

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 BINALSHIBH;
ALI ABDUL AZIZ ALI;
MUSTAFA AHMED ADAM AL
HAWSAWI**

AE 173A

Government Response

To Defense Motion to Compel the
Production of Witnesses Listed in Defense
Request for Production of Witnesses Dated
31 May 2013, to Testify at Motion Hearing
17-21 June 2013 and in Subsequent
Hearings

3 July 2013

1. Timeliness

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

2. Relief Sought

Although the Defense motion is filed as one request, AE 173 (WBA) is seeking production of witnesses on two completely separate issues. As such, the Prosecution will separately address the request for “camp personnel” and the request for “IT witnesses.”

With respect to the request for “camp personnel,” the Defense has failed to demonstrate the relevance and necessity of each of the witness’ proposed testimony as required under R.M.C. 703; therefore, the Prosecution respectfully requests that the Military Judge deny the Defense motion to compel their production.

With respect to the request for “IT witnesses,” the Defense has failed to demonstrate the relevance and necessity of each of the witness’ proposed testimony, moreover, the Defense has failed to demonstrate that the requested witnesses will contribute to a “matter in issue” pursuant to R.M.C. 703(b)(1), Discussion. Therefore, the Prosecution respectfully requests that the Military Judge deny the Defense motion to compel their production. In addition, the instant

request is moot. The 17-21 June hearings have already taken place. The Defense's IT concerns are in the process of being remediated through agreement between the Government, EITSD, and the Office of the Chief Defense Counsel (OCDC). The Commission ruling in AE 155D provided a remedy to past IT issues. The IT agreement to effectively isolate the Defense network provides a practical remedy to future concerns. As such, this request for IT witnesses to testify on past issues is moot.

However, in order to accommodate the Defense on this issue and preserve judicial economy, the Prosecution will agree to stipulate to the testimony in another case of Mr. Bryan Broyles, Principal Deputy Chief Defense Counsel. *See Unofficial/Unauthenticated Transcript, United States v. Nashiri*, at 2013-2085. Mr. Broyles testified to the same issues subject to the instant motion, to include efforts at that time to remediate the issue moving forward. Although not necessary, this stipulation—incorporating the rulings of the military judge on counsel objections in that case—will effectively place into the record in this case a large swath of testimony proposed by the Defense regarding the “IT issue.”

3. Burden of proof

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)-(2). The Defense must establish that the prospective testimony is relevant and necessary. R.M.C. 703(b)(1).

4. Facts

On 31 May 2011 and 25 January 2012, pursuant to the Military Commissions Act of 2009, charges in connection with the 11 September 2001 attacks were sworn against Khalid Shaikh Mohammad (Mohammad), Walid Muhammad Salih Bin Attash (Bin Attash), Ramzi Binalshibh (Binalshibh), Ali Abdul Aziz Ali (Ali), and Mustafa Ahmed Adam al Hawsawi (Hawsawi). These charges were referred jointly to this capital Military Commission on 4 April 2012. The Accused are each charged with Conspiracy, Attacking Civilians, Attacking Civilian

Objects, Intentionally Causing Serious Bodily Injury, Murder in Violation of the Law of War, Destruction of Property in Violation of the Law of War, Hijacking an Aircraft, and Terrorism.

Camp Personnel

On 11-13 February 2013, an inspection of the Accused's legal bins by JTF-GTMO guards revealed the discovery of physical contraband and mislabeled materials that raised concerns about the safety and security of the detention facility. For example, physical contraband – three pencils and a metal pen refill – were found in the Accuseds' cell and in the binding of a book, respectively. *See* AE 144B, Attachment B, Annex 5 and 6; Unofficial/Unauthenticated Transcript of Testimony, 13 February 2013, at 2367. In addition, nine books found on the “banned list” were found in the Accused's cells. *See* AE 144B, Attachment B, Memorandum For Commander, Joint Detention Group, JTF-GTMO. Separate and apart from the contraband, JTF-GTMO guards discovered numerous material in the legal bins that was unmarked, improperly marked, or improperly stored as legal material. *See* AE 144B, Attachment B, Annex 1-4. The presence of potentially dangerous physical contraband, and the state of the material found in the Accused's legal bins, raises continued concerns about the effective marking of legal material and segregation of legal and non-legal materials.

At the recommendation of the Chief Prosecutor, and by direction of the JDG Commander, a fact-finding inquiry was conducted to determine the facts surrounding the location and seizure of contraband and any other mislabeled and inappropriately placed items in the Accused's legal bins. The results of the inquiry are contained in the Commander's Inquiry Summary of Findings, dated 21 February 2013. *See* AE 144B, Attachment B.

On 3 June 2013, counsel for Mr. bin 'Attash requested the production of witnesses subject to the instant motion. *See* AE 173 (WBA), Attachment B. On 10 June 2013, the Prosecution responded to the Defense request. *See* AE 173 (WBA), Attachment C.

On 12 June 2013, the Defense filed the instant motion requesting the same array of witnesses.

IT Witnesses

On 9 April 2013, counsel for Mr. bin ‘Attash filed AE 148A (WBA). That filing requested a continuance with respect to ten of the 19 docketed motions in this case. The sole basis for that request was the unsubstantiated assertion that the Defense lost data pertaining to the docketed motions.

On 10 April 2013, the Chief Defense Counsel issued an order to all OCDC personnel prohibiting the transmission of privileged materials over the Government network and instructing OCDC personnel to refrain from saving privileged materials on the networked “O” and “H” drives. *See* AE 155, Attachment C. However, the Chief Defense Counsel specifically authorized counsel in this case to access and use external hard drives to draft and file computer-generated motions and other documents. *Id.* The Defense was advised that the external hard drives “allow you to create and store documents—especially those necessary to meet court imposed filing deadlines.” *Id.*

On 11 April 2013, the Prosecution responded to AE 148A (WBA), citing various facts demonstrating that the data loss was limited to brief periods of time—in one case the Defense experienced an information loss lasting about one day. *See* AE 148B. The Prosecution also advised the Commission that the computer problems experienced by various personnel were not the result of inherent problems with the network or targeted monitoring. *Id.* Rather, it was a problem limited to the now completed replication process. The Prosecution incorporates by reference the facts and argument of AE 148B into this response.

On 12 April 2013, the Defense filed AE 155A. In that motion, the Chief Defense Counsel claims that seven gigabytes of information was never restored. AE 155A, at 7. The Chief Defense Counsel has not specified what files were lost, nor did she specify which Defense teams within her office lost information. In their filing, the five defense teams in this case did not indicate how, or to what extent, the remaining seven gigabytes pertained to this Military Commission or the scheduled hearings.

On 17 April 2013, this Commission denied the Defense request for abatement in these proceedings. *See* AE 155D. However, the Commission granted the Defense request for a continuance until 17 June 2013. *See* AE 155D; AE 155F. Later that day, the Commission denied a Prosecution motion to reconsider the previous order. *See* AE 155F.

On 2 May 2013, recognizing that AE 155 was resolved by the Commission, counsel for Mr. bin ‘Attash, in a supplement to a scheduling order, stated that counsel “intends to seek reconsideration of the relief sought in AE 155A.” *See* AE 155H (WBA), at 2. To date, counsel has not sought “reconsideration of the relief sought in AE 155A.”

On 15 May 2013, this Commission issued its Docketing Order for the June session. *See* AE 159. The Docketing Order did not include AE 148, AE 155, or AE 155I.

On 16 May 2013, the Prosecution filed AE 155I, requesting, in part, that this Commission order the Defense by 31 May 2013 to address, in writing, specific lost Defense files that would impact the Defense’s ability to proceed on any of the 23 motions docketed for the week of 17 June 2003.

On 30 May 2013, counsel for Mr. bin Attash filed AE 159A, “Mr. bin ‘Attash’s Response to Docketing Order for 17-21 June Motion Hearings.” In its proposed amended docketing order, counsel for Mr. bin ‘Attash did not request that AE 148, AE 155A, or AE 155I be argued during the June session.

On 30 May 2013, counsel for Mr. bin ‘Attash responded to AE 155I, sharing the preference of the Prosecution that this Commission rule on AE 155I “based on the pleadings alone.” AE 155L, at 13.

On 3 June 2013, counsel for Mr. bin ‘Attash requested the production of witnesses subject to the instant motion. *See* AE 173 (WBA), Attachment B. On 10 June 2013, the Prosecution responded to the Defense request. *See* AE 173 (WBA), Attachment C.

On 11 June 2013, a prosecutor in another case addressed ongoing solutions to defense concerns over IT issues. The prosecutor noted that all parties, including the Chief Defense Counsel, are working to among other items; establish separate e-mail systems by 22 July 2013,

implementation of a veritable stand-alone system as chosen by the Chief Defense Counsel, and administrative access is currently now set at the Chief Defense Counsel level. . *See* Unofficial/Unauthenticated Transcript, *United States v. Nashiri*, at 1813-1817.

On 12 June 2013, Mr. Bryan Broyles, Principal Deputy Chief Defense Counsel, testified in another case on the IT issue. In his testimony, Mr. Broyles confirmed that his office was working with various entities within the Government to resolve the concerns. *See* Unofficial/Unauthenticated Transcript, *United States v. Nashiri*, at 2013-2085.

On 12 June 2013, the Defense filed the instant motion requesting the production of 11 witnesses at the June session or subsequent hearings. Between 17-21 June 2013, a scheduled session of this Commission took place. Counsel for the Accused did not request any sort of relief based on IT issues, nor did IT issues become part of the June docket.

On 14 June 2013, counsel for Mr. Mohammad joined the Defense motion. *See* AE 173 (KSM). On 19 June 2013, counsel for Mr. Binalshibh joined the Defense motion. *See* AE 173 (RBS).

5. Law and Argument

Among the many protections provided to accused facing trial by military commission is the right to obtain witnesses. The Military Commissions Act of 2009 (hereinafter “MCA”) 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. The Secretary of Defense, in turn, promulgated the Manual for Military Commissions (hereinafter “the Manual”), which contains the Rules for Military Commissions (hereinafter R.M.C.). The procedures contained in the Manual are based upon the procedures for trial by general courts-martial under chapter 47 of title 10 (the Uniform Code of Military Justice). R.M.C. 102(b).

Among the rules issued by the Secretary of Defense in the Manual is R.M.C. 703 (Production of witnesses and evidence). R.M.C. 703 is patterned directly after R.C.M. 703, the rule followed in courts-martial practice by the United States military. R.M.C. 703(b) provides

that “[e]ach party is entitled to the production of any available witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.” See R.M.C. 703(b)(1).

The procedures set forth by R.M.C. 703 as to non-expert witnesses comport with military law and provides the Accused in this case the same safeguards afforded to members of our Armed Forces. See Ruling, AE 036C, at 4-6, citing *United States v. Arias*, 3 M.J. 436 (C.M.A. 1977); *United States v. Williams*, 3 M.J. 239, 243 (C.M.A. 1977); *United States v. Dixon* 8 M.J. 858 (N.M.C.M.R. 1980). R.M.C. 703(c)(2) requires the Defense to give the trial counsel a written list of witnesses they want and to provide contact information as well a synopsis of the expected testimony sufficient to show each witness’ relevance and necessity. See Ruling, AE 036C, at 4-5. The Prosecution takes its obligations seriously in this case, and will produce defense witnesses upon an adequate showing of relevance and necessity.

The applicable rules require more than providing a topic of the witnesses’ testimony. See *United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999) (“[T]he requirement of RCM 703(c)(2)(B)(i) for a synopsis of expected testimony is not satisfied by merely listing subjects to be addressed; rather, it must set out what the witness is expected to say about those subjects”).

Testimony is *relevant* “when a reasonable person would regard the evidence as making the existence of any fact that is of consequence to the determination of the commission action more probable or less probable than it would be without the evidence.” M.C.R.E. 401. Military jurisprudence has further recognized that relevant testimony is only *necessary* “when it is not cumulative and when it would contribute to a party’s presentation in some positive way on a matter in issue.” See R.C.M. 703(b)(1) Discussion. Here, the Defense has made little, if any, attempt to explain how the requested witnesses are relevant.

In *United States v. Breeding*, 44 M.J. 345, 352 (C.A.A.F. 1996), the C.A.A.F. held that the defense must first justify the relevance and materiality of any witness at trial in order for the court to properly exercise its discretion in determining which witnesses are cumulative and unnecessary. The *Breeding* court further held that this gate keeper responsibility requires the

court, not defense counsel, to evaluate the necessity of a witnesses' presence at trial even where the defense has agreed to incur all costs associated with producing the witness on the day of trial. *See Breeding*, 44 M.J. at 351-352.

I. The Defense Has Failed to Provide a Synopsis of Expected Testimony of Camp Personnel, Particularly in Light of the Comprehensive Commander's Inquiry

In the subject motion relating to "camp personnel," the Defense has not provided any synopsis of expected testimony. Instead, the Defense argues that "the Prosecution has concealed the witness' identities from the Defense" and "[T]he defense cannot provide a 'synopsis' in its witness request because the prosecution has obstructed access to these witnesses." AE 173(WBA) at 3-4. In the witness request, which was denied within a week of receipt by the Prosecution as reflected in AE 173 (WBA), Attachment B-C, the justification for the broadly-listed categories of individuals is so brief that it is not possible to determine the relevance and necessity of the requested witnesses' testimony. The Defense further states that it could not conduct interviews. *Id.*

Counsel's line of argument fails because the Defense was provided the name of the pertinent commander when the Defense received the Commander's Inquiry Summary of Findings, dated 21 February 2013. Included in paragraph 5 of the Commander's Inquiry memorandum is the commander's name, duty title, organization, phone number and email address. As such, the commander's contact information has not been concealed and nothing is preventing defense counsel from reaching out to the commander.

In addition to possessing the commander's name and contact information, the Defense also has access to the overall Commander's Inquiry. The report is detailed and includes findings, sworn statements, and Standard Operating Procedures. This information serves as the basis for the commander's findings with regard to the reason for the search and method for conducting the subject search. In the instant motion, the Defense has failed to detail the expected testimony of the broad-array of witnesses, and instead provides only a general topic. It is not clear what additional knowledge that the Defense believes this array of witnesses possess beyond the sworn

statements and findings contained in the Commander's Inquiry. Similarly, the Defense has failed to provide any synopsis regarding the expected testimony of "guards [REDACTED]" As such, the Defense has not met its burden in establishing how the witness testimony of the referenced personnel is relevant and necessary. They could certainly do so based on the reports without having their real names if they so chose.

The Prosecution concedes that the legal bins were searched during the February 2013 hearings in this case. The guards' reasoning for searching the legal bins is laid out in the Commander's Inquiry, and the Prosecution will not object to the Defense using the Commander's Inquiry as evidence on the motions it propounds. However, the reasons that the guards may have had for searching the legal bins of the Accused, to the extent said reasoning was ever relevant to docketed motions, should no longer be relevant following the Military Judge's Interim Order in AE 144E, which prevents seizures from occurring in a similar manner in the future. Following the Military Judge's ruling in AE 144D, and his order in AE 144E, as well as the other evidence already on the record, these witnesses are simply not necessary for the resolution of any of the Defense motions.

II. The Defense is Requesting Production of IT Witnesses to Testify to an Issue That is No Longer Pending

Five days before the beginning of the June hearings in this case, the Defense filed a motion requesting that this Commission compel the immediate production of 11 witnesses.¹ *See* AE 173 (WBA). The timing of this request is untenable and an affront to the process. Furthermore, the 11 witnesses requested by the Defense are expected to testify to an issue that already has been resolved by this Commission. The Military Judge afforded the Defense relief on the IT issue by ordering an eight-week continuance. *See* AE 155D. The Military Judge then denied a Prosecution request for the Commission to reconsider the order. *See* AE 155F.

¹ Counsel for Mr. Binalshibh inexplicably joined the Defense motion to compel the listed witnesses on 19 June 2013, which was three days into the June session.

Between 17-21 June 2013, this Commission held a week of hearings in this case, to include taking lengthy testimony of three witnesses (VADM Bruce MacDonald, RADM David Woods, and CAPT Thomas Welsh) and hearing arguments on various docketed motions. *See* AE 013GG; AE 018; AE 108; AE 136; AE 152 (RBS).

Since AE 155 was resolved by the Commission, the Defense sought amendments to the docket and schedule, but not once did counsel file a motion with the Commission requesting specific relief on the IT issue beyond the eight-week continuance previously granted. As such, AE 155 and AE 155I cannot be considered matters in issue in this case, pursuant to R.M.C. 703(b)(1), Discussion. It is simply improper to seek production of witnesses for something that is not docketed or even pending with the Commission. It is additionally improper to seek production of witnesses for an issue that has already been ruled upon by the Commission and now subject of a collaborative IT separation project initiated independently of the court. Although counsel for the five Accused raised concerns over various IT items, none have sought relief from this Commission beyond the Military Judge's Order in AE 155D. Without a docketed issue before the Commission, the instant request for production of witnesses is premature.

However, the Prosecution proposes an alternative means of addressing the underlying issue derived by the instant motion to compel the production of witnesses. Although not necessary, the Prosecution will agree to stipulate to the testimony in another case of Mr. Bryan Broyles, Principal Deputy Chief Defense Counsel. Mr. Broyles testified to the same issues subject to the instant motion that the requested IT witnesses may testify. *See* Unofficial/Unauthenticated Transcript, *United States v. Nashiri*, at 2013-2085. This stipulation will effectively place into the record in this case much of the evidence sought by the Defense regarding the "IT issue." It was noted by Mr. Broyles and the trial counsel in that case that all parties, including the Chief Defense Counsel, are working to among other items; establish separate e-mail systems by 22 July 2013; conduct a comparison between the pre and post-replication to determine what files may have been lost, and to locate such files if necessary;

implementation of a veritable stand-alone system as chosen by the Chief Defense Counsel; and administrative access is currently now set at the Chief Defense Counsel level.

Prudence suggests that the proposed alternative solution is the most practical method in handling the current issue. In this way, the Prosecution in this case is affirming as officers of the court that the Office of the Chief Defense Counsel IT concerns are being addressed in a significant and collaborative manner. Moreover, the Prosecution in this case is affirming the many checks and balances that are currently implemented to alleviate Defense IT concerns. Once the long-term IT solutions are implemented, the Defense will have a more constructive view of what, if any, relief is requested. Until that happens, it is simply premature to request witnesses without any sort of pending requested relief.

III. The Defense-Proffered Testimony of Each IT Witness Is Cumulative, or Otherwise Not Relevant and Necessary to Any Relief

Even if the instant motion was pertinent to an actual matter in issue before this Commission, the Defense is seeking 11 witnesses to testify on the same topic, rendering much of the witnesses' testimony cumulative. But again, it is difficult for the Prosecution to determine the relevance or necessity of each witness without a pending request for relief. Rather than make an even modest attempt at demonstrating the relevance and necessity of the requested witnesses, the Defense filed a motion to compel all 11 proposed witnesses. The Prosecution objects to the production of each of the 11 witnesses. However, should this Commission determine that witness testimony on the IT issue is necessary despite the Prosecution's objections as stated above, the Prosecution will agree to the production of Mr. [REDACTED]

The Defense requests seven witnesses (Mr. [REDACTED] Unnamed Individual, Mr. [REDACTED] [REDACTED] Ms. [REDACTED] Mr. [REDACTED] Mr. [REDACTED] and Mr. [REDACTED] to discuss the technical side of the issue relating to potentially missing files and the replication process. As such, this request is cumulative. To the extent this Commission determines a need to hear this issue, Mr. [REDACTED] is the appropriate witness. As Chief Information Officer, Office of the Secretary of Defense, Mr. [REDACTED] is the Designated Approval Authority for all IT

systems support to OMC. Mr. [REDACTED] is aware of the issues and authorized the replication process. He also is involved in the current process in conjunction with the Chief Defense Counsel of segregating Defense systems both in the short term and long term.

Furthermore, a stipulation of Mr. Broyles's prior testimony in the *Nashiri* case effectively addresses the impact on defense counsel, as well as the steps taken by OCDC to rectify the situation. As such, OCDC personnel Mr. [REDACTED] and Ms. [REDACTED] are cumulative to Mr. Broyles's prior testimony. Mr. Broyles also testified to exactly the topics the Defense cites in its request for the production of Col Karen Mayberry and CAPT McCormick. *See* AE 173 (WBA), at 5-6. By stipulating to Mr. Broyle's testimony, the expected testimony of all OCDC personnel is addressed.

Finally, the Defense requests production of Mr. Paul L. Oostburg Sanz and BG Mark Martins. Neither of these witnesses are relevant or necessary to resolve the IT issue. The Defense requests Mr. Oostburg Sanz and BG Martins solely to rebut statements attributed to defense personnel during a meeting regarding the IT issue. The Defense does not explain what it expects to get out of this testimony in terms of tangible relief. Since the meeting, steps have been undertaken in conjunction between the Government and OCDC to address all of the defense IT concerns. As such, the testimony of Mr. Oostburg Sanz and BG Martins would do nothing to contribute to the Defense's arguments for relief.

6. Conclusion

The Prosecution in its 10 June 2013 response explained to the Defense that the witness request originally submitted for camp personnel was insufficient, cited the applicable standards that must be followed, and expressed the Prosecution's willingness to reconsider the requests if the Defense submitted additional information. Rather than providing a more detailed request or any explanation regarding how any of the requested witnesses' testimony is relevant and necessary, the Defense filed the pending motion that includes the same deficient showing contained in the original request.

In order to obtain the presence of witnesses, the Defense must establish both the relevance and necessity of the proposed testimony. Here, rather than make the requisite showing or providing any substantive argument in the motion explaining why presence of these witnesses is legally compelled, the Defense is seeking to shift its burden to the Prosecution by claiming the Defense has somehow not been able to access the pertinent information. That argument fails because the Commander's Inquiry Summary of Findings contains information germane to the February seizure issue. The consequence of that decision is that the defense has fallen far short of meeting the standard prescribed in R.M.C. 703 and the motion should be denied.

The Prosecution, in its 10 June 2013 response, also explained to the Defense that the witness request originally submitted for IT witnesses pertained to a subject that is no longer pending with the Commission. As such, the Defense is asking that witnesses be produced for something that is not a matter in issue before this Military Commission. Even if the matter was in issue, the Defense request for 11 witnesses is cumulative, with many witnesses not relevant or necessary in any way. However, the Prosecution will agree to stipulate to the testimony of Mr. Bryan Broyles. By placing the testimony into the record in this case, the Government and OCDC can continue to address all of the Defense concerns without court action.

7. Oral Argument

The Prosecution does not request oral argument, but reserves an opportunity to be heard if this Commission grants oral argument to the Defense.

8. Witnesses and Evidence

The Prosecution will not rely on any witnesses or attachments in support of this motion.

9. Additional Information

The Prosecution has no additional information.

10. Attachments

A. Certificate of Service, dated 3 July 2013

Respectfully submitted,

//s//

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ATTACHMENT A

