

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

UNITED STATES OF AMERICA

v.

KHALID SHEIKH MOHAMMAD, WALID
MUHAMMAD SALIH MUBARAK BIN
'ATTASH, RAMZI BIN AL SHIBH, ALI
ABDUL-AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

AE3500(AAA)

Mr. al Baluchi's Motion to Compel
Production of Information Regarding the
Former CIA Interpreter Utilized by Mr. bin al-
Shibh's Defense Team

25 June 2015

1. **Timeliness:** This motion is timely filed.
2. **Relief Sought:** Mr. al Baluchi respectfully requests that the military commission compel production of information and documents in the possession of the United States regarding the former CIA interpreter utilized by Mr. bin al-Shibh's defense team (hereinafter "Interpreter"), as requested in DR-211-AAA.
3. **Overview:** The military commission should order the government to provide responsive information regarding the former CIA interpreter, upon which the government has relied in court filings and public pronouncements. First, the former CIA interpreter is a witness to events important to the case, as described in the classified supplement (Attachment B). Second, the requested material is necessary to fully investigate the serious matter of a former CIA interpreter participating in the defense interpreter pool and the courtroom, as well as to prepare for deposition or testimony by the former CIA interpreter. Third, the discovery is important to determine whether there is a reasonable basis for the government's accusation that the defense teams were derelict in their hiring and/or vetting practices, whether there have been further government attempts to surveil or infiltrate the defense teams before this Commission, or whether there exists institutional or procedural defects in the hiring process which require remedial action.
4. **Burden and Standard of Proof:** The burden of persuasion on this motion to compel

discovery rests with the defense.

5. Facts:

a. The classified supplement to this motion (Attachment B) contains facts relevant to this motion.¹

b. On 31 March 2015, counsel for Mr. al-Baluchi filed DR-211-AAA,² requesting discovery of information and documents in the possession of the United States regarding the former CIA linguist on one of the defense teams.³

c. On 16 April 2015, the government responded to DR-211-AAA as follows:⁴

The Prosecution has already stated affirmatively in filings with this Commission, and now reiterates, that the presence of a former CIA linguist utilized by Mr. Binalshibh's defense team is absolutely not due to any action by any agency of the Executive branch to gather any information regarding defense activities from any of the defense teams.

As such, the Defense cannot cite to any specific theory of relevance that would reasonably warrant production of the requested information, nor does the Defense request appear to be material to the preparation of the defense, pursuant to R.M.C. 701. Therefore, the Prosecution respectfully declines to produce the requested material.

6. Law and Argument

Information regarding the former CIA interpreter is clearly exculpatory and material to the preparation of the defense. First, the former CIA interpreter is a witness to important events, as described in the classified supplement (Attachment B). Second, the requested material is necessary to fully investigate the serious matter of a former CIA interpreter participating in the

¹ Mr. al Baluchi has not consulted counsel for his co-defendants in the drafting of Attachment B, and is not providing them a copy. See AE013TTT Motion to Strike MoU Requirement.

² Attachment C. Per instruction from OCDC leadership, Mr. al Baluchi submitted Attachment C for classification review prior to filing, which took a significant period of time.

³ Att. C at 1.

defense interpreter pool and the courtroom, as well as to prepare for deposition or testimony by the former CIA interpreter. Third, the discovery is important to determine whether there is a reasonable basis for the government's accusation that the defense teams were derelict in their hiring and/or vetting practices, whether there have been further government attempts to surveil or infiltrate the defense teams before this Commission, or whether there exists institutional or procedural defects in the hiring process which require remedial action.

The government has already acknowledged the importance of information regarding and testimony by the former CIA interpreter. In fact, the government filed a type of discovery motion requesting the military commissions to compel the Convening Authority to provide information about the former CIA interpreter,⁵ something they would hardly have done if information about the former CIA interpreter had no connection to the case. The government has acknowledged that they "generally would not oppose the [interpreter] testifying at an evidentiary hearing to the extent the testimony would be relevant to a legal issue properly before this Commission."⁶

In the same obviously-scripted language it used in the courtroom, the prosecution claims "that the presence of a former CIA linguist utilized by Mr. bin al Shihb's defense team is absolutely not due to any action by any agency of the Executive branch to gather any information regarding defense activities from any of the defense teams."⁷ The requested discovery is essential to determine the veracity of the Government's denials of their own culpability in this

⁴ Attachment D.

⁵ AE350B, Government Motion Requesting the Commission Compel and Review, *in Camera*, All Documents in the Convening Authority's Possession Pertaining to the Request for Linguist Services by Mr. bin al Shihb's Defense Team and Other Translator Support for this Session.

⁶ AE350F, Government Response to Defense Motion for Deposition of Witness Known as "The Former CIA Interpreter Utilized by Mr. bin al Shihb's Defense team" at 2; *see also id.* at 11.

⁷ Attachment D.

matter. As Mr. Mohammad has articulated,⁸ the government's denial leaves open several troubling possibilities, even if true. But more importantly, the defense simply does not need to take the government at its word: when the defendants plead not guilty, will the government take them at their word? The government presently seeks to aggressively investigate the defense conduct in working with the Interpreter, but refuses to provide the defense with even basic information regarding the government's own conduct in this matter, which would also preclude any investigation into the underlying conflict.

There appear to be three possible explanations for the presence of a former CIA interpreter on Mr. bin al-Shibh's team, and in a position with access to information and records from multiple defense teams.

First explanation: The government's accusation in AE350B is correct, and the defense failed to properly vet interpreters or other staff. In this instance, it is vitally necessary to conduct discovery to determine the scope of the damage, as well as the nature of the failure. It is insufficient to simply presume that the government is correct when it states that the Interpreter had "previous extensive and unconcealed work experience with the United States government's intelligence community"⁹ – discovery is necessary to establish both the fundamental accuracy of that statement, and to determine whether that experience was, in fact, accurately represented to the defense teams during the hiring and vetting process.

Second explanation: The use of the Interpreter was due to some form of institutional or procedural failure, but not attributable to any one individual or party, or represents a failure which is attributable to multiple parties. Absent discovery, this military commission cannot resolve a factual dispute between the government's responses with the statement in

⁸ AE350E(Mohammad) Defense Response to AE350B, incorporated herein by reference.

⁹ AE350B(GOV) at 2.

AE350J(WBA) that “[t]he United States has not provided factually complete details of this interpreter’s overseas employment.”¹⁰

Third explanation: The government, with or without the knowledge of the prosecution, took advantage of an opportunity to place the Interpreter in a position where we would be exposed to confidential defense information. The government claims otherwise, but it is hardly unreasonable for the defense to look behind a frequently-repeated script presented by the government after an extremely short investigation.

At present, without discovery, it is impossible to even speculate which of these three scenarios is most likely,¹¹ much less determine the matter conclusively. In all three scenarios, the requested information about the Interpreter is necessary to determine the scope of potential damage caused by the placement of this individual into a position with an extraordinary level of access to classified, confidential, and privileged information. Specific information about the Interpreter’s potential previous and/or concurrent conflicts is vital to determine what remedial steps, if any, are necessary to limit the damage caused by this incident, as well as to prevent future similar incidents.¹²

The government has already relied upon the requested information in court filings,¹³ and public pronouncements,¹⁴ but seeks to deny the defense any opportunity to independently confirm, address, or rebut their allegations. The government requests that the judge review the

¹⁰ AE350J(WBA) at 4.

¹¹ Or, for that matter, whether this incident was the result of some other, unimagined set of circumstances.

¹² As well as potentially ongoing incidents, since, depending on how this current incident came about, it is possible that that other individuals currently serving on the Defense Teams are similarly conflicted.

¹³ Including AE350(GOV), AE350B(GOV), and their denial for the requested discovery.

¹⁴ Associated Press, *Pentagon Says Guantanamo Interpreter Worked for CIA*, New York Times, 10 February 2015, available at http://www.nytimes.com/aponline/2015/02/10/world/americas/ap-cb-guantanamo-sept-11-trial.html?_r=0

defense's use of the Interpreter provided by the Convening Authority, but refuses to provide the information it is relying upon in declaring itself without fault in this matter.

7. **Request for Oral Argument:** The defense requests oral argument.
8. **Certificate of Conference:** The government's position is stated in Attachment D.
9. **Attachments:**
 - A. Certificate of Service;
 - B. Classified Addendum (hand-delivered; not provided to counsel for co-defendants);
 - C. Discovery request DR-211-AAA;
 - D. Government response to DR-211-AAA.

Very respectfully,

//s//
JAMES G. CONNELL, III
Detailed Defense Counsel

Counsel for Mr. al Baluchi

//s//
STERLING R. THOMAS
Lt Col, USAF
Detailed Military Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 25th day of June, 2015, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing, except Attachment B, on all counsel of record by email. I filed Attachment B with the Clerk and served the government with Attachment B by hand-delivery.

//s//

JAMES G. CONNELL, III
Learned Counsel

Attachment B

United States v. KSM et al.

APPELLATE EXHIBIT 3500 (AAA)

(Pages 10 - 14)

Classified

Defense Motion

APPELLATE EXHIBIT 3500 (AAA) is located in the classified annex of the original record of trial.

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

United States v. KSM et al.

APPELLATE EXHIBIT 3500 (AAA)

Attachment C



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**DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620**

31 March 2015

MEMORANDUM FOR Trial Counsel

FROM: James G. Connell, III, Detailed Learned Counsel for Ammar al Baluchi

SUBJECT: DEFENSE REQUEST FOR DISCOVERY
(The Former CIA Interpreter)

Mr. al Baluchi, by and through undersigned counsel, pursuant to RMC 701, 10 U.S.C. § 949p-4, Common Article 3 to the Geneva Conventions, the Due Process Clause of the Fifth Amendment, the Confrontation and Compulsory Process Clauses of the Sixth Amendment, the Eighth Amendment, and the Detainee Treatment Act, hereby requests that the government produce the discovery requested below.

Definitions

As used in this request:

“Communication” means any record of interpersonal interaction, including emails, letters, text messages, formal memoranda, and notes of telephone, videoteleconference, or in-person conversations.

“Contract” means a mutually binding legal relationship.

“Convening Authority” means the Office of the Convening Authority and any of its components or personnel as well as the Convening Authority for Military Commissions.

“Document” means recorded information, regardless of the nature of the medium or the method or circumstances of recording.

“Information” means any knowledge that can be communicated.

To the extent that responsive documents are subject to the attorney-client or other applicable privilege, the word “produce” means to provide a privilege log of any withheld information or documents, along with all unprivileged information in the responsive documents. Otherwise, the word “produce” means to convey to the defense without redaction (except as authorized by the military commission pursuant to MCRE 505) or alteration of any electronically stored information associated with the responsive documents.

“Organization” includes successor entities to defunct or reorganized entities.

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DR-211-AAA
2015-03-31

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Requests

- (1) Please produce all information and documents in the possession of the United States regarding the former CIA interpreter utilized by Mr. bin al Shibh's team [hereinafter TFI],¹ including but not limited to the following:
 - a. All communications between the Office of the Chief Prosecutor and any other person or entity regarding TFI;
 - b. All communication between the Convening Authority and any other person or entity regarding TFI;
 - c. All personnel records regarding TFI;
 - d. All personnel security data records for TFI, including those found in the Joint Personnel Adjudication System, Scattered Castles, and Defense Central Index of Investigations databases;
 - e. All contracts between TFI and any United States component, including non-disclosure agreements;
 - f. All documents and information describing events for which TFI was present.

This request excludes any document or information covered by AE160C Protective Order #3. Organizations holding responsive documents or information may include CIA, National Media Exploitation Center, National Virtual Translation Center, and Drug Enforcement Agency.

- (2) Pursuant to RMC 703(c)(2) & (f)(4)(B), please issue and serve a subpoena to each organization which both (a) presently holds or formerly held a contract with the United States and (b) presently holds or formerly held a contract with TFI. Organizations which meet these criteria may include Washington Research Center, SAIC, and Leidos. The subpoena should command each organization to produce all books, papers, documents, or other objects within its possession or control regarding TFI for inspection by the parties no later than 21 days after service of the subpoena.
- (3) Pursuant to RMC 703(e)(2) & (f)(4)(B), please issue and serve a subpoena on TFI. The subpoena should command TFI to produce all books, papers, documents or other objects within his possession or control regarding his relationship with the CIA.

Thank you for your attention in this matter. If you have any questions on this request or would like to discuss further, please feel free to contact me.

Respectfully,

//s//

James G. Connell, III

¹ This person is defined by name in AE350 Classified Pleading, incorporated here by reference.

Attachment D



OFFICE OF THE
CHIEF PROSECUTOR

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

16 April 2015

MEMORANDUM FOR Defense Counsel for Ali Abdul Aziz Ali

SUBJECT: Prosecution Final Response to 31 March 2015
Request for Discovery (DR-211-AAA)

1. The Prosecution received the Defense request for discovery on 31 March 2015. The Prosecution hereby responds to the Defense request.
2. The Defense requests the Prosecution produce all information and documents in the possession of the United States regarding the former CIA linguist on one of the defense teams.

The Prosecution has already stated affirmatively in filings with this Commission, and now reiterates, that the presence of a former CIA linguist utilized by Mr. Binalshibh's defense team is absolutely not due to any action by any agency of the Executive branch to gather any information regarding defense activities from any of the defense teams.

As such, the Defense cannot cite to any specific theory of relevance that would reasonably warrant production of the requested information, nor does the Defense request appear to be material to the preparation of the defense, pursuant to R.M.C. 701. Therefore, the Prosecution respectfully declines to produce the requested material.

Respectfully submitted,

//s//

Nicole A. Tate
Assistant Trial Counsel