

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p>AE 350RRR</p> <p>ORDER</p> <p>Defense Motions in the AE 350 Series</p> <p>13 December 2018</p>
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1. Procedural Background.

a. During Commission proceedings on 9 February 2015, Mr. bin al Shibh stated that he could no longer trust his interpreter (Interpreter) because he recognized him as an interpreter for the Central Intelligence Agency (CIA).¹ The Defense interviewed the Interpreter shortly thereafter. During that interview the Interpreter denied any previous association with the CIA.²

b. The Government later confirmed³ that the Interpreter, in fact, had previously been employed by the CIA.⁴ The Government asserted that the “presence of a former CIA linguist on one of the defense teams was absolutely not due to any action by any agency of the Executive [B]ranch to gather any information regarding defense activities from any of the defense teams.”⁵ The Government also stated that the Defense’s failure to properly vet their team members was a violation of certain ethics regulations. To support their ethics claims, the Government moved for

¹ AE 350B (GOV), 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. Binalshibh’s Defense Team and Other Translator Support for This Session, filed 11 February 2015.

² AE 350C (AAA), Defense Motion for Deposition of Witness Known as “The Former Interpreter Utilized by Mr. Binalshibh’s Defense Team,” filed 23 February 2015.

³ AE 350 (GOV), Government Unclassified Notice of Classified Filing, filed 10 February 2015.

⁴ AE 350B (GOV).

⁵ *Id.*

the Commission “to compel the Convening Authority to produce to the Commission, for review, all documents pertaining to the hiring of the Interpreter.”⁶

c. *Motion to Compel Deposition of the Interpreter.*

(1) On 23 February 2015, Mr. Ali (a.k.a. al Baluchi) moved⁷ to compel a deposition of the Interpreter. Mr. Ali specifically requested an oral, videotaped deposition on the following matters: (1) – (3) are certain classified materials listed in ¶¶5.A.(1-3) of AE 350C (AAA);

(4) the interpreter's knowledge of other witnesses to items 1-3; (5) the scope and provisions of the interpreter's Non-Disclosure Agreement, particularly any authorizations or requirements to provide false information about his CIA involvement; (6) the process of the interpreters employment and assignment to the Office of the Chief Defense Counsel, including any information the interpreter did provide or could have provided regarding his involvement with the CIA prior to accepting work on behalf of the Office of the Chief Defense Counsel and individual defendants; and (7) the scope and nature of the interpreter's work on behalf of the Office of Chief Defense Counsel and individual defendants.⁸

Mr. Ali cited Rule for Military Commissions (R.M.C.) 703 and *United States v. Cabrera-Frattini*⁹ as authority for the Commission to compel the deposition.

(2) On 9 March 2015, the Government responded,¹⁰ asserting the Commission should deny the Defense motion for deposition because: (1) the Defense failed to prove the Interpreter will be unavailable for trial, (2) no “unusual circumstances” relieve the Defense of its obligation to provide evidence of unavailability, and (3) the Defense was actually seeking to

⁶ *Id.*

⁷ AE 350C (AAA).

⁸ *Id.*

⁹ 65 M.J. 950 (N-M. Ct. Crim. App. 2008), review granted, decision aff'd (C.A.A.F. Oct. 1, 2008).

¹⁰ AE 350F (GOV), Government Response to Defense Motion for Deposition of Witness Known as “The Former CIA Interpreter Utilized by Mr. Binalshibh’s Defense Team, filed 9 March 2015.

depose for the improper purpose of obtaining discovery.¹¹ The Government added that it did not object to the Defense calling the Interpreter as a witness if, in the normal course of litigation, it would be relevant to a legal issue properly before the Commission.¹²

(3) On 16 March 2015, Mr. Ali replied,¹³ arguing the requirement for extraordinary circumstances in R.M.C. 702(a) competes with R.M.C. 702(c)(3)(A), which allows a deposition for a “good cause.”¹⁴ Mr. Ali asserted that both extraordinary circumstances and good cause standards were met and, therefore, the Commission should compel a deposition.

d. *Motion to Compel Appointment of Independent Counsel.*

(1) On 3 March 2015, Mr. Ali moved¹⁵ the Commission to appoint independent counsel to investigate the matter and to advise Defense Counsel regarding ethics claims. Mr. Ali argued the Commission should appoint independent counsel to advise the Defense teams on the ethics claims because Defense Counsel cannot represent the Accused in an inquiry into counsel’s own incompetence. Mr. Ali also argued that independent counsel should be appointed because an attorney’s efforts to avoid accusations of ethical misconduct can give rise to a conflict of interest. Mr. Mohammad asserted similar arguments for the appointment of independent counsel.¹⁶ Mr. bin al Shibh also moved¹⁷ for appointment of independent counsel.

¹¹ *Id.* at 1.

¹² *Id.*

¹³ AE 350H (AAA), Defense Reply to Government’s Response to Defense Motion for Deposition of Witness Known as “The Former CIA Interpreter Utilized by Mr. bin al Shibh’s Defense Team,” filed 16 March 2015.

¹⁴ *Id.*

¹⁵ AE 350D (AAA), Mr. al Baluchi’s Motion for Appointment of Independent Counsel, filed 3 March 2015.

¹⁶ AE 350E (KSM), Defense Response to AE 350B, 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 Shibh’s Defense Team and Other Translator Support for This Session, filed 3 April 2015.

¹⁷ AE 350S (RBS), Mr. Binalshibh’s Motion for Appointment of Independent Counsel, filed 23 July 2015.

(2) On 23 March 2015, the Government responded,¹⁸ disputing the need for appointment of independent counsel because there was no conflict of interest created by the Defense use of the Interpreter.

(3) On 30 March 2015, Mr. Ali replied,¹⁹ reiterating the arguments made in the original motion.

(4) The Government later withdrew²⁰ the motion to compel the documents and the Commission ruled²¹ the matter moot. The Government continued to maintain its assertion that the Interpreter's presence on a Defense team was not due to any Executive Branch agency attempt to gather information regarding Defense team activities.²² To date, the Government has not, however, provided any evidence – such as a declaration from the Interpreter's former employer, the CIA – to support their proffers.

e. *Motion to Compel Production of Information.*

(1) On 25 June 2015, Mr. Ali moved²³ to compel the Government to produce information regarding the Interpreter that was exculpatory and material to the preparation of the defense. Mr. Ali argued that the Interpreter was a witness to important events and the information sought is required to determine how he became part of the Military Commissions Defense Organization (MCDO) interpreter pool where he had access to defense materials, and whether there is a reasonable basis that Defense teams violated any

¹⁸ AE 350I (GOV), Government Response to Mr. al Baluchi's Motion for Appointment of Independent Counsel, filed 23 March 2015.

¹⁹ AE 350J (AAA), Mr. al Baluchi's Reply to Government Response to Mr. al Baluchi's Motion for Appointment of Independent Counsel, filed 30 March 2015.

²⁰ AE 350LL (GOV), Government Motion to Withdraw AE 350B (GOV), filed 15 February 2016.

²¹ AE 350MM (Ruling).

²² AE 350LL (GOV) at 2-3.

²³ AE 350O (AAA), Mr. al Baluchi's Motion to Compel Production of Information Regarding the Former CIA Interpreter Utilized by Mr. bin al- Shihb's Defense Team, filed 25 June 2015.

ethical regulations. Mr. bin ‘Attash supplemented²⁴ Mr. Ali’s motion to compel with classified facts and argument on 12 July 2018.

(2) On 9 July 2015, the Government responded²⁵ to Mr. Ali’s motion, arguing (1) the information the Defense requests be compelled is not the type of information the Government had agreed to produce under the ten-category construct; (2) the Interpreter is not a Government witness and, therefore, they are not obligated to produce personnel files;²⁶ and (3) because neither the Government, nor any Executive Branch Agency, was involved with the placement of the Interpreter there are no records that could be discovered that indicated otherwise.

(3) On 16 July 2015, Mr. Ali replied,²⁷ arguing the “requested discovery is material and exculpatory regardless of whether the Interpreter ever testifies as a witness, let alone who calls the Interpreter to the stand. The requested discovery may reveal evidence of ill-treatment, as well as evidence of government—or defense—errors in granting the Interpreter access to privileged defense information.”²⁸

(4) The Commission approved²⁹ Government requests for summaries and substitutions under Military Commission Rule of Evidence (M.C.R.E.) 505 for certain underlying classified information pertaining to the Interpreter. On 31 January 2018, the

²⁴ AE 3500 (WBA Sup), Mr. bin ‘Attash’s Supplement to AE 3500 (AAA), Defense Motion to Compel Production of Information Regarding the Former CIA Interpreter Utilized by Mr. Bin al Shibh’s Defense Team, filed 12 July 2018.

²⁵ AE 350P (GOV), Government Response to Mr. Ali’s Motion to Compel Production of Information Regarding the Former CIA Interpreter Utilized by Mr. Binalshibh’s Defense Team, filed 9 July 2015.

²⁶ *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150, (1972) and R.M.C. 701.

²⁷ AE 350Q (AAA), Mr. al Baluchi’s Reply to Government Response to Production of Information Regarding the Former CIA Interpreter Utilized by Mr. bin al Shibh’s Defense Team, filed 16 July 2015.

²⁸ *Id.* at 5.

²⁹ See AE 350BBB Order, Government Motion to Request Substitutions and Other Relief for Classified Discovery Regarding the Former Central Intelligence Agency Interpreter Utilized by the Bin al Shibh Defense Team, dated 17 May 2018; AE 542I Order, Government Motion to Request Substitutions and Other Relief Regarding Classified Continuing and Trial Discovery, dated 18 July 2018; AE 542AA Order, Government Motion to Request Substitutions and Other Relief Regarding Classified Continuing and Trial Discovery, dated 28 November 2018.

Government also notified³⁰ the Commission that it had provided the Defense with relevant non-disclosure agreements, classification guidance, and other materials related to the litigation.

f. *Motion to Compel the Interpreter as a Witness*

(1) On 2 October 2015, Mr. Ali moved³¹ to compel the Government to produce the Interpreter as a witness for the motions AE 350C (AAA), AE 350O (AAA), or any other motion in the AE 350 series. Mr. Ali argued that because the Interpreter's testimony is "vital to settle a series of factual disputes and provide a basic understanding of the relevant facts"³² he has a right to production pursuant to R.M.C. 703 (reasonable opportunity to obtain witnesses and evidence) and the Fifth and Sixth Amendments to the United States Constitution.

(2) On 15 October 2015, the Government responded,³³ opposing the motion to compel the Interpreter because the Defense did not provide a synopsis of expected testimony and, thereby, failed to demonstrate the relevance and necessity of the requested witness.³⁴ The Government also argued the Defense already had a chance to interview the Interpreter, which should suffice. The Government averred the Interpreter's denial of employment by the CIA during the Defense interview was caused by a misunderstanding of his Non-Disclosure Agreement, and if he were to testify, he would only reiterate facts the Defense has already asserted.

³⁰ AE 350SS (GOV), Government Notice Of Status of AE 350 Discovery, filed 31 January 2018. *See also* Unofficial/Unauthenticated Transcript of the *U.S. v. Khalid Shaikh Mohammad, et al.* Motions Hearing Dated 26 February 2018, from 1:23 P.M. to 2:57 P.M. at p. 18900 (the parties discussed the status of discovery pertaining to the AE 350 series and agreed that motions in the AE 350 series were not ripe for argument.)

³¹ AE 350X (AAA), Defense Motion to Compel the Production of The Former CIA Interpreter Utilized By Mr. bin al Shihb's Defense Team, filed 2 October 2015.

³² *Id.* at 1.

³³ AE 350DD (GOV), Government Response to Defense Motion to Compel Production of The Former CIA Interpreter Utilized by Mr. Binalshihb's Defense Team, filed 15 October 2015.

³⁴ (citing *United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999) ("[T]he requirement . . . for a synopsis of expected testimony is not satisfied by merely listing subjects to be addressed; rather, it must set out what the witness is expected to say about those subjects."))

(3) On 20 October 2015, Mr. Ali replied,³⁵ restating his relevance arguments.

g. The Commission heard argument on these motions in open session on 7 December 2016,³⁶ and 14 November 2018³⁷ and in closed session on 16 November 2018 for classified argument. During oral argument on 14 November 2018, the Commission inquired of Defense Counsel whether their motion to compel a deposition of the Interpreter was redundant with their motion to compel the Interpreter as a witness, or if the Defense sought both a deposition and witness testimony.³⁸ Counsel for Mr. Ali stated that either the deposition or the witness testimony would be sufficient.³⁹ The Commission also asked for Defense Counsel's position on whether testimony could be heard in an open session pursuant to R.M.C. 803 or a closed session pursuant to R.M.C. 806.⁴⁰ Counsel for Mr. Mohammad responded that a closed session would be required.

h. On 7 October 2015, Mr. bin 'Attash moved⁴¹ the Commission to compel the Government to produce other witnesses on the motions in the AE 350 series.

2. Law.

a. *Motion to Compel Deposition.* "A deposition may be ordered whenever, after swearing of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at a military commission." R.M.C. 702(a).

³⁵ AE 350FF (AAA), Defense Reply to Government Response to Defense Motion to Compel Production of the Former CIA Interpreter Utilized by Mr. bin al Shibh's Defense Team, filed 20 October 2015.

³⁶ Unofficial/Unauthenticated Transcript of the *U.S. v. Khalid Shaikh Mohammad, et al.* Motions Hearing Dated 7 December 2016, from 9:02 A.M. to 10:32 A.M. at, pp. 14388-14394.

³⁷ Transcript Dated 14 November 2018 from 1:06 P.M. to 2:16 P.M. at pp. 21482-21527.

³⁸ Transcript at pp. 21488-21489; pp. 21511-21512.

³⁹ Transcript at p. 21515 ("As I stand here today, I would like to clarify that we are asking for either a deposition or for testimony under oath.")

⁴⁰ Transcript at pp. 21518-21519.

⁴¹ AE 350AA (WBA), Defense Motion to Compel Production of Witnesses for Evidentiary Hearings on Motions in AE 350 Series, filed 7 October 2015.

b. *Motions to Compel Witnesses.* “The defense shall have reasonable opportunity to obtain witnesses and other evidence as provided in these rules.” R.M.C. 703(a). “Each party is entitled to the production of any available witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.” R.M.C. 703(b)(1). “Upon request of either party the military judge may permit a witness to testify from a remote location by two way video teleconference, or similar technology . . .” R.M.C. 703(c)(3).

3. Analysis.

a. *Motion to Compel Appointment of Independent Counsel.* The Government withdrew⁴² its motion to compel the Convening Authority to produce documents regarding the hiring of the Interpreter, and the Commission correspondingly ruled⁴³ the matter moot. The Commission finds that the Defense Counsel are not conflicted in their representation of the Accused and that appointment of independent counsel is not necessary for resolution of this matter.

b. *Motion to Compel Production of Information Regarding the Interpreter.* The Commission authorized⁴⁴ the Government to produce to the Defense summaries and substitutions of underlying classified information regarding the Interpreter. The Government also notified⁴⁵ the Commission that it provided the Defense with relevant non-disclosure agreements, classification guidance, and other materials relevant to the litigation of the AE 350 series. The Commission will order the production of the Interpreter as a witness, rendering the production of any further information pertaining to the Interpreter unnecessary at this stage.

c. *Motion to Compel Deposition.* R.M.C. 702(a) provides that “[a] deposition may be ordered whenever, after swearing of charges, due to exceptional circumstances of the case it is in

⁴² AE 350LL (GOV), Government Motion to Withdraw AE 350B (GOV), filed 15 February 2016.

⁴³ AE 350MM Ruling.

⁴⁴ See AE 350BBB Order; AE 542I Order; and AE 542AA Order.

⁴⁵ See AE 350SS (GOV).

the interest of justice that the testimony of a prospective witness be taken and preserved for use at a military commission.” The Commission finds no exceptional circumstances that would necessitate that the Interpreter be deposed to preserve his testimony for future use in these proceedings. No evidence has been presented that would justify a finding that the Interpreter will be unavailable for trial. In fact, the Government has stated it, “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 the Commission.”⁴⁶

d. *Motion to Compel Interpreter as a Witness.* R.M.C. 703(b)(1) states that “[e]ach party is entitled to the production of any available witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.” The Commission finds that at this stage of the proceedings, the testimony of the Interpreter is relevant and necessary in order to determine the following: (1) the circumstances leading up to his employment with the Defense, (2) the extent to which he had access to privileged information during his tenure as a Defense interpreter, and (3) whether or not he shared any information gained during his tenure as a Defense interpreter with any other persons or organizations. The Defense has not met its burden of establishing the relevance or necessity of any other witness on this matter.

4. **Ruling.**

- a. AE 350C (AAA) is **DENIED**.⁴⁷
- b. AE 350D (AAA) is **MOOT**.
- c. AE 350E (KSM), to the extent it requests for appointment of independent counsel, is

MOOT.

⁴⁶ See AE 350F (GOV) at 2.

⁴⁷ Although denied, the Commission’s granting of the relief requested in AE 350X renders this denial moot since the Defense clarified that they sought *either* a deposition of the Interpreter or his in-court testimony.

- d. AE 350O (AAA) is **MOOT**.
- e. AE 350S (RBS) is **MOOT**.
- f. AE 350X (AAA) is **GRANTED IN PART**.
- g. AE 350AA (WBA) is **DENIED**.
- h. Any motions in the 350 series that are not addressed in this Ruling are considered **MOOT**.

5. Order.

a. The Government will produce the Interpreter to testify as a witness via video teleconference in a closed session pursuant to R.M.C. 806. The witness will be present at the **Mark Center, Mark Center Drive, Alexandria, Virginia, during Commission hearings scheduled for 28 January – 1 February 2019 at the U.S. Naval Station, Guantanamo Bay, Cuba**. If the Government determines that it is necessary to request any additional procedural safeguards from the Commission in order to protect national security they may do so no later than **7 January 2019**.

b. Defense Counsel will limit their examination of the witness to the following matters:

(1) The circumstances surrounding the Interpreter's employment and assignment to the MCDO, including any information the Interpreter did provide or could have provided regarding his involvement with the CIA prior to accepting work on behalf of the MCDO and with individual Defense teams (including the scope and provisions of the interpreter's non-disclosure agreement);

(2) The scope and nature of the Interpreter's work on behalf of the MCDO and individual Defense teams (including what potentially privileged information the Interpreter may have had access to); and

(3) Whether or not, and if so, to what extent, the Interpreter shared any potentially privileged information with any other persons or organizations.

c. The Defense will refrain from inquiring into what the Interpreter did or observed while employed by the CIA for any period of time prior to his seeking employment as an interpreter within the MCDO.

So **ORDERED** this 13th day of December, 2018.

//s//
K. A. PARRELLA
Colonel, U. S. Marine Corps
Military Judge