

UNITED STATES OF AMERICA

v.

KHALID SHEIKH MOHAMMAD, WALID
MUHAMMAD SALIH MUBARAK BIN
'ATASH, RAMZI BIN AL SHIBH, ALI
ABDUL-AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

AE404(AAA)

Defense Motion to Compel Production
of Evidence of Confinement Conditions at
Camp Seven

1 February 2016

1. **Timeliness:** This motion is timely filed within the Trial Judiciary Rules of Court, Rule 3.7(b).¹
2. **Relief Sought:** Mr. al Baluchi respectfully requests that the military commission compel JTF-GTMO and any other relevant agency to produce a complete and unredacted set of all documents and information relating to Mr. al Baluchi's confinement conditions at Camp 7, including Standard Operating Procedures (SOPs), Temporary Standing Orders (TSOs), and building records.²
3. **Overview:** Mr. al Baluchi has requested discovery of materials relating to conditions of confinement at Camp 7. The prosecution has failed to produce most of the requested materials, including many SOPs. Mr. al Baluchi therefore respectfully requests that the commission compel discovery at this time.
4. **Burden and Standard of Proof:** The burden of persuasion on this motion to compel

¹ This motion was previously filed as AE254VV, and denied by the Commission in its Order of 8 October 2015, AE254XXX, for being "overbroad" in relation to the subject matter of AE254. Mr. al Baluchi, of course, has no control over the Appellate Exhibit number assigned by the Trial Judiciary to a motion. Mr. al Baluchi here amends and re-files this motion, which is not dependent on the AE254 series for relief, with an independent AE number.

² The relief sought here is greater in scope than that sought in AE328(WBA) Defense Motion to Compel Discovery Related to Conditions of Confinement and Disciplinary Status. This motion, for example, seeks historical SOPs and other documents as well as SOPs from 1 July 2014 forward. AE255(AAA) Defense Motion to Compel Discovery Regarding Recordings of Mr. al

discovery rests with the defense.

5. Facts:

a. On September 17, 2001, six days after the attacks of September 11, 2001, President George W. Bush signed a covert action Memorandum of Notification to authorize the Director of Central Intelligence to “undertake operations designed to capture and detain persons who pose a continuing, serious threat of violence or death to U.S. persons and interests or planning terrorist activities.”³

b. According to the recently-released redacted Executive Summary of the *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program*, Pakistani authorities arrested Mr. al Baluchi on 29 April 2003.⁴

c. On or before 2 May 2003, CIA officers were observing the foreign government interrogation of Mr. al Baluchi via video feed.⁵

d. In May 2003, Mr. al Baluchi was “rendered to CIA custody and immediately subjected to the CIA’s enhanced interrogation techniques.”⁶ The *Redacted Executive Summary*

Baluchi addresses the fourth discovery item in AE328, “All audio or video recordings of Mr. bin ‘Atash made at ‘Camp 7’ for the period 1 July 2014 to present.” AE328 Att. B.

³ Senate Select Committee on Intelligence, *Executive Summary, Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program* 11 [hereinafter *Redacted Executive Summary*], S. Rep. 113-288 (Dec. 9, 2014), available at <http://www.intelligence.senate.gov/study2014.html> (contained in the record at AE254OO(Mohammad) Response to AE254KK Government Motion for an Expedited Litigation Schedule to Resolve AE254Y). The defendants have moved the military commission to order the government to provide this document, among others, in AE286 Defense Motion to Compel Discovery of Senate Select Committee on Intelligence Study of RDI Program and Related Documents.

⁴ *Redacted Executive Summary* at 388 n. 2190. Counsel lacks sufficient information to confirm or deny this date. On 14 May 2013, Mr. al Baluchi requested the government to produce discovery regarding his initial detention in DR-035-AAA; the government responded that it would do so, but has not produced any report or narrative description of the circumstances of initial detention.

does not describe which interrogation techniques the CIA used on Mr. al Baluchi, but generally describes some of the torture and other cruel, inhuman, and degrading treatment the CIA inflicted as part of its program.⁷

e. Beginning in September 2003, the CIA held a number of detainees at three CIA facilities on the grounds of, but separate from, the U.S. military facilities at Guantanamo Bay, Cuba.⁸ By April 2004, the CIA had transferred these men from Guantanamo Bay to other detention facilities out of fear that the Supreme Court of the United States might grant them the right to *habeas corpus*.⁹

f. Mr. al Baluchi remained in CIA custody until his transfer to Guantanamo Bay in September 2006.¹⁰

g. On September 6, 2006, in a speech based on CIA information and vetted by the CIA,¹¹ President George W. Bush announced the transfer of fourteen CIA detainees, including Mr. al Baluchi, to Guantanamo Bay, Cuba.¹² After the CIA detainees arrived at the U.S. military base at Guantanamo Bay, they were housed in a separate building from other U.S. military detainees

⁵ *Redacted Executive Summary* at 243 n.1378. The government has not produced the cable (identified as 14291) the *Redacted Executive Summary* cites for this fact.

⁶ *Redacted Executive Summary* at 244.

⁷ In remarks before the Committee Against Torture, the United States acknowledged its use of torture. See Opening Statement of Assistant Secretary Tom Malinowski, Committee Against Torture (Nov. 12, 2014), available at <https://geneva.usmission.gov/2014/11/12/malinowski-torture-and-degrading-treatment-and-punishment-are-forbidden-in-all-places-at-all-times-with-no-exceptions/>. “Enhanced interrogation techniques” are not the only methods of abuse; some abusive techniques were defined as “standard interrogation techniques” or not defined at all.

⁸ *Redacted Executive Summary* at 140 & n. 848. The *Redacted Executive Summary* refers to the three Guantanamo Bay CIA facilities as DETENTION SITE MAROON, DETENTION SITE INDIGO, and DETENTION SITE RED. *Id.*

⁹ *Redacted Executive Summary* at 140-41.

¹⁰ *Redacted Executive Summary* at 246.

¹¹ *Redacted Executive Summary* at 159.

and remained under the operational control of the CIA.¹³ According to the *Miami Herald*, the CIA spokesperson has “declined to say when—if ever—the agency relinquished control of Guantanamo’s most secretive prison.”¹⁴

h. Admiral Walsh, following the completion of the 2009 Review of Department Compliance with President’s Executive Order on Detainee Conditions of Confinement, commonly known as the Walsh Report, stated that conditions at Camp 7 were “effectively” the same as a “supermax facility.”¹⁵

i. On 2 August 2013, Mr. bin ‘Atash requested all SOPs governing Camp 7 detention staff in effect from 2006 to the present in DR-087-WBA.¹⁶

j. On 19 March 2014, Mr. al Baluchi requested the following information from the government in DR-159-AAA:

Any documents or information describing conditions of confinement at Camp 7, including but not limited to the following:

- (a) Blueprints, line drawings, architect’s concept sketches, and/or as-built diagrams regarding the construction of the detainee areas of Camp 7;
- (b) Contracts regarding the construction of or the maintenance of the detainee areas of Camp 7;

¹² The White House, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html>.

¹³ *Redacted Executive Summary* at 160. The United States has not declassified when, if ever, the CIA relinquished operational control of the men it held in secret detention.

¹⁴ Carol Rosenberg, *Senate report confirms CIA had ‘black site’ at Guantanamo, hid it from Congress*, *Miami Herald* (Dec. 11, 2014), available at http://www.mcclatchydc.com/2014/12/11/249826_senate-report-confirms-cia-had.html?rh=1.

¹⁵ *Dep’t of Def. News Briefing with Vice Chief of Naval Operations, Adm. Patrick M. Walsh*, 23 February 2009, transcript available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4359>.

- (c) Standard Operating Procedures (SOPs) regarding treatment of Camp 7 detainees which have been in effect at any time since September 2006, including any policy governing transfer from Camp 7 to other facilities;
 - (d) Documents regarding the conditions of confinement at Camp 7, including any alleged mistreatment of Camp 7 detainees;
 - (e) Documents or information regarding the certification of Camp 7 as a SCIF.¹⁷
- k. On 1 April 2014, the government responded as follows:¹⁸

The Prosecution is currently conducting its due diligence with respect to the discovery request submitted on 19 March 2014. The Prosecution will respond accordingly upon completion of its due diligence.

- l. The government has not responded further to DR-159-AAA.

m. On 5 June 2014, Mr. al Baluchi moved to decline joinder to Mr. al Hawsawi's motion regarding conditions of confinement on the basis that "the issue is not yet ripe for presentation to the military commission."¹⁹ Among other reasons, Mr. al Baluchi explained that, "the government is still conducting its due diligence with respect to a 19 March 2014 request for information about Mr. al Baluchi's current conditions of confinement."²⁰

n. On 6 June 2014, Mr. al Baluchi requested additional discovery relating to Camp 7 conditions in DR-159A-AAA:

¹⁶ Attachment B (DR-087-WBA).

¹⁷ Attachment C (DR-159-AAA). The quoted language is from an unclassified portion of DR-159-AAA.

¹⁸ Attachment D.

¹⁹ AE303(Mohammad, bin 'Atash, bin al Shibh, al Baluchi) Joint Motion to Decline Joinder of AE303(MAH) Defense Motion for Appropriate Relief to Require Confinement Conditions that Comply with International Humanitarian Standards at 1.

²⁰ *Id.* at 2.

Documents or information, including but not limited to memoranda, directives, or emails, regarding the segregation of so-called “high-value detainees” from other internes at Guantanamo Bay Naval Station.²¹

o. On 12 June 2014, the government responded as follows:²²

The Defense does not cite to any specific theory of relevance that would reasonably warrant production of the requested information, nor does the Defense request appear to be material to the preparation of the defense, pursuant to R.M.C. 701.

Further, the Defense has access to the actual conditions of confinement of their client pursuant to the order of this Commission in AE 108J.

As such, the Prosecution respectfully declines to produce the requested material.

p. On or about 8 October 2014, JTF-GTMO placed women in roles involving direct contact with detainees.

q. On 15 October 2014, in DR-187-WBA, Mr. bin ‘Atash requested discovery from the government regarding certain aspects of conditions of confinement at Camp 7, from 1 July 2014 to the present.²³ Mr. bin ‘Atash’s request includes a subset of the discovery this motion addresses.

r. On 12 November 2014, the government responded to Mr. bin ‘Atash’s discovery request DR-197-WBA in relevant part:²⁴

²¹ Attachment E (DR-159A-AAA).

²² Attachment F.

²³ AE328(WBA) Defense Motion to Compel Discovery Related to Conditions of Confinement and Disciplinary Status, Attachment B (DR-187-WBA).

²⁴ AE328(WBA), Attachment C.

There are other documents that are responsive to your request that are classified and will be produced only after defense counsel have signed the Memorandum of Understanding Regarding the Receipt of Classified Information.

s. On 19 November 2014, Mr. bin 'Atash moved the military commission to compel the government to produce the requested discovery in AE328(WBA).²⁵ Mr. al Baluchi joined the motion by operation of Rule of Court 3(5)(i).

t. On 2 December 2014, in responding to AE328(WBA), the government stated, "In conducting its due diligence, the Prosecution did identify an SOP that deals specifically with disciplinary policies and procedures for Camp VII, which is, in fact, classified at the SECRET//NOFORN level."²⁶ The government noted that, "The Prosecution eagerly awaits compliance with AE013DDD by the Defense so that it can swiftly provide not only the materials specifically requested by this filing, but all additional discovery signing the MOU would allow the Defense to receive, so that this case can finally begin to proceed."²⁷

u. On 5 December 2014, Mr. al Baluchi filed a reply²⁸ on the basis his counsel has signed the MOU at issue on two separate occasions, with the first being in February 2013.

v. On 9 January 2015, the government filed AE254KK Motion for an Expedited Litigation Schedule to Resolve AE254Y.

w. On 20 January 2015, Mr. al Baluchi filed AE254OO(AAA) Response to Government Motion for an Expedited Litigation Schedule to Resolve AE254Y. In this response, Mr. al

²⁵ AE328(WBA).

²⁶ AE328A Government Response to Defense Motion to Compel Discovery Related to Conditions of Confinement and Disciplinary Status at 3.

²⁷ *Id.* at 4.

²⁸ AE328B(AAA).

Baluchi stressed the government's failure to provide SOPs or other discovery responsive to his discovery requests regarding conditions of confinement.

x. On 26 January 2015, the military commission denied the government's AE254KK Motion for an Expedited Litigation Schedule to Resolve AE254Y in AE254RR Order. In doing so, the military commission stated, "Discovery and witness production motions will be placed on the docket for the February [2015] session of the Commission."

y. On 5 February 2015, having been placed on notice by AE254RR of the importance of filing discovery motions with a bearing on AE254Y prior to the February 2015 hearing, Mr. al Baluchi filed AE254VV Motion to Compel Production of Evidence of Confinement Conditions at Camp Seven. This motion stated multiple bases for discovery of conditions of confinement, and included one sentence about AE254Y: "Most currently, the defendants have challenged JTF-GTMO's order for female guards to touch the detainees."²⁹

z. On 19 February 2015, the government filed AE254HHH Response to Defense Motion to Compel Production of Evidence of Confinement Conditions at Camp Seven.

aa. On 2 April 2015, Mr. al Baluchi filed his Reply to Government Response to Defense Motion to Compel Production of Evidence of Confinement Conditions at Camp Seven.

bb. On 8 October 2015, without oral argument, the military commission denied AE254VV. The military commission wrote:

Complete and unredacted set of all documents and information relating to confinement conditions at Camp 7. The request is overbroad. The Defense has not met its burden to show how this evidence is relevant for the court's

²⁹ AE254VV at 9.

determination of the current policy [regarding female guards] is reasonably related to legitimate penological interests under *Turner*.³⁰

cc. The government has produced some discovery responsive to DR-087-WBA, DR-159-AAA, DR-159A-AAA, and DR-187-AAA, which is summarized in **Attachment G**.

6. Law and Argument

A. American and international law grant Mr. al Baluchi a nested set of protections relating to his conditions of confinement, most of which are unrelated to his status as a pre-trial defendant.

Ammar al Baluchi is a civilian detained under the law of war.³¹ American and international law provide a nested set of protections to Mr. al Baluchi based on his detention proper, his detention by the Department of Defense, his detention at Guantanamo Bay, his detention under the law of war, and—most narrowly—the war crimes charges pending against him.

Most basically, the United States is detaining Mr. al Baluchi. The mere fact of U.S. detention, regardless of custodian, location, or basis, brings certain protections against unlawful conditions of confinement into effect. The following sources of law protect Mr. al Baluchi solely by operation of his detention by the United States:

- The Detainee Treatment Act.³²
- The Convention Against Torture (“CAT”).³³

³⁰ AE254XXX Order at 22.

³¹ For deeper analysis of Mr. al Baluchi’s status as a civilian, please see AE321(AAA Sup.) Mr. al Baluchi’s Supplement to Defense Motion to Permit Telephonic Access with Family Members at 2-4, incorporated herein by reference.

³² 42 U.S.C. § 2000dd(a) (“No individual in the custody or under the physical control of the United States government, regardless of nationality or physical location, shall be subject to cruel, inhuman or degrading treatment or punishment.”). The DTA, in turn, incorporates the protections of the CAT and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. § 2000dd(d); *see* AE321(AAA Sup.) at 14-15.

- The United Nations Standard Minimum Rules for the Treatment of Prisoners.³⁴
- The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.³⁵
- Customary international human rights law (IHRL).

Second, the United States is detaining Mr. al Baluchi on a Department of Defense military base. Department of Defense custody (if not “operational control”) adds the protections of Department of Defense policy. These policies protect Mr. al Baluchi by virtue of his detention on a U.S. military base:

- Department of Defense Directive 2310.01E, *DoD Detainee Program*.³⁶
- Army Regulation 190-8.³⁷

Third, the United States is detaining Mr. al Baluchi on a military base at Guantanamo Bay Naval Station, which is “within the constant jurisdiction of the United States.”³⁸ Mr. al

³³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113.

³⁴ Available at https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf.

³⁵ U.N. General Assembly, A/RES/43/173 (Dec. 9, 1988).

³⁶ (Aug. 19, 2014). This document is found in the record at AE321 (AAA Sup.) Mr. al Baluchi’s Supplement to Defense Motion to Permit Telephonic Access with Family Members, Attachment E. DoD Directive 2310.01E incorporates, in turn, Common Article 3, Additional Protocol I Art. 74, and Additional Protocol II Art. 4-6.

³⁷ Army Regulation 190-8/OPNAVINST 3461.6/AFJI 31-304/MCO 3461.1 Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees [hereinafter AR 190-8] § 1-5(a)(1).

³⁸ *Boumediene v. Bush*, 553 U.S. 723,769 (2008). Between May 2003 and September 2006, the United States held Mr. al Baluchi as an arbitrary detainee in secret overseas detention facilities. The *Redacted Executive Summary* does not describe in which black sites the CIA held Mr. al Baluchi. Mr. al Baluchi seeks the full report and related documents in AE286 Defense Motion to Compel Discovery of Senate Select Committee on Intelligence Study of RDI Program and Related Documents. If the United States were detaining Mr. al Baluchi at Bagram Theater Internment Facility rather than Guantanamo Bay, the legal analysis might be different. See *Maqaleh v. Gates*, 605 F.2d 84, 97 (D.C. Cir. 2010).

Baluchi's physical location at Naval Station Guantanamo Bay brings with it the protections of the United States Constitution unless an individual protection is "impracticable and anomalous."³⁹ In particular, the government's decision to detain Mr. al Baluchi at Guantanamo Bay confers, among others, the following protections on Mr. al Baluchi related to conditions of confinement:

- Fifth Amendment to the United States Constitution.
- Eighth Amendment to the United States Constitution.

Fourth, the United States is detaining Mr. al Baluchi on a military base at Guantanamo Bay Naval Station under the law of war pursuant to the Authorization for Use of Military Force.⁴⁰ On or about 6 September 2001, the United States transferred Mr. al Baluchi to the nominal custody of the Department of Defense, but housed him in a separate building from other U.S. military detainees and kept him under the operational control of the CIA.⁴¹

The United States' detention of Mr. al Baluchi under the law of war carries with it additional protections. These additional protections include:

- The Fourth Geneva Convention.⁴²

³⁹ *Boumediene*, 553 U.S. at 759, 770. For more detailed argument, see AE057 Motion to Recognize that the Constitution Governs the Military Commissions, incorporated herein by reference.

⁴⁰ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 -31 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 518-19 (2004). Mr. al Baluchi does not concede that the "global war on terror," without more, constitutes an armed conflict under international law. See, e.g., Commission on Human Rights, *Situation of detainees at Guantanamo Bay*, E/CN.4/2006/120, at 12-23 (Feb. 15, 2006) ("[T]he global struggle against international terrorism does not, as such, constitute an armed conflict for the purposes of the applicability of international humanitarian law.").

⁴¹ *Redacted Executive Summary* at 160.

⁴² IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War [hereinafter Fourth Geneva Convention], available at <https://www.icrc.org/ihl/INTRO/380>; see also AE321(AAA) at 3-4. Until a competent tribunal determines otherwise, Mr. al Baluchi is entitled to the presumption that he is a Prisoner of War subject to the protections of the Third Geneva Convention. III Geneva Convention Relative to the Treatment of Prisoners of War

- Executive Order 13491 on Ensuring Lawful Interrogations.⁴³
- Common Article Three to the Geneva Conventions.⁴⁴
- The Copenhagen Process on the Handling of Detainees in International Military Operations.
- Customary international humanitarian law (IHL).

Fifth, and most narrowly, the United States has charged Mr. al Baluchi with war crimes while detaining him on a military base at Guantanamo Bay Naval Station under the law of war. At this point in the analysis, Mr. al Baluchi's alleged status as an AUEB comes into play, because the military commission only has jurisdiction over AUEBs.⁴⁵ The government's decision to invoke the jurisdiction of the military commissions confers additional protections on Mr. al Baluchi. These protections regarding conditions of confinement include the following:

[hereinafter Third Geneva Convention], *available at* <https://www.icrc.org/ihl/INTRO/375?OpenDocument> Art. 5; *see also* AR 190-8 § 1-6(a); Hearing Before the Committee on Foreign Relations, United States Senate, 84th Cong., 1st Sess., Geneva Conventions for the Protection of War Victims 8 (June 3, 1955) (Statement of DOD General Counsel Wilber M. Brucker); AE119 Defense Motion to Dismiss and to Compel a Status Determination Pursuant to Article 5 of the Geneva Convention. In general, "Prisoners of war shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area." Third Geneva Convention Art. 25. At the Article 5 hearing, a competent tribunal should determine that Mr. al Baluchi is a civilian.

⁴³ 74 Fed. Reg. 4894 § 3(a) (2009) ("Consistent with the requirements of . . . the Convention Against Torture, Common Article 3, and other laws regulating the treatment and interrogation of individuals detained in any armed conflict, such persons shall in all circumstances be treated humanely . . . whenever such individuals are . . . detained in a facility owned, operated, or controlled by a department or agency of the United States."). EO 13491 thus incorporates the protections of the CAT and Common Article 3. *Id.*; *see* AE321(AAA Sup.) at 13-14.

⁴⁴ *See Hamdan v. Rumsfeld*, 548 U.S. 557, 629-30 (2006).

⁴⁵ 10 U.S.C. § 948c. The government has chosen to construe AE119 Defense Motion to Dismiss and to Compel a Status Determination Pursuant to Article 5 of the Geneva Convention as a challenge to the status of the defendants as AEUBs. *See* AE119A Government Response to Defense Motion to Dismiss and to Compel a Status Determination Pursuant to Article 5 of the Geneva Convention at 6. The status of law-of-war detainees under the Geneva Conventions is a separate question from whether the defendants are AUEBs subject to trial by military commission.

- Sixth Amendment to the United States Constitution.
- The Military Commissions Act of 2009.⁴⁶
- Orders of the United States Military Commission.

B. Mr. al Baluchi is entitled to discovery which is relevant and material to a challenge to the current conditions of confinement at Camp 7.

Mr. al Baluchi is entitled to discovery which is material to challenge the administration and application of those standards to his current confinement conditions. The government's inhumane treatment of Mr. al Baluchi has continued for eight years at Camp 7 in Guantanamo, and by all indications has never met the minimum standards required under domestic and international law.

The government obviously possesses the SOPs, TSOs, and other materials relating to conditions of confinement. SOPs and TSOs are by their very nature intended for widespread distribution throughout JTF-GTMO, and the prosecution has relied heavily on these documents in their own filings, including its defense of JTF-GTMO's October 2014 order for female guards to touch the detainees.⁴⁷ Other materials relating to conditions of confinements, such as documented allegations of abuse, are clearly part of the traditional operation of any American detention facility, whether civilian or military.⁴⁸

By contrast, the defense has access to information about Mr. al Baluchi and other detainees' conditions of confinement only through detainee statements and dated third-party reports. The defense requires accurate and complete access to evidence regarding Mr. al

⁴⁶ For example, 10 U.S.C. § 949s prohibits the infliction of any cruel and unusual punishment on any AUEB.

⁴⁷ See, e.g., AE328A at 3; AE254EE at 3-7.

⁴⁸ Further, assuming that some form of internal review at JTF-GTMO exists, as required by Articles 12 & 13 of the Convention Against Torture, such documentation would be required in order to investigate allegations of detainee abuse.

Baluchi's conditions of confinement in order to challenge those specific policies and procedures which fail to meet domestic and international standards. Mr. al Baluchi's conditions of confinement are within the jurisdiction of the military commission and ripe for review,⁴⁹ as stated previously in Mr. al Baluchi's Reply in AE321C (AAA).⁵⁰

At present, multiple motions have been filed by Mr. al Baluchi and other detainees relating to family and telephonic contact,⁵¹ medical care,⁵² invasive searches,⁵³ touching by female guards,⁵⁴ and other issues. In all pending motions regarding the Camp 7 detainees' conditions of confinement, the burden of proof rests with the defense. Mr. al Baluchi and his codefendants have requested discovery of evidence material to these motions on multiple occasions, and the prosecution has simply not provided most of the responsive discovery.

SOPs, by themselves, may not be presumed to constitute evidence of the day-to-day administration of Camp 7, and may in fact serve to highlight deficiencies when contrasted with actual conditions as documented in ICRC records.⁵⁵ Changes in SOPs over time may serve the same function.⁵⁶ From the few SOPs which have been declassified through other means, it is

⁴⁹ See *United States v. Ouimette*, 52 M.J. 691 (C.G.C.C.A. 2000) ("Prisoners' complaints regarding the conditions of their confinement are matters properly within [a military court's] jurisdiction."); *United States v. Palmiter*, 20 M.J. 90, 96-97 (C.M.A. 1985) (Military courts "are ideally suited to review the conditions of pretrial confinement.")

⁵⁰ Mr. al Baluchi's Reply to Government Response to Defense Motion to Permit Telephonic Access with Family Members, filed 14 November 2014.

⁵¹ AE321(WBA) Defense Motion to Permit Telephonic Access With Family Members.

⁵² AE330(AAA) Defense Motion to Compel Production of Complete, Unredacted Medical Records.

⁵³ AE206(Mohammad) Motion to Cease Daily Intrusive Searches of Living Quarters and Person.

⁵⁴ AE254Y(WBA) Emergency Defense Motion to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel.

⁵⁵ See AE108BB Order.

⁵⁶ Compare AE254III(MAH) (JDG SOP #39 Religious Support of Detainees, dated 24 June 2014) with AE254OOOO (JDG SOP #39 Religious Support of Detainees, dated 29 October 2014) and AE254PPPP (JDG SOP #39 Religious Support of Detainees, dated 24 September 2015).

clear that past practices at JTF-GTMO have infringed on established international standards. For example, the SOP for Camp Delta from 2004⁵⁷ indicates that detainee's basic rights were denied as a matter of course,⁵⁸ and could be reinstated only when approved by interrogators.⁵⁹

C. Mr. al Baluchi is entitled to discovery of evidence establishing illegal pretrial punishment.

Mr. al Baluchi may reasonably challenge his conditions of confinement as illegal pretrial punishment. Mr. al Baluchi is entitled to basic due process under the Fifth Amendment, which includes a prohibition against pretrial punishment.⁶⁰ Although Article 13 of the Uniform Code of Military Justice was not specifically incorporated into the Rules for Military Commissions, this does not negate Mr. al Baluchi's Fifth and Eighth Amendment rights to be free from pretrial punishment.⁶¹

Mr. al Baluchi's conditions of confinement are a pressing issue in that pretrial punishment allegations may be considered waived if not raised in a timely fashion.⁶² Ordinarily, confines in the military justice system are required to demonstrate exhaustion of administrative

⁵⁷ Camp Delta Standard Operating Procedures (SOP) (dated 1 March 2004), available at http://www1.umn.edu/humanrts/OathBetrayed/sop_2004.pdf.

⁵⁸ See *id.*, Ch 4-20 (Describing "Phase One" in detainee intake as intended to "enhance and exploit the disorientation and disorganization felt by a newly arrived detainee in the interrogation process" which includes denial of "ICRC or Chaplain contact, "books and mail privileges," and permitting "basic comfort items only," and "Phase Two" as "continu[ing] the process of isolating the detainee and fostering dependence on the interrogator.")

⁵⁹ See, e.g., *id.*, Ch. 4-20 (Transition of detainees out of "Phase Two", leading to greater privileges, subject to interrogator's discretion), Ch. 15-9 (Access to reading materials to specific classes of detainees only when requested by interrogators).

⁶⁰ See, e.g. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.")

⁶¹ See *United States v. McCarthy*, 47 M.J. 162, 164 (C.A.A.F. 1997) ("The question whether a pretrial prisoner is suffering unlawful punishment is of both constitutional and statutory concern.")

⁶² *United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997); *United States v. Coffey*, 38 M.J. 290, 291 (C.M.A. 1993).

remedies prior to judicial review of Eighth Amendment violation claims.⁶³ The prosecutions continued refusal to propound SOPs and other discovery related to confinement conditions precludes any evaluation of precisely what administrative remedies, such as a prisoner grievance system, are available to detainees at Camp 7, as well as what complaints have been previously filed and in what manner those complaints have been addressed or dismissed.

Mr. al Baluchi is also entitled to discovery of confinement conditions which would constitute violations of the Convention Against Torture (CAT).⁶⁴ The CAT is clearly a *jus cogens* norm,⁶⁵ and violations are properly within the jurisdiction of U.S. courts.⁶⁶ Mr. al Baluchi's rights under the CAT include both the right to be free from torture and other cruel, inhuman, and degrading treatment, as well as a right to rehabilitation required by past ill treatment.⁶⁷

Finally, Mr. al Baluchi is entitled to discovery which could uncover violations under international humanitarian law, and specifically Common Article 3, which prohibits "cruel

⁶³ *Coffey*, 38 M.J. at 291.

⁶⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/RES/39/46 (10 December 1984) (*ratified* by United States, 21 October 1994).

⁶⁵ *See, e.g., United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1261 (11th Cir. 2012); *Yousuf v. Samantar*, 699 F.3d 763, 775 (4th Cir. 2012); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791 n.20 (D.C. Cir. 1984) (Edwards, J. concurring). *See also*, U.N. Committee Against Torture, General Comment No. 2, ¶ 1, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T ¶ 144 (International Criminal Tribunal for the Former Yugoslavia, Dec. 10, 1998).

⁶⁶ *See United States v. Struckman*, 611 F.3d 560, 576 (9th Cir. 2010) ("We have suggested that violation of *jus cogens* norms could provide a basis for dismissal under a court's supervisory powers because, like statutory and constitutional laws, they are justiciable in our courts").

⁶⁷ Article 14 of the CAT provides in relevant part, "Each State party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible." CAT General Comment No. 3 ¶ 1, CAT/C/GC/3 (2012). Further, "[the] Committee considers that article 14 is applicable to all victims of torture and acts of cruel, inhuman or degrading treatment or punishment (hereinafter 'ill-treatment')...". Therefore, regardless of whether Mr. al Baluchi's

treatment and torture” as well as “outrages upon personal dignity, in particular humiliating and degrading treatment.”⁶⁸ Discovery regarding any such violations is crucial both in terms of his current confinement in and of itself, and when viewed in the context of rehabilitation for the ongoing effects of past mistreatment.

The defense is entitled to specific details about the harsh and ongoing restrictions placed on Mr. al Baluchi, and the manner in which those restrictions were instituted, in order to challenge the conditions as pre-trial punishment. The differentiation between Camp 7 and other detention centers at Guantanamo, or, indeed, other military or civilian prisons, strongly suggests that the motivation behind restrictions at Camp 7 are based primarily on protecting his torturers, rather than legitimate concerns over safety or prison administration. The defense and this commission are entitled to greater detail about the circumstances surrounding these restrictions in order to determine corrective action which may be taken at present, and appropriate credit during sentencing.

D. Mr. al Baluchi is entitled to discovery of the circumstances under which any past statements were made by himself, alleged co-conspirators, and potential witnesses.

Mr. al Baluchi is entitled to evidence which may be used to rebut or render inadmissible statements which may foreseeably be offered by the prosecution as evidence. Under 10 U.S.C. 948r, any statement obtained through the use of torture *or* “cruel, inhuman, or degrading

past mistreatment is determine to rise to the level of torture as opposed to “merely” ill treatment, he is entitled to rehabilitation at present.

⁶⁸ Convention for the Amelioration of Condition of the Wounded and Sick Members of Armed Forces in the Field (Geneva Convention I art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II) art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), art. 3, 6 U.S.T. 3316; 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian

treatment”⁶⁹ is inadmissible before this military commission. The defense is therefore entitled to discovery relating to Mr. al Baluchi’s conditions of confinement during his questioning by the FBI and DOD in January of 2007, as well as discovery of certain other detainees’ conditions of confinement during their own questioning.

Mr. al Baluchi is also entitled to such evidence under the Military Commissions Act, which specifically provides broad discovery rights to exculpatory evidence.⁷⁰ The circumstances under which Mr. al Baluchi or other detainees made any inculpatory statements are discoverable in that they may lead to suppression on legal grounds, or, at a minimum, seriously damage the credibility of any such statements. A detailed overview of Mr. al Baluchi and other detainees’ confinement conditions are highly relevant to any statements, not merely their treatment immediately prior to or during the period when any statements were. This is particularly relevant given that the government exerts an extraordinary level of control over all aspects of the Camp 7 detainees’ lives, even when compared to other incarcerated individuals, and because of the continued effects of past mistreatment on any detainee’s mental state then undergoing questioning.

E. Mr. al Baluchi is entitled to discovery which may be used in mitigation at trial.

The government should produce all confinement records because a capital defendant’s behavior while confined is always a key issue in a capital trial. Mr. al Baluchi is explicitly

Persons in Time of War (Geneva Convention IV) art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁶⁹ The phrase “cruel, inhuman, or degrading treatment is in turn defined by 42 U.S. Code § 2000dd(d) by reference to the Fifth, Eighth, and Fourteenth Amendments, as well as the United States Reservations, Declarations and Understandings to the U.N. Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, New York, December 10, 1984.

⁷⁰ 10 U.S.C. § 949j(d).

entitled to present mitigation evidence under the Rules for Military Commissions (RMC),⁷¹ and as the Supreme Court explained in *Skipper v. South Carolina*, “Consideration of a defendant’s past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing.”⁷² Thus, “a defendant’s disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination.”⁷³ Mr. al Baluchi’s Fifth and Eighth Amendment right to introduce evidence of his good behavior in custody reaches the entire “period between apprehension and trial,”⁷⁴ including his imprisonment prior to Guantanamo Bay.

Specific details as to Mr. al Baluchi’s prolonged detention in isolation as well as the long-term impact of past mistreatment are clearly mitigating factors to be considered during potential sentencing. Mr. al Baluchi’s environment over the past decade, as well as his interactions with authorities as described in complaints or administrative documents are also highly relevant to an evaluation of potential future dangerousness.

F. Mr. al Baluchi is entitled to discovery necessary for expert preparation.

Penological experts will be required for a complete and comparative analysis of Mr. al Baluchi’s confinement conditions. Prisoners’ rights claims require either directly or indirectly addressing whether challenged detention policies have a legitimate and rational basis. The judicial standards applied to pretrial punishment and Eighth Amendment violations in custody

⁷¹ See RMC 1001(a)(1)(B) & (c)(1)(B); see also RMC 701, requiring production of all evidence “material to the preparation of the defense.”

⁷² 476 U.S. 1, 5 (1986).

⁷³ *Id.* at 7; see also *Ayers v. Belmonte*, 549 U.S. 7, 475 (2006) (“And just as precrime background and character (*Boyde*) and postcrime rehabilitation (*Payton*) may “extenuat[e] the gravity of the crime,” so may some likelihood of future good conduct count as a circumstance tending to make a defendant less deserving of the death penalty.”).

rely upon subjective determinations by prison officials on complex and interrelated issues. Indeed, the Supreme Court has framed such decisions as a matter of “expert judgment.”⁷⁵

The defense, therefore, must rely upon experts in addressing and rebutting the bases of such decisions. Expert analysis is required for such topics as comparisons to other military and civilian detention facilities, potential alternatives to current policies, and ramifications of proposed changes.⁷⁶ Any such expert analysis will be speculative and susceptible to challenge if those experts are denied access to complete records of both the policies and administration of Camp 7.

Mr. al Baluchi therefore respectfully requests that this Commission compel production of a complete and unredacted set of the requested building documents, SOPs, TSOs, and other materials relating to his conditions of confinement.

7. **Request for Oral Argument:** The defense requests oral argument.
8. **Certificate of Conference:** The government has authorized Mr. al Baluchi to state its position as follows: “With the exception of one category of information that we denied in our earlier correspondence, the Prosecution's position remains the same as it was in the earlier responses. The above-referenced information will now be provided following a future M.C.R.E. 505(f) filing. For purposes of the conference, you can represent that the Prosecution still opposes providing the defense certain items contained within the Defense requests.” The referenced responses are Attachments D and F.

⁷⁴ *United States v. Mason*, 966 F.2d 1488, 1497 (D.C. Cir. 1992). The right to introduce *Skipper* evidence even reaches post-sentencing good conduct. See *Davis v. Coyle*, 475 F.3d 761, 774 (6th Cir. 2007); *Creech v. Arave*, 947 F.2d 873, 881-82 (9th Cir. 1991).

⁷⁵ *Pell v. Procunier*, 417 U.S. 817, 827 (1974).

⁷⁶ See, e.g., *Bell v. Wolfish*, 441 U.S. at 535.

9. **Attachments:**

- A. Certificate of Service
- B. DR-087-WBA
- C. DR-159-AAA, filed on SIPR
- D. Government Initial Response to DR-159-AAA
- E. DR-159A-AAA
- F. Government Final Response to DR-159A-AAA
- G. Summary of responsive discovery produced, filed on SIPR

Very respectfully,

//s//
JAMES G. CONNELL, III
Detailed Defense Counsel

Counsel for Mr. al Baluchi

//s//
STERLING R. THOMAS
Lt Col, USAF
Detailed Military Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 1st day of February, 2016, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//

JAMES G. CONNELL, III

Learned Counsel

Attachment B

02 Aug 2013

From: Defense Counsel for Mr. bin Attash, United States v. Khalid Shaikh Mohammad, et al.

To: Trial Counsel

Subj: REQUEST FOR DISCOVERY ICO UNITED STATES v. MOHAMMAD, et al.

Ref: (a) RMC 701
(b) AE108 – Appropriate Relief to Compel Defense Examination of Accused’s Conditions of Confinement
(c) AE133 (WBA Sup) – Supplement to Emergency Defense Motion
(d) AE144 – Government Notice of Ongoing Command Investigation

1. Defendant, Walid bin ‘Attash, by and through counsel, hereby requests that the government produce the document(s) and information listed below. This request is made pursuant to reference (a), 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.
2. Please produce any and all Standard Operating Procedures (SOP), including any variations, versions, modifications of those procedures, or similar guidance, policies, techniques, etc., relating to the activity and behavior of all Camp Seven detention guards from September 2006 to present. This request specifically includes guidance regarding detention guard interactions with detainees, to include surveillance, oversight, policing and any similar activities.
3. This information is relevant and material to the defense’s preparation efforts with respect to the ongoing litigation of all filings under AE108, AE133, and AE144 (See references b, c, and d).
4. The defense requests that the government inform the defense counsel if it does not intend to comply with any of the provisions of this request. This includes a refusal to produce any documents or information based upon classified status. *See* reference a. You need not duplicate any requested information that has already been provided to the defense; simply note that fact in your response. The defense requests a formal written response that coordinates with the specific request made herein.
5. The defense expects that the government will make a reasonably diligent effort to comply with this information request. As such, the defense will regard any non-response or response without comment as an affirmative assertion by the government that the requested information does not exist. *United States v. Green*, 37 M.J. 88, 89 n.2 (CMA 1993).

6. This is a continuing request and as such, this request includes any information that you may later discover before, during, or after the trial of this case. RMC 701(i); *See United States v. Brickey*, 16 M.J. 258 (CMA 1983).

//s//

CHERYL T. BORMANN
Learned Counsel

//s//

JAMES E. HATCHER
LCDR, JAGC, USNR
Defense Counsel

//s//

MICHAEL A. SCHWARTZ
Capt, USAF
Defense Counsel

//s//

TODD M. SWENSEN
Capt, USAF
Defense Counsel

Attachment C

United States v. KSM, et al

**APPELLATE EXHIBIT 404 (AAA)
Attachment C**

(Pages 28 - 29)

Classified

Defense Motion

**APPELLATE EXHIBIT 404 (AAA) Attachment C
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 404 (AAA)

Attachment D

Attachment E



DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

6 June 2014

MEMORANDUM FOR Trial Counsel

FROM: James G. Connell, III, Detailed Learned Counsel for Ammar al Baluchi

SUBJECT: DEFENSE REQUEST FOR DISCOVERY (Camp 7 conditions)

Pursuant to 10 U.S.C. § 949j, RMC 701, the Geneva Conventions, and the Due Process Clause of the Fifth Amendment to the United States Constitution, Mr. al Baluchi through counsel requests the government produce the following in discovery:

Documents or information, including but not limited to memoranda, directives, or emails, regarding the segregation of so-called "high-value detainees" from other internees at Guantanamo Bay Naval Station.

Thank you for your attention in this matter. If you have any questions regarding this request or would like to discuss further, please feel free to contact me.

Respectfully Submitted,

//s/

James G. Connell, III

DR-159A-AAA
2014-06-06

Attachment F



OFFICE OF THE
CHIEF PROSECUTOR

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

12 June 2014

MEMORANDUM FOR Defense Counsel for Ali Abdul Aziz Ali

SUBJECT: Prosecution Response to 6 June 2014 Request for
Discovery (DR-159A-AAA)

1. The Prosecution received the Defense request for discovery on 6 June 2014. The Prosecution hereby responds to the Defense request.
2. The Defense requests production of "memoranda, directives, or emails, regarding the segregation of so-called "high-value detainees" from other internees at Guantanamo Bay Naval Station." The Prosecution responds as follows, in bold:

The Defense does not cite to any specific theory of relevance that would reasonably warrant production of the requested information, nor does the Defense request appear to be material to the preparation of the defense, pursuant to R.M.C. 701.

Further, the Defense has access to the actual conditions of confinement of their client pursuant to the order of this Commission in AE 108J.

As such, the Prosecution respectfully declines to produce the requested material.

Respectfully submitted,

//s//

Nicole A. Tate
Assistant Trial Counsel

Attachment G

United States v. KSM, et al

**APPELLATE EXHIBIT 404 (AAA)
Attachment G**

(Pages 37 - 39)

Classified

Defense Motion

**APPELLATE EXHIBIT 404 (AAA) Attachment G
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 404 (AAA)