

**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 183H (GOV)

Government Response
To Commission Order
On The Joint Defense Motion
For Telephonic Access For Effective
Assistance Of Counsel

20 March 2015

1. Timeliness

This Response is timely because it complies with the Commission's Order directing the Prosecution to update the Commission by 20 March 2015. *See* AE 183G at 1.

2. Update

To prevail on its Motion, the Defense must persuade the Commission, by a preponderance of the evidence, that the Sixth Amendment right to effective assistance of counsel entitles the Accused, "at their option, to communicate daily by telephone with their defense teams, over an unclassified line with no monitoring or recording by any individual or any governmental entity." AE 183 at 1. As the Prosecution details in its Response and two Supplements, the Defense fails to satisfy its burden because the Sixth Amendment does not entitle the Accused to such communications. *See* AE 183A; AE 183A (Gov 1st Sup); *see also* AE 183A (Gov 2nd Sup). The Defense has not cited any authority compelling a contrary conclusion. In fact, since filing its Motion, the principal case on which the Defense relies to support its Motion has been reversed by the United States Court of Appeals for the District of Columbia Circuit. *See* AE 183B (citing *In re Guantanamo Bay Detainee Litig.*, 953 F. Supp. 2d 40 (D.D.C. 2013), *rev'd*, *Hatim v. Obama*, 760 F.3d 54 (D.C. Cir. 2014)). The Commission should therefore deny the Motion on this basis alone. *See id.*

It is the policy of the United States that, in order to prevent the disclosure of classified national security information, High Value Detainees (“HVDs”) are not permitted to make unmonitored telephone calls. This policy and the lack of legal entitlement notwithstanding, the Prosecution offered, in its Response, to “explore the possibility of telephone communications between the Accused and Defense Counsel” because the government “remains committed to continuing to facilitate efficient means of communication between [them].” *See* AE 183A at 1. In July 2013, the Staff Judge Advocate for Joint Task Force-Guantanamo (“JTF-GTMO”) informed then-counsel for Khalid Shaikh Mohammad that the infrastructure required to support unmonitored TS/SCI telephone calls between the Accused (and any HVD) and their Defense Counsel was not in place at the U.S. Naval Station Guantanamo Bay detention facility. *See* AE 183C, Attach. E (E-mail from Joseph Romero to Jason Wright (July 3, 2013, 1524 EST)).

For an unmonitored telephone call to occur, the telephone call between the Accused (as HVDs) and their Defense Counsel must occur via a telephone line that can secure TS/SCI in order to protect national security information. This is due to the fact that Amended Protective Order #1—even if further amended as the Prosecution proposes in Appellate Exhibit 13RRR—as well as the current classification level of certain categories of information require that the information be protected at the TS/SCI classification level.¹ *See* AE 13AA at ¶ 2.g.; AE 13RRR at ¶ 2.g.

The Prosecution notes that recently, for humanitarian reasons, HVDs have been permitted [REDACTED] communications with their families, in coordination with the International Committee for the Red Cross. [REDACTED]

¹ The defense request for daily unmonitored calls at defense option and over an unclassified line exceeds that which the government offers non-HVDs. Telephone calls between non-HVDs and their counsel are monitored by a privilege team, do not exceed the SECRET classification level (as these detainees are non-HVDs), and require ten days’ notice to JTF-GTMO. *See* AE 183C, Attach. E.

In this Update, the Prosecution reports to the Commission that Department of Defense policy remains unchanged and that the current infrastructure remains largely the same as reported to Defense Counsel in July 2013: the infrastructure required to support unmonitored telephone calls between the Accused (and any HVD) and their Defense Counsel is not in place at the JTF-GTMO detention facility, and there are no current Department of Defense plans in place to expend funds for this purpose. The only time an HVD detained aboard the U.S. Naval Station Guantanamo Bay detention facility has been permitted to communicate by telephone occurred over four years ago, as a one-time exception, using a temporary, ad hoc logistical arrangement that has not been replicated since. In this single instance, an HVD spoke with his family through a temporary telephone line that was manually routed from another room into a location secured at the TS/SCI level [REDACTED]

[REDACTED] AE 183C, Attach. C.

Compelling the government to build this infrastructure would require incurring additional expenses attendant in, for example, creating a permanent Sensitive Compartmented Information Facility (“SCIF”) certified to secure TS/SCI information with telephone capabilities that also secure TS/SCI. The creation of a separate site to host these telephone calls would require additional security details (*i.e.*, manpower) to monitor the execution of the proposed calls. This, in turn, would further diminish JTF-GTMO’s capacity to support in-person HVD legal meetings [REDACTED]

[REDACTED] The ability for JTF-GTMO to currently support on this front is already burdened by the Commission’s order enjoining JTF-GTMO from having female guards in positions where they may have incidental touching of the Accused en route to legal meetings and court, except “in cases of emergency and other urgent needs.” *See* AE 254JJ at 3. The current [REDACTED]

ATTACHMENT A

