

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

AE255B(AAA)

**Mr. al Baluchi's Reply  
 to Government Response to  
 Motion to Compel Discovery**  
 Regarding Recordings of Mr. al Baluchi

7 February 2014

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

2. **Facts:**

Defendant supplements the facts in the principal brief as indicated here.

a. Except as stated in the classified addendum,<sup>1</sup> the government has failed to produce responsive information to this discovery request.

b. CAPT Patrick McCarthy, USN, former Staff Judge Advocate of Joint Task Force-Guantanamo twice testified about the existence of detainee recordings. In a deposition, CAPT McCarthy discussed issues addressed by the Convening Authority and JTF-GTMO, including "access to videotapes of foreign delegations meeting with their nationals. And the [other] one was access to ICRC records."<sup>2</sup> CAPT McCarthy later testified about "ICRC tapes" and "recordings of foreign government officials' meetings speaking with their nationals here in Guantanamo."<sup>3</sup>

c. A few months later, at the December 2008 RMC 803 hearing, CAPT McCarthy testified that, "I am aware that certainly individuals watched interviews of the detainees, but they

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<sup>1</sup> **Att. B.** Per guidance, Attachments B and E are filed under seal, and Mr. al Baluchi has not provided copies to counsel for other defendants. Mr. al Baluchi, Mr. Mohammad, and Mr. bin 'Attash object to this sealing, and respectfully request the military commission to permit Mr. al Baluchi to provide them with copies of Attachments B and E. Mr. bin al Shaibah and Mr. al Hawsawi have not stated a position.

<sup>2</sup> Att. C, pp. 41-42, 2008-07-03 CAPT McCarthy deposition excerpts in *United States v. Jawad*.

<sup>3</sup> Att. D at 163-164, 2008-12-08 RMC 803 excerpts re CAPT McCarthy Testimony.

themselves, didn't access detainees personally.”<sup>4</sup> CAPT McCarthy further testified that these monitors were prosecutors in the high-value detainee cases. The prosecutors were in the same building but outside the interview rooms.<sup>5</sup> This occurred in approximately January 2007,<sup>6</sup> which was the same timeframe in which a joint FBI-CITF team interrogated Mr. al Baluchi.

### **3. Law and Argument:**

There are several contexts in which the government had the ability to monitor and/or record Mr. al Baluchi's statements, including but not limited to:

- (1) Communications to/from defense counsel and habeas counsel;
- (2) Communications to/from the ICRC;
- (3) Communications to/from foreign governments (if any);
- (4) Purported voice exemplars;
- (5) Statements to law enforcement, including the January 2007 'clean team' statements;
- (6) Statements made prior to Mr. al Baluchi's 2006 transfer to Guantanamo Bay.

Of course, recordings of a defendant are “statements” within the meaning of the criminal discovery rules.<sup>7</sup> “Generally speaking, the production of a defendant's statements has become ‘practically a matter of right even without a showing of materiality.’”<sup>8</sup>

Against this backdrop, the government offers nothing. In its oppositional brief, the government never addresses whether it recorded any of these categories of communication. Put simply, because of the government's complete silence on this topic, no one—the defense, the military commission, nor the public—knows whether the government recorded Mr. al Baluchi in these six scenarios. If recording occurred, the recordings are responsive to the discovery request.

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<sup>4</sup> Att. D at 158.

<sup>5</sup> *Id.* at 158-159.

<sup>6</sup> *Id.*

<sup>7</sup> *United States v. Brodie*, 871 F.2d 125, 128-29 (D.C. Cir. 1989); *United States v. Bryant*, 439 F.2d 642, 647 (D.C. Cir. 1971), *overruled in part on other grounds*, *Arizona v. Youngblood*, 488 U.S. 51 (1988); *United States v. Kersey*, 494 F. Supp. 2d 669, 671 (S.D. Ohio 2006).

<sup>8</sup> *United States v. Yunis*, 867 F.2d 617, 621-22 (D.C. Cir. 1989) (quoting *United States v. Haldeman*, 559 F.2d 31, 74 n.80 (D.C. Cir. 1976)).

If policy allowed, prohibited, or limited such recording, the policy is responsive to the discovery request. If a decision-maker directed JTF-GTMO or other agencies to record or not record, those communications are responsive to the discovery request.

Even as to the specific instances, the government is strangely silent. It never addresses the REDWOLF program. [REDACTED]

[REDACTED] Most surprising, the government is resoundingly silent on the issue of prior monitoring of attorney/client communication. Mr. al Baluchi's request for policy regarding recording detainees was simple and straightforward, where he requested "any and all government policies, procedures, guidance, orders, and/or instructions regarding the recording (of any kind and in any format) of detainees now or ever held at Guantanamo Bay."

Unfortunately, the government's response tells the military commission nothing. According to the government:

- (1) it does not admit whether any such policies exist;
- (2) it does not deny whether any such policies exist;
- (3) it has not asserted any privilege; and
- (4) such policies are not material.

Clearly such policies are indeed material because they inform the ultimate issue of whether recordings could have been, should have been, or actually were made. Moreover, if recordings were destroyed, the policies may be relevant to sanctions.<sup>9</sup>

The Military Judge should not allow the government to continue to make these

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<sup>9</sup> See generally *Park v. City of Chicago*, 297 F.3d 606, 615 (7th Cir. 2002) (noting the general rule that violation of a record retention regulation creates a presumption that the missing record contained evidence adverse to the violator); *Raher v. Federal Bureau of Prisons*, 2012 WL 2721613 at \*2 (D. Or. July 9, 2012) (discovery of retention policies was relevant and permitted because inter alia, if records were destroyed in violation of applicable authorities, the policies would be relevant to a finding of contempt or a referral to the Special Counsel).

proceedings more opaque than they are now. Clearly this evidence is discoverable. It is material to the preparation of the defense and discoverable under Rule for Military Commission (“RMC”) 701 and the Fifth and Eighth Amendments.<sup>10</sup> Further, the government is required to turn over all statements that tend to exculpate the defendant and mitigate his potential sentence.<sup>11</sup> The government should either produce responsive information or make affirmative representations subject to penalty of perjury and sanction that such recordings and/or policies do not exist.

4. **Attachments:**

- A. Certificate of Service;
- B. **Classified Addendum** (filed under seal);
- C. CAPT McCarthy deposition excerpts in *United States v. Jawad*;
- D. RMC 803 excerpts re CAPT McCarthy Testimony;
- E. **Classified attachment** (filed under seal).

Very respectfully,

//s//

JAMES G. CONNELL, III  
Learned Counsel

Counsel for Mr. al Baluchi

//s//

STERLING R. THOMAS  
Lt Col, USAF  
Defense Counsel

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<sup>10</sup> Apart from his other constitutional arguments, given the importance of Mr. al Baluchi’s statements to his defense as a whole, they are admissible as a matter of right under the Due Process Clause regardless of whether RMC 701 and/or the Military Commission Rules of Evidence would otherwise bar them. *Mississippi v. Chambers*, 410 U.S. 284, 302 (1973) (prior statements by a witness admissible to impeach witness regardless of state evidence rules that would otherwise bar them).

<sup>11</sup> RMC 701(e); *Brady v. Maryland*, 373 U.S. 83 (1963).

# **Attachment A**

**CERTIFICATE OF SERVICE**

I certify that on the 7th day of February, 2014, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email. Attachments B and E were provided only to the Clerk of the Court and prosecution, via SIPRNet.

//s//

JAMES G. CONNELL, III

*Learned Counsel*

# **Attachment B**

## **Filed on SIPR**

**United States v. KSM et al.**

**APPELLATE EXHIBIT 255B (AAA)**

**Attachment B  
(Pages 8-12)**

~~**SECRET**~~

**APPELLATE EXHIBIT 255B (AAA) is located in  
original record of trial Secret Annex.**

**POC: Chief, Office of Court Administration  
Office of Military Commissions**

**United States v. KSM et al.**

**APPELLATE EXHIBIT 255B (AAA)**

# **Attachment C**

1 personally observed. Well, he has established the  
2 foundation that he has been a legal advisor, Staff  
3 Judge Advocate several times, including general court  
4 martial convening authority, SJA, so I think he has  
5 familiarity with the roles and responsibilities of  
6 that.

7 COLONEL MORRIS: Objection, because he's  
8 asking for opinion as an expert, and the witness has  
9 not been so qualified and shouldn't have the burden  
10 of answering such a question.

11 LTC. [REDACTED]: If you can rephrase the  
12 question in a way that does not -- I mean, are you  
13 asking for his expert opinion based on his own  
14 experiences?

15 MAJOR FRAKT: I'm asking for him to  
16 describe anything else unusual that could have been  
17 construed as unlawful influence by those who were  
18 present.

19 LTC. [REDACTED]: That's not -- I mean, I  
20 understand you asked it in a question way, but I  
21 don't see --

22 BY MAJOR FRAKT:

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1 Q. Let me try one more time. Captain  
2 McCarthy, did any other actions that General Hartmann  
3 took as the legal advisor strike you as unusual?

4 A. The -- as I described it, it struck me as  
5 unusual that General Hartmann dismissed Staff Judge  
6 Advocates from the room when speaking directly with  
7 senior leadership of other commands. It's not been  
8 my experience that Staff Judge Advocates speak with  
9 senior leadership about the commands, particularly  
10 not without their counsel present. Other than that,  
11 from a -- from a Staff Judge Advocate perspective, I  
12 don't think that I have seen anything that I would  
13 deem to be unusual.

14 Q. What about berating your subordinates?

15 A. Well, again, from a Staff Judge Advocate  
16 perspective, I would not deem that to be unusual. I  
17 don't have personal knowledge of him berating his  
18 subordinates. He did not berate my subordinates. He  
19 berated me in front of my subordinates which I found  
20 to be offensive, and I came up with, you know, ways  
21 to work around that.

22 He is a general officer and I respect that

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1 rank deeply. And I worked out a way with my client  
2 to -- to overcome that and continue to move forward  
3 in a way that I thought was professional and was  
4 constructive and helped the process move forward.

5 Q. You mentioned earlier that you were aware  
6 of General Hartmann being in certain buildings on  
7 June 19th. Were you aware of any other personnel  
8 that were accompanying him throughout the day that we  
9 might be able to talk to who would have observed what  
10 he was doing?

11 A. Well, he has an aide, an aide-de-camp who  
12 was assigned to him. He was with him. I saw him a  
13 couple of times that day. He was with him. I'm sure  
14 that he could probably provide additional  
15 information. But I have no personal knowledge that  
16 he watched any part of the testimony on that day.

17 MAJOR FRAKT: I understand. I'll turn him  
18 over to you, Colonel Morris.

19 LTC. [REDACTED] Sir, do you have any  
20 questions? Proceed, sir.

21 CROSS-EXAMINATION BY COUNSEL FOR GOVERNMENT

22 BY COLONEL MORRIS:

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Patrick McCarthy

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1 Q. On the issue of watching the testimony, am  
2 I correct that your testimony is he had the  
3 opportunity to do so had he wanted to do so?

4 A. The building is technically capable of  
5 carrying that. And yes, he would have had the  
6 opportunity had he wished to. And again, I have no  
7 knowledge that he did.

8 Q. I understand. On the issue of, as you  
9 responded to your counsel or to counsel's question  
10 about identifying himself with prosecution efforts,  
11 isn't it right that a number of the issues that you  
12 and he dealt with each other on, and some of the ones  
13 that became controversial or matters of debate were  
14 not prosecution specific, but had to do with the  
15 process and had equal impact on defense, as well as  
16 prosecution?

17 A. The issues that we dealt with -- I'll go  
18 down the five issues that became most contentious.  
19 One was joint meetings for the, for defense counsel,  
20 defense military commissions counsel and habeas  
21 counsel. That's one.

22 The second one was access to medical

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1 records. The third one was access to intelligence  
2 information. The fourth one was access to videotapes  
3 of foreign delegations meeting with their nationals.  
4 And the fifth one was access to ICRC records.

5 In each of those, in each of those  
6 discussions, the issue became the requirement of the  
7 prosecution to get access to those records so that  
8 the prosecution could meet its legal obligation to  
9 provide exculpatory information for the defense,  
10 provide discoverable information for the defense, but  
11 also to do their own due diligence with respect to  
12 those cases.

13 Now I want to be clear here. I am not an  
14 expert on the -- on what influence is proper or  
15 appropriate or improper and inappropriate with  
16 respect to the legal advising convening authority for  
17 military commissions. I'm merely stating my  
18 interaction with General Hartmann on those issues.  
19 And the judge, I suppose, can figure out, you know,  
20 whether it's right, wrong or indifferent.

21 I did not have those conversations by and  
22 large with the head prosecutor, and I did not have

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1 those conversations by and large with the head  
2 defense counsel. I had those conversations with the  
3 legal advisor to the military commissions, to the  
4 convening authority.

5 Q. And during a number of issues, as you've  
6 recounted it, he was pushing for access to  
7 information so that, among other things, Brady or  
8 exculpatory type material could be provided to the  
9 defense?

10 A. That's correct.

11 Q. And were not most of the matters of  
12 disagreement or discussion between the two of you  
13 issues having to do with how to make that happen as  
14 opposed to whether it should happen?

15 A. That's a fair statement. Yes.

16 Q. And to look at -- just to take one of  
17 those several as an illustration, to look at the  
18 issue of defense counsel access, isn't it accurate to  
19 say that General Hartmann was pushing to maximize  
20 defense counsel access to the facilities and to their  
21 clients, not to reduce it?

22 A. That's fair. Yes. That's a fair and

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Patrick McCarthy

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1 accurate statement. Absolutely.

2 COLONEL MORRIS: Colonel [REDACTED] I have no  
3 further questions at this time.

4 LTC. [REDACTED] Major Frakt, based upon the  
5 cross-examination of the government counsel, do you  
6 have any further questions.

7 MAJOR FRAKT: Nothing further.

8 LTC. [REDACTED]: Just one administrative  
9 matter, I did not swear you in as the reporter, but  
10 if we can swear you in, and then if you could state  
11 your name for the record.

12 Whereupon,

13 [REDACTED]  
14 was sworn to report the proceedings correctly.

15 MAJOR FRAKT: I would just ask if there  
16 is -- the judge indicated, I think, he was going to  
17 actually write an expanded order, so if he does, that  
18 should be appended. But other than that, nothing  
19 further.

20 LTC. [REDACTED]: Colonel Morris, anything  
21 further from the government?

22 COLONEL MORRIS: No, ma'am.

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Patrick McCarthy

Arlington, VA

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1 LTC. [REDACTED]: Thank you. This deposition is  
2 in recess.

3 (The proceedings adjourned at 11:16 a.m.)  
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1       U N I T E D S T A T E S )  
 2               V S.                               )   C E R T I F I C A T E   O F   C O R R E C T I O N  
 3       M O H A M M E D   J A W A D               )   

4       -----  
 5       The record of deposition in the above case, which was  
 6       ordered by Military Commission convened by Convening  
 7       Order (RMC) 702 Office of the Convening Authority,  
 8       Office of Military Commissions, Washington, DC, Dated  
 9       26 June 2008, at Arlington, Virginia, is corrected by  
 10      the insertion on page \_\_\_\_\_, immediately following  
 11      line \_\_\_\_\_, of the following:

AUTHENTICATION OF CORRECTION

15      I have examined the correction to the record of trial  
 16      in the above referenced case and find it accurately  
 17      reports the proceedings. I authenticate the  
 18      correction in accordance with R.M.C. 1104.

19      \_\_\_\_\_  
 20      Date   Stephen R. Henley  
 21   Colonel, U.S. Army  
 22   Military Judge

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*CERTIFICATE OF REPORTER*

I, [REDACTED], RPR, CRR, do hereby certify that the foregoing transcript is a true and correct record of the statements of Counsel; that I am neither counsel for, related to, nor employed by any of the parties to the action; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

[REDACTED]

*Notary Public in and for  
the District of Columbia*

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AUTHENTICATION OF DEPOSITION

of

PATRICK M. McCARTHY, Captain, USN

In the Case of

UNITED STATES

vs.

MOHAMMED JAWAD

I certify that on the 3rd day of July, 2008, at Arlington, Virginia, the above deposition was taken by me in the presence of counsel for the government and the accused. The accused was not present. The above-named witness, having been duly sworn by me, gave the foregoing testimony. I further certify that the detailed reporter, [REDACTED] was duly sworn during the hearing.

[REDACTED]

Deposition Officer

11 JUL 08

Date

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AUTHENTICATION OF DEPOSITION

of

PATRICK M. McCARTHY, Captain, USN

ERRATA SHEET

<u>Page #</u>	<u>Line</u>	<u>Current</u>	<u>Corrected</u>
1	15	Air Force	Army
1	17	Air Force	Army
4	15	SJ	SJA
7	22	radio	video



Deposition Officer

11 JUL 08  
Date

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CONVENING AUTHORITY

**OFFICE OF THE SECRETARY OF DEFENSE**  
OFFICE OF MILITARY COMMISSIONS  
1600 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1600

June 30, 2008

MEMORANDUM FOR: LTC [REDACTED] USA, DAJA-LA

SUBJECT: Appointment as Deposition Officer

In accordance with Rule for Military Commissions (RMC) 702(d)(1), and with the concurrence of your commander, you are hereby appointed as the deposition officer for the deposition of CAPT Patrick McCarthy, USN, Staff Judge Advocate, JTF-GTMO, in the case of United States v. Mohammed Jawad. The deposition has been previously scheduled for 3 July 2008, at the Office of Military Commissions, 2521 South Clark Street [REDACTED] Arlington, Virginia 22202. You are to conduct the deposition in accordance with the order of the military commission dated 26 June 2008 and RMC 702.

Susan J. Crawford  
Convening Authority  
for Military Commissions

Attachment  
Order dtd 26 June 2008

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Appellate Exhibit (255B7AAA)  
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# **Attachment D**

1 [The R.M.C. 803 was called to order at 0900, 8 December 2008.]

2 MJ [COL HENLEY]: This military commission is called to order.  
3 All parties present when the commission recessed are again present  
4 with a number of exceptions and perhaps an addition on the  
5 prosecution side. Some members of the prosecution team are absent  
6 based on prior excusals by the military judge.

7 Mr. Swann, are you able to identify those persons?

8 CTC [MR. SWANN]: I am, Your Honor. Major Jeffrey Groharing,  
9 who was not at the last session but was at the session before that,  
10 is excused for this session. The following two members of the  
11 prosecution team have permanently been excused from this case, Mr.  
12 Thomas Swanton with the Department of Justice and Mr. Jordan  
13 Goldstein with the Department of Justice.

14 In addition to that, Mr. Ed Ryan has returned for this  
15 session and Colonel Larry Morris is also present for this session. I  
16 believe that accounts for all the members of the prosecution.

17 MJ [COL HENLEY]: Mr. Swann, are you aware of any additions or  
18 absences with regard to defense counsel?

19 CTC [MR. SWANN]: Your Honor, with respect to--I believe one of  
20 the civilian consultants, Ms. Nina Ginsberg is not present for this  
21 process--for this proceeding. In addition to that, I believe all  
22 other parties are accounted for.

23 MJ [COL HENLEY]: Thank you. On that issue, prior to this

1 MJ [COL HENLEY]: No?

2 DC [CDR LACHELIER]: Well, we have an additional motion we need  
3 file in light of the government's response in discovery, though.

4 MJ [COL HENLEY]: Okay.

5 DC [CDR LACHELIER]: But we can address one of the discovery  
6 motions.

7 MJ [COL HENLEY]: At some time, Commander Lachelier, we will go  
8 on the record to resolve the discovery issues.

9 DC [CDR LACHELIER]: That's right, sir.

10 MJ [COL HENLEY]: Assuming they can be resolved, when were you  
11 prepared to proceed on the 909? The commission assumes that you had  
12 additional witnesses that you were going to call.

13 DC [CDR LACHELIER]: On the 909?

14 MJ [COL HENLEY]: Are you looking for early January?

15 DC [CDR LACHELIER]: Sir, I--frankly, the way--the way this  
16 proceeding on the 9--706 and 909 has gone, I don't see it happening  
17 before February or March.

18 MJ [COL HENLEY]: All right. I see Captain McCarthy is here.  
19 So we'll return to this issue shortly.

20 DC [CDR LACHELIER]: Yes, sir.

21 TC [MR. TRIVETT]: Yes, sir.

22 **CAPTAIN PATRICK MICHAEL MCCARTHY, U.S Navy, was called as a witness**  
23 **for the defense, was sworn, and testified as follows:**



1 A [CAPT MCCARTHY]: I was the Deputy--Deputy Legal Counsel to  
2 the Chairman of the Joint Chiefs of Staff.

3 Q [LT FEDERICO]: Sir, I would like to invite your attention to  
4 September of 2006. Were you on the island during that month?

5 A [CAPT MCCARTHY]: I was.

6 Q [LT FEDERICO]: Sir, do you recall when it was that the five  
7 detainees in this case and the other, what I'll call or the  
8 government has called, high-value detainees were transferred to  
9 Guantanamo?

10 A [CAPT MCCARTHY]: I do.

11 Q [LT FEDERICO]: And, sir, why were you told they were being  
12 transferred here?

13 TC [COL MORRIS]: Objection, relevance, Your Honor.

14 DC [LT FEDERICO]: Sir, the----

15 MJ [COL HENLEY]: Counsel?

16 DC [LT FEDERICO]: D-001, it goes to the unlawful influence of--  
17 it is focused on General Hartmann, but in addition to senior  
18 political appointees. The whole crux of this motion is to determine  
19 whether or not, when Judge Crawford referred these charges, she did  
20 so after receiving impartial, objective, pretrial advice and that  
21 there were no influences upon her.

22 The decision by the United States Government to transfer  
23 these individuals here was undoubtedly made at the highest levels.

1 Starting at that point then, sir, I would like to know from the Joint  
2 Task Force-----

3 MJ [COL HENLEY]: Thank you, Counsel.

4 Captain McCarthy, you can answer the question. Who told  
5 you that they were being transferred to Guantanamo Bay?

6 WIT [CAPT MCCARTHY]: Dr. Steve Cambone came to Guantanamo and  
7 advised us that we would be receiving detainees who would be brought  
8 to Guantanamo to face trial by military commission.

9 Q [LT FEDERICO]: Sir, who is Dr. Cambone?

10 A [CAPT MCCARTHY]: He was Under Secretary of Defense for  
11 Intelligence.

12 Q [LT FEDERICO]: And, sir, did he tell you why again they were  
13 being transferred here?

14 TC [COL MORRIS]: Objection, Your Honor.

15 MJ [COL HENLEY]: Sustained.

16 Q [LT FEDERICO]: Sir, at any point when you were the SJA at  
17 JTF-GTMO, did you participate in or overhear conversations regarding  
18 the charging of this case?

19 A [CAPT MCCARTHY]: I'm not sure that I recall hearing specific  
20 conversations about the specific charging in the case of the  
21 individuals sitting here. In your individual case, who do you  
22 represent again?

23 Q [LT FEDERICO]: Mr. Binalshibh, sir.

1 A [CAPT MCCARTHY]: No, I don't recall specific discussions  
2 about specific charging issues prior to the time that they were  
3 charged. We--I was the one who read Mr. Binalshibh his charges.

4 Q [LT FEDERICO]: Sir, let's talk about that. Who directed you  
5 to do that?

6 A [CAPT MCCARTHY]: I was asked to do that by the Office of  
7 Military Commissions Prosecution.

8 Q [LT FEDERICO]: And specifically who was that, sir?

9 A [CAPT MCCARTHY]: I believe it was Mr. Swann who asked me to  
10 do that.

11 Q [LT FEDERICO]: And do you recall, sir, when that was?

12 A [CAPT MCCARTHY]: I don't recall the specific date, but it's  
13 marked on--on the documentation.

14 Q [LT FEDERICO]: Sir, when did you first learn that the charges  
15 had, in fact, been referred?

16 A [CAPT MCCARTHY]: When we received the charges to serve.

17 Q [LT FEDERICO]: Now, you stated that you don't recall any  
18 specific discussions regarding the charging of Mr. Binalshibh or the  
19 other four co-accused, but what about general discussions about the  
20 charging of the high-value cases? Was there ever any discussions  
21 with either OMC personnel or anyone from the convening authority's  
22 office about cases being charged in the commissions?

23 A [CAPT MCCARTHY]: There were simply general discussions that

1 these individuals would be charged with offenses under the Military  
2 Commissions Act.

3 Q [LT FEDERICO]: And when do you first recall those discussions  
4 being answered?

5 A [CAPT MCCARTHY]: Those discussions were begun from the very  
6 time that they arrived, that there was--that they would be--that they  
7 would be charged under the Military Commissions Act.

8 Q [LT FEDERICO]: And, sir, how often would you say those  
9 discussions took place?

10 A [CAPT MCCARTHY]: I can't really put a number on it. It was  
11 just a--it was a general understanding. And it--there were  
12 discussions every now and then simply indicating that they would be  
13 charged. And the Office of Military Commissions Prosecution, they  
14 dealt with developing what charges they were going to bring forth.

15 Q [LT FEDERICO]: Sir, as the SJA for JTF Guantanamo, did you  
16 help facilitate access to these individuals and access to information  
17 about them?

18 A [CAPT MCCARTHY]: As the SJA, I participated in discussions  
19 about when access would be given and who would have access during--  
20 throughout the time that I was the SJA.

21 Q [LT FEDERICO]: And, sir, did that include access by persons  
22 who would be making charging decisions?

23 A [CAPT MCCARTHY]: No. I am not aware that--that anyone who I-

1 -who I would consider a person making a charging decision, that would  
2 be a prosecutor that would be anyone in OMC, outside of a prosecutor,  
3 I am not aware of them having specific--specific access to the  
4 detainees, although, I am aware that certainly individuals watched  
5 interviews of the detainees, but they, themselves, didn't access the  
6 detainees personally.

7 Q [LT FEDERICO]: And, sir, how are you aware that individuals  
8 that would have charging decisions witnessed these interviews?

9 A [CAPT MCCARTHY]: Witness interviews----

10 TC [COL MORRIS]: Objection, Your Honor, again to the relevance  
11 of the line of questioning having to do with prosecutorial  
12 preparation.

13 MJ [COL HENLEY]: Overruled.

14 WIT [CAPT MCCARTHY]: Because I witnessed individuals witnessing  
15 interviews.

16 Q [LT FEDERICO]: And, sir, we're talking generically. Can you  
17 be specific, and not necessarily all by names, but by the specific  
18 positions they held, as to the persons that were witnessing these  
19 interviews taking place?

20 A [CAPT MCCARTHY]: Well, they were--they were prosecutors, and--  
21 -actually, I want to back up. The individuals that I saw weren't  
22 actually witnessing the interviews. They were in a building where  
23 the interviews were being witnessed.

1           But I have to say that on further reflection they were  
2 actually outside of that room, and they were--they were prosecutors  
3 in the high-value detainee prosecution team.

4           Q [LT FEDERICO]: Sir, do you recall approximately the month and  
5 year that that occurred?

6           A [CAPT MCCARTHY]: It was the January timeframe of 2007.

7           Q [LT FEDERICO]: Sir, were you ever present when there were any  
8 meetings held with Brigadier General Hartmann and members of the  
9 prosecution?

10          A [CAPT MCCARTHY]: Not that I recall.

11          Q [LT FEDERICO]: Sir, were you ever present with Brigadier  
12 General Hartmann here at JTF-GTMO?

13          A [CAPT MCCARTHY]: Yes.

14          Q [LT FEDERICO]: And how often did that occur?

15          A [CAPT MCCARTHY]: I was in three or four meetings with General  
16 Hartmann.

17          Q [LT FEDERICO]: And what types of meetings were those, sir?

18          A [CAPT MCCARTHY]: The first one was in November of 2007.  
19 General Hartmann laid out a plan of action, a chart indicating the  
20 cases as he saw them that would proceed, and the months that they  
21 would proceed, and what the flow--basically, it was a flow chart, how  
22 many cases would proceed and the months, and so forth, and so on.

23          Q [LT FEDERICO]: Sir, do you know who created that flow chart?

1 A [CAPT MCCARTHY]: He said he did.

2 Q [LT FEDERICO]: And did that flow chart include this case?

3 A [CAPT MCCARTHY]: I don't recall whether specific ISNs were on  
4 that flow chart.

5 Q [LT FEDERICO]: Sir, did it allude to any capital cases?

6 A [CAPT MCCARTHY]: I don't recall that any capital cases were  
7 alluded to either.

8 Q [LT FEDERICO]: Sir, did it include any information about  
9 high-value detainee cases?

10 A [CAPT MCCARTHY]: I believe it indicated that the high-value  
11 detainee cases would start somewhere in the May--April and May  
12 timeframe of 2008.

13 Q [LT FEDERICO]: And, sir, by "start," what do you mean by  
14 that?

15 A [CAPT MCCARTHY]: That the--that the initial proceedings would  
16 begin in that timeframe.

17 Q [LT FEDERICO]: So by "initial proceedings," are you referring  
18 to such as an arraignment, sir?

19 A [CAPT MCCARTHY]: Yes.

20 Q [LT FEDERICO]: And why was he showing this to you, sir?

21 A [CAPT MCCARTHY]: He had come down to brief the JTF on kind of  
22 his vision. This was right after the time that the Colonel Morris  
23 issue had been resolved, and he was coming down--basically, that was

1 his first--that was his--the commencement of his activities here in  
2 Guantanamo was that meeting.

3 He came down. He met with General Crawford outside of my  
4 presence. I came back in and--and raised an issue that the SJA had  
5 been--had not been present for that meeting, and he came back in, and  
6 briefed me on what he had briefed General Crawford.

7 Q [LT FEDERICO]: Sir, as the SJA, did you have any  
8 responsibility regarding oversight of the logistics for commission's  
9 proceedings?

10 A [CAPT MCCARTHY]: Yes, I did.

11 Q [LT FEDERICO]: So, sir, is it fair to say then that in  
12 November of 2007 that briefing was essentially your warning order to  
13 be prepared in terms of logistics, something of that nature?

14 A [CAPT MCCARTHY]: Yeah, I think so.

15 Q [LT FEDERICO]: And, sir, you mentioned that there were, I  
16 think, four to five meetings with General Hartmann. What was another  
17 one?

18 A [CAPT MCCARTHY]: Three to four meetings, I think, is what I  
19 said. There was a meeting--he--General Hartmann came down in the  
20 January timeframe to meet with Admiral Busby, and he brought some  
21 staff members, and Admiral Busby brought some staff members.

22 It was a pre-meeting between Admiral Busby, General  
23 Crawford, and General Hartmann. And then they came out and the

1 staffs and the principals went into a conference room. And General  
2 Hartmann was asking about certain things that he thought were  
3 important, certain aspects of moving forward he thought were  
4 important. And we provided responses on where we stood with respect  
5 to those things. So it was, basically, a logistical meeting.

6 Q [LT FEDERICO]: All right, sir. What were some of the aspects  
7 that he thought were important?

8 A [CAPT MCCARTHY]: I think some of the things he was talking  
9 about was--was some of the housing issues, vehicles, were the  
10 vehicles online, things about moving forward with the courtroom,  
11 things along that nature.

12 Q [LT FEDERICO]: Sir, in terms of logistics, does this case  
13 present any more logistical issues or challenges than some of the  
14 other commission's cases?

15 A [CAPT MCCARTHY]: Well, there--there are two different types  
16 of cases. There are what we call the high-value detainee cases and  
17 then there are the non-high-value detainee cases. There's a--there  
18 is a great difference in terms of the logistics that are required for  
19 this particular case simply because you have five defendants in the  
20 courtroom all at the same time.

21 We also have a much higher number of QR personnel and other  
22 logistical issues that are different here than they would be, say, in  
23 the courtroom up on the hill.

1 Q [LT FEDERICO]: So, sir, in this meeting in January 2008 with  
2 General Hartmann, did any of the issues regarding logistics focus on  
3 challenges that you believe were unique to a high-value multi-  
4 defendant case such as this one?

5 A [CAPT MCCARTHY]: I don't think so. I think, at that point,  
6 we were really--we hadn't shifted our focus to the high-value cases  
7 and the logistical challenges that would be present based upon high-  
8 value cases.

9 Q [LT FEDERICO]: And, sir, what was the next meeting you recall  
10 with General Hartmann regarding?

11 A [CAPT MCCARTHY]: The next meeting I specifically recall was a  
12 meeting in the May timeframe. General Hartmann came down and had set  
13 up meetings with the head of the Joint Intelligence Group and the  
14 Joint Medical Group to talk about release of intelligence information  
15 and medical information to OMC-P.

16 Q [LT FEDERICO]: And what was--in the course of that meeting,  
17 what did you learn General Hartmann's role to be in that release of  
18 that information?

19 A [CAPT MCCARTHY]: There had been an ongoing discussion, heated  
20 discussion about the release of that information by the JTF to OMC-P,  
21 and JTF had sought guidance from higher authority. There were five  
22 issues that were under discussion.

23 One was combined meetings between habeas counsel and

1 defense counsel, the next one was release of intelligence  
2 information, the next one was release of medical information, the  
3 next one was the release of ICRC tapes, and the last one was release  
4 of recordings of foreign government officials' meetings speaking with  
5 their nationals here in Guantanamo.

6 That particular meeting was--was directed at the head of  
7 the intelligence group and the head of the medical group with respect  
8 to intel and medical information.

9 Q [LT FEDERICO]: And, sir, you mentioned that this was a heated  
10 discussion. What did you mean by that?

11 A [CAPT MCCARTHY]: Well, it was a discussion that had--that--in  
12 that particular day, General Hartmann was very animated in how he  
13 addressed the head of the Joint Intelligence Group.

14 When I attempted to intercede on a couple of occasions to  
15 correct some of the statements that General Hartmann was saying in  
16 terms of why the Joint Intelligence--why the Joint Task Force was not  
17 comfortable simply releasing the information, he became angry with me  
18 for doing so. And as I say, it was a heated conversation. He was  
19 very upset that I was in the room, but General Zanetti took me into  
20 the room. So----

21 Q [LT FEDERICO]: And, sir, when you say he was very animated,  
22 what did you mean by that?

23 A [CAPT MCCARTHY]: Well, he was loud on a couple of occasions;

1 he swore. He wanted that information, and the Joint Task Force  
2 responded that we had sought guidance from higher authority, and we  
3 hadn't received that guidance, so we weren't in a position to provide  
4 the information.

5 Q [LT FEDERICO]: Sir, that information had been requested by  
6 the prosecution?

7 A [CAPT MCCARTHY]: It was requested by General Hartmann.

8 Q [LT FEDERICO]: And why did he request that information, sir?

9 A [CAPT MCCARTHY]: Well, I believe he requested it--well, he  
10 requested the information because he wanted it--for what we were  
11 told, he wanted it for purposes of the prosecution.

12 Q [LT FEDERICO]: And who told you that, sir?

13 A [CAPT MCCARTHY]: That's what he was saying.

14 Q [LT FEDERICO]: Sir, where did that meeting take place?

15 A [CAPT MCCARTHY]: It took place in the deliberation room of  
16 the courthouse.

17 Q [LT FEDERICO]: Which courthouse, sir?

18 A [CAPT MCCARTHY]: The courthouse up on the hill.

19 Q [LT FEDERICO]: So building AV 34; is that correct, sir?

20 A [CAPT MCCARTHY]: Yeah, I think that's what it is.

21 Q [LT FEDERICO]: And, sir, you mentioned that there were four  
22 meetings and you've described three. Do you recall the fourth?

23 A [CAPT MCCARTHY]: The next one was the following day with the

1 head of the Joint Medical Group, and it was a similar meeting. It  
2 was almost--I described it as a deposition afterwards, where General  
3 Hartmann was--was questioning the JTF personnel. So those were the  
4 four meetings that I specifically recall.

5 Q [LT FEDERICO]: And, sir, what do you mean by it was a  
6 deposition?

7 A [CAPT MCCARTHY]: It was--he was very pointed in the manner in  
8 which he was questioning the--the JTF members. And several times,  
9 when I interceded, he would say things like, "Well, who asked you?  
10 What are you even doing here," to the point where I then, in order to  
11 be able to respond to some of the things I thought were simply being  
12 posed incorrectly, I turned to General Zanetti, and I was--I started  
13 speaking to General Zanetti.

14 And when General Hartmann asked me, "Who asked you," I had  
15 to put my hand out and say, "I'm speaking with my client, sir." So  
16 it was a--it was a heated conversation that we had.

17 Q [LT FEDERICO]: And, sir, and not necessarily by name but by  
18 title, you mentioned that this was with a group of individuals from  
19 JTF. Who else was present in that meeting?

20 A [CAPT MCCARTHY]: I brought my deputy SJA and the current--and  
21 the current Deputy SJA. General Zanetti was present for the meeting.  
22 And then, I had, of course, the head of the Joint Intelligence Group  
23 was at his meeting, and then the head of the Joint Medical Group was

1 at his meeting.

2 Q [LT FEDERICO]: Sir, as the SJA, did you have any oversight  
3 function in terms of the access that defense attorneys would have to  
4 the clients once they were detailed?

5 A [CAPT MCCARTHY]: I didn't have an oversight function per se.  
6 I was the--I was in charge of facilitating defense counsel access to  
7 detainees for commissions and habeas purposes.

8 Q [LT FEDERICO]: And, sir, do you recall specifically the SJA  
9 office having a requirement that, for this case, the defense  
10 attorneys--excuse me one second, Your Honor.

11 **[Defense counsel conferred.]**

12 ADC [LT FEDERICO]: Sorry, Your Honor.

13 Q [LT FEDERICO]: Sir, again, do you recall a specific  
14 requirement that the defense attorneys for this case had to have not  
15 just the read-ons for the program, but a specific one from JTF-GTMO  
16 regarding where the individuals were kept and access to that  
17 information?

18 TC [COL MORRIS]: Objection, Your Honor, as to the relevance of  
19 this line of inquiry.

20 MJ [COL HENLEY]: Sustained.

21 Q [LT FEDERICO]: Sir, do you recall a dispute as to--between, I  
22 believe, you, or JTF-GTMO, and the convening authority's office in  
23 terms of whether or not defense lawyers could be read-on to the

1 program here on the ground, on the island, or in Washington, D.C., by  
2 the convening authority's office, specifically Mr. Chapman?

3 A [CAPT MCCARTHY]: Oh, I don't think it was a dispute. It was  
4 at the very beginning of the process, and we were attempting to work  
5 together to get counsel read-on. And by "read on," we're referring  
6 to--to get the proper clearances so they could have access to the  
7 detainees.

8 And there was--there was what I would consider to be the  
9 usual conversation going back and forth trying to make sure we had  
10 the right things in the right place at the right time. I think, at  
11 one point, there was a thought that--that we could do it here on the  
12 ground.

13 And then the folks in Washington, who own the program, who  
14 are the ones who have to authorize those kind of things, they were--  
15 they took a position and said, "No, you know, we would like to do it  
16 in Washington." So that's my recollection. I did not find that to  
17 be unusual at all. And I wouldn't--would not characterize that as a  
18 dispute in any way.

19 Q [LT FEDERICO]: Okay. Yes, sir, I didn't mean to  
20 mischaracterize it. I appreciate that. Sir, do you recall being  
21 notified that the convening authority's office required a memorandum  
22 of understanding to be signed by the defense lawyers before you would  
23 be allowed to give them access to clients?

1 A [CAPT MCCARTHY]: I think I do recall it.

2 TC [COL MORRIS]: Objection, Your Honor, relevance again.

3 MJ [COL HENLEY]: Counsel, this is a motion to dismiss for  
4 unlawful influence in the swearing for all the charges. Can we get  
5 to the point?

6 DC [LT FEDERICO]: Yes, sir. But the point of this specifically  
7 as it relates to General Hartmann is he has aligned himself with the  
8 prosecution office in terms of--and whether or not then he was taking  
9 part in functions, traditionally those taken on by the prosecution,  
10 such as access to evidence, discovery, access to clients. And I'm  
11 about to ask the next question whether or not he had a role in this  
12 memorandum of understanding.

13 MJ [COL HENLEY]: So you believe this witness will testify that  
14 General Hartmann imposed some restrictions on counsel access to  
15 information?

16 DC [LT FEDERICO]: Sir, I am certain that the convening  
17 authority's office provided this memorandum of understanding, but,  
18 again, having not had a chance to speak with this witness, frankly,  
19 I'm at a disadvantage of not knowing.

20 MJ [COL HENLEY]: Stop, stop. The objection is overruled. You  
21 may ask the question, and let's see what the response is.

22 DC [LT FEDERICO]: Thank you, sir.

23 Q [LT FEDERICO]: Sir, again the--were you aware that--was it

1 communicated to you that the convening authority's office had a  
2 memorandum of understanding that it was required that defense  
3 counsels must all sign before they could meet with the clients?

4 A [CAPT MCCARTHY]: I recall there was a memorandum of  
5 understanding of some sort that was required by the defense counsel.  
6 But, if I could, the requirements of the program were not set by the  
7 Office of Military Commissions. The requirements for the program  
8 were set by the CIA working on behalf of the National Security  
9 Council.

10 So the Office of Military Commissions was a middleman, and--  
11 --they were facilitating access. And then--and that was that  
12 conversation I was talking about earlier, is we were trying to figure  
13 out how do we satisfy the requirements that were coming out from the  
14 individuals that managed that program. And it was a big issue to get  
15 folks in there to see the detainees.

16 Q [LT FEDERICO]: Sir, was General Hartmann involved in that--in  
17 any of those conversations or any of those issues?

18 A [CAPT MCCARTHY]: I do not recall specifically speaking with  
19 General Hartmann or receiving any specific guidance from General  
20 Hartmann on any of those particular matters.

21 Q [LT FEDERICO]: Sir, from your interactions both with members  
22 of the convening authority's office and the prosecution office, who  
23 did you see as sort of the point person for pushing commissions'

1 cases forward?

2 A [CAPT MCCARTHY]: General Hartmann.

3 Q [LT FEDERICO]: Why is that, sir?

4 A [CAPT MCCARTHY]: General Hartmann made it very clear that he  
5 was the one who was responsible for moving the cases forward. He was  
6 the point man. Whenever there had to be discussions with JTF  
7 Guantanamo, it was General Hartmann. General Hartmann had the  
8 schedule as he laid out to me in November. General Hartmann kept to  
9 that schedule.

10 And oftentimes, staffers from the Office of Military  
11 Commissions would call saying, "General Hartmann has directed action,  
12 General Hartmann wants to know why." For example, just the--the  
13 security regulations that pertain here to this--to this facility.

14 General Hartmann personally held up promulgation of the  
15 security procedures for this facility because he heard that I had  
16 seen those regulations and had commented on them, even though it was  
17 a JTF Guantanamo product, and that--that regulation was held up. So,  
18 in my opinion, based upon my interactions with OMC, General Hartmann  
19 was responsible for moving the commissions along.

20 Q [LT FEDERICO]: Sir, do you recall when this facility came  
21 online and was ready for use of this courtroom?

22 A [CAPT MCCARTHY]: Well, it was supposed to be ready for use on  
23 the 5th of June, I believe. And I think there was a slight delay

1 because those--those procedures were not in place on the date it was  
2 supposed to be set to go.

3 Q [LT FEDERICO]: And, sir, was it your understanding from your  
4 involvement with the procedures for this courtroom that it was maybe  
5 not exclusively designed but certainly, with this case in mind, was  
6 designed to house this case?

7 A [CAPT MCCARTHY]: The--the ELC was designed to handle high-  
8 value detainee cases.

9 Q [LT FEDERICO]: Sir, what was General Hartmann's role in terms  
10 of making sure that this courtroom came online for high-value  
11 detainee cases?

12 A [CAPT MCCARTHY]: General Hartmann has been involved in every  
13 aspect of this operation, the ELC.

14 Q [LT FEDERICO]: And when did that begin, sir?

15 A [CAPT MCCARTHY]: It began from the very beginning.

16 Q [LT FEDERICO]: "The very beginning," what does that mean,  
17 sir?

18 A [CAPT MCCARTHY]: Well, from the planning phases all the way  
19 through. He--he is involved today. I mean, he's just involved in  
20 every aspect of it.

21 Q [LT FEDERICO]: Sir, when you say "In the beginning," did that  
22 occur prior to February of 2008?

23 A [CAPT McCarthy]: There--there was a planning process that

1 went on. I think in the February or March timeframe of 2008 is when  
2 we got the go-ahead to start construction, maybe a little earlier  
3 than that. But he has been involved since whenever that planning  
4 process started. And you can probably find that out through  
5 discovery of documents.

6 ADC [LT FEDERICO]: One moment please, Your Honor.

7 **[Defense counsel conferred.]**

8 ADC [LT FEDERICO]: Your Honor, I've been handed a visual aid  
9 I'd like for the--to assist in the examination of the witness. It's  
10 kind of a cumbersome product. I'm not sure the best way in terms of  
11 marking it.

12 But I will essentially show it to the prosecution and then  
13 I suppose request it or a picture of it to be made the next appellate  
14 exhibit in line and ask permission to approach the witness.

15 MJ [COL HENLEY]: Colonel Morris, have you seen this exhibit  
16 previously? Have you seen this exhibit previously?

17 **[LT Federico handed the exhibit over to the Prosecution table for  
18 review. The prosecution table reviewed the exhibit.]**

19 ADC [LT FEDERICO]: Your Honor, may I approach the witness?

20 MJ [COL HENLEY]: Right. We'll treat this as a filing submitted  
21 after the initial filing in D-001 and it will be marked F. And a  
22 photograph may be substituted in the record. You may proceed.

23 ADC [LT FEDERICO]: I'm sorry, sir. I'm not sure I caught that.

# **Attachment E**

## **Filed on SIPR**

**United States v. KSM et al.**

**APPELLATE EXHIBIT 255B (AAA)**

**Attachment E  
(Pages 52-53)**

**~~SECRET~~**

**APPELLATE EXHIBIT 255B (AAA) is located in  
original record of trial Secret Annex.**

**POC: Chief, Office of Court Administration  
Office of Military Commissions**

**United States v. KSM et al.**

**APPELLATE EXHIBIT 255B (AAA)**