

UNCLASSIFIED//FOR PUBLIC RELEASE  
MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD,  
WALID MUHAMMAD SALIH  
MUBARAK BIN 'ATTASH,  
RAMZI BIN AL SHIBH,  
ALI ABDUL AZIZ ALI,  
MUSTAFA AHMED ADAM  
AL HAWSAWI

AE 386M

RULING

**Defense Motion**  
To Invalidate *Touhy* Notice  
Requirements as Non-Reciprocal Discovery

28 October 2016

**1. Procedural History.**

a. On 6 November 2015, the Defense filed AE 386 (AAA),<sup>1</sup> asking the Commission find that the Defense need not comply with *Touhy*<sup>2</sup> regulations “because the regulations constitute a non-reciprocal discovery requirement in violation of the Due Process Clause and Detainee Treatment Act.” AE 386 (AAA) at 1. Relying on *Wardius v. Oregon*, 412 U.S. 470, 475-76 (1973) and *United States v. Bahamonde*, 445 F.3d at 1225, 1230 (9th Cir. 2006), the Defense argued *Touhy* compliance “would force the [D]efense to reveal, in ever more exacting detail, their litigation and discovery strategy to the [G]overnment which seeks to convict and execute the defendants in this trial.” *Id.* at 6.

b. In response,<sup>3</sup> the Government argued *Touhy* compliance has been deemed constitutional in “federal, state and military courts across the country [who] have routinely required criminal defendants to comply with a federal agency’s *Touhy* regulations.” AE 386D (GOV) at 5-6. The

<sup>1</sup> AE 386 (AAA), Defense Motion to Invalidate *Touhy* Notice Requirements as Non-Reciprocal Discovery, filed 6 November 2015.

<sup>2</sup> *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) (affirming federal agency authority to centralize determination as to whether or not a subpoena *duces tecum* will be willingly obeyed or challenged.)

<sup>3</sup> AE 386D (GOV), Government Response to Defense Motion to Invalidate *Touhy* Notice Requirements as Non-Reciprocal Discovery, filed 20 November 2015.

Government also claimed that “pursuant to [Rule for Military Commissions (R.M.C.)] 703(c)(2)(B)(i), ‘a synopsis of the expected testimony sufficient to show its relevance and necessity’ is already required of the Defense for any witness production request submitted to the Prosecution,” and “[c]ertainly, a similar synopsis submitted to the Prosecution could be used for any *Touhy* notice submitted for this case without ‘revealing, in ever more exacting detail’ than that which is already required of [the Defense.]” *Id.* at 11.

c. Despite the various positions taken by the parties,<sup>4</sup> at its core the question before the Commission is whether the *Touhy* notice requirement for the production of witnesses or disclosure of agency materials or information from agency employees places a separate burden on an accused from that already required by R.M.C. 703.<sup>5</sup> If so, presuming the separate agencies are not parties to this case, the Defense would have to comply with the *Touhy* regulations. On the other hand, if R.M.C. 703 is essentially equivalent to the various *Touhy* regulations, the Defense substantially complies with *Touhy* when it complies with R.M.C. 703.

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<sup>4</sup> AE 386 (AAA); AE 386D (GOV); AE 386E (AAA), Mr. al Baluchi’s Reply to Government Response to Motion to Invalidate *Touhy* Notice Requirements as Non-Reciprocal Discovery, filed 23 November 2015; AE 386H (AAA), Mr. al Baluchi’s Reply to Government Response to Motion to Invalidate *Touhy* Notice Requirements as Non-Reciprocal Discovery, filed 7 December 2015; AE 386B (AAA), Mr. al Baluchi’s Motion to Invalidate CIA Former Employee Regulation as Not Authorized by the Housekeeping Statute, filed 19 November 2015; AE 386G (GOV), Government Response to Mr. Ali’s Motion to Invalidate CIA Former Employee Regulation as Not Authorized by the Housekeeping Statute, filed 3 December 2015; AE 386I (AAA), Mr. al Baluchi’s Reply to Government Response to Defense Motion to Invalidate CIA Former Employee Regulation as Not Authorized by the Housekeeping Statute, filed 10 December 2015; AE 386F (GOV), Government Response to Mr. Ali’s Response (sic) to Request for Position Whether CIA Is a Party Under 32 C.F.R. § 1905.4(d), filed 30 November 2015; AE 386A (AAA Sup) (Corrected Copy), Defense Supplement to AE 386A (AAA), Response to Request for Position on Whether the CIA is a party Under 32 C.F.R. 1905.4(d), filed 5 October 2016.

<sup>5</sup> In a related filing, the Government claimed it did not have to produce a former Central Intelligence Agency (CIA) interpreter (hereinafter “the Interpreter”) because the Defense failed to “demonstrate the relevance and necessity of any testimony from the Interpreter to the issues underlying the AE 350 series, and . . . the Defense[’s] . . . fail[ure] to comply with the [CIA’s] *Touhy* regulations.” See generally AE 350DD (GOV), Government Response to Defense Motion to Compel Production of The Former CIA Interpreter Utilized by Mr. Binalshibh’s Defense Team, filed 15 October 2015. In the instant motion, the Defense argues the Prosecution’s denial of witness production based on *Touhy* requirements creates “a nonreciprocal discovery requirement, which would force the [D]efense to reveal, in ever more exacting detail, their litigation and discovery strategy to the [G]overnment which seeks to convict and execute the defendants in this trial” and such “notice requirements within the military commissions system [is] unconstitutional under *Wardius*.” AE 386 (AAA) at 6. This Commission will not address either party’s arguments regarding non-reciprocal discovery as the issue is not ripe.

**2. Law.**

a. The Military Commissions Act of 2009 (“MCA”) provides the accused a reasonable opportunity to obtain witnesses and other evidence. *See* 10 U.S.C. § 949j. R.M.C. 703 provides that “[e]ach party is entitled to the production of any available witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.” *See* R.M.C. 703(b)(1). The rule also entitles each party to “the production of evidence which is relevant, necessary, and non-cumulative.” Relevant non-cumulative evidence is necessary when it “contribute[s] to a party’s presentation of the case in some positive way on a matter in issue.” R.M.C. 703(f)(1) and Discussion.

b. Pursuant to R.M.C. 703(c)(2)(A), the defense must submit a written list of witnesses the defense wishes produced to the trial counsel. The list must include the name, telephone number, and address of the potential witness, and “a synopsis of the expected testimony [of the witness] to show its relevance and necessity.” R.M.C. 703(c)(2)(B)(i). The trial counsel arranges for the witnesses to testify. R.M.C. 703(c)(2)(D). But the trial counsel may also claim the production of a witness is not required or protected because the witness’ production is classified or protected government information. *Id.* If the trial counsel deems the witness is either not required or is protected, the matter is submitted to the military judge. *Id.* If the trial counsel does not provide the witness pursuant to the order, the military judge “shall issue such order as the interests of justice require.” *Id.* R.M.C. 703 provides comparable procedures when the Defense seeks production of evidence. R.M.C. 703(f)(3).

c. Federal agencies have promulgated regulations to protect against the unrestricted disclosure of information in court, including setting forth the procedures a party requesting information and/or witnesses from a government agency must follow. *Touhy*, 340 U.S. at 468

(purpose of the DOJ regulation at issue is to mitigate the risk of harm to an agency from the unrestricted disclosure to courts through the centralization of the agency's response to a subpoena); *Bobreski v. U.S. E.P.A.*, 284 F. Supp. 2d 67, 78 (D.D.C. 2003) (purpose of Environmental Protection Agency (EPA) *Touhy* regulations are, in the event an EPA employee is requested to testify or is subpoenaed, to ensure government employees' time is spent on only official business, public funds are not used for private purposes, and to establish procedures for approving testimony and producing documents). *Touhy* regulations are rooted in the Federal Housekeeping Statute, 5 U.S.C. § 301, (Housekeeping Statute) which provides "[t]he head of an Executive department or military department [to] prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property."

### 3. Analysis.

a. The Department of Justice (DOJ), Central Intelligence Agency (CIA), and other agencies' *Touhy* requirements demand no more specificity than that required by R.M.C. 703.<sup>6</sup> Although the *Touhy* requirements vary for each agency, they generally require the party subpoenaing the witness or information provide a description of the expected oral or written testimony to the agency and provide that agency an opportunity to respond. In turn, the regulations require the agency to provide an official notification to the court that the demand has been or is being referred for the prompt consideration of the appropriate agency official. Finally, the appropriate agency official makes a decision as to the witness demand and informs the court of that decision. *See generally* 28 CFR 16.22 and 32 CFR § 1905.4.

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<sup>6</sup> *See* 28 CFR 16.22 (c) and (d) requiring "an affidavit, or, if that is not feasible, a statement by the party seeking the testimony . . . setting forth a summary of the testimony sought and its relevance to the proceeding."; *see also* 32 CFR § 1905.4 (d) requiring "a reasonably detailed description of the testimony sought, in the form of an affidavit or, if that is not feasible, a written statement, by the party seeking the testimony . . . furnished to the CIA Office of General Counsel."

b. For example, the CIA *Touhy* requirements demand “a reasonably detailed description of the testimony sought” in writing and “furnished to the CIA Office of the General.” 32 C.F.R. § 1905.4(d). This is also required by R.M.C. 703(c)(2)(A) (requiring a written list of witnesses, including “a synopsis of the expected testimony [of the witness] to show its relevance and necessity.”) Similarly, the CIA *Touhy* requirements allow the agency to decline to comply with the subpoena. 32 C.F.R. . § 1905.4(g). Implicit in that refusal is the recognition that the subpoenaing power may determine that the witness or evidence is necessary for the Defense and issue an order as required by the interest of justice. R.M.C. 703(c)(2)(D). In fact, the Government has acknowledged “the information required of [the Defense] under applicable *Touhy* regulations is no different than that already required under . . . R.M.C. 703.”<sup>7</sup> The Government has also agreed to forward Defense *Touhy* notices to the relevant agencies.

Understanding that the *Touhy* issue, writ large, is currently being litigated, based on the Military Judge’s suggestion on the record, OCP agrees to be the “mailbox” for such requests, and will forward any such request on to OGC to ensure they receive it and work it in a timely matter. As such please deliver such *Touhy* requests for CIA witnesses to me in the same manner as you would a discovery request or motion conference.

AE 386E (AAA), Attachment B.<sup>8</sup>

c. The Rules for Military Commissions afford an accused the right to the production of relevant, necessary, and noncumulative evidence. R.M.C. 703(f)(1). As the discussion to R.M.C. 703(a) explains, the rule is intended to provide an accused a comparable “opportunity to [that of] a criminal defendant in a court of the United States under article III of the Constitution.” The R.M.C. protects the agencies in the same manner as do *Touhy* regulations, by requiring the

<sup>7</sup> AE 386D at 11-12. The Defense agrees with the Prosecution’s position on R.M.C. 703’s requirements. *See* AE 386E (AAA) at 1-2.

<sup>8</sup> Email, subject “[Non-DoD Source] Contact with CIA OGC Regarding *Touhy* Request” sent on November 18, 2015 at 11:47 AM from Clay Trivett to Mr. James Connell and Lt Col Sterling Thomas.

Defense to request witnesses and evidence the Defense wishes the Government to produce. The system thus provides the Government and the relevant agencies notice of the witnesses and evidence requested, and allows the agencies to mitigate the risk of harm to them from the unrestricted disclosure of agency information.

d. Unlike the Commission process, federal and state rules of criminal procedure allow a defendant to issue subpoenas for witnesses and evidence without going through the prosecution. *See* Federal Rule of Criminal Procedure 17 (“The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served”); Form AO 89, Subpoena to Testify at a Hearing or Trial in a Criminal Case; N.Y. CRIM. PROC. § 610.20(3) (an attorney for the defendant may issue a subpoena); IND. CODE § 35-37-5-2(b)(4) (“The clerk shall issue a subpoena . . . signed and sealed but otherwise blank, to a party requesting it or to his attorney. . . .”); ILL. COMP. STAT. 725 ILCS 5/115-17 (“An attorney admitted to practice in the State of Illinois, as an officer of the court, may also issue a subpoena in a pending action”). Thus, in both federal and state cases, the *Touhy* requirements afford an agency knowledge that agency information or witnesses are being sought, and provides procedures for agency approval for access and use of its information. Similarly, R.M.C. 703 requires the Defense to go through the Government to subpoena witnesses and evidence, fulfilling the notice and access requirements served by *Touhy* regulations.

e. The Commission finds the Defense is in ***substantial compliance*** with the notice requirements of 28 CFR 16.22 and 32 CFR § 1905.4 when it seeks to obtain witnesses and evidence through R.M.C. 703.



f. The Defense maintains the CIA is a party to these proceedings, and thus, the Defense does not have to comply with the C.I.A.'s *Touhy* regulations.<sup>9</sup> The Commission disagrees and finds the C.I.A. is not a party. *See United States v. Wallace*, 32 F.3d 921, 929 (5th Cir. 1994) (in federal prosecution, defendant seeking testimony of Drug Enforcement Agency agents must comply with applicable *Touhy* regulations); *United States v. Allen*, 554 F.2d 398, 406 (10th Cir. 1977) (in a federal prosecution, defendant seeking testimony from DOJ employees must follow applicable *Touhy* regulations); *United States v. Moussaoui*, 2002 WL 1987909 n. 1 (E.D. Va. 2002) (in federal prosecution, defendant seeking to compel testimony from Federal Bureau of Investigation (FBI) agents must comply with FBI's *Touhy* regulations).

g. The Defense also argues that the Housekeeping Statute authorizing the CIA to promulgate its *Touhy* regulation does not empower the agency to apply its *Touhy* requirements to former employees of the agency.<sup>10</sup> Again, the Commission disagrees. As set forth above, *Touhy* regulations are rooted in the Housekeeping Statute which provides "[t]he head of an Executive department or military department [to] prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." The purpose of *Touhy* regulations is to protect against the unrestricted disclosure of agency information in court, including setting forth the procedures any party requesting information and/or witnesses from a government agency must follow. This includes instances where the Defense seeks to elicit agency information acquired by former employees during the course of their duties with the agency. *See United States v. Blizzard*, 674 F.2d 1382 (11th Cir. 1982) (upholding decision to quash subpoena

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<sup>9</sup> See AE 386A (AAA) and AE 386A (AAA Sup) (Corrected Copy).

<sup>10</sup> See AE 386B (AAA).

for former employee of DOJ because of Defense failure to comply with the agency *Touhy* regulation.)<sup>11</sup>

h. Agency *Touhy* requirements apply to these proceedings. Accordingly, when the Defense seeks the production or disclosure of agency materials or information from employees or former employees of the agency without going through R.M.C. 703, the Defense is required to file a *Touhy* notice pursuant to applicable agency *Touhy* regulations. The Government shall treat R.M.C. 703 compliant requests for witnesses and evidence as requests that comply with the aforementioned agency *Touhy* regulations.

**4. Ruling.**

a. The Defense motion to invalidate additional *Touhy* notice requirements when the Defense requests agency information via witnesses and evidence through the Government pursuant to R.M.C. 703 is **GRANTED**.

b. The Defense motions in the AE 386 series are otherwise **DENIED**.

So **ORDERED** this 28th day of October, 2016.

//s//  
JAMES L. POHL  
COL, JA, USA  
Military Judge

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<sup>11</sup> See also additional case law cited in AE 386G (GOV) at 7-8.