

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

UNITED STATES OF AMERICA  v.  ABD AL HADI AL-IRAQI	<b>AE 043</b>  <b>Government Motion</b> <i>In Limine</i> To Consider Evidence During Preliminary Matters and To Admit Evidence for Trial on the Merits  22 April 2015
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**1. Timeliness**

This Motion is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.c.(1).

**2. Relief Requested**

The Government respectfully moves the Commission *in limine* to consider the following items when determining whether the Government has proved this Commission properly exercises *in personam* jurisdiction over the Accused (AE 020B), as well as when assessing any motion to suppress the Accused's statements to law enforcement, and to admit the same items into evidence for the trial on the merits: a two-page letter that identifies the Accused as a participant in meetings of senior al Qaeda and Taliban leadership ("Shkin Meeting Letter"). See Attachment B.

**3. Overview**

The Department of Defense ("DoD") acquired the Shkin Meeting Letter from the vicinity of Shkin, Afghanistan, on about 17 May 2003. The document was affixed with two capture tags. All documents were provided to Tactical Human Intelligence Team ("THT") 3, 313<sup>th</sup> Military Intelligence Battalion, 82<sup>nd</sup> Airborne Division, at Forward Operating Base ("FB") Shkin, located near Shkin and Agor Adda which are on the Afghanistan/Pakistan border. The DoD maintained custody of the documents until 3 April 2013, at which time the DoD transferred custody of the Shkin Meeting Letter to the Federal Bureau of Investigation ("FBI"). The Military Judge should

consider the Shkin Meeting Letter and accompanying capture tags when determining whether the Government has proved this Commission properly exercises *in personam* jurisdiction over the Accused, as well as when assessing any motion to suppress the Accused's statements to law enforcement,<sup>1</sup> and should admit the Shkin Meeting Letter into evidence for trial on the merits.

A preliminary ruling on the admissibility of evidence for trial on the merits is a question of law appropriate for the Military Judge, not the members. *See* Military Commission Rule of Evidence ("M.C.R.E.") 104 ("Preliminary questions concerning . . . the admissibility of evidence . . . shall be determined by the military judge."); *see also* Rules for Military Commissions ("R.M.C.") 906(b)(11) (identifying "[p]reliminary rulings on admissibility of evidence" as an appropriate pre-trial motion). Thus, it is appropriate for the Military Judge to find this evidence is admissible at trial on the merits during a pre-trial hearing.

At the pre-trial hearing, the Government will authenticate the Shkin Meeting Letter by a preponderance of proof through witness testimony and other evidence. Further, the Government will prove the Shkin Meeting Letter is relevant because it makes "the existence of any fact that is of consequence to a determination of the commission action more probable or less probable than it would be without the evidence." M.C.R.E. 401.

Finally, the Shkin Meeting Letter is not hearsay. The Shkin Meeting Letter is not hearsay because it is "a statement by a co-conspirator . . . [made] during the course and in furtherance of the conspiracy. . . ." *See* M.C.R.E. 801(d)(2)(E). The capture tags are not hearsay because they are records of regularly conducted activity, admissible under M.R.E. 803(b)(6), applicable to this Commission pursuant to M.C.R.E. 803(a).

Thus, in addition to considering the Shkin Meeting Letter when determining whether the Government has proven this Commission properly exercises *in personam* jurisdiction over the

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<sup>1</sup> The Military Judge is not bound by the rules of evidence when considering preliminary questions, except those rules regarding privileges. *See* Military Commission Rules of Evidence 104(a). The Military Judge may consider the Shkin Meeting Letter when determining whether the Commission has *in personam* jurisdiction over the Accused, as well as when determining the admissibility of the Accused's statements to law enforcement, prior to determining the evidence is admissible for trial on the merits.

Accused, as well as when assessing any motion to suppress the Accused's statements to law enforcement, the Military Judge should admit the Shkin Meeting Letter into evidence for trial on the merits.

#### **4. Burden of Proof**

As the moving party, the Government must demonstrate by a preponderance of evidence that the requested relief is warranted. *See* R.M.C. 905(c)(1)-(2). Specifically, to be admitted into evidence for trial on the merits, the Government must prove by a preponderance of evidence that each item is authentic and relevant. *See Bourjaily v. United States*, 483 U.S. 171, 175 (1987) ("The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration.").

#### **5. Facts**

##### **I. Background Facts**

The Government hereby re-asserts and incorporates by reference the facts contained in AE 035, Government Motion *In Limine* to Consider Evidence During Preliminary Matters and To Admit Evidence for Trial On the Merits, Part 5.I. at 3-5. On 3 February 2014, the Accused was charged with a number of offenses arising out of his decade-long role as a senior member of the al Qaeda terrorist network. *See* Referred Charge Sheet. As alleged in the Referred Charge Sheet, during the course of his conspiracy with members and associates of al Qaeda and associated groups, the Accused's leadership took many forms, including commanding an al Qaeda terrorist training camp in Afghanistan; commanding al Qaeda guesthouses in Afghanistan; serving on al Qaeda's senior advisory council during which he assisted in setting the terrorist policies and objectives of al Qaeda, which included killing Americans and other civilians; serving as a key al Qaeda liaison to the Taliban; commanding the al Qaeda insurgency in Afghanistan and Pakistan following Operation Enduring Freedom; and aiding the al Qaeda insurgency in Iraq following Operation Iraqi Freedom.

For his actions, the Accused is charged before this Commission with one Specification of Denying Quarter (Charge I), one Specification of Attacking Protected Property (Charge II), three Specifications of Using Treachery or Perfidy (Charge III), one Specification of Attempted Use of Treachery or Perfidy (Charge IV), and one Specification of Conspiracy to Commit Offenses Triable by Military Commission (Charge V). *See* Referred Charge Sheet.

Charge V alleges that the Accused conspired with a number of senior al Qaeda members, members of other affiliated groups, and other terrorists and insurgents to commit the following war crimes: Terrorism; Denying Quarter; Using Treachery or Perfidy; Murder of Protected Persons; Attacking Protected Property; Attacking Civilians; Attacking Civilian Objects; and Employing Poison or Similar Weapons. Consistent with the stated terrorist aims of al Qaeda—aims the Accused aided in establishing—each of the object crimes of the criminal conspiracy was committed for the purpose of attempting to force the United States, its allies, and non-Muslims out of the Arabian Peninsula, Afghanistan, and Iraq.

The Accused's criminal conspiracy was an international effort that took place in Afghanistan, Pakistan, Iraq, Turkey, and other places. This global criminal conspiracy spanned a period beginning in at least 1996 and continuing until at least 1 November 2006 and involved two theaters of insurgency (Afghanistan and Iraq) against the U.S. and its allies. As alleged in the Referred Charge Sheet, the Accused and/or his co-conspirators engaged in at least 63 overt acts in furtherance of the criminal conspiracy.

## **II. Facts Concerning Specific Items of Evidence Recovered**

The Government seeks to admit the Shkin Meeting Letter acquired by the DoD from the vicinity of Shkin, Afghanistan, on or about 17 May 2003. The Government will authenticate the Shkin Meeting Letter through the testimony of CSM [REDACTED] 3<sup>rd</sup> Brigade Combat Team (BCT), 82<sup>nd</sup> Airborne Division, and Department of Defense Criminal Investigation Division ("CID") Special Agent ("SA") James Hodgson.

To that end, the Government anticipates CSM [REDACTED] will testify as follows: He was assigned as a First Sergeant, 3/504<sup>th</sup> Parachute Infantry Regiment (PIR), 82<sup>nd</sup> Airborne Division, deployed to FB Shkin, Afghanistan during the spring 2003. CSM [REDACTED] will testify that the capture tags affixed to the Shkin Meeting Letter are consistent in form and content with capture tags used by CSM [REDACTED] unit at FB Shkin in May 2003. The capturing unit used document tags to identify items retrieved from captured persons, enemy KIA, and from Sensitive Site Exploitation (SSE) locations in and around the vicinity of Shkin, Afghanistan. CSM [REDACTED] is expected to testify that a typical scenario involved Troops in Contact (TIC) with enemy forces, resulting in items being seized after the particular engagement was complete. The unit, or the attached S-2 (Military Intelligence) ("MI") element, would conduct a sweep of the area, and collect documents and other items and affix capture tags to those items. CSM [REDACTED] is expected to testify he recognizes the unit listed on the capture tags as the MI element assigned to FB Shkin, which consisted of Tactical HUMINT Team (THT) 3, 313<sup>th</sup> MI Battalion, 82<sup>nd</sup> Airborne Division.

The Government anticipates SA Hodgson will testify as follows: He currently serves as a U.S. Army CID Special Agent assigned to the Criminal Investigation Task Force ("CITF") and has served in that capacity since 2004. SA Hodgson has investigated the Accused since 2007, participating in the law enforcement interviews of the Accused at Guantanamo Bay, Cuba.

On 9 August 2012, SA Hodgson traveled to a facility for maintaining evidence and took custody of the original Shkin Meeting Letter and accompanying capture tags. SA Hodgson located the document in a box marked "OEF [Operation Enduring Freedom] Box 62." SA Hodgson will further testify the each page of the two-page Shkin Meeting Letter was affixed with one capture tag each, marked US CED 1005 and US CED 1006. The capture tags included a time of capture using the standard U.S. Army Date/Time Group ("17 05 1200Z 2003"), listed the place of capture as "FB Shkin," and included the capturing unit as THT 3, 313<sup>th</sup> MI. The 313<sup>th</sup> MI Battalion was the MI organization organic to the 82<sup>nd</sup> Airborne Division, based at Ft. Bragg, NC, at that time. SA Hodgson will testify that he read an English translation of the Shkin

Meeting Letter, the original of which was handwritten in Pashtu, a language peculiar to Afghanistan/Pakistan region. SA Hodgson reviewed the original Shkin Meeting Letter with a translator to confirm its contents. SA Hodgson took custody of OEF Box 62—that included the subject documents—for transport to storage at CITF Headquarters at Ft. Belvoir, Virginia, on 10 August 2012. On 3 April 2013, SA Hodgson transferred the Shkin Meeting Letter to the custody of the FBI, through [REDACTED] for purposes of fingerprint analysis and to have the FBI maintain custody for the pending prosecution of the Accused.

## **6. Law and Argument**

The Government hereby re-asserts and incorporates by reference the legal argument and case law contained in AE 035, Parts 6.I. through 6.III. at 13-26. In addition to considering the item identified in Attachment B, and the accompanying capture tags, when determining whether the Government has proved this Commission properly exercises *in personam* jurisdiction over the Accused, as well as when assessing any motion to suppress the Accused's statements to law enforcement, the Military Judge should admit the Shkin Meeting Letter into evidence for trial on the merits. During the pretrial hearing, the Government will prove by a preponderance of the evidence that the Shkin Meeting Letter is authentic, relevant, and are not hearsay.

### **I. It Is Appropriate for the Military Judge to Admit Evidence as a Preliminary Matter**

The Military Judge should admit the Shkin Meeting Letter into evidence in advance of trial on the merits, consistent with the practice in federal courts. *See United States v. Douglas*, 482 F.3d 591, 593-94 (D.C. Cir. 2007) (affirming order granting the government's motion *in limine* to admit evidence of defendant's prior arrest); *United States v. Sutton*, 31 M.J. 11, 16-17 (C.M.A. 1990) (affirming that Rules of Courts-Martial ("R.C.M.") 905(b) provides that any defense, objection, or request which is capable of determination without the trial of the general issue of guilt may be raised before trial and questions concerning the admissibility of evidence on . . . grounds [other than involuntary confessions and admissions, unlawful searches and



seizures, and eyewitness identification] may be raised by objection at trial or by motions *in limine* and affirming that R.C.M. 906(b)(13) lists a “[p]reliminary ruling on admissibility of evidence” as one of the matters that “may be requested by motion for appropriate relief.”).

Similar practice is authorized in military commissions. M.C.R.E. 104(a), which is entitled “Questions of admissibility and procedure generally” states,

Preliminary questions concerning . . . the admissibility of evidence . . . shall be determined by the military judge. In making these determinations the military judge is not bound by the rules of evidence, except those with respect to privileges.

When resolving preliminary issues under M.C.R.E. 104(a), the Military Judge should apply the “more probable than not” standard. *See Bourjaily*, 483 U.S. at 175 (“The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration.”). Once a party lays a proper foundation, the Military Judge should find the evidence admissible—a matter completely within the Military Judge’s discretion and not appropriate for the members’ consideration. M.C.R.E. 104(a). *See* AE 035 at 13-15.

For all the reasons provided herein, the Commission should conduct an appropriate pre-trial hearing and admit the Shkin Meeting Letter upon finding the Government met all of the appropriate standards.

## **II. The Documents the Government Seeks to Admit Are Authentic and Relevant**

When proffering a piece of evidence for admission, the Government must satisfy the twin requirements of authentication and relevance. *See, e.g., United States v. Blackwell*, 694 F.2d 1325, 1329-30 (D.C. Cir. 1982) (stating “[a]uthentication and identification are specialized aspects of relevancy that are necessary conditions precedent to admissibility.”); *United States v. Lawson*, 494 F.3d 1046, 1052 (D.C. Cir. 2007) (stating, “[t]o be admissible, evidence must be relevant, and its probative value must not be substantially outweighed by the danger of unfair prejudice or misleading the jury.”); *United States v. Blanchard*, 48 M.J. 306, 309-10 (C.A.A.F. 1998) (affirming the well-established view that authentication is a component of relevancy and

requires a preliminary determination by the judge that sufficient evidence of authenticity exists to present the authenticity question to the members for their ultimate factual determination). *See* AE 035 at 15-22.

As detailed below, the Government will prove by a preponderance of evidence that the Shkin Meeting Letter and accompanying capture tags offered are both authentic and relevant.

**A. Each Item the Government Seeks to Admit Is Authentic**

The Government will prove the Shkin Meeting Letter is authentic through the testimony of CSM [REDACTED] and SA James Hodgson as detailed above.

M.C.R.E. 901 provides,

Evidence shall be admitted as authentic if: (a) the military judge determines that there is sufficient basis to find that the evidence is what it is claimed to be; and (b) the military judge instructs the members that they may consider any issue as to authentication or identification of evidence in determining the weight, if any, to be given to the evidence.

The equivalent Federal Rule of Evidence (“Fed. R. Evid.”) 901<sup>2</sup> identifies specific means by which a party may authenticate evidence, including direct “testimony of a witness with knowledge,” circumstantial proof, distinctive characteristics such as appearance, contents, substance, and internal patterns, and circumstances of discovery, and comparisons by expert witnesses or the trier-of-fact. *See* Fed. R. Evid. 901(b); *see also United States v. Bruner*, 657 F.2d 1278, 1284 (D.C. Cir. 1981) (circumstantial evidence of authenticity can be sufficient). Courts interpreting Fed. R. Evid. 901 universally hold “[t]he threshold for the Court’s determination of authenticity is not high.” *United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006).

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<sup>2</sup> Because the Federal Rules of Evidence and the Military Rules of Evidence (“M.R.E.”) relevant to this issue are substantially the same, all references to the Federal Rules of Evidence are intended to refer to their M.R.E. counterparts as well. *See Blanchard*, 48 M.J. at 309 (explaining M.R.E. 901 and Fed. R. Evid. 901 are the same, and thus the “federal court of appeals decisions applying [authenticity] principles would be most helpful.”).



Moreover, M.C.R.E. 901 “is satisfied if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification.” *United States v. Dhinsa*, 243 F.3d 635, 658 (2d Cir. 2001); *United States v. Fadayini*, 28 F.3d 1236, 1241 (D.C. Cir. 1994). “If in the court’s judgment it seems reasonably probable that the evidence is what it purports to be, the command of Rule 901(a) is satisfied, and the evidence’s persuasive force is left to the jury.” *Dhinsa*, 243 F.3d at 659; *see also United States v. Blanchard*, 48 M.J. 306, 309-10 (C.A.A.F. 1998) (explaining that “[M.R.E.] 104 gives discretion to the trial judge as to the manner in which he makes preliminary determinations concerning admissibility of evidence” and “reject[ing] appellant’s general argument that the military judge erred by failing to strictly follow selected federal decisions in making his authenticity determination”).

The Government does not need to call every witness in the chain of custody because any challenge to the chain of custody goes to the weight of the evidence rather than its admissibility. *See e.g., Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 n.1 (2009); *United States v. Mejia*, 597 F.3d 1329, 1335 (D.C. Cir. 2010) (finding challenges to the chain of custody go to the weight rather than admissibility, even where the gap in the chain is at the original point of collection); *United States v. Harris*, 55 M.J. 433, 440 (C.A.A.F. 2001) (quoting *United States v. Maxwell*, 38 M.J. 148, 150 (C.M.A. 1993), cert. denied, 510 U.S. 1112 (1994)) (“[T]o establish chain of custody, the Government is not required to exclude every possibility of tampering.”); *see also* M.C.R.E. 901(b).

CSM [REDACTED] and SA Hodgson will describe the process of collecting, identifying, and retrieving documents, to include the Shkin Meeting Letter and accompanying capture tags. CSM [REDACTED] will testify about how items were confiscated and capture details recorded at FB Shkin in May 2003, using capture tags such as those associated with the Shkin Meeting Letter. CSM [REDACTED] will further testify that the capture tag information is consistent with unit SOP and is accurate for FB Shkin in May 2003. SA Hodgson will testify he took custody of the documents at a DoD repository of similar such documents and materials identified as originating from OEF, associated with the Afghanistan Theater of Operations (“ATO”). Finally, the face of the Shkin

Meeting Letter reveals it is a unique handwritten document, originally written in Pashtu, a language associated with the Afghanistan/Pakistan region in which the Accused was located in May 2003—as he described to law enforcement during interviews.

These combined factors provide the Commission sufficient authentication facts that meet the standard under a traditional Fed. R. Evid. 901 analysis. When combining the contents, substance, distinctive characteristics, and method of retrieval among materials taken from ATO (*see* Fed. R. Evid. 901(b)), such evidence proves that an objective member would conclude that the evidence is what the Government asserts it to be. *See* AE 035, hereby incorporated by reference (detailing a series of military commissions and federal district court cases in which similar testimony was held to be sufficient to authenticate documents retrieved from the battlefield). For the foregoing reasons, the Military Judge in this Commission should find the Government has sufficiently authenticated the Shkin Meeting Letter in Attachment B.

#### **B. The Items the Government Seeks To Admit Is Relevant**

The Shkin Meeting Letter is relevant. M.C.R.E. 402 states, “All evidence having probative value to a reasonable person is admissible . . . .” M.C.R.E. 401 states, “Evidence has ‘probative value to a reasonable person’ when a reasonable person would regard the evidence as making the existence of any fact that is of consequence to a determination of the commission action more probable or less probable than it would be without the evidence.” *See also United States v. Wuterich*, 67 M.J. 63, 77 (C.A.A.F. 2008) (holding the same under the M.R.E.). The Government must demonstrate by a preponderance of the evidence (more probable than not) that the evidence is relevant. *See Bourjaily*, 483 U.S. at 175.<sup>3</sup> The Government’s proof readily meets this relatively low bar as well.

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<sup>3</sup> *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977) (“[e]vidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill.”); *Gunning v. Cooley*, 281 U.S. 90, 94 (1930) (“Issues that depend on the . . . weight of evidence are to be decided by the jury.”); *Baltimore & Ohio R. Co. v. Groeger*, 266 U.S. 521, 524 (1925) (“the weight and probative value of evidence are to be determined by the jury and not by the judge”).

The Shkin Meeting Letter was recovered on about 17 May 2003 in the vicinity of FB Shkin, Afghanistan. The documents are evidence the Accused participated in meetings consisting of senior leadership from both al Qaeda and the Taliban, many of whom are named in the charges against the Accused, and corroborates the Accused's role as a leader of the al Qaeda insurgency, particularly by time and location. *See* Referred Charge Sheet.

Further, the Shkin Meeting Letter corroborates statements the Accused made to law enforcement agents. Law enforcement agents will testify that during interviews the Accused described Shkin, which straddles the border of Afghanistan and Pakistan, as the operational center for al Qaeda during the period of time Hadi was military operational commander for al Qaeda. The Accused referenced Shkin more than twenty times during interviews with law enforcement agents. Indeed, the Accused is charged with commanding an attack on U.S. forces located near Shkin on 29 September 2003. *See* Referred Charge Sheet at Overt Acts 35-38 and Charge II. The Shkin Meeting Letter and accompanying capture tags corroborate the Accused's presence in the vicinity of Shkin, Afghanistan, during the proper time range, as well as the Accused's role as the military operational commander for al Qaeda in Afghanistan and Pakistan. The presence of the Accused's name on a list of senior leadership for al Qaeda and the Taliban further corroborates the Accused's statements to law enforcement regarding his overall leadership role within al Qaeda. Similarly, the Accused provided law enforcement agents with a history of his support to the Taliban that began more than a decade before the date of the Shkin Meeting Letter, resulting in the Accused being a key liaison figure between al Qaeda and the Taliban. The list of attendees in the Shkin Meeting Letter includes several senior Taliban commanders and war lords. Finally, the use of Pashtu in drafting the original Shkin Meeting Letter is consistent with the Accused's statements to law enforcement that members of al Qaeda and the Taliban sometimes communicated in Pashtu, a language the Accused found simple, but nonetheless, used a translator when engaging in operational discussions with Taliban commanders.

SA Hodgson will testify concerning the Shkin Meeting Letter's significance in connection with facts and allegations in this case. FBI [REDACTED] and [REDACTED] [REDACTED] will testify to substance and circumstances surrounding the series of voluntary statements the Accused made to the agents in 2007, during which the Accused provided significant details and context that further underscores the relevance of the Shkin Meeting Letter. In addition, Mr. Evan Kohlmann is expected to testify for the Government as an expert on al Qaeda and associated groups. Mr. Kohlmann will discuss al Qaeda and Taliban leadership structure, and identify the role and stature in those organizations of the participants listed in the Shkin Meeting Letter. The Government anticipates Mr. Kohlmann will provide the following background and identifying information about the other individuals listed in the Shkin Meeting Letter:

**Sayf-al-Adal:** Former director of security for al Qaeda. Included in DoJ/FBI "Most Wanted Terrorists" (wanted in connection with August 7, 1998 bombings of U.S. Embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya). The Accused described Sayf-al-Adal to law enforcement agents as a senior al Qaeda leader.

**Abu Muhammad Al-Misri:** Former emir of al Qaeda Al Farouq training camp. Included in DoJ/FBI "Most Wanted Terrorists" (wanted in connection with August 7, 1998 bombings of U.S. Embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya).

**Sulayman Abu Ghaid:** Al Qaeda spokesperson, Son-in-law to Usama bin Ladin, convicted and sentenced in U.S. federal court in September 2014, serving a life sentence for terrorist related activity.

**Mukhtar-al-Balutsi** (aka Khalid Sheikh Mohammad): Former senior al Qaeda leader, mastermind of the 11 September 2001 attacks, presently detained at Guantanamo Bay, Cuba. The Accused described Mukhtar-al-Balutsi to law enforcement agents as a senior al Qaeda leader.

**Haqqani Jal-al-Din:** Taliban official and creator of the Haqqani Network. In September 2012, the United States declared as the Haqqani Network a terrorist group.

**Sayf-al-Rahman, son of Mawlana Mansur:** Taliban leader and commander identified with shooting down a U.S. Helicopter and killing American Soldiers.

**Kashmir Khan:** Commander of Hizb-i-Islami faction whose forces were situated in Kunar Province, the location of intense fighting with U.S. forces.

**Gulbadin, (Hekmatyar):** Senior Taliban commander, founder of Hezb-i-Islami with ties to al Qaeda. The Accused described Gulbadin to law enforcement agents as the leader whose forces were responsible for the overthrow of the Afghan government. The Accused stated he fought for Gulbadin for approximately eight months beginning in 1992.

**Mawlana Bakht Jan:** Taliban commander and warlord, the subject of U.S. military operations for his capture.

The Shkin Meeting Letter is consistent with the statements of the Accused himself, the testimony of Government witnesses and experts, and other evidence, making the Accused's involvement in conspiracy, and liability for the substantive offenses charged, "more probable." *See* M.C.R.E. 401. Thus, the evidence is relevant.

### **III. The Shkin Meeting Letter Is Not Inadmissible Hearsay**

The attached Shkin Meeting Letter is not inadmissible hearsay. M.C.R.E. 801(d)(2)(E) provides that "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" is not hearsay. Because the Shkin Meeting Letter is specifically exempted by M.C.R.E. 801(d)(2)(E), it is not inadmissible hearsay. Similarly, the capture tags are records of regularly conducted activity, admissible under M.R.E. 803(b)(6), applicable to this Commission pursuant to M.C.R.E. 803(a), as described below.<sup>4</sup>

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<sup>4</sup> Though Government need not prove the capture tags fall within an exception to the rule against hearsay when merely offering the capture tags as corroboration and authentication of the substantive item of evidence—the Shkin Meeting Letter, the Government does so here to further confirm the reliability of the capture tags as corroborative proof.



**A. The Shkin Meeting Letter is a Statement of the Accused's Co-Conspirators Made During the Course of and in Furtherance of the Conspiracy**

The Shkin Meeting Letter is a record made by the Accused's co-conspirators during the course and in furtherance of their conspiracy. M.C.R.E. 801(d)(2)(E) provides that "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" is not hearsay. When such a statement is offered against a party, it is "not hearsay" and is therefore admissible. *See, e.g., United States v. Mehanna*, 735 F.3d 32 (1st Cir. 2013) (describing Fed. R. Evid. 801(d)(2)(E), which is the same as M.C.R.E. 801(d)(2)(E)). When deciding whether a statement was made during the course and in furtherance of the conspiracy, the Military Judge should ask whether the record evinces "that a conspiracy embracing both the declarant and the defendant existed, and that the declarant uttered the statement during and in furtherance of the conspiracy." *United States v. Piper*, 298 F.3d 47, 52 (1st Cir. 2002) (internal quotation marks omitted). Further, the Government need only prove that the declarant was more likely than not a conspirator. *See United States v. Ayala*, 601 F.3d 256, 267-68 (4th Cir. 2010).

Even where the precise author of the document is unknown, the item should still be admitted into evidence pursuant to Fed. R. Evid. 801(d)(2)(E) where a preponderance of the evidence indicates the documents were made by a member of the conspiracy. *United States v. Lyons*, 740 F.3d 702, 719 (1st Cir. 2014); *see, e.g., United States v. El-Mezain*, 664 F.3d 467, 505 (5th Cir. 2011) ("The failure of a document to identify the declarant is not fatal to admissibility, if the facts and circumstances surrounding the making of the statement indicate that the speaker is a member of the conspiracy . . . ."); *Ayala*, 601 F.3d at 267-68 (noting that "it is not necessary for the offering party to identify the declarant by name" and the government need only show for admissibility that the declarant was more likely than not a conspirator).<sup>5</sup>

On its face, the Shkin Meeting Letter appears to have multiple authors. It is nonetheless consistent with the form of hand-written correspondence typical of internal communications used

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<sup>5</sup> To satisfy the requirements of M.C.R.E. 801(d)(2)(E), the Military Judge should find by a preponderance of the evidence that a conspiracy including the Accused and the individual who authored the document exists. *See United States v. Al-Moayad*, 545 F.3d 139 (2d Cir. 2008).



by Taliban and al Qaeda leadership. The document appears to include elements of operational security and trade craft such as the use of code words and separating the list of names on one page from the meeting location on a separate page. The Accused is charged with conspiring with Usama bin Laden, Ayman al Zawahiri, Mohammed Atef, Khalid Shaikh Mohammad and others to commit various substantive offenses triable by military commission between about 1996 and on or about 1 November 2006.<sup>6</sup> See Referred Charge Sheet. As described above, the Shkin Meeting Letter includes a list of senior leadership among al Qaeda and the Taliban, including Khalid Shaikh Mohammad (aka “Mukhtar-al-Balutsi”), a named co-conspirator in this case. Significantly, the Shkin Meeting Letter brings together in one location a number of operational commanders across multiple organizations all involved in the conspiracy for which the Accused is charged. Further, the information contained in the Shkin Meeting Letter, including participants, location, and knowledge of impending activity, demonstrates an apparent familiarity with sensitive operational information likely known only to someone trusted and closely involved in the conspiracy.

#### **B. The Capture Tags are Records of Regularly Conducted Activity**

As noted above, capture tags affixed to the Shkin Meeting Letter are routinely used by military units to document items of intelligence collected on the battlefield. M.R.E. 803(b)(6)<sup>7</sup> includes an exception to the rule against hearsay for records of a regularly conducted activity, regardless of the availability of the declarant, defined as follows:

A record of an act, event...if:

(A) the record was made at or near the time by – or from information transmitted by – someone with knowledge;

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<sup>6</sup> The Accused’s voluntary statements to the FBI will confirm further the Accused’s membership in the al Qaeda conspiracy he shared with those listed in the Shkin Meeting Letter.

<sup>7</sup> M.C.R.E. 803(a) provides “[h]earsay evidence may be admitted in trials by military commission if the evidence would be admitted under the rules of evidence applicable in trial by general courts-martial, and the evidence would otherwise be admissible under these Rules or this Manual.”

(B) the record was kept in the course of a regularly conducted activity of a uniformed service...;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or other qualified witness...; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness. Records of regularly conducted activities include, but are not limited to...chain of custody documents..." M.R.E. 803(b)(6) (2012 ed.).

CSM [REDACTED] is expected to testify that capture tags of the same type as those affixed to the Shkin Meeting Letter were used regularly in May 2003 at FB Shkin. CSM [REDACTED] will also testify that using capture tags to identify and provide a chain of custody for items captured or seized by the U.S. military and brought to FB Shkin was SOP. CSM [REDACTED] is expected to testify that capture tags were filled out by the capturing unit or by someone who obtained the requisite information from the capturing unit. The capture tags were affixed to the captured material and provided to the MI unit at FB Shkin. CSM [REDACTED] is expected to confirm the capture tags accompanying the Shkin Meeting Letter are consistent with those used by the units assigned to FB Shkin in May 2003. Further, SA Hodgson will testify about the presence of capture tags connected to multiple items of evidence associated with FB Shkin in 2003 that he reviewed in the DoD evidence facility. SA Hodgson will testify the capture tags are consistent with other similar capture tags he viewed that were affixed to documents and items of evidence captured and processed at FB Shkin in 2003. For all the reasons provided, the capture tags fall within the requirements of M.R.E. 803(b)(6) and are reliable as corroborative proof of the Shkin Meeting Letter under that exception to the rule against hearsay.

**C. Even if the Shkin Meeting Letter Does Not Fit Within One of the Categories Described Above, the Evidence Is Nevertheless Admissible as it Is Reliable, Probative of a Material Fact, Direct Testimony from the Declarant Is Not Available as a Practical Matter, and Meets the Interests of Justice**

Assuming *arguendo* that the Commission finds the Shkin Meeting Letter does not fit within the exceptions listed above, it is nonetheless admissible pursuant to M.C.R.E. 803(b)(2).<sup>8</sup>

M.C.R.E. 803(b)(2)(C) states that such evidence is not hearsay when direct testimony from the declarant is “not available as a practical matter.” In making this assessment, M.C.R.E. 803(b)(2)(C) instructs the Military Judge to consider “the physical location of the witness, unique circumstances during hostilities, and adverse impacts on operations that would likely result from production of the witness.” *Id.* As described above, all of these factors exist in this case. The Shkin Meeting Letter is probative of several material facts, is corroborated by witness testimony and other evidence, is reliable, is voluntary (other members of the charged conspiracy authored the Shkin Meeting Letter with no Government involvement), and the general purpose of the rules of evidence and the interests of justice will be best served by admission of the evidence. 10 U.S.C. § 949a(b)(3)(D)(ii); M.C.R.E. 803(b)(2); *see also* AE 035 at 24-26.

The history of Fed. R. Evid. 807 is also helpful when assessing the admissibility of this evidence pursuant to M.C.R.E. 803(b)—the textual corollary of Fed. R. Evid. 807. *See* AE 35 at 26. Fed. R. Evid. 807 was created to provide federal courts with the flexibility required to accomplish the purposes of Fed. R. Evid. 102. *See* 7 Michael H. Graham, *Handbook of Federal Evidence*, § 701:1 (7th Ed. 2011). To that end, M.C.R.E. 803(b) and Fed. R. Evid. 807 alike require the judge to find that admitting the evidence will best serve “the general purposes of the rules of evidence and the interests of justice . . .” Fed. R. Evid. 102 states the purposes of the rules of evidence as follows:

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<sup>8</sup> M.C.R.E. 803(b)(1) requires the proponent of the evidence offered pursuant to the rule to give notice “sufficiently in advance” of trial. This pleading is intended to serve as the required notice.

These rules shall be construed so as to administer every proceeding fairly . . . and promote the development of evidence laws, to the end of ascertaining the truth and securing a just determination.

Similarly, M.C.R.E. 102 states:

These rules should be construed to secure fairness in administration, elimination of unjustifiable expense and delay, the protection of national security, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Both M.C.R.E. 803(b) and Fed. R. Evid.807 are borne out of the desire to ensure that strict adherence to the formalism of the hearsay rules does not deprive the fact-finder of probative, reliable evidence that aids him or her in rendering a just verdict. The spirit and general purpose of M.C.R.E. are best served by admitting the Shkin Meeting Letter. Doing so eliminates unjustifiable expense and delay, appropriately protects national security, and promotes the search for the truth in a manner that allows the proceedings to be justly determined. Thus, there is no basis to exclude the Shkin Meeting Letter as inadmissible hearsay.

## **7. Conclusion**

The Government will authenticate the evidence identified in this motion and prove its relevance at a pre-trial hearing. This will allow Defense to know what evidence it must meet at trial, and the members can be protected from exposure to inadmissible evidence or undue delay during trial. Thus, for all the reasons above, in addition to considering the items identified in Attachment B when determining whether the Government has proved this Commission properly exercises *in personam* jurisdiction over the Accused, as well as when assessing any motion to suppress the Accused's statements to law enforcement, the Military Judge should admit the document listed in Attachment B into evidence prior to trial on the merits.<sup>9</sup>

## **8. Oral Argument**

The Government does not request oral argument to address the merits of whether the Commission may admit evidence before trial. The Commission can decide that matter without oral argument. *See* Military Commissions Trial Judiciary Rule of Court 3.9(a). The

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<sup>9</sup> The Government reserves the right to seek the admission of additional evidence found and not otherwise identified in this pleading.

Government, however, requests an evidentiary hearing to lay a foundation for the items identified in this motion.

**9. Witnesses<sup>10</sup> and Evidence**

The Government intends to call the following witnesses in support of this motion:

1. CSM [REDACTED] 82<sup>nd</sup> Airborne Division (Foundation/Authentication)
2. CITF SA James F. Hodgson (Active Case Agent)
3. FBI [REDACTED] (Interviewing Agent)
4. FBI [REDACTED] (Interviewing Agent)
5. Mr. Evan Kohlmann (Terrorism Expert)

**10. Certificate of Conference**

The Government certifies that it conferred with the Defense before filing this motion.

The Defense objects to the relief requested.

**11. Additional Information**

The Government has no additional information.

**12. Attachments**

- A. Certificate of Service, dated 22 April 2015.
- B. One document comprising a two-page letter and accompanying translation related to the Accused and acquired from the vicinity of Shkin, Afghanistan, in May 2003.

Respectfully submitted,

\_\_\_\_\_  
//s//  
Mikeal M. Clayton  
Trial Counsel  
LTC David J. Long, JA, USA  
Assistant Trial Counsel  
Office of the Chief Prosecutor  
Office of Military Commissions

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<sup>10</sup> The Government respectfully requests to have this motion heard during the July sessions for judicial economy concerning these witnesses who are also necessary witnesses concerning other matters scheduled for the July sessions.

# ATTACHMENT A

Filed with TJ  
22 April 2015

Appellate Exhibit 043 (al Hadi)  
Page 20 of 32



**CERTIFICATE OF SERVICE**

I certify that on the 22nd day of April, 2015, I filed **AE 043, Government Motion In Limine To Consider Evidence During Preliminary Matters and To Admit Evidence for Trial on the Merits**, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

*//s//*

---

Mikeal M. Clayton  
Trial Counsel  
Office of the Chief Prosecutor  
Military Commissions

# ATTACHMENT B

Filed with TJ  
22 April 2015

Appellate Exhibit 043 (al Hadi)  
Page 22 of 32

از طرف سورتان طالب  
پیشانی پادشاه

زما نران عا حبه (سلام علیہ) سلام د فرما

تاسو لولو ملگرو روغاهو رتيا رغو لهر

ملاوون پور خنبر دادو چي ما تاسو تاي تافار

3 سارن دلی

۲ نامون نه او ته زه نه دواړه

سیدان

دی تاسو دی گمانا یسین

مجلس ۱۷

۱۷۱۷

مجلس کربلا ۲۰۰۰

5 2003

تبرکات و فضائل و مناقب و سیرت و احوال و غیره

وہ لوگوں کے لئے ہے جو اللہ کے رسول کے ساتھ ہیں

...

[illegible]

*Amphibian*

عبدالله بن محمد

الحمد لله

المينى العدل

عبد الحامد الملقب

البوحي المدالي

مجلس القضاة

كتاب التاريخ

حقاً کی جلا اردو

السيف والرمح

والزموا انما صان للصور

کنفیضان

1000

لو عندنا

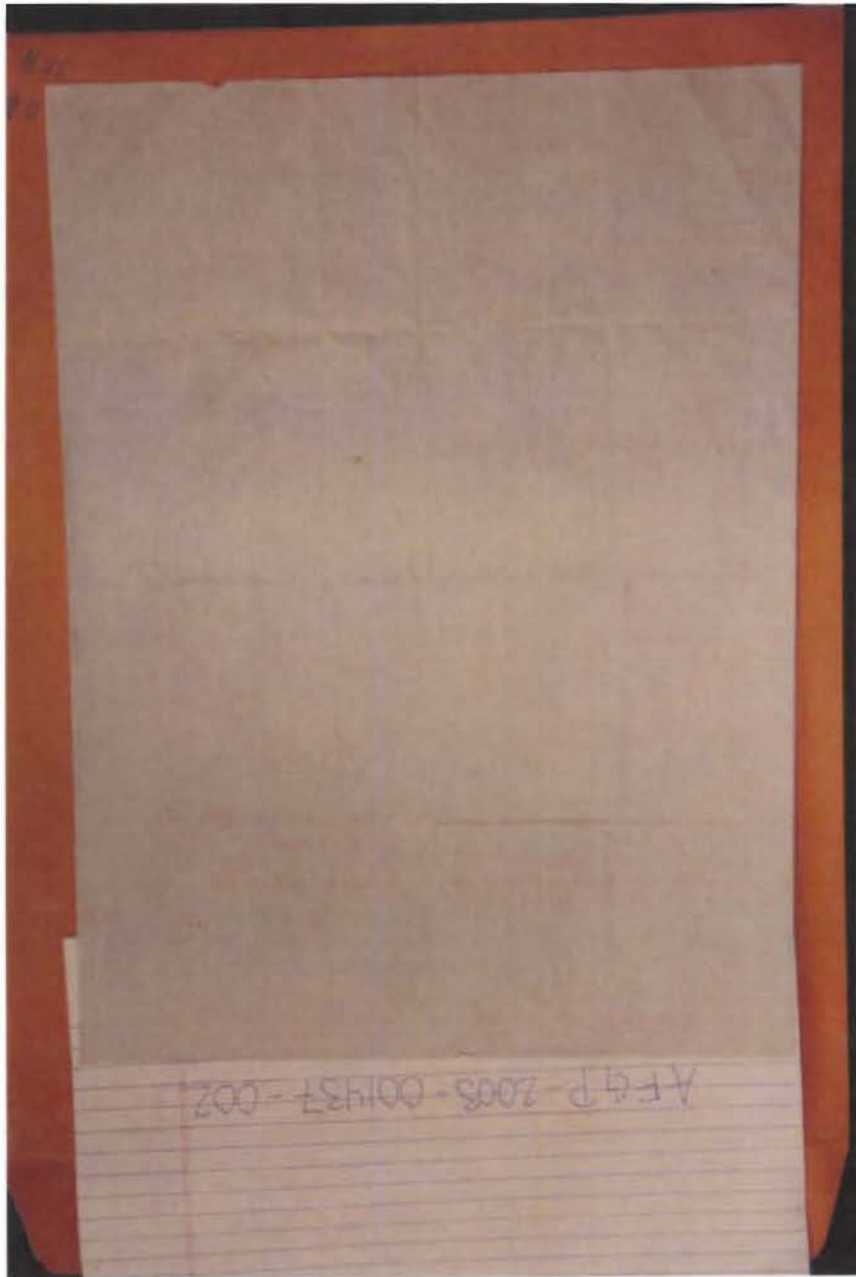
ولا تأتوا حتى ياتوا

سید محمد

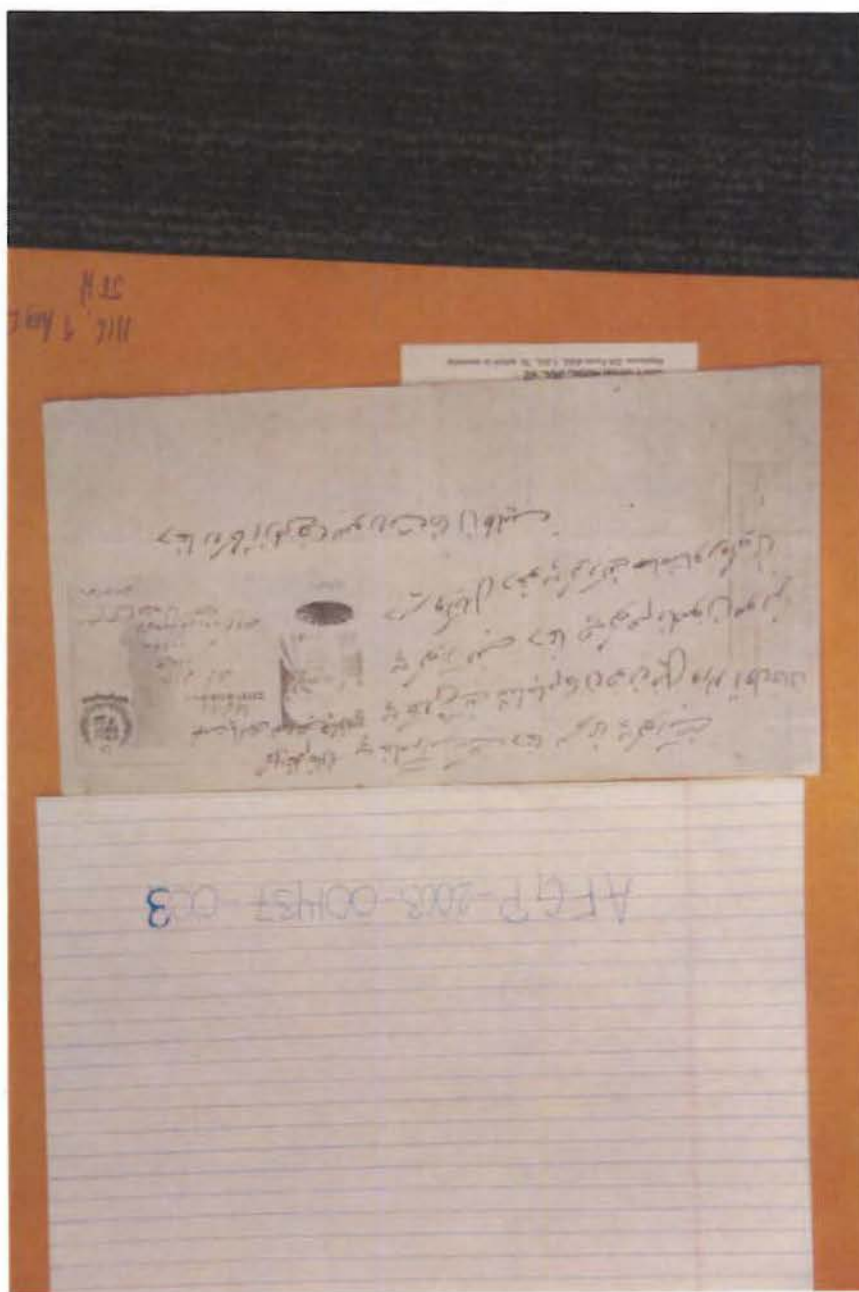
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219 H

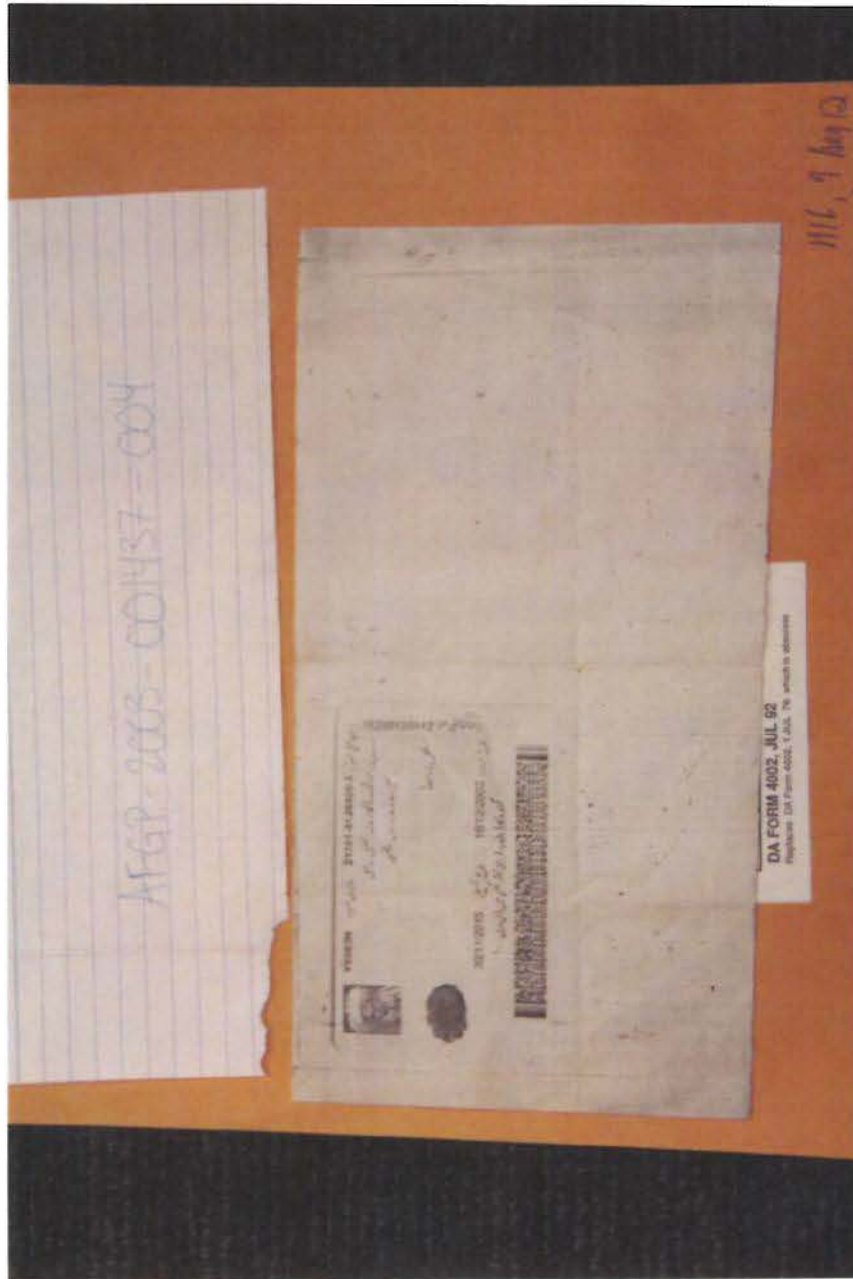
HADI-1-006525



HADI-1-006526



HADI-1-006527





MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

ABD AL HADI AL-IRAQI

DECLARATION OF



1. I am fluent in written and spoken English as well as written and spoken Pashto.
2. I have taken the ALTA Language Services Translation Assessment and scored at skill level three or higher, which corresponds to professional performance.
3. I am familiar with the Pashto document bearing bates numbers AFGP-2003-001437-001 and AFGP-2003-001437-003, which is a letter from Surat Khan to Mumtaz Khan.
4. To the best of my knowledge and belief, the English translation attached to this Declaration is a true and accurate translation from Pashto into English of the Pashto document described in paragraph 2 of this Declaration.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 4/4/2014

McLean, Virginia



MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

ABD AL HADI AL-IRAQI

DECLARATION OF

[REDACTED]

1. I am fluent in written and spoken English as well as written and spoken Urdu.
2. I have taken the ALTA Language Services Translation Assessment and scored at skill level three or higher, which corresponds to professional performance.
3. I am familiar with the Urdu document bearing bates numbers AFGP-2003-001437-003 and AFGP-2003-001437-004, which is a Pakistani national identification card.
4. To the best of my knowledge and belief, the English translation attached to this Declaration is a true and accurate translation from Urdu into English of the Urdu document described in paragraph 2 of this Declaration.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 4/4/2014

McLean, Virginia

[REDACTED]

AFGP-2003-001437-001

~~Sayf al-Adl~~  
~~'Abd al-Hadi~~  
~~Al-Iraqi~~

Sayf-al-Adal  
 'Abd-al-Hadi Al-Iraqi  
 Abu Muhammad Al-Misri  
 Sulayman Abu Ghaid  
 Mukhtar-al-Balutsi  
 Haqqani Jal-al-Din  
 Sayf-al-Rahman son of  
 Mawlana Mansur  
 Kashmir Khan  
 Gulbadin  
 Commander  
 Mawlana Bakht Jan  
 Gayan Khail

From [TC: Illegible]

An injured Arab person in the house of Shawar Khan; we do not know anything how he was injured. The injured was transported to Wana in a Datsun by Syedil and Zawil Khan at 6:00 in the morning. 17<sup>th</sup> day, 2 O'clock

From: Surat Khan Talib  
 To: Mumtaz Khan,

Dear friends, May peace be upon you. I wish you all good health.

I want to let you know that I gave you the name of three persons and two names were missing from the total of five names. Those two names are: Sulayman and Mukhtar.

Moreover, you are requested to be alert regarding the ongoing campaign by a group that plans to attempt an extreme action against you. It will be, first in the location of Angur bus stop and in Zawal Khyal on 17 May 2003 thereafter. Shawar Khan, son of Elam Khan has a wounded person in his house.

About Zawil Khan; son of Bubadai and Syidil Khan; son of Abdali,

We could not obtain any information.

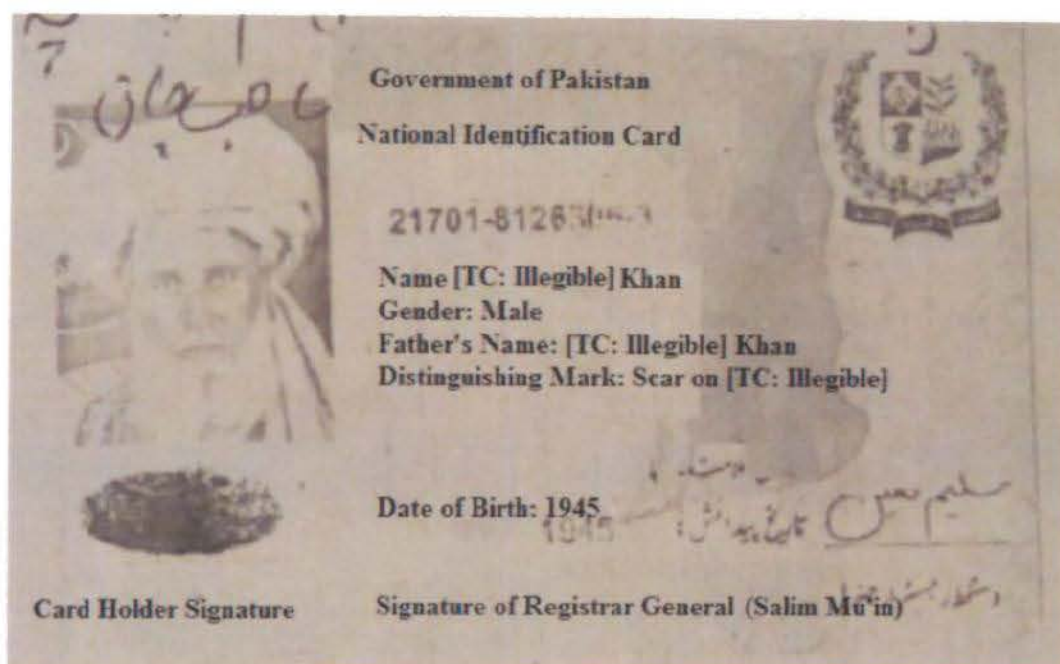
HADI-1-006517

**AFGP-2003-001437-002**

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AFGP-2003-001437-003

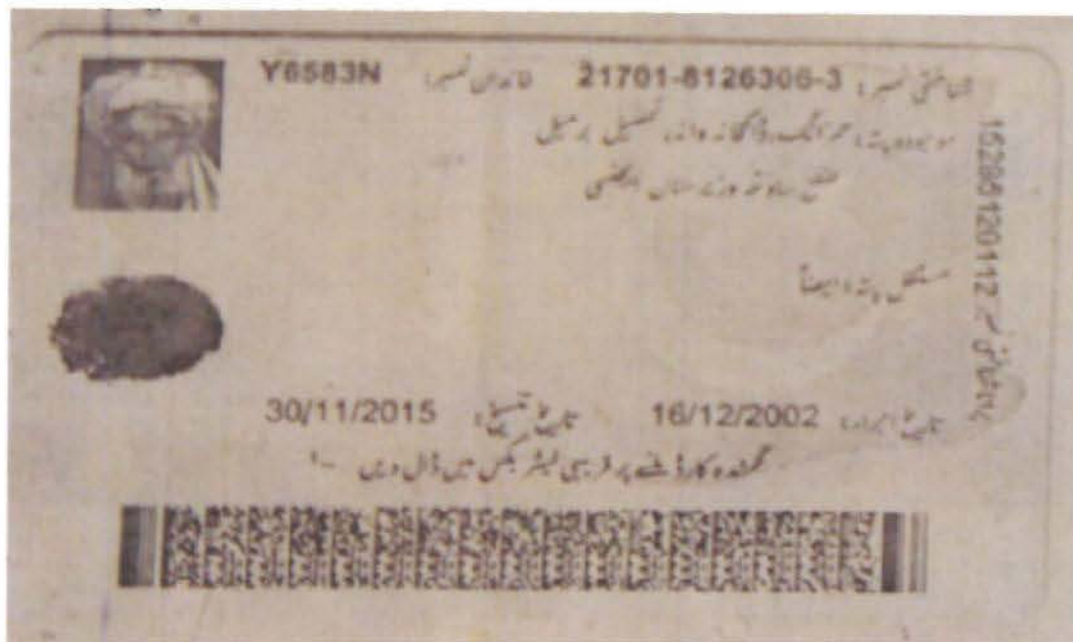
Gul 'Azam Khan, Sahib Jan



The names I have provided; hold meetings in the houses of: Gul Azam Khan from Hamzang and Shah Jam Khan Khuni Khail son of Awal Khan from Shakai  
This short note is from Surat Khan Talib.



AFGP-2003-001437-004



Family Number: Y6583N Identification No. 21701-8126306-5  
Current Address: Hamzang, Post Office Wana, Sub-district Barmail  
South Waziristan District Agency

Permanent Address: The Same

Issue Date: 16/12/2002  
Expiration Date: 30/11/2015

If found, drop into the nearest mail-box

Identification Number: 15285120112  
[TC: Illegible]