

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 415A (WBA)

**Mr. bin 'Atash's Response to AE 415(GOV),  
Government Motion for the Admission of  
Certificates of Non-existence of Records**

Date Filed: 1 April 2016

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

**2. Relief Sought:**

The Government relief requested in AE 415(GOV) violates the United States Constitution, applicable law and treaties and must be denied.

**3. Overview:**

In AE 415(GOV) the Government seeks to “preadmit” five documents, Certificates of Non-existence of Records (“CNRs”), that are hearsay—testimonial hearsay—under the guise that they are admissible under a “firmly-rooted exception” to the hearsay rule. (AE 415(GOV) at 1-2). The relief sought by the Government denies Mr. bin 'Atash his right to cross-examine and test the evidence introduced against him.

CNRs are testimonial hearsay that implicate the Confrontation Clause of the Sixth Amendment, pursuant to Crawford v. Washington, 541 U.S. 36, 59 (2004). Accordingly, regardless of whether the CNRs would otherwise be admissible under a firmly rooted exception to the hearsay rule, this Commission, no military court, and no federal court could admit the

documents proffered by the Government in AE 415(GOV) into evidence without the appropriate witness, i.e., the author of the document, and subjecting the declarant to cross-examination by the accused. Although, the Government concedes that the Confrontation Clause bars the admission of CNRs in military and federal courts—customary courts of jurisdiction in the United States—they claim that Congress did not intend that Mr. bin ‘Atash’s rights to a fair trial include “full, post-Crawford” confrontation rights as guaranteed in every other United States jurisdiction. (AE 415(GOV) at 5). This Commission cannot lawfully deny Mr. bin ‘Atash his right to cross-examine and test the evidence introduced against him. The Sixth and Eighth Amendments bar the Government from, by statute or otherwise, denying Mr. bin ‘Atash the right to confront the witnesses against him as guaranteed by the Constitution and international law.

#### **4. Burdens of Proof:**

The Government bears the burden of persuasion; although the standard of proof is normally preponderance of the evidence, because the Government seeks introduction of evidence without the crucible of cross-examination to prove an element of the offenses charged, the Government must be held to the standard of proof in all criminal cases: beyond a reasonable doubt. R.M.C. 905(c)(1).

#### **5. Facts:**

A. On 31 May 2011 and 25 January 2012, the Government charged Mr. bin ‘Atash and the other codefendants with the following offenses under the Military Commissions Act of 2009 (“MCA”): (1) conspiracy, 10 U.S.C. § 950t(29); (2) attacking civilians, 10 U.S.C. § 950t(2); (3) attacking civilian objects, 10 U.S.C. § 950t(3); (4) murder in violation of the Law of War, 10 U.S.C. § 950t(15); (5) destruction of property in violation of the Law of War, 10 U.S.C. § 950t(16); (6) hijacking an aircraft, 10 U.S.C. § 950v(23); and (7) terrorism, 10 U.S.C.

§ 950t(24) (2012). These charges were referred to the Military Commission on 4 April 2012 as capital offenses.

B. The MCA grants the Secretary of Defense express authority to convene military commissions to prosecute those fitting the definition under the MCA of “alien unprivileged enemy belligerents.” 10 U.S.C. § 948c. Accordingly, the United States must prove beyond a reasonable doubt that Mr. bin ‘Atash was an alien and not a United States citizen at the time of the offenses charged. 10 U.S.C. § 948(a)(1).

C. On 18 March 2016, the Government filed AE 415(GOV), Government Motion for the Admission of Certificates of Non-existence of Records. In the motion, the Government seeks something they label “preadmission” of documents generated at their request by the U.S. Department of Homeland Security (“DHS”) opining that, based upon a search of various databases by unknown individuals, Mr. bin ‘Atash was not a naturalized U.S. citizen at the time of the offenses charged. (AE 415(GOV) at Attachment B).

## **6. Law and Argument:**

This Commission must deny the Government’s attempts to circumvent Mr. bin ‘Atash’s right to test testimonial evidence introduced against him. The Government concedes that the documents tendered for preadmission are testimonial hearsay. (AE 415(GOV) at 5). Absent the Government calling the appropriate witnesses to tender these documents in open court, and thereby subjecting those witnesses to cross-examination by the accused, these documents are inadmissible.

### **A. The Confrontation Clause prohibits the admission of hearsay testimonial statements in a criminal prosecution.**

The Confrontation Clause of the Sixth Amendment prohibits the introduction of hearsay statements against the accused if they are deemed “testimonial” in nature, unless the declarant is

unavailable for trial and the defendant has had a prior opportunity to cross-examine the declarant. See Crawford v. Washington, 541 U.S. 36, 59 (2004). In Crawford, the Court sought to align Confrontation Clause analysis to the original intent of the Framers, who, according to the Court, were concerned with abuses such as the use at trial of hearsay statements taken by magistrates in pretrial bail proceedings and the introduction of an alleged co-conspirator's statement in the political trial of Sir Walter Raleigh. See id. at 61-63. Founding era cases led the Court, through Justice Scalia, to prohibit such testimonial statements, including affidavits and the stationhouse statement of the accused's wife in Crawford. See id. at 68-69.

In subsequent cases, the Court honed the definition of “testimonial” for purposes of determining which statements must be tested by cross-examination. Testimonial statements requiring cross-examination include information prepared for purposes of prosecution like the statements taken in founding era pretrial bail proceedings, the accomplice confession in Raleigh's case, or the stationhouse statement of Crawford's wife. See Davis v. Washington, 547 U. S. 813, 828 (2006); Michigan v. Bryant, 562 U.S. 344 (2011). Statements are testimonial and remain excludable under the Confrontation Clause “when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” Davis, 547 U.S. at 822.

Other post-Crawford cases have held that a drug test administered for the purpose of being produced at trial is, similarly, inadmissible without the testimony of the analyst who performed the test. See Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310-311 (2009). The Court concluded that the report was virtually identical to the affidavits of the sort targeted by the

Framers and rejected the argument that scientific testing was reliable and objective enough to avoid constitutional scrutiny. See id. at 316-17.

To comport with the Confrontation Clause, and for the purpose of admitting testimonial hearsay, the declarant must be subject to examination. It is not sufficient to call someone other than author of a document. In Bullcoming v. New Mexico, 131 S. Ct. 2705, 2713 (2011), Justice Ginsburg wrote for a majority that a “certificate” of the results of a test of the defendant’s blood alcohol content could not be introduced through testimony of another laboratory analyst. The surrogate witness did not perform the analysis, had no direct knowledge of the testing, and, therefore, could not be properly cross-examined in compliance with Crawford. See Bullcoming, 131 S. Ct. at 2714-2716. The Court again rejected the prosecution’s argument that the reliability of the analyst’s report should allow it to escape cross-examination and testing required by the Confrontation Clause. See id. at 2717. The Court concluded that the mere fact that a surrogate witness was qualified as an expert in DNA analysis did not substitute for the testimony of the analyst who actually performed the test. See id. at 2715.

**B. Mr. bin ‘Atash has a right to confront witnesses under international law.**

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

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

Unless the above-described treaty obligations are abrogated by an act of Congress or the United States exercises an option present in the treaty to withdraw, these obligations remain the law of the land under the Supremacy Clause. See, e.g., U.S. Const. art. VI., cl. 2; Fong Yue Ting v. United States, 149 U.S. 698, 720 (1893) (providing that it well-settled that an act of Congress, “if clear and explicit” must be upheld by the courts even if contrary to obligations in an earlier treaty); Treaty on the Limitation of Anti-ballistic Missile Systems, May 26, 1972, 23 U.S.T. 3435, art. XV(2) (allowing for right to withdraw for each party if it decides extraordinary events have jeopardized its supreme interests, so long as the party provides six-month notice and explains those extraordinary events; which the United States provided on December 13, 2001 in a White House Press Release).

In the absence of expressed abrogation, a subsequent statute, even if it conflicts with the treaty, does not necessarily nullify the obligation. See, e.g., United States v. Dion, 476 U.S. 734, 773-74 (1986) (expressed abrogation need not be a piece of legislation designed to specifically abrogate the treaty—although the Court viewed that as preferable—but may be demonstrated by legislative history that showed “clear evidence that Congress actually considered the conflict between the intended action on the one hand . . . and treaty rights on the other, and chose to

resolve that conflict with by abrogating the treaty.”); Cook v. United States, 288 U.S. 102, 120 (1933) (“A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.”); Whitney v. Robertson, 124 U.S. 190, 194 (1888) (“When the [stipulations of the treaty and the requirements of the law] relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.”).

In passing the MCA, Congress did not debate, much less explicitly mention, the abrogation of Article 3 of the Convention (First) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field or Article 14(3)(e) of the United Nations International Covenant on Civil and Political Rights. On the contrary, Congress specifically and consciously recognized the importance of calling and confronting witnesses to develop a robust factual record when it directed that “[t]he opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under Article III of the Constitution.” 10 U.S.C. § 949j. The Government bears the burden of persuasion with respect to any finding by this Commission that the MCA abrogated a treaty obligation of the United States. See R.M.C. 905(c)(1). The Government has failed to advance an argument on this issue.

**C. The evidence proffered for “preadmission” by the Government is testimonial hearsay that requires the author of the documents to be present and subject to cross-examination.**

CNRs frequently come up in the context of immigration offenses. In prosecutions for illegal re-entry of a removed alien, in violation of 8 U.S.C. § 1326(a), prior to Crawford and

Melendez-Diaz, it was common for the Government to introduce CNRs though the case agent, without subjecting the author of the CNR to cross-examination. The Government used these CNRs to prove an element of the offense: that the defendant had not received the permission of the Attorney General to enter the United States subsequent to removal. This had been justified by prosecutors as a hearsay exception: claiming the CNRs were business records generated in the normal course of the work performed by U.S. immigration officials. This summary admission was in eventually held to be in violation of the Sixth Amendment's guarantee of cross-examination. In United States v. Martinez-Rios, 595 F.3d 581, 586 (5th Cir. 2010), however, the Fifth Circuit ruled that CNRs were testimonial hearsay and could not be admitted at trial unless the Government called the author of the document and allowed the defendant cross-examination. Emphasizing that CNRs were not routinely produced government records, but rather produced exclusively for trial to prove an essential element, the Martinez-Rios Court held that they were exactly the type of testimonial hearsay that Melendez-Diaz addressed as subject to the Sixth Amendment. See Martinez-Rios, 595 F.3d at 586.

The Ninth Circuit has ruled similarly. See United States v. Orozco-Acosta, 607 F.3d 1156, 1161 n.3 (9th Cir. 2010). Although the D.C. Circuit has not yet ruled on the specific issue of CNRs, it has ruled that autopsy reports and death certificates generated by the D.C. Medical Examiner are testimonial hearsay subject to Melendez-Diaz. See United States v. Moore, 651 F.3d 30, 72 (D.C. Cir. 2012) (holding that "solemn declarations or affirmations made for the purpose of establishing or proving some fact are testimonial statements").

**D. The CNRs proffered by the Government in AE 415(GOV) cannot be admitted into evidence unless the declarant is subject to cross-examination.**

The Government proffers that the CNRs are hearsay, but claims they are "highly probative and reliable proof of jurisdictional elements" and, therefore, should be admitted under

M.C.R.E. 901. (AE 415(GOV) at 3). The Government also argues that the statements are admissible under the “absence of a public record” exception under the Military Rule of Evidence 803(10) and the catch-all M.C.R.E. 803(a). Finally, conceding that this Commission could determine that the CNRs are testimonial hearsay, the Government makes an incredible argument: that the MCA, a statute, supersedes the Sixth Amendment to the United States Constitution. The Government ignores the United States Constitution in favor of 10 U.S.C. § 949a(3)(D), arguing that it provides that hearsay otherwise inadmissible under the rules of evidence applicable in trial by courts-martial may be admitted if the hearsay is probative and notice given. (AE 415(GOV) at 5).

While Section 949a(3)(D) might appear to expand hearsay beyond what would be admissible in a post-Crawford court, this provision cannot be reconciled with Section 949j’s mandate that “[t]he opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under Article III of the Constitution.” If the witness and evidentiary rules are to be comparable to an Article III court, there can be no more appropriate mechanism to realize that mandate than by applying the Sixth Amendment and post-Crawford jurisprudence.

A review of the proffered CNRs belies Government claims that they are mere perfunctory administrative documents. In every CNR authored by Mike Quinn or Teddy O. Davis, the document notes that the author or an agency employee acting at their direction “performed a search for records relating to the subject identified” in five presumably separate and distinct databases: (1) Enforce Alien Removal Module; (2) Computer Linked Application Information Management System; (3) Central Index System; and (4) Master Index. (AE 415(GOV) at Attachment B, ¶ 3). The databases are not otherwise described. It is unclear what these

databases are, who specifically searched which ones, or how these searches were conducted. The proffered documents go well beyond mere administrative statements that a particular person has no record on file with DHS, and are instead testimonial hearsay that a particular person or persons did a particular task (searched a database), in a particular way, reported the results of that labor to Mr. Quinn or Mr. Davis, and that these results were accurate because of unknown and unstated reasons.

The CNRs proffered by the Government contain “solemn declarations or affirmations made for proving some fact.” Moore, 651 F.3d at 72. They are, therefore, testimonial statements that implicate the Confrontation Clause and require the presence of the declarant for cross-examination in order to be potentially admissible under one of the established exceptions to the hearsay rule. See Melendez-Diaz, 557 U.S. at 310-311 (2009); Moore, 651 F.3d at 73; Martinez-Rios, 595 F.3d at 586. The presence and confrontation of the declarants as witnesses is also required under international law. See Hamdan, 548 U.S. at 633. The declarants are necessary to establish the admissibility of the proffered documents. They are not unavailable and have not yet been subject to cross-examination by Mr. bin ‘Atash. Accordingly, “preadmission” is impossible, and this Commission must deny the relief requested in AE 415(GOV). See Crawford, 541 U.S. at 59.

7. **Oral Argument:** The defense requests oral argument.
8. **Witnesses:** Mr. bin ‘Atash reserves the right to request the production of witnesses on this Response at a later date.
9. **Attachments:**
  - A. Certificate of Service

//s//

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# **Attachment A**

CERTIFICATE OF SERVICE

I certify that on 1 April 2016, I electronically filed the attached **Mr. bin 'Atash's Response to AE 415(GOV), Government Motion for the Admission of Certificates of Non-existence of Records**, with the Trial Judiciary and served it on all counsel of record by e-mail.

*//s//*

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