

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

AE373(AAA)

**Defense Motion to Dismiss**  
For Government Intrusion  
Into Attorney-Client Relationship

21 September 2015

1. **Timeliness:** This request is timely filed within the timeframe established by Rule for Military Commission (R.M.C.) 905.
2. **Relief Requested:** The military commission should dismiss the charges against Mr. al Baluchi.
3. **Overview:**



In mid-June 2015, the government surreptitiously seized clearly marked, attorney-client privileged DVDs from Mr. al Baluchi's legal storage. These illegal seizures intrude into Mr. al Baluchi's attorney-client relationship, in violation of his Fifth, Sixth, and Eighth Amendment rights, as well as this commission's order in AE018U Written Communications

Order. These violations have irreparably and fatally damaged Mr. al Baluchi's ability to assist in his own defense. Even if these intrusions were to cease, no reasonable person in Mr. al Baluchi's circumstances could trust the confidentiality of his attorney-client communications, and without that trust, a full defense and a fair trial are impossible. As a result, Mr. al Baluchi respectfully requests that this commission dismiss all charges against him.

**4. Burden of Proof and Persuasion:** Once the defense has proven the seizure of attorney-client privileged materials, the government bears the burden to overcome the presumption that privileged information seized by a government agent is conveyed to the prosecution.<sup>1</sup>

**5. Facts:**

On 17 or 18 June 2015, the government took clearly marked, privileged DVDs from one of Mr. al Baluchi's legal bins without notifying him or his attorneys. When Mr. al Baluchi and his attorneys demanded their return, the government continued to retain them, no doubt for exploitation of their contents, before finally returning the DVDs to Mr. al Baluchi himself. These violations are simply the latest episode in the pattern of seizure and examination of legal material in violation of the attorney-client privilege and this military commission's orders. These invasions are no accident: they are part of the ongoing intelligence-gathering effort against the defendants in this case and their attorneys.<sup>2</sup>

<sup>1</sup> "Further, once the investigatory arm of the government has obtained information, that information may reasonably be assumed to have been passed on to other governmental organs responsible for prosecution. Such a presumption merely reflects the normal high level of formal and informal cooperation which exists between the two arms of the executive." *Briggs v. Goodwin*, 698 F.2d 486, 495 (D.C. Cir. 1983), *vacated on other grounds*, 712 F.2d 1444 (D.C. Cir. 1984); *see also Edmond v. United States Postal Service General Counsel*, 949 F.2d 415, 424 n.17 (D.C. Cir. 1991) ("Although vacated because of an intervening Supreme Court decision covering immunity, the *Briggs* opinion retains precedential weight on other issues."); *United States v. Neill*, 952 F. Supp. 834, 840 (D.D.C. 1997) (citing *Briggs* as authority for the presumption).

<sup>2</sup> Joint Task Force-Guantanamo Bay "was set up to be the umbrella over a detention mission and intelligence mission sometime in the early 2000s." Unofficial/Unauthenticated Transcript of 12 February 2013 at 2038; *id.* at 1946-47 (Ms. Bormann: "We believe that 133 directly implicates the seizure by JTF-GTMO which Captain Welsh was involved with of attorney-client privileged material which happened in October of 2011, because we believe it demonstrates ongoing

a. The government allows its prisoners to keep legal materials in plastic containers designated as “legal bins.”<sup>3</sup> As the case continues and the number of legal communications and documents increases, the need for and importance of legal bin storage increases as well.<sup>4</sup> JTF-GTMO has “several places that the bins are stored outside of the cell.”<sup>5</sup>

b. Mr. al Baluchi’s small cell contains a great deal of legal and non-legal written material. In October 2013, the military judge stated, “I have this image that they’re sitting on their cot surrounded by bins.”<sup>6</sup> [REDACTED]

[REDACTED]

[REDACTED]

*The 2011 “baseline review” seizure of all legal documents*

c. ~~(U//FOUO)~~ On 30 September 2011, Rear Admiral David B. Woods, commander of Joint Task Force-Guantanamo Bay, ordered a search of all written material of prisoners in Camp [REDACTED] with a focus on Mr. al Baluchi and the other five men facing trial by military commission.<sup>8</sup>

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intelligence gathering function of JTF-GTMO that involves the audio monitoring of the meetings in Echo II.”).

<sup>3</sup> Unofficial/Unauthenticated Transcript of 24 October 2013 at 6943-44.

<sup>4</sup> Unofficial/Unauthenticated Transcript of 24 October 2013 at 6944-45.

<sup>5</sup> Unofficial/Unauthenticated Transcript of 24 October 2013 at 6946-47.

<sup>6</sup> Unofficial/Unauthenticated Transcript of 24 October 2013 at 6947.

<sup>7</sup> See Attachment B. [REDACTED]

[REDACTED]

Attachment C, the situation can only have gotten worse.

<sup>8</sup> Attachment D at 1. The government applied the redaction in this document as part of the declassification process, and provided the underlying text to counsel for Mr. al Baluchi.

2. ~~(S//NF)~~ You are directed to conduct a baseline security review of all materials held by detainees at Guantanamo Bay, Cuba, with the initial focus on material held by the one High Value Detainee (HVDs) who is pending trial by Military Commission (ISN 10015) and the five other HVDs (ISN 10011, ISN 10013, ISN 10014, ISN 10018 and ISN 10024) who have had charges preferred against them. The purpose of the review is to screen and mark all documents determined to be held by the detainee in accordance with applicable regulations so that the absence of a screening stamp in the future can readily identify a document as contraband. This will enable Joint Task Force – Guantanamo (JTF – GTMO) to avoid unnecessary intrusion upon what might otherwise be a privileged communication between a detainee and his Habeas or Office of Military Commissions – Defense (OMC – D) counsel. You are to complete the baseline security review of materials held [REDACTED] no later than 14 October 2011.

The 30 September 2011 “baseline review” order provided:<sup>9</sup>

d. ~~(U)~~ The guards shall conduct the search by conducting a cursory review of each page of every document in the possession of each detainee. This cursory review shall consist of scanning the document long enough to determine whether it constitutes legal material, other previously screened documents of a non-legal nature that were sent to the detainees in accordance with the governing references, or contraband:

d. On 12 October 2011, Staff Judge Advocate then-CDR<sup>10</sup> Thomas Welsh informed defense counsel that JTF-GTMO staff had seized the legal mail bin of Mr. al Baluchi, among others, for inspection to determine his “baseline” level of compliance with a JTF-GTMO legal communications order.<sup>11</sup> CDR Welsh suggested that Mr. al Baluchi may have declined to meet his attorneys that day because his legal materials were missing.

e. The following day, 13 October 2011, defense counsel again attempted to visit Mr. al Baluchi. An Assistant SJA informed then-Maj<sup>12</sup> Thomas and Mr. Connell that [REDACTED] the Assistant SJA) had returned to speak to Mr. al Baluchi after the meeting on 12 October 2011. The Assistant SJA told Maj Thomas and Mr. Connell that Mr. al Baluchi had cited the seizure of

<sup>9</sup> *Id.* at 2.

<sup>10</sup> CDR Welsh was later promoted to Captain.

<sup>11</sup> Unofficial/Unauthenticated Transcript of 12 February 2013 at 2094; *see also id.* at 2005 (seizure of Mr. Mohammad’s legal materials); *id.* at 2038-39 (seizure of Mr. al Hawsawi’s legal materials); AE008 Defense Motion to Dismiss for Defective Referral, Attachment K.

<sup>12</sup> Maj Thomas was later promoted to Lieutenant Colonel.

the legal materials as a basis for refusing to meet them.<sup>13</sup>

f. For almost two years, from 12 October 2011 until 15 August 2013, Mr. al Baluchi refused to meet with his defense counsel. One of the main reasons that Mr. al Baluchi refused to meet with his attorneys is that he believed they were powerless to protect his legal materials or any resulting attorney-client privileged work products.

*The legal mail boycott*

g. On 14 November 2011, in response to JTF-GTMO's claimed authority to read legal mail, Maj Thomas and Mr. Connell stopped sending legal mail to Mr. al Baluchi and instructed the then-Office of the Chief Defense Counsel<sup>14</sup> courier not to seek to deliver any legal mail she had previously received for delivery to Mr. al Baluchi.<sup>15</sup>

h. On 8 January 2012, Chief Defense Counsel Colonel J.P. Colwell issued an interim ethics instruction to Maj Thomas, Mr. Connell, and other attorneys at OCDC, which was reaffirmed in a final ethics instruction on January 13.<sup>16</sup> In these instructions, Colonel Colwell concluded that complying with the privilege team and attorney acknowledgement provisions of a new JTF-GTMO legal communication policy would violate the ethical duty to safeguard client confidences and secrets.

i. From 14 November 2011 to 8 November 2013, Mr. al Baluchi received no privileged mail through JTF-GTMO.<sup>17</sup> Thus, for a period of two years, Mr. al Baluchi did not acquire any new attorney-client privileged materials from his attorneys.

<sup>13</sup> See Unofficial/Unauthenticated Transcript of 18 December 2013 at 7726.

<sup>14</sup> The Office of the Chief Defense Counsel (OCDC) later changed to the Military Commission Defense Organization (MCDO).

<sup>15</sup> Unofficial/Unauthenticated Transcript of 28 January 2013 at 1373 (Ms. Bormann: "But since October of 2011 I have been unable to send any written communication in to my client.").

<sup>16</sup> AE008 Defense Motion to Dismiss for Defective Referral, Attachment H.

<sup>17</sup> Unofficial/Unauthenticated Transcript of 24 October 2013 at 6946; *id.* at 7008-09.

*The “unfortunate February incident” of 2013*<sup>18</sup>

j. On 11-13 February 2013, at approximately the time that CAPT Welsh was testifying about the October 2011 “baseline review” review of defendant legal materials, the government seized stamped privileged materials from the defendants.<sup>19</sup> Among other items, the government took properly marked legal strategy materials from Mr. al Hawsawi.<sup>20</sup>

k. An unidentified person or persons photocopied at least some of the legal material taken from the defendants’ cells.<sup>21</sup> Linguists involved with intelligence prepared summary translations of the seized legal material.<sup>22</sup>

l. On 14 February 2013, Assistant Staff Judge Advocate LCDR George Massucco testified that he intended to return the privileged materials to the prisoners from whom they were taken, acknowledging that they were, in fact, privileged legal materials previously processed by

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<sup>18</sup> In the euphemistic style for which Guantanamo is justly famous, LCDR Massucco described the February 2013 seizure of stamped, privileged materials as the “unfortunate February incident.” Unofficial/Unauthenticated Transcript of 24 October 2013 at 6916.

<sup>19</sup> Unofficial/Unauthenticated Transcript of 24 October 2013 at 6949; *see also* Unofficial/Unauthenticated Transcript of 14 February 2013 at 2564; Unofficial/Unauthenticated Transcript of 13 February 2013 at 2427-29; Unofficial/Unauthenticated Transcript of 12 February 2013 at 2434-37, 2441, 2444. It is not clear whether JTF-GTMO took legal materials from Mr. al Baluchi. LCDR Massucco initially testified that “nothing was seized from” Mr. al Baluchi. Unofficial/Unauthenticated Transcript of 14 February 2013 at 2635. He later testified that, “items were taken from all of the detainees.” Unofficial/Unauthenticated Transcript of 24 October 2013 at 6840; *see also id.* at 6884 (COL Pohl: “The material were seized? . . . Eventually, this goes for all of the detainees?” LCDR Massucco: “That’s correct.”).

<sup>20</sup> Unofficial/Unauthenticated Transcript of 24 October 2013 at 6871-72 (COL Pohl: “I’m simply saying your allegation is that documents were seized that say attorney-client information on them, correct? . . . The government, Commander Massucco, everyone agrees with that.”); *id.* at 6885-86 (Mr. Groharing: “But as far as the actual materials that were seized, we’ll agree that they were seized . . .”); *id.* at 6892 (CDR Ruiz: “[R]ight now there is no dispute whatsoever as to the fact that these are the documents that were seized and returned. Prosecution acknowledges that and confirms that.”); *see also id.* at 6850-51, 6862-65, 6963-64; AE031LL Privileged Communication.

<sup>21</sup> Unofficial/Unauthenticated Transcript of 14 February 2013 at 2618-19; Unofficial/Unauthenticated Transcript of 24 October 2013 at 6903-05; *id.* at 6932-33.

<sup>22</sup> Unofficial/Unauthenticated Transcript of 24 October 2013 at 6933-35.



the government.<sup>23</sup> JTF-GTMO, however, did not provide LCDR Massucco with Mr. al Hawsawi's privileged legal materials.<sup>24</sup>

m. The military commission ordered an investigation into the searches and seizures of legal materials.<sup>25</sup>

n. In early March 2013, Mr. al Hawsawi informed LCDR Massucco that he was missing clearly privileged legal strategy materials.<sup>26</sup>

o. Approximately two weeks later, in mid-March 2013, JTF-GTMO provided Mr. al Hawsawi's missing legal strategy materials to LCDR Massucco.<sup>27</sup> LCDR Massucco could not account for the whereabouts of Mr. al Hawsawi's legal documents between mid-February and mid-March 2013.<sup>28</sup>

*The AE018U regime*

p. On 25 March 2013, the military commission issued AE144D Ruling and AE144E Interim Order. The military commission established a regime under which, "Examination of the legal bins by the guard force will be limited to review for appropriate markings, scanning for

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<sup>23</sup> Unofficial/Unauthenticated Transcript of 14 February 2013 at 2601; *see also id.* at 2662 (COL Pohl: "I mean, we had Commander Massucco come up here and say I looked at this stuff that should never have been seized.").

<sup>24</sup> Unofficial/Unauthenticated Transcript of 24 October 2013 at 6882.

<sup>25</sup> Unofficial/Unauthenticated Transcript of 14 February 2013 at 2687-90.

<sup>26</sup> Unofficial/Unauthenticated Transcript of 24 October 2013 at 6842; *see also, e.g.*, Unofficial/Unauthenticated Transcript of 21 August 2013 (Mr. Ruiz describing the return of clearly privileged strategy materials); Unofficial/Unauthenticated Transcript of 24 October 2013 at 6850-51 (CDR Massucco describing proper markings on documents); *id.* at 6862-65 (CDR Massucco describing yellow legal pad pages); AE031LL Privileged Communication.

<sup>27</sup> Unofficial/Unauthenticated Transcript of 24 October 2013 at 6899.

<sup>28</sup> Unofficial/Unauthenticated Transcript of 24 October 2013 at 6901; *id.* at 7026-27. Mr. al Hawsawi raised this issue to the military commission in AE144 (MAH Supp.) Defense Supplement to Defense Proposed Interim Order Regarding Seizure and Inspection of Accused's Legal Mail.

classification marking of written materials, and inspection for contraband.”<sup>29</sup>

q. On 6 November 2013, this military commission issued AE018U, implementing its interim regime for storage of legal material. Paragraph 11, governing storage of legal material, provides as follows:

**11. Inspection of Legal Bins**

a. Each Accused possess one or more containers known as "legal bins," in which they store materials protected by the attorney-client privilege, as defined in Military Commission Rule of Evidence (M.C.R.E.) 502(a)(1). These materials are identified by various markings, including stamps of various forms placed from time to time by USG personnel and banners or markings placed by counsel for the Accused or their representatives. The content of materials bearing any of these various markings, notwithstanding inconsistencies in their form, may not be read or otherwise observed for content by USG personnel other than to identify that the materials are, in fact, marked.

b. USG personnel may inspect legal bins of an Accused only in the presence of a trained Non-Commissioned Officer or higher as designated by the Joint Detention Group Commander and only for contraband. Contraband is defined in paragraph 2.i., above.

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<sup>29</sup> AE144D Ruling at 2; *see also* AE144A Notice of Filing of Proposed Interim Order Regarding Seizure and Inspection of Accused's Legal Materials; Unofficial/Unauthenticated Transcript of 14 February 2013 at 2658-59 (Ms. Bormann proposing SJA discussion with defense counsel as an interim solution); *id.* at 2668-70 (Mr. Nevin proposing physical contraband search only as an interim solution). The military commission previously considered a solution involving Privilege Review Team inspection of legal bins. *See, e.g.*, Unofficial/Unauthenticated Transcript of 14 February 2013 at 2598, 2655.



c. Materials other than physical contraband observed in the legal bins of the Accused, if any, which do not bear the markings referred to in paragraph 3 shall be segregated in a sealed container, labeled with the date, time and identification of the USG personnel by whom it was observed, and retained by the Non-Commissioned Officer supervising the inspection. In such an event, an attorney representative of the SJA will be immediately notified. Seizure of such material may occur only upon the prior authorization of an attorney representative of the SJA, made upon personal inspection. If the materials are determined to be properly marked, they will be returned to the Accused. If the materials are not properly marked, they will be retained by the attorney representative of the SJA and counsel for the Accused shall be immediately notified. If the materials originated with Defense Counsel, they shall be promptly returned to counsel. The materials shall not be duplicated, photographed, or otherwise copied by any process prior to being shown to Defense Counsel.

d. Material, marked as indicated in paragraph 11.a, above, that is found in locations other than the legal bin of an Accused, shall be segregated in a sealed container, labeled with the date and time and identification of the USG personnel by whom it was observed, and retained by the Non-Commissioned Officer supervising the inspection.

(1) In such an event, an attorney representative of the SJA will be immediately notified. Seizure of such material may occur only upon the prior authorization of an attorney representative of the SJA, made upon personal inspection. If the materials are determined to be properly marked, they will be returned to the Accused.

(2) If the materials are not properly marked, they will be retained by the attorney representative of the SJA, and Defense counsel for the Accused shall be immediately notified. If the materials originated with counsel, they shall be promptly returned to Defense Counsel. The materials shall not be duplicated, photographed, or otherwise copied by any process prior to being shown to counsel.

r. Counsel for Mr. al Baluchi began sending him privileged communications on 8 November 2013, and have done so continuously ever since. The resumption of legal mail after the two-year hiatus generated an even greater need for legal bin storage.<sup>30</sup>

*14 August 2014 seizure of legal notes*

s. On 14 August 2014, Mr. al Baluchi attended a military commission hearing. In advance of his transport to the Expeditionary Legal Complex (ELC), Mr. al Baluchi prepared notes of items he wished to discuss with his attorneys at the hearing. These notes, on a yellow

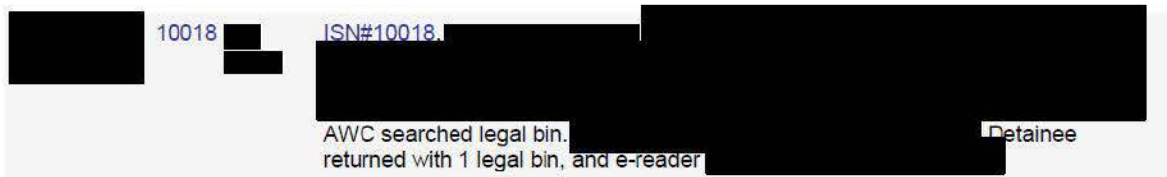
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<sup>30</sup> See Unofficial/Unauthenticated Transcript of 24 October 2013 at 6945-46 (CDR Massucco: "I'm going to assume, assuming there's an order for a privilege team. You will start sending legal documents in, and then there's going to be a need for a privilege team for more legal space.")

post-it note, included a potential motion for the attorneys to prepare, two suggestions for expert witnesses, and other strategy considerations.<sup>31</sup>

t. JTF-GTMO searches legal bins whenever a defendant goes to or from a legal meeting or military commission hearing.<sup>32</sup>

u. (U//FOUO) On 14 August 2014, the Assistant Watch Commander searched Mr. al Baluchi's legal bin, as noted in redacted DIMS records.<sup>33</sup>



v. On 14 August 2014, at the ELC holding cell, SOO #1227 seized three papers, one “sticky note,” and one folder from Mr. al Baluchi's legal bin.<sup>34</sup>

<sup>31</sup> Attachment E. Because this document contains privileged attorney-client information, Mr. al Baluchi is filing it under seal. This document bears no Privilege Team markings because it was never sent as legal mail; Mr. al Baluchi prepared it himself in Camp 7. The original is two sides of the same note, although the attachment has separate pages for the front and back. Under all available guidance, Attachment E is unclassified, but is being submitted for classification review out of an abundance of caution.

<sup>32</sup> Unofficial/Unauthenticated Transcript of 24 October 2013 at 6951.

<sup>33</sup> Attachment F. The government redacted this document before providing to the defense, so Mr. al Baluchi does not know the nature of the redacted material. These unauthorized redactions illustrate how the government's ongoing violations of MCRE 506 prejudice Mr. al Baluchi and disrupt the truth-seeking process. See AE161(AAA) Defense Motion to Require the Government to Comply with MCRE 506 Regarding Redaction of Unclassified Discovery; AE336(MAH) Defense Motion to Compel Non-Redacted Detainee Information Management Systems (DIMS) Reports and Allow the Defense to Share the Reports with Mr. al Hawsawi; AE336(AAA Sup.) Supplement to Defense Motion to Compel Non-Redacted Detainee Information Management Systems (DIMS) Reports and Allow the Defense to Share the Reports with Mr. al Hawsawi.

<sup>34</sup> Attachment G. The government produced both redacted and unredacted versions of this document; Mr. al Baluchi is using the redacted version to avoid FOUO markings. On 25 August 2014, Mr. al Baluchi sent DR-185-AAA to the government, requesting all information and documents relating to the materials seized from Mr. al Baluchi on 14 August 2014. Attachment H. On 22 September 2014, the government produced the documents which are Attachment F. The government's response states that it “will continue to conduct its due diligence for other requested information.” Attachment I. Mr. al Baluchi has requested the results of the

1. LOCATION GUANTANAMO BAY, CUBA	2. DATE (YYYYMMDD) 20140814	3. TIME 1530	4. FILE NUMBER
5. LAST NAME, FIRST NAME, MIDDLE NAME SOO # 1277	6. BADGE NUMBER SOO # 277	7. GRADE/STATUS E-5/SGT	
8. ORGANIZATION OR ADDRESS JTF GTMO/NEGB, APO AE 09200			
9. I WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH			
<p>I, SOO #1277, conducted a routine legal bin search for ISN #10018 at approximately 1530 on 14 Aug 2014. While conducting the search I noticed paperwork that was not stamped with the [redacted] with the ISN's # on it. The paperwork consisted of 3 papers, 1 sticky note, and 1 folder. The items were sealed in a manilla envelope and transported back to Camp. Once at Camp the sealed envelope was transferred to the evidence custodian. /// End of statement ///</p>			

w. The "sticky note" was Mr. al Baluchi's legal notes. The notes, in English and Arabic, include a motion idea and expert witness suggestions as well as other strategy considerations.<sup>35</sup> The sticky note was also attached to other legal notes.

x. There is no indication that SOO #1277 or any other person notified an attorney representative of the Staff Judge Advocate's Office, or that any SJA authorized the seizure.<sup>36</sup> In fact, SOO #1277 refused to call an SJA when requested to do so by Mr. al Baluchi. No government personnel notified counsel for Mr. al Baluchi of the seizure, although counsel for Mr. al Baluchi were less than 100 meters away in the Expeditionary Legal Complex.

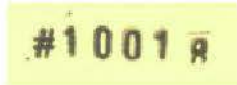
government's continued investigation. Attachment J (DR-185A-AAA). As of this filing, the government has not responded.

<sup>35</sup> Attachment E.

<sup>36</sup> JTF-GTMO has a history of not notifying the SJA of its legal bin searches. Unofficial/Unauthenticated Transcript of 24 October 2013 at 6912-14 (LCDR Massucco: "On a couple of occasions I didn't find out until after the fact.").



y. On 15 August 2014, JTF-GTMO guards returned the legal notes to Mr. al Baluchi. Between the time JTF-GTMO seized the notes, and the time they returned them, an unknown person added the following stamp to the notes:<sup>37</sup>



z. On 18 March 2015, Mr. al Baluchi notified the military commission of this intrusion into the attorney-client relationship via AE018QQ(AAA Sup.) Supplement to Defense Motion for Government to Show Cause for Its Violation of AE018U.

aa. On 31 March 2015, the government acknowledged its violation of this military commission's order in AE018U.<sup>38</sup> The government stated that it had taken remedial action to prevent future violations of the AE018U:<sup>39</sup>

<sup>4</sup> The Prosecution has requested that the JTF-GTMO Office of the Staff Judge Advocate re-emphasize with the Guard Staff the need to inform Defense Counsel if/when legal material, as defined in AE 018U, is seized during or subsequent to a search.

The government did not make any representations about the requirement for SJA authorization of legal material seizure.

*September 2014 Persian Gulf investigation/mitigation travel*

bb. In September 2014, James Connell travelled to Kuwait and the United Arab Emirates with linguist [REDACTED] to investigate allegations in the Charge Sheet and Mr. al Baluchi's biopsychosocial history. Mr. Connell videorecorded certain aspects of his investigation.<sup>40</sup>

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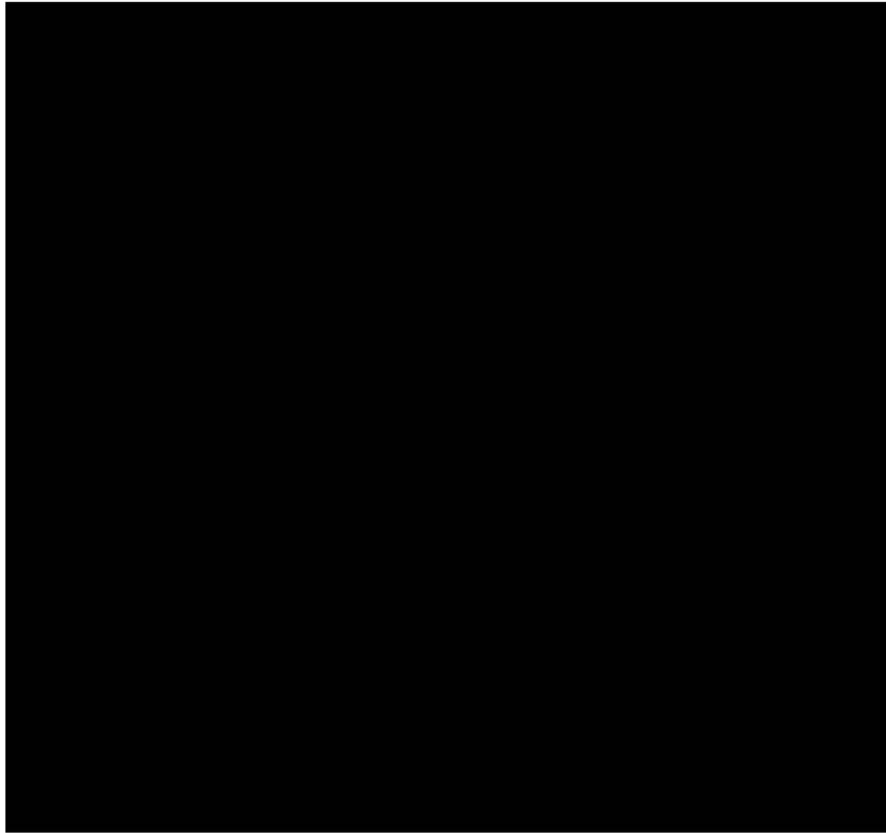
<sup>37</sup> Attachment E.

<sup>38</sup> AE018RR Government Response to Defense Motion for Government to Show Cause for Its Violation of AE018U at 5.

<sup>39</sup> *Id.* at 5 n.4.

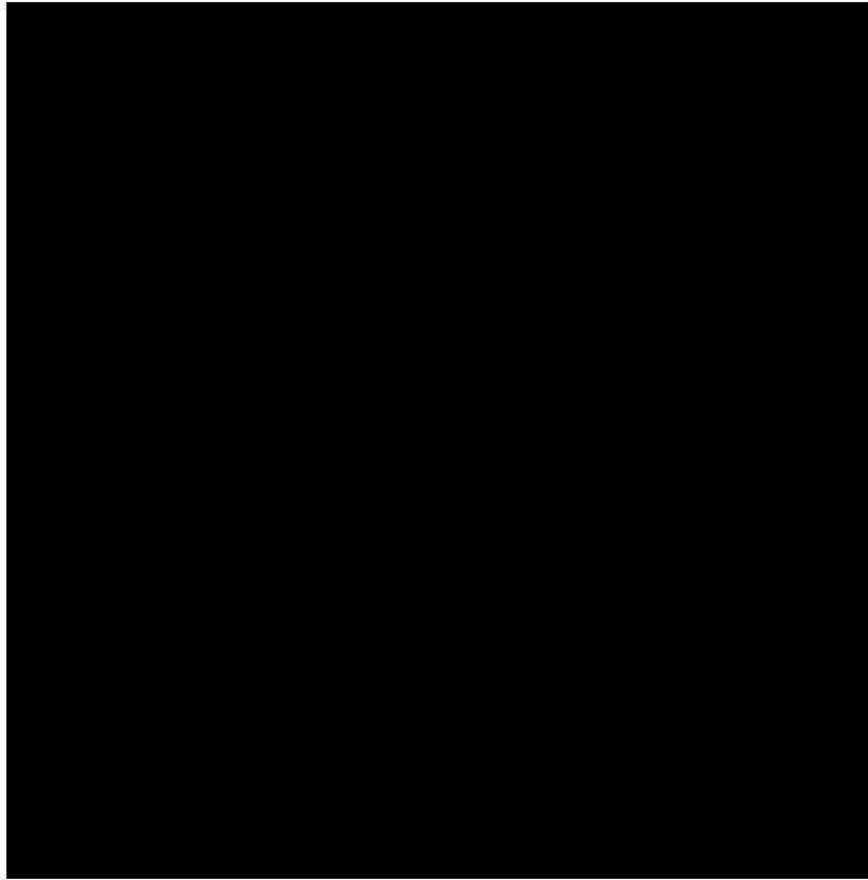
<sup>40</sup> Attachment N.

cc. On 16 October 2014, Mr. [REDACTED] saved the videorecordings to two DVDs. Mr. [REDACTED] labelled the DVDs in accordance with AE018U. Shortly thereafter, a paralegal submitted the DVDs to the Privilege Team. The following photographs depict the markings on the DVDs:<sup>41</sup>



<sup>41</sup> Attachment N. [REDACTED] Attachment EE.  
[REDACTED] Attachment FF.



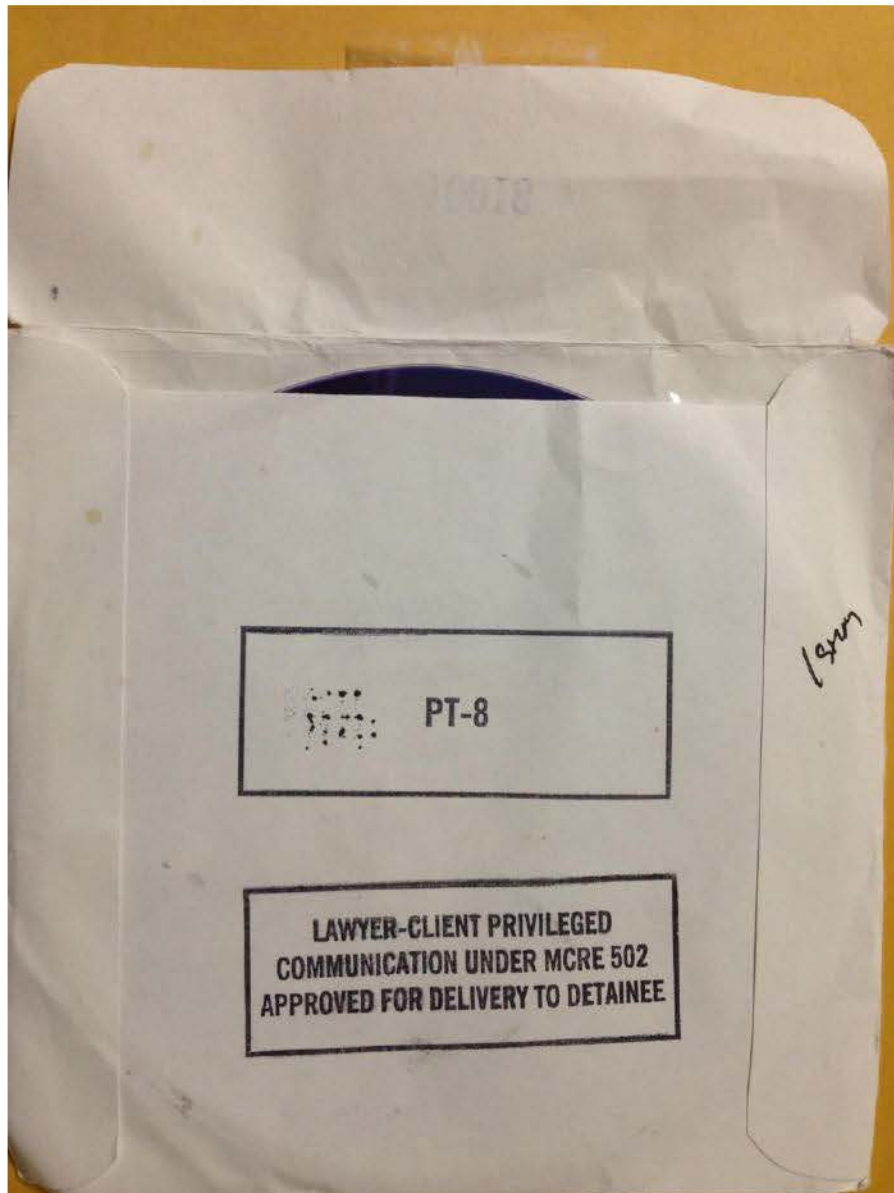


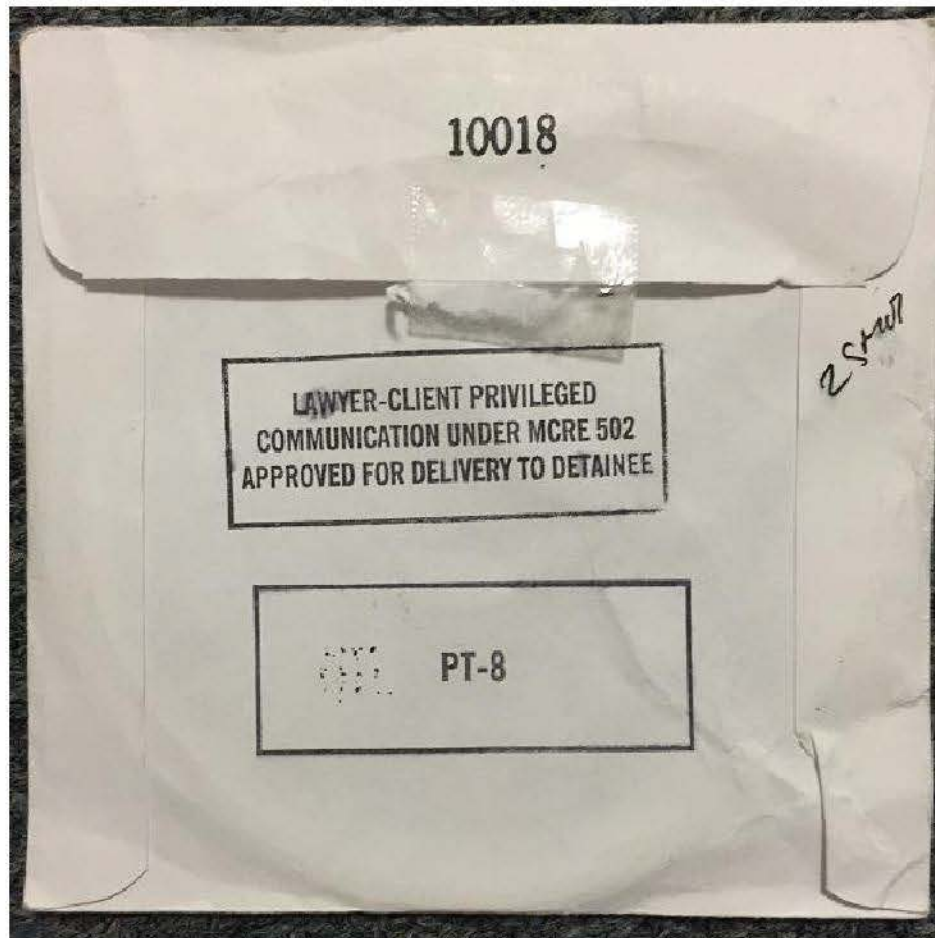
dd. On or about 17 October 2015, PT-8<sup>42</sup> reviewed the DVDs and marked the disk with Mr. al Baluchi's ISN, his own identifier "PT8," and "LCM" for Lawyer-Client Material in red marker. In addition, PT-8 stamped the paper DVD cases with the same stamps he or she uses on paper documents:<sup>43</sup>

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<sup>42</sup> The Privilege Team refuses to reveal the identity of its members. Privilege Team members identify themselves by numbers such as "PT-8."

<sup>43</sup> Attachment N.





ee. After PT-8 reviewed and marked the DVDs, the DVDs were provided to Mr. al Baluchi in accordance with AE018U and JTF-GTMO procedures.<sup>44</sup>

ff. Mr. al Baluchi stored the DVDs in a disk case provided by JTF-GTMO. While Mr. al Baluchi is in his cell, JTF-GTMO maintains custody of the disk case in a separate location within Camp 7.

*15 March 2015 seizure of legal materials*

gg. On or about 15 March 2015, the government seized 44 small pages (consistent with a small legal pad) and 54 full-size pages of written materials created by Mr. al Baluchi.

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<sup>44</sup> Attachment N.

[REDACTED]

[REDACTED] These documents were not marked because they are not legal mail; Mr. al Baluchi created them in Camp 7. On information and belief, the documents were in Mr. al Baluchi's legal bin prior to their seizure. Mr. al Baluchi does not know if an SJA was notified of or authorized the seizure.

hh. On 2 April 2015, an ASJA provided the documents to Mr. al Baluchi's Defense Information Security Officer at Guantanamo Bay. The unidentified SJA<sup>46</sup> refused to provide any details about how, when, or why the documents were seized.

*18 June 2015 seizure of legal materials*

ii. On or about 18 June 2015, the government seized three clearly and properly marked DVDs from Mr. al Baluchi's disk case while the case was in out-of-cell legal storage provided by JTF-GTMO. The government did not provide notice of the seizure to counsel for Mr. al Baluchi, or to Mr. al Baluchi himself. [REDACTED]

jj. One of the three disks contained videorecordings of Mr. Connell's investigation/mitigation trip to Kuwait in September 2014. Another of the disks contained videorecordings of Mr. Connell's investigation/mitigation trip to United Arab Emirates in

<sup>45</sup> Attachment K (filed under seal because the material is privileged). Attachment K is being submitted for classification review.

<sup>46</sup> Assistant Staff Judge Advocates, and sometimes Staff Judge Advocates, at Guantanamo conceal their identities from defense counsel.

<sup>47</sup> Attachment L. [REDACTED]

[REDACTED] Mr. al Baluchi is also filing a privileged, unredacted version of this document under seal as Attachment M, in addition to the public, redacted version. Under all available guidance, Attachments L and M are unclassified, but are being submitted for classification review out of an abundance of caution. Two of the disks are Attachments GG and HH.

September 2014. Both of these disks contained privileged legal materials. The third disk, properly marked Other Case Related Material, contained open-source audio recordings.

kk. [REDACTED]

ll. On 23 June 2015, upon return from TDY travel, Lt Col Thomas learned of the seizure through a communication from Mr. al Baluchi.

mm. On 23 June 2015, Lt Col Thomas emailed the JTF-GTMO SJA requesting the DVDs be returned to Mr. al Baluchi, and noting that JTF-GTMO had failed to provide the Defense with notice of the seizure.<sup>49</sup>

CDR [REDACTED] & the Litigation Support Staff,

Please have the JDG return Mr. al Baluchi's DVDs. On information and belief, on or about 18 June 2015, the JDG camp commander seized Mr. al Baluchi's legal DVDs marked attorney-client privileged and Other Case Related Material. To date counsel for Mr. al Baluchi have not received notice of the seizure of Mr. al Baluchi's legal materials.

This seizure could violate the attorney-client privilege and Mr. al Baluchi's right to counsel. It also appears to be in violation of Judge Pohl's protective order AE018U (p. 18-19, para.11), Privileged Written Communications, issued 6 Nov 2013.

Thank you for your prompt assistance in immediately resolving this matter. The courtesy of a reply email would be appreciated.

STERLING R. THOMAS, Lieutenant Colonel, USAF

A JTF-GTMO SJA representative responded by email the same day acknowledging receipt but providing no further information:<sup>50</sup>

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<sup>48</sup> Attachment L; Attachment Y. Under all available guidance, Attachment Y is unclassified, but is being submitted for classification review out of an abundance of caution.

<sup>49</sup> Attachment O.

<sup>50</sup> Attachment P.



ALCON,

Re: ISN 10018 Counsel Email of 23 June 2015.

1) Your email has been received and will receive due consideration.

Thank you.

Very Respectfully,

LSS

nn. Two days later, on 25 June 2015, Lt Col Thomas again emailed the JTF-GTMO SJA office, requesting an update on the seized DVDs:<sup>51</sup>

CDR [REDACTED] & the Litigation Support Staff,

Could you please provide me with an update on your investigation of the 18 June 2015 seizure of Mr. al Baluchi's legal DVDs marked attorney-client privileged and Other Case Related Material? If your investigation has confirmed that Mr. al Baluchi's legal DVDs marked attorney-client privileged and Other Case Related Material have been seized, please note that counsel for Mr. al Baluchi still have not received notice of the seizure of Mr. al Baluchi's legal materials (see AE018U (p. 18-19, para.11), Privileged Written Communications, issued 6 Nov 2013).

A reply email is requested. Thank you for your assistance.

STERLING R. THOMAS, Lieutenant Colonel, USAF

oo. The next day, on 26 June 2015, a representative of JTF-GTMO SJA emailed in response:<sup>52</sup>

ALCON,

Re: ISN 10018 DVD Seizure of 18 June 2015.

On 18 June 2015, JTF-GTMO seized 3 discs from ISN 10018. No USG personnel have examined the data on the discs. JTF-GTMO is aware of its responsibilities under AE 018U and will act accordingly.

Thank you.

Very Respectfully,

LSS

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<sup>51</sup> Attachment Q.

<sup>52</sup> Attachment R.



pp. On 29 June 2015, Lt Col Thomas emailed the JTG-GTMO SJA requesting specific details as to the seizure:<sup>53</sup>

CDR [REDACTED] and Litigation Support Staff,

Thank you for the attention you have thus far dedicated to this matter.

As we noted on 23 June 2015, the three DVDs you seized may be marked attorney-client privileged and Other Case Related Material. The seizure of three of Mr. al Baluchi's legal DVDs, may (1) impugn our attorney client relationship with, and our zealous representation of Mr. al Baluchi; and (2) involve attorney work product or attorney-client privileged material. To help resolve this question please provide answers to the following questions:

1. Provide a detailed description of the markings on the 3 discs that you have seized.
2. Who was present when you seized these 3 discs (Please provide, at a minimum, the individual(s) rank, position and camp identification pseudonym)?
3. Exactly where were these 3 discs when they were seized (e.g. on Mr. al Baluchi's bed, in his legal bin)?
4. Exactly when were these 3 discs seized?
5. What justification(s) has been provided for the seizure of these 3 discs?
6. What is the name of the SJA attorney representative who provided the prior authorization for seizure of the 3 discs?
7. When was the attorney representative of the SJA notified of this seizure?
8. Provide a copy of all duplications, photographs or copies otherwise made of the 3 discs seized from Mr. al Baluchi.
9. Provide a copy of all notes/reports/investigations by whatever name JTF-GTMO may use to describe them, made by the individuals involved in the seizure and retention of Mr. al Baluchi's 3 discs.

Your prompt reply is appreciated.

A representative for the JTF-GTMO SJA responded the same day:<sup>54</sup>

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<sup>53</sup> Attachment S.

<sup>54</sup> Attachment T.

ALCON,

Re: ISN 10018 DVD Seizure of 18 June 2015.

1) We are in receipt of your email of 29 June 2015.

2) Respectfully request you please route discovery requests through OCP.

Thank you.

Very Respectfully,

LSS

qq. The following day, on 30 June 2015, Lt Col Thomas emailed in response. Essentially, Lt Col Thomas cited the specific requirements of AE018U and noted that the defense was not seeking discovery in this instance, but attempting to determine the basis for an ongoing<sup>55</sup> withholding of attorney-client communications apparently in violation of the commission's order.<sup>56</sup>

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<sup>55</sup> As of 30 June 2015, the government had withheld the seized DVDs for 11-12 days.

<sup>56</sup> Attachment U.

CDR [REDACTED] and the Litigation Support Staff,

You seem to have misunderstood the intent of my questions. Allow me to re-phrase:

Counsel for Mr. al Baluchi will certainly pursue every avenue of discovery available to us. However, the fact that the Office of the Chief Prosecutor is the official gateway for discovery requests does not relieve your office (JTF-GTMO/SJA) of its obligation to abide by the Military Judge's Order (AE18U). Thank you for your prompt response to the following questions:

(1) Have the three DVDs seized by you been returned to Mr. al Baluchi? I direct you to your obligations under AE18U, Order, Privileged Written Communications, pg 18-19 paragraph 11 (c) and (d) require that if materials seized by you "are determined to be properly marked they will be returned to the Accused."

(2) Please immediately reveal the markings on the 3 seized DVDs.

a) AE18U, Order, Privileged Written Communications, pg 18-19 paragraph 11(c) Inspection of Legal Bins, requires that "if the materials originated with Defense Counsel, they shall be promptly returned to counsel." In order to determine whether the 3 DVDs "originated with Defense Counsel" and whether you have an obligation to immediately return them to defense counsel, your office must reveal the markings on the 3 seized DVDs.

b) AE18U Privileged Written Communications, pg 18-19 paragraph d(2), "If the materials originated with counsel, they shall be promptly returned to Defense Counsel." Please immediately provide a description of the markings on the 3 DVDs you have seized so that we may determine if they "originated with counsel."

(3) Whether the materials seized were "properly marked" (see AE18U, para 11 (c)) or "not properly marked", (see AE 18U, para 11 (d)(2)), Judge Pohl's order requires that you return them to counsel, if they originated with counsel.

Please immediately comply with your obligations under AE18U as set forth above. I am available to discuss this with you by phone at the numbers listed in my signature block below.

Regards,

Lt Col Thomas

rr. Lt Col Thomas also attempted to call the JTF-GTMO SJA but was unable to reach anyone by phone, leaving at least one voicemail message on 13 July 2015.

ss. On 14 July 2015, Lt Col Thomas submitted a JTF-GTMO Commissions Attorney Request Form requesting that the Staff Judge Advocate for JTF-GTMO SJA return his phone calls regarding the seizure and ongoing withholding of Mr. al Baluchi's legal materials.<sup>57</sup>

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<sup>57</sup> Attachment V.



JTF-GTMO Commissions Attorney Request Form

Date: 2015-07-14  
From: Lt Col Sterling R. Thomas  
ISN: 10018  
Subject: Identify markings on 3 seized legal DVDs

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I request the following assistance from Joint Task Force Guantanamo Bay:

Please have CDR [REDACTED] (JTF-GTMO/SJA) call Lt Col Sterling Thomas (Defense Counsel for Mr. al Baluchi) at: [REDACTED] and provide the markings on the 3 legal DVDs that Mr. al Baluchi says were taken from his cell on 18 Jun 2015.

I am trying to determine whether the markings on these 3 DVDs indicate that the materials seized originated with counsel.

Later the same day, personnel JTF-GTMO SJA acknowledged receipt of the Special Request, again refused to provide any information to LTC Thomas, and directed him to contact Mr. Clay Trivett at the Office of the Chief Prosecutor:<sup>58</sup>

ALCON,

Re: ISN 10018 Special Request (DVD's) of 14 July 2015.

- 1) Your special request has been received.
- 2) Please contact Mr. Clay Trivett, OCP with all requests regarding this matter.

Thank you.

Very Respectfully,

LSS

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<sup>58</sup> Attachment W.

tt. Later on the same day, 14 July 2015, Lt Col Thomas emailed Mr. Trivett regarding the seized DVDs<sup>59</sup> and left multiple voicemails for Mr. Trivett.

Clay,

Per the request of CDR [REDACTED] Litigation Support Staff, I am contacting you regarding three legal DVDs seized from Mr. al Baluchi on or about 18 June 2015. Could you please call me at your earliest convenience? Thank you,

Sterling

uu. Also on 14 July 2015, a Watch Commander brought Mr. al Baluchi the [REDACTED] and the OCRM disk, but not the [REDACTED]<sup>60</sup>

vv. On 15 July 2015, Mr. Trivett emailed in response, "Regarding the request for the information you attach, we will consider that a request for discovery and we will handle it in due course."<sup>61</sup>

ww. On 16 July 2015, Lt Col Thomas emailed back to Mr. Trivett as part of the attempt to gain information about the DVDs:<sup>62</sup>

Mr. Trivett,

Thank you for your reply. And I appreciate your willingness to assist in this matter. I must, however, disagree with the characterization of the question below as a request for discovery. We are at this point only trying to determine the markings on the seized DVDs.

As you are aware the military judge has chided the defense for not pursuing questions about what material has been seized from our clients.

We merely want to know how the DVDs are labeled. That information will be compared to the military judge's order to determine the appropriate course of action.

Thank you again, and please feel free to call me to discuss this matter.

Lt Col Thomas

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<sup>59</sup> Attachment X.

<sup>60</sup> Attachment L. [REDACTED]

<sup>61</sup> Attachment Z.

<sup>62</sup> Attachment AA.

xx. On 25 July 2015, having received no further response from the government, Lt Col Thomas submitted DR-222-AAA to the government:<sup>63</sup>

- (1) Please produce all documents and information relating to any seizure and exploitation of materials associated with Mr. al Baluchi subsequent to 14 August 2014, to include any and all notes, reports, and investigation materials by whatever name.
- (2) Please provide all documents and information relating to any policy or guidance, formal or otherwise, relating to the seizure and exploitation of materials associated with Mr. al Baluchi subsequent to 14 August 2014.
- (3) Please produce any seized material associated with Mr. al Baluchi which has not already been returned to Mr. al Baluchi.

yy. On 29 July 2015,<sup>64</sup> Mr. Trivett emailed Lt Col Thomas:<sup>65</sup>

Lt Col Thomas,

In response to your request below, we have verified through JTF-GTMO that there were three discs that were seized, which were marked as follows: Two of the discs were marked "Lawyer-Client Privileged Communication Under MCRE 502" and one of the discs was marked "Military Commissions Other Case Related Material."

Regards,

Clay Trivett

zz. On 11 August 2015, an assistant SJA from JTF-GTMO returned the [REDACTED] to Mr. al Baluchi.<sup>66</sup> The DVD sleeve was open and the seal broken.

aaa. As of 21 September 2015, the government has not responded in any manner to DR-222-AAA.

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<sup>63</sup> Attachment BB.

<sup>64</sup> 13 days after Lt Col Thomas' last email, and 41 days after the seizure of the DVDs.

<sup>65</sup> Attachment CC.

<sup>66</sup> Attachment Y. [REDACTED]



**6. Argument:**

The only reason the government would hold a properly marked, attorney-client privileged DVD for almost two months is to examine its contents. In this case, the contents of the DVDs include Mr. al Baluchi's most intimate legal and family information, also known as mitigation evidence. The illegal seizure and exploitation of Mr. al Baluchi's most closely-held information is merely the most recent in a series of intrusions into the attorney-client relationship. These intrusions clearly violate Mr. al Baluchi's Sixth Amendment right to the assistance of counsel, his Fifth Amendment right to a fair trial, and his Eighth Amendment right to a mitigation presentation. Mr. al Baluchi's ability to assist in his own defense and access to counsel are irreparably compromised by the government's repeated and willful violations, and he therefore requests that this military commission dismiss all charges against him.

*The Fifth and Sixth Amendment violations*

Initially, intrusion into the attorney-client relationship violates the Fifth Amendment right to a fair trial.<sup>67</sup> "The attorney-client privilege, while it has not been elevated to the level of a constitutional right, is key to the constitutional guarantees of the right to effective assistance of counsel and a fair trial."<sup>68</sup> Although the D.C. Circuit has not addressed the issue, the D.C. District Court has considered three factors to determine whether the government conduct was so outrageous as to constitute a violation of due process and require dismissal of the indictment on Fifth Amendment grounds: (1) the government's awareness of an attorney-client relationship; (2)

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<sup>67</sup> *United States v. Stringer*, 535 F.3d 929, 941 (9<sup>th</sup> Cir. 2008); *Caldwell v. United States*, 205 F.2d 879, 881 (D.C. Cir 1953); *Coplon v. United States*, 191 F.2d 749, 757 (D.C. Cir. 1951); *Neill*, 952 F. Supp. at 839.

<sup>68</sup> *United States v. Neill*, 952 F. Supp. 834, 839 (D.D.C. 1997); *see also United States v. Kennedy*, 225 F.3d 1187, 1194 (10<sup>th</sup> Cir. 2000) (recognizing separate Fifth and Sixth Amendment violations for intrusion into the attorney-client relationship).

deliberate intrusion by the government into that relationship; and (3) actual and substantial prejudice to the defendant.<sup>69</sup>

Furthermore, the statutory and constitutional right to counsel before this military commission<sup>70</sup> “protect[s] the attorney-client relationship from intrusion in the criminal setting.”<sup>71</sup> The right to counsel is the right to effective assistance of counsel,<sup>72</sup> which necessarily includes “the right of private consultation.”<sup>73</sup> “To provide effective assistance, a lawyer must be able to communicate freely without fear that his or her advice and legal strategy will be seized and used against the client in a criminal proceeding.”<sup>74</sup>

By seizing privileged attorney-client materials, the government has violated Mr. al Baluchi’s right to counsel.<sup>75</sup> The D.C. Circuit examines four factors in determining whether an intrusion into the attorney-client relationship violates the Sixth Amendment: “(1) was evidence used at trial produced directly or indirectly by the intrusion; (2) was the intrusion by the government intentional; (3) did the prosecution receive otherwise confidential information about trial preparations or defense strategy as a result of the intrusion; and (4) were the overheard

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<sup>69</sup> *United States v. Hsia*, 81 F. Supp. 2d 7, 18-19 (D.D.C. 2000) (citing *United States v. Voight*, 89 F.3d 1050 (3d Cir. 1996)); see also *United States v. Williams*, 720 F.3d 674, 686 (8<sup>th</sup> Cir. 2013).

<sup>70</sup> See, e.g., 10 U.S.C. § 949a(b)(2)(C)(ii); 10 U.S.C. § 949c(b)(1).

<sup>71</sup> *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974), overruled in part on other grounds, *Sandin v. Conner*, 515 U.S. 472 (1995).

<sup>72</sup> *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

<sup>73</sup> *Coplon v. United States*, 191 F.2d at 757.

<sup>74</sup> *Neill*, 952 F. Supp. at 839.

<sup>75</sup> See *Bishop v. Rose*, 701 F.2d 1150, 1155 (6<sup>th</sup> Cir. 1983) (analyzing seizure of privileged document as *Weatherford* violation).

conversations and other information used in any other way to the substantial detriment of the defendant?”<sup>76</sup>

The intrusion in Mr. al Baluchi’s established attorney-client relationship is unconstitutional under both the Fifth and Sixth Amendment tests. First, the government intrusion into attorney-client privileged material was clearly intentional. JTF-GTMO personnel are well aware of the importance of respecting privileged information, having been through multiple hearings on the topic. In fact, even the prosecution has recently reminded them of this obligation.<sup>77</sup> Although the legal materials Mr. al Baluchi created himself were not marked—because they could not be—the disks the government took were clearly marked as legally privileged. There can be no claim that the government did not understand that the disks were privileged when it seized them.

The government’s bad faith in taking the privileged disks is demonstrated by their behavior afterward. [REDACTED]

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<sup>76</sup> *United States v. Kelly*, 790 F.2d 130, 137 (D.C. Cir. 1986); *see also Neill*, 952 F. Supp. at 840. These factors come from the holding of *Weatherford v. Bursey*, 429 U.S. 545, 558 (1977): “There being no tainted evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion by [a government agent], there was no violation of the Sixth Amendment . . . .” The D.C. Circuit has not determined what combination of the *Weatherford* factors is sufficient to state a Sixth Amendment violation, but the Third Circuit has explained that, “We think that the Court was suggesting by negative inference that a sixth amendment violation would be found where, as here, defense strategy was actually disclosed or where, as here, the government enforcement officials sought such confidential information.” *United States v. Levy*, 577 F.2d 200, 210 (3d Cir. 1978), *cited with approval in United States v. Kember*, 648 F.2d 1354, 1365 (D.C. Cir. 1980). Mr. al Baluchi’s position is that an intentional government intrusion into the attorney-client relationship (factor 2) is sufficient without more to establish a Sixth Amendment violation. *See Briggs v. Goodwin*, 698 F.2d 486, 493 n.22 (D.C. Cir. 1983), *vacated on other grounds*, 712 F.2d 1444 (D.C. Cir. 1984); *United States v. Costanzo*, 740 F.2d 251, 254-55 (3d Cir. 1984); *Hsia*, 81 F. Supp. 2d at 18..

<sup>77</sup> *Id.* at 5 n.4.

[REDACTED] From 18 June until 26 June, JTF-GTMO did not inform defense counsel about the seizure despite a specific request from counsel.<sup>79</sup> It took more than another month of effort (until 29 July) by defense counsel to find out the markings on the seized disks. The government did not return the [REDACTED] to Mr. al Baluchi until 11 August, seven weeks after its seizure. As of this filing, the government has still not responded *at all* to the defense request for discovery about the seizures.

Second, the seizures themselves operate to the detriment of Mr. al Baluchi and his relationship with his attorneys. In his first appearance before a military commission, Mr. al Baluchi explained that he has been under constant threat:<sup>80</sup>

If the government gave me lawyer first that was arrested, I would have appreciated that unquestionably. But it's been five years I've been deprived from all rights, very basic human rights. Until now I am under threat. People who mistreated me, they gave me threat.

They threat to me ahead of time. Things I might say here might affect my confinement there. I'm staying a few hours in the Court and I'm going back to them. I know which kind of--

[REDACTED]

The seizures of Mr. al Baluchi's privileged material, like the presence of the former CIA interpreter in the courtroom in February 2015 or the revelation that a defense investigator cooperated with the FBI, serve as a constant reminder that he cannot trust his defense team

<sup>78</sup> Attachment L; Attachment Y.

<sup>79</sup> Attachment R.

<sup>80</sup> Attachment DD. The transcript of the last page does not match precisely with the transcript of the other pages because the boxed language on the last page was declassified separately.

<sup>81</sup> Attachment L.

because his client secrets are not safe from government intrusion. “The right to counsel protects the whole range of the accused’s interests implicated by a criminal prosecution,” not just the trial narrowly defined.<sup>82</sup> These seizures interfere with the right to counsel by rendering impossible “the candid exchange between attorney and client needed for a vigorous defense.”<sup>83</sup>

The remaining factors do not weigh against a Sixth Amendment violation; rather, they are simply unknown at this time. Because this case is still pre-trial, it is not possible to know whether the prosecution will use information from the seized legal communications directly or indirectly at trial.

Mr. al Baluchi expects the evidentiary hearing on this matter to demonstrate that the government accessed and exploited the information on the privileged DVDs. The DVDs are a gold mine for the government: they contain facts about Mr. al Baluchi’s history relevant to both guilt/innocence and mitigation as well as information about his attorney’s trial and sentencing strategies. The only reason to seize the DVDs is to review their content; it is impossible to gain any information from the disks other than their markings without viewing them on a DVD player or computer. The government must have found something of interest on the [REDACTED] why else keep two disks for four weeks and the [REDACTED] for seven?

While Mr. al Baluchi’s constitutional right to confidential attorney-client communications is recognized by AE018U, it is important to note that that right exists independently of the military commission’s order. The government has demonstrated that it can and will seize any documents generated by Mr. al Baluchi for use in his defense; Mr. al Baluchi has no means to shield any document he generates from intrusion. Many of these documents

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<sup>82</sup> *Briggs*, 698 F.2d at 494.

<sup>83</sup> *Kember*, 648 F.2d at 1364 n.19; *see also Neill*, 952 F. Supp. at 839.

involve discussions of the most private details of Mr. al Baluchi's life. *Even if*, and it is by no means certain, the government can demonstrate that only JTF-GTMO, Mr. al Baluchi's jailers, have intruded into his legal communications, the facts remain almost directly analogous to those in *Nordstrom v. Ryan* which led the Ninth Circuit to find a clear Sixth Amendment violation.<sup>84</sup>

*The Eighth Amendment violation*

The seizure of Mr. al Baluchi's privileged documents also violate the Eighth Amendment right to develop and present evidence in mitigation. A capital defendant has a right to present all available mitigation evidence in a sentencing proceeding,<sup>85</sup> and a primary duty of capital defense counsel is to develop such evidence.<sup>86</sup> "It takes no stretch of imagination to see how an inmate would be reluctant to confide in his lawyer about . . . the intimate details of his own life and his family members' lives, if he knows that a guard is going to be privy to them, too."<sup>87</sup> Mr. al Baluchi's letter vividly demonstrates the chilling effect the government's actions have on both attorney-client communication and a reasonable mitigation investigation.

*The AE018U violation*

This commission, having recognized those rights, specifically codified procedures to protect the confidentiality of attorney-client communications in AE018U. AE018U provides for the marking of privileged attorney-client materials and directs that "[t]he content of materials bearing any of these various markings, notwithstanding inconsistencies in their form, may not be

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<sup>84</sup> *Nordstrom v. Ryan*, 762 F. 3d 903, 907-8 (9<sup>th</sup> Cir. 2014).

<sup>85</sup> *See, e.g., Penry v. Johnson*, 532 U.S. 782, 797 (2001); *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

<sup>86</sup> *See, e.g., Williams v. Taylor*, 529 U.S. 362, 395 (2000).

<sup>87</sup> *Nordstrom v. Ryan*, 762 F.3d 903, 910 (9<sup>th</sup> Cir. 2014) ("It takes no stretch of imagination to see how an inmate would be reluctant to confide in his lawyer about the facts of the crime, perhaps other crimes, possible plea bargains, and the intimate details of his own life and his family members' lives, if he knows that a guard is going to be privy to them, too.").



read or otherwise observed for content by USG personnel other than to identify that the materials are, in fact, marked.”<sup>88</sup> In the event that legal materials are believed to be improperly marked or stored, they may be seized only with prior authorization by a JTF-GTMO SJA representative.<sup>89</sup> Defense counsel is to be immediately notified of any seizure.<sup>90</sup> If improperly marked materials originated with Defense counsel, they are to be “promptly returned to counsel.”<sup>91</sup> If it is determined that the materials are, in fact, properly marked, they are to be returned to the defendant.<sup>92</sup>

Each of these seizures involved a multitude of violations of this commission’s order in AE018U. In all three instances, the government failed to provide notice to Defense counsel, and failed to promptly return the seized materials to the proper party. The government seized, likely reviewed, and ultimately withheld properly marked confidential materials on the [REDACTED] for 54 days, despite repeated attempts by defense counsel to obtain the return of the improperly withheld materials. This is a far cry from the “prompt” return required by AE018U, particularly considering the searches and resultant seizures were illegal from the outset.

While the government continued to withhold some of the seized DVDs, JTF-GTMO refused to provide any information whatsoever to the defense regarding the markings, ultimately routing him to the prosecution, who only identified the markings on the DVDs 41 days after their seizure. The government continued to hold the [REDACTED] for an additional thirteen days even after finally acknowledging that it was properly marked. Further, the government has never provided any information whatsoever regarding the facts and circumstances which led to these

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<sup>88</sup> AE018U at 18.

<sup>89</sup> *Id.* at 18-19.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 19.

<sup>92</sup> *Id.*

seizures. And, of course, all of this occurred long after defense counsel repeatedly notified the government of their ongoing violation of the notice requirements of AE018U, even going so far as to specifically cite the appropriate paragraphs.

*The need for dismissal*

While the government's present misconduct would be impermissible regardless of context, it becomes far more significant when considered in light of Mr. al Baluchi's particular circumstances. Mr. al Baluchi, having already been subjected to repeated, extensive, and deceptive intelligence-gathering techniques by the government for well over a decade, would naturally expect that those tactics are ongoing. Even when viewed through a narrow lens looking only at the current proceedings, the government has repeatedly surveilled and intruded into the defendants' attorney-client relationship.

There is nothing short of a dismissal which would completely remove the taint created by the government's misconduct. Any amended or additional order from this commission, ultimately, depends on the government making a good faith effort to execute it, or at least not actively violate it. The government's present misconduct, coupled with the cumulative effect of over a decade of intentionally-inflicted psychological harm and denial of rehabilitation, makes it impossible for Mr. al Baluchi to be able to prepare or present any defense. And it is impossible to guarantee a fair trial if the defense counsel cannot guarantee that their communications with Mr. al Baluchi will not be seized and inspected by the same government which has tortured him, threatened him, and is now prosecuting him in a capital case. No reasonable person in Mr. al Baluchi's circumstances could be expected to expose themselves to surveillance by the government after such a series of violations. As a result, Mr. al Baluchi respectfully requests that this commission dismiss all charges.

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

8. **Witnesses:**

a. ~~(U//FOUO)~~ All persons with knowledge of the 14 August 2014 seizure of legal materials, including but not limited to the Assistant Watch Commander, SOO #1277, Evidence #1371, and SOO #1349, any other person present, and the HVD ASJA;<sup>93</sup>

b. PT-8;

c. All persons with knowledge of the approximately 15 March 2015 seizure of documents from Mr. al Baluchi, including but not limited to the ASJA who delivered the documents to the defense team;

d. All persons with knowledge of the approximately 18 June 2015 seizure of DVDs from Mr. al Baluchi, including but not limited to the Camp Commander, Watch Commander(s), SJA, HVD ASJA, and all persons who have come into contact with the seized DVDs.

9. **Conference with Opposing Counsel:** The government opposes this motion.

<sup>93</sup> \_\_\_\_\_ Mr. al Baluchi has determined these witnesses using best efforts from DIMS and a handwritten document. See Attachments F and G. SOO #1277 may be the Assistant Watch Commander. The handwritten notations for Evidence #1371 and SOO #1349 are difficult to read, and may be different numbers:

NAME, GRADE OR TITLE	NAME, GRADE OR TITLE
Evidence 1371	SOO1349

**10. Attachments:**

Attachment Letter	Attachment Name	Distribution to				
		GOV	MOH	WBA	RBS	MAH
A	Certificate of Service	Yes	Yes	Yes	Yes	Yes
B		Yes	No	No	No	Yes
C	Prosecution Response to DR-19A-AAA	Yes	Yes	Yes	Yes	Yes
D	Redacted Baseline Review Memo (FOUO)	Yes	Yes	Yes	Yes	Yes
E		No	No	No	No	No
F	DIMS record (FOUO)	Yes	Yes	Yes	Yes	Yes
G	Incident reports	Yes	Yes	Yes	Yes	Yes
H	DR-185-AAA Seized client note from 14 August 2014	Yes	Yes	Yes	Yes	Yes
I	Prosecution Response to DR-185-AAA	Yes	Yes	Yes	Yes	Yes
J	DR-185A-AAA 2nd Request Seized client note from 14 August 2014	Yes	Yes	Yes	Yes	Yes
K		No	No	No	No	No
L		Yes	No	No	No	Yes
M		No	No	No	No	No
N	Declaration	Yes	Yes	Yes	Yes	Yes
O	23 JUN 15 email to JTF-SJA re Seizure of legal materials	Yes	Yes	Yes	Yes	Yes
P	23 JUN 15 email response re Seizure of legal materials	Yes	Yes	Yes	Yes	Yes
Q	25 JUN 15 email to JTF-SJA re Seizure of Mr. al Baluchi's legal materials	Yes	Yes	Yes	Yes	Yes
R	26 JUN 15 email response re Seizure of Mr. al Baluchi's legal materials	Yes	Yes	Yes	Yes	Yes
S	29 JUN 15 email to JTF-SJA re Seizure of Mr. al Baluchi's legal materials	Yes	Yes	Yes	Yes	Yes
T	29 JUN 15 email response re Seizure of Mr. al Baluchi's legal materials	Yes	Yes	Yes	Yes	Yes
U	30 JUN 15 email to JTF-SJA re seizures	Yes	Yes	Yes	Yes	Yes
V	14 JUL 14 email to JTF-SJA re Identify Markings	Yes	Yes	Yes	Yes	Yes
W	14 JUL 14 email response re Identify Markings	Yes	Yes	Yes	Yes	Yes
X	14 JUL 15 email to Trivett re seizures	Yes	Yes	Yes	Yes	Yes
Y		Yes	No	No	No	Yes
Z	15 JUL 15 Email from Trivett re 3 seized DVDs	Yes	Yes	Yes	Yes	Yes
AA	16 JUL 15 email to Trivett re markings	Yes	Yes	Yes	Yes	Yes
BB	DR-222-AAA	Yes	Yes	Yes	Yes	Yes
CC	29 JUL 15 Email from Trivett re 3 seized legal DVDs	Yes	Yes	Yes	Yes	Yes
DD	Excerpt from 2008-06-05 Arraignment Transcript	Yes	Yes	Yes	Yes	Yes
EE		No	No	No	No	No
FF		No	No	No	No	No
GG	Draft Sealing Order	Yes	Yes	Yes	Yes	Yes
Key						
Yes	Mr. al Baluchi is serving the exhibit upon the party.					
No	Mr. al Baluchi will serve the exhibit upon the party once the exhibit is confirmed as unclassified, or the MOU dispute is resolved, whichever occurs first.					
No	Mr. al Baluchi will not serve the exhibit upon the party because it contains privileged information.					

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 21st day of September, 2015, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

Distribution of classified and *ex parte* Attachments to the various parties was conducted in accordance with the distribution list under Para. 10, Attachments, in the subject motion.

//s//

JAMES G. CONNELL, III  
*Learned Counsel*

## **Attachment B**

(Classified, filed on SIPR)

**United States v. KSM et al.**

# **APPELLATE EXHIBIT 373 (AAA)**

**(Page 41)**

*Classified*

## **Attachment B**

**APPELLATE EXHIBIT 373 (AAA) is located in the classified annex of the original record of trial.**

**POC: Chief, Office of Court Administration  
Office of Military Commissions**

**United States v. KSM et al.**

**APPELLATE EXHIBIT 373 (AAA)**

## **Attachment C**





OFFICE OF THE  
CHIEF PROSECUTOR

UNCLASSIFIED//FOR PUBLIC RELEASE

## DEPARTMENT OF DEFENSE

OFFICE OF THE CHIEF PROSECUTOR OF MILITARY COMMISSIONS  
1610 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1610

9 December 2014

MEMORANDUM FOR Defense Counsel for Ali Abdul Aziz Ali

SUBJECT: Prosecution Final Response to 20 October 2014  
Request for Discovery (DR-19A-AAA)

1. The Prosecution received the Defense request for discovery on 20 October 2014.
2. The Defense requests "a second inspection [of conditions of confinement] in connection with pending and expected motions regarding conditions of confinement."
3. The Prosecution responded on 17 November requesting the Defense articulate the specific alleged restrictions it believes are "beyond those contained in AE 108J."
4. The Prosecution received the Defense response to the Prosecutions 17 November request for information on 2 December 2014. The Prosecution hereby responds to the Defense initial request of 20 October, below, in bold.

**The Prosecution has considered the classified response to our request for information of 17 November 2014. Based upon the additional information provided by the Defense, the Prosecution does not believe a second inspection of the confinement facility is required by the Defense. The area to which the Defense was denied access was neither an adjoining cell nor any other area defined by the Military Judge in AE108J, as an area the Defense was permitted to view. Based on the information provided, the Prosecution respectfully declines this request for a second inspection of the confinement facility.**

Respectfully submitted,

//s//

Nicole A. Tate  
Assistant Trial Counsel

//s//

Clay Trivett  
Managing Deputy Trial Counsel

## **Attachment D**



~~SECRET//NOFORN~~  
DEPARTMENT OF DEFENSE  
HEADQUARTERS, JOINT TASK FORCE GUANTANAMO  
U.S. NAVAL BASE, GUANTANAMO BAY, CUBA  
APO AE 09360

JTF-GTMO-CDR

30 September 2011

MEMORANDUM FOR Commander, Joint Detention Group, Joint Task Force – Guantanamo,  
Guantanamo Bay, Cuba, APO AE 09360

SUBJECT: ~~(U)~~ Baseline Review of Materials Currently Held by Detainees

1. ~~(U//FOUO)~~ References.

~~(U//FOUO)~~ Memorandum, Joint Task Force – Guantanamo, Military Commissions Counsel  
Visitation of Detainees Practice Guide, 19 May 08.

~~(U)~~ Court Order, U.S. D.C. (D.C.), Protective Order and Procedures for Counsel Access to  
Detainees at the United States Naval Base in Guantanamo Bay, Cuba, 11 Sep 08.

~~(S//NF)~~

~~(S//NF)~~

~~(U//FOUO)~~ Memorandum, Joint Task Force – Guantanamo, Necessity for a Baseline  
Review, 25 Sep 11.

2. ~~(S//NF)~~ You are directed to conduct a baseline security review of all materials held by detainees  
at Guantanamo Bay, Cuba, with the initial focus on material held by the one High Value Detainee  
(HVDs) who is pending trial by Military Commission (ISN 10015) and the five other HVDs (ISN  
10011, ISN 10013, ISN 10014, ISN 10018 and ISN 10024) who have had charges preferred against  
them. The purpose of the review is to screen and mark all documents determined to be held by the  
detainee in accordance with applicable regulations so that the absence of a screening stamp in the  
future can readily identify a document as contraband. This will enable Joint Task Force –  
Guantanamo (JTF – GTMO) to avoid unnecessary intrusion upon what might otherwise be a  
privileged communication between a detainee and his Habeas or Office of Military Commissions –  
Defense (OMC – D) counsel. You are to complete the baseline security review of materials held  
no later than 14 October 2011.

3. ~~(S//NF)~~ The baseline review is to be conducted by the guard force currently assigned to Camp

4. ~~(U//FOUO)~~ The JTF – GTMO Staff Judge Advocate (SJA) shall provide training to the guard  
force on the Visitation Practice Guide and the Protective Order. No guard shall participate in this  
baseline review without receiving this training. Additionally, the JTF – GTMO SJA will be present  
to advise guards in determining whether a particular document constitutes legal material.

~~SECRET//NOFORN~~

MEA-CLS-00000047

~~SECRET//NOFORN~~

JTF-GTMO-CDR

SUBJECT: ~~(U)~~ Baseline Review of Materials Currently Held by Detainees5. ~~(S//NF)~~ The following provisions shall apply to the execution of the baseline review:

- a. ~~(U)~~ A minimum of [REDACTED] guards shall conduct the baseline review.
- b. ~~(U)~~ Other personnel deemed necessary to thoroughly execute the baseline review, including linguists, for the facilitation of conducting a cursory review of material written in a language other than English.
- c. ~~(U)~~ The guard force shall maintain a search log detailing the events of the baseline review. [REDACTED]  
[REDACTED] If the baseline review of a detainee's material takes more than one day, appropriate entries shall be made for each date.
- d. ~~(U)~~ The guards shall conduct the search by conducting a cursory review of each page of every document in the possession of each detainee. This cursory review shall consist of scanning the document long enough to determine whether it constitutes legal material, other previously screened documents of a non-legal nature that were sent to the detainees in accordance with the governing references, or contraband:
  - (1) ~~(U)~~ Documents bearing a security screening stamp by the Habeas Privilege Review Team shall be immediately cleared without further cursory review. However, the guards shall stamp each page of such documents with the ISN number of the detainee before being returned to the detainee.
  - (2) ~~(S//NF)~~ Documents such as Red Cross messages and other non-legal mail [REDACTED] shall likewise be [REDACTED] returned to the detainee, but not in the container designated for the storage of legal material.
  - (3) ~~(U)~~ Documents bearing a stamp by the OMC-D have not been subject to a review by a Privilege Review Team for Military Commissions cases. These documents, as well as documents bearing no stamps whatsoever shall be subject to the cursory review to confirm they meet the definition of legal material.
- e. ~~(U//FOUO)~~ Documents that are determined to meet the definition of legal material shall be stamped with a distinctive JTF – GTMO security screening stamp and the detainee's ISN before being returned to the storage container designated for the storage of the detainee's legal material.
- f. ~~(S//NF)~~ Documents that are determined not to meet the definition of legal material and have not otherwise been [REDACTED] submitted via the proper channels for the introduction of non-legal material shall be considered contraband [REDACTED] and will be removed from the detainee's possession and handled in accordance with paragraph 5g, below.



JTF-GTMO-CDR

SUBJECT: ~~(U)~~ Baseline Review of Materials Currently Held by Detainees

g. ~~(U//FOUO)~~ Documents removed from the possession of a detainee because they are determined to be contraband shall be placed in an envelope (or envelopes if more than one envelope is necessary), sealed, and marked with the following notation: "Documents removed from ISN [number] as non-legal material/mail on [DATE]." (If more than one envelope is necessary, each envelope shall be marked and numbered sequentially as "1 of \_" or "1/\_", signed and dated.) The total number of pages removed from a detainee's possession shall be annotated on the envelope. A corresponding entry will be made in the search log. These documents shall be retained by the JTF - GTMO SJA.

h. ~~(U//FOUO)~~ Documents that raise force protection or national security concerns or raise the possibility of a violation of law or regulations shall be secured separately for possible investigation or inquiry as to how they were introduced into the camp. Such documents shall be individually placed in a separate envelope with a description of the document and an explanation as to why the document was removed, sealed, marked as "Potential Force Protection/National Security Concern," and shall be retained by the JTF-GTMO SJA.

i. ~~(U//FOUO)~~ Following the completion of each baseline review of all documents held by an individual detainee, the guards shall sign and date the log entry, place it in a sealed envelope, date and mark the envelope as "Search Log for Baseline Review of Materials Held by ISN \_\_\_\_". The logs shall be retained by the JTF-GTMO SJA.

j. ~~(U)~~ Materials shall be returned to the detainee as expeditiously as possible upon completion of the baseline review of his material.

k. ~~(U)~~ The detainee will be notified of the number of pages removed from their possession.

6. ~~(U//FOUO)~~ Material removed from a detainee's possession as contraband shall be available for inspection by the detainee's OMC-D attorney to verify if the document had been submitted by the attorney.

(1) ~~(U//FOUO)~~ If a Military Commissions Privilege Team is subsequently established by proper authority, counsel shall follow the procedures or regulations relevant to such a Privilege Team for sending the materials to the detainee.

(2) ~~(U//FOUO)~~ In the absence of a Privilege Review Team vested with the authority to conduct such a review, OMC-D counsel shall be provided the opportunity to confirm that the documents were originally submitted as legal material as defined by the Visitation Practice Guide.

(i) ~~(U//FOUO)~~ Documents confirmed by OMC-D counsel as having been provided to the detainee as legal material in accordance with the Visitation Practice Guide shall be stamped with a JTF - GTMO security screening stamp, placed in a sealed envelope, and returned to the detainee.

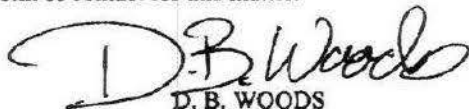
(ii) ~~(U//FOUO)~~ Documents that OMC - D counsel state did not originate from them, or documents that OMC - D counsel affirm did originate but are acknowledge as non-legal material shall be returned to the envelope, resealed and retained by the JTF-GTMO SJA.

JTF-GTMO-CDR

SUBJECT: ~~(S)~~ Baseline Review of Materials Currently Held by Detainees

(iii) ~~(U//FOUO)~~ Documents removed due to force protection or national security concerns shall not be returned to OMC-D counsel, but will be returned to the envelope and re-sealed in the presence of the OMC-D counsel. These documents will be retained by the JTF - GTMO SJA pending further guidance from competent authority regarding their disposition.

7. The undersigned is the point of contact for this matter.



D. B. WOODS  
Rear Admiral, U.S. Navy  
Commanding

## **Attachment E**

(pending classification review, filed under seal)

**United States v. KSM et al.**

# **APPELLATE EXHIBIT 373 (AAA)**

**(Pages 51 - 52)**

**Under Seal**

*Classified*

**Attachment E**

**APPELLATE EXHIBIT 373 (AAA) is located in the classified annex of the original record of trial.**

**POC: Chief, Office of Court Administration  
Office of Military Commissions**

**United States v. KSM et al.**

**APPELLATE EXHIBIT 373 (AAA)**

## **Attachment F**



			Detainee took 1 legal bin, searched and signed by the AWC.
10018		ISN#10018.	Detainee was notified [REDACTED] for legal appointment by SOO1287.
10018		ISN#10018.	Detainee conducted library.
10018		ISN#10018.	Detainee received laundry from SOO1261.
10018		ISN#10018.	[REDACTED]
10018		ISN#10018.	[REDACTED]
10018		ISN#10018.	Detainee refused library.
10018		ISN#10018.	Detainee offered breakfast meal. Detainee refused clamshell. Detainee accepted: nothing. [REDACTED]
10018		ISN#10018.	Detainee accepted dinner meal. [REDACTED]
10018		ISN#10018.	Detainee receives 1 roll of toilet paper.
10018		ISN#10018.	Detainee received back his laundry. No complaints.
10018		ISN#10018.	[REDACTED]
10018		ISN#10018.	[REDACTED]
10018		ISN#10018.	[REDACTED]
10018		ISN#10018.	Detainee accepted both the 0900 and 1330 Legal appointments.
10018		ISN#10018.	[REDACTED]
10018		ISN#10018.	[REDACTED]
			AWC searched legal bin. [REDACTED] Detainee returned with 1 legal bin, and e-reader [REDACTED]
10018		ISN#10018.	Detainee off-site for lunch.
10018		ISN#10018.	AWC searched detainee's legal bin [REDACTED]
10018		ISN#10018.	[REDACTED]
10018		ISN#10018.	[REDACTED]
			Detainee took 1 legal bin and e-reader signed out by SOO1279.
10018		ISN#10018.	Detainee turned in dirty laundry to SOO1372.

## **Attachment G**

SWORN STATEMENT			
For use of this form, see AR190-45; the proponent agency is ODCSOPS			
<b>PRIVACY ACT STATEMENT</b> AUTHORITY: Title 10 USC Section 301; Title 5 USC Section 2591; E.O. 8387 dated November 22, 1943 (SSN). PRINCIPAL PURPOSE: To provide commanders and law enforcement officials with means by which information may be accurately. ROUTINE USES: Your social security number is used as an additional alternate means of identification to facilitate filing and retrieval. DISCLOSURE: Disclosure of your social security number is voluntary.			
1. LOCATION GUANTANAMO BAY, CUBA	2. DATE (YYYYMMDD) 20140817	3. TIME 1530	4. FILE NUMBER
5. LAST NAME, FIRST NAME, MIDDLE NAME Soo # 1277	6. BADGE NUMBER Soo # 277	7. GRADE/STATUS E-5/Sgt	
8. ORGANIZATION OR ADDRESS JTF GTMO/NEGB, APO AE 09260			
9. I WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH			
<p>I, Soo # 1277, conducted a routine legal coin search for ISN # 10018 at approximately 1530 on 14 AUG 2014. While conducting the search I noticed paperwork that was not stamped with the SS. I noticed the ISN's # on it. The paperwork consisted of 3 papers, 1 sticky note, and 1 folder. The items were sealed in a manilla envelope and transported back to Camp. Once at Camp the sealed envelope was transferred to the evidence custodian. /// End of statement ///</p>			
10. EXHIBIT	11. INITIAL OF [REDACTED] STATEMENT	PAGE 1 OF 2 PAGES	
ADDITIONAL PAGES MUST CONTAIN THE HEADING: STATEMENT OF [REDACTED] TAKEN [REDACTED] DATED [REDACTED]			
THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT, AND PAGE NUMBER MUST BE INDICATED.			
DA FORM 2823, DEC 1998		DA FORM 2823, JUL 73 IS OBSOLETE	

STATEMENT OF <u>Soo # 1277</u> <span style="background-color: black; color: black;">[REDACTED]</span> TAKEN <u>OFF-GARMO</u> DATED <u>14 AUG 2014</u>	
2. STATEMENT (Continued)	
<b>AFFIDAVIT</b>	
I, <u>Soo # 1277</u> <span style="background-color: black; color: black;">[REDACTED]</span> HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 2. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR INDUCEMENT.	
WITNESSES  <hr/> <hr/> <hr/>	<div style="text-align: center;"> <u><span style="background-color: black; color: black;">[REDACTED]</span></u>  <i>(Signature of Person Making Statement)</i> </div> <div style="text-align: center; margin-top: 10px;">         Subscribed and sworn before me, a person authorized by law to administer oaths, this _____          At <u>GTMO NEGE</u> </div> <div style="text-align: center; margin-top: 10px;"> <u><span style="background-color: black; color: black;">[REDACTED]</span></u>  <i>(Signature of Person Administering Oath)</i> </div> <div style="text-align: center; margin-top: 10px;"> <u><span style="background-color: black; color: black;">[REDACTED]</span></u>  <i>(Typed name of Person Administering Oath)</i> </div> <div style="text-align: center; margin-top: 10px;"> <u>ART 130 (b) (4) UCMJ</u>  <i>(Authority To Administer Oaths)</i> </div>
ORGANIZATION OR ADDRESS  <hr/> <hr/> <hr/>	
INITIALS OF PERSON MAKING STATEMENT <span style="background-color: black; color: black;">[REDACTED]</span>	PAGE 2 OF 2 PAGES

EVIDENCE/PROPERTY CUSTODY DOCUMENT		INPC/ID SEQUENCE NUMBER		
For use of this form see AR 150-45 and AR 193-5; the proponent agency is US Army Criminal Investigation Command		CFO REPORT/ID ROI NUMBER		
RECEIVING ACTIVITY <i>Camp III, Guantanamo Bay, Cuba</i>		LOCATION <i>Camp III, Guantanamo Bay, Cuba</i>		
NAME, GRADE AND TITLE OF PERSON FROM WHOM RECEIVED <input type="checkbox"/> OWNER <i>ISN #10018</i> <input type="checkbox"/> OTHER		ADDRESS (Include Zip Code) <i>Camp VII</i>		
LOCATION FROM WHERE OBTAINED <i>Expeditionary Legal Center</i> <i>Joint Task Force Guantanamo Bay, Cuba</i>		REASON OBTAINED <i>Evidence</i>	TIME/DATE OBTAINED <i>1530/14 Aug 14</i>	
ITEM NO.	QUANTITY	DESCRIPTION OF ARTICLES (Include model, serial number, condition and unusual marks or scratches)		
1	3	Papers, unstamped w/ writing on it.		
2	1	Sticky note, unstamped w/ writing on it		
3	1	Folder		
CHAIN OF CUSTODY				
ITEM NO.	DATE	RELEASED BY	RECEIVED BY	PURPOSE OF CHANGE OF CUSTODY
1-3	14 AUG 14	SIGNATURE <i>ISN #10018</i>	SIGNATURE <i>Soo 1277</i>	Evidence
1-3	14 AUG 14	SIGNATURE <i>Soo #1277</i>	SIGNATURE <i>Evidence 1271</i>	Evidence
1-3	14 AUG 14	SIGNATURE <i>Evidence 1271</i>	SIGNATURE <i>Soo 1277</i>	Returned to ISN 10018 after stampage
		SIGNATURE	SIGNATURE	
		NAME, GRADE OR TITLE	NAME, GRADE OR TITLE	
		SIGNATURE	SIGNATURE	
		NAME, GRADE OR TITLE	NAME, GRADE OR TITLE	

DA FORM 4137, 1 JUL 76

Replaces DA FORM 4137, 1 Aug 74 and DA FORM 4137-R Privacy Act Statement 28 Sep 75 Which are Obsolete

LOCATION \_\_\_\_\_ DOCUMENT NUMBER \_\_\_\_\_

LSARRC V1.00



## **Attachment H**



UNCLASSIFIED//FOR PUBLIC RELEASE  
**DEPARTMENT OF DEFENSE**  
**OFFICE OF THE CHIEF DEFENSE COUNSEL**  
**OFFICE OF MILITARY COMMISSIONS**  
1620 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1620

25 August 2014

MEMORANDUM FOR Trial Counsel

FROM: Sterling R. Thomas, Lt Col, USAF, Military Defense Counsel for Mr. al Baluchi

SUBJECT: DEFENSE REQUEST FOR DISCOVERY  
**Seized client (Mr. al Baluchi) from 14 August 2014**

Defendant, by and through undersigned counsel pursuant to RMC 701, 10 U.S.C. § 949p-4, Common Article III to Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, the Due Process Clause of the Fifth Amendment, the Confrontation Clause to the Sixth Amendment, and the Compulsory Process Clause of the Sixth Amendment to the United States Constitution, hereby requests that the government produce the following discovery:

**REQUESTS**

Background. On or about 14 August 2014 at approximately 1530 in the ELC holding cells, JTF security escorts seized privileged notes prepared by Mr. al Baluchi. JTF did not return the notes until the following day.

Request: Please produce and all information and documents that relate to material seized from Mr. al Baluchi on 14 August 2014, including but not limited to emails, memoranda, JDIMS entries, and the results of any document exploitation.

Thank you. Please let me know if you need further information.

Respectfully Submitted,

//s//

Sterling R. Thomas  
Lt Col, USAF  
Counsel for Mr. al Baluchi

# **Attachment I**



OFFICE OF THE  
CHIEF PROSECUTOR

**DEPARTMENT OF DEFENSE**  
OFFICE OF THE CHIEF PROSECUTOR OF MILITARY COMMISSIONS  
1610 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1610

22 September 2014

MEMORANDUM FOR Defense Counsel for Ali Abdul Aziz Ali

SUBJECT: Prosecution Response to 25 August 2014 Request  
for Discovery (DR-185-AAA)

1. The Prosecution received the Defense request for discovery on 25 August 2014. The Prosecution hereby responds to the Defense request, below, in bold.
2. The Defense requests production of "all information and documents that relate to material seized from Mr. al Baluchi on 14 August 2014, including but not limited to emails, memoranda, JDIMS entries, and the results of any document exploitation."

**Attached please find documents responsive to your request. Two copies are attached: MEA-DR-185-0001 through 0003 is for Counsel, MEA-DR-185-0004 through 0006 is releasable to the accused. The Prosecution will continue to conduct its due diligence for other requested information.**

Respectfully submitted,

//s//

Nicole A. Tate  
Assistant Trial Counsel

## **Attachment J**



UNCLASSIFIED//FOR PUBLIC RELEASE  
**DEPARTMENT OF DEFENSE**  
**OFFICE OF THE CHIEF DEFENSE COUNSEL**  
**OFFICE OF MILITARY COMMISSIONS**  
1620 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1620

18 August 2015

MEMORANDUM FOR Trial Counsel

FROM: Sterling R. Thomas, Lt Col, USAF, Military Defense Counsel for Mr. al Baluchi

SUBJECT: DEFENSE REQUEST FOR DISCOVERY  
**Seized legal materials from 14 August 2014**

Defendant, by and through undersigned counsel pursuant to RMC 701, 10 U.S.C. § 949p-4, Common Article III to Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, the Due Process Clause of the Fifth Amendment, the Confrontation Clause to the Sixth Amendment, and the Compulsory Process Clause of the Sixth Amendment to the United States Constitution, hereby requests that the government produce the following discovery:

**REQUESTS**

Background. On or about 14 August 2014 at approximately 1530 in the ELC holding cells, JTF security escorts seized privileged notes prepared by Mr. al Baluchi. JTF did not return the notes until the following day. On 22 September 2014, the government produced a sworn statement from SOO #1277, the guard who seized the items in question. The government's response states, "The Prosecution will continue to conduct its due diligence for other requested information."

Request: Mr. al Baluchi renews his request to produce all information and documents that relate to material seized from Mr. al Baluchi on 14 August 2014, including but not limited to emails, memoranda, JDIMS entries, and the results of any document exploitation.

Thank you. Please let me know if you need further information.

Respectfully submitted,

//s//

Sterling R. Thomas  
Lt Col, USAF  
Counsel for Mr. al Baluchi



## **Attachment K**

(pending classification review, filed under seal)