

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

<p><b>UNITED STATES OF AMERICA</b></p> <p><b>v.</b></p> <p><b>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</b></p>	<p><b>AE 564E</b></p> <p><b>RULING</b></p> <p><b>Mr. al Baluchi’s Motion to Compel Production of Documents Related to Communications between the United States and the Taliban Regarding Osama bin Laden</b></p> <p><b>24 August 2018</b></p>
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**1. Procedural History.**

a. On 9 April 2018, Mr. Ali (a.k.a. al Baluchi) moved<sup>1</sup> to compel all “documents, reports, and recordings of any communications between any individual or organization purporting to represent the Islamic Emirate of Afghanistan and any individual or organization representing the United States government regarding al Qaeda or Osama bin Laden between 1 January 1996 and 31 October 2001. Mr. Ali contended that “the communications between the United States and the Taliban are material because they will cast doubt on the government’s contention that hostilities between the United States and al Qaeda began in 1996, tending to deny this military commission jurisdiction over Mr. [al Baluchi].”<sup>2</sup> Mr. Ali advised the Commission he acquired “a significant cache of U.S.-Taliban communication records through the Freedom of Information Act”<sup>3</sup> and the requested discovery was needed to ensure he possessed a complete set of relevant U.S.-Taliban communications between 1 January 1996 and 31 October 2001. Mr. Ali also asserted that the

<sup>1</sup> AE564 (AAA), Mr. al Baluchi’s Motion to Compel Production of Documents Related to Communications between the United States and the Taliban regarding Osama bin Laden, filed 9 April 2018.

<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.* at 5.

communications would allow him to “understand and appropriately contextualize” an ultimatum by President Bush to the Taliban following the 11 September 2001 terror attacks.<sup>4</sup>

b. On 23 April 2018, the Government responded,<sup>5</sup> opposing the motion because the “information is neither relevant nor material to the preparation of the defense.”<sup>6</sup> The Government argued the Defense “inappropriately confuses the relationship between the United States and al Qaeda with the relationship between the United States and the Taliban prior to September 11, 2001.”<sup>7</sup> The Government specifically argued the “Defense now seeks to misdirect the Commission by inappropriately linking the Taliban with al Qaeda for the purposes [sic] of establishing hostilities (or to demonstrate the lack thereof) with the United States prior to the attacks of September 11, 2001.”<sup>8</sup> The Government also asserted that “both the U.S. Supreme Court and the D.C. Circuit Court of appeals “have recognized and/or did not dispute” that the U.S wars with al Qaeda and the Taliban in Afghanistan were and are “separate and distinct.”<sup>9</sup>

c. On 11 May 2018, Mr. Ali replied,<sup>10</sup> arguing the Commission should compel the Government to produce the materials because “they will affect the quantum of proof necessary to demonstrate that the United States and al Qaeda were engaged in hostilities prior to 11 September 2001.”<sup>11</sup> Mr. Ali also asserted that the Government “has once again conflated its

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<sup>4</sup> *Id.* at 9.

<sup>5</sup> AE 564A (GOV), Government Response to Mr. Ali’s Motion to Compel Production of Documents Related to Communications between the United States and the Taliban Regarding Osama bin Laden, filed 23 April 2018.

<sup>6</sup> *Id.* at 5.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 6-7 citing *Hamdan v Rumsfeld*, 548 U.S. 557, 628 (2006) and *United States v. Hamidullin*, No. 15-4788, 2018 U.S. App. LEXIS 9743, 41-42 (D.C. Cir. 2005).

<sup>10</sup> AE 564B (AAA), Mr. al Baluchi’s Reply to Government’s Response to Mr. al Baluchi’s Motion to Compel Production of Documents Related to Communication between the United States and the Taliban Regarding Osama bin Laden, filed 11 May 2018.

<sup>11</sup> *Id.* a 3.

obligation to provide material discovery to the [D]efense with its separate obligations under *Brady v. Maryland*,<sup>12</sup> and with limitations on admissibility of evidence at trial.”<sup>13</sup>

d. On 15 June 2018, Mr. Ali filed a classified supplement<sup>14</sup> to his original motion.

e. On 25 July 2018, the Commission heard oral argument on AE 564.<sup>15</sup>

## 2. Law.

a. The burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence. Rule for Military Commissions (R.M.C.) 905(c)(1). The burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party. R.M.C. 905(c)(2).

b. The government must disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to (1) negate the guilt of the Accused of an offense charged, (2) reduce the degree of guilt of the Accused of an offense charged, or (3) reduce the punishment. *United States v. Graner*, 69 M.J. 104, 107 (C.A.A.F. 2010). "Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*

c. In a military commission, as is true in all criminal cases, the Government has the responsibility to determine what information it must disclose in discovery. R.M.C. 701(b)-(c); *United States v. Briggs*, 48 M.J. 143 (C.A.A.F. 1998); *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987). “[T]he prosecutor’s decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the State’s files to argue relevance.” *Ritchie*, 480 U.S. at 59. It is incumbent upon the Government to execute this duty faithfully, because the consequences are dire if

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<sup>12</sup> 373 U.S. 83 (1963).

<sup>13</sup> *Id.* at 1.

<sup>14</sup> AE 564 (AAA Sup), Mr. al Baluchi’s Supplement to Mr. al Baluchi’s Motion to Compel Production of Documents Related to Communications between the United States and the Taliban regarding Osama bin Laden, filed 15 June 2018.

<sup>15</sup> Unofficial/Unauthenticated Transcript *United States v. Khalid Shaihk Mohammad et al.*, 25 July 2018 from 1419 to 1517 at pp. 20279-20303.

it fails to do so. *See United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015) (finding no abuse of discretion in military judge’s dismissal with prejudice of charges due to a Government discovery violation); *United States v. Bowser*, 73 M.J. 889 (A.F. Ct. Crim. App. 2014), *summarily aff’d* 74 M.J. 326 (C.A.A.F. 2015) (same).

**3. Analysis.**

a. The Defense discovery request for “all documents, reports, and recordings of any communications” between any individual or organization purporting to represent the Islamic Emirate of Afghanistan (“the Taliban”) and any individual or organization representing the United States government regarding al Qaeda or Osama bin Laden between 1 January 1996 and 3 October 2001” is overbroad and irrelevant.

b. The issue is hostilities between the United States and al Qaeda – not hostilities between the United States and the Taliban. The requested discovery is not material to the preparation of the defense.

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

So **ORDERED** this 24th day of August, 2018.

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JAMES L. POHL  
COL, JA, USA  
Military Judge