

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

<b>UNITED STATES OF AMERICA</b>  <b>v.</b>  <b>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</b>	<b>AE 494F</b>  <b>ORDER</b>  <b>Defense Motion to Compel</b> the Production of Unredacted 28 Pages from the Joint Congressional Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001  <b>26 July 2017</b>
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**1. Procedural History.**

a. On 1 March 2017, Mr. bin ‘Attash asked the Commission to order the Prosecution to “produce unredacted copies of Pages 415 through 443, constituting Part Four of the Congressional report entitled the Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001 (Joint Inquiry).”<sup>1</sup> Mr. bin ‘Attash claimed that “any information that identifies individuals responsible [for the September 11 attacks] who are not tied to Mr. bin ‘Attash is material and helpful for the defense.”<sup>2</sup> Mr. bin ‘Attash asserted that his counsel must “identify any instance” in which the Government identified Mr. bin ‘Attash as being affiliated with Al Qaeda—and “every instance” in which the Government did not identify Mr. bin ‘Attash as being responsible for the attacks.”<sup>3</sup> Mr. bin ‘Attash also claimed that any information linking Saudi Arabia to the September 11, 2001 attacks may implicate the Commission’s jurisdiction, in that the Government would have to prove Mr. bin ‘Attash does not

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<sup>1</sup> AE 494 (WBA), Defense Motion to Compel Production of Unredacted 28 Pages from the Joint Congressional Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, filed 1 March 2017 at 1.

<sup>2</sup> AE 494 (WBA) at 6.

<sup>3</sup> AE 494 (WBA) at 6-7.

enjoy the status of a “privileged belligerent” pursuant to the Military Commissions Act of 2009.<sup>4</sup>

In other words, Mr. bin ‘Attash argued the Prosecution had to establish that if Mr. bin ‘Attash was involved in the September 11, 2001 attacks, he did not do so at the behest of the Saudi government.

b. On 8 March 2017, Mr. Ali (a.k.a. al Baluchi) partially joined Mr. bin ‘Attash’s motion, specifically declining to join in that part of the motion that indicated a possibility that Mr. bin ‘Attash would assert belligerent privilege.<sup>5</sup> Mr. Ali also disclaimed any intent to argue that the Saudi government was involved in any way in the September 11, 2001 attacks.<sup>6</sup> Instead, Mr. Ali claimed information in the redacted 28 pages would support Mr. Ali’s notion that the attacks on September 11, 2001 did not occur in the context of, or associated with, hostilities between al Qaeda and the United States.<sup>7</sup> Mr. Ali argued the redacted pages support Mr. Ali’s contention that the United States treated the al Qaeda threat as a law enforcement, diplomatic, and intelligence problem—not as an object of hostilities.<sup>8</sup>

c. In response to Mr. bin ‘Attash’s argument, the Prosecution maintained that the Joint Inquiry Mr. bin ‘Attash seeks to have unredacted is a Congressional record, and the Prosecution accordingly is not allowed to release the document via discovery.<sup>9</sup> Per the Prosecution, “[i]t is clear that Congress retains possession and control over the [Joint Inquiry], and has neither relinquished control nor waived its respective privilege over the Report.”<sup>10</sup> The Prosecution argued in the alternative that even if the Joint Inquiry is not privileged, Mr. bin ‘Attash failed to

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<sup>4</sup> AE 494 (WBA) at 7-8.

<sup>5</sup> AE 494A (AAA), Mr. al Baluchi’s Notice of Declination of Joinder and Motion to Consider Other Arguments or for Other Relief Regarding AE 494 (WBA), filed 8 March 2017, at 1.

<sup>6</sup> AE 494 (AAA) at 2.

<sup>7</sup> AE 494 (AAA) at 2.

<sup>8</sup> AE 494 (AAA) at 2.

<sup>9</sup> AE 494B (GOV), Government Response to Defense Motion to Compel the Production of Unredacted 28 Pages from the Joint Congressional Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 1001, filed 14 March 2017 at 4-5.

<sup>10</sup> AE 494B (GOV) at 5.

establish the information in the Joint Inquiry Mr. bin ‘Attash sought was relevant and material to the preparation of the defense. The Prosecution stated that it took its discovery obligations seriously and would continue to produce discoverable material.<sup>11</sup>

d. In response to Mr. Ali’s argument, the Prosecution contested Mr. Ali’s assertion that hostilities did not exist between the United States and al Qaeda at the time of the September 11 attacks.<sup>12</sup> The Prosecution again asserted the 28 pages were a Congressional record, and thus not releasable in discovery by the Prosecution.<sup>13</sup> The Prosecution argued that, even though the 28 pages are not releasable, the Federal Bureau of Investigation (FBI) report on the attacks of September 11, 2001 that provides the data for the 28 pages, has been produced in discovery, and thus the Prosecution’s discovery obligation has been fulfilled. “The fact that another branch of the government repackaged these same Executive Branch documents and came to their own conclusions about the subject matter does not now make the repackaged items discoverable; especially where the Defense has been given (or will be given) the discoverable information contained in the source documents from the actual FBI investigation.”<sup>14</sup>

e. On 16 May 2017, the Commission heard oral argument. Mr. bin ‘Attash argued that “[t]he 28 pages tell a story. It’s a summary of an investigation that is based on . . . tens, if not hundreds of FBI 302s and Central Intelligence Agency memoranda. . . .”<sup>15</sup> Mr. bin ‘Attash asserted the redactions “point to documents, memoranda, leads that, if taken or if provided to the defense, would provide favorable evidence. . . .”<sup>16</sup> Mr. Ali argued the redacted 28 pages would show the potential involvement of Saudi nationals in the attacks of September 11, 2001, and

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<sup>11</sup> AE 494B (GOV) at 9.

<sup>12</sup> AE 494C (GOV), Government Response to Mr. Ali’s Notice of Declination of Joinder and Motion to Consider Other Arguments or for Other Relief Regarding AE 494 (WBA), filed 22 March 2017 at 2-3.

<sup>13</sup> AE 494C (GOV) at 8.

<sup>14</sup> AE 494C (GOV) at 8.

<sup>15</sup> See Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 16 May 2017 from 1:35 P.M. to 3:07 P.M. at 15895.

<sup>16</sup> Transcript at 15891.

bolster Mr. Ali's argument that the United States was not in hostilities with al Qaeda on September 11, 2001.<sup>17</sup>

f. The Prosecution argued that an FBI agent had been "given access for the specific purpose of reviewing the redactions, the unredacted form."<sup>18</sup> The Prosecution assured the Commission that the underlying documents, if material or exculpatory, would be turned over to the Defense.<sup>19</sup> The Prosecution also assured the Commission it was compiling discoverable material relating to hostilities, as requested by Mr. Ali.<sup>20</sup>

## 2. Law.

a. In a military commission, the Prosecution, as is true in all criminal cases, has the responsibility to determine what information it must disclose in discovery. Rule for Military Commissions (R.M.C.) 701(b)-(c); *United States v. Briggs*, 48 M.J. 143 (C.A.A.F. 1998); *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987). "[T]he prosecutor's decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance." *Ritchie*, 480 U.S. at 59. It is incumbent upon the Prosecution to execute this duty faithfully, because the consequences are dire if it fails to do so. *See United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015) (finding no abuse of discretion in military judge's dismissal with prejudice of charges due to a Prosecution discovery violation); *United States v. Bowser*, 73 M.J. 889 (A.F.Ct.Crim.App. 2014), *summarily aff'd* 74 M.J. 326 (C.A.A.F. 2015) (same).

b. Information is discoverable if it is material to the preparation of the defense as defined in R.M.C. 701(c)(1-3), or exculpatory, as explained by R.M.C. 701(e) and *Brady v. Maryland*, 373 U.S. 83, 88 (1963). Information is also discoverable if there is a strong indication that the

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<sup>17</sup> Transcript at 15900-15901.

<sup>18</sup> Transcript at 15919.

<sup>19</sup> Transcript at 15920.

<sup>20</sup> Transcript at 15921. The Commission considered all the pleadings and arguments presented by the parties, even those not specifically cited in the ruling.

information will play an important role in uncovering admissible evidence, assist in impeachment, corroborate testimony, or aid in witness preparation. *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993). Finally, information is discoverable if it is material to sentencing. R.M.C. 701(e)(3).

### 3. Analysis.

a. The Prosecution has assured the Commission it has been fulfilling its discovery obligations, and will continue to do so. Courts ordinarily do not review information the prosecution does not provide to the defense, and the Commission declines to do so in this circumstance. The Prosecution should be well aware of its responsibilities and the severe consequences for failing to fulfill them. Depending on the severity of the discovery violation, the sanction against the Prosecution could range from granting the Defense a continuance, to prohibiting the Prosecution from presenting certain evidence, to even dismissal of one or more charges. *Stellato*, 74 M.J. at 488.

b. The Prosecution has also represented that the redacted 28 pages are part of a Congressional record that is not in the custody or control of the Executive Branch, and the Prosecution has no authority to provide it to the Defense. More importantly, the Prosecution has assured the Commission that the documents that provide the basis for the Joint Inquiry have been provided (to the extent they are discoverable) to the Defense.<sup>21</sup> As Counsel for Mr. bin ‘Attash stated, the Joint Inquiry provides a summary of the FBI’s investigation; it is not the investigation itself.<sup>22</sup> The investigative reports and other information that provide the basis for the Joint Inquiry have been or will be provided to the Defense. Under these circumstances, there has been

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<sup>21</sup> Federal Bureau of Investigation 302s have been the subject of a separate motion before this Commission. AE 161J, Order: Defense Motion to Require the Government to Comply with M.C.R.E. 506 Regarding Redaction of Unclassified Information, dated 16 June 2017.

<sup>22</sup> Unofficial/Unauthenticated Transcript at 15895.

no sufficient demonstration that (1) the Prosecution is failing to adequately fulfill its discovery obligations, or (2) unredacted copies of these specific documents are necessary for either Mr. bin 'Attash or Mr. Ali to develop the various theories and arguments to which they cite.

4. **Ruling.** The Defense motion is **DENIED**.

So **ORDERED** this 26th day of July 2017.

//s//  
JAMES L. POHL  
COL, JA, USA  
Military Judge