witness, on any topic, at any place, so long as they did not disclose classified information to those not entitled to receive it (and discussions had to occur in a secure facility if classified was discussed with a witness with a clearance and need to know). The September prohibitions changed that as to both people and places.

As to places, the guidance in AE 525M revokes and supersedes that in AE 525G. This 27 Feb 2018 guidance revokes the prohibition on overseas investigation, and seems to return the defense to the 5 Sep 2017 status quo ante: you cannot reveal classified information, but otherwise you can investigate anywhere.

Mr. Groharing, for the prosecution, stated that is so unless the defense is basing the info on classified information, such as a picture that was provided to the defense of a black site. Mr. Connell replied that the government has never provided the locations of the black sites to the defense, and of course they could not show a classified photo to an uncleared person. The small category of the "defendant as the source of the information" remains.

Mr. Groharing adhered to the government position that information provided by the defendant could be classified, and Mr. Connell reiterated that the defendant's knowledge cannot be classified under the terms of the EO 13526 because it is not owned by, produced by, or controlled by the US Government. [Editorial note, only nuclear energy info is born classified. This point was argued before the commission as part of the motion on the Convention Against Torture in the AE 200 series in the October 2013 hearing. The military judge has not ruled on this legal issue.]

Mr. Connell then created a chart with two sides, the left entitled "RDI" and the right "Non-RDI." One the left "RDI" side, he placed UFI persons in para 2 of the new guidance in AE 524I. The new guidance on personnel in para 2 for those with a UFI requires that if the defense knows someone is covered by a UFI, then they must go through the government to interview or investigate. For para. 3, covering those who have been officially acknowledged by the CIA as associated with the RDI program (8 named individuals), the defense need not coordinate in advance with the prosecution. The open question of others who have self-identified or acknowledged their involvement with the RDI program by authoring books, for example, particularly if they have gone, as required, through pre-publication review, is not covered by this category, but defense investigative efforts of these personnel would not disclose classified information. Mr. Connell argued that there are unequivocally more than eight persons that should be in that category. Paras. 5 and 6 involve those overt and covert CIA officers who were not involved in the CIA RDI program (for example those who may have been involved in other covert programs, or who may have once worked in the CIA but who now work for the FBI, DoD, or DoS).

Mr. Connell did object to the restrictions on investigation in paras. 2, 3, and 4. Mr. Connell said that he interpreted the requirement for going through the prosecution to apply only to the right side of the hand-drawn diagram (CIA RDI personnel), and that the prosecution had requested in this latest guidance that the defense inform them if it was unwilling to abide by these restrictions. Mr. Connell stated he was so informing the prosecution.

The al Baluchi defense team had made previous requests to interview CIA witnesses based on the prior 6 September 2017 guidance and had received no response to this date. There is a clear government intent to protect CIA information regarding the torture of the defendants and the defense objected to it. In fact, it contravenes Protective Order #1 in AE 013BBB, which stated that the PO shall be construed with the right of the defense to interview witnesses regardless of their location. Why is there a provision in the PO to protect the right of the defense to interview witnesses? Because that is the core of our entire adversarial system. Sometimes the government makes mistakes and we rely on the defense to interview witnesses to try to find the objective truth to present at trial to the fact finder. The defense efforts are essential to this truth-seeking function. As to the categories in the latest guidance, the case law is clear. For those witnesses in para. 2 with UFIs, first, the defense doesn't know if someone is covered with a UFI, and therefore should be able to approach these people for interviews. Further under Roviero and Yunis, the standard is clear. The privilege for the identify of protected witnesses must give way if the identity is relevant and helpful to the defense of the accused. The prosecution has conceded that these witnesses are relevant and helpful so no further determination is needed. All of this is quoted in the AE 502J series. Para. 4 of the "new" guidance continues to purport to prohibit the independent defense attempts to locate and interview CIA RDI witnesses. Argued in AE 534, the defense requested on 21 July 2017 to interview 45 witnesses identified by UFI. The government has provided no response except for the 6 Sep 2017 categorical prohibition on the independent attempt to contact CIA witnesses. Mr. Connell argued that the fact that the defense has received no response by 28 February 2018 illustrates that this is intended to be an obstacle, not a proce-

dure. The defense objects to this procedure. Roviero and Yunis make clear what is legally required. The witness may indicate that he or she doesn't want to be interviewed only after being located. MCRE 507 also supports this conclusion. Further, caselaw clearly establishes that the government may not interpose itself in the process to control access to witnesses. It is both a violation of due process and unlawful command influence. The government only advises a person of their right to not be interviewed, if the defense wants to interview them. *US v. Fischell* and *US v. Enlos* clearly establish it is beyond the authority of the US to interpose itself between the witness and the defense.

This substantially interferes with the defense ability to obtain evidence. Military cases show it is improper to interfere with access to witnesses. In *US v. Gore*, it was considered unlawful influence, and 10 USC s. 949 prohibits unlawful influence. Here, the interference is over the defense exercising its professional judgment in the defense of the accused. The DC Circuit in *Gregory v. US* also made clear that witnesses are not the property of the government. The defense has the equal right and equal opportunity to interview witnesses. This governmental prohibition establishes both a structural and a procedural conflict of interest. Investigation is the principal duty of the defense. Stickland and Rompilla make the constitutional duty clear. The threat of prosecution of defense counsel illustrates the personal conflict of interest, and if this prohibition is upheld the structural conflict is illustrated by the diametric conflict between the requirement of the defense to independently investigate, and if upheld by the military commission, the prohibition not allowing such investigation.

The MJ asked, Does the limit on investigation create a conflict of interest or a legal issue? Mr. Connell answered, It would depend on the scope of the prohibition. Here, it creates both. This prohibition creates a bar to investigating a huge swath of the case. This conflict has been present in a latent form in this case for a long time. In the MOU (in para 9c) that the prosecution required the defense to sign in the litigation over the PO in the AE 013 series, the defense had to acknowledge the national defense character of the information which is required for a prosecution under the Espionage Act.

The government does not cite any authority for these prohibitions. They (appropriately) abandoned their Touhy claims, and the government purports to extend this prohibition to even self-identified CIA employees or contractors. The defense finds these witnesses through their own self-advertisements—their books, press releases, biographies on website, or LinkedIn, and in one case on the person's real estate website. The defense and their ability to approach witnesses does not identify these individuals or reveal classified information. The defense is not the problem. A large number of these witnesses self-identify.

The defense must carry out its constitutionally mandated responsibility to investigate. The government does not get to control the pipeline of access to witnesses. Further, the cases support the military commission's ability to compel defense interviews with current government employees. The legal authority for that is in the briefs. [Editorial note: the public accessibility of filings in the military commissions has become more difficult and is the subject of AE 551, argued on Monday 26 February 201. Because of the lack of public accessibility for the motions by the time they are argued, it is difficult to assess or look up the law supporting the parties' arguments.]

The MJ asked, If hypothetically he found that the restrictions were improper, would the defense still face a threat of criminal prosecution or adverse effect on security clearances> Mr. Connell stated, It would protect against the structural (not the personal) conflict of interest. The MJ asked what potential remedies existed. Mr. Connell responded that RMC 505h(6) lays out some potential remedies, with dismissal as the default but also a finding against the prosecution on any issue to which the excluded information relates. But, the government has not yet invoked the national security privilege on this information. It has affirmatively stated that it will not produce black site location data and will absorb whatever sanctions ensue.

Even if the defense ultimately wins the motion to suppress, this torture evidence is still relevant in sentencing.

The commission recessed for lunch at 1153 and reconvened at 1317.

Mr. Nevin asked to clarify that his earlier comments on the military commission "embarrassing counsel" was intended to be as used in Holloway, and that the commission has been careful to treat all parties with courtesy. He agreed with Mr. Connell on AE 524 on the effect and objections to the "new guidance" but disagreed with his interpretation under AE 525. Our understanding is that information we acquire from the defendant is subject to the PO and is classified. It is correct that the government has never confirmed the locations of the black site, but we understood the continued government position to be that the defendant's knowledge and memories is classified. If it is not classified, then we are good to go.

The MJ and Mr. Nevin then engaged in a discussion over the analogy of when a defendant's knowledge is equivalent to open-source information, and discussed a New York Times story, based on its own investigatory efforts, that there was a hypothetical black site in Canada. Even if classification only includes that which the government owns, produces or controls, the defense is still faced with the issue of confirming or denying classified information under the mosaic theory. Are we impliedly revealing classic information? He argued that information is either classified or it is not. And it does not solve the issue of information that is obtained through independent sources, one classified, and one not.

[Editorial note: this has been a longstanding concern in the commissions. As far back as AE 200 in October 2013, the EO governing, and actually defining, classified information only allows classification of information that is produced by or for, controlled by, or owned by the government (with the exception of nuclear data which is born classified). So, the residents of Cambodia would not have their observations of the bombings there during the Vietnam War classified, even though US government information on the bombing might be. The MJ has not ruled on this issue but his ruling in AE 200I implicitly recognizes this difference.]

What would constitute confirming or denying is left open, argued Mr. Nevin. He has not had a chance to thoroughly analyze the new guidance that was just received, but problems still exist. The government in AE525I tells us to rely on an NGO independent investigation to satisfy our constitutional obligation to investigate, and in AE 525M has the same problems. We would not be effective defense counsel if we don't conduct independent investigation. That is the core of our duty.

Mr. Connell argued that when we say information is classified or it is not, this is the same ontological question we've encountered before. Take for example, the square root of three cal-

culated to 1000 places, used by the government in a cryptographic algorithm. That could be classified. But if an independent mathematician calculated the same square root of three to 1000 places, that would not be classified. Only nuclear information is born classified. Calling it classified pollutes the waters. The issue is whether the "new guidance" in AE 525M clarifies or muddies the waters on this question: can cleared personnel ask questions based on open-source information, even if classified info exists? If they are presenting open-source information, then they clearly can. Paragraph 3 of the new guidance seems to restate the old 5 September status quo—the defense cannot present classified information to uncleared personnel and can present open-source information to those uncleared personnel. The scope of the open source is the limit of that ability. As for the MJ's prior question on the remedies available, alternate remedies supported by military case law, such as *US v. Murphy*, a 2008 CCA Lexis 511 (2011 CCA) case, allows the maximum punishment to be capped at no punishment as one option. AE 548 and 549 do present a specific request for remedy.

Mr. Nevin stated that the Mohammad team requested an opportunity to file a responsive brief and requested deferral of any argument on AE 548 until that had occurred.

Mr. Ruiz and Mr. Harrington concurred with Mr. Connell's argument. Ms. Bormann also wanted to file a brief in response to the prosecution's new guidance. The MJ agreed that in AE 524/525, we only had notices, and she agreed that if an accused has knowledge that information is not classified and use of it by the defense does not confirm or deny classified information, then it would be ineffective assistance of counsel not to independently investigate a purported black site in Canada since the defense has not been provided black site location info.

Mr. Groharing, for the prosecution, argued that what is at issue here is the protection of the identities of CIA personnel operating in many countries, and the location of overseas detention facilities. This is some of the most sensitive information the government has. We have asserted the national security privilege as to locations in AE 308C and substitutions for personnel in AE 308V. The relief for the government was the approved substitutes and summaries. AE 524 asserts the privilege as to identities and AE 525 as to places and the 27 Feb 18 memo is the government's guidance and reflects the underlying rule that you cannot disclose classified unless the person has the requisite security clearance and the need to know "as determined by the OCA." We have agreed that if there is a need to know for the defense team. It extends to every member of it with the appropriate clearance. The MJ asked if we agree that all personnel in this case have a TS/SCI with SAP access and need to know to participate in this case, is there another need-to-know hurdle in the later investigation process?

Mr. Groharing answered tht the OCA determines need-to-know. It doesn't qualify the investigation. Mr. Groharing clarified that if the defense gets classified information from the defendant [again, it is not agreed that this is classified] then they can use it so long as they do not disclose it. If the defense gets information from both a classified and open source, then they can then investigate so long as they point to the open source as the source. The prosecution has briefed its disagreement with the defense on the scope of the investigation. [again, without access to the briefs, it is impossible to discern the scope or legitimacy of either position.]

Mr. Groharing argued that with the information already provided to the defense on the 10-paragraph construct on RDI information, the defense is already in the position to paint a vivid picture and make a compelling presentation of the accused's experience in the RDI program. Thousands of pages of discovery have been provided from prior investigations and public releases and from the best source—the accused himself. Additional information would damage the national security of the US and is cumulative. The conditions of confinement are not reasonably in dispute. The prosecution will agree with a reasonable description of the conditions of confinement that is "tethered to reality." The prosecution opposes any request for delay to investigate. The actual facts of this case are those of 9-11, not the treatment of the defendants. The defense investigative resources should be focused on the charges and not on additional cumulative information when the government does not dispute what happened to the accused.

The prosecution sought additional guidance that enabled it to answer what to do with open-source info. The OCA has articulated a policy that allows investigation while still protecting classified information. AE 525G is a fair reading of this policy up to November 2017. The rules have not changed on the defense ability to provide classified to uncleared persons. AE 525M provides additional guidance on open sources and allows greater flexibility for the investigation that the defense needs to conduct. The 27 and 28 February 2018 memos are the government's final position on this.

Mr. Connell responded with two points. First, regarding AE 525M, the OCA seems to modify the "need to know." This has been a problem ever since AE 013, which proposed to use the term "need to know as determined by the OCA" in the PO. The MJ substituted the term "as determined by the government," but there is no internal need to know and no mechanism to determine or request the need to know. In para. 6 of the PO, the military commission recognized the need of the defense teams to operate on a joint basis. The parsing of the need to know is contrary to DODM 5200.01. Secondly, in para. 3, the government addresses multiple source basis knowledge. And, the DC Circuit has made clear that an inquiry apparently based on open-source info does not confirm or deny classified.

Mr. Harrington wanted to make several comments on the prosecution's argument. First, its comment that the defense should rely on the defendant's knowledge as a source of information goes against bedrock law that the burden of proof in a criminal case is on the prosecution, including when they fulfill their discovery or other obligations. Secondly, the prosecution counsels us to focus on guilt or innocence versus the sentence, which clearly shows that the prosecution does not know what capital cases are all about. The prosecution does not tell the court or the defense how to defend a case. When commenting that the client is a source, the prosecution is implying that the only way to present a case is to put the defendant on the stand. Finally, the prosecution's comments show that they do not understand that torture affects memory and how the defense can get information from the defendants.

Mr. Nevin responded we are still stuck with the fundamental problem—even if we assume that some NGO has investigated and published information, if the government remains the sole source of information, with the prohibitions on investigation existing, this is not the constitutionally mandated investigation.

Ms. Bormann adopted the above arguments.

AE 114 Defense Motion to Compel Discovery of Information Relating to Buildings in Which the Accused or a Potential Witness has Been Confined and AE 114F Defense Motion to Compel Government to Grant Defense Counsel Access to Buildings and Locations in Which the Defendants May Have Been Confined.

Ms. Pradhan argued that these two motions are being reargued in the context of AE 525 and the prohibitions on independent investigation. The physical characteristics of black sites become even more important in the context of the prosecution's attempts to prohibit defense investigation. SA Perkins December 2017 testimony is also implicated. The commission's order in AE 425PP disapproving any remedy for the destruction of the black site with no notice to the defense is also relevant [filed 1/19/2018, but also still not available to the public]. The military commission has suspended future evidentiary hearings on the personal jurisdiction motion until the al Baluchi team chooses to file a motion to suppress. The al Baluchi team cannot file such a suppression motion until we have all the information we need to do so, on all the factors that influence the voluntariness of the January 2007 statements to the FBI at Guantanamo. There is a straight line between AE 525 and the government's use of evidence to execute Mr. al Baluchi. We recognize the national security implications, but this is the most infamous covert torture program in modern American history, where the government has destroyed critical video tapes of the torture and one black site. In addition, Agent Perkins admitted using torture-derived evidence to prepare for the January 2007 interrogations.

The military commission's order in AE 425PP that the destruction of the black site was not the destruction of exculpatory evidence, rather, at most, it was evidence for use in mitigation or useful in certain defense motions, is not true. The MJ interrupted, saying that he did not want to hear why the defense thought his order in AE 425PP was wrong. Ms. Pradhan argued that the distinction was that in AE 425PP, the defense was seeking post hoc relief. Here they were seeking prospective relief. SA Perkins clearly stated that she used black site information when preparing for the January 2007 interrogations. That makes the similarities between circumstances of the taking of the Guantanamo January 2007 statements even more relevant to the details of the black sites. Details from the summaries the defense has been given clearly show that at least one of the black site statements was taken after 82 hours of continuous sleep deprivation, with the defendant naked, and with him nodding off in the middle of the statement. His being subject to this program of learned helplessness and his recanting in 2004 is relevant to the defense, as is the effects of the torture on his memory and brain function now. Additionally, the defense was only provided a visual substitute for one black site; the conditions varied greatly at the various locations; and there is no adequate substitute for the examination of the black sites. The defense needs more information to conduct a forensic examination.

BG Martins for the prosecution rested on the briefs.

AE 524, as to prohibitions on independent investigation regarding persons. Mr. Connell had nothing to add from his prior arguments.

Mr. Groharing responded that the prosecution had provided the September 2017 guidance in conjunction to the indexes in response to Mr. Al Baluchi's witness list for the personal jurisdiction hearing. The prosecution provided the names of eight individuals publicly connected to the RDI program and are happy to continue

to work with the defense and the OCA to identify other similar individuals.

The MJ asked, Is the defense forced to go through the prosecution to approach individuals who are publicly self-identified as being associated with the RDI program, or where the government gave the defense the witness's true name? When Mr. Groharing replied that it was fact-specific, the MJ asked how that provided categorical guidance to the defense if it was fact dependent. Mr. Groharing responded that it is as simple as asking a question to the OCA thru the prosecution. It is not intended to be an impediment. The government is trying to avoid problems of individuals being associated with the RDI program or disclosing classified information. We cannot answer every factual situation in advance.

The MJ asked, Do para. 5 and 6 (non RDI CIA personnel) only provide a voluntary process for the defense to request assistance from the prosecution if the defense chooses to do so? Mr. Groharing replied that they are asking for official government information, it is the equivalent of a discovery request. There is a dispute on the scope of the permissible interview as shown in the briefs.

For non-RDI, they don't have to go through the government to interview. If the witness is overt , they can approach, but the individual should then contact their OGC (Office of General Counsel) for guidance. If the defense wants to knock on their door, they are free to do so, with the obvious caveat that the better course is to go thru the government to define the scope. The government owns that information. If they talk to the individual, it is an attempt to conduct discovery. It wouldn't be appropriate to do so. The OCA gave discovery on its assessment of need to know; therefore, there is no need to know beyond discovery already given. The better course is to go through the government to set clearly delineated boundaries, so there is no need to know for beyond the purposes of this litigation. The MJ stated that the proposed procedure in para. 4 seemed like the Touhy procedure without invoking Touhy. Mr. Groharing responded that once topics are approved, the witness may want a third party or government attorney present. If the process is followed, then the notice is given and the OCA determines what is ok or not. Then, the defense can come back to the prosecution, and if the prosecution does not agree, they can come to the MJ. And if the MJ disagrees, we follow the 505 process.

What happened at the black site and the identities of these people and what they observed are "collateral matters to this litigation," easily distinguished from these facts. This is the appropriate process. The Hadi commission approved this process. We hope to have an answer to Mr. Connell's requests for witness interviews by March 15th.

The MJ asked, Before issuing any remedies under the 505, will the government need to file additional declarations? Does the prosecution have to ask for a PO? All we have here is two notices. What is the next step? If the defense won't follow the procedure, and reaches out to witnesses, will the prosecution seek a PO? What is the litigation posture in this case?

Mr. Connell agreed that AE 524/525 created an amorphous debate, which was why they filed AE 548/549 which seeks specific remedies. The new guidance is narrower than the 2017 guidance, but it is the same proposed procedure for most CIA RDI witnesses. To the extent it implicates places we are back to the pre-September 6, 2017 guidance, and for paras. 5 and 6, we are

also free to approach witnesses. From this discussion, the prosecution seems to have lifted the prohibition on places, and that on non-RDI CIA witnesses. Categorically for RDI witnesses other than the 8 named individuals, the prosecution purports to prohibit any attempt to contact witnesses. There are no investigative prohibitions on places or non-RDI CIA witnesses, unless we choose to go through the prosecution to request assistance in the exercise of our professional judgment. We won't do that, Mr. Groharing knows what he has done. [Editorial note: briefings after the court indicated that Mr. Groharing may have affirmatively interfered with witness willingness to interview with the defense after the defense requested assistance in facilitating an interview—this will likely be litigated in future.].

AE 548 is separate from AE 549. Once there is unlawful influence to interfere with the professional judgement of a defense attorney, there is more flexibility than provided by RCM 505 to fashion remedies. The defense has addressed possible remedies in these two motions in its prayer for relief. If 505 relief, then it is available only after government triggers the Rule with filing for a PO; if unlawful influence, then the relief is not so dependent.

The government asked us to notify it if the defense was unwilling to abide by these restrictions, I am so notifying that I am unwilling to do so.

The MJ stated that if the prosecution wanted to file for a PO they should do so within one week of Monday 5 March 2018, or 12 March. The defense will have two weeks to respond, and the government one week to reply. Mr. Connell asked if this would be adversarial, particularly in the context of this motion, and not ex parte. If they file ex parte with the commission and it issues the PO, then the prosecution tries to trap us in the request for reconsideration bar. This particular PO needs to be adversarial. The MJ instructed the prosecution to inform the judicial staff if it would not be filing for a PO. The government would not commit to filing this as an adversarial motion. The commission recessed at 1524, until tomorrow morning at 0900 when it will hold a 505h and 806 hearing.

One hour after the recess, the observers met with BG Baker, the Chief Defense Counsel. He briefed us on some of the systemic defense challenges and his slides are included. They demonstrate the persistent and serious undermanning of the defense function, the heavy travel of defense teams, and the miniscule discovery on RDI provided by the prosecution, among other issues. He detailed the general status of the 21 GTMO detainees under charges (of the 41 total, five of which have been cleared for release), including the six who were previously charged and assigned defense counsel but who have no current charges. His greatest current challenges are: defense manpower; secure attorney-client meeting locations; unexplained firing of CA and Legal Advisor; the tension between the rule of law and protecting national security; and classified information spill management and IT support (they have had to destroy up to 125 iPhones and also computer hard drives to remedy inadvertent spills). He also discussed the lack of RDI discovery to include documents so basic as custodial medical records for the detainees while at GTMO. Congress has approved the reprogramming of $114 million to renovate the ELC, provide six additional office trailers for classified work in the ELC, and make other security improvements. No second courtroom was approved.

A press conference was held by al Baluchi defense team and the media on 2 March 2018 (the

al Baluchi team was the only defense team present). [Editorial note: DoD used to sponsor official press conferences at the end of each session, with all parties present and participating, to include the Chief Prosecutor, the defense teams, and victim family members if they chose to participate. After the Chief Prosecutor was prohibited from engaging in public statements by the CA, these became informal press conferences. Their future contour is a work in progress.]

After remembering the families and victims of the 9-11 attacks, Mr. Connell commented that this session illustrated the fact that torture is the original sin of the military commissions.

The case has moved from a strict prohibition on any interviews of all current and former CIA employees or contractors and a prohibition on any overseas investigations, to a more limited but still substantive and objectionable prohibition, now allowing overseas investigation but continuing to purport to prohibit any attempt to independently identify or interview any CIA RDI witness, on penalty of criminal prosecution, other than for the 8 named individuals publicly associated with the RDI program.

Clearly, torture information is privileged over all the other national security information in this case. For example, there is ample evidence on past covert actions that would support or undermine the government's contention that hostilities existed between Al Qaeda and the US back to 1996. It can involve the US involvement in the 1953 coup overthrowing the democratic government in Iran since his client is originally from the Baluchistan area of Iran, and other covert actions in the 1990s. But only torture classified information gets the priorities of the US Government.

Second, the discovery process illustrates the US Government's efforts to blur, hide, and obfuscate torture evidence available to the defense.

Third, we heard from the MJ rule that the DoD regulation, despite its clear language establishing a public trial process, requires a full OCA review for every document in the commissions no matter how obviously unclassified they are before posting on the OMC website. The defense will await the commission order on the public trial motion (AE 551) and will consider filing a writ of mandamus, as one of the few bases for these extraordinary writs is the denial of the right of a public trial.

The MJ also stated in a closing 802 that if the scheduled two-week session is shortened to one week, it is the second week that will be cancelled.

The MJ did order more briefing on the circumstances surrounding the firing of the Convening Authority and the Legal Advisor and has not precluded additional briefing or the calling of witnesses.

The issue of whether the defense can pursue overseas investigations where the defendant is the source of the information remains unresolved The EO is clear that this information is not classified because it is not produced by, owned by, or controlled by the US. This issue is more theoretical than real. The defense can get little useful information from the defendants. The defense is cautious on investigations in foreign countries. This information is the crown jewels of the torture program, and Mr. Connell would not put any enforcement action beyond the United States Government.

The places involved in the vast institution required to administer the torture program allow us to present complaints to international organizations and collaborate with NGOs so long as they follow the basic rule of not disclosing classified information. Many of the details of the torture program are not currently available to the public.

The over six months of not conducting overseas investigations based on the government's threats of criminal prosecution has only been resolved this week. And the al Baluchi team has over 75 overseas witnesses to talk to. Only one small subset remains off limits, and the defense will renew its overseas investigations for those not covered by the current prohibition, even though the defense objects to the prohibition. The torture information is critical to the issue of evidence on the guilt or innocence of the defendants because the evidence the government is using to convict our clients is derived from torture.

Where the black sites are and what information about them exists and our ability to discuss them with experts is necessary to build a compelling case. A competent defense goes to every site of importance in a murder trial, the prohibitions on investigating the torture through the expedient of denying the defense information about torture, flies in the face of our adversarial system of justice, where both sides contribute to the search for the truth.

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Dru Brenner-Beck

Khalid Sheikh Mohammed

30 April 2018

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She graduated from Georgetown University's School of Foreign Service, Boston University's School of Law, and earned an LL.M in military law from the US Army Judge Advocate General's Legal Center and School. She is also a past President of the National Institute of Military Justice.

The commission convened at 0905 with all defendants present.

Capt. Marc Andreu and Mr. Ben Farley entered their appearance for Mr. Al Baluchi. The MJ advised the defendants of their right to be present and their ability to waive that right.

Mr. bin 'Atash, addresseing the commission, said that he had spent the last 2-1/2 years unable to solve his problems with his counsel and still wished to replace his learned counsel, Ms. Cheryl Bormann, with another counsel. He had spent the intervening time without benefit of counsel despite his attempts to solve the situation. The MJ stated that there had been no change in his situation and that his motion to replace counsel was denied.

AE 555: Mr. al Baluchi's Motion to Dismiss for Unlawful Influence over Convening Authority and Legal Advisor [not yet available to the public]. The MJ stated that the trial judiciary had received a second pair of declarations from Mr. Rishikoff, the prior Convening Authority, and Mr. Brown, the prior Legal Authority. The declarations were being assigned the numbers AE 555L, and that copies of these declarations would be distributed to all counsel so that they could be argued this week in conjunction with argument on AE 555.

Mr. bin 'Atash then asked to bring another fact to the commission's attention and asked that his case be separated from the trial of the cases of his other brothers [co-defendants] because he had done everything he could to stay with his attorney and could not do so. The MJ reminded him that he was represented by counsel, and his counsel was supposed to address the commission, but that his motion to sever was denied.

AE 565N, Motion To Abate April/May Hearings for interference with Mr. Bin al Shibh's Right to Counsel, filed on Friday 27 April, 2018. [not available to public] Mr. Harrington informed the MJ that he had not met with nor spoken with Mr. bin al Shibh since 5 April when Mr. bin al Shibh had been placed in a disciplinary status in Camp 7. Mr. bin al Shibh was not allowed to return to his normal cell to retrieve his legal materials. Fur-

ther, he was taken to the disciplinary cell with nothing but a thin prayer mat, no clothes, no toothbrush, and no soap. He was threatened to be taken to a dry cell with no access to water and was kept in solitary confinement. This replicated the circumstances at the black sites and re-traumatized Mr. bin al Shibh and caused him apprehension and fear. The CP 7 SOPs and the MJ's order were not followed, and the MJ's order, which is supposed to be posted at the door to his cell, was removed. The guards also threatened to remove him to a padded cell. Mr. bin al Shibh continued to complain of the noises and vibrations, the denial of access to his legal bins, and went on a hunger strike. Many of the guard statements were egregious. Since that point, he has not been visited by any member of the defense team. This disruption of his legal right has caused his defense team to consider if they must move to withdraw. The defense is seeking an order to comply with the MJ's order on treatment of Mr. bin al Shibh, an evidentiary hearing, and seeks to hold the JTF in contempt. This series will be placed in the AE 565 series of motions. The defense will supplement last Friday's motion this afternoon. Mr. bin al Shibh sought to add comments on what the guards had said to him, and the MJ instructed him that he had to provide evidence through the appropriate process through his attorneys.

AE 524/AE 525/AE 548/AE 549: In this iteration of these motions, also argued in earlier form in the January 2018 and the February/March 2018 sessions, the defense seeks to argue against government renewed interferences with defense investigations into CIA RDI witnesses.

AE 524: Mr. al Baluchi's Motion to Dismiss, or in the Alternative, to Compel the Government to Produce Witnesses for Interview [no pleadings filed after 24 Oct 17 are available to the public].

AE 524Q: Mr. al Baluchi's Motion to Compel Production of Documents and Witness Information Related to Defense Investigative Prohibitions [not available to the public].

AE 525: Mr. al Baluchi's Motion to Compel Information Identifying the Locations of Black Sites in Which the United States Imprisoned Mr. al Baluchi [fully argued and ripe for MJ decision].

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BLUF: Since the last hearing at the end of February 2018, in which the prosecution slightly modified the earlier prohibitions on defense investigations unilaterally implemented in September/October 2017, the prosecution filed a proposed protective order with the military commission that would impose investigatory prohibitions on the defense that would prohibit the defense from seeking to contact or identify CIA RDI witnesses, except for a small list of CIA employees who are officially acknowledged to have been associated with the RDI program (Rendition, Detention, and Interrogation, aka the Torture program). The proposed PO also precludes the defense from approaching or contacting "affiliated individuals," which includes family, community, academic, or business individuals who can identify CIA entities. This is a broad prohibition, is not limited to RDI CIA individuals by its terms, and could potentially include even defense team members who are former CIA members.

In September and October 2017, the prosecution unilaterally imposed investigatory limits on defense investigations, prohibiting the defense from contacting present and former CIA employees/contractors and from conducting overseas investigations upon threat of criminal prosecution. These threats were reemphasized during oral argument at the January 2018 hear-

ings. On 26 and 27 February 2018, the prosecution refined its guidance, limiting the restriction on contacting CIA employees/contractors to those who were involved in the CIA RDI program (the Rendition, Detention, and Interrogation Program, otherwise known as the CIA Torture program), and allowing overseas investigations so long as no classified information was disclosed. The defense, as requested by the prosecution, indicated that it was not willing to abide by these restrictions.

Subsequent to the late February/early March hearings, the prosecution requested a protective order with the commission including these restrictions on defense investigations, and broadening the restrictions from those represented during the February 2018 hearing. The prosecution filed this request ex parte, but the MJ ordered that the draft PO be provided to the defense. The motions underlying the PO and its justification remained ex parte. From today's argument, the prosecution appears to be requesting that the defense must go through the prosecution to contact any CIA-RDI witness and any covert CIA witness with the sole exception of a list of CIA witnesses who have been officially acknowledged to have been involved in the RDI program. This list originally consisted of 8 people, since expanded to 24, and does not include all CIA personnel who have self-identified as being involved in the CIA RDI program.

Mr. Groharing of the prosecution argued that the government seeks a protective order that will allow the defense to conduct a reasonable investigation without risking the lives of CIA personnel and while protecting national security. He argued that there are serious equities involved and that the government does not invoke its authority lightly but does so seriously. There may be administrative consequences to the defense for an inappropriate disclosure, but it is not on par with the death of an agent or the damage to national security. [Editorial note: this is a somewhat disingenuous argument, given that the September 2017 letter from the prosecution threatened the defense with criminal prosecution, and that BG Martin's, the Chief Prosecutor, in oral argument in January 2018, threatened the defense with prosecution under the Espionage Act.]

In response to an inquiry by the MJ, Mr. Groharing replied that the position in the requested PO is the final position of the US government. The prosecution recognizes that it cannot anticipate every eventuality but would work with the defense on requests that don't fall within it. The MJ clarified that the proposed PO precluded contact with any covert or overt CIA officer who was connected with the RDI program (except for the list of those who were officially acknowledged to be associated with the RDI program, be it 8 or 24). For all but that list, for RDI-CIA the defense must go through the prosecution to seek to contact the witness.

The proposed protocol required the defense to send a request letter through the prosecution to the OCA asking to talk to the specific witness on a specific topic. The OCA would then make a need-to-know determination. If the OCA determined that the defense has a need-to-know, then the CIA witness will be asked if he/she wants to discuss the information with the defense. If the witness does, then he/she can meet with defense counsel in the appropriate secure area. If not, then the defense can seek military the commission's involvement. The MJ asked if the need to know is already predetermined based on discovery already provided. In other words, if the OCA has already determined that a set of information will not be provided, for example, the location of a black site, then the

government can return to the substitution process with the military commission in response to the defense request. The MJ asked if the government was really just importing a *Touhy* requirement back into a situation where the *Touhy* regulations did not apply, and Mr. Groharing replied that the principles of *Touhy* did apply so that the CIA could control and protect its classified information. The MJ asked if CIA employees chose not to avail themselves of identity protection by self-identifying by publishing a book, why should the MJ give that employee back additional protections he or she had discarded?

For those individuals who have been officially acknowledged to have been associated with the CIA RDI program, he or she should determine the scope of any interview in consultation with the OCA. There is no such requirement in the PO but they should come to the OCA.

The MJ asked about the relevance of the specificity of the torture of the defendants—what is the government's intent as to the introduction of statements taken using EITs? Mr. Groharing replied that the prosecution did not intend to use any statements taken using EITs in their case in chief, rebuttal, or sentencing. They intended to use 2/4 of the CSRT statements and all 5 clean team statements.

Mr. Groharing then argued that these CIA employees/contractors are not witnesses to the charges. They are only associated with the defendants' detention. The government will not call them as witnesses. There is no need to do background investigations as you would do for fact witnesses. The *Gregory* case cited by the defense is a fact witness and is therefore not relevant.

The protocol proposed by the prosecution in the PO is an effort to bring the defense investigative efforts into alignment with the OCA determinations and the MJ's rulings. The MJ commented that the parties' evaluations of the summaries done through the section 949p process (the MCA's CIPA-like process) were often based on mistaken impressions of what was in the original documents. When Mr. Groharing commented again that the prosecution was willing to stipulate to any description of the treatment of the defendants that was tethered to reality, the MJ asked why the prosecution continued to make that assertion and why they did not just draft such a stipulation. Mr. Groharing replied that the government has given the defense access to the discovery and the defense has access to the accused, so the defense has all they need to draft any such stipulation.

The commission took a break from 1029 to 1052. Upon return, Mr. Connell addressed AE 524 and his slides introduced in AE 522CC, which deals with the Government's Unilateral Investigative Prohibitions. This motion involves the same factual predicate as that in AE 548/549 (which seeks dismissal as a remedy for these impediments). Mr. Connell agreed that the US Government had a serious compelling interest in conducting a trial of the 9-11 case consistent with constitutional principles. It also has a compelling interest in protecting national security information and has in this instance valued the OCA's determination of the need to know over the military commission's determination of information that is material to the preparation of a defense. The proposed PO is the capstone of a concerted effort to deny the defense investigation since the September 2017 letter, with restrictions designed to protect the identities of those who tortured the defendants. This decision was made at the highest levels of government. There have been at least eight levels of increasing investigatory prohibitions placing the national security interests of protecting the torturers over the interests in a fair trial. We

have seen this before in this country, from the My Lai trial to espionage trials that failed to deliver death sentences in recent decades.

The MCA sets out the protocol to address these conflicts between governmental interests, and it does so in section 949p-6.

The spectrum of current restrictions and obstacles on defense investigations include on one side the prosecution's unilateral use of pseudonyms in unclassified medical records. The commission will address this during the week in the AE 330 and AE 523 motion series. The commission will also address the unilateral prohibitions on defense investigations in the AE 524/ AE 548/AE 549/AE 558 series and the attempts to have the military commission order prohibitions on defense investigations in AE 425 and AE 524L.

This latest series of government interferences with defense investigations began on 6 September 2017 with the prosecution letter purporting to prohibit defense attempts to locate or contact any current or former CIA employee or contractor. On 26 Feb. 2018, the prosecution argued that the prohibition only applied to the overlap of the CIA personnel affiliated with the RDI program identified by UFI indexes and not the whole universe of CIA personnel it had previously asserted were included. The 27 Feb. 2018 letter (AE 524I att. B) prohibited contact of any current or former CIA employee or contractor with "potential involvement in the RDI program," other than the 8 named and listed personnel who were publicly acknowledged to be involved in the CIA RDI program by the CIA (now enlarged to 24). The government today states that this is its final position but the numerous shifting positions over the last months undermine confidence in that assertion. The sixth position of the US government is in the ex parte pleading filed by the prosecution on 2 April 2018, in AE 524S seeking a protective order (PO) incorporating the restrictions against any attempt to contact or locate any covert, or any CIA-RDI officer, except those officially acknowledged to have been associated with the RDI program.

The government also has issued a separate opinion prohibiting double blind photographic line ups to identify potential witnesses. This includes CIA witnesses, reversing prior government instructions that they were permissible and did not constitute an attempt to locate or identify CIA RDI individuals in the Kiriakou declaration.

These shifting, often unilateral prosecution prohibitions on defense investigations, have resulted in damage to defense investigative efforts for the last 9 months. The government attempts to control and interfere with access to witnesses prevents the identification of witnesses. And the government has not honored requests for assistance.

There have been numerous instances of actual prejudice to the defense during the last ten months. Of the 44 witnesses that the defense team has requested the prosecution's assistance with (taking them up on their offer), the prosecution located only 32. Of these, four were deceased, and 28 of the remaining 28 refused to interview with the defense. The defense, however, when approaching these witnesses themselves, was able to gain consent in 4 out of 5 of the cases. The ability of the defense to personally approach prospective witnesses allows it to make a favorable first impression. The defense can, identify itself, build rapport, provide safety factors, use social networks, and use background knowledge. All of these contributed to a greater than 90% success rate, compared with the government's 0% success rate.

In response to the government's prohibitions, the defense implemented an investigative freeze. Prior to that freeze, 20 CIA witnesses interviewed with the defense, and an additional witness had agreed but had not yet been interviewed when the freeze was initiated. Another three agreed with the condition of consulting with the CIA. None of the interviews have occurred because of the freeze. The government proposed protocol ignores the ongoing cycle of developing leads by speaking with numerous personnel.

In AE 523, the defense discussed the *Roviero/ Yunis* framework for when the government must disclose the identity of a witness over a claim of privilege. *US v. Fischell*, 686 F.2d 1081, includes the pretrial interview within this framework. The government cannot control witness access to gain a tactical advantage. *State v. Blazas*, 74 A.2d 991 (N.J. App. 2013), and *Enloe* 35 M.J. 228 (C.M.A. 1965) also stand for this proposition.

Gregory, from the D.C. Circuit, stands for the proposition that witnesses are not the property of either side of a litigation. Both sides have the equal right and opportunity to interview witnesses. Here the government purports to require the defense to request to interview the witness by name or UFI (unique functional identifier) but there is no way to find the name within the process proposed by the prosecution.

The relief requested in AE 524 and 524Q, is dismissal of the case, or that the MJ compel interviews with these witnesses. The MJ asked about the source of authority of compelling a witness to interview, and the cases cited, *US v. Stellato*, 74 M.J. 473 (CAAF 2013*), Killebrew*, 9 M.J. 154 (C.M.A. 1980); *US. v. Opager*, 589 F.2d, 799 (5th Cir. 1979); *US v. Carrigan*, 804 F.2d 599 (10th Cir. 1986), Mr. Connell argued in support of the defense that the MJ can order the witness to be present for an interview, and once present, the witness can still decline the actual interview .

The defense has presented ample evidence of the prejudice arising from these prohibitions and seeks relief: compel discovery (in AE 524Q) or dismiss or compel UFI (in AE 524).

The current restrictions prevent the effective assistance of counsel, creates a conflict of interest, and interferes with the professional exercise of judgment by defense counsel.

The prosecution's proposed PO also precludes the defense from approaching or contacting "affiliated individuals" which includes family, community, academic, or business entities who can identify CIA entities. This is such a broad proscription it could potentially involve every person in the US. Contacting includes approaching or questioning. This can include CIA members who are already members of the defense teams. In effect, it prohibits the defense from approaching anyone within one degree of separation from a current or former CIA employee or contractor. Mr. Connell provided a concrete example of the harm this cased to defense investigatory efforts. Mr. Connell also referred the commission to two declarations by its two investigators detailing (and disclosing an immense amount of information concerning) its defense investigatory strategy to show the damage caused to the defense duty arising from the prosecution's proposal.

The MCA provides a statutory scheme to deal with conflicts arising between the due process requirements of a fair trial and the government's national security needs, and creates a six step path for resolution of this conflict. First, the disclosure determination, seen here under AE 523/524/562. Second, the government motion for an alternate procedures, seen here with

the unilateral imposition of alternate procedures addressed in AE 524L/S. Third, the denial of the government motion for alternate procedures in full or in part which we are arguing today, supported by a declaration by the OCA which may have already occurred ex parte, (AE 524L). Fourth, a commission order to prevent defense disclosure, if the alternate procedure is denied in full or in part. Fifth, dismissal of the case or a grant of other relief. And sixth, the government may withdraw the objection in whole or in part or take an interlocutory appeal.

The government gets to choose which is more important: an adversarial trial meeting constitutional due process requirements, or protecting classified information.

If the MJ alters the PO in whole or in part, then we are in the last portion of this scheme, putting the government to its choice of modifying its demands or appealing. Then, the commission evaluates the remedy of dismissal or other remedy such as excluding evidence, finding facts against the government, etc.

Mr. Harrington, for Mr. bin al-Shibh, argued that Mr. Groharing's benign description of the only potential downside for disclosure for the defense fails to take into account the long history of other agencies persecuting defense teams in this case. This includes the AE 292 series and the recent AE 532 complaint, where counsel only tangentially involved were dragged into a criminal investigation. The prosecution's argument that they are willing to stipulate to the torture mitigation is brilliant. The more clinical the evidence, the less is its impact on a panel. And the accused may not be capable of reliving the trauma of the torture or be able to differentiate among its repetitions because of its duration and its effect on his mental stability to testify to its effect. Certainly personal defense investigations are more likely to be successful.

Mr. Nevin, in AE 524I, argued that the effect of these restrictions is to put witnesses off limits, so that the defense cannot even approach them. The defense has a duty to independently investigate. This proposed PO mandates ineffective assistance of counsel. *Strickland* requires a thorough investigation and only after that will counsel's tactical decisions be given weight. There are numerous cases where inadequate investigation forms the basis for reversal of conviction. The conflict of interest here arises because we are required to investigate and the government nonetheless says we cannot do so and threatens us with criminal prosecution if we do so. We understand the need to protect this information. We are loyal Americans.

The obligation to investigate is at the heart of our defense duty. The two investigator declarations given to the MJ by Mr. Connell are extraordinary. That sort of information is never shared. Every one of these CIA witnesses is hidden from the defense, at the government's peril. Yes, we have been forced to interview witnesses in front of the jury before, but we cannot do that here. Here, we cannot even identify the witnesses to put them on the stand [editorial note, nor force them to travel to Guantanamo]. The proposed PO is yet another additional layer of restriction added on to the original PO/MOU which we signed. The government's suggested process will not result in a fair trial. Remedies must be crafted and the government put to a choice. If the trial is not consistent with the interests of national security, as so asserted by the prosecution, then dismissal is appropriate.

AE 524 continued. Mr. Ruiz asked that Mr. al Hawsawi be excused from attending after

lunch. The MJ granted the request and recessed the commission for lunch at 1244. We reconvened at 1404. Mr. al Hawsawi's absence was found to be voluntary.

Mr. Perry, for Mr. bin 'Atash, argued that the supplement that is being filed contradicts the government's assertions of this morning and gives a concrete example that eviscerates a defendant's investigation and right to a complete defense in a capital case. The government's proposed PO is not authorized by the MCA. 10 USC 949p-3 and p-4 regulate the provision of discovery to the defendant with the MCRE 505 process and does not grant authority to the government to regulate the defense investigation.

The government's concerns over disclosure are already addressed by the defense obligation to respect the IIPA (Intelligence Identities Protection Act), Espionage Act, the MOU signed in this case, and the 3d amended PO #1 in this case.

Mr. Ruiz, for Mr. al Hawsawi, argued that the MJ should decline the prosecution's PO. The proper response is to dismiss the case or the death penalty. This is no way to try a capital case. The prosecution's attempt to interfere with the defense investigations undermines due process. The prosecution has chosen to protect CIA operatives and not to give a fair trial to the defendants. AE 524 requires access to the witnesses or dismissal of the case.

As one example of why the defense needs background information, even for "non-fact witnesses," recall the cross examination of the defense expert, Prof. Sean Watts. The prosecution used all modern-day research tools available to investigate his background, to include social media. The same applies for CIA witnesses identified by UFI. The defense needs their actual names to do this investigation and will not further disclose this information, which will be used only by cleared defense personnel.

In a capital case, defense counsel are ethically required to conduct a meaningful interview. There is a conflict of interest lurking here. We must investigate to satisfy our ethical obligation and to be effective constitutionally.

Mr. Groharing replied that the government is not required to make a choice. That is why CIPA was enacted and why courts have been employing creative solutions [editorial comment-but CIPA also recognizes that there comes a point where the government must make such a choice].

The impact claimed by the defense is not accurate. They can still interview the CIA witnesses. They just have to go through the government to do so. The PO affects only RDI information.

Mr. Groharing agreed with the MJ that 949p-4 was the section implicated by the requested PO, and he also stated that the double-blind photo lineup response was only sent in response to a question by Mr. Connell. Mr. Groharing also agreed that Mr. Connell's six path slide was fundamentally accurate, but that the government could either accept the commission's alteration of the PO or file an interlocutory appeal at the earlier state or at the end of the process. He disagreed that the cases cited by Mr. Connell allowed for compulsory witness interviews.

Finally, Mr. Groharing argued that it was imperative to put this PO in place soon. The prosecution vigorously disputed the effect on the defense and he asked that no further oral argument be granted after Mr. bin 'Atash's supplement was filed.

The MJ asked about Mr. Connell's "affiliated individual" definition and if it was as broad as he contended. Mr. Groharing stated that it

would only affect affiliated individuals in an attempt to identify those CIA in the RDI program, although he admitted it was not drafted so narrowly.

Mr. Connell argued that the defense had no idea how large the actual universe of covert CIA officials is, but that para 2g(4)(b), PO#1 included, as protected, the names, identities, and physical descriptions of those involved in the capture, detention, and transportation of the detainees prior to 6 September 2006. Thus, the PO already protects and has protected this information in a much clearer and understood manner, and that had functioned well for years.

The "affiliated individual" prohibition is broad: the defense *shall not contact* any affiliated individual for the purpose of learning any information regarding a CIA person other that an officially acknowledged RDI person.

That makes it impossible for the defense to contact FBI or military or former military personnel. It stops all investigative work to identify possible CIA witnesses, which is a necessary first step in order to interview them.

AE 548, Mr. Connell stated his argument was the same for AE548, AE 524/AE524Q, AE 549, AE 558.

Mr. Nevin stated that when Mr. Mohammad had filed AE 548E, it was a couple of iterations of government prohibitions on defense investigations ago, but that the basic premise was that the government continued to attempt to narrow the definition of mitigation evidence. The government argues that torture is not really relevant to anything, and certainly not to the charges. But torture is relevant to many things, mitigation and guilt phase issues included. This requires that the defense investigate the details of the torture. These uses include: use for suppression, for motions to dismiss for outrageous government conduct, and for denial of speedy trial (constitutionally based), which looks to both the length and nature of the pretrial detention. If there is a conviction on a capital charge, then it will also be relevant to the moral authority to execute. The 8th Amendment was adopted to do away with the super added infliction of pain for egregious offenses. And the details of the torture can be relevant in swaying just one panel member in evaluating the appropriateness of the death penalty, and the issues of the sufficiency of punishment and adjustment to prison.

Mr. Nevin asked the MJ for a specific ruling on the scope of relevance of the torture evidence. The government repeatedly asserts that the defense should just rely on what the government has given it. However, of the 5-6 million pages of RDI evidence, the defense has received only 17,000 pages. That reflects a far different view of torture-related evidence.

Ms. Bormann, for Mr. Bin 'Atash, argued that they were filing a supplement based on discovery they had received from the prosecution at 1330 on Friday afternoon. Here, the government is conflating discovery and investigation. Disclosure is when and how materials are disclosed from one party to the other and is determined and regulated by the court. Investigation is a duty imposed on the defense, and cannot be regulated by the court. In fact, it is only regulated by a court when there is interference with it. That is the *Gregory* case.

Mr. Groharing rested on his pleadings.

AE 525 AE 525: Mr. al Baluchi's Motion to Compel Information Identifying the Locations of Black Sites in Which the United States Imprisoned Mr. al Baluchi [fully argued and ripe for MJ decision conflict of interest aspect].

Mr. Nevin argued that in AE 525 and AE 524, the conflict of interest is created by the threat of criminal prosecution and administrative sanction. With the overseas investigation sanction, Mr. Nevin did not consider the conflict resolved with the February 27, 2018, additional guidance to not confirm or deny classified information, and to base inquiries on open source information.

The MJ and Mr. Nevin agreed that defense counsel can be rendered ineffective by a court order.

Mr. Nevin reminded the MJ about the prosecution's continued assertions that any statements from Mr. Mohammad are classified, in effect continuing its argument from October 2013 that the US government can classify the defendants' life experiences and memories. The prosecution has provided no information on the identity of CIA RID agents or the locations of black sites, so nothing can be based on classified or confirm classified in these areas. Mr. Nevin requested an order to decide this issue.

In AE 525M, Mr. Connell disagreed with Mr. Nevin and considered the prosecution's 27 February 2018 guidance as resetting the overseas travel to its status quo ante prior to its October 2017 letter prohibiting such travel as confirming classified information. Now, we have returned to the prior situation where the defense can investigate so long as it does not confirm classified information. That is a workable solution. The proposed PO as to people, however, creates an entire new set of problems. We differ with Mr. Nevin on what type of conflict is created. Rather than a conflict under *Strickland*, we consider that a structural chronic conflict is created by placing the defense duty to investigate in direct opposition to its duty to follow classification guidance.

Mr. Groharing for the prosecution argued that there is no conflict of interest. The defense can properly prepare for trial. What the MJ decided in AE 114 G was that the defense did not need to know the locations of the black sites in order to adequately defend their clients. The defendants can testify. The government will stipulate. There is nothing left to see overseas. The accused do not need access to CIA agents to present vivid pictures of their conditions of confinement.

Mr. Connell responded that Mr. Groharing's argument is contradictory. The prosecution states that the defense did not need additional information on the black sites because we could access witnesses on those sites, and now the defense cannot call those witnesses because we cannot access them.

Ms. Bormann argued that all of the defense counsel want the literal and figurative blow-by-blow description of what happened to their clients.

AE 530VV: Government Motion to Reconsider AE 530LL, Order, Defense Motion to Compel the Government to Return Immediately All Materials Seized From Mr. Bin 'Attash by JTF-GTMO on 18 October 2017 [not available to the public]. Mr. Ryan for the prosecution argued that in AE 530LL the MJ had informed Mr. Al Baluchi, Mr. Mohammad, and Mr. Bin 'Atash that they must consent to a forensic examination of their laptop computers as a precondition to have them returned to them. The MJ had found a significant difference in facts for Mr. Al Hawsawi and Mr. Bbn al-Shibh such that their laptops would be returned after a review by the defense IT department and a final check by the trial judiciary. The prosecution, during a search of Mr. al Hawsawi's cell, had discovered a 46-page document printed from the internet,

marked as other case related material, on a shelf in Mr. Hawsawi's cell. It was properly stamped as OCM and had been through the privilege review team (PRT). Mr. Ruiz objected because he had not been given access to these seized documents, which should have been turned over to him in accordance with the MJ's ruling in AE 18U. The MJ refused to turn the documents over to the defense but ordered that the prosecution would provide copies to Mr. Ruiz to review with his client prior to argument on this issue. Mr. Harrington is in the same position. The commission recessed at 1618.

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Dru Brenner-Beck

Khalid Sheikh Mohammed

1 May 2018

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She graduated from Georgetown University's School of Foreign Service, Boston University's School of Law, and earned an LL.M in military law from the US Army Judge Advocate General's Legal Center and School. She is also a past President of the National Institute of Military Justice.

The commission convened at 0905 with only Mr. Mohammad and Mr. bin Al Shibh present. The prosecution established evidence on Mr. Hawsawi, Mr. Al Baluchi's and Mr. Bin 'Atash's waivers of presence which the MJ found to be voluntary and knowing. Mr. Connell objected to the anonymous testimony by the SJA representative who had testified to establish the notice of the hearing and the waiver by the defendants. The objection to this anonymous testimony was based on violations of the 1st, 6th, 5th Amendments, the RTMC, and the MCA. The MJ overruled the objection.

AE 530VV: Government Motion to Reconsider AE 530LL, Order, Defense Motion to Compel the Government to Return Immediately All Materials Seized From Mr. Bin 'Attash by JTF-GTMO on 18 October 2017 [not available to the public]. [Ed. note: The JTF seized all five laptop computers from the defendants in October 2017, as a result of allegations of tampering with the computers by the defendants. The evidence of the alleged tampering was limited to Mr. Al Baluchi, Mohammad, and Mr. bin 'Atash, so the MJ ordered the laptops returned to Mr. al Hawsawi and Mr. bin al Shibh. This portion of AE 530 involves the government's request for reconsideration of that portion of the order]. Mr. Ruiz asked if argument could be deferred until Thursday to allow discussion of the discovery just provided by the prosecution with his client, and Mr. Harrington requested the same. Mr. Ryan clarified that the new laptop for Mr. bin al Shibh was in the defense IT hands pending certification and approval by the trial judiciary and Mr. Hawsawi's was in the possession of defense counsel. Both counsel would be able to review the discovery with their clients.

AE 566: Mr. al Baluchi's Motion to Meet with His Defense Team [not available to the public]. Capt Andreu for the Al Baluchi team argued this motion, which asks the MJ to order the JDG (Joint Detention Group Commander at Guantanamo) to approve cleared defense team members to meet with the defendant even if a lawyer or paralegal is not present. This is a capital case in which a defense team consists of many professions: mitigations

specialists, interpreters, investigators, paralegals, attorneys, psychologists, psychiatrists, etc., often from different cultural backgrounds than the accused. Meetings are a key way to build rapport and to make progress on preparation of the defense. After mid-December 2017, the JDG commander began to enforce a preexisting policy that required the presence of an attorney or paralegal at a client meeting, and the previous special exceptions allowing such meetings were now routinely denied. From December to April 2018, 41 of 43 requested meetings were denied. After this motion was filed, an additional 8 of 10 requested meetings were approved. While the defense understands that the MJ will not routinely interfere with the day to day operation of the detention facility, the MJ has stated that he will interfere if it affects the commissions operations or the defendant's rights. Here ,this change in procedure is affecting the defendants' 6th Amendment rights. Four psychiatrist meetings have been denied, and these types of professionals seldom want third parties attending forensic evaluations with the defendant. This policy requires that paralegals or attorneys are diverted from other case priorities. All material brought into client meetings is appropriately reviewed by the PRT and marked in accordance with the commission's orders. The defense asks the MJ to remove this unnecessary impediment to client meetings.

Mr. Nevin argued that ABA guidance in death penalty cases requires the defense to form a team with members of different expertise, to develop a continuing interactive dialogue with the client, and to establish and maintain a relationship with the client during all stages of the proceeding. Here, with cultural and linguistic differences, these efforts are particularly important. The policy interferes with the defense's ability to accomplish this requirement.

Ms. Bormann argued that the person who should determine which cleared defense team member meets with the defendant is the defense counsel, not the JDG Commander. The defense provides the information required when meeting with our client, including the list of who might attend and their security clearance, but any more information than that is not appropriate. This policy has existed for a while but has been sporadically applied. It is another example of constantly changing rules at Guantanamo.

Mr. Harrington stated that for his team, which only has 2 cleared paralegals, this requirement can be a burden. All requests in the last two months have been rejected. Constant interaction with our client is important to both develop and maintain relationships with him that are essential for the preparation of a defense.

Mr. Ruiz argued that this is an example of arbitrary and capricious application of policies. To him, the sole restriction should be that the defense team member is properly cleared.

Mr. Swann, for the prosecution, argued that this policy is in JDG SOP 11, it is not a recent change, and the JDG has required an attorney or paralegal since January 2016 for a client visit, with a special exception request procedure to deal with requests without an attorney/ paralegal participating. There has not been uniform enforcement. The defense must simply justify the exception. Requests were routinely approved over a long period of time. The JDG commander is the decision maker. There was 100% approval from August to mid-December 2017 with 26/26 approved. The peak ability to support attorney meetings for all detainees is 6/ day. There are multiple competing interests at any one time. Something has to give. In the prosecution's filing in AE 566A, a chart from 11

January 2018 to 15 April 2018 shows of 118 meetings requested, 23 were denied, 95 approved, and 66 conducted. Late December was a bad time. There was an al-Baluchi investigator who requested visits last week from Tuesday to Saturday. They were approved, but a paralegal covered them when the investigator did not attend. The defense is being denied nothing. How difficult can it be to have an attorney or paralegal come down to make meetings happen? [editorial note: this is another aspect of infrastructure limitations affecting legal proceedings. In most other detention/prison facilities, meeting spaces are available within the prison itself, and do not require that the prisoner be moved to meet with counsel, only that counsel come to the facility. The meetings at GTMO occur at E-2 in huts, or at one other location in the Nashiri case. Building attorney-client meetings spaces at Camp 7 would greatly alleviate the problems that are caused by increasing manpower limitations. It is far easier to transport a single defense attorney or members of a defense team in a closed vehicle to CP 7 meeting spaces, if they were to be built, than to continue to transport High Value Detainees to E-2].

The MJ asked Mr. Swann, What about experts such as psychiatrists who are unlikely to want others present? Mr. Swann answered that Dr. Xenakis (the Al Baluchi team psychiatrist) had been in to see Mr. Al Baluchi by special request, but had exhausted his hours approved by the CA [how and why a prosecution would have access to this information is troubling], so he had not seen Mr. Al Baluchi.

The MJ asked, What was the rationalization for the denial of meetings? Is it a space issue? Is that why the presence of attorneys and paralegals is being used to prioritize visits among the detainees? Mr. Swann replied that if the attorney/paralegal rule is maintained, then it is more likely that a visit can be accommodated.

Capt Andreu informed the MJ that all four of Dr. Xenakis' visits had been denied. This policy had been in place since 2015 and the special requests had been routinely granted since 2016. From January to April 2018, only two special exception meetings without an attorney/paralegal present were approved, all others were disapproved.

Mr. Nevin reminded the MJ that this is similar to the other resourcing inadequacies affecting adequate representation in this capital case. If something has got to give, why is it the ability to provide a defense in a timely way? The prosecution repeatedly asks for a trial date in AE 478. We have discussed the issue of inadequate housing and will later discuss in AE 555 the firing of the CA because of his actions to remedy resourcing inadequacies at Guantanamo. Resourcing inadequacies affect this commission in multiple ways.

Ms. Bormann reminded the MJ that the visit number limitation was not based on space, but on manpower, as litigated in the AE 254 series. There are 16 meeting rooms in E-2. But the real issue is the government's choice not to provide adequate personnel to support defendant visits. The prosecution cannot require the defense to lay out why they want a particular meeting with a particular expert consultant and the defendant. That reveals far too much defense strategy. And now we discover that the prosecution can go to the JDG commander and get the information included within the special request, which the prosecution wants to include justifications.

The US Government made the manning resource decisions, they cannot now use their inadequate decisions to deny defense meetings.

There should be no need to list anything other than the name and proper clearances of the defense personnel on any defense request for a meeting. The JDG commander should have no say on who the defense chooses to meet with the client.

Mr. Harrington reminded the MJ that the defense has tried to work within these constraints for a long time, and only comes to the commission when the situation becomes untenable. The JDG commander does not even explain his denials. The defense should not have to justify, give a reason, or compete with other defendants to meet with the defendants.

Mr. Ruiz argued that there is no space issue driving this policy. This is a personnel issue. In December 2017, we were told by Mr. Swann that a one-time manpower under-resourcing was causing the JDG inability to support attorney visits, and that that would never happen again. The US government spends millions and millions of dollars on Guantanamo. There aren't just six meeting spaces. There are 16, plus a recent additional meeting space used by Nashiri. This is a manning issue that once again becomes our problem that adversely impacts this military commission and the defendant's rights. Mr. Swann cavalierly states how hard can it be to have a paralegal or attorney present—well, that means that the paralegal or attorney is not working on other issues, and this delays other aspects of case progress.

Mr. Swann replied that the JDG commander declaration states the limitations are because of operational reasons. The MJ asked, What is the baseline? How many requirements exist for defense-client visits? Mr. Swann responded, for the HVDs, several. [Editorial note: That would place the number less than the total of 41 detainees total]. After a short break we reconvened.

AE 526D: 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 [not available to the public] Mr. Sowards, for Mr. Mohammad, argued for the MJ to reconsider his denial of an order to keep the MRI machine at Guantanamo pending a defense request.

Mr. Mohammad underwent an MRI scan in late January 2018. Although these were inadequate scans for defense purposes, they did disclose extensive brain injury from the torture. The defense sought additional MRI services and requested an order requiring the machine to remain at Guantanamo. The MJ informed Mr. Sowards that he denied the order to reconsider because he had never ordered MRI expert assistance as necessary for the preparation of the defense in the first place. The proper procedure is to request such expert assistance from the CA, and if denied, seek it from the MJ. That has not occurred. Mr. Sowards will now make such a request, and the prosecution stated that the MRI will remain at GTMO until the end of the fiscal year.

AE 330/523

AE 330 (AAA) Defense Motion to Compel Complete Unredacted Medical Records [avail]

AE 523F: ORDER – SPECIFIED ISSUE - Mr. al Baluchi's Motion to Compel Production of Identities of Witnesses Referred to by Pseudonym in Discovery [not available to the public].

Mr. Connell argued that the denial of his use of proposed slides in this argument, which were FOUO, despite numerous rulings that FOUO materials could be used in court, was another aspect of the denial of the public trial right. His suspicion is that the reviewing officials may have seen these medical records and assumed

some medical privacy concern, but that he has discussed this with Mr. al Baluchi and he has waived his medical privacy on these materials. The MJ checked with his CESO and it was determined that this was the reason for denial, and the MJ then allowed their use. The slides are at AE 330G, 330I, and 330H.

Unilateral Use of Pseudonym by the Prosecution

The MJ ordered briefing of the basis for the prosecution's authority to unilaterally use pseudonyms in unclassified discovery without the authority of the military commission, either through the 505 or 506 process. This issue is one of the spectrum of obstacles to defense investigation argued generally yesterday.

The first major basket of identities involved in this issue are those in medical records. AE 330 addresses medical records issues. Although the government has worked to eliminate gaps in the records, all identifying information of witnesses and medical treatment providers has been removed. Even when the identity of the medical provider is ultimately provided, unredacted copies of these clearly relevant medical records have not been provided.

In his first example, Mr. Connell showed a medical note dated 18 Jan. 2007 one of the days on which his client was being interrogated by the FBI at Guantanamo. The medical officer notes detailed head trauma causing nausea and dizziness and a history of head trauma. The record included the pseudonym "Dr. 10," even though the government produced the identity of Dr. 10 (four years after it was requested). Dr. 10, when contacted, did not think he wrote this record. No unredacted record was provided to allow clarification with Dr. 10 or exploration of other potential witnesses. Clearly this note is relevant and material to the preparation of the defense.

The second example showed a handwritten medical note including the comment, "this conforms to note shared by the agency" in the same timeframe, with redacted name of Dr. 21 (a dentist), and hospitalman 2. When the defense requested hospitalman 2's identity, the prosecution responded it was not relevant.

The second major basket of identities included those listed in paragraph "2d discovery" [this refers to paragraph 2d of the 10 paragraph construct under which the prosecution agreed to provide information in categories under the RDI program in AE 397, and '2d' includes the identities of those who had direct and substantial contact with the accused]. This discovery is listed in the MJ orders and the prosecution's discovery responses as not having gone through the 505 process. This has raised confusion throughout the litigation, with the government stating the MJ approved the "summaries" and the MJ order and other prosecution filings stating that the prosecution "did not ask the 505 process from the MJ." Either the MJ has approved these summaries, which contradicts the explicit language of the orders and discovery responses, or the sole remaining authority for prosecution withholding is lack of relevance, which by their categorization as part of 2d discovery (individuals who had substantial and direct contact with Mr. Al Baluchi in CIA custody) is not accurate.

The defense asks the MJ to order the government to produce a complete unredacted set of medical records, and to provide identifying information of the "2d" information. [editorial note: I am still confused on exactly what the status and the government's assertions and the

MJ's review of the "2d" information is. I think many observers are also confused, particularly those of us without access to the filings]. The condition of the defendant's teeth in the second example used by Mr. Connell in this argument, and the correspondence or lack thereof of this medical record to the "agency's notes," are certainly relevant to the defendant's condition in the immediate aftermath of his arrival at Guantanamo.

Mr. Swann argued that, other than the earliest days, you will never see a true name on the medical records. The prosecution has provided approximately 15,000 pages of medical records to each detainee. The prosecution did provide the name of medical providers, even if requested. The medical providers at Guantanamo have been using pseudonyms for a long period of time. The MJ asked if their names were classified, and Mr. Swann was unclear with his answer. If that were so, the prosecution would have to go through the 505 process. If personally identifying information (PII) is the concern, then the 506 process would apply. Mr. Swann agreed with the MJ that the medical treatment was discoverable, and that the treating individual's identity would be material to the preparation of the defense. But, Mr. Swann claimed the defense would have to make the case for the identify of each medical provider they requested.

Mr. Connell responded to the prosecution's contention that all the defense had to do was ask for medical provider identities. It took four years to get a government response for the identity of doctors 10 and 21. The prosecution has never provided the unredacted medical records for those entries. The government has never provided the identity of hospitalman 32, and that request has been outstanding since August 2013.

Medical records are a continuing issue. The defense does not have to lay out its case to convince the government to provide discovery materials. Discovery doesn't work that way. This shows how much the prosecution is actually impeding our defense. Doctor 21 is a dentist who conducted a dental examination shortly after the detainees' arrival at Guantanamo. This exam would show what the CIA did to Mr. Al Baluchi's teeth. The refusal to provide this information makes any relevance determination by the prosecution questionable. This is clearly relevant.

If the information is being withheld for reasons of classification, then it must go through the 505 process. And that requires judicial review. Additionally, simply because it is classified doesn't mean it can be withheld from the attorney. You can always provide two copies, with one more redacted for production to the defendant.

Ms. Bormann argued that this motion shows how Rule 701's purpose (describing the duty of the prosecution to produce material necessary for the preparation of the defense) has failed miserably. The prosecution gives us a large tranche of medical records, where they redact true names or refuse to add them. They are not reviewing them for relevance. The prosecution knew that the January 18, 2007, FBI interrogation and contemporaneous medical visit was relevant. This is blatant materiality.

Mr. Connell argued that if the "2d" summaries had in fact not been reviewed by the MJ, then the sole remaining grounds for non-production would be the lack of relevance under RMC 701. Although the MJ did not ordinarily review what the prosecution did not give the defense in the first instance, in this case it would be appropriate to do so. We recessed for lunch at 1235.

The commission reconvened at 1405.

AE 555: Mr. al Baluchi's Motion to Dismiss for Unlawful Influence over Convening Authority and Legal Advisor [only expedited briefing order AE555D available to the public, all others not available]. Mr. Connell argued that this motion requests dismissal because of the actions of the Secretary of Defense and Acting General Counsel Castle in firing Harvey Rishikoff, the Convening Authority (CA), and Gary Brown, the Legal Advisor (LA), in retaliation for judicial acts done by the CA.

The government's description of the three part legal test in its pleading, AE 555I, is incorrect. That test applies only when addressing unlawful influence (UI) on appeal. The correct standard is outlined in AE 555, exh. 6, where the initial burden is on the defense to produce "some" evidence. There must be a logical connection between the UI and the trial, not the prejudice and proximate cause requirement as outlined by the government.

The evidence available so far include the declarations of Acting General Counsel Castle (AE555E, attachment B), the original declarations of Mr. Rishikoff and Brown (AE555E, Exh 3), and the 29 April declarations of Mr. Rishikoff and Brown (AE555L). Secretary Mattis' declaration states that he acted based on the advice of Mr. Castle is therefore not helpful in evaluating this issue. Although Mr. Castle's declaration does not tell the whole story, it includes as a basis for the termination decision the December 2017 management memorandum that was submitted to the Secretary of Defense without being staffed through the Acting General Counsel, and the issue of the CA requesting aerial imagery of the Expeditionary Legal Complex (ELC-where the courtroom at Guantanamo is located) in January 2018.

There are 37 prosecutorial and security functions reposed in the CA by the Regulation for Trial by Military Commission (RTMC). These are both judicial and quasi-judicial. Prior to the current Chief Prosecutor, the CA directly supervised the Chief Prosecutor in the commissions. The RTMC also lists ten security functions that are the responsibility of the CA, and many of the security functions have judicial aspects. For example, the CA is responsible for the DSOs (Defense Security Officers), for the classification review function, and was previously in charge of the Office of Special Services, which manages security clearances. Finally, the CA is responsible for the release of information to the public. All of these issues have been litigated as directly affecting ongoing commissions multiple times in this case alone.

Mr. Castle states that Mr. Rishikoff submitted the management memorandum in December 2017. That was in direct response to a directive given to him upon assuming his role as CA ordering a frank assessment of the state of military commissions. Mr. Rishikoff states he was asked to provide his report directly to the Secretary of Defense. The commission had dealt with similar issues in the AE 532 series in December 2017 hearings.

The MJ asked, Does it matter if you do those functions badly? Mr. Connell replied, No, the essence of independence is the power to take positions and to make decisions. Yes, the CA serves at the pleasure of the Secretary of Defense, but resourcing and staffing the commissions are judicial functions for the CA. The MJ wanted to know, absent personal misconduct, on what grounds could the CA be fired?

Mr. Connell answered that understanding that issue requires an understanding of what the words "judicial acts" means within the MCA, 10 USC 949a(2)(b), which entered military law as part of the Elston Act in 1948 as Art. 88 of the Articles of War, which became Art. 37 of the

UCMJ, and which was designed to separate the operational authority of the commander from his acts with respect to courts-martial. It enters the US legal system much earlier in the case of *Murray's Lessee*. In that case, the Supreme Court determined that "judicial act" did not solely include the exercise of Article III power. Instead, it included in judicial acts all those administrative duties the performance of which involved the determination of the existence of facts and the application of them to rules of law. The doctrine of judicial immunity flows from judicial acts, and includes all acts within the duties of judges, prosecutors, and administrative agencies. *Mireles v. Waco*, 502 U.S. 9 (1991) demonstrates how broad this doctrine is, encompassing all actions in the ordinary course of their duties and is a functional analysis. Labeling a duty as "administrative" is not determinative; instead, it is whether the duty involves the inquiry into the existence of facts and the application of the law thereto.

The core of Mr. Rishikoff's responsibility as CA is involved here: the organization of prosecution and security functions and retaliation for his action to obtain aerial imagery to address the legal infrastructure issue here at Guantanamo. When you asked, what a CA can be fired for, the answer is the inverse, he cannot be fired for these actions.

The CA has numerous resourcing responsibilities. The defense makes motions to the CA on resource requests and this includes not just judicial resources. There are significant under-resourcing issues for defense personnel that the CA has determined are necessary for the defense, including issues on adequate housing at Naval Station Guantanamo Bay (NSGB) which was litigated in AE 485C, and failures in transportation in AE 485E and 485H. Resourcing also includes legal infrastructure issues, which have been raised in this case with the discussions on the record of a second courtroom and the ELC expansion. These issues have been discussed extensively on the record in relation to the prosecution's pending motion for a trial schedule/date hearings, at 15452, 15461, and 15499 of the transcript.

Mr. Rishikoff and Brown were appointed on 4 Apr. 2017. On 30 May 2017, the defense presented briefings to the CA on resourcing issues. In June 2017, the CA was on site at GTMO, with many OMC staff and with representatives from the local command, to discuss the requirement for an additional courtroom and more office space in the ELC. The Chief Defense Counsel (CDC) provided formal input, advocating for additional work space and a second courtroom. In June 2017, the CDC issued ethics guidance to defense counsel not to meet with clients in meetings spaces unless the defense counsel was confident that they were not being monitored. The prosecution informed the commission that no additional courtroom would be constructed because that would require congressional appropriations and reiterated that DoD conclusion during later hearings.

The counsel situation in the *Nashiri* case, which arose from concerns over monitoring of attorney-client communications, was becoming more acute during this period. In the fall of 2017, Mr. Rishikoff had to decide on the contempt holding for BG Baker in the Al Nashiri case, while he was also evaluating solutions to the ongoing allegations of government monitoring of attorney-client conversations raised in that situation. In AE133RR (AAA Supp), there is also a representation that an unnamed attorney criticized Rishikoff and Brown to Mr. Castle in this period.

By the end of 2017, the CA was dealing with the needs for additional office space at Guantanamo in the ELC, a second courtroom, and the

allegation of monitoring of attorney-client communications, and was communicating with Congress in his role as CA.

The critical sequence leading to the firing began in January 2018. On 19 January DoD OLL (Office of Legislative Liaison) forwarded a request to reprogram $114 million dollars to the House and Senate Appropriations Committees. In these requests the expansion of the ELC was described as time sensitive, with an expected critical mission to commence on 1 Nov. 2018.

In AE 555L, Mr. Rishikoff stated that the Senate Committee on Appropriations requested current aerial photography of the ELC. This photography post-dated a recent hurricane. This Senate request was made during the week of 22 January. The CA requested the imagery from SOUTHCOM and was told it could not be done. The CA then requested that the Coast Guard produce the imagery, which was done. On 26 January 2018, Mr. Rishikoff, Mr. Brown, and BG Baker met with the Senate Committee to advocate for approval of this request. Three ranking democratic members of that committee were concerned and wanted to hear the defense view, which is why BG Baker was included in the meeting.

On 29 January, the Senate Committee approved the re-programming request. Three Senators wrote Secretary Mattis a disapproving letter on their concerns over trials scheduled in November 2018 and over the monitoring allegations.

On 3 February, Secretary Mattis revokee Mr. Rishikoff's designation as CA, and on 5 February Mr. Brown was fired as Legal Advisor. Their CAC cards were confiscated and they were escorted from their offices.

The request for imagery, which seems to be at the heart of the dueling declarations, was done to solve a central issue that the CA was responsible for: adequate courtroom infrastructure for the military commission trials. And it appears that he was fired for trying to fix these problems. Rishikoff's declaration describes the relationship between resourcing and his judicial acts, and that it was impossible to disentangle resourcing and director of OMC decisions. They were inextricably intertwined.

Under *Murray's Lessee*, these acts are judicial acts. Other places where outsiders interfered with judicial acts have been deemed UCI: the change to the RTMC requiring military judges to move permanently to Guantanamo; the unilateral cancellation of housing for commission participants; the commingling of the trial judiciary on transportation across Guantanamo Bay. These resulted in abatements. The declarations of Mr. Rishikoff and Mr. Brown clearly state that the functions of the CA focus on the judicial impact of resourcing decisions. The core responsibility of the CA is to resource this case and to allow it to move forward.

This is more than "some" evidence of UI. Additionally, the MJ must also be concerned about the perception of UI, and the perception of the informed public about the fairness of the military commission system. Even commentators on Lawfare have raised concerns over the fairness of the commissions arising from this unexplained summary firing. The proper approach is to gather more evidence from Mr. Castle, to take testimony from Mr. Rishikoff, and to review the documents referred to in the declarations.

Mr. Nevin argued that Mr. Mohammad had asked for discovery on this matter in AE 555H. The conflicting declarations in this case show that something more is going on than a mere personnel decision. The purported reasons on

their face are questionable. The failure to correctly staff the taking of aerial photography seems out of step with the subsequent summary firing, stripping of credentials, and marching of these senior officials from the building. The Rishikoff and Brown declarations refer to a conflict of interest in the organization that raises suspicions. The defense continues to seek discovery.

Mr. Harrington argued that the smell in air makes clear that the burden has shifted on this motion. The prosecution must now prove beyond a reasonable doubt that the firing was not UI. We need an evidentiary hearing. There are references in the declarations to documents and diaries and to efforts to settle the case that raise a strong inference of the underlying cause.

Mr. Swann, for the prosecution, argued that this motion for UI has no legs. The defense continually moves for dismissal. The trial for the murder of thousands cannot be stopped by a labor dispute. This is an innocuous issue. Mr. Rishikoff was let go for good reason. He just did not have the judgment or temperament to operate at that level, and Secretary Mattis rescinded his designation for that reason. The defense has offered only supposition. We agree that the MCA's UI provisions are broader than article 37's UCI analytical framework. But the defense has no facts. There must be some evidence of actual manipulation, that if true, has a logical connection to the commission. Rishikoff was terminable at will. In February 2018, it was decided that he did not meet management's expectations of corporate decision making. There were no judicial or quasi-judicial acts involved here. The aerial photography incident was the last straw in the judgment area.

In the military you are expected to coordinate your actions through the chain of command Going around the chain of command is not what we expect of those that we place in charge. Unity of effort on all aspects of this case is not just expected, it is required. And if the leadership doesn't understand that, then they should not be in charge. [editorial note: this is classic UI, the CA is independent, he is not expected to toe the line, but to exercise his discretion as he sees fit.]

The MJ asked Mr. Swann, What does the prosecution understand the *Biagasi* burden shifting structure to be? Does the prosecution believe that if the commission decides the burden has shifted, it will get a piecemeal decision from the commission, and then do the entire issue in its entirety to show the lack of UI beyond a reasonable doubt? Or is the prosecution required to present its entire case now? To prepare for either determination by the commission, whether the burden has shifted or not? Mr. Swann replied that the prosecution did not believe any burden has shifted. It has no further evidence to present and understands that this is the only opportunity to do so. The individuals here, Secretary Mattis and Mr. Castle, have put pen to paper and explained that there was no impropriety. That ought to be the end of it.

The decision to fire Mr. Rishikoff was based on coordination and temperament. You don't bypass the OGC with some of your bright ideas because the ideas might not be so bright. For example, the change in the RTMC requiring the MJs to relocate to Guantanamo.

You must go through the chain of command. The CA and Legal Advisor had to go through others to get their job done, and they ignored the decision of a four-star officer on the aerial photograph issue. Unity of effort is required. There is actual and apparent UI, and some evidence means something other than coincidence. The facts must be tied to effects on this case. It must lead to a perception of unfairness in the

military commission system. This is a logistical issue.

Mr. Connell responded that the CA here was acting within the scope of his judicial authority. The idea that resourcing issues at the military commissions don't impact the cases goes against the experience of military commissions here at Guantanamo. Mr. Connell agreed to finish his argument on Thursday, May 3rd when we reconvene at 0900. Tomorrow, 2 May, the commission will hold a 505h hearing on AE 524 (produce witnesses for interview), AE 538 (MTC FBI Terrorism Interrogation Manual), AE 562 (MTC Documents concerning Interrogator personnel), and AE 530 (the laptops). We recessed at 1620.

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