

UNCLASSIFIED//FOR PUBLIC RELEASE  
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 133QQ

**RULING**

**Emergency Defense Motion**  
to Remove Sustained Barrier to  
Attorney-Client Communication and  
Prohibit Any Electronic Monitoring and  
Recording of Attorney-Client Communication  
in any Location, including Commission  
Proceedings, Holding Cells, and Meeting  
Facilities and to Abate Proceedings

**30 November 2016**

1. During a session of the Commission on 28 January 2013, audio and video transmissions between the Expeditionary Legal Center Courtroom (ELC Courtroom) (a.k.a Courtroom #2) and the public viewing areas<sup>1</sup> were cut<sup>2</sup> after one of the Defense Counsel referenced the title of an unclassified motion.<sup>3</sup> This closure of the proceeding was not ordered or approved by the Military Judge or the Court Information Security Officer (CISO.)<sup>4</sup> The hearing was suspended until ELC Courtroom personnel could reset video and audio transmissions of the hearing.

<sup>1</sup> The public viewing areas include the public seating in the ELC Courtroom galley and closed circuit TV sites authorized by the Commission. *See*: AE 007 Government's Motion For Public Access To Open Proceedings of this Military Commission Via Closed-Circuit Television Transmission to Remote Locations, filed 19 April 2012, *et seq.*; AE 022, Defense Motion To Grant Public Access to Commission Designated Broadcast Sites, filed 4 May 2012, *et seq.*; AE 033, Government's Motion For Public Access To Open Proceedings of this Military Commission Via Closed-Circuit Television Transmission to Remote Locations, filed 11 May 2012, *et seq.*; AE 068, Amended Order, Public Access To Open Proceedings of this Military Commission Via Closed-Circuit Television Transmission to Remote Locations, dated 24 August 2012.

<sup>2</sup> The physical manifestation of halting the transmission is the triggering of a red light on the bench thus later references in argument and pleadings to a "red light" is a cryptonym for a cessation of the public transmission.

<sup>3</sup> Unofficial/Unauthenticated Transcript of *the Khalid Shaikh Mohammed et al.* (2) Hearing Dated 10/19/2012 (*sic*) from 1:31 PM to 2:46 PM at p. 1445. *NOTE*: the correct date of the session is 01/28/2013 from 1:31 PM to 2:46 PM.

<sup>4</sup> At the session of the Commission the next day the military judge stated on the record:

Yesterday during the close of the hearing, or close to the close of the public hearing, the red light went on and the feed was discontinued to the general public. The purpose of the 40-second delay, which for those who are watching on television, is designed to prevent spillage of classified information. That is its sole purpose. In accordance with that, there are various guidance given to the court security officer of when that light should go on or not. However, only the judge has authority to close the courtroom accordance with the Rule For Military Commission 806.

## 2. Procedural Background:

a. On 31 January 2013, the Defense filed a motion<sup>5</sup> raising concerns that their attorney-client oral communications were being monitored both in the ELC Courtroom, and in client interview rooms located at the detention center (identified as “ECHO II.”) In support, the motion offered a number of vignettes leading to the Defense supposition there was “credible circumstantial evidence that their privileged conversations are being monitored and recorded by the Government, to include the Joint Task Force (JTF) and Joint Detention Group (JDG) at Guantanamo; and/or other government agencies (OGA), to include the Central Intelligence Agency (CIA).” The Defense contended the Fifth, Sixth, and Eighth Amendments to the U.S. Constitution, Section 949s of the Military Commissions Act of 2009, and Common Article 3 of the 1949 Geneva Conventions “entitled the Accused to representation by competent counsel, and placed upon the Government the burden of demonstrating why “they are not entitled to such protections during these proceedings.” Asserting the Accused, if detained in a “civilian facility” and awaiting trial on capital charges could not “legally” be subjected to monitoring, and there is no legitimate government interest served by monitoring attorney-client communications, the Accused sought, as relief, a Commission order:

---

So when this happens, the explanation is given to me, and I decide whether or not it is appropriate that that particular information should have been held in a closed session. It is not the court security officer's decision or anybody else's whether a particular session or part of a session is closed. Again, the 40-second delay is a prophylactic measure to avoid a more difficult unringing of the bell if improper information is disseminated.

In this particular case, Mr. Nevin's comment that resulted in the interruption I find is not a valid basis for the court to have been closed. Accordingly, I will summarize what Mr. Nevin said in open court that was basically the part that the general public missed. Basically he simply reiterated the caption in a particular appellate exhibit that is unclassified, specifically 080 Joint Defense Motion to Preserve Evidence of Any Existing Detention Facility. And again, closure of the court is not the decision of anybody but the military judge.

See Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 1/29/2013 from 9:09 AM to 10:08 AM.

<sup>5</sup> AE 133 (KSM et al), Emergency Defense Motion to Remove Sustained Barrier to Attorney-Client Communication and Prohibit Any Electronic Monitoring and Recording of Attorney-Client Communication in any Location, including Commission Proceedings, Holding Cells, and Meeting Facilities and to Abate Proceedings, filed 31 January 2013. *NOTE:* this motion was originally filed as a classified filing but, after review, is now unclassified; see [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE133\(KSM%20et%20al\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE133(KSM%20et%20al)).pdf).

protecting and ensuring their ability to exercise their rights to communicate and consult in private with their respective counsel, their other defense team members and persons necessary to their legal representation; and specifically prohibiting the Government and all others operating with its knowledge, irrespective of whether it is with the Government's direction or control; and/or any individuals or agencies with official access to Guantanamo Bay Naval Base, Guantanamo Bay, Cuba, from electronically monitoring and/or recording any of the Accused's communications with defense personnel at any time, to include during legal visits and Commission proceedings, and to abate Commission proceedings until such time as this matter is properly resolved.

b. On 6 February 2013, Mr. bin 'Attash filed a supplement<sup>6</sup> to the original Defense motion and, in addition to reiterating the relief sought earlier, expanded Defense concerns to add suspected monitoring in the holding cells adjacent to the ELC Courtroom.

c. On 6 February 2013, the Defense filed a motion<sup>7</sup> to permit them to listen to the official court reporter audio recordings of the proceedings to ascertain whether the court reporter audio feeds provided a capability to overhear in-court conversations between Counsel and the Accused. The Government response<sup>8</sup> imposed no objection to the Defense request but cautioned there was no segregation between the recorded tracks of the various courtroom microphones, thereby permitting any Counsel, if there were in fact any spillage, to hear whatever might have been captured from conversations of the other parties. The Commission granted the motion to review the audio recordings and reiterated the concerns of the Government.<sup>9</sup>

d. The response<sup>10</sup> of the Government to the initial Defense motion (AE 133), filed on 7 February 2013, asserted:

No entity of the United States Government is listening, monitoring or recording communications between the five Accused and their counsel at any location.

---

<sup>6</sup> AE 133 (WBA Sup), Walid bin 'Attash's Supplement to Emergency Defense Motion to Remove Sustained Barrier to Attorney-Client Communication and Prohibit Any Electronic Monitoring and Recording of Attorney-Client Communication in any Location, including Commission Proceedings, Holding Cells, and Meeting Facilities and to Abate Proceedings, filed 6 February 2013.

<sup>7</sup> AE 133E, Joint Motion to Review Court reporter Audio Recordings, filed 6 February 2013.

<sup>8</sup> AE 133I, Government Response to Joint Motion to Review Court reporter Audio Recordings, filed 7 February 2013.

<sup>9</sup> AE 133NN, Order, Joint Defense Motion to Review Court Reporter Audio Recordings, dated 23 May 2014.

<sup>10</sup> AE 133A, Government's Response to Emergency Defense Motion to Remove Sustained Barrier to Attorney-Client Communication and Prohibit Any Electronic Monitoring and Recording of Attorney-Client Communication in any Location, including Commission Proceedings, Holding Cells, and Meeting Facilities and to Abate Proceedings, filed 7 February 2013.

And later:

The Prosecution states unequivocally that the evidence presented in regard to AE 133 and as a matter of fact, that Counsel's privileged communications with the Accused are not being listened to, monitored or recorded by the United States Government.

The Government asked the Commission to deny the Defense motions as they failed to offer any credible evidence to support their contentions.

e. By way of reply<sup>11</sup> the Defense reaffirmed their belief that actions of the Government infringed upon the Accused's right to "effective assistance of counsel." The Defense also expanded their requested relief, seeking (1) a meeting location "free of any microphones, particularly any which may be lined to recording devices;" (2) a specific prohibition on the "flow of the unfiltered audio feed to the OCA or anyone else;" and (3) a requirement that the Government "prove that any evidence it proposes to use is derived from a legitimate source wholly independent of the information disclosed in the recorded conversations."

**3. Oral Argument.** The Defense requested argument in the original motion and the supplement thereto,<sup>12</sup> a request reiterated by the Government in their response.<sup>13</sup> A decision to grant oral argument on a written motion is within the sole discretion of the Military Judge.<sup>14</sup> Throughout the course of these proceedings both parties have advanced their respective positions, both directly<sup>15</sup>

---

<sup>11</sup> AE 133Q (KSM et al), Defense Reply to AE 133A Government's Response to Emergency Defense Motion to Remove Sustained Barrier to Attorney-Client Communication and Prohibit Any Electronic Monitoring and Recording of Attorney-Client Communication in any Location, including Commission Proceedings, Holding Cells, and Meeting Facilities and to Abate Proceedings, filed 12 February 2013 (classified). An unclassified, redacted, copy of the pleading is found at [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE133Q\(KSM%20et%20al\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE133Q(KSM%20et%20al)).pdf).

<sup>12</sup> AE 133 (KSM et al) and AE 133 (WBA Sup).

<sup>13</sup> AE 133A.

<sup>14</sup> Military Commissions Trial Judiciary Rule of Court 3.5 m (1 September 2016).

<sup>15</sup> Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 10/19/2012 (sic) from 1:31 PM to 2:46 PM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 1/29/2013 from 9:09 AM to 10:08 AM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 1/31/2013 from 9:01 AM to 9:22 AM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 1/31/2013 from 9:40 AM to 10:19 AM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 1/31/2013 from 10:40 AM to 11:25 AM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/11/2013 from 9:02 AM to 10:12 AM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/12/2013 from 9:02 AM to 10:07 AM; Unofficial/Unauthenticated Transcript of

and indirectly,<sup>16</sup> a number of times. Further oral argument is not necessary for the Commission's consideration of the issue before it. The request for [further] oral argument is **DENIED**.

#### 4. Findings of Fact:

a. In rendering this Ruling the Commission considered the pleadings of all parties; the exhibits<sup>17</sup> submitted to the Commission for consideration, and the declarations,<sup>18</sup> depositions, or stipulations of expected testimony,<sup>19</sup> or testimony from pertinent witnesses.<sup>20</sup>

---

the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/12/2013 from 10:25 AM to 11:42 AM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/12/2013 from 1:00 PM to 2:37 PM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/12/2013 from 2:47 PM to 5:19 PM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/13/2013 from 10:28 AM to 12:02 PM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/13/2013 from 1:02 PM to 2:36 PM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/14/2013 from 4:04 PM to 5:43 PM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Motions Hearing Dated 8/22/2013 from 12:00 PM to 12:43 PM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Motions Hearing Dated 8/22/2013 from 2:18 PM to 4:28 PM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Motions Hearing Dated 12/18/2013 from 9:03 AM to 10:32 AM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 5/31/2016 from 3:28 PM to 4:17 PM; and sessions, closed pursuant to Military Commission Rule of Evidence 505 (h) to address classified issues, on 28 January 2013; 20 June 2103; and 16 December 2013.

<sup>16</sup> e.g. See: AE 284 (WBA), Defense Motion to Compel the Production of Information Related to the Monitoring and/or Collection of Attorney-Client Privileged Information, filed 26 March 2014; AE 292, Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused, filed 14 April 2014; and AE 367 (MAH), Motion to Dismiss Because National Security Considerations Make a Fair Trial Impossible, filed 22 July 2015. See also: Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Motions Hearing Dated 6/16/2014 from 9:05 AM to 11:05 AM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Motions Hearing Dated 8/14/2014 from 11:18 AM to 1:00 PM; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/11/2015 from 10:00 AM to 11:15 AM.

<sup>17</sup> **Exhibits:**

Attachment B, AE 133 (WBA Sup), MEMORANDUM FOR Commander, JTF-Guantanamo Joint Detention Group, dated 19 May 2008, SUBJECT: Military Commissions Counsel Visitation of Detainees Practices Guide (Buzby Memo);

Attachment C, AE 133 (WBA Sup), MEMORANDUM, dated 27 December 2011, SUBJECT: Order Governing Logistics of Defense Counsel Access to Detainees Involved in Military Commissions;

AE 133T (AAA), ELC Courtroom Wiring Schematic;

AE 133U (KSM), p. 1, Email [REDACTED] Capt Thomas J. Welsh, dated October 12, 2012, 12:56 PM; Subject: Re Question Regarding Monitoring Attorney Client Meetings;

AE 133U (KSM), pp. 2-8, Email from Paul W. Rester [REDACTED] dated August 05, 2008, 12:22; Subject: Re U.S. May Have Taped Visits To Detainees;

AE 133U (KSM), p. 9-11, Email [REDACTED] CAPT Patrick McCarthy, dated May 08, 2008, 2:45; Subject: eavesdropping article;

AE 133U (KSM), pp. 12-14, Email from CAPT Patrick Rabun [REDACTED] dated March 08, 2012, 6:37 AM; Subject: FW HOT (unclassified);

AE 133U (KSM), p. 15, Email from CAPT Thomas J. Welsh to COL John Bogden, dated February 05, 2013, 1:33 PM; Subject: JDG Order On Monitoring;

AE 133U (KSM), pp. 16-17, Email from CAPT Thomas J. Welsh to COL John Bogden, dated February 08, 2013, 9:38; Subject: FW Request for Interview;

AE 133U (KSM), p. 18, Email from COL John Bogden to CAPT Thomas J. Walsh, dated February 04, 2013, 9:24 AM; Subject: RE Declarations Regarding Issues We Discussed Thursday With Prosecutors;



b. As to the ELC Courtroom:

(1) A session of the Commission held on 28 January 2013 was temporarily halted when the sound and video feeds of the proceedings going to the public viewing areas were suspended by a third party, not the military judge. The ELC Courtroom is a Sensitive Compartmentalized Information Facility (SCIF).<sup>21</sup> Access to the courtroom is controlled at all times.<sup>22</sup> Closed circuit audio and video (CCTV) feeds of the proceedings in the ELC Courtroom are transmitted to locations on the U.S. Naval Station, Guantanamo Bay Cuba (GTMO),<sup>23</sup> and viewing locations in the United States.<sup>24</sup> The CCTV feeds, both at GTMO and within the United States, are viewed on a 40 second delay ordered by the Commission.<sup>25</sup> The CCTV feed is also monitored in real-time by the court interpreters to provide simultaneous translation and by an

---

AE 133V (KSM), Photograph;

AE 133U (KSM), Extract (pp. 9-10) JTF-GTMO-CDR (memo) Subject: Order Governing Logistics of Defense Counsel Access to Detainees Involved in Military Commissions;

AE 133X (MAH), Joint Task Force Guantanamo (Web Capture) [www.jtfgtmo.southcom.mil](http://www.jtfgtmo.southcom.mil);

Attachment B, AE 133Z (Mohammad), Louroe Electronics AP-2/AP-4/AP-8 Audio Monitoring Base Station Installation and Operating Instructions;

<sup>18</sup> **Declarations:**

Attachment B, AE 133A (Sup), Declaration of Maurice Elkins, dated 7 February 2013;

Attachment C, AE 133A (Sup), Declaration of Col John V. Bogdon, dated 7 February 2013;

Attachment D, AE 133A (Sup), Declaration of [REDACTED], dated 7 February 2013;

Attachment B, AE 133S (KSM), Declaration of CDR James R. Longo, dated 12 February 2013;

Attachment B, AE 133A (Sup), Declaration of CAPT Eric Schneider, Director, J-2, dated 13 February 2012.

<sup>19</sup> **Deposition/Stipulation:**

*United States v. Jawad*, AE 109, Deposition of CAPT Patrick M. McCarthy, United States Navy;

Stipulation of Ms. Sadiq, Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammed et al. (2) Hearing Dated 2/12/2013 from 1:00 PM to 2:37 PM, at p. 1954;

AE 133BB (MAH), Stipulation as to Visitation Log. *See*: Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/14/2013 from 4:04 PM to 5:43 PM at pp. 2653 – 2654.

<sup>20</sup> AE133R, Government Updated Notice of Witness Availability for 11-14 February Hearings, filed 12 February 2013.

<sup>21</sup> To the Commission's knowledge this is the only United States trial court so configured; the United States Foreign Intelligence Surveillance Court (FISA Court) meets in a "secure" environment but is not a criminal trial court in the classic sense. *See* Rule 17(b), United States Foreign Intelligence Court Surveillance Court Rules of Procedure.

<sup>22</sup> Attachment B, AE 133A, dated 7 February 2013.

<sup>23</sup> ELC Media Center, Building AV-29 Building AV-34" and spaces in the ELC assigned to the OMC-CA, OCP, OMCD, the OMC Special Security Officer ("SSO,"), the court interpreters, and the Data Trailer.

<sup>24</sup> The CCTV feeds are transmitted specified locations within the United States so that victim family members, first responders, the media, and members of the public may watch the proceedings. *See*: AE 007 *et seq*; AE 022, *et seq*; and AE 033 *et seq*.

<sup>25</sup> Para 8a(3), AE 013P (KSM), Protective Order #1, To Protect Against Disclosure of National Security Information, dated 6 December 2012 and subsequent amendments to the original order.

Original Classification Authority to conduct classification review.<sup>26</sup> There is a device (euphemistically referred to as the "red button") that terminates any transmission feed from the courtroom. The Judge and the CISO have the ability to terminate transmissions of the proceedings, both audio and video.<sup>27</sup> The Commission has previously determined

the brief delay is the least intrusive and least disruptive method of meeting both responsibilities. The delay permits the Commission to assess and remedy any negligent or intentional disclosure of classified information without unduly impacting on the ability of the public and press to fully see and understand what is transpiring.<sup>28</sup>

In accordance with the Commission's Order of 29 January 2013,<sup>29</sup> there is no longer a third-party capability to terminate the transmissions.<sup>30</sup> The incident, however, both established that an OCA monitors the proceedings in real-time and served as the predicate for Defense concerns as to their communications with the Accused.

(2) In 2011, the court reporter recording system was upgraded to insure the court reporters could identify who was speaking for the trial record when more than one participant was speaking at the same time. The "For The Record" (FTR) system is the standard for court reporting and is the same system used to record and prepare a record of trial in courts-martial and most courts throughout the United States.<sup>31</sup> There are 23 microphones located throughout the ELC Courtroom and the audio from these microphones feeds into one of eight (8) channels which are recorded by the court reporting software system. One channel is for the microphones located on the counsel tables for the five Defense teams. When the system is active, the base of each microphone has a green light indicating that it is "hot" (i.e., live), unless a "mute" button is pushed; when the mute button is pushed, no audio transmits from that microphone. There is also a

---

<sup>26</sup> Attachment B, AE 133A; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/12/2013 from 9:02 AM to 10:07 AM at p. 1862.

<sup>27</sup> *Id.*

<sup>28</sup> AE 0130, Ruling, Government Motion To Protect Against Disclosure of National Security Information, dated 6 December 2012.

<sup>29</sup> The clear directive was issued on 31 January 2013; see Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 1/31/2013 from 9:01 AM to 9:22 AM at pp. 1720-1721.

<sup>30</sup> Attachment B, AE 133A.

<sup>31</sup> Attachment D, AE 133A.

mute button on the computer panel touch-screens on each counsel table. If only the touch-screen mute button is pushed, the counsel table microphones will not amplify or broadcast in the courtroom, and will not send audio to the CCTV transmission. However, they will still feed audio to the court reporter recording system, the translators, and the OCA.<sup>32</sup> If the individual microphone is not muted, it is activated by a voice tone of a specified decibel level (the “gate.”). If the tone is “gated” (i.e., meets or exceeds the decibel threshold), it is heard in the courtroom and made part of the record of trial. If the audible is below the threshold, it is “pre-gated,” meaning the “pathway will pick up even a low tone, maybe not with clarity, but it will pick it up.”<sup>33</sup> The gated feeds, whether in real-time or on 40 second delay, transmit the audio that is heard in the courtroom.<sup>34</sup> The “pre-gated” feed, going to the court reporters, translators, and the OCA,<sup>35</sup> may transmit background voices and discussions, depending on the volume of any particular voice and the number of people being picked up by different unmuted microphones.<sup>36</sup> All Counsel were provided briefings on the necessity of muting the counsel table microphones and were advised that failure to do so could result in ungated discussions being recorded by the court reporters FTR system.<sup>37</sup> As a reminder, there are signs on both the doors the ELC Courtroom and the counsel tables warning Counsel of the need to “mute microphones for sidebar conversations.”<sup>38</sup> The Accused were afforded the opportunity to listen to the court reporter recordings to ascertain if the pre-gated feed provided a capability to overhear in-court

---

<sup>32</sup> Attachment B, AE 133A; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/12/2013 from 9:02 AM to 10:07 AM at pp. 1861-1862.

<sup>33</sup> Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/12/2013 from 9:02 AM to 10:07 AM at p. 1854.

<sup>34</sup> *Id.*

<sup>35</sup> Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/12/2013 from 9:02 AM to 10:07 AM at p. 1866.

<sup>36</sup> Best summed up by Mr. Connell during questioning:

Q...the filtered or gated audio that we hear contains less sound information than the audio flow, the pre-gated audio flow that the three entities receive, correct?

A. Depending on the volume in which you are speaking, yes.

Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/12/2013 from 9:02 AM to 10:07 AM at p. 1862.

<sup>37</sup> Attachment D, AE 133A.

<sup>38</sup> *Id.*



conversations between Counsel and the Accused.<sup>39</sup> The Commission is unaware if the opportunity was ever taken or, if it was, what it indicated.

c. As to the Holding Cells adjacent to the ELC Courtroom:

Defense Counsel have the opportunity of meeting with the Accused prior to or immediately after proceedings. Meetings occur either in the ELC holding cells, which provide a private meeting area, or in the ELC Courtroom. In the ELC holding cells there is camera coverage for security monitoring only; there are no audio capabilities or listening devices in the ELC holding cells.<sup>40</sup>

d. As to the interview rooms at ECHO II:

(1) Captain (CAPT) Thomas J. Welsh, U.S. Navy (USN), Staff Judge Advocate, JTF-GTMO testified<sup>41</sup> the issue of being able to monitor meetings in the interview rooms at ECHO II first came to this attention in January 2012. ECHO II is used for multiple purposes, including attorney-client meetings, meetings between the International Committee of the Red Cross (ICRC) delegates and detainees, and for some medical meetings where specialists meet with the detainees on specific issues. He was unaware any previous use for ECHO II or who controlled it before it came under the control of JTF-GTMO. In January 2012 there was a meeting between a detainee and his defense counsel, prosecutors, and law enforcement officials. CAPT Welsh walked into the control room and saw a law enforcement official with headphones listening to the meeting. There was also a video monitoring capability. Prior to that time he had not known there was the capability to audio monitor at the facility. Later he queried the previous Joint Detention Group commander about the monitoring capability; the commander's response indicated that there was an ability to do so, but it was not used to monitor attorney-client meetings. CAPT Welsh concurred with the Defense proposition that the microphones in the

---

<sup>39</sup> AE 133E.

<sup>40</sup> Attachment B, AE 133A.

<sup>41</sup> Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/12/2013 from 1:00 PM to 2:37 PM at pp. 1954-2029; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/12/2013 from 2:47 PM to 5:19 PM at pp. 2030-2062.

ECHO II rooms were not apparent as such and could have been mistaken for smoke alarms. Upon further questioning by the Defense, CAPT Welsh stated he had no prior knowledge about the monitoring capability before his arrival; his predecessor did not convey any information about monitoring during the short period of turning over responsibilities; and after the discovery in January 2012, he made no further inquiry into the matter until the defense in this case brought it to his attention in October 2012. The Defense also questioned CAPT Welsh whether the requirement to identify the language to be used during attorney-client meetings was a precursor to being able to monitor meetings. CAPT Welsh testified the requirement was not enforced but was, to his belief, initiated to make sure that translation capabilities were available for counsel. When asked why such a capability would be needed unless the Government was going to monitor the conversation, CAPT Welsh was unable to offer an explanation, but did not agree that it was meant to enable audio monitoring of such meetings.

(2) In an affidavit,<sup>42</sup> Commander (CDR) John Longo, USNR, special investigator for the Defense Team representing Mr. Mohammad, stated he conducted an interview with CAPT Eric Schneider, USN, J2 Director, JTF-GTMO, on 11 February 2013. The purpose of the interview was to elicit CAPT Schneider's knowledge of video and audio surveillance equipment located at Camp Echo II. In his affidavit, CDR Longo stated that CAPT Schneider confirmed the J2 is responsible for all audio and video surveillance equipment located at Camp Echo II. He advised that he has been in his current assignment as the J2 Director at GTMO for approximately three weeks, and was briefed by his predecessor in regard to this audio and video surveillance equipment. In conclusion CDR Longo wrote that CAPT Schneider "advised that to his knowledge, no recording of the audio or video takes place, though monitoring of both ... has taken place during attorney client meetings in Echo II for force protection purposes only." By affidavit, executed in response to that of CDR Longo, CAPT Schneider filed a "responsive"

---

<sup>42</sup> Attachment B, AE 133S (KSM).

declaration.<sup>43</sup> After reviewing CDR Longo's statement, CAPT Schneider disagreed with the statement that attorney-client meetings are monitored by both video and audio means for force protection and stated he was unaware of any such monitoring both from his own knowledge and from having checked this with his predecessor.

(3) In his affidavit,<sup>44</sup> and during his testimony,<sup>45</sup> Colonel (COL) John V. Bogdan, Commander, JDG, JTF-GTMO, Guantanamo Bay, Cuba, avowed he had the responsibility to facilitate meetings between detainees and their Defense Counsel. These meetings took place in individual meeting rooms at ECHO II. These meeting rooms are also used for purposes other than attorney-client meetings. Each of the rooms in ECHO II is equipped with video cameras to facilitate remote video monitoring (real-time ability to watch or listen) for security purposes by the guard force. This enables the guards to respond instantly in the event a detainee attempts to harm himself or another individual in the room. There is no capability to record (electronically save) audio or video from the meetings, and additional equipment would need to be installed in order to do so. Guard force personnel are trained and directed to not listen to conversations between attorneys and detainees. He was not aware of any instance, either before or during his tenure as commander, in which guards or other personnel have monitored or recorded, whether intentionally or unintentionally, meetings between detainees and attorneys. Meetings between detainees and the ICRC are not recorded. He has also issued written guidance to the JDG regarding the monitoring of Attorney-Client Meetings and ordered that all audio capability be disconnected.<sup>46</sup>

---

<sup>43</sup> Attachment B, AE 133A (Sup).

<sup>44</sup> Attachment C, AE 133A (Sup).

<sup>45</sup> Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/13/2013 from 10:28 AM to 12:02 PM pp. 2169-2247; Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/13/2013 from 1:02 PM to 2:36 PM at pp. 2248-2294.

<sup>46</sup> JTF-GTMO-CJDG MEMORANDUM FOR ALL PERSONNEL ASSIGNED TO THE JOINT DETENTION GROUP (JDG), dated 4 February 2012; Subject: Monitoring of Attorney-Client Meetings, Attachment I, Government Response (Attachment I, AE133A).

(4) The deposition<sup>47</sup> of CAPT Patrick M. McCarthy, USN, was taken pursuant to an order by Judge Henley, in *United States v. Jawad*, to ascertain “his knowledge, if any, of video teleconferences involving Brigadier General (Brig. Gen.) Thomas Hartman (former Legal Advisor to the Convening Authority), other General Officers and senior JTF-GTMO and United States Southern Command (SOUTHCOM) officials in which Military Commission cases were discussed.” At the time of the deposition CAPT McCarthy was the JTF-GTMO Staff Judge Advocate.<sup>48</sup> During the deposition, upon cross-examination by Col Morris, the (then) Chief Prosecutor, CAPT McCarthy addressed issues of contention between himself and Brig. Gen. Hartman. One of the issues brought up, pertaining to the motion now before this Commission, went to “access to videotapes of foreign delegations meeting with their nationals,” addressed in order for the prosecution to perform due diligence in providing discoverable information for the defense.<sup>49</sup> The responses of CAPT McCarthy in this context would support the contention that there is, or was at that time, an ability to make and retain audio and visual records of meetings in ECHO II.

(5) The Commission has looked at the picture<sup>50</sup> of the microphone in an ECHO II room and concurs that, with casual observation, it can be mistaken for a fire alarm. No representation was made by the Accused that it was actively claimed to be such by the JDG.

(6) As a sworn officer of the Commission, the Chief Prosecutor, Brigadier General Mark Martins, USA, has avowed that, “No entity of the United States

---

<sup>47</sup> *United States v. Jawad*, AE 109, Deposition of CAPT Patrick M. McCarthy, United States Navy. The Commission was requested to take judicial notice of this deposition. See AE 133, para 4a.

<sup>48</sup> CAPT McCarthy was a predecessor to CAPT Welch in this position.

<sup>49</sup> See AE 062, *United States v. Khadr*, Government Response to Defense Special Request for Relief from the Terms the Protective Order, filed 23 January 2008, and AE 306, *United States v. Khadr*, Notice of Defense Motion To Compel Production of Video and/or Audio Recordings of Interrogations of the Accused and Photos of Accused, filed 4 March 2008. The fact that some interviews and meetings with Accused could be audio and/or videotaped does not appear to be a particularly heavily guarded fact.

<sup>50</sup> AE 133V (KSM).

Government is listening, monitoring or recording communications between the five Accused and their counsel at any location.”<sup>51</sup>

## 5. Law:

a. As a basic proposition the Defense has asserted the Government bears the burden of demonstrating why the Accused are not entitled to protection of their communications with Defense Counsel.<sup>52</sup> Rule for Military Commissions (R.M.C.) 905(c)(2) directs that, except as otherwise noted in the Manual for Military Commissions, the burden of persuasion for any motion lies with the moving party. The Defense contends constitutional protections entitle the Accused to their requested relief as a matter of right, thereby requiring the Government to prove a negative. This begs the question actually before the Commission - factually whether there was any infringement at all of the right to protected communications. To this end, since the Defense supposition does not go to what must be proven to convict, the Defense must show, by a preponderance of evidence, an actual, improper, inhibition of communication has occurred. *See: United States v. Hsia*, 81 F.Supp.2d 7, (D.D.C. 2000) citing *United States v Kelly*, 790 F.2d 130 (D.C.Cir.1986).

b. Assuming, *arguendo*, that the Defense assertions are supported by facts in the record, the Supreme Court, in *Weatherford v. Bursey*, 429 U.S. 545 (1977), set forth the factors the Defense must satisfy to show a cognizable infringement of a protected right. To do so, the Defense must show (1) evidence used at trial that was produced directly or indirectly from an intrusion; (2) the intrusion by the government was intentional; (3) the prosecution received otherwise confidential information about trial preparations or defense strategy as a result of the intrusion; or (4) the information was used in any other way to the substantial detriment of the defendant. *United States v Kelley*, 790 at 137. To establish a *prima facie* showing of prejudice the Defense must show the Government acted affirmatively to effectuate their intrusion. *Weatherford*

---

<sup>51</sup> AE 133A.

<sup>52</sup> AE 133 (KSM et al), para 3.



at 558. Further, the result of any such intrusion must work to the “substantial” detriment of the Accused, a standard requiring demonstrated use of “confidential information pertaining to defense plans and strategy, and from other actions designed to give prosecution an unfair advantage at trial.” *US v Danielson* 325 F.3d 1054 (9th Cir. 2003).

## 6. Analysis and Ruling.

### a. As to the ELC Courtroom:

(1) There is no specific prohibition against an individual, with the appropriate need to know, from monitoring the Commission proceedings, either through physical presence in the courtroom or electronically, in the manner being challenged by the Defense. For example, a motion has been filed for the Chief Defense Counsel to be physically present in the courtroom during classified sessions in furtherance of his duties<sup>53</sup> and the Government has routinely had law enforcement members of their team observing the proceedings from within the courtroom.<sup>54</sup> The error on the OCA’s part was their unauthorized interruption of the proceeding; not their having followed the trial in real time in performance of their responsibilities to be mindful of national security interests and so advise the CISO when appropriate. The crux of the issue before the Commission lies in whether “pre-gated” information from the court reporting system was being used to assist the Government in the prosecution of this case. Evidence before the Commission has shown the pre-gated feed is the one used by the OCA to follow the proceedings.

(2) The Defense assertion in this regard fails at least two requirements of the “Kelly” test. First, there has been no proof offered that the pre-gated feed captures any retrievable information, confidential or otherwise. The Defense was provided the chance to test the system, and apparently decided to forgo that opportunity. More importantly, there is no evidence that the alleged intrusions, assuming they occurred, were intentional. The “pre-gated” feed is part and

<sup>53</sup> AE 013HHHH (AAA), Mr. al Baluchi’s Motion to Modify Third Amended Protective Order #1 to Allow Chief Defense Counsel to Review Classified Information, filed 17 September 2015.

<sup>54</sup> See, e.g., Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammed et al. (2) Hearing Dated 2/12/2013 from 9:02 AM to 10:07 AM at p. 1836.

parcel of the court reporting system; there is no evidence selection of the FTR system was done as a means to provide the Government the ability to eavesdrop.<sup>55</sup> In fact, the contrary is shown. Counsel were warned<sup>56</sup> of the consequences of not muting their microphones both during courtroom technology training and by signs placed on the door to the ELC Courtroom, and at the counsels' tables, to remind them of the need to mute the microphones to preserve confidentiality.<sup>57</sup> This can hardly be construed as a covert intrusion when the Defense was both on notice as to the possibility and had the power to mute the system if they believed it compromised confidentiality.

(3) The Defense has not shown their attorney-client communications in the ELC Courtroom are being purposely intruded upon; or, in fact, whether any such intrusion has occurred at all. Accordingly, the Defense motion to deny the OCA the ability to monitor the proceedings in real time is **DENIED**.

b. As to the ELC Courtroom holding cells: Evidence indicated the Government has the ability to video monitor the holding cells, but nothing was adduced to indicate there was an ability to monitor conversations between Defense Counsel and client in the cells. The Defense has not shown their attorney-client communications were being intruded upon in the ELC Courtroom holding cells. As to that aspect of their motions, the specific relief sought is **DENIED**.

c. As to the interview rooms at ECHO II: The Government had the ability to monitor, by both audio and visual means, meetings in the interview rooms at ECHO II. The Commission understands why the uninitiated could mistake the system for doing so was a fire or smoke alarm. Evidence of record shows these rooms were used for a number of functions besides attorney-

<sup>55</sup> Ms. [REDACTED] affidavit indicates it is a commonly used system. See Attachment D, AE 133A.

<sup>56</sup> *Id.*

<sup>57</sup> A "low tech" solution to the problem was instituted; now instead of having to turn the microphones off to mute them they have to be turned on to be active. See: Unofficial/Unauthenticated Transcript of *the Khalid Shaikh Mohammed et al.* (2) Hearing Dated 2/11/2013 from 9:02 AM to 10:12 AM at p. 1824.

client meetings. There was, however, no evidence offered<sup>58</sup> indicating Defense Counsel were purposely misled as to the function of these “fire alarms” nor, from information provided in other cases, was the fact that there was audio and video monitoring capability a closely held secret. The Government did provide evidence that they were aware of the responsibility to respect attorney-client privileged meetings in ECHO II. Their witnesses uniformly indicated that no audio monitoring of meetings between the Accused and their attorneys occurred. Evidence of the capability to monitor does not by itself establish the fact or probability of abuse or misuse of that capability, especially where there are unrelated legitimate reasons for the capability’s presence. As to this portion of the motion by the Defense, the specific relief sought is **DENIED**.

d. An overarching remedy sought by the Defense is that the Government be required to “prove that any evidence it proposes to use is derived from a legitimate source wholly independent of the information disclosed in the recorded conversations.” While this relief would be appropriate had a substantial infringement of the privilege been sufficiently shown, the facts as developed do not warrant this drastic relief. The Defense motion in this regard is **DENIED**.

e. The Defense is correct in asserting the attorney-client privilege is sacrosanct, and while a breach of such privilege was not demonstrated by the issues and facts before the Commission at this time, the Commission recognizes the Defense concern about protecting that privilege. The Commission is all too aware that, with continual changes in the personnel comprising JTF-GTMO and the JDG, what has been done right at one point may become a historical notation, especially after several changes of the guard force. To address these concerns, the motion of the Defense for a prophylactic remedy is **GRANTED** as set forth in paragraph Seven (7) of this Order.

7. **Order.** The Commission directs that the salient points of the directive issued by COL Bogden be formally made part of the standard operating procedures for JTF-GTMO and the JDG. Further,

---

<sup>58</sup> Defense Counsel proffered that a guard had assured them the device was a smoke detector and not a listening device, however no evidence was provided to support this contention. *See: Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammed et al. (2) Hearing Dated 2/11/2013 from 9:02 AM to 10:12 AM at p. 1807.*

when new Defense Counsel are being shown or briefed on the interview rooms at ECHO II, they must be specifically made aware of the monitoring capability and its uses. Lastly, if a meeting with an Accused involving Defense Counsel (e.g., a plea negotiation) is to be monitored, the Defense Counsel involved will be advised in advance of the monitoring.

So **ORDERED** this 30th day of November, 2016.

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