

MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY

UNITED STATES OF AMERICA

v.

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

AE 360C(WBA)

**Defense Motion** to Reconsider  
AE 360B(RUL), Ruling on Defense Motion to  
Compel Discovery Related to Audio and Video  
Messages to Family

17 May 2018

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

2. **Relief Sought:**

Mr. bin 'Atash requests the Commission to reconsider its ruling in AE 360B(RUL). Specifically, this Commission should reconsider its denial of Mr. bin 'Atash's request to compel discovery related to Joint Task Force-Guantanamo's refusal to transmit Mr. bin 'Atash's video communication of 7 December 2014 to his family. Reconsideration is proper because this motion presents newly discovered evidence not known at the time of this Commission's determination of AE 360(WBA).

3. **Burden of Proof:**

As the moving party, the defense bears the burden of persuasion; the standard of proof is a preponderance of the evidence. R.M.C. 905(c)(1).

4. **Facts:**

a. Mr. bin 'Atash adopts the facts in AE 360(WBA).

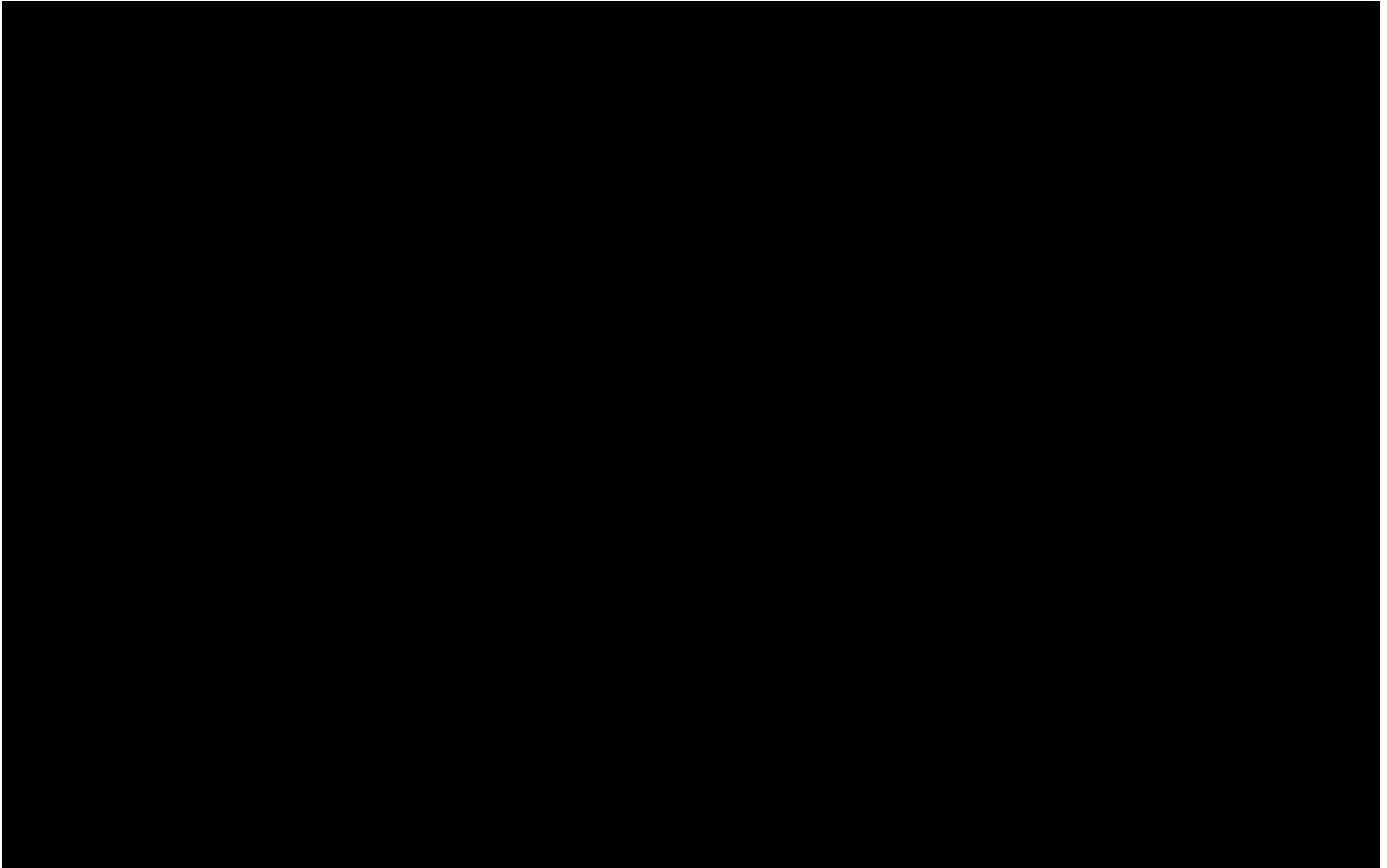
b. In December 2014, Mr. bin ‘Atash attempted to participate in the International Committee of the Red Cross (“ICRC”) video communication program with his family. (AE 360(WBA) at ¶¶ 5.b, d). Mr. bin ‘Atash recorded a video communication on 7 December 2014 for transmittal to his family in Saudi Arabia. (AE 360(WBA) at ¶ 5.d). Joint Task Force-Guantanamo (“JTF-GTMO”) refused, without justification, to transmit the video communication to Mr. bin ‘Atash’s family. (AE 360(WBA) at ¶ 5.d).

c. On January 27 2015, Mr. bin ‘Atash requested discovery related to JTF-GTMO’s refusal including a copy of the video communication and “any documentation and communication with respect to Mr. bin ‘Atash’s video recorded on or about 7 December 2014, the decision to deny release of the video, and any alleged rules infractions by Mr. bin ‘Atash with respect to the video.” (AE 360(WBA), Attach. B at 1).

d. On 14 May 2015, Mr. bin ‘Atash filed AE 360(WBA), Defense Motion to Compel Discovery Related to Audio and Video Messages to Family. The motion sought the video communication Mr. bin ‘Atash recorded on 7 December 2014 as well as any documentation related to JTF-GTMO’s failure to transmit Mr. bin ‘Atash’s video to his family. (AE 360(WBA)).

e. On 10 June 2016, this Commission granted the motion to compel, in part, and ordered JTF-GTMO to provide a copy of the video communication, finding that communications between Mr. bin ‘Atash and his family were “relevant to the proceedings as potential mitigation evidence.” (AE 360B(RUL) at ¶ 4.a). However, the Commission denied Mr. bin ‘Atash’s request for documentation relating to the Government’s decision to deny the release of the video communication to Mr. bin ‘Atash’s family, finding “Mr. bin ‘Attash has not met his burden to establish relevance . . . .” (AE 360B(RUL) at ¶¶ 3.b, 4.b).

f. On 8 July 2016, Counsel for Mr. bin ‘Atash received a copy of the video communication.



g. Mr. bin ‘Atash never heard from the Government regarding the “further review” of the video communication. Because the Government never properly classified the video communication, Defense Counsel for Mr. bin ‘Atash were forced to seek classification review pursuant to the Third Amended Protective Order #1. (AE13BBBB(ORD) at ¶ 4.d).

h. On 2 November 2016, Counsel for Mr. bin ‘Atash submitted the translated transcript they had prepared of the video communication to the Office of Special Security point of contact (“OSS POC”) for classification review by the Original Classification Authority (“OCA”). The transcript of the video communication was assigned the internal number WBA 030. (Attach. C). On 28

November 2016, the transcript was returned to Mr. bin ‘Atash and marked as unclassified. (Attach. D).

i. Because Mr. bin ‘Atash’s words did not pose any threat to national security and were apparently not the reason JTF-GTMO refused to transmit Mr. bin ‘Atash’s video to his family, Defense Counsel sought review of the entire video for classification. Defense Counsel had viewed the video and saw it as an appropriate communication from Mr. bin ‘Atash to his family members. Nevertheless, in an attempt to determine what caused JTF-GTMO to refuse its transmission, Defense Counsel sought to determine whether any of Mr. bin ‘Atash’s gestures or movements might have been perceived by JTF-GTMO or any other OCA as a threat to national security. On 22 December 2016, Counsel for Mr. bin ‘Atash submitted the video communication to the OSS POC for classification review by the OCA, where it was assigned the internal number WBA 033. (Attach. E). Due to issues with the OCA and the former Defense Information Security Officer, a delay of approximately 15 months ensued and the video remained pending classification review.

j. On 18 April 2018, Counsel Mr. bin ‘Atash were informed that WBA 033, the 7 December 2014 video communication—delivered to Counsel on 8 July 2016 marked “Presumptive TS//SCI//Pending Further Review”—was unclassified. (Attach. F).

k. Counsel for Mr. bin ‘Atash have never been informed why the United States refused to transmit the video communication to Mr. bin ‘Atash’s family.

##### **5. Law and Argument:**

The OCA(s)’ recent and long-awaited determination that Mr. bin ‘Atash’s video communication to his family is unclassified eliminates any legitimate reason for the Government’s refusal to transmit it to his family, making any purported reason for the Government’s refusal

pretextual and discoverable. The revelation that the video communication poses absolutely no threat to national security is new evidence warranting reconsideration of the previous denial of discovery by this Commission. R.M.C. 905(f). It has been established that motions for reconsideration are limited to circumstances wherein there has been an “intervening change in controlling law,” a party has discovered “new evidence,” or there is a “need to correct clear error or prevent manifest injustice.” United States v. Libby, 429 F. Supp. 2d 46, 47 (D.D.C. 2006); see also Nat’l Ctr. for Mfg. Scis. v. U.S. Dep’t of Def., 199 F.3d 507, 511 (D.C. Cir. 2000) (noting that motions to reconsider are limited to “new facts or clear errors of law”); Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996). Documentation related to purported, and apparently pretextual, reasons for JTF-GTMO’s refusal to allow communication between Mr. bin ‘Atash and his family is relevant to various aspects of Mr. bin ‘Atash’s defense: (1) pre-trial motions to permit family visitation; (2) pre-trial motions where incommunicado conditions of confinement operate to deprive Mr. bin ‘Atash of rights secured under the U.S. Constitution and international law and influence his statements made to interrogators; (3) issues at trial where incommunicado conditions of confinement render statements made in such confinement unreliable; and (4) evidence of unlawful pretrial punishment and outrageous government conduct.

- a. The Commission should reconsider its ruling in AE 360B(RUL) because new facts make the purported reasons for Government’s refusal to permit family communication pretextual and material to various pretrial motions where Mr. bin ‘Atash’s incommunicado detention is germane.

The pretextual denial of Mr. bin ‘Atash’s family communications make the reason for the denial material to Mr. bin ‘Atash’s pretrial motions relating his family communications and the suppression of his statements. The Government has kept Mr. bin ‘Atash incommunicado for virtually all of his fifteen years in custody. Mr. bin ‘Atash was seized on 29 April 2003 and for

the next 40 months, he was held incommunicado at a number of black sites where he was brutally tortured. During this period, he was not permitted to communicate with anyone except his captors and torturers. On 6 September 2006, Mr. bin 'Atash was rendered to Naval Station-Guantanamo Bay, Cuba, and imprisoned in a secret facility where he has been held since. Mr. bin 'Atash has had no contact with anyone but captors and his legal team since arriving in Guantanamo. He has been denied any personal contact with his family since he was seized. What little communication Mr. bin 'Atash has had with his family via video or letter has been arbitrarily permitted or denied contrary to the U.S. Constitution and international law. The newly discovered evidence of the Government's pretextual denial of Mr. bin 'Atash's 7 December 2014 family communication demonstrates this reality. The purported reasoning for the Government's refusal to transmit Mr. bin 'Atash's communications are relevant to Mr. bin 'Atash's pending pretrial motions related to family communication and to a forthcoming motion to suppress Mr. bin 'Atash's statements.

The new facts demonstrate that even the very limited communication channel permitted Mr. bin 'Atash is and has been arbitrarily denied. The inability of Mr. bin 'Atash to communicate with his family is the subject of pretrial motions in AE 399(WBA), Defense Motion to Compel JTF-GITMO to Permit In-Person Visitation between Mr. bin 'Atash and Members of his Family, and AE 321(WBA), Defense Motion to Permit Telephonic Access with Family Members. Both of these motions request Mr. bin 'Atash be given access to his family; a right he is guaranteed under the U.S. Constitution and international law. (AE 321(WBA) at 6-15; AE 399(WBA) at 5-15). This arbitrary and unjustified denial of simple video transmission rebuts the Prosecution's positions in AE 321(WBA) and AE 399(WBA). The new facts eliminate any legitimate reason for JTF-

GTMO's refusal to transmit Mr. bin 'Atash's family communication, leaving only pretext. Defense Counsel are required to investigate and expose that pretext.

The Government's use of falsely claimed "threats to national security" as pretext for continuing Mr. bin 'Atash's incommunicado detention is also relevant to Mr. bin 'Atash's pretrial motion to suppress his statements made in 2007 and 2008. A pattern of conduct by the Government that demonstrates incommunicado detention before and after the period of interrogation makes it more likely that incommunicado detention was a factor in the elicitation of Mr. bin 'Atash's statements in 2007 and 2008. Incommunicado detention is material to the voluntariness of Mr. bin 'Atash's statements and therefore discoverable. Miranda v. Arizona, 384 U.S. 436, 457-58 (1966) (finding "[t]he current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself."); see also Darwin v. Connecticut, 391 U.S. 346, 349 (1968) (finding "[t]he denial of access to counsel and the outside world continued throughout, and there was no break in the stream of events" from the coerced confession to the defendant's subsequent confession) (internal citations and quotations omitted); Haynes v. Washington, 373 U.S. 503, 514 (1963) (stating that "even apart from the express threat, the basic techniques present here—the secret and incommunicado detention and interrogation—are devices adapted and used to extort confessions from suspects."); Ziang Sung Wan v. United States, 266 U.S. 1, 11, 15-17 (1924) (reversing the conviction because the defendant's confession was involuntary due, in part, to the defendant being held incommunicado for seven days during questioning); United States v. Odeh (In re Terrorist Bombings of the U.S. Embassies in E. Afr.), 552 F.3d 177, 214 (2d Cir. 2008) (finding the defendant's incommunicado detention a significant data point in the totality-of-the-circumstances analysis).

Additionally, the Commission in making a determination on the voluntariness of Mr. bin ‘Atash’s statements must determine if there was a break between his tortured statements and his subsequent statements to the FBI. For the Commission to admit Mr. bin ‘Atash’s 2007 and 2008 statements at trial against him, the Commission must find that: (1) “the totality of the circumstances renders the statement reliable and possessing sufficient probative value;” and (2) “the statement was voluntarily given.” R.M.C. 304(a)(2). The Rules for Military Commission direct the military judge to consider the totality of the circumstances specifically including factors such as “the details of the taking of the statement” and “lapse in time . . . between the statement sought to be admitted and any prior questioning.” R.M.C. 304(a)(4). The Government’s continuing denial of any communication, even circumscribed video, between Mr. bin ‘Atash and his family is evidence that incommunicado detention existed and influenced Mr. bin ‘Atash in 2007 and 2008, thereby rendering his 2007 and 2008 statements involuntary. The Commission should reconsider, and reverse, its denial of Mr. bin ‘Atash’s request for the basis of JTF-GTMO’s refusal to transmit Mr. bin ‘Atash’s family communication because it is material to the preparation of the defense.

- b. The Commission should reconsider its ruling in AE 360B(RUL) because new facts make the purported reasons for the Government’s refusal to permit family communications pretextual and thus material to issues at trial related to the incommunicado detention of Mr. bin ‘Atash.

The new evidence makes the reason for denying Mr. bin ‘Atash’s family communications pretextual and material to the panel’s determination of the reliability of his statements. The Government seeks to introduce statements made by Mr. bin ‘Atash at trial. (AE 477(GOV) at ¶¶ 1, 3, 4, 10, 11). If the Commission determines that Mr. bin ‘Atash’s 2007 and 2008 statements are admissible at trial, the panel then makes an independent determination about the reliability and credibility of the statement. Jackson v. Denno, 378 U.S. 368, 386 n.13 (1964) (stating that “[j]ust



as questions of admissibility of evidence are traditionally for the court, questions of credibility, whether of a witness or a confession, are for the jury.”); see also Perry v. New Hampshire, 565 U.S. 228, 245 (2012) (recognizing “that the jury, not the judge, traditionally determines the reliability of evidence.”); United States v. Larrahondo, 885 F. Supp. 2d 209, 219 (D.D.C. 2012). The intent of the United States’ pre-2007-2008 incommunicado detention and the facts of Mr. bin ‘Atash’s post-2007-2008 incommunicado detention are circumstances that bear on the reliability of Mr. bin ‘Atash’s statements made in 2007 and 2008.

The Government’s pretextual denial of Mr. bin ‘Atash’s family communications will be material to the panel member’s determination of the reliability of his statements because it is evidence of the United States intent to continue incommunicado detention. “[I]ncommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights.” Miranda, 384 U.S. at 476; see also Darwin, 391 U.S. at 349 (finding no communication with the outside world as a factor in the lack of a break between a coerced confession and the defendant’s subsequent confession); Haynes, 373 U.S. at 514 (stating that “the secret and incommunicado detention and interrogation -- are devices adapted and used to extort confessions from suspects.”); Ziang Sung Wan, 266 U.S. at 11 (reversing the conviction because the defendant’s confession was involuntary due, in part, to the defendant being held incommunicado for seven days during questioning); In re Terrorist Bombings of the U.S. Embassies in E. Afr., 552 F.3d at 214 (finding the defendant’s incommunicado detention a significant data point in the totality-of-the-circumstances analysis). Mr. bin ‘Atash was held incommunicado at the black sites for years and his incommunicado detention continued after his arrival at NS-Guantanamo Bay. Evidence of the Government’s complicity in his continuing incommunicado detention is relevant

to the panel member's determination of what weight, if any, should be attributed to Mr. bin 'Atash's statements made during the incommunicado detention.

- c. The Commission should reconsider its ruling in AE 360B(RUL) because new facts make the purported reasons for the Government's refusal to permit family communications pretextual and thus material to issues at sentencing related to the incommunicado detention of Mr. bin 'Atash.

The Government's refusal to permit communications between Mr. bin 'Atash and his family is unjustified and the pretextual nature of any stated justification for continued incommunicado detention is relevant to the panel members' sentencing determination. The pretextual reasoning for the Government's continuation of incommunicado detention will demonstrate to the panel members government misconduct constituting illegal pre-trial punishment and outrageous treatment in violation of domestic and international law.

The requested documentation related to purported reasons for refusal to transmit communications between Mr. bin 'Atash and his family will demonstrate the nature of Mr. bin 'Atash's detention. This Commission held that the "Discussion of R.M.C. 1001(c) authorizes the Accused to raise the nature and length of the pretrial detention as a matter in mitigation." (AE 360B(RUL) at ¶ 2.g) (internal quotations omitted). The arbitrary denial of Mr. bin 'Atash's attempts to innocently and harmlessly communicate with his family is mitigating evidence at sentencing. Mr. bin 'Atash must be able to examine JTF-GTMO's purported justification for the refusal to allow communication and present such evidence to the panel members at sentencing. It is direct evidence of the "nature" of Mr. bin 'Atash's detention.

The unjustified restrictions imposed on Mr. bin 'Atash's communications with his family also constitutes pretrial punishment and a violation of Mr. bin 'Atash's right to due process under

the Fifth Amendment to the U.S. Constitution. Mr. bin 'Atash should not be "punished prior to an adjudication of guilt." Bell v. Wolfish, 441 U.S. 520, 535 (1979) (stating that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."). Mr. bin 'Atash, as a detainee, is afforded protections not afforded a convicted prisoner. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983) (due process rights of pretrial detainees are "at least as great as the Eighth Amendment protections available to a convicted prisoner."); Hill v. Nicodemus, 979 F.2d 987, 991 (4th Cir. 1992) ("[w]hile a convicted prisoner is entitled to protection only against 'cruel and unusual' punishment, a pretrial detainee, not yet found guilty of any crime, may not be subjected to punishment of any description.").

Where restrictions on a pretrial detainee are "arbitrary or purposeless," like the denial of Mr. bin 'Atash's attempts to communicate with his family, a court may "infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees." Bell, 441 U.S. at 539 (stating these are "constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility."). In this instance, the Commission should reconsider AE 360B(RUL) and grant Mr. bin 'Atash's request for discovery because the Government's refusal to transmit innocent and harmless communications between Mr. bin 'Atash and his family communication has now been demonstrated arbitrary and purposeless, making any purported justification pretextual.

The documentation related to JTF-GTMO's refusal to allow Mr. bin 'Atash's communications with his family is discoverable because it will allow Mr. bin 'Atash to make a comprehensive presentation of evidence related to pre-trial punishment to the Commission and the panel members. The Commission and panel members must be permitted to learn that the United

States has engaged in a pattern of conduct that falsely uses “national security” as justification for denial of due process and basic human rights to Mr. bin ‘Atash.

Mr. bin ‘Atash has introduced new facts, eliminated all legitimate reasons for JTF-GTMO’s refusal to transmit communications between Mr. bin ‘Atash and his family, and has demonstrated why the requested discovery is material to the preparation of his defense. The Commission should reconsider its ruling in AE 360B(RUL) and grant Mr. bin ‘Atash’s request to compel discovery of the reasons for the Government’s refusal to transmit Mr. bin ‘Atash’s video communication to his family.

**6. Oral Argument:** Requested.

**7. Witnesses:** None.

**8. Conference with Opposing Counsel:** The Prosecution opposes the requested relief.

**9. Attachments:**

A. Certificate of Service.

B. 

C. 

D. Email from OCA to defense team, dtd 28 November 2016.

E. 

F. 

G. 

**10. Signatures:**

/s/

CHERYL T. BORMANN  
Learned Counsel

/s/

EDWIN A. PERRY  
Detailed Defense Counsel

/s/

MATTHEW H. SEEGER  
MAJ, USA  
Detailed Military Counsel

/s/

BRIAN D. BRADY  
Capt, USAFR  
Detailed Military Counsel

# Attachment A

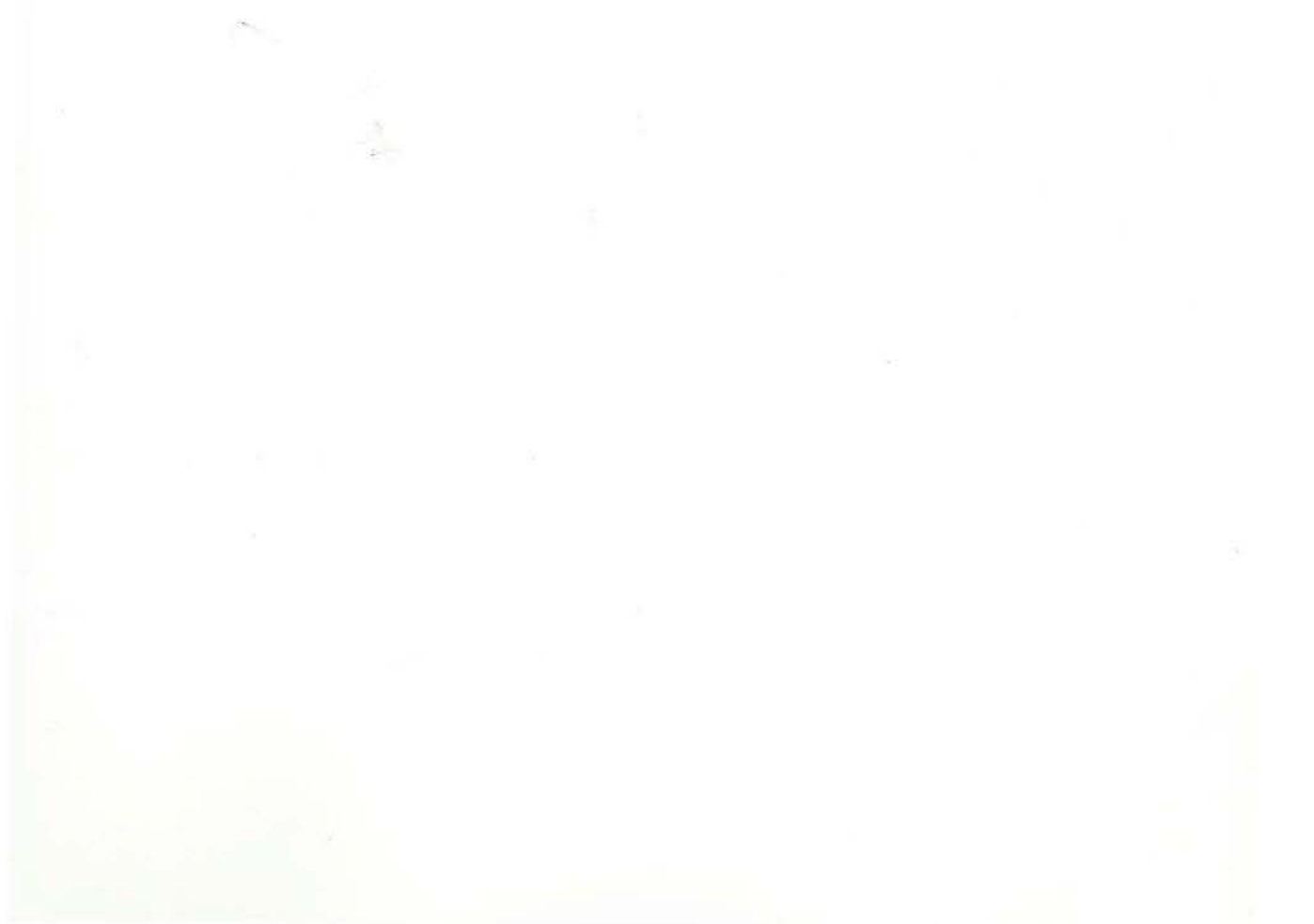
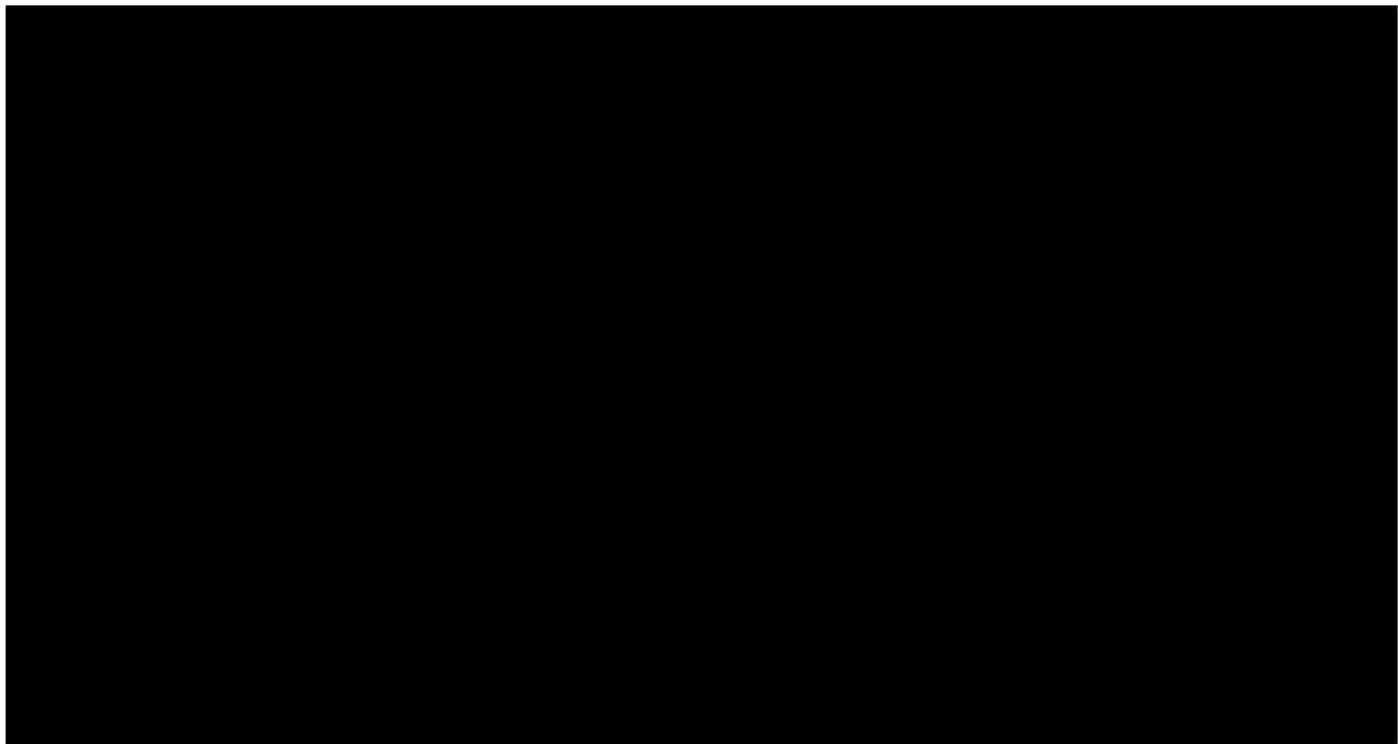
**CERTIFICATE OF SERVICE**

I certify that on 17 May 2018, I electronically filed AE 360C(WBA), Defense Motion to Reconsider AE 360B(RUL), Ruling on Defense Motion to Compel Discovery Related to Audio and Video Messages to Family, with the Trial Judiciary and served a copy on all counsel of record.

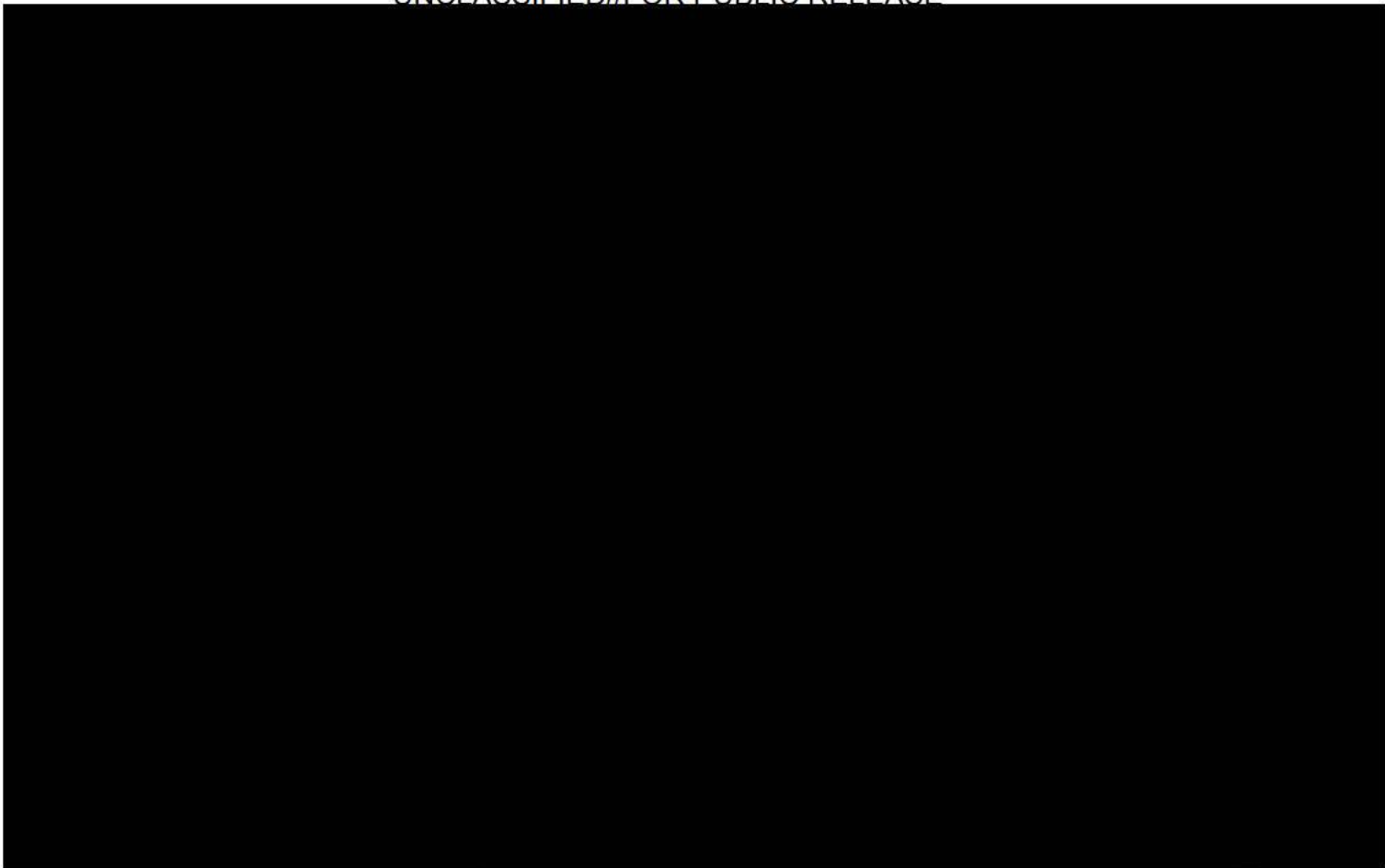
/s/  
CHERYL T. BORMANN  
Learned Counsel

# Attachment B





# Attachment C



# Attachment D

**[REDACTED] CTR (US)**

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**From:** [REDACTED] CIV WHS IO AND WHS STAFF (US) [REDACTED]  
**Sent:** Monday, November 28, 2016 1:38 PM  
**To:** [REDACTED] CTR (US)  
**Cc:** [REDACTED] CIV WHS IO AND WHS STAFF (US)  
**Subject:** [U//FOUO] Status Update OCA Reviews of WBA 025; 028 032

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Good afternoon [REDACTED]

The documents your team submitted have been reviewed by the necessary OCA(s) for potential use in litigation. If used in litigation, the documents are to be treated as the following:

[REDACTED]  
 [REDACTED]  
 WBA030: UNCLASSIFIED

[REDACTED]

Respectfully,

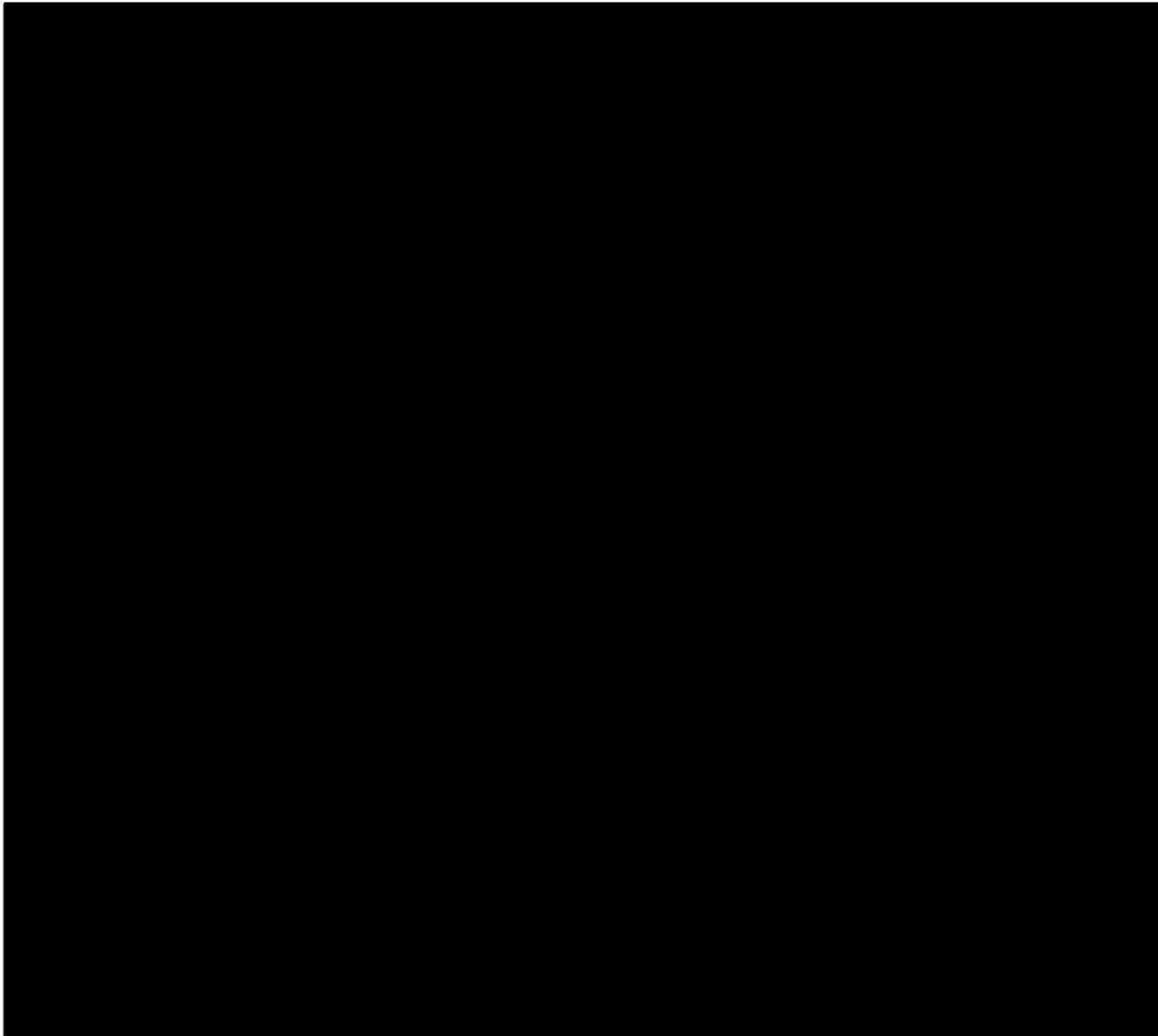
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[REDACTED]  
 Security Assistant  
 Office of Special Security  
 Washington Headquarters Services

[REDACTED] Desk  
 [REDACTED] Mobile  
 NIPR: [REDACTED]

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# Attachment E

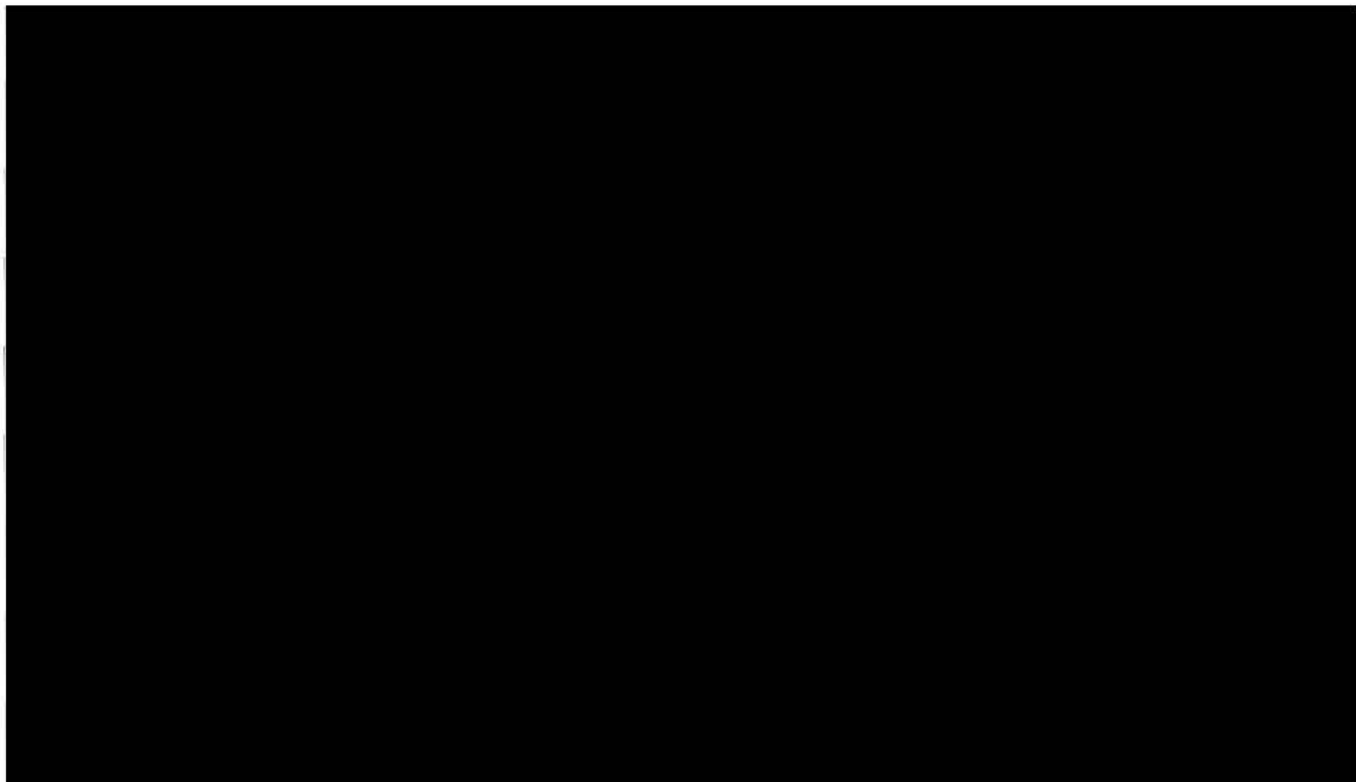


Filed with TJ  
17 May 2018

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# Attachment F





# Attachment G

