

MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD;  
WALID MUHAMMAD SALIH  
MUBARAK BIN 'ATTASH;  
RAMZI BINALSHIBH;  
ALI ABDUL AZIZ ALI;  
MUSTAFA AHMED ADAM  
AL HAWSAWI

AE 373E (GOV)

**Government Response**  
To Defense Motion to Dismiss  
For Government Intrusion into  
Attorney-Client Relationship

9 March 2016

**1. Timeliness**

The Prosecution timely files this Response pursuant to the Commission's ruling in AE 373-2(RUL)(Gov), which established that any response to AE 373 (AAA) and AE 373A (AAA) is due no later than 9 March 2016.

**2. Relief Sought**

The Prosecution respectfully requests the Commission deny AE 373 (AAA), the Defense Motion to Dismiss For Government Intrusion into Attorney-Client Relationship.

**3. 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).

**4. Facts**

**I. Issues Related to JTF-GTMO's "Baseline Review" Prior to Arraignment (AE 008)**

On 19 April 2012, Defense counsel for Mr. Hawsawi filed AE 008, Defense Motion to Dismiss for Defective Referral. Within its Motion, the Defense requested the Commission "to dismiss the charges and specifications based on defects in the referral process" or "direct the Legal Advisor to the Convening Authority (CA) to prepare a new pretrial advice, after the CA

affords counsel adequate time, resources, communications and the type of client access necessary to provide input to the CA.” AE 008 at 1. In support of its argument, the Defense cited to the “baseline review,” wherein the Commander, Joint Task Force-Guantanamo (“JTF-GTMO”), directed a one-time review of all material in the cells of the Accused to identify and remove any contraband materials, including those presenting force protection or national security concerns. The Defense stated that, as a result of the “baseline review,” “counsel was unable to establish the necessary rapport to effectively communicate regarding sensitive, privileged and personal information that was indispensable in the preparation of a [mitigation] submission to the CA.” *Id.* at 9.

On 4 May 2012, the Prosecution filed AE 008A, Government Response to Defense Motion to Dismiss for Defective Referral. Within its Response, the Prosecution requested the “Military Judge deny the defense motion to dismiss and its alternative requested relief for the Military Judge to direct a new pre-trial advice after the defense is provided adequate time, resources, communications, and the type of client access necessary to provide input to the Convening Authority.” AE 008A at 1. Further, the Prosecution asserted that “it [was] entirely appropriate for the Commander to have mandated a limited inspection by a walled-off privilege team of materials exchanged between detainees and their military commission attorney” and that such review was consistent with federal court precedent. *Id.* at 32-34. The Prosecution also unequivocally stated that “the prosecution has not been informed of the content of any of the attorney-client privileged information that JTF-GTMO may have had access to . . . .” *Id.* at 32.

On 29 December 2015, after substantial litigation, the Commission issued AE 008NNN, Order, Defense Motion to Dismiss for Defective Referral, rejecting the Defense argument and denying its motion. AE 008NNN at 12; *see also id.* at 2 (noting argument advanced by Defense counsel for Mr. Ali and Mr. Bin ‘Attash regarding “the restrictions placed on attorney-client communications during the referral period by virtue of a written communications order in place during that period of time”).

**II. Protection of Attorney-Client Privileged Written Communications  
(AE 018/AE 032/AE 049/AE 144)**

On 27 April 2012, before the Accused were arraigned by this Commission, the Prosecution filed AE 018, a motion requesting a Privileged Written Communications Order. *See* AE 018. The policies contained within the proposed order “balanced the requirement that JTF-GTMO: (1) maintain safe and secure facilities; (2) maintain good order and discipline; and, (3) protect national security with the ability of defense counsel to effectively communicate with the accused.” *Id.* at 1. Further, the Prosecution noted that the “policies [were] consistent with practices employed in federal detention facilities throughout the United States and do not impact the accused’s right to counsel in this military commission as provided in 10 U.S.C. §§ 949a(b)(2)(C) and 949c(b).” *Id.* at 1.

On 11 May 2012, the Defense filed AE 032, a Joint Defense Motion for Appropriate Relief to Protect Right to Counsel by Barring Invasion of Privileged Attorney-Client Communications. *See* AE 032. In filing their Motion, the Defense requested that the Commission issue an order providing for the “rescission of [JTF-GTMO’s] orders and the institution of unfettered lawyer-client communications.” *Id.* at 1. In the absence of such relief and access, the Defense argued, “The trial of this case, and representation of the accused as envisioned in the M.C.A., cannot proceed with this level of interference with attorney-client communications.” *Id.* at 2.

On 21 May 2012, the Defense timely responded to the Prosecution’s Motion (AE 018) and objected to the requested relief therein. *See* AE 018C. Within their Response the Defense contended that the proposed Order,

1) defines as “Contraband” matters essential to the accused’s defenses to the charges and to mitigation of any sentence to be imposed upon them, and forbids effective attorney-client communications on these matters; and 2) requires government personnel to read communications between counsel and client, rendering these communications unprivileged.

*Id.* at 1. For these reasons, the Defense warned that if the Commission issued the proposed order

the Accused will be denied the opportunity to discuss, develop, and present a defense to the charges and mitigate any sentence to be imposed upon him if he is convicted; and detailed and learned counsel will be unable to fulfill their obligations both to “represent,” R.T.M.C. 4-3(A), R.M.C. 506(b), the Accused, and to provide constitutionally effective assistance of counsel to them.

*Id.* at 1.

On 24 May 2012, the Prosecution timely responded to AE 032, the Joint Defense Motion for Appropriate Relief to Protect Right to Counsel by Barring Invasion of Privileged Attorney-Client Communications. *See* AE 032A. Within its Response, the Prosecution asserted that its proposed Privileged Written Communications Order filed under AE 018 effectively addressed the Defense concerns regarding JTF-GTMO’s screening of legal communications and easily passes muster under the D.C. Circuit’s decision in *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007), *vacated on other grounds*, 554 U.S. 913 (2008). *See* AE 032A at 3.

On 6 November 2013, this Commission entered AE 018T/AE 032PP/AE 019B/AE 144W, Ruling, Privileged Written Communications. In granting the Prosecution’s request for a Privileged Written Communications Order, the Commission stated that,

[t]he Order proposed by the Government has its foundation [in] both the “PROTECTIVE ORDER AND PROCEDURES FOR COUNSEL ACCESS TO DETAINEES AT THE UNITED STATES NAVAL BASE IN GUANTANAMO BAY, CUBA” (2008) issued by the United States District Court for the District of Columbia and the special administrative measures used by the Federal Bureau of Prisons in terrorism related cases (28 C.F.R. 501.3(d) – Prevention of acts of violence and terrorism).

AE 018T/AE 032PP/AE 019B/AE 144W at 3. The Commission also specifically found that the procedures contained within the Commission’s implementing Order (AE 018U) “ensure the safety and security of the detention facility and do not conflict with the obligations of an attorney to preserve the confidences of his client.” *Id.* at 5 (citing *Bismullah*, 501 F.3d at 178).

### **III. Defense Request for Government to Show Cause for Alleged Violation of AE 018U (AE 018PP)**

On 12 February 2015, Defense counsel for Mr. Hawsawi filed AE 018PP (MAH), requesting that this Commission “order the Government to Show Cause for its violation of

AE 018U, and conduct a thorough inquiry into a new breach of the attorney-client privilege by JTF-GTMO.” AE 018PP (MAH). The basis for the Defense motion concerned an incident that occurred on 5 February 2015 whereby material belonging to Mr. Hawsawi was seized that was neither marked as legal material in accordance with AE 018U, nor located in a legal bin. *See* AE 018RR (GOV), Attachment B at 3.

On 18 March 2015, Defense counsel for Mr. Ali filed AE 018QQ (AAA Sup), Mr. Ali’s Supplement to Defense Motion for Government to Show Cause for Its Violation of AE 018U. Within its Supplement, the Defense asserted that a violation of the Commission’s order in AE 018U occurred on 14 August 2014. In support of this assertion, the Defense attached a statement from a JTF-GTMO guard as well as an evidence custody document. *See id.*, Attachment B, C.

On 31 March 2015, the Prosecution timely responded and filed AE 018RR (GOV) and respectfully requested that the Commission deny, without oral argument, AE 018PP (MAH) and AE 018QQ (AAA Sup). In its Response, the Prosecution indicated to the Commission that, in both cases, once the material was appropriately determined to contain attorney-client privileged information, the material was properly stamped and returned to the respective detainees. *See* AE 018RR (GOV) at 5. The Prosecution also stated that in neither instance, “did JTF-GTMO duplicate, photograph, or otherwise copy by any process the subject material or divulge their contents to the Prosecution.” *Id.* at 5.

#### **IV. Defense Request to Dismiss Charges Against Mr. Ali for Alleged Government Intrusion Into Attorney-Client Relationship**

On 2 July 2015, the Prosecution filed AE 365 (GOV), its Classified *Ex Parte, in Camera*, Under Seal Filing. In response to that filing, on that same day, the Military Judge issued AE 365A, a Classified *Ex Parte*, Under Seal Order.

On 21 September 2015, Defense counsel for Mr. Ali filed AE 373 (AAA), a Defense Motion to Dismiss for Government Intrusion into the Attorney-Client Relationship. *See* AE 373 (AAA). Within the motion, the Defense requested that the Commission dismiss the

charges against Mr. Ali because of alleged “illegal seizures [that have] intrude[d] into [Mr. Ali’s] attorney-client relationship, in violation of his Fifth, Sixth, and Eighth Amendment rights, as well as this Commission’s order in AE 018U.” *Id.* at 1. Among the seizures cited included those already under litigation and cited above, *see* AE 018QQ (AAA Sup.), as well as those alleged to have occurred in March and June 2015. *See id.* at 10-26. Defense counsel for Mr. Ali argued that such seizures “have irreparably and fatally damaged [Mr. Ali’s] ability to assist in his own defense” and that “no reasonable person in [Mr. Ali’s] circumstances could trust the confidentiality of his attorney-client communications, and without that trust, a full defense and fair trial are impossible.” *Id.* at 1.

On 22 September 2015, Defense counsel for Mr. Ali filed AE 373A (AAA), the Defense Motion to Compel the Government to Produce Discovery Regarding Its Intrusion into Attorney-Client Relationship. *See* AE 373A (AAA). In the motion, the Defense requested that the Commission “compel the prosecution to produce discovery related to its seizures of [Mr. Ali’s] privileged material on approximately 14 August 2014, 15 March 2015, and 18 June 2015, as requested in DR-222-AAA and DR-185A-AAA.” *Id.* at 1. Defense counsel argued that such material is relevant to the issues underlying AE 373 (AAA), which was filed a day earlier.

On 25 September 2015, the Prosecution responded to Mr. Ali’s discovery request (DR-222-AAA), dated 24 July 2015. *See* AE 365E (AAA) at 5. Within its Response, the Prosecution provided documentation responsive to Mr. Ali’s discovery request pertaining to the alleged



seizure of legal materials that occurred on 18 June 2015 and other dates.<sup>1</sup> *See id.*, Attachments C, D.

On 29 September 2015, the Prosecution sent a message to Learned Counsel for Mr. Ali to inquire whether he would like to withdraw AE 373 (AAA) and AE 373A (AAA) and refile or, in the alternative, provide a supplemental filing, in light of the discovery provided on 25 September 2015. The Prosecution indicated that it would not oppose either course of action. The Prosecution did not receive a response.

On 1 October 2015, the Prosecution filed AE 373-1 (EXT)(GOV), Government Motion for Extension of Time to File a Response to AE 373 (AAA), Defense Motion to Dismiss For Government Intrusion Into Attorney-Client Relationship, and AE 373A (AAA), Defense Motion to Compel Government to Produce Discovery Regarding Its Intrusion Into Attorney-Client Relationship. *See* AE 373-1 (EXT)(GOV). In its request, the Prosecution stated its desired intent to respond to AE 373 (AAA) and AE 373A (AAA); however, to better provide focus to the underlying issues contained within both motions, it was necessary for the Prosecution to file an *ex parte* filing with the Military Judge regarding the 18 June 2015 seizure of materials. *Id.* at 3. Defense counsel for Mr. Ali did not object to the extension. *Id.* at 3.

On 2 October 2015, the Prosecution filed AE 365C (GOV), its *Ex Parte, In Camera*, and Under Seal Motion for Appropriate Relief and Order Pursuant to M.C.A., 10 U.S.C. § 949p-3, and M.C.R.E. 505(e)(2).

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<sup>1</sup> Within the instant motion, the Defense asserts that “[on] or about 15 March 2015, the government seized 44 small pages (consistent with a small legal pad) and 54 full-size pages of written materials created by Mr. Ali.” AE 373 (AAA) at 17. The Government has no record of any search of Mr. Ali’s cell that resulted in a seizure of written materials occurring on 15 March 2015. Rather, it is believed that the material in question was seized on 30 January 2015 and subsequently returned to a representative of Defense counsel on 2 April 2015. The Prosecution has previously provided a JTF-GTMO guard statement and an Evidence/Property Custody Document relevant to the 30 January 2015 search. *See* MEA-DR222-AAA-000021-24. As in any instance where legal material is inadvertently seized from the Accused, at no time did JTF-GTMO duplicate, photograph, or otherwise copy by any process the subject material or divulge their contents to the Prosecution or any person working with the Prosecution.

On 11 December 2015, during an open hearing of the Military Commission, Counsel for Mr. Ali requested that the Military Judge issue a ruling on AE 365C (GOV), noting that he believed it necessary for litigation to proceed on AE 373 (AAA). *See* Unofficial/Unauthenticated Transcript (Tr.) at 10178. The Military Judge responded to this request by indicating he had “already made a note on that.” *See* Tr. at 10178.

On 24 February 2016, the Commission issued AE 365I, an Under Seal order. The Prosecution incorporates by reference the facts as stated in AE 365I.

## **5. Law and Argument**

As in all national security cases, this one features issues that require the Commission to protect both the security of the United States *and* the privileged relationship between the Accused and their respective Defense counsel. Throughout this case, the Commission has done just that, fashioning appropriately balanced remedies when needed to prevent and/or correct any perceived possible violation of the attorney-client privilege. *See* AE 008; AE 018U; AE 133. Despite the Commission’s diligent and exhaustive efforts, Defense counsel for Mr. Ali now assert that their cited alleged “intrusions clearly violate [Mr. Ali’s] Sixth Amendment right to the assistance of counsel, his Fifth Amendment right to a fair trial, and his Eighth Amendment right to a mitigation presentation,” AE 373 (AAA) at 27, and therefore “nothing short of dismissal . . . would completely remove the taint created by the government’s conduct.” *Id.* at 34. In doing so, the Defense focuses its argument on a seizure of DVDs on or about 17 or 18 June 2015 that this Commission has already effectively resolved. *See* AE 365I. As demonstrated to the Military Judge in AE 365, the seizure of those materials was completely proper. This Commission should decline the Defense invitation to re-open the issues/motions cited above, and deny the Defense Motion without oral argument.

To be clear—contrary to Defense claims—the U.S. Government is not unlawfully exploiting, for intelligence or any other purpose, the contents of any attorney-client privileged materials belonging to the Accused, and there is no evidence before this Commission to suggest otherwise. *See* AE 373 (AAA) at 2 (“[T]he government continued to retain them, no doubt for



exploitation of their contents before finally returning the DVDs to [Mr. Ali] himself.”); *id.* at 27 (“The illegal seizure and exploitation of [Mr. Ali’s] most closely-held information is merely the most recent in a series of intrusions into the attorney-client relationship.”); *id.* at 31 (“[Mr. Ali] expects the evidentiary hearing on this matter to demonstrate that the government accessed and exploited the information on the privileged DVDs.”).

To be sure, there have been instances when the Accused’s materials have been seized. *See generally* AE 008A at 12-17; AE 018PP (AAA Sup); AE 365I.<sup>2</sup> As it has in the past, the Prosecution now again affirmatively states that, if privileged information has ever been improperly or inadvertently seized from the Accused while in the detention facility, it was not directed by the Prosecution, and the Prosecution has not been made privy to any of the contents of the attorney-client or attorney work-product materials seized from the Accused in the detention facility. As such, it would not be used at trial or to the substantial detriment of the Accused and would therefore not be a violation of the Accused’s rights to counsel. “There being no tainted evidence in this case, no communications of defense strategy to the prosecution, and no purposeful intrusion by [the government’s agent], there [is] no violation of the Sixth Amendment.” *Weatherford v. Bursey*, 429 U.S. 545, 558 (1977). Further, where there has been no “actual and substantial prejudice to the defendant,” *United States v. Hsiai*, 81 F.Supp.2d 7, 18-19 (D.D.C. 2000) (citing *United States v. Voight*, 89 F.3d 1050 (3d Cir. 1996)), there is additionally no violation of the Fifth Amendment.

Mr. Ali and his Defense team can and should freely communicate regarding his case, but they must also take care to properly mark written communications pursuant to AE 018U in order to prevent seizure of that material as potential contraband within the detention facility. Should they not wish to communicate through written communications because of an unfounded belief

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<sup>2</sup> The Prosecution recognizes that Defense counsel for Mr. Ali, at the time of filing AE 373 (AAA) and AE 373A (AAA), were not privy to all facts and circumstances surrounding the 15 June 2015 seizure of materials. However, as demonstrated in AE 365I, specifically paragraphs 3 and 7, this Commission’s Privileged Written Communications Order (AE 018U) was complied with at all times, and necessary steps were taken to prevent privileged attorney-client materials from being shared with the Prosecution and those working with the Prosecution.

“that [Mr. Ali] cannot trust his defense team because his client secrets are not safe from government intrusion,” AE 373 (AAA) at 31, such a choice would be a strategic decision on their part. Such a voluntary decision certainly does not equate to actual government interference with the conduct of the Defense or an intrusion into the attorney-client relationship.

## **6. Conclusion**

As set forth above, the Prosecution recognizes the balanced approach required in this case to protect the safety and security of the United States while still ensuring the sanctity of the attorney-client privilege between the Accused and their respective Defense counsel. Subject to clarification that the Government has sought—*see* AE 018Y—the Commission’s Written Privileged Communications Order accomplishes this, and the Government remains committed to compliance with its provisions. While privileged information may have been inadvertently seized from the Accused in the detention facility during the pendency of these proceedings, it was neither directed by the Prosecution, nor has the Prosecution ever been made privy to any of the contents such material. As such, where there is no tainted evidence in this case, no communications of defense strategy to the prosecution, and no actual and substantial prejudice to the Accused, the Commission should deny the Defense motion.

## **7. Oral Argument**

The Prosecution does not request oral argument. Further, the Prosecution strongly posits that this Commission should dispense with oral argument as the facts and legal contentions are adequately presented in the material now before the Commission and argument would not add to the decisional process. However, if the Military Commission decides to grant oral argument to the Defense, the Prosecution requests an opportunity to respond.

## **8. Witnesses and Evidence**

The Prosecution will not rely on any witnesses or additional evidence in support of this motion.

**9. Additional Information**

The Prosecution has no additional information.

**10. Attachments**

A. Certificate of Service, dated 9 March 2016

Respectfully submitted,

//s//

Jeff Groharing  
Trial Counsel

Christopher M. Dykstra  
Major, USAF  
Assistant Trial Counsel

Mark Martins  
Chief Prosecutor  
Military Commissions

# ATTACHMENT A

**CERTIFICATE OF SERVICE**

I certify that on the 9<sup>th</sup> day of March 2016, I filed **AE 373E (GOV), Government Response To Defense Motion to Dismiss For Government Intrusion into Attorney-Client Relationship with the Office of Military Commissions Trial Judiciary** and I served a copy on counsel of record.

      //s//      

Jeff Groharing  
Trial Counsel  
Office of the Chief Prosecutor  
Office of Military Commissions