

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 AL HAWSAWI

AE 255A

Government Response
To Defense Motion to Compel Recordings
of Mr. al Baluchi

31 January 2014

1. Timeliness

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

2. Relief Sought

The Prosecution respectfully requests that this Commission deny the Defense motion.

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).

4. Overview

The Prosecution will comply with all of its discovery obligations as detailed in the Military Commissions Act and Manual for Military Commissions. The Manual for Military Commissions requires the Prosecution to produce (1) the contents of all relevant statements—oral, written or recorded—made or adopted by the accused, that are within the possession, custody or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and are material to the preparation of the defense or are intended for use by trial counsel as evidence in the prosecution case-in-chief at trial; and

(2) any statement of the accused that reasonably tends to: (A) Negate the guilt of the accused of an offense charged; (B) Reduce the degree of guilt of the accused with respect to an offense charged; or (3) Reduce the Punishment of the accused. *See* R.M.C. 701(c)(3); R.M.C. 701(e)(1). The Prosecution's response to this motion should not be read to either confirm or deny any past or present capability of the United States to record detainees. To the extent that there are recordings of the accused that fit under the criteria articulated above, the materials will be provided to the Defense in this case.

Whether or not the United States has or has ever had, the capability to record communications of the accused in this case, any policy with respect to recording detainees would not be material to the preparation of the defense. As such, the Defense motion with respect to this information should be denied.

5. Facts

On 31 May 2011 and 25 January 2012, pursuant to the Military Commissions Act of 2009 ("M.C.A."), charges in connection with the 11 September 2001 attacks were sworn against Khalid Shaikh Mohammad, Walid Muhammad Salih Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al 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.

6. Law and Argument

I. The Prosecution is Aware of its Discovery Obligations Pursuant to R.M.C. 701 and Will Produce any Statements of the Accused, including Recorded Materials to the Extent Such Materials Exist, as Required by R.M.C. 701(c)(3) or 701(e)

Pursuant to the M.C.A., the Rules for Military Commissions (R.M.C.) require that the government produce all relevant statements—oral, written or recorded—made or adopted by the

accused, that are within the possession, custody or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and are material to the preparation of the defense or are intended for use by trial counsel as evidence in the prosecution case-in-chief at trial; and (2) any statement of the accused that reasonably tends to: (A) Negate the guilt of the accused of an offense charged; (B) Reduce the degree of guilt of the accused with respect to an offense charged; or (3) Reduce the Punishment of the accused. See R.M.C. 701(c)(3); R.M.C. 701(e)(1).

The Prosecution's response to this motion should not be read to either confirm or deny any past or present capability of the United States to record detainees. To the extent that any recorded communications of the accused exist that are required to be provided to the Defense under R.M.C. 701(c)(3) or R.M.C. 701(e), the Prosecution will provide those materials to the Defense.

II. To the Extent any Policies or Communications exist regarding Recording of Detainees, such Policies or Communications are not Material to the Preparation of the Defense

The Military Commissions Act of 2009 (M.C.A.) affords the Defense a reasonable opportunity to obtain evidence through a process comparable to other United States criminal courts. *See* 10 U.S.C. § 949j. However, no authority grants defendants an unqualified right to receive, or compels the government to produce discovery merely because the defendant has requested it. Rather, the government's discovery obligations are defined by the relevant rules and statutes. *See generally* *United States v. Agurs*, 427 U.S. 97, 106 (1976)(noting that "there is, of course, no duty to provide defense counsel with unlimited discovery of everything known to the prosecutor.").

The Defense is entitled to examine:

[a]ny books papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and which are material to the

preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

R.M.C. 701(c)(1).

The Prosecution's response to this motion should not be read to either confirm or deny any past or present capability of the United States to record detainees. Whether or not such a capability exists, or has ever existed, any policy with respect to recording detainees would not be material to the preparation of the defense. As such, the Defense motion with respect to this information should be denied.

7. Oral Argument

The Prosecution waives oral argument, but to the extent the Commission grants the Defense request for oral argument, the Prosecution requests the opportunity to be heard.

8. Witnesses and Evidence

None.

9. Additional Information

None.

10. Attachments

A. Certificate of Service, dated 31 January 2014.

Respectfully submitted,

//s//
Jeffrey Groharing
Deputy Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

