

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

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 399C (WBA)

**Defense Motion
to Compel the Production of Witnesses
Necessary to Prove that Mr. bin 'Atash Has
Been and Is Denied Access to Members of his
Family in Violation of the Law**

Date Filed: 18 March 2016

1. Timeliness:

This motion is timely filed.

2. Relief Sought:

Mr. bin 'Atash requests that the Commission compel the production of the witnesses to JTF-GTMO's failed video-messaging and video-conferencing program so that JTF-GTMO may eventually attain compliance with international law and United States domestic law on the treatment of pre-trial detainees. The Government has, on several occasions, including in its response to AE399(WBA), Motion to Permit In-Person Visitation between Mr. bin 'Atash and Members of his Family, claimed that Mr. bin 'Atash is able to communicate with his family by video messages and video-conferencing. This claim is misleading and false.

Although video-conferencing might allow for some contemporaneous, [REDACTED] conversation over a video screen, no such video-conference has ever occurred between Mr. bin 'Atash and his family. Defense Counsel requests an order from this Commission requiring the JTF-GTMO to produce its own personnel responsible for facilitating the video-messaging program and the video-conferencing program to answer and explain these failures—and

importantly—to rebut the false and misleading assertions made by the Prosecution in its filing AE399A(GOV). Additionally, Defense Counsel request an order from this Commission requiring the Prosecution to produce ICRC personnel responsible for facilitating the video-messaging program and the video-conferencing program to answer and explain these failures. These witnesses are necessary to prove that Mr. bin ‘Atash has been and is denied access to his family members in violation of the law.

3. Overview:

For over 12 years, Mr. bin ‘Atash has been detained in United States custody as an untried prisoner without reasonable access to, or communication with, his family members. (AE 399B(WBA) at 1-2). This denial of reasonable access by the United States constitutes pre-trial punishment and stands in direct violation of applicable international and domestic law. (AE 399B(WBA) at 5-15). Despite the Government’s assertions to the contrary, no meaningful steps have been taken to allow contemporaneous, real-time [REDACTED] communication with family members. (AE 399B(WBA) at 4-5). This Commission should order the production of the witnesses requested so they may provide evidence that the Government has failed to abide by international and domestic requirements of humane treatment by failing to provide access to family in accordance with applicable international and domestic law.

4. Burden and Standard of Proof:

The defense bears the burden of persuasion. The standard of proof is a preponderance of the evidence. R.M.C. 905(c)(1).

5. Facts:

a. On or about 6 January 2016, Defense Counsel filed its Motion to Permit In-Person Visitation between Mr. bin ‘Atash and Members of his Family. (AE 399(WBA)). In that filing,

the Defense described the “video messaging program” and the “video conferencing program” intended to facilitate communication between the detainees and their families. (AE 399(WBA) at 2-5).

b. Despite over 12 years of detention, the Department of Defense, in coordination with the International Committee of the Red Cross (“ICRC”), did not begin these programs until the fall of 2014. (AE 399(WBA) at 3).

c. For an unexplained reason, the JTF-GTMO imposed restrictions on the video-messaging program, dictating without explanation which family members of Mr. bin ‘Atash would receive the recordings. (AE 399(WBA) at 4). Further, for an unexplained reason, the JTF-GTMO restricted the video message from being shown to Mr. bin ‘Atash’s family. (AE 399(WBA) at 4). Still further, for an unexplained reason, the JTF-GTMO cancelled Mr. bin ‘Atash from participating in the video-conferencing program without allowing him to ever participate. (AE 399(WBA) at 5).

d. Despite these complete and abject failures of the video-messaging program and the video-conferencing program, the Government continues to insist, without proof, that the programs are a success. Then, the Government urges this Commission to believe the unsupported claims and give complete judicial deference to JTF-GTMO. (AE 399A(GOV) at 2, 11).

e. On 15 February 2016, Defense Counsel sent its Request for Production of Witnesses on AE 399(WBA) (“Request”), in order to substantiate the failure of both the video-messaging program and the video-conferencing program, thereby rebutting the claims made by the Prosecution in AE399A(GOV). (Attachment B). In the Request, Defense Counsel asked for the production of: (1) JTF-GTMO personnel responsible for facilitating the failed

videoconference and recorded video broadcasts between Mr. bin 'Atash and his family; and (2) ICRC representative(s) responsible for facilitating the failed videoconference and recorded video broadcasts between Mr. bin 'Atash and his family.

f. The Request explained further that the claims by the Government with regard to the video-messaging program and the video-conferencing program are wholly inaccurate by stating:

The Prosecution claims that the government currently provides [REDACTED] communications” and “the Government will continue to allow [REDACTED] communications with family members whenever and wherever possible . . .” and that “Mr. bin 'Atash is permitted to send video messages” (AE 399A(GOV) at 2). These claims are inaccurate. The government has never permitted Mr. bin 'Atash any manner of real-time [REDACTED] communication with family members. The few attempts the government has made to allow for such communication have failed and no such communication has been possible. The ICRC representative responsible for the facilitating videoconference and recorded video broadcasts between Mr. bin 'Atash and his family has knowledge of the reasons for the government’s complete failure to support Mr. bin 'Atash ‘s right to communicate with his family.

(Attachment B at 1).

g. On 3 March 2016, the Government responded to the 15 February Request and declined to produce any witnesses at this time because Defense Counsel “failed to include, beyond a threadbare statement of argument, an adequate ‘synopsis of the expected testimony sufficient to show its relevance and necessity.’” (Attachment C at 2 quoting R.M.C. 703(c)(2)(B)). The Government added that it would send the Request to JTF-GTMO “so that personnel who are assigned to JTF-GTMO may determine if they would like to speak with you.” (Attachment C at 1). With a reference to its Bench Brief dated 3 December 2014 at AE 29A(GOV) and its claim that discovery is governed in part by the regulations promulgated in light of United States ex rel. Touhy v. Ragen, 340 U.S. 462, 468 (1952), the Government noted that any decision by JTF-GTMO personnel to speak with Defense Counsel “rests solely with the individual witnesses,” but nevertheless directed Defense Counsel to coordinate any interview

with the JTF-GTMO Staff Judge Advocate. (Attachment C at 2). The Government also directed Defense Counsel to contact the ICRC directly and request to interview their personnel regarding the issue, the catch being that only once an ICRC individual announces her willingness to speak with Defense Counsel, would the Government reconsider the 15 February Request. (Attachment C at 1).

h. Defense counsel for Mr. bin 'Atash have no access to the identities of JTF-GTMO personnel who facilitate, administer or otherwise are involved in the Camp 7 programs claimed by the Prosecution to provide video-messaging and video-conferencing [REDACTED] communications" with Mr. bin 'Atash's family members. Apparently, the Prosecution has access to those personnel. Yet, the Government has continued to take the position that defense counsel be prohibited from learning the identities of JTF-GTMO personnel. Consequently, the Government's own policies have made defense attempts to interview JTF-GTMO witnesses impossible.

6. Law and Argument:

This Commission has the power to compel the Government to comply with international law and domestic law by producing these witnesses to answer for operations that adversely impact the rights of the Accused, such as the failed video-messaging program and the video-conferencing program. 10 U.S.C. § 949j (2012); R.M.C. 703. This Commission has previously ruled that it accepts the responsibility to intervene when the operation of the detention facility adversely impacts the rights of Mr. bin 'Atash, as it stated:

[T]he Commission is responsible to ensure appropriate legal protections for [Mr. bin 'Atash] and will intervene when it is established that daily operations of the detention facility adversely impact the Commission's ability to proceed or [Mr. bin 'Atash]'s rights.

(AE 018U at 2-3). Further, this Commission indicated its power to address grievances from detainees when “such requests involve a right or a privilege within the criminal process.” (AE 303D at 6); see generally 10 U.S.C. § 948d.

In the Military Commissions Act of 2009, Congress specifically and consciously recognized the importance of calling witnesses to develop a robust factual record when it directed that “[t]he opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under Article III of the Constitution.” 10 U.S.C. § 949j. Under the Rules, Mr. bin ‘Atash is entitled to “production of any available witness whose testimony on a matter in issue on the merits or an interlocutory question would be relevant and necessary.” R.M.C. 703(b)(1). Testimony is relevant when a “reasonable person would regard the evidence as making the existence of any fact that is of consequence to a determination of the commission action more probable or less probable than it would be without the evidence.” M.C.R.E. 401. In the military justice system, this is a “low threshold of relevance.” United States v. Wuterich, 67 M.J. 63, 77 (C.A.A.F. 2008). Testimony is thus necessary “when it is not cumulative and when it would contribute to a party’s presentation in some positive way on a matter in issue.” R.M.C. 703(f)(1), cmt.

The production of witnesses is also guaranteed under international law. Common Article 3 of the Geneva Conventions of 1949 prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” Convention (First) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31. The right to call witnesses is one of those indispensable judicial guarantees. See Hamdan v. Rumsfeld, 548 U.S. 557, 633 (2006)

(recognizing the Convention for the Protection of Victims of International Armed Conflicts (Protocol I), art. 75(4), Jun. 8, 1977, 1125 U.N.T.S. 3 (“Protocol I”), which provides that “anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him . . .”); see also United Nations International Covenant on Civil and Political Rights, art. 14(3)(e), Dec. 16, 1966, 999 U.N.T.S. 171 (recognizing right to obtain the attendance and examination of witnesses in a criminal proceeding as a “minimum guarantee”).

Here, the United States claims that it need not comply with the law because it provides an adequate substitute. Mr. bin ‘Atash does not concede that video-conferencing or messaging is an adequate substitute for family visitation, but at the very least, Mr. bin ‘Atash must be provided the opportunity to rebut the false claims of the Prosecution. Failure to provide Mr. bin ‘Atash with the witnesses necessary to substantiate the claim that he is being unlawfully denied access to his family in violation of the First, Fifth, and Eighth Amendments to the Constitution, Common Article 3 of the Geneva Conventions, international humanitarian law, and international human rights law is tantamount to outright denial of those rights. (AE 399(WBA) at 5-14). Without the ability to examine the witnesses involved in the failed communication programs, the JTF-GTMO unlawfully estops Mr. bin ‘Atash from exercising the rights provided under international and domestic law. Providing Mr. bin ‘Atash with the witnesses requested would prove that the JTF-GTMO has denied Mr. bin ‘Atash access to the video-messaging program and the video-conferencing program, which exacerbates the denial of family visitation, rebuts the Prosecution’s claims, and in turn is a violation of international and domestic law.

The testimony of JTF-GTMO personnel and the ICRC representative(s) responsible for facilitating the failed video conference and recorded video broadcasts between Mr. bin 'Atash and his family is relevant and necessary to prove, at a minimum, that the Government's claim that it provides [REDACTED] communications between Mr. bin 'Atash and his family members is false and misleading. More specifically, these witnesses can explain: (1) whether a current plan exists that allows Mr. bin 'Atash to exercise his right to communicate with his family; and (2) to the extent the efforts employed by JTF-GTMO and ICRC have failed or succeeded, what are the reasons for these failures and successes. These witnesses have personal knowledge of these lines of inquiry. Without this testimony, the Commission cannot determine whether video-messaging and video-conferencing programs have ever been provided to Mr. bin 'Atash and, if they ever are provided in the future, whether the video-messaging and video-conferencing programs are sufficient under international and domestic law. In short, these witnesses know facts essential to resolving all motions by all parties in the AE399 series before the Commission.

Because these witnesses are a direct source of this information and they can assist the Commission in determining whether a fact underlying a decision at issue in the AE 399 series is more or less probable, their testimony would be relevant. See M.C.R.E. 401. As of the filing of this motion, Mr. bin 'Atash is aware of no other witness who could be called on this matter. Accordingly, the attendance and examination of these JTF-GTMO and ICRC witnesses is necessary. See R.M.C. 703(f)(1), cmt. Having reached this low threshold of demonstrating relevance and necessity, as required by R.M.C. 703(b)(1), this Commission must order the Prosecution to provide the appropriate JTF-GTMO personnel and ICRC representatives responsible for video-messaging and video-conferencing at any hearing related to AE 399 to

ensure compliance with the Constitution, international law, and the MCA. See Washington, 388 U.S. at 19; Taylor, 329 F.2d at 386; Protocol I at art. 75(4); 10 U.S.C. § 949j.

Alternatively, the Commission should dismiss the charges.

7. Oral Argument:

The Defense requests oral argument.

8. Witnesses:

- A. JTF-GTMO personnel responsible for facilitating the failed videoconference and recorded video broadcasts between Mr. bin ‘Atash and his family.
- B. ICRC representative(s) responsible for facilitating the failed videoconference and recorded video broadcasts between Mr. bin ‘Atash and his family.

Mr. bin ‘Atash reserves the right to amend this request for witnesses at a later date.

9. Conference with Opposing Counsel:

The Government opposes the relief requested herein.

10. Attachments:

- A. Certificate of Service
- B. Request for Production of Witnesses on AE 399(WBA), sent 15 February 2016.
- C. Prosecution Response to Request for Production of Witnesses on AE 399(WBA), dated 3 March 2016.

11. Signatures:

Very Respectfully,

//s//
CHERYL T. BORMANN
Learned Counsel

//s//
EDWIN A. PERRY
Defense Counsel

//s//
MATTHEW H. SEEGER
MAJ, USA
Defense Counsel

//s//
MICHAEL A. SCHWARTZ
Defense Counsel

//s//
JASON M. MILLER
CPT, USAR
Defense Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on 18 MARCH 2016, I cause to be electronically filed the attached **Defense Motion to Compel the Production of Witnesses Necessary to Prove that Mr. bin 'Atash Has Been and Is Denied Access to Members of his Family in Violation of the Law** with the Trial Judiciary and served it on all counsel of record by e-mail.

//s//

CHERYL T. BORMANN

Learned Counsel

Attachment B



15 February 2016

From: Counsel for Mr. bin 'Atash ICO *United States v. Mohammad, et al.*

To: Trial Counsel

Subj: Request for Production of Witnesses on AE 399(WBA)¹

1. Pursuant to the Fifth, Sixth and Eighth Amendments to the U.S. Constitution, and R.M.C. 703(c)(2)(B), Mr. bin 'Atash, through counsel, requests that the government make the following witnesses available for interview and produce them for testimony at any upcoming hearing regarding AE 254Y(WBA), Mr. bin 'Atash's motion to bar regulations substantially burdening free exercise of religion and access to counsel.

2. Mr. bin 'Atash previously filed a motion to compel the production of various witnesses on the entirety of the AE 399 series. *See* AE 399B(WBA). Mr. bin 'Atash reiterates his request for the production of those witnesses, incorporates his argument from AE399B(WBA), and provides the following additional relevance and necessity information related specifically to the issues raised in AE 399(WBA):

a. JTF-GTMO personnel responsible for facilitating the failed videoconference and recorded video broadcasts between Mr. bin 'Atash and his family

The Prosecution claims that the government currently provides [REDACTED] communications" and "will continue to allow for [REDACTED] communications with family members whenever and wherever possible . . ." The Prosecution also claims that "Mr. bin 'Atash is permitted to send video messages" (AE 399A(GOV) at 2). These claims are inaccurate. The government has never permitted Mr. bin 'Atash any manner of real-time [REDACTED] communication with family members—a fact relevant to the outcome of AE 399(WBA), and which the JTF-GTMO officer responsible for the ICRC's failing videoconference and recorded video broadcasts between Mr. bin 'Atash and his family can substantiate. The witness can also explain that no current plan exists to allow Mr. bin 'Atash to exercise his right to communicate with his family.

b. ICRC representative(s) responsible for the facilitating the failed videoconference and recorded video broadcasts between Mr. bin 'Atash and his family

¹ Counsel for Mr. bin 'Atash submit this request for witnesses pursuant to the Commission's Order in AE36D, which incorrectly ignores the Military Commissions Act of 2009's requirement that Mr. bin 'Atash's opportunity to obtain witnesses shall be comparable to the opportunity available to a criminal defendant in an Article III court. In being forced to obtain witnesses through the process herein, which divulges to the government Defense strategy well in advance of motion hearings, Mr. bin 'Atash is denied the opportunity afforded him by law.

The Prosecution claims that the government currently provides [REDACTED] communications” and “the Government will continue to allow for [REDACTED] communications with family members whenever and wherever possible . . .” and that “Mr. bin ‘Atash is permitted to send video messages” (AE 399A(GOV) at 2). These claims are inaccurate. The government has never permitted Mr. bin ‘Atash any manner of real-time [REDACTED] communication with family members. The few attempts the government has made to allow for such communication have failed and no such communication has been possible. The ICRC representative responsible for the facilitating videoconference and recorded video broadcasts between Mr. bin ‘Atash and his family has knowledge of the reasons for the government’s complete failure to support Mr. bin ‘Atash ‘s right to communicate with his family.

3. Mr. bin ‘Atash objects to the R.M.C. 703 witness production procedure for the reasons articulated in AE036 Defense Motion to Declare R.M.C. 703 Unconstitutional Because It Gives the Prosecution Unilateral Notice of and Control over the Defense Fact and Expert Witnesses.

4. Point of contact for this request is Mr. [REDACTED] at [REDACTED]

//s//
CHERYL T. BORMANN
Learned Counsel

//s//
MICHAEL A. SCHWARTZ
Detailed Defense Counsel

//s//
EDWIN A. PERRY
Detailed Defense Counsel

//s//
MATTHEW H. SEEGER
Major, U.S. Army
Detailed Defense Counsel

Attachment C



OFFICE OF THE
CHIEF PROSECUTOR

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

3 March 2016

MEMORANDUM FOR Defense Counsel for Mr. Bin 'Attash

SUBJECT: United States v. Mohammad et al – Request for Production of Witnesses

1. The Prosecution is in receipt of your witness request,¹ dated 15 February 2016, (hereinafter "Request") to make available for interview and produce the following categories of individuals as witnesses relating to AE 399 (WBA):

- a. JTF-GTMO personnel responsible for facilitating the failed videoconference and recorded video broadcasts between Mr. Bin 'Attash and his family; and,
- b. ICRC representative(s) responsible for facilitating the failed videoconference and recorded video broadcasts between Mr. Bin 'Attash and his family.

For the reasons discussed below, the Prosecution respectfully declines to produce the requested witnesses, at this time; however, the Prosecution has sent your witness request to JTF-GTMO so that personnel who are assigned to JTF-GTMO may determine if they would like to speak with you. Further, for those individuals currently employed by the International Committee of the Red Cross ("ICRC"), the Prosecution recommends you contact that organization for any request to interview their personnel regarding ICRC official information.² Should the requested individuals choose to do so, you may resubmit your request to the Prosecution with an adequate synopsis and the Prosecution will reconsider your request.

2. Rule for Military Commission (R.M.C.) 703 and AE 245, Trial Conduct Order, provides procedures for the production of witnesses for military commissions. The Defense is required to submit to the trial counsel a written list of witnesses whose production by the government the defense requests 14 days prior to when production is needed. *See* R.M.C.703 (c)(2)(A); AE 245. The request must include "a synopsis of the expected testimony sufficient to show its relevance and necessity." R.M.C. 703(c)(2)(B); *see also* Ruling, AE 036C, at 4-5 (stating "R.M.C. 703(c)(2) requires the defense to give the trial counsel a written list of witnesses they want and to provide contact information as well [as] a synopsis of the expected testimony sufficient to show each witness' relevance and necessity). Testimony is *relevant* "when a reasonable person would regard the evidence as making the existence of any fact that is of consequence to the

¹ Within your request, you state affirmatively that "[Mr. Bin 'Attash] previously filed a motion to compel the production of various witnesses on the entirety of the AE 399 series," and cite to AE 399B (WBA) in support of this assertion. The Prosecution notes that AE 399B (WBA) was the Defense Reply to Government Response to Defense Motion to Compel JTF-GTMO to Permit In-Person Visitation between Mr. Bin 'Attash and Members of his Family, and was neither a Motion to Compel the Production of a Witness, or a request for production of witnesses within the provisions of R.M.C. 703 or AE 036D.

² The ICRC has indicated that any request to interview their personnel regarding this issue should be made through Mr. Yazan Khalailah (ykhalailah@icrc.org), Deputy Protection Coordinator, or Ms. Andrea Harrison (anharrison@icrc.org), Legal Advisor.

