

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

AE404C(AAA)

Mr. al Baluchi's Reply to
Government Response to Defense Motion
to Compel Production of Evidence of
Confinement Conditions at Camp Seven

16 February 2016

1. **Timeliness:** This reply is timely filed.

2. **Argument:**

The government's response is deficient in two ways. First, the government fails to address the application of constitutional principles, as it also did in its recent response in AE403. Second, the government's claim that the request is overbroad is fundamentally flawed in that it assumes that the constitutional discovery standard is different for classified and unclassified information. The government may not ignore the application of Constitutional protections at Guantanamo, nor may it evade the production of otherwise discoverable information simply because it is classified.

In its Response, the government continues in its attempt to strip the defendants of their Fifth and Eighth Amendment rights.¹ This absurd argument should be rejected outright. While much has been made of the D.C. Circuit's decision in *Kiyemba I*,² which purports to strip Guantanamo detainees of due process rights, the controversial holding in *Kiyemba* does not apply to criminal prosecutions such as those before the military commissions.³ In fact, the

¹ AE404B(GOV) at 6, fn4. ("...the Defense argues that the United States' decision to detain Mr. Ali at Guantanamo Bay confers him with rights under both the Fifth and Eight Amendments to the United States Constitution. [citation omitted] This is simply not so...")

² *Kiyemba v. Obama* 555 F.3d 1022, 1026 (D.C. Cir. 2009).

³ *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (recognizing that aliens are "persons" under the Constitution).

government even conceded during oral arguments in *Al-Bahlul v. United States* that “*Kiyemba* addressed the context of civil litigation” and did not create precedent for a criminal case.⁴

The due process protections of the Constitution have “full effect” at Guantanamo Bay, as affirmed by the Supreme Court in *Boumediene*.⁵ After *Boumediene*, the D.C. Circuit in *Aamer*⁶ affirmed the applicability of constitutional due process rights at the Guantanamo Bay military commissions. In *Aamer*, the D.C. Circuit broadened *Boumediene*’s grant of *habeas corpus* to enforce detainees’ underlying constitutional due process rights, including the ability to challenge the conditions of their confinement. The court therefore affirmed the inextricability of *habeas corpus* and constitutional due process protections, consistent with the historic application of the Fifth Amendment.⁷ This commission should reject outright the government’s contention that *habeas* rights and Fifth Amendment procedural protections are severable.

Further, the D.C. Circuit in *Aamer*⁸ assumed that confinement conditions at Guantanamo were analyzed under *Turner v. Safley*, which establishes the standard for the legality of prison rules or regulations that “impinge on inmates’ constitutional rights.”⁹ Although Mr. al Baluchi’s position is that *Turner v. Safley* is inapplicable to law of war detainees in a pre-trial

⁴ Transcript of *Al-Bahlul v. United States of America* at pp. 24-25, available at <https://www.justsecurity.org/wp-content/uploads/2014/11/Bahlul-transcript-10-22-14-CADC1.pdf>.

⁵ *Boumediene v. Bush*, 128 S.Ct. 2229, 2261-62 (2008).

⁶ *Aamer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014).

⁷ See Joshua Alexander Geltzer, *Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After Boumediene and the Relationship Between Habeas Corpus and Due Process*, 14 U. Pa. J. Const. L. 719, 748 (2012) (“Because the prevailing assumption has been that *habeas* and due process generally stand or fall together, the few cases and writings addressing both *habeas* and due process have explored the nature and extent of judicial protections when both clauses are inapplicable or, more typically, when both clauses are applicable.”)

⁸ *Aamer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014).

⁹ *Aamer*, 742 F.3d at 1039 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

posture,¹⁰ *Turner* is clearly predicated on the existence of due process rights - balancing them against legitimate penological interests. The government's own reliance on *Turner*,¹¹ the military commission's as-yet-unargued suggestion that the *Turner* framework governs AE254Y,¹² and D.C. Circuit precedent all strongly support the argument that Mr. al Baluchi enjoys the protections of the Due Process Clause.

The government, having incorrectly rejected the applicability of Constitutional protections, has narrowly redefined its discovery obligations as governed exclusively by statute and rule. While the government is correct that *United States v. Yunis*,¹³ as implemented in 10 U.S.C. § 949p-4 and MCRE 505(f), governs the production of classified information pursuant to RMC 701, the government is incorrect in its suggestion that the *Yunis* standard limits the production of evidence under *Brady*. In contrast, information that is material and exculpatory under *Brady* satisfies *Yunis* by definition; there is no difference in the constitutional discovery standard for classified and unclassified information.¹⁴

The due process *Brady* standard is applicable to classified and unclassified evidence alike.¹⁵ The Circuits uniformly recognize that information "favorable" and "material" under

¹⁰ See, e.g., AE321(AAA Sup.) Mr. al Baluchi's Supplement to Defense Motion to Permit Telephonic Access with Family Members; *Benjamin v. Fraser*, 264 F.3d 175, 187 (2d Cir. 2001) (holding that *Turner* is not applicable to pre-trial prisoners).

¹¹ AE254EE Government Response to Emergency Defense Motion to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel at 19.

¹² AE254XXX Order at 16.

¹³ 867 F.2d 617, 622-623.

¹⁴ For more in-depth analysis of the scope and application of discovery rules, incorporated here by reference, see AE403B(AAA) Mr. al Baluchi's Reply to Government Response to Motion to Compel Discovery Of CIA Oral History Program Interviews, 11 February 2016.

¹⁵ See, e.g., *United States v. Aldawsari*, 740 F.3d 1015, 1019 n.7 (5th Cir. 2014) ("We note the government's agreement during oral argument that, for example, FISA-related materials containing exculpatory evidence or evidence tending to impeach a government witness would need to be disclosed . . . under the Constitution."); *United States v. Sedaghaty*, 728 F.3d 885, 892 (9th Cir. 2013) (holding that inadequate substitute for classified evidence violated *Brady*); *United*

Brady is by definition “relevant and helpful” under *Yunis* because “*Brady* information is plainly subsumed within the larger category of information that is ‘at least helpful’ to the defendant.”¹⁶ The government’s view of the scope of discovery is therefore much too narrow.

Even in the Guantanamo *habeas* context - with far fewer protections than a death penalty case - the D.C. Circuit has required that “counsel ha[ve] access to as much as is practical of the classified information regarding his client.”¹⁷ It therefore “presumes counsel for a detainee has a ‘need to know’ *all Government information* concerning his client” unless the government overcomes that presumption by an *ex parte, in camera* presentation.¹⁸ If the government wants to provide less than “all” discoverable information, it must overcome the presumption of discovery to the satisfaction of the military commission.

With that basis, Mr. al Baluchi has a clear interest in his confinement conditions from the moment of his transfer to Guantanamo through the present, which directly relate to issues of mitigation, admissibility of other evidence, and potential future challenges to his confinement conditions.¹⁹ Mr. al Baluchi also has an interest in the confinement conditions of other detainees, insofar as statements by other detainees will likely be offered against Mr. al Baluchi at trial, as well as other evidence which was uncovered through, or corroborated by, the statements

States v. Moussaoui, 591 F.3d 263, 286-87 (4th Cir. 2010) (applying *Brady* to withheld classified information).

¹⁶ *United States v. Mejia*, 448 F.3d 436, 456-57 (D.C. 2006); *see also United States v. Amawi*, 695 F.3d 457, 471 (6th Cir. 2012); *United States v. Aref*, 533 F.3d 72, 80 (2d Cir. 2008).

¹⁷ *Bismullah v. Gates*, 501 F.3d 178, 187 (2007).

¹⁸ *Id.* (emphasis added).

¹⁹ The government dismisses the use of expert analysis in challenges of confinement conditions as rendering legal precedents on the operation of prisons “utterly meaningless.” AE404B at 7. This is completely false – the Supreme Court has clearly established that the operation of a prison is inherently a matter of “expert judgment.” *see Pell v. Procunier*, 417 U.S. 817, 827 (1974). It is difficult to even conceive of why the use of subject-matter experts to analyze an issue of expert judgment would be objectionable; logically, it would appear to be required.

of other detainees. The information sought easily satisfies the *Yunis* standard of relevant, non-cumulative, and helpful, as well as the narrower *Brady* standard of material and favorable.

Mr. al Baluchi therefore respectfully requests that this commission compel the production of the discovery regarding conditions of confinement.

3. List of Attachments:

A. Certificate of Service

Very respectfully,

//s//

JAMES G. CONNELL, III
Detailed Learned Counsel

Counsel for Mr. al Baluchi

//s//

STERLING R. THOMAS
Lt Col, USAF
Detailed Military Defense Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 16th 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