

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

UNITED STATES OF AMERICA

v.

MAJID SHOUKAT KHAN

AE 027A

Government Response
to Defense Motion for Order Requiring the
Government to Provide Mr. Khan Access to
a Laptop Computer

19 February 2019

1. Timeliness

This Motion is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.

2. Relief Sought

The Government respectfully requests the Military Judge deny the Defense Motion for Order Requiring the Government to Provide Mr. Khan Access to a Laptop Computer, AE 027 (hereinafter, “the Motion.”).

3. Overview

On 5 February 2019, the Defense filed Appellate Exhibit (AE) 027, arguing the Military Judge should order the Government to provide the Accused with “a privileged laptop computer, loaded with Microsoft Office, Adobe Acrobat Pro, and photo and video-editing software” AE 027 at 1. This is in order to insure that the Accused can, “[assist] his counsel and [participate] in a meaningful fashion in the preparation of his presentencing case and/or a petition for clemency.” *Id.*

There are several flaws in the Defense’s argument. First, and most importantly, the Defense erroneously presumes that the Accused is afforded the right to a laptop computer unless the government has a legitimate interest in denying the Accused this right. To the Government’s

knowledge, no United States court has ever held that a prisoner or pretrial detainee has a right to possess and use laptop computers or any other similar electronic device. AE 027 at 4-5.

Second, the Defense asserts the Accused requires a laptop in order to enjoy meaningful access to the courts and to have effective assistance of counsel. AE 027 at 3-4. The Defense has identified no precedent that links an Accused's right to meaningful access to the courts and the effective assistance of counsel, to access to or possession of a computer while in confinement.

Finally, the Defense claims there is no legitimate governmental interest in denying Mr. Khan access to the laptop computer. As shown below, the Government has a substantial and justifiable interest in denying laptop computers to detainees.

The Defense has failed to carry its burden of establishing that the Accused requires a laptop in order to cooperate and communicate effectively with counsel in preparation and presentation of his defense. While the Government remains committed to facilitating efficient means of communication between the Accused and Defense Counsel, a laptop computer is not necessary. Because the Defense has failed to meet its burden, the Commission should deny the Defense Motion.

4. Burden of Proof

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

5. Facts

In 1996, the Accused entered the United States illegally with other family members. Prosecution Exhibit 1 at 4. In July 1998, the Accused was granted derivative asylee status as an unmarried minor child when his mother's petition for asylum was granted. *Id.* The Accused resided in Baltimore, Maryland, from 1998 through 2002 and graduated from Owings Mills High School in 1999. *Id.* In 2001, the Accused resided in or near the Baltimore area and commuted to Northern Virginia, where he worked for a company named Electronic Data Systems (EDS) as an Oracle Database Administrator. *Id.* In 2000, the Accused met an individual named Iyman Faris,

a/k/a Abdul Rauf, at the Accused's family home. *Id.* After listening to Iyman Faris speak about his time as a Muhajideen fighting the Soviets, the Accused began thinking about jihad. *Id.* On September 11, 2001, the Accused was working on a high floor of a building located in Tyson's Corner, Virginia. *Id.* The Accused viewed the smoke rising from the Pentagon from his office building. *Id.* Following the September 11, 2001 terrorist attacks, the Accused became more radicalized and sent and received computer email messages containing pro-Taliban content. *Id.* In early January 2002, the Accused sought a leave of absence from EDS and traveled to Pakistan. *Id.* at 5. The Accused intended to do the following in Pakistan: to get married, commence a 40 day spiritual healing, explore the possibility of moving to Afghanistan to live under Sharia law, and understand jihad. *Id.* at 6. The Accused proceeded in the acts that resulted in the charged offenses and was captured in or about March 2003. *Id.* at 16. *See also* AE 012.

On 13 February 2012, five charges were preferred against the Accused under the Military Commissions Act, to wit: Charge I: Violation of 10 U.S.C. § 950t(29), Conspiracy; Charge II: Violation of 10 U.S.C. § 950t(15), Murder in Violation of the Law of War; Charge III: Violation of 10 U.S.C. § 950t(28), Attempted Murder in Violation of the Law of War; Charge IV, Violation of 10 U.S.C. § 950t(25), Providing Material Support for Terrorism; and Charge V: Violation of 10 U.S.C. § 950t(27), Spying. *Id.*, AE 016Y. The Convening Authority referred these charges and their underlying specifications to a non-capital military commission on 15 February 2012.

On 13 February 2012, the Accused and his counsel submitted an offer for a pretrial agreement (PTA) with the Convening Authority. The Accused offered to plead guilty to Charges I through V, and agreed to a number of other conditions, in exchange for certain actions and considerations by the Convening Authority. Among those actions and considerations (none of

which included providing the Accused a laptop computer, video editing,¹ or other software his counsel have requested added to the computer)² were the following:

- a. "The approved sentence will not exceed 25 years." AE 13 at 1.³
- b. "At the time the Convening Authority takes action on the sentence, the Convening Authority may disapprove, suspend, or remit any additional portion of the sentence as the Convening Authority may determine to be appropriate in light of the cooperation [the Accused] provided pursuant to [the pretrial] agreement." *Id.*

¹ In fact, the Prosecution has consistently insisted that video editing software or nonlinear media product creation is not something the Prosecution would ever agree to provide. *See* Attachment B.

² During the inquiry into the modification to the pretrial agreement, the military judge specifically asked the Accused whether anyone had made promises to him that were not written into the modification agreement in an attempt to get him to modify his original pretrial agreement and the Accused affirmed no one had. Tr. at 156. Thus, the modification to the pretrial agreement also did not contain any provision for a laptop, nor was any promise of a laptop used as an inducement to the Accused to modify the terms of the pretrial agreement. Both Prosecution and Defense Counsel agreed there were no other pretrial agreements other than those found in the terms of AE 12, AE 12A, and AE 13. Tr. 156-57. The Accused re-affirmed to the military judge that "no other promises have been made by the convening authority, or any other person, which may potentially affect [his] offers to plead guilty[.]" Tr. at 168.

³ *See also* Tr. at 171-72, where the Accused acknowledged the Convening Authority must find that he, Khan, had provided full and truthful cooperation:

MJ [COL OSBORN]: And that's if, as you see there in Appendix A, if in the convening authority in his discretion determines you have provided full and truthful cooperation amounting to substantial assistance.

ACC [MR. KHAN]: Yes, of course.

MJ [COL OSBORN]: You understand that, then?

ACC [MR. KHAN]: Yes, of course, ma'am. I just want to emphasize the words "not to exceed 19 years" because the prosecution said "25 years." I just wanted to clarify that.

MJ [COL OSBORN]: Well, take a look. The 25 years, take a look at paragraph 1.

ACC [MR. KHAN]: Yes. If I'm not cooperative, then --okay. Yes, ma'am. I understand that. I'm good. Thank you.

- c. “Should the Convening Authority, in his sole discretion, determine that [the Accused] provided full and truthful cooperation amounting to substantial assistance, the Convening Authority will approve a sentence not to exceed 19 years.” *Id.*
- d. “The statements contained within this Offer and the attached Appendix contain all of the terms, conditions, and other provisions that represent the entire agreement with the Convening Authority. There are no other inducements that are not expressly contained in this agreement that affect [the Accused’s] offer to plead guilty. Any modification of this agreement shall be effective only if made in writing and signed by the Convening Authority and [the Accused].” AE 12 at 6.
- e. “To effect [the Accused’s] agreement to a range of confinement . . . [the Accused] agree[s] that, in accordance with RMC 705(b)(1), 705(b)(2)(f) and 1005(e)(l), the Government and [the Accused] shall jointly request the Military Judge to instruct the members, prior to deliberation, that the sentence to confinement must be at least 25 years and may not exceed 40 years, as reflected in Appendix A. The period of any approved sentence to confinement shall run from the date that the Military Judge accepts [the Accused’s] plea.” *Id.* at 2.
- f. “Except as provided in [the Accused’s] Offer for Pretrial Agreement, [the Accused] waive[s] any right to assert a claim for any day-for-day credit against [his] sentence to confinement based on any capture, detention or confinement prior to the date that the Military Judge accepts [his] plea.” AE 13 at 1.

On 15 February 2012, the Convening Authority referred charges against the Accused to this non-capital Commission. Charge Sheet at 2. On 29 February 2012, in accordance with the terms of the PTA between the Accused and the Convening Authority, the Accused pled guilty to

five charges, one of which was later dismissed.⁴ AE 012. In the PTA, the Accused, in exchange for the sentencing cap, agreed to waive all discovery except for what has been provided for in Paragraph 12 of the PTA. AE 12 at 3. Paragraph 12 states specifically: “I waive my right to any discovery beyond what the Government is obligated to provide pursuant to R.M.C. 701(b)(1) and 701(d). I additionally waive any request for forensic or scientific testing of any physical evidence in the Government's possession. The Government may dispose of any physical evidence upon completion of any appellate processes not waived by this agreement or otherwise available to me.” AE 12 at 3. The Defense received discovery that was required under Paragraph 12, on 24 February 2012. See Attachment B.

On 25 October 2018 the military judge ordered the litigation and trial dates for the sentencing of the Accused. AE 16Y. The Accused is scheduled to appear for a presentencing hearing the week of 8 – 12 July 2019 to face sentencing on the four remaining charges to which he agreed to plead guilty in the modification to his pretrial agreement accepted by the Commission on 14 September 2016.

The Accused is currently represented by his detailed military defense counsel, LCDR Jared Hernandez, JAG, USN and civilian defense counsel J. Wells Dixon, Katya Jestin, Natalie Orpett, Karthik Reddy and Ian Moss (recently hired). Of these six counsel, at least two—Mr. Dixon and Ms. Jestin—have represented the accused since the Accused entered into his pretrial agreement on 13 February 2012, and signed the agreement as counsel for the accused.⁵

⁴ While the Accused originally pled guilty to five charges, subsequent to the findings in *Ali Hamza Ahmad Suliman Al Bahlul v. United States*, 767 F.3d 1 (2014), and in accordance with the provisions in the PTA modification signed by the Accused and the Convening Authority (AE 012A), the original Charge IV: Violation of 10 U.S.C. § 950t(25), Providing Material Support For Terrorism, was dismissed, thereby leaving the four charges that remain before the Commission for sentencing.

⁵ Mr. Dixon and Ms. Jestin also signed the modification to the Accused's pretrial agreement executed in late 2015. Mr. Dixon signed on 7 October 2015, certifying that he advised the Accused of the effects of his pretrial agreement modification and witnessed the Accused's voluntary signature. Ms. Jestin signed on 14 September 2016, during the Commission inquiry with the Accused on the terms of the modification to the pretrial agreement. Ms. Jestin certified that she discussed the agreement with the Accused but did not witness his signature to the modification. See Unofficial/Unauthenticated Transcript (Tr.) at 155 and AE 12A.

6. Law and Argument

There is no factual support or legal authority that deems it necessary for the Accused to possess a laptop computer in order for him to effectively participate in his defense. The Defense asserts the Accused is entitled to a laptop computer because he (1) has a right to a laptop, (2) that he has a need for a laptop, and (3) despite the fact that the Defense bears the burden to demonstrate by a preponderance of the evidence that the requested relief is warranted, the Defense shifts their burden by claiming there is no legitimate government interest in denying the Accused a laptop. As discussed below, the Defense has failed to meet its burden that this requested relief is warranted.

I. The Accused does not have a legal right nor is he otherwise entitled to a laptop computer.

The Defense attempts to paint the picture that the Accused is solely responsible for reviewing, analyzing, and preparing his presentencing case that allegedly involves “complex factual issues and require[s] analysis of a vast amount of case-related materials, including information concerning [the Accused’s] capture, detention, and confinement **that he and his counsel have accumulated over the period of more than a decade.**” AE 027 at 3 (emphasis added). The Accused is represented by one detailed military defense counsel and four civilian defense counsel who signed the Motion. In addition, another civilian defense counsel has been approved to be hired by the Convening Authority. AE 025O at 2. Based on previous filings with the Commission, at least one paralegal has assisted in this case. Furthermore, at least two of the Accused’s civilian counsel were signatories on his 2012 PTA with the Convening Authority and have personally been involved with this case for at least the past seven years.

No court has found that a detainee or prisoner has a right to a privileged laptop computer, and certainly not where, as here, the Accused has a robust defense team which has actively litigated many issues on behalf of the Accused over the years. Numerous federal courts have addressed this same issue and, to the Government’s knowledge, no court has ever found that civilly committed persons, detainees, or prisoners have a constitutional right to personal

computers, or items that are similar to computers. *See Endsley v. Luna*, 2008 U.S. Dist. LEXIS 78327, at *9 (C.D. Cal. May 23, 2008) (citing *Sands v. Lewis*, 886 F.2d 1166, 1172 (9th Cir. 1989) (holding that prisoners do not have a constitutional right to have memory typewriters in cells)), *overruled on other grounds by Lewis v. Casey*, 518 U.S. 343, 350-55 (1996); *Taylor v. Coughlin*, 29 F.3d 39, 40 (2d Cir. 1994) (“If prison inmates do not enjoy a constitutional right to typewriters as implements of access to the courts, it would be illogical for us to rule that there is a constitutional right to typewriters of a specific memory capacity.”); *Allen v. King*, 2016 U.S. LEXIS 108748, at *20, 21 (E.D. Cal. August 16, 2016) (“To this Court’s knowledge, no court has ever held that a civil detainee such as a SVP (sexually violent predator) has a constitutionally protected right to possess and use personal laptops and other similar electronic devices.”); *Telucci v. Withrow*, 2016 U.S. Dist. LEXIS 66334, at *14, 15 (E.D. Cal. May 19, 2016) (“No court has found that prisoners have a constitutional right to possess personal computers, or items that are similar to personal computers, in their cells.”); *White v. Monahan*, 2009 U.S. Dist. LEXIS 14167, at *2 (C.D. Ill. Feb 24, 2009) (although acknowledging that civil detainees enjoy more liberties than convicted prisoners, the court stated that “[t]he inability to possess a computer does not implicate a property interest that might be protected by procedural due process protections or an interest that might be classified as a substantive due process interest.”); *Spicer v. Richards*, 2008 U.S. Dist. LEXIS 61970, at *7 (W.D. Wash. Aug. 11, 2008) (unpub.) (finding no authority to show that there was a Fourteenth Amendment right to possess a “cell phone, pager, computer, [or] color ink cartridge printer”); *Carmony v. County of Sacramento*, 2008 U.S. Dist. LEXIS 11137, at *18 (E.D. Cal. Feb. 14, 2008) (finding civil detainee had no “free-standing First Amendment right to access computers and/or the internet”); *State ex rel. Anstey v. Davis*, 203 W.Va. 538, 545, 509 S.E.2d 579 (1999) (“We are persuaded by the uniformity of opinion on this issue and therefore hold that prison inmates have no constitutional right to possess personal computers in their cells.”). The U.S. Constitution and this barren legal

landscape simply do not compel providing a law of war detainee with access to and control over a laptop computer.

Two recent military commissions convened under the 2009 Military Commissions Act, including the capital military commission in *United States v. al Nashiri*, have also denied requests for laptop computers from similarly-situated detainees. See *United States v. al Nashiri*, AE 380E, Ruling at 1 (“The Defense has not identified any precedent in case law that supports an Accused’s right to a laptop computer where he is represented by detailed and learned counsel. Furthermore, in its filings, the Defense fails to clarify how an Accused represented by four attorneys and provided multiple experts has been denied due process or right to counsel solely because he has not also been afforded a laptop computer.”); *United States v. Abd’ al Hadi al Iraqi*, AE 091D, Ruling at 2 (“The Defense provided no case law finding an accused in pretrial detention has a right to a personal laptop computer. Case law cited by both the Government and Defense largely concludes a detained accused does not have a right to a personal laptop.”).

Finally, the Defense reliance on Constitutional rights is misplaced. No court has applied the constitutional rights cited in the Defense motion to any Accused in a military commission. Both the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia have specifically decided the issue to the contrary. See *Kiyemba v. Obama*, 555 F.3d 1022, 1032 (D.C. Cir. 2009) (concluding that the Supreme Court “had never extended any constitutional rights to aliens detained outside the United States” and that “[*Boumediene v. Bush*, 553 U.S. 723 (2008)] therefore specifically limited its holding to the Suspension Clause”); Memorandum Opinion at 10-11, *Salahi v. Obama*, Civil Action No. 05-0569 (RCL) (D.D.C. Dec. 17, 2015) (holding “the Due Process Clause of the Fifth Amendment does not apply to Guantanamo detainees” and that *Aamer v. Obama*, 742 F.3d 1023 (D.C. Cir 2014) did not overrule *Kiyemba*); See also *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1316-18 (U.S.C.M.C.R. 2011) (rejecting the argument that, under *Boumediene*, all the “constitutional due process and equal protections must apply to [his]

military commission" and holding that "read[ing] the *Boumediene* opinion to extend Fifth Amendment equal protection rights to [alien unlawful enemy combatants] tried before military commissions would be an exceptionally broad and incautious expansion of constitutional rights"). In addition to this, while the Accused may have a right to counsel due to the Military Commissions Act of 2009, 10 U.S.C. ¶ 948a *et seq.*, those rights are statutory and despite what the Defense claims, have never been found to be granted under the Sixth Amendment of the Constitution.

II. The Accused has meaningful access to the courts and effective assistance of counsel regardless of access to a laptop computer.

The Accused has had numerous opportunities to meet with his defense counsel since his guilty plea. OMC provides charter flights to Naval Air Station Guantanamo Bay, Cuba, regularly that would allow, and no doubt have allowed, numerous opportunities for in person meetings between the Accused and his counsel. Presumably, defense counsel have been able to review various materials with their client and engage in constructive analysis and dialogue over the last seven years to prepare for their presentencing case in July 2019. To allege⁶ that the Accused's lack of a personal privileged laptop computer "materially impairs his ability to understand and analyze facts of his case and limits his ability to assist counsel with the preparation of a complete defense" is unsupported by the facts in this case. This is so particularly when the Accused waived production of most discovery in his case and the discovery that was provided was provided to him on 24 February 2012. *See* Attachment B.

The Defense has not alleged failure to provide the Accused with pens or papers, or access to his attorney-client privileged materials. Nor does the Defense assert that the Accused has been unable to meet and discuss his case with his multiple defense counsel since he was convicted seven years ago. The numerous motions and filings occurring over the last several months give testament to the fact that the Accused enjoys robust access to the courts and

⁶ AE 027 at 4.

counsel, regardless of whether he has a laptop computer. In fact, in the last year, the Accused's counsel have either filed, responded or joined in no less than a dozen motions—which include motions to compel funding of an expert, joint motions updating the court, motions to excuse counsel, motions for litigation scheduling orders, motions to amend litigation scheduling orders, and this very motion...the motion for an order to provide a laptop.

Lack of a privileged laptop computer does not equate to ineffective assistance of counsel, particularly when the Accused is armed with a staff of five or six lawyers. The Defense's reliance on *Johnson-El v. Schoemehl*, 878 F.2d 1043 (8th Cir. 1989) and *Wolfish v. Levy*, 573 F.2d 118 (2d Cir. 1978), is misplaced. The Defense cites *Wolfish v. Levy* for the proposition that "the curtailment of the "ability to assist in [one's] own defense" is "one of the most serious deprivations suffered by a . . . detainee." AE 027 at 6, *citing Wolfish v. Levy* at 133, *rev'd on other grounds by Bell v. Wolfish*, 441 U.S. 520 (1979). While noting a general point regarding access to the courts, the more pertinent observation from the Court in *Wolfish v. Levy* was "we can perceive no constitutional right to a typewriter as an incident to the right of access to the courts." *Id.* at 132. In addition to this, the Court went on to support the great deference that should be given to prison administration officials in making security concerns by stating "while it may be true, as Judge Frankel poignantly noted, that "typed papers . . . leap more vividly than handwritten ones to the watery judicial eye," such a vivid rhetorical flourish on the value of the typewriter cannot justify a gross intrusion into prison administration. *Id.* As stated previously, subsequent to *Wolfish v. Levy*, numerous additional courts have likewise held that prisoners and/or detainees are not entitled to typewriters or computers – even when acting as pro se litigants. Here, the Accused has a team of attorneys to support him; lack of a laptop computer does not give rise to a valid claim of inadequate assistance of counsel.

The Prosecution also notes the findings within the Commission on this position by highlighting the Ruling in *Abd' al Hadi al Iraqi*, where the Military Judge stated:

Review of the extensive discovery in this case is a time-consuming task, with or without the use of a computer. However, this is not the Accused's task alone, and

there is no indication this has or will prevent him from communicating with counsel, preparing a defense, or deprive him of effective assistance of counsel. Undoubtedly the use of a computer would be helpful to the Accused. The use of computers by the accused in other Commissions demonstrates such a course of action is possible, even in light of the secure environment in which the Accused is detained. However, “helpful” and “possible” aren’t the standard this Commission applies to compel relief.

Abd’ al Hadi al Iraqi, AE 091D, Ruling at 4.

In addition, as noted in the ruling in *Abd’ al Hadi al Iraqi*, the Accused’s reliance on various cases such as *Bounds v. Smith* is misplaced. *Bounds* held the “fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries *or* adequate assistance from person trained in the law.” See *Bounds v. Smith*, 430 U.S. 817, 828 (1977). To prevail under *Bounds*, the Accused must establish his access to courts is deficient in more than a theoretical sense, it must be an actual injury.

The Defense's conclusory statement that providing the Accused with a laptop is "necessary" is not self-evident in this case and is wholly insufficient to meet the Defense's burden of showing the Accused is entitled to the requested relief.

III. The Defense has failed to carry its burden of establishing that the Accused requires a laptop in order to cooperate and communicate effectively with counsel in preparation and presentation of his defense.

As noted for the above reasons, the Defense has failed to carry its burden of establishing by a preponderance of the evidence why this laptop is necessary. Additionally, in the PTA, the Accused waived all discovery beyond what the government should provide pursuant to Rules for Military Commissions (R.M.C.) 701(b)(1) and (d). Evidence required under R.M.C. 701(b)(1) was provided on 24 February 2012 as evidence by Attachment B. This was reiterated and confirmed by the Prosecution with the Military Judge and agreed to by the Defense at the 14 September 2016 hearing during which the Military Judge asked about the status of discovery and the Prosecution stated that, pursuant to the PTA, there was a limited amount of discovery and referenced an early version of the litigation Scheduling Order, AE 016Q. AE 016Q stated

the only discovery still required to be provided was RMC 701(d) material; evidence the Prosecution intends to introduce at presentencing. Defense counsel was asked if he had reviewed AE 016Q and he replied that he had reviewed it and did not have any objections to that litigation scheduling order.⁷ Defense counsel's statement that the Accused now needs a laptop, after seven years of having the discovery they agreed to be limited to in the PTA, is simply not credible. To now say that it should "come as no surprise that the upcoming presentencing proceedings will involve complex factual issues and require analysis of a vast amount of case-related materials..."⁸ is simply not true. The discovery they received fits in a three-inch binder of paper.

IV. The Government has legitimate security interests associated with denying law of war detainees, to include the Accused, access to highly-sophisticated electronic computing devices.

Even if an Accused did have a legitimate requirement for a laptop computer, any such requirement would be overcome by the substantial, legitimate, and overriding security interest the Government has in the control, restriction, and/or prohibition of various items within the confines of the detention facility housing the Accused. Courts have long-recognized the legitimacy of maintaining a safe and secure facility and acknowledged that "[p]rison [or detention facility] administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979).

The Defense attempts to rely upon the decisions regarding the issuance of laptops to certain accused in *United States v. Mohammed, et al* (hereinafter *Mohammed*),⁹ but this reliance is wholly misplaced. While the Defense's motion infers the five co-accused in that case were simply provided laptop computers, the facts surrounding the original issuance and subsequent

⁷ Tr. at 176-177

⁸ AE 027 at 3

⁹ AE 027 at 4

confiscation of those laptops for security reasons are not analogous to the Accused's situation.

On 5 June 2008, under previous military commission charges, the five co-accused in *Mohammed* elected to proceed *pro se*, and the Military Judge appointed stand-by, advisory counsel for each Accused. As a result of their *pro se* status, the Government provided the Accused with individual laptop computers to assist them in preparing their defense.¹⁰ On 21 January 2010, the Convening Authority withdrew and dismissed the referred charges without prejudice. Shortly thereafter, on 25 January 2010, the Government took custody of the five co-accused's laptops and accompanying media.¹¹ On 31 May 2011 and 25 January 2012, charges in connection with the September 11, 2001 attacks were again sworn against the five co-accused.¹² On 20 March 2013, Defense counsel for the Accused filed AE 149 (*Mohammad*), Joint Defense Motion for Return of Computer Hard Drive and Back-up DVD's and on 3 April 2013, the Prosecution responded and filed AE 149A, the Government's Response to the Joint Defense Motion for Return of Computer Hard Drive and Back-up DVDs.¹³ In its Response, the Prosecution in *Mohammad*, stated that it "does not oppose the Defense access to the laptop computers previously provided to the Accused during the prior Military Commission proceedings to *Defense counsel*." ¹⁴ It did not concede, and in fact opposed, the actual laptops going back to the accused, who were no longer representing themselves. There was various litigation over the use by defense counsel and/or accused in the *Mohammed* case, but ultimately the laptops were ordered returned to the Accused provided that agreements were signed by Defense counsel and it

¹⁰ The Military Judge in *Mohammed* granted three of the five Accused the right to proceed *pro se*. The other two individuals asked to be allowed to represent themselves, and the Military Judge's decision was withheld pending a mental competency determination that the two Accused were competent to voluntarily waive their right to counsel. Although the Prosecution initially declined to produce laptops to those two individuals, the defense attorney for Mr. Hawsawi argued that declining to do so was creating an incentive for his client to proceed *pro se*, (i.e. so he could get a laptop), and as a result of this allegation, the Prosecution agreed to provide laptops to all five individuals. See *Mohammed* AE 530F at 4

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 4, citing to *Mohammed* AE 149 at 1

¹⁴ *Id.* at 4, citing to *Mohammed* AE 149A at 1(emphasis added).

strictly specified which software would be installed and that the government opposed any PowerPoint and any software enabling video editing or non-linear media product creation. *See* Attachment C.

On or about 16 October 2017, JTF-GTMO discovered a contraband communication between two of the *Mohammed* Accused, indicating that they could compromise the laptops they received in 2008 in order to enable functions that had been previously disabled for force protection reasons. The communication also indicated that one of the *Mohammed* Accused's new 2016 laptop had encryption software on it that could allow the Accused to pass clandestine messages. None of the approved software in the laptop agreement, to the Government's knowledge, was to have had encryption capabilities. *See* Attachment D. On 18 October 2017, JTF-GTMO seized five of the Accused's laptops (one 2016 model, and four of the 2008 models) and other hard-drives and E-Reader devices. Due to the ongoing legitimate security concern regarding the laptops, the Government has not – and does not plan to – “return” the laptops to the *Mohammed* five co-accused unless and until ordered by the court. The laptop issues continue to be litigated for the *Mohammad* five co-accused.

In addition to the aforementioned security concerns and violations associated with other accused having access to laptop computers, it is notable that the Accused himself is knowledgeable in computers and worked for a time in Northern Virginia as an Oracle Database Administrator.¹⁵ As such, the Accused may reasonably be considered to have a certain expertise with computers, which, in turn, provides further support that the Government has a legitimate security concern if the Accused were to have access to a laptop computer. Specifically, the laptop may be manipulated by Mr. Khan in a way to circumvent any security protocols the United States would seek to implement; which is exactly what happened in *United States v. Mohammad*, where the accused suspected of devising the plan to manipulate the laptops was a former Microsoft-certified computer engineer.

¹⁵ Prosecution Exhibit 001, at 4

Not only does the Defense desire a laptop computer for the Accused, but they also requested the Commission to order the Government to provide the following software on said laptop: Microsoft Office, Adobe Acrobat Pro, and photo and video-editing software. In addition to the Government objecting to providing the Accused with a privileged laptop computer, the Government notes its additional objection to each of the various software packages desired by Defense. The Defense has further failed to meet its burden for the software requested in AE 27, specifically:

- a. The Defense requests the use of Adobe Acrobat to view electronic versions of documents that can easily be printed and delivered to the Accused. *See* AE 027 at 1. However, the Defense fails to explain how it has been unsuccessful in presenting such printed documents for the Accused to review, highlight, and comment upon.
- b. The Defense has also failed to show why the Accused needs to use Microsoft Word to effectively communicate his thoughts on discovery and how handwritten notes have frustrated his access to the courts. *See id.*
- c. Finally, the Defense has failed to show why the Accused needs his own laptop to view video files and why the Defense cannot simply show them to the Accused and discuss with him during client meetings. Upon information and belief, Defense Counsel can show audiovisual files to the Accused during client meetings and their client can assist in analyzing/organizing the material with them. This method also alleviates the need for Microsoft Word, as the Accused can contemporaneously provide verbal feedback on the discovery to the Defense team.

Similar to their failure to meet the burden to show why production of a laptop computer is required, the Defense has completely failed to articulate the reason why the Government should provide the Accused with these various software packages should the provision of a laptop be ordered.

7. Conclusion

The Government respectfully requests the Military Judge deny the Defense Motion for Order Requiring the Government to Provide Mr. Khan Access to a Laptop Computer. As evidenced by the Defense's Motion, there is no question that the Accused enjoys free and unfettered access to the Commission and his counsel. Similarly, the Accused has effective assistance of a five or six-attorney team of military and civilian counsel. Third, the Defense has failed to carry its burden of establishing that the Accused requires a laptop in order to cooperate and communicate effectively with counsel in preparation and presentation of his defense. Finally, the Government maintains strong, reasonable, and legitimate security concerns regarding the provision of laptop computers to any detainee at the detention facilities at Guantanamo Bay, Cuba. As the Accused has done previously – and countless other detainees have done in the past, the Accused can effectively use other methods of review and analysis (e.g., hardcopy reviews and hand-written notes) to continue to effectively assist his team of attorneys before the presentencing proceedings, as well as any post-sentencing requests they may decide upon.

8. Oral Argument

The Government does not request oral argument. However, if the Military Judge determines a hearing is appropriate, the Government requests an opportunity to be heard and present evidence in support of the requested relief.

9. Witnesses and Evidence

The Government does not anticipate the use of witnesses or evidence in support of this response, except for the attached documents.

10. Certificate of Conference

N/A.

11. Additional Information

The Government has no additional information on this topic.

12. Attachments

- A. Certificate of Service, dated 19 February 2019
- B. Receipt for Evidence dated 24 February 2012
- C. Written Correspondence regarding agreements for *Mohammed* co-accused
- D. 27 October 2017 Declaration from the Joint Detention Group Commander

Respectfully submitted,

//s//

JOY L. PRIMOLI, Lt Col, USAF
Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

David L. O'Dowd, CDR, JAGC, USN
Assistant Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

We certify that on the 19 February 2019, we filed AE 027A, **Government Response to Defense Motion for Order Requiring the Government to Provide Mr. Khan Access to a Laptop Computer**, and that we served copies on all counsel of record.

Respectfully submitted,

//s//

JOY L. PRIMOLI, Lt Col, USAF
Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

David L. O'Dowd, CDR, JAGC, USN
Assistant Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

ATTACHMENT B

UNITED STATES OF AMERICA)	
)	
v.)	
)	
MAJID KHAN)	CERTIFICATE
)	OF
)	SERVICE
)	
)	
)	
)	

I hereby acknowledge receipt from the Prosecution of the following discovery, 2 binders provided to me in the above captioned case, labeled as follows:

U.S. v. Majid Khan
 10020 Referral Binders
 10020 Tab A thru N (See Attachment)
 10020 OA – 001 thru OA -061

I have been advised that release of the documents contained in these binders are subject to a protective order issued by the military judge in this case. The term "I" applies to myself, other military defense counsel detailed to or assigned to this case, civilian counsel who may provide representation on this case, paralegal support staff and any other members of the defense team to include experts or witnesses.


 Defense Representative

24 FEB 2012
 Date

MAJID SHOUKAT KHAN

REFERRAL BINDER

Supporting Evidence to Charges

The following is an index of evidence submitted to the legal advisor to the convening authority for consideration and advice as to whether there exists reasonable grounds to believe that offenses triable by military commission have been committed and that the accused, MAJID SHOUKAT KHAN and committed them.

Tab A	Charge Sheet and Forwarding Letter
Tab B	Majid Khan LHM 20070202
Tab C	Majid Khan LHM 20070620
Tab D	January 16, 2007 Interview of Khalid Shaykh Muhammad
Tab E	January 17, 2007 Interview of Ali Abdul Aziz Ali
Tab F	Ahmed Khan 302 20030305
Tab G	Mahmood Khan 302 20120214
Tab H	Bashir Bin Lap LHM 20070204
Tab I	Ismail 302 20070530
Tab J	Mahmood Khan 302 20030306
Tab K	Mohammed Farik Bin Amin LHM 20070201
Tab L	Mohammed Farik Bin Amin LHM 20080110
Tab M	Ahmed Khan 302 20030308
Tab N	FBI 302 Witness Interview 20090903

Also included in the discovery referral binders is evidence supporting Overt Acts 1-61.

ATTACHMENT C



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

16 September 2016

From: Managing Trial Counsel, United States v. Mohammad, et al.
To: Defense Counsel ICO of *United States v. Mohammad, et al.*

Subj: Parties' Agreement for the MCDO's Purchase and Use of New Detainee Laptops

This letter seeks to capture and finalize the agreement of the parties on the Military Commissions Defense Organizations' (MCDO) purchase and use of new detainee laptops, as set forth in my 16 May 2016¹ and 9 June 2016² correspondence with the Defense; Mr. Connell's 29 June 2016 correspondence to the Prosecution;³ and the attached IT security checklist.⁴ This Agreement supersedes and integrates the prior communications. Should you agree to the terms, please sign the bottom of the agreement and provide the signed and dated version to the undersigned. JTF-GTMO will not allow the newly-purchased laptops to be provided to your client until your defense team's lead counsel has agreed, in writing, to these terms:

1. The Military Commissions Defense Organization (MCDO) will purchase laptop computers (Model: Toughbook 54 CF-54CX005CM) for each Accused, with no optional DVD burner. MCDO Information Technology (IT) staff will certify, and the Convening Authority's IT staff will verify, that it has disabled wireless and Bluetooth capability, but not USB connectivity, for the laptops, as set forth in the attached Security Checklist. The Accused will not be granted "Administrative Rights" for the computers. IT re-certification in the above-stated manner is required every time Defense counsel take possession of the laptops from the Accused and remove the laptop from Echo II or the ELC courtroom.
2. In order to facilitate electronic transfer of data, Defense counsel will have portable hard drives, subject to both *Third Amended Protective Order #1* and AF 018U (or its successor), for the electronic transfer of digital media between counsel and the client. Defense counsel must procure and then maintain the hard drives, and the Accused will not be allowed to keep possession of these portable hard drives in their cells. The Defense must obtain authorization from JTF-GTMO to bring the portable hard drives into Echo II for meetings with their clients and must first provide the portable hard drives to the Privilege Review Team (PRT) for review.

¹ Attachment A
² Attachment B
³ Attachment C
⁴ Attachment D

[REDACTED]

All of the uploading and downloading of information onto or from the computers must occur in either Echo II (following PRT review of the portable hard drive), in the ELC Courtroom, or after the Defense takes possession of the laptops.

3. The Office of the Chief Prosecutor (OCP) will provide all of the discovery that is releasable to the Accused on two (2) Terabyte hard drives as described in the 9 June 2016 memorandum from OCP to Defense Counsel. After the Prosecution's discovery is loaded onto the Accused's laptops via the portable hard drives, the Defense can keep the hard drives for use as contemplated in the 16 May 2016 memo from OCP to the Defense.
4. Information on Defense hard drives brought into Echo II will be governed by AE 018JJJ Interim Order, or its permanent replacement. Each Defense team will provide OCP and the Chief Defense Counsel a list of software it wishes to install on the laptops, to either be agreed upon by the Prosecution, or litigated in a motion before the Military Judge. The Prosecution agrees to approve Microsoft Service Packs, Word, Excel, Windows Media Player, Real Player, WinZip, WinRAR, Casemap, and Adobe Acrobat Pro; with the understanding that inspections of the laptops will include inventorying the software installed to ensure it is limited to the approved list per the below. The Prosecution opposes PowerPoint and any software enabling video editing or nonlinear media product creation and reserves all of its remedies if the matter becomes subject to litigation. The Defense agrees not to load/install any software on the laptops or the portable hard drives that is not on the "Approved List of Software for Accused Laptops" (hereinafter "Approved List"), which will be created following the Prosecution's review and approval of the software on the Defense's requested list, and amended by any subsequent Orders of the Military Judge (as necessary). Each time the Defense IT staff re-certify the configuration, Defense IT staff will inspect the computer for unapproved software without opening any non-executable files. If the Defense IT staff finds unapproved software, they will coordinate with defense counsel to remove the software and any files created using the software. The Convening Authority IT staff will verify the certification without opening any non-executable files.
5. Joint Task Force-Guantanamo Bay will permit the Accused to possess and use individually-issued laptops under these terms. No component of the Government will impose additional procedures, restrictions, or requirements beyond those articulated in this Agreement and the attached Security IT checklist.

Page 2 of 3

Filed with TJ
27 October 2017

Appellate Exhibit 530F (Gov)
Page 36 of 98

Filed with TJ
19 February 2019

Appellate Exhibit 027A (Khan)
Page 26 of 40

6. By signing the agreement, the Defense agrees not to file any motions that claim the Government is in violation of the Military Commission's Order in AE182K (Return of Laptops to Accused with Same Functionality in 2010) by allowing electronic data transfer via portable hard drives, as opposed to data transfer via CD-burning capability. The Defense further agrees that it will not file any motions challenging any of the terms of this Agreement once this Agreement has been signed unless a substantial change of circumstances occurs.⁵

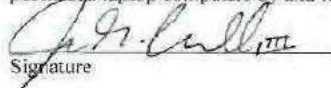
TRIVETT, CLAYTON D.
ORGEJR

Clay Trivett
Managing Trial Counsel
U.S. v. Mohammad, et al.
Office of the Chief Prosecutor

16 Sept 16

Date

I James Connell, Learned Counsel for (circle one) Mr. Hawsawi, Mr. Ali, Mr. Binalshibh, Mr. Bin Attash, Mr. Mohammad, hereby agree to the terms set forth above for the use of newly purchased laptop computers by and for my client.


Signature

16 SEP 2016

Date

⁵ This provision does not apply to any Defense motions that may be filed for specific software the Prosecution has notified the Defense that it opposes, as contemplated in Agreement Term #4, above.

6. By signing the agreement, the Defense agrees not to file any motions that claim the Government is in violation of the Military Commission's Order in AE182K (Return of Laptops to Accused with Same Functionality in 2010) by allowing electronic data transfer via portable hard drives, as opposed to data transfer via CD-burning capability. The Defense further agrees that it will not file any motions challenging any of the terms of this Agreement once this Agreement has been signed unless a substantial change of circumstances occurs.⁵

TRIVETT, CLAYTON G.
ORGE JR.

Clay Trivett
Managing Trial Counsel
U.S. v. Mohammad, et al.
Office of the Chief Prosecutor

16 Sept 16
Date

I _____, Learned Counsel for (circle one) Mr. Hawsawi, Mr. Ali, Mr. Binalshibh, Mr. Bin 'Attash, Mr. Mohammad, hereby agree to the terms set forth above for the use of newly purchased laptop computers by and for my client.

BORMANN, GERRY L.

Signature

Date

⁵ This provision does not apply to any Defense motions that may be filed for specific software the Prosecution has notified the Defense that it opposes, as contemplated in Agreement Term #4, above.

6. By signing the agreement, the Defense agrees not to file any motions that claim the Government is in violation of the Military Commission's Order in AE182K (Return of Laptops to Accused with Same Functionality in 2010) by allowing electronic data transfer via portable hard drives, as opposed to data transfer via CD-burning capability. The Defense further agrees that it will not file any motions challenging any of the terms of this Agreement once this Agreement has been signed unless a substantial change of circumstances occurs.⁵

TRIVETT, CLAYTON
COUNSEL

Clay Trivett
Managing Trial Counsel
U.S. v. Mohammad, et al.
Office of the Chief Prosecutor

16 Sept 16
Date

I, WALTER Ruiz, Learned Counsel for (circle one) Mr. Hawsawi, ~~Mr. Ali~~, ~~Mr. Binalshibh~~, ~~Mr. Bin Attash~~, Mr. Mohammad, hereby agree to the terms set forth above for the use of newly purchased laptop computers by and for my client.

Signature

11/8/2016
Date

⁵ This provision does not apply to any Defense motions that may be filed for specific software the Prosecution has notified the Defense that it opposes, as contemplated in Agreement Term #4, above.

6. By signing the agreement, the Defense agrees not to file any motions that claim the Government is in violation of the Military Commission's Order in AE182K (Return of Laptops to Accused with Same Functionality in 2010) by allowing electronic data transfer via portable hard drives, as opposed to data transfer via CD-burning capability. The Defense further agrees that it will not file any motions challenging any of the terms of this Agreement once this Agreement has been signed unless a substantial change of circumstances occurs.⁵

TRIVETT, CLAYTON G.
ORGE JR.

Clay Trivett
Managing Trial Counsel
U.S. v. Mohammad, et al.
Office of the Chief Prosecutor

15 Sept 16
Date

I, James P. Harrington, Learned Counsel for (circle one) Mr. Hawsawi, Mr. Ali, Mr. Binalshibh, Mr. Bin 'Attash, Mr. Mohammad, hereby agree to the terms set forth above for the use of newly purchased laptop computers by and for my client.

Signature

14 Nov 16
Date

⁵ This provision does not apply to any Defense motions that may be filed for specific software the Prosecution has notified the Defense that it opposes, as contemplated in Agreement Term #4, above.



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

16 May 2016

MEMORANDUM FOR Defense Counsel in the case of *United States v. Mohammad, et al.*

SUBJECT: Portable Hard Drives for the Accused's Laptop Computers

1. Following the Military Judge's order to return the laptops to 2010 functionality in AE 182K, the USB ports in the Accused's laptops were re-enabled. It is my understanding, however, that JTF-GTMO refused to accept a CD/DVD burner from the Defense, and is not willing to upload or download information onto or from the laptops onto CDs/DVDs based on security and accountability concerns. There also appears to be conflicting facts as to whether the Accused had "Administrative Rights" for the computers in 2010, but JTF-GTMO is currently not willing to provide administrative rights based on security reasons.
2. In order to facilitate electronic transfer of data, JTF-GTMO is amenable to allowing the Defense counsel to have portable hard drives, subject to both *Third Amended* Protective Order #1 and AE 018U (or its successor), for the electronic transfer of digital media between you and your client's laptop. Defense counsel must procure and then maintain these hard drives, and the Accused will not be allowed to keep possession of these portable hard drives in their cells. All of the uploading and downloading of information must occur in either Echo II (following PRT review of the items) or after the Defense takes possession of the laptops. The Prosecution defers to the PRT on how it goes about clearing the materials, but the Prosecution would encourage the Defense counsel to engage with the PRT on coming up with a

solution that would not require the PRT to have to re-verify every file on the hard drive that they may have already approved for a prior attorney visit.

3. If the Defense takes possession of the Accused's laptops, Defense IT would then have to certify that no new software was uploaded onto the hard drives, and that other functionality of the computer is disabled. Convening Authority IT would have to verify those averments consistent with the current IT protocol prior to return to the Accused for use in Camp 7. While the Prosecution anticipates that some new executable files may have to go on the laptop, any new software not currently present on the laptop would need to be pre-approved by the Government before it is uploaded onto the laptops. While the Government would be willing to consider allowing certain new software upon Defense request, to the extent the Government opposes such software, the request for new software (not present on the laptop from 2010) would have to be litigated via motion to the Military Judge.

4. Please let me know if you have any questions or concerns. I can be reached at _____ or via email at Claytogt_____.

Clay Trivett
Managing Trial Counsel
U.S. v. Mohammad, et al.



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

9 June 2016

MEMORANDUM FOR Defense Counsel in the case of *United States v. Mohammad, et al.*

SUBJECT: Conditions for Government Approval for New Laptop Computers

1. This memorandum is a follow up to, and should be read in conjunction with, my 16 May 2016 correspondence regarding the use of portable hard drives, in lieu of CD-burning capability, for electronic data transfer between counsel and the Accused.
2. Based on Defense representations made to the Commission over the past several sessions regarding the space left on certain hard drives, and the current functionality of the 2008 Panasonic Toughbooks (and also due to the fact that the Prosecution is seeking an alternative to providing discovery releasable to the Accused in a digital form other than on the E-Readers), the Prosecution is amenable to seeking government approval to provide new laptops to the Accused, providing Counsel agree to the conditions below.
3. Provided the condition pertaining to software (as set forth below in paragraph 4) is met--and assuming the Commission's ruling(s) on any amendments to AE 18U do not fundamentally alter the risks involved--the Prosecution is amenable to gaining government approval for new laptop computers for the detainees, to be used in conjunction with the defense-maintained portable hard-drive process set forth in my 16 May 2016 memo to you. The Prosecution is also amenable to gaining approval for all previously provided discovery (releasable to the Accused) to be placed on a 2 Terabyte portable hard drive that the Prosecution would provide to the Defense counsel in a manner which could obviate the need for the PRT to individually approve the more than 275,000 pages of discovery that the Prosecution has already disclosed to the defense. After the Prosecution's discovery is loaded onto the Accused's laptops via the portable

1

Attachment B

hard drives, the Defense can keep the hard drives for use as contemplated in the 16 May 2016 memo.

4. However, the Prosecution's position opposing certain software, to include any linear video-editing software, including Powerpoint, has not changed, and we would oppose such software being loaded onto the new laptops, and will oppose new laptops if the safeguards preventing such software from being loaded are not sufficient. As such, if each defense team can provide me a list which includes the current software on the 2008 laptops, as well as a listing of additional software you would like included on the new laptops, the Prosecution will then inform you of what software, if any, it opposes, and then new laptops can be purchased and configured with the Prosecution's agreed-upon software (which would be verified by Convening Authority IT staff). You should include any additional software you have already requested for approval in this correspondence. Any software the Defense seeks that the Prosecution opposes would then need to be litigated, as was originally contemplated in AE 182.

5. Please let me know if you are amenable to this process. I can be reached at [REDACTED] or via email at Claytoga[REDACTED]

Regards,

Clay Trivett
Managing Trial Counsel
U.S. v. Mohammad, et al.



DEPARTMENT OF DEFENSE
MILITARY COMMISSIONS DEFENSE ORGANIZATION
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

29 June 2016

MEMORANDUM FOR Trial Counsel

FROM: James G. Connell, III & Lt Col Sterling Thomas, Defense Counsel for Ammar al Baluchi
SUBJECT: Laptop computers

1. We are in receipt of your letters dated 16 May and 9 June 2016. As the situation currently stands, the government is in violation of the military commission's order in AE182K, as we described in AE182M(AAA) Mr. al Baluchi's Response to Government Status of Compliance with AE182K Order. Your letters, and this response, are part of an effort to resolve the laptop issue through negotiation.
2. We propose that the Military Commissions Defense Organization (MCDO), through channels, purchase laptop computers model Toughbook 54 CF-54CX005CM, with no optional DVD burner. MCDO information technology staff will certify that it has disabled wireless and Bluetooth capability, but not USB connectivity, for the laptops. The Office of the Chief Prosecutor (OCP) will provide the releasable discovery on 2TB hard drives as described in your 9 June 2016 memorandum. Information on hard drives brought into Echo 2 will be governed by AE018JJJJ Interim Order or its permanent replacement. Each defense team will provide OCP and the Chief Defense Counsel a list of the software it wishes to install on the laptops, to be agreed upon or litigated as the case may be. Joint Task Force-Guantanamo Bay will permit interested defendants to possess and use the laptop under its current terms. The government will not impose additional procedures, restrictions, or requirements beyond those articulated in the 16 May and 9 June letters.
3. If this proposal is amenable to you, please let me know so that we may formally advise the Chief Defense Counsel of our request. If all parties concerned comply with this proposal, Mr. al Baluchi will take the position that the government has satisfied the requirements of AE018K.

Very respectfully,

//s//
JAMES G. CONNELL, III
Learned Counsel

Counsel for Mr. al Baluchi

//s//
STERLING R. THOMAS
Lt Col, USAF
Defense Counsel

Attachment C

Military Commission Defense Organization

Client Laptop Disablement Checklist

____ Technician Name _____
____ Client Name _____
____ Model Laptop _____
____ Serial Number laptop _____
____ MAC addresses of the laptop _____
____ Convening Authority Observer's Printed Name/Signature for verification _____

Functions that will be disabled on the laptop:

____ Wireless Network Interface Cards
____ Ethernet Network Interface Cards
____ SD Card Readers
____ IEEE 1394 Connectors
____ Modem ports
____ Microphones
____ cameras (if present on system)
____ Peripheral ports (not covered by the rest of the checklist)
____ CD/DVD-writing software will be uninstalled (or disabled in windows)
____ set of unique BIOS passwords
____ no administrative privileges available to the user (only official DoD administrators)
____ Word Processor Program (must be available)
____ Screws on the exterior of the laptop will be glued
____ Verification that software is on the "Approved List of Software for Accused Laptops" (as of 15 September 2016 approved software limited to Microsoft Service Packs, Word, Excel, Windows Media Player, Real Player, WinZip, WinRAR, Casemap, and Adobe Acrobat Pro).

Attachment D

ATTACHMENT D

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

<p style="text-align: center;">UNITED STATES OF AMERICA</p> <p style="text-align: center;">v.</p> <p style="text-align: center;">KHALID SHAIKH MOHAMMAD; WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH; RAMZI BINALSHIBH; ALI ABDUL AZIZ ALI; MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p style="text-align: center;">Declaration of Stephen Gabavics, Colonel, United States Army, MP Joint Detention Group Commander JTF-GTMO</p> <p style="text-align: right; padding-right: 20px;">27 October 2017</p>
---	--

1. My name is Colonel Stephen E. Gabavics. I am on active duty in the United States Army with over 22 years of service as a Military Police Officer. I currently serve as the Joint Detention Group (JDG) Commander of Joint Task Force Guantanamo Bay (JTF GTMO), Cuba. As such, I am responsible for all aspects of detention operations at JTF GTMO, including the safety and security of detainees, guards, and visitors in the detention facility while interacting with detainees. I am familiar with all areas of detention within JTF GTMO, including the conditions and operational policies and procedures of the various detention areas. I have held this position since 23 June 2016, and report directly to Rear Admiral Edward B. Cashman, Commander, JTF GTMO.
2. On or about 16 October 2017, JDG guards, in accordance with Standard Operating Procedure (SOP), were conducting a routine, cursory inspection for contraband of Mr. Mohammad's legal bin while at the Expeditionary Legal Complex (ELC) at the conclusion of the day's court session in preparation for Mr. Mohammad being transported back to Camp 7. One of the guards noticed that Mr. Mohammad had papers that bore the identification number of Mr. Ali and appeared to be non legal in nature. The legal bin is to be used solely for the storage and transport of legal materials only of that individual. The guard asked Mr. Mohammad about the papers and Mr. Mohammad responded that they were just "ICRC messages." The guard then pointed out

that some of the papers bore the identification number of Mr. Ali. Mr. Mohammad then responded that the guard should "just give them back to Ali."

3. The guard seized the relevant papers, as detainees are not permitted to have papers marked with another detainee's ISN per the SOP. The papers were properly stored [REDACTED]
[REDACTED] I have reviewed the Prosecution's notice at AE 530 (GOV), Attachment B, and I can state that one of the items contained therein is a copy of one of the papers seized by the guard from Mr. Mohammad. It can more specifically be described as a pre-printed prayer schedule for August 2017 that is provided to the detainees by the JTF and is readily available in Camp 7. On the back of the prayer schedule is Arabic handwriting. Also contained in Attachment B is an English translation of the Arabic handwriting. Based upon the date in which the prayer schedule was provided by JTF-GTMO, in August 2017, the hand-written instructions could have been more than two months old.
4. [REDACTED]
5. The five Accused had laptop computers that had been originally issued to them in 2008 for their first military commission. In recent months, new 2016 laptops were to be issued to four of the Accused pursuant to negotiations between the parties. However, all of the Accused have declined to use the new 2016 laptops, and have opted to continue to use the old 2008 laptops, with the only exception being Mr. Bin al Shihb, whose old laptop no longer operated, so he utilized the 2016 laptop. During my command, the Accused have had access to their laptops 24 hours per day and seven days per week.
6. As a result of these events, on or about 18 October 2017, one 2016 laptop and four 2008 laptop computers of the five Accused were seized, along with portable electronic hard drives, and E-Readers (Disabled laptops provided by the Prosecution that only allow for review of Discovery). These electronic items have been secured and stored consistent with principles of proper evidence storage. Each laptop is contained inside a "pelican" case. The case is sealed with evidence tape. [REDACTED]
7. In the early evening hours of 18 October 2017, guards went to the cell of Mr. Ali for the purpose of searching for and seizing an item that is now described and pictured in AE 530 (GOV), Attachment B. Upon arriving back at his cell, Mr. Ali stated to the guards that he "knew what they were looking for." He then handed to them that item which they seized and properly stored. In addition, he provided to the guards an internal computer

component that he had removed from the laptop, which he took from an envelope in his cell.

8. _____

9. _____

10. On 20 and 21 October, JTF-GTMO conducted additional searches of all of the cells of all of the detainees in Camp 7, and seized additional non-legal materials from the Accused and other detainees. Cell searches that were conducted revealed that Mr. Bin 'Attash also had a similar written letter with condensed instructions on how the Accused could compromise the laptops provided to them. Other hard copy materials of unsecured legal mail, non-legal mail, and contraband were seized. JTF-GTMO is adhering to its SOPS, and AE 018U (Amended), and is working to return the seized legal materials to the Defense counsel. The Prosecution has not and will not have access to anything marked as legal material.

I do hereby attest, under penalty of perjury, that the above is true and correct to the best of my knowledge and belief.



Stephen E. Gabavics
COL, USA, MP

27 Oct 17

Date