MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ATTASH, RAMZI BINALSHIBH, ALI ABDUL-AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	AE 36K *ORDER* Government Motion Seeking to Clarify and Amend Trial Conduct Order and Defense Motions to Compel Witnesses and Documents in Response 22 June 2015

1. Motion to Amend Trial Conduct Order

a. On 5 February 2013, this Commission denied a motion by the Defense to declare Rules for Military Commissions (R.M.C.) Rule 703 unconstitutional.[1] Simultaneously this Commission set the procedures for witness requests by the Defense for all witnesses. [2] The Government filed a request to "clarify and amend" AE 036D to define the prosecutions role and responsibilities better.[3] The Government requested four additional paragraphs be added to the order.[4] Among the requests, the Government requested the order include defining government funded witness as any witness that requires "the use of U.S. Government resources, equipment, or personnel or

[1] RULING Defense Motion To Declare RMC 703 Unconstitutional Because It Gives the Prosecution Unilateral Notice of and Control over the Defense Fact and Expert Witnesses, filed 5 February 2013 (AE 036C).
[2] TRIAL CONDUCT ORDER Defense Motion To Declare RMC 703 Unconstitutional Because It Gives the Prosecution Unilateral Notice of and Control over the Defense Fact and Expert Witnesses, filed 5 February 2013 (AE 036D).
[3] Government Motion Seeking to Clarify and Amend Military Commission Trial Conduct Order AE036D Regarding Government-Funded Production of Defense Witnesses and Use of Government Video Teleconference Equipment, filed 17 October 2013 (AE 036E).
[4] *Id.* Attachment H.

when such travel will otherwise result in U.S. Government expense[;]" as well as requiring Defense to consult the Prosecution before using video teleconferencing to present witnesses.[5]

b. Mr. Aziz Ali responded by arguing the Government was attempting to gain *de facto* control over the Defense's ability to produce voluntary witnesses to appear before the Commission without Government production and create an ability to veto Defense witnesses' appearances at hearings.[6] In addition to requesting denial of the Government's clarification language, Mr. Aziz Ali also requested this Commission to rule that the "[G]overnment is required to provide travel and lodging assistance for witnesses who agree to appear voluntarily on behalf of the defense, without regard to its assessment of the witnesses' materiality."[7]

c. Mr. Mohammad responded similarly, arguing that the "Prosecution is asking for an expansion of power under R.M.C. 703."[8] Mr. Mohammad also requested this Commission amend AE 036D to distinguish between voluntary witnesses and witnesses that the Defense requests the Government to produce. He further moved to strike a portion of the Convening Authority's Standard Operating Procedure (SOP) for Witness Travel that requires travel arrangements must not be made for a witness whose travel has not been "approved by trial counsel, ordered by the convening authority, or ordered by the military judge."[9]

d. Mr. Bin 'Attash replied by asking this Commission to deny the request and to rule witnesses who are authorized or will pay their own way to Guantanamo Bay need not be

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[5] *Id.*
[6] Mr. al Baluchi's Response To Government Motion Seeking to Clarify and Amend Military Commission Trial Conduct Order AE036D Regarding Government-Funded Production of Defense Witnesses and Use of Government Video Teleconference Equipment, filed 31 October 2013 (AE 036F(AAA)).
[7] *Id.* at 1.
[8] Mr. Mohammad's Response To Government Motion Seeking to Clarify and Amend Military Commission Trial Conduct Order AE036D Regarding Government-Funded Production of Defense Witnesses and Use of Government Video Teleconference Equipment, filed 7 November 2013 (AE 036F (Mohammad)).
[9] *Id.* at 11.

"produced" by the government.[10] They also requested this Commission reconsider the determination that R.M.C. 703(c)(2) is constitutional.

2. Motion to Compel Discovery

a. On 22 November 2013, Mr. Aziz Ali filed a Motion to Compel Discovery Related to Policies Governing Defense Witnesses.[11] Mr. Aziz Ali's concern was the policies governing the witness-production role assigned to the prosecution by the Convening Authority granted perceived "control over [D]efense witnesses."

b. The Government previously produced standard operations procedures issued by the Convening Authority.[12] In its response, the Government argued the Defense did not present an adequate theory of relevance to justify the compelled production of evidence.[13]

3. Motion to Compel Witnesses

a. On 22 November 2013, Mr. Aziz Ali filed a motion requesting this Commission compel the government to identify, make available for interview, and produce for testimony witnesses regarding costs identified in AE 036E.[14] In AE 036E, the Government relied, in part, on the cost of witness production. Mr. Aziz Ali stated he simply "seeks to investigate the basis for the unsubstantiated prosecution's factual financial claims."

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[10] Defense Response to Government Motion Seeking to Clarify and Amend Military Commission Trial Conduct Order AE036D Regarding Government-Funded Production of Defense Witnesses and Use of Government Video Teleconference Equipment, filed 7 November 2013 (AE 036F (WBA)).
[11] Defense Motion to Compel Discovery Related to Policies Governing Defense Witnesses, filed 22 November 2013 (AE 36G (AAA)).
[12] See AE 036E, Attachment B.
[13] Government Response To Defense Motion to Compel Discovery Related to Policies Governing Defense Witnesses, filed 4 December 2013 (AE 36I).
[14] Defense Motion to Compel Witness(es) Regarding Witness Production Expense, filed 22 November 2013 (AE 36H (AAA)).

b. The Government's response requested this Commission to deny the requested relief.[15] The Government argued because the request in AE 036E is to have this Commission affirm and clarify its ruling but not change the requested relief are not needed.

4. Law

a. The Military Commissions Act of 2009 (M.C.A. 2009) (10 U.S.C. §§948a, *et seq*) gives the Defense a reasonable opportunity to obtain witnesses (10 U.S.C. §949j). "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. §§948j. The opportunity to obtain witnesses and evidence is not unlimited. For example, the Defense must demonstrate the necessity for an expert witness. *United States v. Warner,* 62 M.J. 114 (C.A.A.F. 2005). R.M.C. 703(c)(2) requires the defense to provide trial counsel with certain information that has been upheld under Rule for Courts Martial (R.C.M.) 703.[16]

b. M.C.A. 2009 provides the accused a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense. *See* 10 U.S.C. § 949j. R.M.C. 701(c)(1) requires the Government to produce evidence that is "material to the preparation of the defense." "Each party is entitled to the production of evidence which is relevant, necessary and noncumulative," and evidence is relevant under the MCA when it "contribute[s] to a party's presentation of the case in some positive way on a matter in issue." R.M.C. 703(f)(1) and Discussion.

[15] Government Response To Defense Motion to Compel Witnesses Regarding Witness Production Expense, filed 4 December 2013 (AE 036J).
[16] R.M.C. 703 is largely patterned on and comparable to R.C.M. 703.

5. Discussion.

a. There are logistical realities included in every Court-Martial and Commission. Witnesses must be subpoenaed and transported either to the hearing or a site where they can appear by video teleconference. Consequently, the Defense will have to give notice and information to the Government so the requested witness can be brought to United States Naval Station Guantanamo Bay, Cuba or to a video-teleconferencing site. This process has been repeatedly upheld by military appeals courts.[17] The Commission agrees that R.M.C. 703(c)(3) does not grant the Government the right to preliminarily determine the materiality of VTC witnesses, voluntary or otherwise. If the Defense disagrees with a Government decision regarding production a witness, the Defense can petition this Commission to order production. This process was laid out in AE 036D, as well as delineated in R.M.C. 703(c)(3).

b. The Commission is not persuaded the extensive changes and additions to AE 036E requested by the Government are necessary.

c. Defense amendment requests similarly have not persuaded this Commission to amend AE 036E. Mr. Aziz Ali's request[18] is superfluous, if the Government overreaches or denies a witness on any grounds, materiality included, the remedy set forth, both within AE 036E and the R.M.C., is to move this Commission. Mr. Mohammad's request[19] is also not needed. The Commission will continue to adhere to legal precedent in regards to "production" and not redefine the term "production." The Commission is not persuaded to "reinforce" legal precedent by continual orders, binding legal authority is just that, binding, and this Commission will apply it as such. Mr. Mohammad's Motion to Strike is similarly not needed, without opining on the

[17] *See United States v. Arias*, 3 M.J. 436 (C.M.A. 1977); *United States v. Williams,* 3 M.J. 239 (C.M.A. 1977); *United States v. Dixon,* 8 M.J. 858 (N.M.C.M.R. 1980).
[18] AE 036F (AAA).
[19] AE 036F (KSM).

constitutionality of the provision, as AE 036D sets for the protocol used if the Defense requests relief from any action by the Convening Authority in regards to witnesses regardless if that action be pursuant to a standard operating procedure (SOP) or otherwise.

d. Mr. Bin 'Attash presented no new law, facts, or any other authority that has persuaded this Commission to reconsider its determination that R.M.C. 703(c)(2) is constitutional. As previously stated, logistical realities of this Commission, as with many Courts-Martial, can be complex. Any decisions, denials, limitations, or any other ostensibly adverse impacts to witnesses should be handled under AE 036D. As such, it would not be prudent for this Commission to establish an all-encompassing rule in regards to any witness willing to pay their own way.

c. Because the Government's request for amending this Commission's order is denied, the Defense's requests of production of witnesses and additional documents are not required or necessary.

6. Given the nature of the pleadings and relief requested, pursuant to Rule for Military Commission 905(h) and Military Commissions Trial Judiciary Rule of Court 3.9, the requests for oral argument are **DENIED**.

7. Accordingly,

a. Mr. Bin 'Attash's Motion for Reconsideration of the Constitutionality of 703(c)(2), AE 036F(WBA), is **DENIED**;

b. The Government's Motion Seeking to Clarify and Amend Military Commission Trial Conduct Order AE036D Regarding Government-Funded Production of Defense Witnesses and Use of Government Video Teleconference Equipment, AE 036E, is **DENIED;**

c. Mr. Aziz Ali's, Mr. Mohammad's, and Mr. Bin 'Attash's motions to amend AE 036D, AE 036F(AAA), AE 036F(KSM), and AE 036F(WBA), are **DENIED;**

d. Mr. Mohammad's motion to strike a portion of the Convening Authority's SOP for Witness Travel (AE 036F(KSM)), is **DENIED**;

e. Mr. Aziz Ali's Motion to Compel Discovery Related to Policies Governing Defense Witnesses (AE 036G(AAA)) is **DENIED;** and,

f. Mr. Aziz Ali's Motion to Compel Witness(es) Regarding Witness Production Expense (AE 036H(AAA)) is **DENIED.**

So ORDERED this 22nd day of June 2015.

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JAMES L. POHL
COL, JA, USA
Military Judge