

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

UNITED STATES OF AMERICA

v.

**KHALID SHAIKH MOHAMMAD;
WALID MUHAMMAD SALIH
MUBARAK BIN ‘ATTASH;
RAMZI BINALSHIBH;
ALI ABDUL AZIZ ALI;
MUSTAFA AHMED AL HAWSAWI**

AE 415 (GOV)

Government Motion
For the Admission of Certificates of Non-
Existence of Records

18 March 2016

1. Timeliness

This Motion is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.c.(1).

2. Relief Sought

The United States respectfully moves for the admission of the Certificates of Non-Existence of Records (“CNR”) from the Department of Homeland Security (“DHS”) for each of the five Accused into evidence. *See* Attachment B.

3. Overview

The Prosecution has a pretrial duty to prepare to make a prompt, full, and orderly presentation of the evidence at trial. Among other things, the Prosecution will prove at trial that each of the five accused is an “Alien” as that term is defined by the Military Commissions Act of 2009 (the “M.C.A.”). *See* 10 U.S.C. § 948(a)(1). The attached CNRs certify that there is no evidence in DHS records that four of the Accused (Messrs. Binalshibh, Bin ‘Attash, Ali, and Hawsawi) ever received permission for admission into the United States, and that no record was found to exist indicating that Mr. Mohammed obtained naturalization as a United States citizen.¹

¹ Mr. Mohammed was legally present in the United States from approximately 1983 through 1986 on a student visa. Accordingly, his CNR is different than those of his co-Accused. It is, nonetheless, still probative of the fact that he is an “alien” as defined by relevant law.

The CNRs, which certify the absence of a public record, fall within a firmly-rooted exception to the hearsay exclusionary rule that is applied in military and federal courts.

4. Burden of Proof

As the moving party, the United States must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

5. Facts

The United States has averred in this case, in short, that the five Accused planned, coordinated, and directed the 11 September 2001 attacks upon the United States that resulted in the deaths of 2,976 people. On 31 May 2011 and 25 January 2012, charges in connection with the 11 September 2001 attacks were sworn against Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin ‘Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi. These charges were referred jointly to this capital Military Commission on 4 April 2012. The five Accused are each charged with Conspiracy, Attacking Civilians, Attacking Civilian Objects, Intentionally Causing Serious Bodily Injury, Murder in Violation of the Law of War, Destruction of Property in Violation of the Law of War, Hijacking an Aircraft, and Terrorism.

The United States now seeks the admission of CNRs issued by the DHS for each of the five Accused.

6. Law and Argument

Among the Prosecution’s many pretrial duties is to “prepare to make a prompt, full, and orderly presentation of the evidence at trial.” R.M.C. 502(d)(6), Discussion (E). Accordingly, the Prosecution now moves the Military Judge to pre-admit the CNRs for each of the Accused. As set forth below, the evidence is relevant and authentic and falls within a firmly-rooted exception to the hearsay exclusionary rule.

A. The CNRs Are Relevant and Authentic

All evidence having probative value to a reasonable person is generally admissible. *See* M.C.R.E. 402. Evidence has a probative value to a reasonable person 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. Military Commission Rule of Evidence 901 further provides that evidence shall be admitted as authentic if the military judge determines that there is sufficient basis to find that the evidence is what it is claimed to be, and instructs the members that they may consider any issue as to authentication or identification of evidence in determining the weight, if any, to be given the evidence. *See* M.C.R.E. 901.

Here, the Prosecution will prove at trial, among other things, that each of the five Accused is an "Alien," as that term is defined by the M.C.A. *See* 10 U.S.C. § 948(a)(1). The CNRs certify that, as to Messrs. Binalshibh, Bin 'Attash, Ali, and Hawsawi, no record was found to exist in Department of Homeland Security, Citizenship and Immigration Services relating to these individuals. As to Mr. Mohammed, the CNR establishes that no record was found to exist indicating that Mr. Mohammad obtained naturalization as a United States citizen. Thus, the CNRs are highly probative and reliable proof of jurisdictional elements of the substantive offenses the Prosecution will establish in this case. Accordingly, the Military Judge should find the CNRs to be relevant evidence.

Given the official nature of these government records, the Prosecution has also provided sufficient evidence to establish authenticity and identification of the CNRs. Unlike for evidence presented in courts-martial, and based, in part, on the fact that hearsay is otherwise admissible in military commissions, M.C.R.E. 901 sets forth only one requirement for authentication or identification of evidence introduced at military commissions. *See* M.R.C.E. 901(a) (evidence shall be admitted as authentic if the military judge determines there is a sufficient basis to find that the evidence is what it is claimed to be; and the military judge instructs the members that

they may consider any issue as to authentication or identification of evidence in determining the weight, if any, to be given to the evidence).

The CNRs submitted for pre-admission would, on their face, also qualify for self-authentication at general court-martial under the Military Rules of Evidence and the Federal Rules of Evidence as certified copies of public records. *See* M.R.E. 902(4); *see also* Fed. R. Evid. 902(4). Thus, the Military Judge should determine that there is a sufficient basis to find the evidence is what it is claimed to be. *See* M.C.R.E. 901(a). The Military Judge should admit the evidence and, at trial, instruct the members that they may consider any issue as to authentication of the evidence in determining the weight, if any, to be given to the evidence. *See* M.C.R.E. 901(b).

B. The CNRs Fall Within the “Absence of a Public Record” Exception to the Hearsay Exclusionary Rule

Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. M.C.R.E. 801(d). Hearsay evidence may be admitted in trials by military commission if the evidence would be admitted under the rules of evidence applicable to trial by general courts-martial, and the evidence would otherwise be admissible under the Military Commission Rules of Evidence or the Manual for Military Commissions. *See* M.C.R.E. 803(a).²

Military Rule of Evidence 803(10) provides that a certification that a diligent search failed to disclose a public record or statement is not excluded by the rule against hearsay if the certification is admitted to prove, (1) that the record or statement does not exist, or (2) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that

² Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted only if the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the proponent’s intention to offer the evidence, and the particulars of the evidence. *See* M.C.R.E. 803(b)(1). The Prosecution posits that the CNRs all fall under firmly-rooted hearsay exceptions as set forth above and below. However, with this motion, the Prosecution hereby provides said notice and requests the Military Judge admit the evidence as hearsay if the Military Judge determines, contrary to the Prosecution’s position, that the CNRs are, or contain in part, hearsay not otherwise falling under a firmly-rooted hearsay exception.

kind. M.R.E. 803(10); *see also* Fed. R. Evid. 803(10). Applying Rule 803(10) of the Military Rules of Evidence applicable at court-martial, the Military Judge should admit the attached CNRs into evidence in this case.

Assuming, *arguendo*, that, following the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), the CNRs are to be considered testimonial in nature, as both the 5th Circuit and 9th Circuit have found,³ they are nonetheless admissible at this Military Commission. Congress, while providing a robust set of trial rights in the Military Commissions Act of 2009, did not intend to provide accused tried before military commission full, post-*Crawford*, 6th Amendment Confrontation Clause rights. Rather, it determined, in both 2006 and 2009, that hearsay that would otherwise violate the 6th Amendment was admissible. *See* 10 U.S.C. § 949a.3.(D). Notwithstanding the fact that CNRs have been determined by certain federal courts to be testimonial in nature, they nonetheless still fall under firmly-rooted exceptions to the hearsay rule and are thus reliable and admissible under the M.C.A. *See* M.C.R.E. 803(a); M.R.E. 803(10).

In essence, the admission of these records into evidence without cross-examination of the custodian of records is clearly contemplated under the Military Commissions Act, and simply puts the Accused in the same position as the countless federal and state defendants who were convicted before 2004, based in part on testimonial hearsay admitted in their criminal cases, pre-*Crawford*.⁴

Accordingly, the Prosecution requests the attached documents be pre-admitted into evidence in order to streamline the presentation of evidence and maximize efficiency before the members at trial.

³ *See, e.g. United States v. Martinez-Rios*, 595 F.3d 581, 585-86 (5th Cir. 2010); *United States v. Orozco-Acosta*, 607 F.3d 1156, 1161 n.3 (9th Cir. 2010).

⁴ The decision in *Crawford* was determined by the Supreme Court to not apply retroactively to cases that were final prior to its decision in 2004. *See Whorton v. Bockting*, 549 U.S. 406, 419 (2007). As such, those convicted in cases that were final prior to 2004 could not have those convictions overturned due to the use of testimonial hearsay in their cases.

ATTACHMENT A

ATTACHMENT B

U.S. Department of Homeland Security
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

Interoffice Memorandum

To: Anthony Gentry
20 Massachusetts Avenue NW
Washington, DC 20529

Attention: USCIS
CHIEF COUNCIL

From: Office of Records Headquarters (HQREC)

Re: Certification Request(s) for 02/11/2008

Attached is (are) the Certification of Document(s) Record that may relate to your subject(s):

<u>File Number</u>	<u>Subject</u>
A74 241 729	Khalid Shaikh Mohammad

As Chief of the Records Services Branch, National Security Records Verification, I am duly authorized to make such certification and to delegate such authority in my absence.

A handwritten signature in black ink, appearing to read "Mike Quinn".

Mike Quinn, Section Chief
Records Services
National Security Records Verification
Central Office Washington

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services

Certificate of Nonexistence of Record

HQORM-70/42.4 - C

02/11/2008

I, Mike Quinn, certify to the following:

1. That I am the Section Chief, NSRV, Citizenship and Immigration Services, United States Department of Homeland Security, and by virtue of the authority contained in Section 475(b)(1) of the Homeland Security Act of 2002, Section 290(d) of the Immigration and Nationality Act and 8 CFR 103.7(d)(4), I am authorized to certify the nonexistence of an official Service record.
2. That Citizenship and Immigration Services maintains centralized records relating to immigrant aliens who entered the United States on or after June 30, 1924, to nonimmigrant aliens who entered on or after June 30, 1948, and a centralized index of all persons naturalized on or after September 27, 1906.
3. That I, or an agency employee acting at my direction, performed a search for records relating to the subject identified below. Specifically this office searched Deportable Alien Control System (DACS), Computer Linked Application Information Management System (CLAIMS), and the Central Index System (CIS) (list any other systems searched).
4. That after a diligent search was performed in these database systems, no record was found to exist indicating that the subject listed below obtained naturalization as a citizen of the United States.

File No: A74 241 729

Subject: Khalid Shaikh Mohammad

Also known As (AKA): Khalid Sheikh Mohammed, Khalid Shaykh Muhammad, Khaled Shaikh Mohammad, Mukhtar, Khalid Shaikh, Abdulrahman A. A. Al-Ghamdi, Abdul Rahman A. A. Al-Ghamdi, Abdulrahman Abdullah Alghamdi, Abdul Rahman Abdullah Al Ghamdi, Abdullah Adel Rahman Al Ghamdi, Salim Ali, Mukhtar al Baluchi, Fahd Bin Abdallah Bin Khalid, Ashraf Refaat Nabith, Khalid Shaykh Mohammad, Khalid Shaikh Mohammed, Mokhtar, Khalid Sheikh Muhammad

Born on: 04/14/1965

Country of Birth: Kuwait



Mike Quinn, Section Chief
Records Services
National Security Records Verification
Central Office Washington

U.S. Department of Homeland Security
Washington, DC 20529-2204



U.S. Citizenship
and Immigration
Services

Interoffice Memorandum

To: USCIS
CHIEF COUNCIL

Attention: Anthony Gentry
20 Massachusetts Avenue NW, Room 4210
Washington, DC 20529-2120

From: Office of Records Headquarters (HQREC)

Re: Certification Request(s) for 06/10/2011

Attached is (are) Certificate(s) of Nonexistence of Record(s) relating to the following subject(s):

<u>File Number</u>	<u>Subject</u>
N/A	Mustafa Ahmad Al-Hawsawi

As Chief of the Record Services, Records Division, I am duly authorized to make such certification and to delegate such authority in my absence.

A handwritten signature in black ink, appearing to read "Teddy O. Davis".

Teddy O. Davis, Chief
Record Services
Records Division, ESD
Central Office Washington

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services

Certificate of Nonexistence of Record

HQORM-70/42.4 - C

Date: 06/10/2011

I, Teddy Davis, certify to the following:

1. That I am the Section Chief of the Record Services, Records Division, Citizenship and Immigration Services, United States Department of Homeland Security, and by virtue of the authority contained in Section 475(b)(1) of the Homeland Security Act of 2002, Section 290(d) of the Immigration and Nationality Act and 8 CFR 103.7(d)(4), I am authorized to certify the nonexistence of an official Service record.
2. That Citizenship and Immigration Services maintains centralized records relating to immigrant aliens who entered the United States on or after June 30, 1924, to nonimmigrant aliens who entered on or after June 30, 1948, and a centralized index of all persons naturalized on or after September 27, 1906.
3. That I, or an agency employee acting at my direction, performed a search for records relating to the subject identified below. Specifically this office searched the ENFORCE Alien Removal Module (EARM), Computer Linked Application Information Management System (CLAIMS), the Central Index System (CIS), and the Master Index.
4. That after a diligent search was performed in these database systems; no record is found to exist relating to the subject listed below:

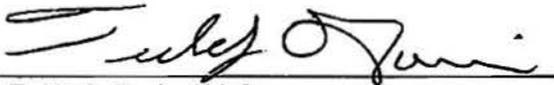
File No: _____

Subject: Mustafa Ahmad Al-Hawsawi

Also known As (AKA): Mustafa Ahmed Adam al-Hawsawi, Mustafa Ahmed Adin al-Hawsawi, Mustafa Ahmed, Mustafa Ahmad, Ahanad Mustafa, Zahir, Hashim 'Abd Al-Rahman, Hashem Abderahman, Hashem Abdollahi, Ahamad Mustafa, Ayyub, Muhammad Adnan, Almohtaram

Born on: 8/5/1968

Country of Birth: Saudi, Arabia



Teddy O. Davis, Chief
Record Services
Records Division, ESD
Central Office Washington



U.S. Citizenship
and Immigration
Services

Interoffice Memorandum

To: USCIS
CHIEF COUNCIL

Attention: Anthony Gentry
20 Massachusetts Avenue NW, Room 4210
Washington, DC 20529-2120

From: Office of Records Headquarters (HQREC)

Re: Certification Request(s) for 06/10/2011

Attached is (are) Certificate(s) of Nonexistence of Record(s) relating to the following subject(s):

<u>File Number</u>	<u>Subject</u>
N/A	Walid Muhammad Salih Mubarak Bin Attash

As Chief of the Record Services, Records Division, I am duly authorized to make such certification and to delegate such authority in my absence.

A handwritten signature in black ink, appearing to read "Teddy O. Davis".

Teddy O. Davis, Chief
Record Services
Records Division, ESD
Central Office Washington

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services

Certificate of Nonexistence of Record

HQORM-70/42.4 - C

Date: 06/10/2011

I, Teddy Davis, certify to the following:

1. That I am the Section Chief of the Record Services, Records Division, Citizenship and Immigration Services, United States Department of Homeland Security, and by virtue of the authority contained in Section 475(b)(1) of the Homeland Security Act of 2002, Section 290(d) of the Immigration and Nationality Act and 8 CFR 103.7(d)(4), I am authorized to certify the nonexistence of an official Service record.
2. That Citizenship and Immigration Services maintains centralized records relating to immigrant aliens who entered the United States on or after June 30, 1924, to nonimmigrant aliens who entered on or after June 30, 1948, and a centralized index of all persons naturalized on or after September 27, 1906.
3. That I, or an agency employee acting at my direction, performed a search for records relating to the subject identified below. Specifically this office searched the ENFORCE Alien Removal Module (EARM), Computer Linked Application Information Management System (CLAIMS), the Central Index System (CIS), and the Master Index.
4. That after a diligent search was performed in these database systems; no record is found to exist relating to the subject listed below:

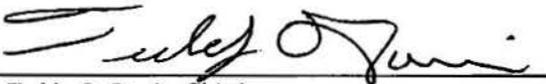
File No: _____

Subject: __ Walid Muhammad Salih Mubarak Bin Attash __

Also known As (AKA): __ Khallad Bin Attash, Tawfiq Bin Attash, Salah Saeed Mohammed Bin Yousaf, Salah Sai'd Muhammad Bin Yusuf, Salah Sai'd Muhammad Bin Yusuf, Silver, Tawfiq Muhammad Salih Bin Rashid, Walid, Tafiq Muhammad Saleh Bin Roshayd Bin Attash __

Born on: __ 01/01/1974 or 1978 __

Country of Birth: __ Saudi Arabia __



Teddy O. Davis, Chief
Record Services
Records Division, ESD
Central Office Washington



U.S. Citizenship
and Immigration
Services

Interoffice Memorandum

To: USCIS
CHIEF COUNCIL

Attention: Anthony Gentry
20 Massachusetts Avenue NW, Room 4210
Washington, DC 20529-2120

From: Office of Records Headquarters (HQREC)

Re: Certification Request(s) for 06/10/2011

Attached is (are) Certificate(s) of Nonexistence of Record(s) relating to the following subject(s):

<u>File Number</u>	<u>Subject</u>
N/A	Ali Abdul Aziz Ali

As Chief of the Record Services, Records Division, I am duly authorized to make such certification and to delegate such authority in my absence.

A handwritten signature in black ink, appearing to read "Teddy O. Davis".

Teddy O. Davis, Chief
Record Services
Records Division, ESD
Central Office Washington

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services

Certificate of Nonexistence of Record

HQORM-70/42.4 - C

Date: 06/10/2011

I, Teddy Davis, certify to the following:

1. That I am the Section Chief of the Record Services, Records Division, Citizenship and Immigration Services, United States Department of Homeland Security, and by virtue of the authority contained in Section 475(b)(1) of the Homeland Security Act of 2002, Section 290(d) of the Immigration and Nationality Act and 8 CFR 103.7(d)(4), I am authorized to certify the nonexistence of an official Service record.
2. That Citizenship and Immigration Services maintains centralized records relating to immigrant aliens who entered the United States on or after June 30, 1924, to nonimmigrant aliens who entered on or after June 30, 1948, and a centralized index of all persons naturalized on or after September 27, 1906.
3. That I, or an agency employee acting at my direction, performed a search for records relating to the subject identified below. Specifically this office searched the ENFORCE Alien Removal Module (EARM), Computer Linked Application Information Management System (CLAIMS), the Central Index System (CIS), and the Master Index.
4. That after a diligent search was performed in these database systems; no record is found to exist relating to the subject listed below:

File No: _____

Subject: Ali Abdul Aziz AliAlso known As (AKA): Ali Abd al-Aziz Ali, Ammar Al-Baluchi, Abd Al-Aziz, Ali, Hani (Fawaz Trdng), Ali Abd al Aziz Ali, Isam Mansour, Isam MansrBorn on: 8/29/1977Country of Birth: Al-Ahmadi, Kuwait


Teddy O. Davis, Chief

Record Services

Records Division, ESD

Central Office Washington

U.S. Department of Homeland Security
Washington, DC 20529-2204



U.S. Citizenship
and Immigration
Services

Interoffice Memorandum

To: USCIS
CHIEF COUNCIL

Attention: Anthony Gentry
20 Massachusetts Avenue NW, Room 4210
Washington, DC 20529-2120

From: Office of Records Headquarters (HQREC)

Re: Certification Request(s) for 06/9/2011

Attached is (are) Certificate(s) of Nonexistence of Record(s) relating to the following subject(s):

<u>File Number</u>	<u>Subject</u>
N/A	Ramzi Bin Al-Shibh

As Chief of the Record Services, Records Division, I am duly authorized to make such certification and to delegate such authority in my absence.

A handwritten signature in black ink, appearing to read "Teddy O. Davis".

Teddy O. Davis, Chief
Record Services
Records Division, ESD
Central Office Washington

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services

Certificate of Nonexistence of Record

HQORM-70/42.4 - C

Date: 06/9/2011

I, Teddy Davis, certify to the following:

1. That I am the Section Chief of the Record Services, Records Division, Citizenship and Immigration Services, United States Department of Homeland Security, and by virtue of the authority contained in Section 475(b)(1) of the Homeland Security Act of 2002, Section 290(d) of the Immigration and Nationality Act and 8 CFR 103.7(d)(4), I am authorized to certify the nonexistence of an official Service record.

2. That Citizenship and Immigration Services maintains centralized records relating to immigrant aliens who entered the United States on or after June 30, 1924, to nonimmigrant aliens who entered on or after June 30, 1948, and a centralized index of all persons naturalized on or after September 27, 1906.

3. That I, or an agency employee acting at my direction, performed a search for records relating to the subject identified below. Specifically this office searched the ENFORCE Alien Removal Module (EARM), Computer Linked Application Information Management System (CLAIMS), the Central Index System (CIS), and the Master Index.

4. That after a diligent search was performed in these database systems; no record is found to exist relating to the subject listed below:

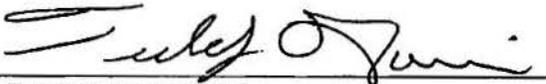
File No: _____

Subject: Ramzi Bin Al-Shibh

Also known As (AKA): Ramzi Binalshibh, Ramzi Mohamed Abdellah Omar, Ahad Sabet, Abu Ubaydah, Ubaydah al Hadrami

Born on: 5/10/1972

Citizenship: Yemen



Teddy O. Davis, Chief
Record Services
Records Division, ESD
Central Office Washington