MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. **KHALID SHAIKH MOHAMMAD,** **WALID MUHAMMAD SALIH** **MUBARAK BIN 'ATTASH,** **RAMZI BIN AL SHIBH,** **ALI ABDUL AZIZ ALI,** **MUSTAFA AHMED ADAM** **AL HAWSAWI**	**AE 524LL** **RULING** **Mr. al Baluchi's Motion to Dismiss,** or in the Alternative, to Compel the Government to Produce Witnesses for Interview **Government Notice** of Proposed Protective Order **17 August 2018**

1. **Procedural History**.

a. On 6 December 2012, upon motion of the Government,[1] the Commission issued an Order (Protective Order #1)[2] governing the protection and use of classified information during the pendency of this case. The Commission subsequently amended Protective Order #1 three (3) times.[3] On 20 August 2013, during oral argument[4] on AE 013FF[5] (a motion to amend Protective Order #1), Trial Counsel stated, "the [D]efense can interview any witness on any topic in any location on

[1] AE 013 (GOV), Government Motion To Protect Against Disclosure of National Security Information, filed 26 April 2012.
[2] AE 013O, Ruling, Government Motion To Protect Against Disclosure of National Security Information, dated 6 December 2012; AE 013P, Protective Order #1, To Protect Against Disclosure of National Security Information, dated 6 December 2012.
[3] In each instance the Order was accompanied by a Ruling setting forth the rationale of the Commission in amending or supplementing the Order. *See* AE 013Z Supplemental Ruling, Government Motion To Protect Against Disclosure of National Security Information, dated 9 February 2013 preceded AE 013AA *Amended* Protective Order #1, To Protect Against Disclosure of National Security Information, dated 9 February 2013; AE 013CCC *Second* Supplemental Ruling, Government Motion To Protect Against Disclosure of National Security Information, dated16 December 2013, preceded AE 013DDD, *Second Amended* Protective Order #1, To Protect Against Disclosure of National Security Information, dated 16 December 2013; and AE 013AAAA *Third* Supplemental Ruling, Government Motion To Protect Against Disclosure of National Security Information, dated 6 July 2015 preceded AE 013BBBB, *Third Amended* Protective Order #1, To Protect Against Disclosure of National Security Information, dated 6 July 2015.
[4] Unofficial/Unauthenticated Transcript of the *U.S. Khalid Shaikh Mohammad, et. al.*, Motions Hearing, Dated 20 August 2013 from 9:05 A.M. to 10:07 A.M. at pp. 4386 – 4399.
[5] AE 013FF (WBA, AAA), Motion to Amend AE 013AA Protective Order #1 to Clarify "Secure Area" Requirement, filed 28 March 2013.

anything."[6] The Defense maintains[7] they conducted pretrial investigation based on this guidance until the Government provided a series of evolving (and sometimes conflicting) guidance starting with a memorandum[8] dated 6 September 2017 (**6 September 2017 Guidance**).[9]

b. The 6 September 2017 Guidance stated, "the [D]efense should make no independent attempt to locate or contact any current or former [Central Intelligence Agency (CIA)] employee or contractor, regardless of that individual's cover status."[10] The 6 September 2017 Guidance mandated an alternate process for the Defense to contact certain categories of individuals during pretrial investigations as follows:

> To the extent that the [Government] has identified an individual with a [Unique Functional Identifier (UFI)], the [Government] is willing to facilitate Defense requests to interview that person. To facilitate any Defense requests, an officer of the CIA, with an FBI special agent present, will contact each requested individual and notify the individual that [D]efense [C]ounsel for the Accused have identified him or her as someone they would like to interview. The CIA officer will make it clear that any interview is completely voluntary – the individual has an absolute right not to do so. . . If any individual agrees to speak with the Defense, the Prosecution will follow up with a letter setting out further information regarding the logistical arrangements for any interview and the scope of the agreed-to questioning. Be advised that in the event these individuals agree to meet, you will be limited in what may be discussed . . .[11]

The 6 September 2017 Guidance required the Defense to follow the same process to request an interview with "other current or former CIA employees and contractors."[12] The 6 September

[6] *See* Transcript Dated 20 August 2013 from 9:05 A.M. to 10:07 A.M. at p. 4399.
[7] AE 524G (AAA) Corrected Copy, Mr. al Baluchi's Consolidated Position Regarding Prohibitions on Investigation (Court-Ordered Supplement Regarding Authority to Compel Interviews and Response to AE 525G Government Notice of Classification Guidance), filed 15 February 2018 at 15.
[8] AE 524 (AAA), Mr. al Baluchi's Motion to Dismiss, or in the Alternative, to Compel the Government to Produce Witnesses for Interview, filed 25 September 2017, Attach. C.
[9] AE 524G (AAA) Corrected Copy at 15.
[10] AE 524 (AAA) at 17.
[11] *Id*.
[12] *Id*.

2017 Guidance concluded by stating, "these necessary restrictions on [D]efense efforts are critical to protecting very sensitive classified information and must be followed."[13]

c. On 25 September 2017, Mr. Ali (a.k.a. al Baluchi) filed a motion[14] in response to the 6 September 2017 Guidance. The motion "request[ed] the [Commission] compel the [G]overnment to dismiss the charges for interference with defense investigation, or in the alternative, to produce for interview witnesses whose identities have been hidden by the [G]overnment and who are employed by or under the exclusive control of the [G]overnment."[15]

d. On 10 October 2017, the Government responded,[16] opposing the motion, arguing that the "protocols and procedures specified in the 6 September 2017 [Guidance] to Defense [C]ounsel . . . are consistent with all governing authority, and properly balance Defense [C]ounsel access to witnesses with the Government's need to protect the highly classified information at issue."[17] The Government cited three principal authorities for its 6 September 2017 Guidance: (1) Rule for Military Commission (R.M.C.) 701; (2) 32 C.F.R. § 1905.1 *et seq*.; and (3) the Commission's Order authorizing the summaries and substitutions of certain underlying classified information in AE 308HHHH.[18]

e. On 3 November 2017, Mr Ali replied,[19] arguing the three authorities cited by the Government do not allow the Government to prohibit Defense "investigations into witnesses

[13] *Id*.
[14] AE 524 (AAA).
[15] *Id*. at 1.
[16] AE 524B (GOV), Government Response to Mr. Ali's Motion to Dismiss, or in the Alternative, to Compel the Government to Produce Witness for Interview, filed 10 October 2017.
[17] *Id*. at 11.
[18] AE 308HHHH (Order), Government Amendment to Government Motion To Request Substitutions And Other Relief Regarding Classified Information Responsive to Paragraphs 2.d., 2.f., and 2.g. of the Commission's Ten Category Construct, dated 19 May 2017.
[19] AE 524C (AAA), Mr. al Baluchi's Reply to Government's Response to Motion to Dismiss, or in the Alternative, to Compel the Government to Produce Witnesses for Interview, filed 3 November 2017.

currently or formerly associated with the CIA."[20] Specifically, Mr. Ali asserted that "[n]either R.M.C. 701 nor 32 C.F.R. § 1905.4 govern independent [D]efense investigations, including pretrial interviews," however, they do "govern witness production," with which Mr. Ali has complied.[21] Mr. Ali also argued the Government may not "claim AE 308HHHH as a basis to prohibit witness interviews" because the Government has "specifically excluded its witness descriptions from [Military Commissions Rules of Evidence (M.C.R.E.)] 505 review.[22]

f. On 20 October 2017, during classified oral argument on AE 525[23] (a separate but related motion pertaining to classified locations), the Commission directed the Government to brief what would constitute Defense confirmation of classified facts during certain investigatory practices.[24] In response, the Government filed a notice[25] with the Commission containing the following guidance (**20 October 2017 Places Guidance**):

> To provide generally applicable guidance and to protect against the improper disclosure of classified information in the future, the [Government] provides guidance below to that question, and on the following broader question: given that certain individuals employed by, affiliated with, or working on behalf of or in cooperation with the Defense teams (collectively "Defense Personnel") have security clearances authorizing them to receive - and requiring them to protect - classified information and given that no Defense Personnel have received information from government sources confirming certain categories of classified facts at issue in this litigation (including, but not limited to, certain identifying information about CIA personnel involved in the RDI [Rendition Detention Interrogation] program and the locations of RDI detention sites), what actions would constitute confirmation or denial of open source material such that Defense Personnel will have disclosed classified information?[26]

[20] *Id*. at 1.
[21] *Id*.
[22] *Id*.
[23] AE 525 (AAA), Mr. al Baluchi's Motion to Compel Information Identifying the Locations of Black Sites in Which the United States Imprisoned Mr. al Baluchi, filed 25 September 2017.
[24] AE 525G (GOV), Government Notice of Classification Guidance on What Would Constitute Defense Confirmation of Classified Facts, filed 17 November 2017 at 1.
[25] *Id*.
[26] AE 525G (GOV), at 7.

The 20 October 2017 Places Guidance also addressed use of open-source (publicly available) information: "cleared Defense Personnel may not act in any way that expressly or impliedly confirms or denies to any uncleared individual any open-source claim that falls within the identified categories of classified information."[27]

g. On 10 January 2018, the Commission heard unclassified oral argument on Mr. Ali's original motion (AE 524 (AAA)).[28] During oral argument, the Commission questioned Trial Counsel on a series of different circumstances pertaining to the Defense investigation restrictions established by the 6 September 2017 Guidance, seeking clarity as to which witnesses the guidance applied:

> MJ [COL POHL] My question is: everybody - - non-CIA people who work for some other U.S. Government agency, do the same rules apply?
> CP [BG MARTINS] Yeah, they shouldn't be approaching them independently either. If we're talking RDI information. . .[29]
> MJ (COL POHL]: Do you take an issue . . . that the Defense has an independent responsibility to investigate this case or any case, quite frankly?
> CP [BG MARTINS]: I think they have to be zealous. They have to work within the rules to get hold of the evidence and witnesses they need to defense their client, absolutely.
> MJ [COL POHL]: Okay.
> CP [BG MARTINS]: But they are not supposed to be going outside of this process to enlarge the scope of discovery, and in this case, in this specific situation, really threaten important national security interests. There's a reason for these processes. If the Commission were to grant this motion, we would have to regard it as a denial of a protective order, and we have invoked national security privilege over this information.[30]

[27] *Id*. at 8. (The Defense asserts this guidance restricts interviews by disallowing their use of open-source information. *See* AE 524G (AAA) Corrected Copy at 20.).
[28] *See* Transcript Dated 10 January 2018 from 1:02 P.M. to 3:15 P.M. at pp. 18521 – 61.
[29] Transcript at pp. 18543 – 46.
[30] Transcript at pp.18558 - 60.

h. On 11 January 2018, the Commission again heard unclassified oral argument on AE 524 (AAA).[31] During this session the Commission sought clarity on the Government's position regarding the application of 32 C.F.R 1901 *et seq*. (**the CIA's *Touhy* Regulation**) to Defense investigations:

> MJ [COL POHL]: Okay. And the first question was, Mr. Connell said Touhy's triggered by a demand, okay? And then in the definitions, it says, "A demand means any subpoena, order, or other legal summons except garnishment." So would Touhy be triggered by an interview?
> . . . CP [BG MARTINS]: In the circumstances we have before us, we think yes.
> MJ [COL POHL]: . . . Let's take Mr. Rodriguez, for example, okay? If defense counsel . . . knocked on his door or called him up and say, I'd like to interview you, okay, does that trigger - - would that interview request trigger Touhy.
> CP [BG MARTINS]: I think technically under that reg provision you cited, no.
> . . . CP [BG MARTINS]: I concede that point. That's not a demand. It's not a demand. I concede the point.
> MJ [COL POHL] Okay. It's not a demand, and therefore, a request to interview somebody like Mr. Rodriguez does not trigger the Touhy notification rules, correct?
> CP [BG MARTINS]: It does not trigger it.[32]

Trial Counsel also stated that, "the force of [the 6 September 2017 Guidance] isn't relying purely on *Touhy*," it was also relying on the Classified Information Procedures Act (CIPA),[33] an unspecified "important declaration," and Commission approved summaries and substitutions.[34] The Commission then questioned the Government on the authority for potential criminal sanctions the Defense could face if they did not follow the 6 September 2017 Guidance:

> MJ [COL POHL]: Let me just ask, what is your legal basis to restrict that type of investigation?

[31] *See* Transcript Dated 11 January 2018 from 9:05 A.M. to 10:38 A.M. at p. 18710.
[32] *See* Transcript at pp. 18711 – 18713.
[33] 18 U.S.C. App. 3 *et seq*.
[34] Transcript Dated 11 January 2018 from 9:05 A.M. to 10:38 A.M. at p. 18715.

> CP [BG MARTINS]: Your Honor, I would go back to . . . the Identities Protection Act [sic], and then the things that we provided you - - we did provide some things ex parte - - the authorities in CIPA . . ."[35]

The Commission concluded oral argument on Mr. Ali's original motion by directing Counsel for Mr. Ali to brief the issue of whether or not the Commission has the authority to compel a Defense interview of government employees.[36]

i. On 15 February 2018, Mr. Ali filed a consolidated pleading[37] that (1) responded to the Commission's verbal Order regarding the authority to compel interviews; (2) set forth Mr. Ali's consolidated position regarding the Government's prohibitions on investigations; and (3) responded to AE 525G, Government Notice of Classification Guidance. Mr. Ali asserted that the Commission had authority to compel interviews because the Court of Appeals for the Armed Forces "affirmed the authority of a court-martial to order interviews of non-governmental witnesses in *United States v. Stellato*."[38] Mr. Ali argued the Government's "invocation of classified information privilege over [D]efense interviews" necessitated the dismissal of all charges[39] because the "investigation prohibitions violate the right to present a complete defense by denying access to witnesses."[40]

j. On 1 March 2018, the Government filed a notice[41] with revised guidance on Defense pre-trial interviews in response to the Commission's inquiries. The revised guidance (**28 February 2018 Revised Guidance**)[42] updated and replaced paragraphs four through six of the 6

[35] Transcript at pp. 18718-19.
[36] Transcript at p. 18730.
[37] AE 524G (AAA) Corrected Copy.
[38] *Id*. at 43 (citing *United States v. Stellato*, 74 M.J. 473, 484 (C.A.A.F. 2015)).
[39] *Id*. at 2.
[40] *Id*. at 33.
[41] AE 524I (GOV), Government Notice of Guidance on Defense Pre-Trial Interviews, filed 1 March 2018.
[42] *See* Att. B, AE 524I (GOV).

September 2017 Guidance.[43] The 28 February 2018 Revised Guidance established five categories of individuals who required particularized contact procedures: (1) "Individuals Identified by [UFI];" (2) "Former CIA Officers Involved in the RDI Program for whom Defense Need Not Coordinate Interview Requests in Advance;" (3) "Other CIA Officers Potentially Involved in the RDI Program;" (4) "Overt CIA Officers or Contractors Not Involved in the RDI Program;" (5) "Covert CIA Officers Not Involved in the RDI Program."[44] According to the 28 February 2018 Revised Guidance, if the Defense wishes to contact individuals identified by UFI; other CIA officers potentially involved in the RDI program; or covert CIA officers not involved in the RDI program, they must go through the process established by the 6 September 2017 Guidance.[45] However, if the Defense wishes to contact the eight former CIA officers involved in the RDI program identified in a 17 October 2017 classification guidance letter provided by the Prosecution to the Defense,[46] or overt CIA officers or contractors not involved in the RDI program, they may do so independently.[47] The 28 February 2018 Revised Guidance concluded by stating, "[S]hould the Defense be unwilling to either abide by this guidance or negotiate in good faith to modify it, please notify the undersigned, so the Prosecution can consider seeking an appropriate protective order from the Commission."[48]

k. During oral argument on 1 March 2018, Counsel for Mr. Ali stated, "the Government asks for us to notify them if we . . . are unwilling to abide by the guidance. I am unwilling to

[43] AE 524I (GOV) at 1.
[44] AE 524I (GOV), at pp. 6-7.
[45] *Id*. at 6.
[46]The 8 former CIA officers were Joseph Cofer Black, Glenn Carle, Michael Hayden, Bruce Jessen, James Mitchell, John Rizzo, Jose Rodriguez, and George Tenet. *Id.* at Attach C. This list of 8 was later expanded to 25 former CIA officers by AE 524DD (Gov), Government Notice of Officially-Acknowledged Central Intelligence Agency former Rendition, Detention, and Interrogation Program Officers, filed 1 May 2018.
[47] AE 524I (GOV) at 1-2.
[48] *Id*. at 7.

abide by the guidance."[49] Trial Counsel then advised the Commission that - in light of Counsel for Mr. Ali's statement - the Government would consider proposing a protective order. The Commission ordered the Government to file a motion for a protective order not later than 12 March 2018 if they deemed it necessary to enforce their 28 February 2018 Revised Guidance.[50] On 12 March 2018, the Commission granted the Government's motion for leave to file a motion for a protective order not later than 16 March 2018.[51]

l. On 16 March 2018, the Government filed a classified, *ex parte*, in camera, and under seal motion[52] requesting the Commission issue a proposed draft protective order (**16 March 2018 Draft PO**).

m. On 27 March 2018, the Commission granted the Government's request to make an *ex parte* presentation to the Commission regarding certain classified information contained in AE 524L (GOV) and ordered[53] the Government to make the *ex parte* presentation on 29 March 2018. *See* 10 U.S.C. § 949p-4(b)(2).

n. On 23 March 2018 and 30 March 2018 respectively, Messrs. Ali and bin 'Attash responded to the Government notice of guidance on Defense pre-trial interviews.[54]

o. On 28 March 2018, Mr. Ali moved to compel "all documents and information relating to government-imposed prohibitions on his investigatory team" to include names and contact

[49] Transcript Dated 1 March 2018 from 9:05 A.M. to 11:57 A.M. at p. 19168.
[50] Transcript at pp. 19170-71.
[51] AE 524-4 (RUL) (GOV) Ruling, Government Motion for Leave to File Motion for a Protective Order Pertaining to Defense Access to CIA Officers for Pre-trial Interviews Out of Time, dated 12 March 2018.
[52] AE 524L (GOV), Government Motion for a Protective Order Regarding Defense Access to Current and Former CIA Employees and Contractors, filed 16 March 2018.
[53] AE 524O Order, *Ex Parte* Presentation IAW 10 U.S.C. § 949p-4(b)(2), dated 27 March 2018.
[54] AE 524N (AAA), Mr. al Baluchi's Response to Government Notice of Guidance on Defense Pre-Trial Interviews, filed 23 March 2018; AE 524M (WBA), Mr. bin Atash's Response to AE 524I (GOV), Government Notice of Guidance on Defense Pretrial Interviews, filed 30 March 2018.

information of persons with knowledge of these events.[55] On 6 April 2018, the Government responded opposing the motion as the requested discovery was not relevant to any issue before the Commission.[56] On 13 April 2018, the Defense replied.[57]

p. On 29 March 2018, the Commission issued an Expedited Briefing Order[58] ordering the Government to serve the Defense with the 16 March 2018 Draft PO that was filed with the Commission *ex parte* and under seal on 16 March 2018.

q. On 2 April 2018, the Government filed a notice[59] serving the Defense with the 16 March 2018 Draft PO in accordance with the Commission's Expedited Briefing Order.

r. On 9 April 2018, Mr. Hawsawi responded[60] to the Government's notice of the 16 March 2018 Draft PO asking the Commission to "dismiss the case with prejudice" because the 16 March 2018 Draft PO "demonstrates that a fair trial is impossible due to the Government's pervasive national security claims."[61] Mr. Hawsawi specifically argued that if the protective order is granted, "[t]he Government would prevent the Defense from investigating the background of material witnesses that were present during the three plus years that Mr. al Hawsawi was imprisoned and tortured by the CIA[62] and "a critical aspect of investigating potential witnesses is the ability to investigate the background of those witnesses, in order to

[55] AE 524Q (AAA), Mr. al Baluchi's Motion to Compel Production of Documents and Witness Information Related to Defense Investigative Prohibitions, filed 28 March 2018 at 1.
[56] AE 524U (GOV), Government Response to Mr. Ali's Motion to Compel Production of Documents and Witness Information Related to Defense Investigative Prohibitions, filed 6 April 2018.
[57] AE 524V (AAA), Mr. al Baluchi's Reply to Government's Response to His Motion to Compel Production of Documents and Witness Information Related to Defense Investigative Prohibitions, filed 13 April 2018.
[58] AE 524R EXPEDITED BRIEFING ORDER, Government Proposed Order Defense Access to Current and Former CIA Employees and Contractors, filed 29 March 2018.
[59] AE 524S (GOV), Government Notice of Proposed Protective Order, filed 2 April 2018.
[60] AE 524T (MAH), Mr. al Hawsawi's Response to Government Notice of Proposed Protective Order Regarding Defense Motion to Compel Witness Interviews, filed 9 April 2018.
[61] *Id*. at 1.
[62] *Id*. at 7.

identify potential bias, inconsistent statements, exculpatory evidence, mitigating evidence and more."[63]

s. On 16 April 2018, Messrs. bin 'Attash and bin al Shibh responded[64] to the Government's notice opposing issuance of the 16 March 2018 Draft PO. Mr. bin 'Attash also asked that, "in the alternative, [the Commission] dismiss the charges as an impermissible interference upon the defense function."[65]

t. On 16 April 2018, Mr. Ali responded[66] to the 16 March 2018 Draft PO stating that, "under controlling law the [Commission] must deny the relief sought in [the protective order]." For controlling law Mr. Ali cited his previous motions.[67] Mr. Ali also argued that the Government "radically expanded" the prohibitions on investigations with the protective order by: (1) "prohibiting investigation into every person who has ever worked for the CIA;" (2) abandoning its "uncleared investigator theory" by seeking to "prohibit investigations by everyone who works with the Defense;" (3) prohibiting "acts to include all forms of investigations;" and (4) "prohibiting investigations on every U.S. citizen who knows a CIA Officer."[68] Mr. Ali further asserted that the 16 March 2018 Draft PO would stop the Defense from investigating "torture" and "guilt or innocence defense of lack of hostilities."[69]

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[63] *Id*. at 8.
[64] AE 524W (WBA), Mr. bin 'Atash's Response to AE 524S (GOV), Government Notice of Proposed Protective Order, filed 16 April 2018; AE 524Z (RBS), Defense Response to AE 524S (GOV) Government Notice of Proposed Protective Order, filed 16 April 2018.
[65] AE 524W (WBA), at 1.
[66] AE 524X (AAA), Mr. al Baluchi's Response to Government's Notice of Proposed Protective Order, filed 16 April 2018.
[67] *Id*. at 5 ("Mr. al Baluchi's previous pleadings explain in depth how investigative prohibitions violate the right of access to witnesses, the right to present a defense, and the prohibition on unlawful influence. The Government's proposed Protective Order dwarfs its previous prohibition in scope, and would end the military commission as a true adversary process.")
[68] *Id*. at 1.
[69] *Id*. at 10-11.

u. On 17 April 2018, Mr. Ali filed a supplement[70] to his original motion (AE 524 (AAA)) advising the Commission that on 6 April 2018, the Government, via email in response to a request for clarification from Mr. Ali, expanded the restrictions in its 28 February 2018 Revised Guidance. The **6 April 2018 Email** explained that, "showing photographs of suspected CIA-affiliated individuals to non-CIA individuals for identification purposes falls within the prohibition against making attempts to identify CIA officers potentially involved in the RDI program."[71] The email provided a caveat that the Defense could show open source photographs of CIA officers or contractors whom the Government has officially acknowledged.[72] Mr. Ali argued this restriction prevents him from showing photographs of CIA officers and contractors to Mr. Ali in violation of Mr. Ali's Sixth Amendment right to effective assistance of counsel and binding D.C. Circuit case law.[73] The Government did not respond to this supplement.

v. On 23 April 2018, the Government filed a combined reply[74] to the Defense responses to the 16 March 2018 Draft PO. The Government argued the Commission "has the authority to 'specify the time, place and manner of discovery and may prescribe such terms and conditions as are necessary to the interests of justice, the protection of national security, and the safety of witnesses.'"[75] The Government also cited 10 U.S.C. §§ 949p-3, 949p-4, and Military Commission Rules of Evidence (M.C.R.E.) 505(e)-(f) as authority for the Commission to grant

[70] AE 524 (AAA Sup), Mr. al Baluchi's Supplement to Mr. al Baluchi's Motion to Dismiss, or in the Alternative, to Compel the Government to Produce Witnesses for Interview, filed 17 April 2018.
[71] *Id.* at 5. The 6 April 2018 email is at Attach. B and is also in AE 524V (AAA) at Attach B.
[72] To date, the Government has identified 25 officially acknowledged CIA officers and contractors. *See* AE 524DD (GOV).
[73] AE 524 (AAA Sup) at 2-3. Counsel for Mr. Ali also asserted that "Defense Counsel have a First Amendment right to communicate about unclassified topics" including photo lineups and that the Government's restrictions are improper content-based prior restraints on speech. As Defense Counsel's First Amendment rights are not justiciable before this Commission, the Commission declines to address this issue.
[74] AE 524AA (GOV), Government Combined Reply to AE 524T (MAH), AE 524W (WBA), AE 524X (AAA), and AE 524Z (RBS), Defense Responses to Government Notice of Proposed Protective Order, filed 23 April 2018.
[75] *Id*. at 1 (citing R.M.C. 701(a)(3)).

the requested protective order. The Government noted its consistent opposition to Defense claims of entitlement to virtually limitless investigation and urged the Commission to consider its arguments to this regard in other AE series.[76] The Government posited that Supreme Court precedent regarding effective assistance of counsel for defense investigation in capital cases requires Counsel to conduct reasonable investigation of available evidence not limitless investigation.[77]

w. On 26 April 2018, Mr. Ali filed a second supplement[78] to his original motion (AE 524 (AAA)) advising the Commission that on 21 July 2017, following the Government's guidance in existence at that time, he requested the Government produce 50 RDI related witnesses (44 of them identified by UFI) for interview. The supplement asserted that on 20 April 2018, the Government advised Mr. Ali that it had contacted 32 UFI witnesses, four were dead, and the 28 remaining witnesses declined to be interviewed by the Defense. The supplement contained declarations from 2 investigators on Mr. Ali's Defense Team stating that, via open source sources, they located over 20 current and former CIA agents or contractors and were successful in gaining consent for interviews from many of these witnesses by employing certain techniques to include: in person contact, identifying themselves, making a good initial impression, building rapport with the witness, reassuring the witness of his/her safety, working through social networks, demonstrating background knowledge of the subject matter, and a willingness to provide a secure space to conduct the interview at the appropriate classification level. The Government did not respond to this supplement.

[76] *Id.* at 12-13. *See* AE 548C (GOV), Government Response to Mr. Ali's Motions to Dismiss for Unlawful Influence Over Defense Interviews of CIA and Black Site Witnesses, filed 1 March 2018 at pp. 12-28 and fn 7 (a related motion alleging unlawful influence over defense interviews).
[77] AE 548C (GOV) at 12-15.
[78] AE 524 (AAA 2nd Sup), Unclassified Notice, Mr. al Baluchi's Second Supplement to Mr. al Baluchi's Motion to Dismiss, or in the Alternative to Compel the Government to Produce Witnesses for Interview, filed 26 April 2018.

x. On 4 May 2018, Mr. bin 'Attash filed a supplement to its 16 April 2018 filing[79] describing Defense Team attempts to interview Mr. John Kiriakou,[80] a former CIA analyst as follows.[81] In January – February 2018, Mr. Joe Bond, an investigator on the bin 'Attash Defense Team, made contact with Mr. Kiriakou who agreed to be interviewed on 15 February 2018. Counsel for Mr. bin 'Attash notified the Government of their intent to interview Mr. Kiriakou and sought assurances that this action would not result in investigation, prosecution, or sanction. Receiving no such assurances, Defense Counsel cancelled the interview. On 27 April 2018, the Government sent a memorandum to Counsel for Mr. bin 'Attash advising that the Government interpreted the request for assurances as a request to interview Mr. Kiriakou and forwarded the request to the CIA pursuant to the 28 February 2018 Revised Guidance and 16 March 2018 Draft PO.[82] Attached to the memorandum was a 13 April 2018 letter from the CIA to Mr. Kiriakou describing what he could and could not discuss, the requirements to consult the CIA Office of General Counsel if the discussion went beyond the permissible scope, and the requirement to conduct the discussion in a facility certified for discussion of Sensitive Compartmented Information (SCI). On 1 May 2018, Mr. Bond emailed Mr. Kiriakou to schedule a time to discuss the CIA letter. On 2 May 2018, Mr. Kiriakou declined to participate on the advice of counsel.[83] Counsel for Mr. bin 'Attash argued their attempt to interview Mr. Kiriakou illustrates that the Government guidance puts the Defense in an "untenable position" with two options: (1) continue to identify/ approach witnesses and risk investigation, sanction, and prosecution; or (2)

[79] AE 524W (WBA Sup), Mr. bin 'Atash's Supplement to AE 524W (WBA), Mr. bin 'Atash's Response to AE 524S (GOV), Government Notice of Proposed Protective Order, filed 4 May 2018.
[80] Mr. Kiriakou is one of the 25 officially acknowledged CIA officers. *Id.* at Attach. D.
[81] AE 524W at Attach. B (Declaration of Joe F. Bond).
[82] AE 524W (WBA Sup) at Attach. C.
[83] *Id.* at Attach B.

follow the Government guidance resulting in witnesses rejecting Defense requests for interview or interviews "with Government dictated results."[84]

y. On 18 May 2018, the Government responded to Mr. bin 'Attash's supplement,[85] questioning whether Mr. Kiriakou actually agreed to be interviewed by the bin 'Attash Defense Team. The Government attached a 23 April 2018 letter from Mr. Kiriakou to the CIA stating he never agreed to be interviewed and would decline any request by Defense Counsel for an interview.[86] The Government described the 16 March 2018 Draft PO as "requiring the Defense to adhere to certain minimal procedures when seeking interviews of current and former CIA personnel"[87] and argued the 16 March Draft PO was necessary and "narrowly tailored to protect classified information while providing the Defense with the ability to conduct whatever additional investigation is necessary regarding the Accused's detention in the CIA RDI program."[88]

z. On 20 July 2018, Mr. Ali filed a third supplement,[89] updating the Commission with the status of Government actions regarding the 44 UFI witnesses Mr. Ali requested the Government produce in accordance with the Government guidance in effect at that time.

(1) Attachments B – E to the third supplement are communications from the Government to Mr. Ali and/or other Accused advising: (1) on 24 May 2018, that the four deceased witnesses died between 2011 and 2017;[90] (2) on 1 June 2018, that the Government

[84] AE 524W (WBA Sup) at 12.
[85] AE 524HH, (GOV), Government Response To AE 524W (WBA Sup) Mr. bin 'Attash's Supplement to AE 524W (WBA), Mr. bin 'Attash's Response to AE 524S (GOV), Government Notice of Proposed Protective Order, filed 18 May 2018.
[86] *Id.* at Attach. B.
[87] *Id.* at 1.
[88] *Id.* at 13.
[89] AE 524 (AAA 3rd Sup), Mr. al Baluchi's Third Supplement to Mr. al Baluchi's Motion to Dismiss, or in the Alternative, to Compel the Government to Produce Witnesses for Interview, filed 20 July 2018.
[90] *Id.* at Attach.B.

contacted all but two of the UFI witnesses requested by Mr. Ali and all declined to be interviewed;[91] and (3) on 18 June 2018, one UFI witness requested by Messrs. Ali, bin al Shibh, and Hawsawi, who had previously declined to be interviewed, now agreed to be interviewed.[92] On 26 June 2018, the Government produced Federal Bureau of Investigation (FBI) 302s showing efforts to contact 48 UFI witnesses by telephone between 13 February and 29 May 2018[93] (Mr. Ali asserted 25 are among the 44 UFI witnesses requested by him.).

(2) Attachment F to the third supplement is a 5 July 2018 memorandum (**5 July 2018 Guidance)** from the Government to all five Accused stating it had contacted "the current and former CIA employees and contractors requested by the Defense and informed them of the Defense requests to interview them." Of those contacted, four had agreed to be interviewed by the Defense.[94] (Only one of the witnesses who agreed to be interviewed had been requested by Mr. Ali, who also asserted he requested 44 UFI witnesses but the Government only contacted 39 and of the 39, two did not respond, four are dead, and 33 declined to be interviewed.)[95]

(3) The 5 July 2018 Guidance required that interviews with the consenting UFI witnesses take place telephonically using a telephone appropriate for transmission of Top Secret Compartmented Information. The 5 July 2018 Guidance also established the "approved scope of the interviews" and information the Defense could not elicit from the witnesses as follows:

> [Approved Scope]
>
> a. The individual's interactions with the accused while in the CIA RDI program;
>
> b. The individual's knowledge regarding the conditions of confinement of the accused in the CIA RDI program;

[91] *Id.* at Attach.C.
[92] *Id.* at Attach.D.
[93] *Id.* at Attach.E.
[94] *Id.* at Attach.F.
[95] *Id.* at 4.

> c. Statements made by the accused during interrogations or debriefings; [This subparagraph contains a footnote advising that in light of Commission approved summaries of the statements, the Defense must notify the Prosecution 21 days in advance of the interview to enable the Prosecution to advise the witness regarding prior need to know determinations with respect to any classified information contained in statements made by the accused.]
>
> d. The individual's knowledge regarding the circumstances of the transfers of the accused from one location to another in the CIA RDI program (without eliciting the actual locations of where the accused were held, or the actual dates of transfer beyond the month and year a particular transfer was made);
>
> e. Positive recognition or adverse actions the individual received as a result of their involvement in the CIA RDI program;
>
> f. The training the individual received related to their involvement in the CIA RDI Program.
>
> [Information the Defense May Not Elicit]
>
> a) Information that would reveal or tend to reveal the foreign countries in which the Accused were detained from their time of capture through 6 September 2006.
>
> b) Information that would reveal or tend to reveal the names, identities, and physical descriptions of any persons involved with the capture, transfer, detention or interrogation of an accused regarding the same from their time of capture through 6 September 2006.
>
> c) Information that would reveal or tend to reveal the Accused's dates of transfer beyond the month and year a transfer was made.

The 5 July 2018 Guidance also provided that the Defense should notify the Government "not less than 20 business days" of any request to "expand or clarify the scope of the interview."

aa. On 23 July 2018, during a Commission hearing, Mr. Ali filed a 20 July 2018 memorandum[96] from the Government to Mr. Ali updating him on the status of UFI witness

[96] AE 524JJ (AAA), *United States v. Mohammad et. al.*- Request for Pretrial Witness Interviews, filed 23 July 2018.

contact. The memorandum stated that an additional UFI witness had agreed to a Defense request for an interview.

2. **Findings of Fact**.

a. From 6 December 2012 through 6 September 2017, Protective Order #1, as amended, and applicable laws and regulations governing the use, storage, and handling of classified information established protocols and procedures the parties were required to follow to protect classified national security information.

b. Beginning on 6 September 2017, the Government has issued a series of evolving (and sometimes conflicting) guidance to the Defense Teams regarding defense investigation of the CIA RDI program beyond discovery provided by the Government. The guidance pertained primarily to contact and interaction with CIA officers and contractors involved with the RDI program and Defense investigation into foreign countries where RDI facilities were located. The evolving (and sometimes conflicting) guidance included the **6 September 2017 Guidance**, **20 October 2018 Places Guidance**, **CIA's Touhy Regulation**, **28 February 2018 Revised Guidance**, **16 March 2018 Draft PO**, **6 April 2018 Email**, and **5 July 2018 Guidance**.

3. **Law**.

a. *Discovery and Access to Witnesses and Evidence*:

(1) "Defense counsel in a military commission….shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations provided by the Secretary of Defense. The opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under Article III of the Constitution." 10 U.S.C. § 949j(a)(1).

(2) "Each party shall have an adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence." R.M.C. 701(j).

(3) A witness has no obligation to submit to a pretrial interview. It is up to the witness whether to consent to an interview by the Prosecution or the Defense. *United States v. Morris*, 24 M.J. 93, 95 (C.M.A. 1987; *U.S.* v. *Bryant*, 655 F.3d 232, 239 (3rd Cir. 2011).

(4) "The military judge may specify the time, place, and manner of discovery and may prescribe such terms and conditions as are necessary to the interests of justice, the protection of national security, and the safety of witnesses." R.M.C. 701(a)(3). "If at any time during the military commission it is brought to the attention of the military judge that a party has failed to comply with this rule, the military judge may take one or more of the following actions:" "(C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed . . .." R.M.C. 701(l)(3)(C).

b. *Classified Information Procedures – Discovery and Access to Classified Information*. The Military Commissions Act of 2009 (M.C.A. 2009) §§ 949p-1-7 establish the Commission's authority and responsibilities pertaining to the protection of classified information. The M.C.A. 2009 provides, "[c]lassified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security. Under no circumstances may a military judge order the release of classified information to any person not authorized to receive such information." 10 U.S.C. § 949p-1(a). The M.C.A. 2009 requires the Commission to follow certain procedures for protecting classified information that are substantively identical to the procedures established by the CIPA for proceedings in Article III courts. *See* 18 U.S.C. § App. 3 *et seq*; *See Also* 10 U.S.C. § 949p-1(d) ("The judicial construction of the Classified Information

Procedures Act (18 U.S.C. App. 3) shall be authoritative in the interpretation of [10 U.S.C. 949p-1 *et seq.*], except to the extent that such construction is inconsistent with the specific requirements of this chapter.") The classified information procedures relevant to the matters raised here are as follows:

(1) Protective Orders. Upon motion of the Government, "the military judge *shall*[97] issue an order to protect against the disclosure of any classified information that has been disclosed by the [Government] to any accused in any military commission under this chapter or that has otherwise been provided to, or obtained by, any such accused in any such military commission." 10 U.S.C. § 949p-3; M.C.R.E. 505(e); *See also* 18 U.S.C. App 3, § 3. "The terms of any such protective order may include, among other things, provisions: (A) prohibiting the disclosure of information except as authorized by the military judge . . .." M.C.R.E. 505(e)(1).

(2) Authorizing Discovery & Access:

(A) The M.C.A. 2009 requires the Commission to limit the discovery of *and access to* classified information if the Government submits the appropriate declaration: (A) invoking the classified information privilege; (B) setting forth the potential damage to national security; and (C) signed by a "knowledgeable United States official with the authority to classify information." 10 U.S.C. § 949p-4(a)(1); M.C.R.E. 505(f)(1)(A).

(B) If the Government files a declaration meeting these standards, the Commission "may not authorize the discovery of *or access to* such classified information *unless* the [Commission] determines that such classified information would be noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing, in

[97] The italicized words in paragraph 3 (Law) subsections are emphasis added by the Commission.

accordance with standards generally applicable to discovery of or access to classified information in Federal criminal cases." 10 U.S.C. § 949p-4(a)(2); M.C.R.E. 505(f)(1)(B).

(C) If the Commission finds that the Government has properly invoked the classified information privilege pursuant to 10 U.S.C. § 949p-4(a)(1) and M.C.R.E. 505 and the military judge finds it necessary to authorize Defense discovery of *or access to* the information, the Commission *must* provide the Government with the opportunity "(A) to delete or withhold specified items of classified information; (B) to substitute a summary for classified information; or (C) to substitute a statement admitting relevant facts that the classified information or material would tend to prove." 10 U.S.C. § 949p-4(b)(1); M.C.R.E. 505(f)(2).

(D) The Commission *must* authorize the Government's substitutions or summaries if they provide the Defense with "substantially the same ability to make defense as would discovery of or access to the specific classified information." 10 U.S.C. § 949p-4(b)(3); M.C.R.E. 505(f)(2)(C). *Cf. United States v. Moussaoui*, 382 F.3d 453, 477 (4th Cir. 2004) ("Thus, a substitution is an appropriate remedy when it will not materially disadvantage the [Accused].")

4. **Analysis**.

a. *Motion to Compel the Government to Produce UFI Witnesses for Interview*. In the base motion to the AE 524 series, Mr. Ali seeks either dismissal of the charges for government interference with the Defense investigation, or in the alternative, that the Commission compel the Government "to produce for interview witnesses whose identities have been hidden . . . and who are employed by or under the exclusive control of the Government."[98] In support of the alternative remedy, Mr. Ali cites 10 U.S.C. § 949j. (1) (reasonable opportunity to obtain

[98] AE 524 (AAA), at 1.

witnesses and evidence by defense counsel), R.M.C. 701(j) (no party may unreasonably impede another party's access to witnesses and evidence), *United States v. Stellato*, 74 M.J. 473, 484 (C.A.A.F. 2015), *United States v. Killebrew*, 9 M.J. 154, 160 (C.M.A. 1980); and *United States v. Opager*, 589 F.2d 799, 804 (5th Cir. 1979). The cited authorities address defense access to witnesses, findings of a potential discovery violation when the Government unreasonably impedes that access, and the authority of Courts, in cases where the Government has intentionally blocked Defense access to a witness, to order production of the witness to in order to permit him/her to decide whether to be interviewed.[99] The Commission does not have authority to require a witness to submit to an interview by any party.[100] The Commission need not decide whether (as a general rule upon a finding that the Government has unreasonably impeded Defense access to a witness) the Commission has authority to compel the Government to produce the witness to give the Defense an opportunity to try to interview him/her.[101] Even if it does, the Commission does not find it appropriate to compel the Government to produce persons whose identities[102] and/or involvement in certain CIA programs is classified. Such a directive by the Commission unnecessarily risks causing damage to the national security. Accordingly, the motion for alternative relief will be denied.

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[99] *See Stellato*,74 M.J. at 484 (upholding military judge's finding of discovery violation when Government impeded Defense opportunity to try to interview witness); *Killebrew*, 9 M.J. at 160 (in the usual case, trial counsel need not arrange for interviews of witnesses, a different burden exists when the Government has intentionally blocked access to a witness by secretly transferring him.)

[100] *See Morris*, 24 M.J. at 95; *Killebrew*,9 M.J. at 160; *but see United States v. Bower*, 575 F.2d 499, 502 (5th Cir. 1978) (court ordered government to produce confidential informant for defense interview.)

[101] *See Bower*, 575 F.2d at 502. Mr. Ali argues that the Commission has the authority to compel witnesses interviews under 10 U.S.C. 949j(a)(1), which provides that "Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence . . ." Mr. Ali also cites R.M.C. 701(j) as authority for the Commission to compel interviews and *United States v. Stellato* 74 M.J. 473, 484 (C.A.A.F. 2015); *United States v. Killebrew*, 9 M.J. 154, 160 (C.M.A. 1980); and *United States v. Opager*, 589 F.2d 799, 804 (5th Cir. 1979) to support his argument.

[102] *See* 50 U.S.C. § 3121 – Protection of identities of certain United States undercover intelligence officers, agents, informants, and sources.

b. *Authority of the Commission to Issue a Protective Order*. The Commission is authorized (and required upon motion of the Government) to issue a protective order establishing protocols and procedures governing Defense access to classified information that is not provided in discovery. 10 U.S.C. 949 §§ p-3 and M.C.R.E. 505(e). The Commission is also required to limit the discovery of and access to classified information if the Government submits the appropriate declaration: (A) invoking the classified information privilege; (B) setting forth the potential damage to national security; and (C) signed by a "knowledgeable United States official with the authority to classify information." 10 U.S.C. § 949p-4(a)(1) and M.C.R.E. 505(f)(1)(A). In AE 524L (GOV), the Government has met these requirements through appropriate declarations.[103] Finally, R.M.C. 701(l) authorizes the Commission to regulate the time, place, and manner of discovery, and to issue appropriate protective orders.

c. *Tension between the Defense's Ability to Conduct Independent Investigation and Equal Access to Witnesses and Evidence and the Government's Need to Prevent Disclosure of Classified Information Damaging to the National Security.*

(1) The Commission recognizes the tension between (a) the Defense ability to conduct an independent investigation that is not unreasonably impeded by the Government and right of equal access to witnesses and evidence, and (b) the Government's need to protect classified information, disclosure of which could reasonably cause damage to the National Security.

(A) The Government frames the issue as one of discovery, arguing the procedures it proposed in the 16 March 2018 Draft PO (1) provide the Defense access to UFI witnesses and other CIA officers and contractors; and (2) prevent disclosure of classified

[103] AE 524L (GOV), identifies specific declarations filed in AE 463A (GOV), Government Unclassified Notice of *Ex Parte, In Camera,* Under Seal Classified Filing, filed 22 December 2016.

information for which the Defense does not have a "need to know." The Government further posits that unfettered Defense investigation seeking access to classified information risks disclosure of (1) the identity of covert CIA persons to Defense Counsel and third parties; (2) the classified connection of CIA persons to the RDI program; and (3) other classified CIA information prior to the OCA making a determination that Defense Personnel have a "need to know" that information. Finally, the Government argues such unfettered investigation deprives the Government of the opportunity to offer summaries and substitutions for classified evidence in accordance with 10 U.S.C. § 949p-4 (b)(1) and M.C.R.E. 505(f)(2).

(B) The Defense frames the issue as one of investigation, arguing the Government's proposed procedures unreasonably impede Defense access to witnesses and evidence and, if the Commission adopts them, will result in potential CIA witnesses declining to be interviewed by the Defense and deprive the Accused of effective assistance of counsel.

(2) The Commission must balance these competing interests. As a starting point, the Commission agrees with the Government that, under Supreme Court jurisprudence, an effective Defense Counsel must conduct a *reasonable* investigation and develop *available* evidence for both the merits and sentencing phases of the case.[104] Effective Defense Counsel are not under a duty to leave no stone unturned. On the other hand, the Government's description of the 16 March 2018 Draft PO as "requiring the Defense to adhere to certain minimal procedures when seeking interviews of current and former CIA personnel"[105] vastly understates the Government intrusion into the Defense investigation and equal access to witnesses and evidence.

[104] *See* AE 548C (GOV) at 12-18. *See also Strickland v. Washington*, 466 U.S. 668, 691 (1984).
[105] AE 524HH (GOV) at 1.

(3) To strike the appropriate balance, the Commission finds *United States v. El-Mezain*[106] instructive. In *El-Mezain,* the Fifth Circuit upheld the District Court's decision to allow two witnesses from the Israeli Security Agency (ISI) to testify by pseudonym because revealing their true names "would jeopardize national security and pose a danger to the safety of the witnesses and their families."[107] The Fifth Circuit also upheld the District Court's decision to preclude the Defense from learning the true names of the two ISI witnesses because of the danger to their safety. *El-Mezain* relied on the Supreme Court's reasoning in *United States v. Roviaro,*[108] (a case involving disclosure of a confidential informant's name), that there is "no fixed rule with respect to disclosure . . . [i]nstead there must a balance [of] the public interest in protecting the flow of information against the individual's right to prepare his defense" which depends on "the particular circumstances of each case."[109] When assessing materiality of the name of the informant to the Defense, *Roviaro* examined how close the relation was between the informant and the offenses with which the defendant was charged. The closer the relation, the greater the materiality to the Defense.[110] The Commission agrees with the *El-Mezain/Roviaro* appproach. Although the AE 524 series involves the Government's proposed protocol for Defense interviews of CIA witnesses rather than witness testimony by pseudonym, the Commission must, as did the *El-Mezain/Roviaro* courts, address Defense contentions that the failure to know the witnesses' true identities negatively impacts the Defense ability to "verify [the witnesses'] credentials or investigate them for prior acts undermining their veracity[, as] they could not present opinion and reputation evidence about their character for untruthfulness,

[106] 664 F.2d 467 (5th Cir. 2011), *cert. den. El-Mezain v. United States,* 133 S. Ct. 525 (2012).
[107] *Id.* at 490. The Fifth Circuit analyzed the issue under the Sixth Amendment Right to Confrontation.
[108] 353 U.S. 53, 62 (1957).
[109] *El-Mezain* at 491 (quoting *Roviaro* at 131). *El-Mezain* also distinguished *Smith v. Illinois,* 390 U.S. 129 (1968), (finding error to allow the witness to testify via pseudonym in a drug case) because *Smith* did not involve classified information or witness safety issues. *Id.*
[110] *Roviaro,* 353 U.S. at 63.

and they could not develop other impeachment evidence."[111] Thus, the Commission will analyze the unique circumstances of this case and the relationship between the CIA witnesses encompassed by the 16 March 2018 Draft PO and the offenses the Accused are charged with in arriving at the appropriate balance with respect to the 16 March 2018 Draft PO.

(4) Upon Government request, the Commission is required to issue a protective order against the disclosure of classified information that has been "disclosed by the United States to any Accused" …*or has otherwise been provided to, or obtained by,* any such accused in such military commission." 10 U.S.C. § 949p-3 and M.C.R.E. 505(e) (emphasis added). However, these authorities do not require the Commission to adopt the particular protective order proposed by the Government. As with Protective Order #1,[112] which was issued after extensive litigation and amended several times, the Commission looks to craft a protective order that best balances the Government's interest in protecting national security while minimizing Government intrusion into the Defense investigation and access to witnesses and evidence.

d. *16 March 2018 Draft PO*. The Commission finds the **16 March 2018 Draft PO** and **5 July 2018 Guidance** to be the current Government guidance germane to its resolution of the issues raised in the AE 524 series. As a foundational matter, the Commission finds the Government's proposed 16 March 2018 Draft PO overbroad in two respects: (1) it precludes the Defense from contacting any CIA person (overt or covert) and affiliated individuals unless the CIA person is one of 25 officially acknowledged CIA persons; and (2) it does not provide consistent guidance for Defense Personnel to follow. The protocol practically prohibits Defense Personnel contact with almost all CIA persons, and functionally precludes the Defense from independently conducting pre-trial investigations involving the CIA RDI program and any other

[111] *Id*. at 490.
[112] AE 013BBBB, *Third Amended* Protective Order #1.

issue involving CIA persons. It also essentially prohibits the Defense from investigating potential lines of impeachment for these witnesses. The lack of consistent guidance allows excessive (and, in the Commission's view, unnecessary) Government exposure to Defense strategy and lines of questioning. Finally, as demonstrated by the supplements filed by Messrs. Ali and bin 'Attash, the protocol established by the 16 March 2018 Draft PO unreasonably chills Defense efforts to persuade CIA persons to consent to an interview. Accordingly, the Commission concludes the 16 March 2018 Draft PO unreasonably impedes the Defense's ability to investigate their case and access witnesses and evidence. The Government protocol as currently structured has the balance too heavily weighted in favor of the Government's interest in protecting national security. Conversely, the Commission concludes that declining to issue any protective order with respect to Defense interviews with CIA persons too heavily weights the Defense interests in independent investigation and equal access to witnesses and evidence over the Government interest in protect against disclosure of classified information that could reasonably cause damage to the national security. The Commission concludes (with one exception) that modifications to the 16 March 2018 Draft PO strike an appropriate balance that is reasonable and provide the Defense with substantially the same ability to make a defense as would discovery of or access to the specific classified information.[113]

[113] The Commission recognizes it has approved summaries and substitutions for original classified information regarding the RDI program and that the summaries included identification of certain CIA personnel by UFI. *See* AE 308HHHH Order, Government Amendment to Government Motion To Request Substitutions And Other Relief Regarding Classified Information Responsive to Paragraphs 2.d., 2.f., and 2.g. of the Commission's Ten-Category Construct, dated 19 May 2017. In that order, the Commission found that the summaries and substitutions provide the Accused with substantially the same ability to make a defense as would discovery of, or access to, the original classified intelligence information. The issues in the AE 308 series did not involve the Government attempts to limit or control Defense investigation or access to witnesses and evidence raised in the AE 524 series.

e. *Commission-Issued Protective Order #4*.

(1) The **5 July 2018 Guidance** establishes clear, workable guidance from the OCA regarding the permissible and impermissible scope of Defense interviews of CIA persons regarding the RDI program. The guidance prevents the Defense from eliciting information that (1) reveals the foreign countries in which the Accused were detained until 6 September 2006; (2) would reveal the names, identities, and physical descriptions of any persons involved with the capture, transfer, detention, or interrogation of the Accused from time of capture until 6 September 2006; and/or (3) would reveal the Accused's dates of transfer beyond month and year. The Government has sought to protect the same information in Protective Order #1.[114] This clear, workable guidance reflects the OCA "need to know" determination for the scope of Defense Personnel interviews of CIA persons regarding the RDI program. It also alleviates the requirement for Defense Personnel to go through the Government to the OCA with a synopsis for each requested interview of a CIA person. The Commission will adopt the 5 July 2018 Guidance in Protective Order #4 (which will be issued in tandem with this Ruling).

(2) Protective Order #4 will also narrow the scope of the CIA persons who fall within the interview protocol by dividing CIA persons into four categories: (1) Overt CIA Person/RDI Involvement Unclassified (Defense Personnel may contact and may discuss the RDI program without going through the protocol); (2) Overt CIA Person/Non-RDI (Defense Personnel may contact but may not discuss the RDI program without going through the protocol); (3) Overt CIA Person/RDI Classified (Defense Personnel may contact but may not discuss the RDI program without going through the protocol, or contact affiliated persons for the purpose of learning about the CIA person's involvement in the RDI program); and (4) Covert

[114] *See* AE 013BBBB *Third Amended* Protective Order #1 at 5.

CIA Person (Defense Personnel may not contact without going through the protocol and may not contact affiliated persons.) The Government seeks to prevent disclosure of any classified information to the Defense prior to an OCA determination that the Defense has a "need to know" it. Protective Order #4 by its terms incorporates the OCA determinations regarding the scope of Defense interviews about the RDI program. With respect to classified information CIA persons possess about areas other than the RDI program, Protective Order #4 assigns the responsibility of OCA coordination to the witness in possession of the classified information, consistent with any applicable non-disclosure agreement.[115]

(3) The final interest advanced by the Government in support of the 16 March 2018 Draft PO is that the protocol would allow the Government to propose summaries and substitutions for the classified information the Defense would seek to elicit from a CIA person who agreed to a Defense interview. The Government has also advised the Commission that the 16 March 2018 Draft PO was intended to facilitate Defense interviews of CIA persons.[116] If this is the Government's stated intent, the Commission is uncertain how such a summary/substitution process would occur unless it were in lieu of the witness interview.

(4) The Commission concludes Protective Order #4 strikes a reasonable balance under the circumstances between the Defense ability to independently investigate their case and have equal access to witnesses and evidence, and the Government interest both in protecting against disclosure of classified information of which could reasonably cause damage to the

[115] *See* Executive Order 13526 – Classified National Security Information, 29 December 2009, Part 4.1(b) (Safeguarding) "Every person who has met the standards for access to classified information….shall receive contemporaneous training on the proper safeguarding of classified information and on the criminal, civil, and administrative sanctions that may be imposed on an individual who fails to protect classified information from unauthorized disclosure.

[116] AE 524HH (GOV) at 6.

national security and in obtaining an OCA "need to know" determination before classified information is disclosed.

f. *Does Protective Order #4 Provide the Accused with Substantially the Same Ability to Make a Defense as Would Discovery of or Access to the Specific Classified Information?*

(1) The Commission now turns to examine whether Protective Order #4 provides the Accused with substantially the same ability to make a defense as would discovery of or access to the specific classified information. In this examination, the Commission applies the *El-Mezain/Roviaro* analysis, which considers how closely the potential CIA witnesses are related to the offenses of which the Accused are charged.

(2) The Accused are charged with offenses culminating in the attacks of 11 September 2001. The parties assert that all of the Accused were captured in 2002 – 2003, well after 11 September 2001 (Mr. bin al Shibh in September 2002; Messrs. Mohammad and Hawsawi in March 2003; and Messrs. bin 'Attash and Ali in April 2003). [117] The techniques in the RDI program were not applied to any of the Accused until after their capture. Thus, none of the CIA RDI witnesses are fact witnesses to any of the offenses charged.

(3) The Government has given notice of intent to offer "clean team statements" given by the Accused to the FBI in 2007 (FBI Clean Team Statements).[118] That notice also stated the Government recognized that the Defense intended to challenge the voluntariness of the FBI Clean Team Statements and allege the statements were derived from the use of interrogation techniques that constituted torture while the Accused were in CIA custody from the date of their

[117] *See* AE 031, Joint Defense Motion to Dismiss For Unlawful Influence, filed 11 May 2012; AE 524L (GOV).
[118] *See* AE 538H (Gov), Government Notice of Exhibit Referenced During AE 538 Motion Series Argument, filed 27 July 2018.

capture until the date of their transfer to U.S. Naval Station, Guantanamo Bay, Cuba (GTMO) in September 2006.[119]

(4) *Coerced/Involuntary Statements.* The M.C.A. 2009 provides the Accused with particular due process and self-incrimination protections by prohibiting the admission of compelled and/or involuntary statements into evidence. "No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment . . . whether or not under color of law, shall be admissible in a military commission." 10 U.S.C. § 948r(a). The M.C.A 2009 specifies the instances when statements may be admitted into evidence.

> A statement of the accused may be admitted in . . . only if the military judge finds [] (1) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (2) that [ ] (A) the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or (B) the statement was voluntarily given.

10 U.S.C. § 948r(c). The M.C.A. 2009 also provides certain standards for determining whether a statement was voluntarily given:

> In determining . . . whether a statement was voluntarily given, the military judge shall consider the totality of the circumstances, including, as appropriate, the following: (1) The details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities[;] (2) The characteristics of the accused, such as military training, age, and education level[; and] (3) The lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.

10 U.S.C. § 948r(d).

[119] *See* AE 031 at 8; AE 502O (Gov), Government Consolidated Response to AE 502L (MAH), Mr. Hawsawi's Witness List for the August 2017 Hearings and AE 502J (AAA), Mr. Ali's List of Potential Witnesses for Personal Jurisdiction Hearing, filed 10 July 2017.

(5) The standards found in the M.C.A. 2009 were modeled after standards developed through United States Supreme Court precedent. "Confessions or testimony procured by torture are excluded under the Due Process Clause because such admissions would run contrary to 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" *Brown v. Mississippi*, 297 U.S. 278, 286 (1936). Also, information elicited from statements made under coercive tactics by an interrogator is less likely to be true. *Linkletter v. Walker*, 381 U.S. 618, 638 (1965).

(6) Nevertheless, the use of coercion or torture to obtain a statement from an Accused does not automatically render a subsequent statement inadmissible, if the effects of the initial coercion are found to have dissipated and the subsequent statement is voluntarily made. *United States v. Bayer*, 331 U.S. 532, 540–41 (1947); *Oregon v. Elstad*, 470 U.S. 298, 311–12 (1985). "Involuntary confessions, of course may be given either simultaneously with or subsequently to unlawful pressures, force or threats. The question of whether those confessions subsequently given are themselves voluntary depends on the inferences as to the continuing effect of the coercive practices which may fairly be drawn from the surrounding circumstances." *Lyons v. Oklahoma*, 322 U.S. 596, 602 (1944).

(7) Courts apply a totality of the circumstances test to determine whether a statement is voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). The Commission finds that *Mohammed v. Obama*, a habeas case in the District of Columbia District Court, provides a practicable framework. *See Mohammed v. Obama*, 689 F. Supp. 2d 38, 61–62 (D.D.C. 2009). "The Supreme Court has ruled that the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession.'" *Id.* at 62. (quoting *Oregon v. Elstad*, 470

U.S. at 310). "[C]ourts should examine, *inter alia,* the age, education, intelligence, and mental health of the witness; whether he has received advice regarding his Constitutional rights; the length of detention; the 'repeated and prolonged nature of the questioning'; and the 'use of physical punishment such as the deprivation of food or sleep.'" *Id*. (quoting *Schneckloth v. Bustamonte,* 412 U.S. at 26). "This multi-factor inquiry aims to uncover whether there has been a 'break in the stream of events . . . sufficient to insulate the statement from the effect of all that went before.'" *Id*. (quoting *Clewis v. State of Texas,* 386 U.S. 707, 710 (1967)).

(8) The record reflects the Accused were captured between 2002 and 2003 and remained in CIA custody and subject to the techniques employed through the RDI program until their transfer to GTMO in September 2006. This is a period of 3-4 years. The CIA persons involved in developing and implementing the RDI program on the Accused, many of whom are identified by UFI, are potential fact witnesses and eyewitnesses to the implementation of the RDI techniques on the Accused, the reaction of the Accused to the RDI techniques and the subsequent interrogations of the Accused over a 3-4 year period. Thus, while these CIA persons were not fact witnesses to the offenses charged, they are fact witnesses and eyewitnesses closely related to the 3-4 years of alleged coercion used by the CIA participating in the RDI program to elicit statements from the Accused.

(9) "The military judge *shall* grant the request of the trial counsel to substitute a summary or to substitute a statement admitting relevant facts, or to provide other relief in accordance with paragraph (1), if the military judge finds that the summary, statement, or other relief would provide the accused with substantially the same ability to make a defense as would discovery of or *access* to the specific classified information." 949p-4(b)(3).

(10) The Commission finds that the extensive discovery provided by the Government regarding the RDI program,[120] the extensive information about the RDI program available in open sources,[121] the Government's offer to stipulate to "verifiable facts regarding the

[120] *See e.g.,* AE 542J Order, Government Motion to Request Substitutions and Other Relief Regarding Classified Continuing and Trial Discovery, dated 26 July 2018: AE 308RRRR Order, Government Motion to Request Substitutions and other Relief from Ordered Discovery of Classified Information So As to Comply With Paragraphs 2.c. and 2.h. of AE 397, dated 31 August 2017; AE 308OOOO/AE 497B Order, Government Motion to Request Substitutions and other Relief from Ordered Discovery of Classified Information So As to Comply With Paragraphs 2.b., 2.c., 2.e., 2.h., and 2.j. of AE 397 and Defense Motion to Compel Production of Durham Investigation Documents, dated 17 July 2017; AE 308MMMM Order, Government Motion to Request Substitutions and other Relief Regarding Classified Information Responsive to Paragraphs 2.b, c, e, h, and j of the Commission's Ten-Category Construct, dated 13 June 2017; AE 308LLLL Order, Government Motion to Request Substitutions and other Relief from Classified Information Responsive to Paragraph 2.c. of the Commission's Ten-Category Construct, dated 7 June 2017; AE 308IIII Order, Government Motion to Request Substitutions and other Relief from Classified Information Responsive to Paragraph 2.h. of the Commission's Ten-Category Construct, dated 19 May 2017; AE 308HHHH Order, Government Amendment to Government Motion to Request Substitutions and other Relief Regarding Classified Information Responsive to Paragraphs 2.d., 2.f., and 2.g. of the Commission's Ten-Category Construct, dated 19 May 2017; AE 308CCCC Order, Government Motion to Request Substitutions and other Relief from Classified Information Responsive to Paragraph 2.h. of the Commissions Ten Category Construct, dated 19 April 2017; AE 308BBBB Ruling, Government Motion to Request Substitutions and other Relief from Classified Information Responsive to Paragraph 2.h. of the Commissions Ten Category Construct, dated 19 April 2017; AE 308AAAA Order, Government Motion to Request Substitutions and other Relief from Classified Information Responsive to Paragraph 2.h of the Commission's Ten-Category Construct, dated 19 April 2017; AE 308VVV CORRECTED Order, Government Motion to Request Substitutions and other Relief from Classified Information Responsive to Paragraph 2.h of the Commission's Ten-Category Construct, dated 6 March 2017; AE 308NNN Order, Government Motion to Request Substitutions and other Relief from Classified Information Responsive to Paragraph 2.h. of the Commission's Ten-Category Construct, dated 18 January 2017; AE 308KKK Order, Government Motion to Request Substitutions and other Relief from Classified Information Responsive to Paragraph 2h of the Commission's Ten-Category Construct, dated 17 January 2017; AE 308JJJ Order, Government Motion to Request Substitutions and other Relief from Ordered Discovery Of Classified Information Responsive to Paragraphs 13.i. and 13.j. Of the Al Nashiri Ten-Category Construct, dated 17 January 2017; AE 308III Order, Government Motion to Request Substitutions and other Relief from Ordered Discovery Of Classified Information Responsive to Paragraphs 13.e. Of the Al Nashiri Ten-Category Construct, dated 12 January 2017; AE 308HHH (Corrected Copy) Ruling, Government Motion to Request Substitutions and other Relief from Classified Information Responsive to Paragraph 2h of the Commissions Ten Category Construct, dated 12 January 2017; AE 308GGG Ruling, Government Motion and Memorandum for A Protective Order Pursuant to the Military Commissions Act of 2009, 10 U.S.C § 949-4, § 949-6 and M.C.R.E. 505, dated 12 January 2017; AE 308BBB (Corrected Copy) Ruling, Government Motion to Request Substitutions and other Relief from Classified Information Responsive to Paragraph 2h of the Commissions Ten Category Construct, dated 3 January 2017; AE 308AAA (Corrected Copy) Ruling, Government Motion to Request Substitutions And other Relief from Classified Information Responsive to Paragraph 2.h. of the Commissions Ten Category Construct, dated 3 January 2017; AE 308ZZ (Corrected Copy) Ruling, Government Motion to Request Substitutions and other Relief from Classified Information Responsive to Paragraph 2h of the Commissions Ten Category Construct, dated 29 December 2016; AE 308V Order, Government Motion to Request Substitutions and other Relief from Ordered Discovery of Classified Information Responsive to Paragraphs 13.a. and 13.b. of the Al Nashiri Ten-Category Construct, dated 4 August 2016.

[121] For example, *see* Senate Select Committee on Intelligence's *Study of the CIA's Detention and Interrogation Program,* Findings and Recommendations and Executive Summary, Approved 13 December 2012 and released in redacted form on 9 December 2014 at https://www.intelligence.senate.gov/press/committee-releases-study-cias-detention-and-interrogation-program; JAMES E. MITCHELL, PHD, WITH BILL HARLOW, ENHANCED INTERROGATION

Accused's involvement and treatment within the CIA's former RDI program,"[122] and witness interviews of CIA persons who consent to a Defense interview pursuant to Protective Order #4 **will not** provide the Defense with substantially the same ability to investigate, prepare, and litigate motions to suppress the FBI Clean Team Statements. Specifically, Protective Order #4 will not allow the Defense to develop the particularity and nuance necessary to present a rich and vivid account of the 3-4 year period in CIA custody the Defense alleges constituted coercion.[123]

(11) Under the specific facts of this case, in order to provide the defense with substantially the same ability to make a defense as would discovery of or access to the specific classified information, the Government will not be permitted introduce any FBI Clean Team Statement from any of the Accused for any purpose.

(12) With regard to use of the conditions of confinement of the Accused while in CIA custody for mitigation, the Commission concludes the extensive discovery provided by the Government regarding the RDI program, the extensive information about the RDI program available in open sources, the Government's offer to stipulate "verifiable facts regarding the Accused's involvement and treatment within the CIA's former RDI program," and witness interviews of CIA persons who consent to a Defense interview pursuant to Protective Order #4 will provide the Defense with the substantially the same ability to investigate, prepare, and litigate its mitigation case.

INSIDE THE MINDS OF THE ISLAMIC TERRORISTS TRYING TO DESTROY AMERICA (2016); AND JOSE A. RODRIGUEZ, JR. WITH BILL HARLOW, HARD MEASURES HOW AGGRESSIVE CIA ACTIONS AFTER 9/11 SAVED AMERICAN LIVES (2013).

[122] *See* AE 502O (Gov).

[123] *See United States. v. Karake*, 443 F. Supp. 2d 8, 13 (D.D.C. 2006) (District Court held a five week evidentiary hearing on suppression issues with 22 days of testimony from 19 witnesses.)

(13) The Commission makes no ruling on the impact Protective Order #4 may have on motions yet to be filed.

(14) So long as the FBI Clean Team Statements are not used by the Government for any purpose, the Commission concludes the Government motion for a protective order as modified by the Commission in Protective Order #4, does not unreasonably impede Defense access to witnesses and evidence. *See* R.M.C. 701(j).

5. **Ruling**.

a. The Commission finds further discovery is not necessary to resolve the issues raised here. The Defense motion for discovery and witness information in AE 524Q (AAA) is **DENIED**.

b. Mr. Ali's motion to dismiss, or alternatively, to compel witnesses for interview in AE 524 (AAA) is **DENIED**.

c. The Government motion for a protective order in AE 524L (Gov) is **GRANTED IN PART** as described in the Ruling. The Government motion is otherwise **DENIED**.

6. **Order**. The FBI Clean Team Statements of the Accused are suppressed and the Government will not introduce the statements for any purpose.

So **ORDERED** this 17th day of August, 2018.

//s//
JAMES L. POHL
COL, JA, USA
Military Judge