

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 409(WBA)

Defense Motion to Compel Discovery
of Documents Captured During the Raid in
Which Osama bin Laden Was Killed

Date Filed: 22 February 2016

- 1. Timeliness:** This request is timely filed.
- 2. Relief Sought:** Mr. bin 'Atash respectfully requests that the Commission compel production of all previously requested documents that were obtained during the United States' raid on May 2, 2011 in Abbottabad, Pakistan in which al Qaeda leader Osama bin Laden was killed.
- 3. Overview:** On May 2, 2011, the United States executed a mission in Abbottabad, Pakistan that resulted in the death of the leader of Al Qaeda, Osama bin Laden. The United States has alleged that Mr. bin 'Atash is a member and leader within the Al Qaeda organization, responsible for, at least in part, several attacks against the United States. During this raid, "more than 1 million documents and files were captured"¹ by the United States. Osama bin Laden is an uncharged co-conspirator in Mr. bin 'Atash's Military Commission and was the head of the Al Qaeda organization on September 11, 2001, making the documents recovered in the Abbottabad raid material to the preparation of the defense.

¹ http://www.weeklystandard.com/blogs/new-docs-reveal-osama-bin-ladens-secret-ties-iran_868678.html (last accessed 11 May 2015)

4. Burden of Proof: The burden of persuasion on this motion to compel discovery rests with the defense. See RMC 905(c)(2).

5. Facts:

- a. On September 11, 2001, Mr. bin Laden was the leader of the al Qaeda organization of which Mr. bin 'Atash is alleged to have been a member and leader. Mr. bin 'Atash's alleged involvement in this organization and conspiracies of this organization are subjects of the capital military commission pending against him.
- b. On May 2, 2011, the United States attacked a compound in Abbottabad, Pakistan that was inhabited by Osama bin Laden.
- c. On March 11, 2015, Mr. bin 'Atash submitted a discovery request for documents captured by the United States Government as part of the May 2, 2011 raid in Abbottabad, Pakistan in which Osama bin Laden was killed. (Attachment B, DR-206-WBA). In particular, the Defense requested documents that reference Mr. bin 'Atash or are related to his alleged acts against the United States.
- d. On March 19, 2015, the Prosecution responded stating it had reviewed the documents from the bin Laden raid and, insofar as the materials are discoverable, the documents will be provided to Mr. bin 'Atash. (Attachment C, Pros. Final Response to DR-206-WBA). However, to date Mr. bin 'Atash has not received any of these documents. The Prosecution's failure to abide by its discovery obligations prevents Mr. bin 'Atash from preparing for his capital military commission.

6. Law and Argument:

Mr. bin 'Atash is entitled to the requested material under the Military Commissions Act of 2009 ("MCA"), the Rules for Military Commissions ("RMC"), and the Fifth and Eighth

Amendments to the Constitution, and international law. The contents of these documents are both “material to preparation of the defense,” as contemplated by RMC 701(c)(1), and “helpful to the defense,” under United States v. Yunis, 867 F.2d 617, 623 (D.C. Cir. 1989), for the case-in-chief and, if necessary, at the sentencing hearing.

During the bin Laden raid, “more than 1 million documents and files were captured” by the United States.² Given the critical role that the Government alleges Mr. bin ‘Atash held within the al Qaeda organization, these one million documents likely contain significant information about Mr. bin ‘Atash and his alleged involvement with al Qaeda, including information that would be exculpatory or mitigating. In the event the one million documents do not contain such relevant information, the absence of the information itself is mitigating and, therefore, the Defense is entitled to the documents.

The Prosecution confirms it has reviewed the one million documents captured in in the bin Laden raid. The Prosecution has failed, however, to deliver any discovery from this cache.

In DR-206-WBA, Mr. bin ‘Atash requested all materials from this raid in possession of the Government that:

- a. Reference, either explicitly or implicitly, Mr. bin ‘Atash or any co-accused, to include but not be limited to:
 - i. His role or position in the Al Qaeda organization.
 - ii. Work he did on behalf the organization at any time.
 - iii. Communications between Mr. bin ‘Atash and members or leaders of the organization.

² http://www.weeklystandard.com/blogs/new-docs-reveal-osama-bin-ladens-secret-ties-iran_868678.html (last accessed 11 May 2015)

- iv. Any of the aforementioned information in relation to members of Mr. bin ‘Atash’s family, to include his father and brothers.
- b. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to an Al Qaeda conspiracy for a planned “second wave” attack on the United States after the attacks of September 11, 2001, regardless if Mr. bin ‘Atash is referenced in the document.
- c. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to an Al Qaeda conspiracy for the attack that occurred on September 11, 2001 in New York, NY, Washington, DC, and Shanksville, PA, regardless if Mr. bin ‘Atash is referenced in the document.
- d. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to any alleged Al Qaeda conspiracy for an attack in Asia simultaneous or related to the attacks of September 11, 2001, regardless if Mr. bin ‘Atash is referenced in the document.
- e. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to an Al Qaeda conspiracy for the attack on the U.S.S. Cole that occurred on October 12, 2000 in Aden, Yemen, regardless if Mr. bin ‘Atash is referenced in the document.
- f. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to an Al Qaeda conspiracy for the failed attempt to attack the U.S.S. The Sullivans on January 3, 2000 in Aden, Yemen, regardless if Mr. bin ‘Atash is referenced in the document.

- g. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to an Al Qaeda conspiracy for the attack on the U.S. Embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya that occurred on August 7, 1998, regardless if Mr. bin 'Atash is referenced in the document.

Each of these categories of information is material to the preparation of Mr. bin 'Atash's case. Information related to Mr. bin 'Atash's alleged role or position in al Qaeda, work he did on behalf of the organization, and communications with members or leaders of the organization will provide or lead to information regarding his guilt or innocence and level of culpability. Information—or the absence of information—in bin Laden raid documents would indicate the degree of Mr. bin 'Atash's alleged role in the al Qaeda organization, thereby informing defense counsel's preparation for the guilt/innocence phase of the case, and any sentencing phase if one is needed.

Furthermore, information about Mr. bin 'Atash's alleged acts, regardless of the presence of his name or those of his co-accused, is essential to preparing his defense. In order to prove Mr. bin 'Atash's innocence or limited culpability, counsel requires as complete an understanding as possible about his alleged acts and which actors did what to cause them to pass. This is only possible with all documentation, unclassified or otherwise.

Since the inception of this case, the Prosecution has repeatedly stated that it takes its discovery obligations seriously. On 10 April 2014, the Prosecution indicated it had accounted for the "overwhelming majority of the discovery expected to be produced in this case...." (AE 175E(GOV) at 4). Its 19 March 2015 response to DR-206-WBA, however, proves the contrary. Continued delay in the discovery process will only serve to delay Mr. bin 'Atash's ability to prepare for trial, potentially causing irreparable harm to the fairness of his defense, and will

require defense counsel to seek delay while attempting to obtain discoverable information the Prosecution, in violation of Mr. bin 'Atash's rights, refuses to produce. Therefore, Mr. bin 'Atash respectfully requests that the Commission order the expedited production of all material responsive to Mr. bin 'Atash's discovery request, DR-206-WBA.

7. Request for Oral Argument: Oral argument is requested.

8. Request for Witnesses: None at this time.

9. Conference with Opposing Counsel: The Government did not respond to the conference request sent on 18 February 2016.

10. Attachments:

- A. Certificate of Service
- B. DR-206-WBA
- C. Pros Final Response – DR-206-WBA

//s//
CHERYL T. BORMANN
Learned Counsel

//s//
MATTHEW H. SEEGER, Maj, USA
Detailed Military Counsel

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

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

Attachment A

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CERTIFICATE OF SERVICE

I certify that on 22 February 2016, I electronically filed the above **Defense Motion to Compel Discovery** of Documents Captured During the Raid in Which Osama bin Laden Was Killed with the Trial Judiciary and served it on all counsel of record by e-mail.

//s//
CHERYL T. BORMANN
Learned Counsel

Attachment B

OSD-OGC-OCDC

11 March 2015

MEMORANDUM FOR Office of the Chief Prosecutor, Office of Military Commissions

SUBJECT: Request for Discovery – Material Captured During the May 2, 2011 Raid in Abbottabad, Pakistan in Which Osama bin Laden was killed

1. Pursuant to RMC 701, 10 U.S.C. § 949j, the Fifth, Sixth, and Eighth Amendments to the United States Constitution, and international law, Mr. bin ‘Atash requests that the Government provide the following information in discovery. Failure to provide the requested information will deny Mr. bin ‘Atash of his rights to the due process of law, to the effective assistance of counsel, a fair, speedy, and public trial, and to be free from cruel and unusual punishment.

2. On May 2, 2011, the United States executed a mission in Abbottabad, Pakistan that resulted in the death of the leader of Al Qaeda, Osama bin Laden. Mr. bin ‘Atash is alleged by the United States to have been a member and leader within the Al Qaeda organization, responsible for, at least in part, several attacks against the United States. During this raid, “more than 1 million documents and files were captured” by the United States.¹ Osama bin Laden is an uncharged co-conspirator in this case and was the head of the Al Qaeda organization, making the documents recovered in the Abbottabad raid material to the preparation of the defense. Therefore, Mr. bin ‘Atash requests any books, documents, papers, photographs, videos, tangible objects, or other materials which are within the possession or control of the Government or any agency of the Government from the above-referenced raid and which:

- a. Reference, either explicitly or implicitly, Mr. bin ‘Atash or any co-accused, to include but not be limited to:
 - i. His role or position in the Al Qaeda organization.
 - ii. Work he did on behalf the organization at any time.
 - iii. Communications between Mr. bin ‘Atash and members or leaders of the organization.
 - iv. Any of the aforementioned information in relation to members of Mr. bin ‘Atash’s family, to include his father and brothers.
- b. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to an Al Qaeda conspiracy for a planned “second wave” attack on the United States after the attacks of September 11, 2001, regardless if Mr. bin ‘Atash is referenced in the document.
- c. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to an Al Qaeda conspiracy for the attack that occurred on September 11, 2001 in New York, NY, Washington, DC, and Shanksville, PA, regardless if Mr. bin ‘Atash is referenced in the document.

¹ http://www.weeklystandard.com/blogs/new-docs-reveal-osama-bin-ladens-secret-ties-iran_868678.html

- d. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to an Al Qaeda conspiracy for the considered Asia part of attacks of September 11, 2001, regardless if Mr. bin 'Atash is referenced in the document.
- e. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to an Al Qaeda conspiracy for the attack on the USS Cole that occurred on October 12, 2000 in Aden, Yemen, regardless if Mr. bin 'Atash is referenced in the document.
- f. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to an Al Qaeda conspiracy for the failed attempt to attack the USS The Sullivans on January 3, 2000 in Aden, Yemen, regardless if Mr. bin 'Atash is referenced in the document.
- g. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to an Al Qaeda conspiracy for the attack on the US Embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya that occurred on August 7, 1998, regardless if Mr. bin 'Atash is referenced in the document.

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

//s//
CHERYL T. BORMANN
Learned Counsel

//s//
TODD M. SWENSEN
Maj, USAF
Defense Counsel

//s//
MICHAEL A. SCHWARTZ
Capt, USAF
Defense Counsel

Attachment C



19 March 2015

MEMORANDUM FOR Defense Counsel for Mr. bin 'Attash

SUBJECT: Prosecution Final Response to 11 March 2015
Request for Discovery (DR-206-WBA)

1. The Prosecution received the Defense request for discovery on 11 March 2015. The Prosecution hereby responds to the Defense request, as follows, in bold.
2. The Defense asserts: "On May 2, 2011, the United States executed a mission in Abbottabad, Pakistan that resulted in the death of the leader of Al Qaeda, Osama bin Laden. Mr. bin 'Atash is alleged by the United States to have been a member and leader within the Al Qaeda organization, responsible for, at least in part, several attacks against the United States. During this raid, "more than 1 million documents and files were captured" by the United States. Osama bin Laden is an uncharged co-conspirator in this case and was the head of the Al Qaeda organization, making the documents recovered in the Abbottabad raid material to the preparation of the defense."
3. The Defense requests that the Prosecution produce any books, documents, papers, photographs, videos, tangible objects, or other materials which are within the possession or control of the Government or any agency of the Government from the above-referenced raid and which:
 - a. Reference, either explicitly or implicitly, Mr. bin 'Atash or any co-accused, to include but not be limited to:
 - i. His role or position in the Al Qaeda organization.
 - ii. Work he did on behalf the organization at any time.
 - iii. Communications between Mr. bin 'Atash and members or leaders of the organization.

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- iv. Any of the aforementioned information in relation to members of Mr. bin 'Atash's family, to include his father and brothers.
- b. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to an Al Qaeda conspiracy for a planned "second wave" attack on the United States after the attacks of September 11, 2001, regardless if Mr. bin 'Atash is referenced in the document.
- c. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to an Al Qaeda conspiracy for the attack that occurred on September 11, 2001 in New York, NY, Washington, DC, and Shanksville, PA, regardless if Mr. bin 'Atash is referenced in the document.
- d. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to an Al Qaeda conspiracy for the considered Asia part of attacks of September 11, 2001, regardless if Mr. bin 'Atash is referenced in the document.
- e. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to an Al Qaeda conspiracy for the attack on the USS Cole that occurred on October 12, 2000 in Aden, Yemen, regardless if Mr. bin 'Atash is referenced in the document.
- f. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to an Al Qaeda conspiracy for the failed attempt to attack the USS The Sullivans on January 3, 2000 in Aden, Yemen, regardless if Mr. bin 'Atash is referenced in the document.
- g. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to an Al Qaeda conspiracy for the attack on the US Embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya that occurred on August 7, 1998, regardless if Mr. bin 'Atash is referenced in the document.

The Prosecution continues to review information in its possession, custody, or control for information that is relevant and "material to the preparation of the defense,"

R.M.C. 701(c); that is exculpatory and reasonably tends to negate the Accused's guilt of an offense charged, reduce his degree of guilt "with respect to an offense charged," or reduce his punishment, if any, R.M.C. 701(e) (1); that "reasonably tends to impeach the credibility of a witness whom the [Prosecution] intends to call at trial," R.M.C. 701(e) (2); and "that reasonably may be viewed as mitigation evidence at sentencing," R.M.C. 701(e) (3). Where materials are classified, the Prosecution will produce responsive materials that are relevant, noncumulative, and helpful to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing. See M.C.R.E. 505(f) (1) (B).

The Prosecution has reviewed items recovered from the 2 May 2011 mission referenced above. To the extent that there is information contained therein that is discoverable consistent with the standards set forth above, the Prosecution will produce the materials.

Respectfully submitted,

 //s//

Nicole A. Tate
Assistant Trial Counsel