

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA	AE 080A
v.	Government's Response to Joint Defense Motion To Preserve Evidence of Any Existing Detention Facility
KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	27 September 2012

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v.

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WALID MUHAMMAD SALIH
MUBARAK BIN ATTASH,
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HAWSAWI

Government's Response
To Joint Defense Motion
To Preserve Evidence of Any Existing
Detention Facility

27 September 2012

1. Timeliness

~~(U)~~ This response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.c(1).

2. Relief Sought

~~(TS//NF)~~ The prosecution respectfully requests that the Military Judge find that the relief requested in AE 080 is moot. The prosecution agreed in the prior Commission to preserve the status quo of any facility that existed as of 20 April 2009 and has not deviated from that agreement. Although the previous case was dismissed without prejudice, the prosecution has not disturbed the status quo of any existing detention facility as of 20 April 2009.

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Accordingly, this Commission should take no action on this motion at this time.

3. **Burden of Proof**

~~(U)~~ As the moving party, the defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1).

4. **Facts**

~~(S//NF)~~ On 22 January 2009, President Obama issued Executive Order 13491, which required the CIA to close any detention facilities that it operated. During the 2008-2009 commission proceedings, the defense for Binalshibh filed several discovery motions seeking access, discovery, and preservation orders regarding overseas detention facilities. See AE D-108, *Defense Motion Requesting a Court Order Directing the Government to Preserve Central Intelligence Agency Detention Facilities Used to Detain High-Value Detainees*, filed 20 April 2009; AE 121, *Defense Motion for Appropriate Relief: Order Granting Access to View and Inspect Central Intelligence Agency Detention Facilities Used to Detain High-Value Detainees*, filed 25 June 2009. On 20 April 2009, defense for Binalshibh sought an order directing the government to preserve CIA detention facilities used to detain high-value detainees, and all fixtures, instrumentalities and other equipment used in those facilities. See AE D-108. Without conceding that access to, or information about, the physical structures in which the accused may have been detained by the CIA was required to be disclosed to the defense under R.M.C. 701 or R.M.C. 703, the prosecution agreed to preserve the status quo that existed as of the date of the defense filing with respect to the facilities, until a hearing could be held upon resumption of

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military commission proceedings. See AE D-108 *Government Response*.

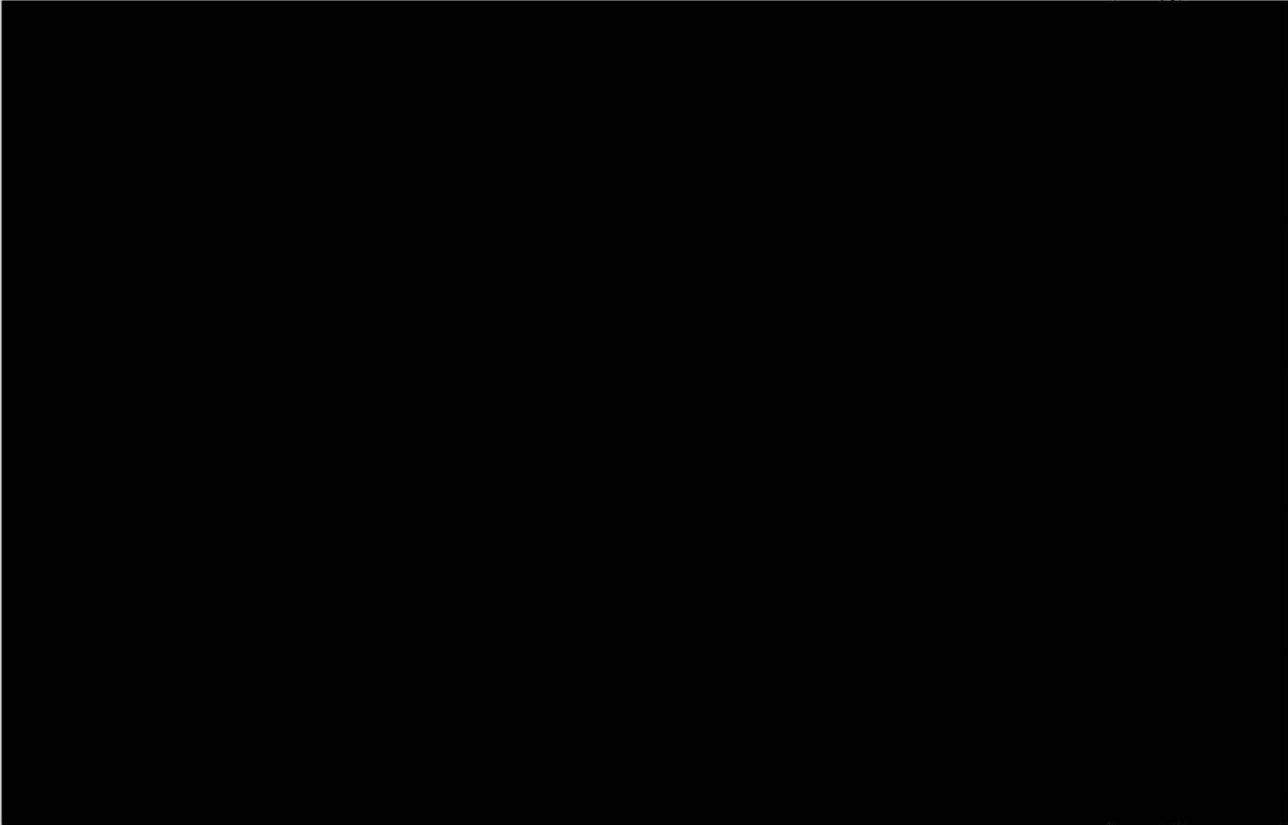
~~(U)~~ On 21 January 2010, charges against the five accused were withdrawn and dismissed, without prejudice, by the Convening Authority.

5. Discussion

~~(U)~~ The defense motion in AE 080 seeks an unnecessary order from this Commission regarding the preservation of any CIA detention facility that may have been used to detain the accused. The prosecution agreed in the prior Commission to preserve the status quo of any facility that existed as of 20 April 2009 and has not deviated from that agreement. Further, the prosecution agreed to provide notice to the Commission and detailed military defense counsel for Binalshibh, should there be any change in plans that deviated from the plan to preserve the status quo. See AE D-108 filed 20 May 2009.

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6. Conclusion.

~~(S//NF)~~ For the reasons explained above, the prosecution respectfully requests that the Military Judge find that the relief requested in AE 080 is moot, because the prosecution has previously agreed to preserve the status quo 



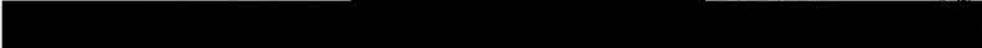
7. Oral Argument

~~(U)~~ The prosecution is willing to waive oral argument but requests an opportunity to be heard should the defense be granted oral argument.

8. Witnesses and Evidence

None.

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9. Attachments.

A. Certificate of Service dated 27 September 2012.

Respectfully submitted,

/s/

Joanna P. Baltes
Deputy Trial Counsel

Michael J. Lebowitz
Captain, JA, U.S. Army
Assistant Trial Counsel

Mark Martins
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CERTIFICATE OF SERVICE

I certify that on the 27th day of September 2012, I filed AE 080A, the **Government's Response to Joint Defense Motion To Motion of Mr. Mohammad, Mr. bin 'Attash, Mr. bin al Shihh, Mr. al Baluchi and Mr. Hawsawi to Preserve Evidence of Any Existing Detention Facility**

//s//

Michael J. Lebowitz
Captain, JA, U.S. Army
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