

**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 ADAM
AL HAWSAWI**

AE 426B (GOV)

Government Response

To Emergency Defense Motion to Compel
Appointment and Funding of Confidential
Expert Consultant or Postpone 30 May 2016
Pretrial Hearings

10 June 2016

1. Timeliness

The Prosecution timely files this Response pursuant to Military Commissions Trial Judiciary Rule of Court (“R.C.”) 3.7.

2. Relief Sought

The Prosecution respectfully requests that this Commission deny all relief requested within AE 426 (WBA), Emergency Defense Motion to Compel Appointment and Funding of Confidential Expert Consultant or Postpone 30 May 2016 Pretrial Hearings.

3. Burden of Proof

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

4. Facts

On 23 July 2015, Commander Navy Region Southeast (“CNRSE”) submitted a request to the Navy and Marine Corps Public Health Center (“NMCPHC”) to conduct a Public Health Review of the Office of Military Commission facilities located on Camp Justice at Naval Station Guantanamo Bay, Cuba. AE 426 (WBA) at 5. The Public Health review was requested when a former defense counsel initiated a hotline complaint to the DoD Inspector General in which it was alleged that, since 2004, military and civilian members working for OMC have been

exposed to carcinogens in the area surrounding OMC trailers, tents, offices, and courtrooms. *Id.* at 5.

In response to this complaint, from 4-8 August 2015, NMCPHC public health experts conducted an onsite preliminary investigation. Based on a review of available documents and an initial industrial hygiene and habitability walk-through of OMC buildings, NMCPHC experts stated that the facilities where personnel live and work were *habitable for occupancy*. *Id.* at 5 (emphasis added). Although the buildings of concern were deemed habitable by the NMCPHC experts, this August 2015 preliminary report noted that environmental records and historical information for Camp Justice was limited.¹ Upon completion of the August Preliminary Report, NMCPHC experts conducted further testing of indoor air, drinking water, paint chips, ionizing radiation and soil.²

On 1 April 2016, the Office of the Chief Prosecutor and the Office of the Chief Defense Counsel both received a report entitled “Preliminary Public Health Screening Risk Assessment Report, Camp Justice,” dated 23 February 2016. AE 426 (WBA) at 5. Within the Report, NMCPHC stated that “the potential cancer risk and non-cancer health effects associated with Camp Justice . . . cannot be determined.” AE 426 (WBA) at 6.

On 11 April 2016, in response to the Report, the Chief Defense Counsel, Brigadier General John Baker, USMC, issued an order forbidding Military Commissions Defense Organization (“MCDO”) staff from sleeping at Camp Justice.³ In doing so, the Chief Defense Counsel stated that his prohibition would remain in effect “until I am provided a clearer explanation of the health risks associated with living at Camp Justice, and how any remedial

¹ See Public Health Review Updates, http://www.cnic.navy.mil/regions/cnrse/installations/ns_guantanamo_bay/news/PublicHealthReviewUpdates.html (last visited 6 June 2016).

² See *id.*

³ Carol Rosenberg, *Citing health concerns, Marine general bans war court defense staff from living at Guantanamo's Camp Justice*, April 12, 2016, <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article71334867.html>.

measures will mitigate those risks.”⁴ The Chief Defense Counsel, however, did not prohibit MCDO staff from working within the Expeditionary Legal Complex (“ELC”).

On 19 May 2016, the NMCPHC once again certified that the housing units located at Camp Justice were safe for occupancy. AE 426 (WBA) at 2. Shortly thereafter, the Chief Defense Counsel lifted his ban on MCDO staff sleeping at Camp Justice.⁵

On 20 May 2016, Defense counsel for Mr. Bin ‘Attash filed the instant motion requesting the appointment of an independent expert consultant so that they may “determin[e] whether the prosecution of this capital case threatens the lives of the judge, lawyers, and staff assigned.” AE 426 (WBA) at 22. On 27 May 2016, the Defense supplemented their motion with new facts not presented within their original motion. *See* AE 426 (WBA Sup).

5. Law and Argument

This Military Commission is a military operation conducted on a United States Naval Station. All of the United States Armed Forces have entities that ensure their facilities and fighting platforms are environmentally safe for their Soldiers, Sailors, Airmen, Marines, and civilians who support their missions. In this instance, the Navy and Marine Corps Public Health Center (“NMCPHC”) has certified on two separate occasions, following a former defense-counsel’s hotline complaint, that the facilities in the ELC are safe for occupancy. The Military Commissions’ consideration of the Defense motions for experts and discovery should start and end with those conclusions of the NMCPHC.

The findings of the NMCPHC are entitled to the presumption of regularity, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties. *See Latif v. Obama*, 400 U.S. App. D.C. 231, 234, 677 F.3d 1175, 1178 (2012). (“The presumption of regularity supports the official acts of public officers, and, in the

⁴ *See id.*

⁵ Carol Rosenberg, *Marine general returns defense lawyers to trailer park at Guantanamo’s Camp Justice*, May 20, 2016, <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article78869677.html>.

absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."'). The entire United States military functions based upon the representations of its officials that their facilities and fighting platforms are safe for occupancy. The military could not function any other way, and this Military Commission should not either, simply because it happens to have a military judge who is part of this mission.

This military commission is one of limited jurisdiction, statutorily created solely to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commissions. *See* 10 U.S.C. §948b.(a). Due to the limited jurisdiction of this court, litigating the environmental habitability of the ELC in an adversarial process falls outside of its jurisdiction. Such litigation would be no different, from a legal perspective, than requiring the Navy to get court approval before it requires a sailor, who is refusing to deploy on a ship that has been deemed habitable, to ship off, or the Army to first get permission by a military judge when a paratrooper refuses to board a plane that has been deemed safe to fly.

To be sure, the above statement of law does not mean that this military commission would be forced to go forward had NMCPHC determined that the ELC was uninhabitable; but the issue still would not be justiciable. If the ELC had been deemed uninhabitable, the Naval Station Commander would prohibit occupancy until the issue was remediated. However, even in such an instance, the Military Commission would still not have jurisdiction over the issue, and the environmental issue still would not be litigated; the case would simply be abated until a suitable courtroom could be found. Conversely, since the ELC has been found to be habitable, the environmental habitability issue must not and should not be litigated. Any legal system that first requires litigation over whether its courtroom has been correctly deemed habitable is doomed to fail.

Nor should the United States Government be forced to pay for an expert consultant to try to poke holes in the findings of the NMCPHC. To be entitled to expert witnesses, counsel for the Accused must show there is reasonable probability—indeed, more than a mere possibility—that the requested expert would be of assistance, and that the denial of such an expert would result in

a fundamentally unfair trial. *See, e.g., United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008); *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994) (citing *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir. 1987), *cert. denied*, 481 U.S. 1054 (1987)). To establish that an expert would be of assistance, the requesting party has the burden of establishing: 1) why the expert assistance is needed; 2) what the expert assistance would accomplish for the accused; and, 3) why Defense counsel were unable to gather and present evidence that the expert assistance would be able to develop. *See Freeman*, 65 M.J. at 458 (quoting *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005)); *see also United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994); *United States v. Allen*, 31 M.J. 572, 623 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991), *cert. denied*, 503 U.S. 936 (1992).

Seeking to dispute the findings of the Navy and Marine Corps Public Health Center (“NMCPHC”) that Camp Justice is safe and habitable for occupancy, Defense counsel for Mr. Bin ‘Attash request that this Commission compel the appointment of an expert consultant so that they can make their own determination as to its habitability. In doing so, they concede that they are “not alleg[ing] that Camp Justice is unsafe,” but assert that “[i]n light of the 23 February 2016 Report, the existence of a suspicious number of cancer and non-cancer diagnoses, the connection between Camp Justice’s toxins and the known diagnoses, the Navy’s poor credibility in matters related to the habitability of Camp Justice, and Defense counsel’s lack of technical expertise, the Commission must intervene.” AE 426 (WBA) at 22. However, even disregarding Defense counsel’s acknowledgment before this Commission that Camp Justice is in all likelihood safe for occupancy, *see Unauthenticated/Unofficial Transcript (“Tr.”) at 12076*, the Military Judge should not appoint an unnamed⁶ independent expert consultant at the cost of

⁶ While the Prosecution does not object to Defense *ex parte* communications with the Military Judge when it is requesting the appointment of expert consultants, it does object where, as is the case here, the Defense seeks to publicly litigate the appointment of an expert consultant, but endeavors to mask the identity and qualifications of the expert they seek. It is the Prosecution’s position that the Defense has the choice of either requesting the appointment of an expert on an entirely *ex parte* basis or in an entirely public manner, *see AE 09B (WBA, Mohammad, RBS)*, but it cannot choose a hybrid approach and request a confidential consultant and then publicly litigate such request. Under the approach taken by the Defense, the

thousands of dollars to review the conclusions of the expert professionals with the NMCPHC. If the Navy has deemed Camp Justice habitable, the judicial inquiry must start and end there.

6. Oral Argument

The Prosecution does not request oral argument. Further, the Prosecution strongly posits that this Commission should dispense with oral argument as the facts and legal contentions are adequately presented in the material now before the Commission and argument would not add to the decisional process. However, if the Military Commission decides to grant oral argument to the Defense, the Prosecution requests an opportunity to respond.

7. Witnesses and Evidence

The Prosecution will not rely on any witnesses or additional evidence in support of this motion.

8. Additional Information

The Prosecution has no additional information.

9. Attachments

A. Certificate of Service, dated 10 June 2016

Respectfully submitted,

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Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

