

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

AE359A(AAA)

Mr. al Baluchi's Response to
Government Motion for the Commission to
Inquire into the Circumstances of
Representation and Impose Procedural
Requirements on Joint Defense Agreements to
Further Safeguard the Accused's Right to
Conflict-Free Counsel

15 May 2015

1. **Timeliness:** This response is timely filed.
2. **Overview:** The military commission should deny the government's latest attempt to insert itself into the defense function because any joint defense agreement (JDA) is itself privileged work product. If JDAs exist, there may be good reasons why the defense has chosen not to reduce them to writing. In the single District Court case which has required written JDAs, the court acted to control the conflict resulting from defendants who cooperated with the government, a situation wholly unlike the one before the military commission.
4. **Burden of Proof and Persuasion:** The government bears the burden of proof on this motion.
5. **Facts:** None additional.
6. **Argument:**

The joint defense privilege protects co-defendants' communications with each other and their attorneys, regardless of whether they participate in a joint defense privilege.¹ This "rule applies not only to communications subject to the attorney-client privilege, but also to

¹ *In re Sealed Case*, 29 F.3d 715, 719 (D.C. Cir. 1994); *United States v. Schwimmer*, 892 F.2d 237, 243-44 (2d Cir. 1977); *Wilson P. Abraham Contr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (1977).

communications protected by the work-product doctrine.”² The joint defense privilege is held as a group: “a joint defense privilege cannot be waived without the consent of all parties who share the privilege.”³ The joint defense privilege is not dependent on the existence of a written defense agreement (JDA),⁴ but co-defendants may choose to enter a JDA to promote “a pooling of resources, a healthy exchange of vital information, a united front against a common litigious foe, and the marshaling of legal talent and advice.”⁵ The government asks the military commission to order the defense to reduce any JDAs to writing and produce them for inspection.

The first reason the military commission should deny the government’s latest intrusion into the defense camp is that any JDA which might exist is itself protected work product.⁶ “The work product privilege protects any material obtained or prepared by a lawyer ‘in the course of his legal duties, provided that the work was done with an eye toward litigation.’”⁷ JDAs meet the criterion for work product privilege, as defense attorneys would have created any JDAs to regulate affairs amongst themselves.

In some cases, JDAs provide a detailed road map to the litigation, investigative or analytical work of the parties which may impact issues before the tribunal. Some JDAs divide responsibility for litigation, investigation, and analysis tasks between the parties, or commit the

² *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990); *Intex Recreation Corp. v. Team Worldwide Corp.*, 471 F. Supp. 2d 11, 16 (D.D.C. 2007).

³ *In re Grand Jury Subpoenas*, 902 F.2d at 248 (citing *Chahoon v. Commonwealth*, 62 Va. (21 Gratt.) 822, 842 (Va. 1871)). A defendant who testifies for the government, however, waives the joint defense privilege for his or her own communications. *United States v. Almeida*, 341 F.3d 1318, 1324 (11th Cir. 2003).

⁴ See, e.g., *In re Regents of the University of California*, 101 F.3d 1386, 1390 (Fed. Cir. 1996) (finding privilege based on licensing agreement which did not mention JDA).

⁵ *Lugosch v. Congel*, 219 F.R.D. 220, 238 (N.D.N.Y. 2003).

⁶ Of course, as with all work product, a party can waive their privilege and advise others of the existence or provisions of a JDA. That is a decision made by the party, not an external actor. Here, Mr. al Baluchi has not acknowledged whether he has entered any JDAs.

⁷ *In re Sealed Case*, 29 F.3d at 718 (quoting *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982)).

parties to contribute certain resources. Any parties to a hypothetical JDA should not have to provide such detailed strategy information to the military commission, even on an *ex parte* basis.

The second reason the military commission should deny AE359 is that if Mr. al Baluchi participates in a JDA, and the JDA is verbal, he need not commit it to writing.⁸ Good reasons exist not to reduce a JDA to writing, including potential evidentiary use of the JDA against the parties. For example, the existence of a joint defense agreement may bear of the question of when an alleged conspiracy ended, as both involve an ongoing common enterprise.⁹ Requiring the parties to a JDA to reduce it to writing may produce evidence against defendants which would not otherwise exist.

⁸ *United States v. Gonzalez*, 669 F.3d 974, 979 (9th Cir. 2012) (“More importantly, it is clear that no written agreement is required, and that a JDA may be implied from conduct and situation, such as attorneys exchanging confidential communications from clients who are or potentially may be codefendants or have common interests in litigation.”); *Intex Corp.*, 471 F. Supp. 2d at 16 (“A written agreement is the most effective method of establishing the existence of a common interest agreement, although an oral agreement whose existence, terms, and scope are proved by the party asserting it, may provide a basis for the requisite showing.”); *Minebea Co., Ltd. v. Papst*, 228 F.R.D. 13, 16 (D.D.C. 2005) (“Obviously, a written agreement is the most effective method of establishing the existence of a joint defense agreement, although an oral agreement whose existence, terms and scope are proved by the party asserting it, may be enforceable as well.”); *Lugosch*, 219 F.R.D. at 237 (“In order then for documents and communications shared amongst these litigants to be considered confidential, there must exist an agreement, though not necessarily in writing, embodying a cooperative and common enterprise towards an identical legal strategy.”); *United States v. Hsia*, 81 F. Supp. 2d 7, 15 (D.D.C. 2000) (“A joint defense arrangement was entered into in early April but was never reduced to writing.”); *Avocent Redmond Corp. v. Rose Electronics, Inc.*, 516 F. Supp. 2d 1199, 1203 (W.D. Wash. 2007) (“A written agreement is not required, but the parties must invoke the privilege; they must intend and agree to undertake a joint defense effort.”).

⁹ *Cf. Schwimmer*, 892 F.2d at 244 (noting that joint defense privilege may apply to “an ongoing common enterprise” prior to actual litigation); *United States v. Turner*, 548 F.3d 1094, 1097 (D.C. Cir. 2008) (noting the importance of the end date of a conspiracy to issues of statutes of limitations, hearsay, and sentencing).

Make no mistake: this case is rife with potential conflicts, all of which so far have been created by the government.¹⁰ But a hypothetical JDA is not their source. The main conflict associated with joint defense arises when one of the participants becomes a cooperator with the government, an unlikely scenario here. In a cooperator situation, the conflict arises from the joint defense *privilege*, however, not from the joint defense *agreement*.¹¹ The JDA may resolve any conflict, rather than creating it, by setting clear rules for withdrawal from the joint pool of information and strategy.

In apparently the only case to adopt the government's proposed course of action, a Northern District of California judge ordered defense counsel in a thirty-defendant street gang case to reduce any JDAs to writing and provide them to the court.¹² The District Court explained that,

The present case appears particularly likely to lead to conflicts caused by cooperation between defendants. Here, there are a large number of defendants, some of whom may not have known each other prior to their first appearance before this court. The charges span a variety of incidents over several distinct periods of time and allege roles of varying degrees of culpability. The interests of any two defendants are less likely to coincide precisely than in the case of two

¹⁰ See, e.g., AE350D(AAA) Mr. al Baluchi's Motion for Appointment of Independent Counsel; AE292L(AAA) Mr. al Baluchi's Motion for Independent Counsel to Advise Him Regarding Potential Conflict.

¹¹ See, e.g., *United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000) (in a case without a formal JDA: "This privilege can also create a disqualifying conflict where information gained in confidence by an attorney becomes an issue, as it did in this case."); *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir. 1978) ("When information is exchanged between co-defendants and their attorneys in a criminal case, an attorney who is the recipient of such information breaches his fiduciary duty if he later, in his representation of another client, is able to use this information to the detriment of one of the co-defendants, even though that co-defendant is not the one which he represented in the criminal case.").

¹² *United States v. Stepney*, 246 F. Supp. 2d 1069, 1071-72 (N.D. Cal.

defendants accused of essentially equal participation in a single crime. Where defendants do not have cohesive interests, the potential for conflict is, by definition, greater—as is the potential for cooperating with the government.¹³

Assuming the military commission finds the reasoning of the District Court persuasive in general, the same considerations do not apply in this case. The defendants all face identical charges. Although the charge sheet alleges a variety of overt acts, the government seeks the death penalty against all the defendants and has not acknowledged significant differences in their culpability. It is highly unlikely that any defendant will seek to cooperate with the government. The government has resisted all attempts to sever defendants for separate trial. Compared to a typical civilian RICO case involving dozens of tenuously-connected defendants all incentivized to reduce their sentences through cooperation, the interests of the five defendants in this case are positively cohesive.¹⁴

There are additional factors unique to the military commissions that counsel against external regulation of any JDAs. All but two of the courtroom participants for defense, prosecution, and trial judiciary are paid by the Executive Branch of the United States government. A single Chief Defense Counsel supervises all the defense counsel in the case,¹⁵ and guards against conflicts of interest.¹⁶ All but a few members of defense teams maintain permanent offices in the Office of the Chief Defense Counsel, and use common information technology systems. The defendants themselves have been housed in the same facility since

¹³ *Id.* at 1078.

¹⁴ Notwithstanding the defendants' cohesive interests, there may be other important reasons for severance of one or more defendants.

¹⁵ Regulation for Trial by Military Commission (RTMC) § 9-1(a)(2).

¹⁶ RTMC § 9-1(a)(8).

2006, and have engaged in a common defense for virtually their entire Guantanamo incarceration.

The military commission should resist the government's suggestion that it involve itself in internal defense affairs on a prophylactic basis. If the military commission wishes to resolve conflict issues, it should appoint independent counsel to Mr. al Baluchi as requested in AE350D and AE292L, rather than create a new ethical issue by breaching defense privilege.

7. **Oral Argument:** The defense requests oral argument.

8. **List of Attachments:**

A. Certificate of Service

Very respectfully,

//s//

JAMES G. CONNELL, III
Learned Counsel

Counsel for Mr. al Baluchi

//s//

STERLING R. THOMAS
Lt Col, USAF
Defense Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 15th day of May, 2015, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//

JAMES G. CONNELL, III

Learned Counsel