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MILITARY COMMISSIONS TRIAL J UDICIARY GUANTANAMO BA Y, 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

1. Timeliness.

AE013D

Government's Response
To the American Civil Li berties Union
Motion for Publi

fil ed time ly pursuant to Military Commissions Trial Judic iary Rule of

Court 3.7.c(I).

2. Relief Sought.

The government respectfully requests that the Commission deny the American Civil

Liberties Union's (ACLU) motion chall enging certain provisions conta ined with in the

government's proposed order protecting aga inst disclosure of national security infonnat ion.

Specifically, the ACLU asserts that the Commission reject the following provisions: I) that

statements of the accused are treated as classified until an Original Classification Authority

("OCA") conducts a classification review; and 2) implementing a 40-second delay of the aud io

feed of commission proceedings to protect against the unauthorized disclosure of classified

infonnation during

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terrorist attacks which re sulted in the deaths of 2,976 people, serious injury to others, and

significant property damage. Th is right, like analogous constitutional and common law rights of

public access to proceedings in federal courts and courts-martial, is a qualified right. The

government has a strong interest in ensuring public access to these historic proceedings and has

moved the Commission to authorize closed-c ircuit television (CCTV) transmission of all

commission proceedin gs to remote viewing sites located in the continental United States. During

the arraignment of the five accused on 5 May 20 12, the proceedings were viewed by individ uals

and media at seven different sites in the United States. See AE7B. Such a transmission has

enabled and will continue to enable the public and victim fam il y members (YFM) to access the

trial of the accused. I

1 The arraignment proceedings had widespread coverage by major media outlets and local news stations as reflected in the following news stories: hup:llwww.cnbc.comlid/47317654 ("U.S. prosecutors say ready for long haul in 9111 case"); hup://www.cnn.comI2012l05/06/justice/guantanamo-ksm-arraignmentl (",9/11 victim's brother to alleged mastermind: 1 came a long way to see you, eye to eye"');
hup://www.time.com/time!nation/artic1e!0.8599.21140 18.00.html ("911 I defendants disruptive at Guantanamo"); hup://www.cbsnews.com/8301-201 _ 162-57428546/9-II-mastermind-others-back-before-guantanamo-judge! ("9/11 "mastermind," others back before Guantanamo judge");
h up://abcnews.go.com/blo gslpo Ii ticsl20 12105/9 1 I-p louers-acc used -ref uses-to-ans wer -in -gu antan amo-bay-arraignmentl ("9111 Plouers Defer Pleas at Guantanamo Bay Arraignment");
hup:l!worldnews.msnbc. msn.conll_newsl20 12/05105/1 I 548929-al leged-sept- l I-planners-disrupt-arrai gnment-at-guantanamo-hearing?1i te ("Alleged Sept. II planners disrupt arraignment at Guantanamo
hearing");hup://www .foxnews.conllusl20 I2I05/06/anger-sighs-as-II -families-watch-terror-hearing- 16825989211 ("'Anger, sighsas9l1 1 families watch Ie!Tl)"rearing',); hup://www.usatooay.conllnewslworldlstoryI2012-05-051911-masterrnind-gitrno-defiant-courU54771 \0411 ("9'11 deferrlants fonmllycha"gtrl, i~ judgeathearing''); hup://www.npr.org/20l2/05106I152129287/pleas-delayed-in-sept- 1 I-case (",Pleas deferred in Sept. II
case");h up ://on line. wsj .conllartic1e!SB 1 000 14 24052 702304 752804 57 73861 0245 251 04 54 .ht ml ?KEYWORDS= gu an tanamo ("Guantanamo judge grapples with disruptive terror suspects")
hup://www.nydai lynews.conllnews/nationaVkhalid-sheikh -mohammed-co-defendents-court-arraignment-artic1e-1.1 073016 ("Arraignment ends with accused terrorist, Ramzi Binalshibh, mocking 9111 family member with a
th umbs up"); http://www.baltimoresun.com/newslbreaki nglbs-md-91 I-arrai gn ments-20 120505. 0, 7 84 2454 .story ("'9/1 1 defendants refuse to participate in arraignment'');http://www.latimes.conllnewslnatiolllnationnowIla-na-nn-gitmo-rnohanullad-arraignment-begins20120505.0.69523 15.story (",911 1 trial begins at Guantanamo with protest by def endan ts") ;hup://www.washingtonpost.com/worldlnational-secu ri

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As in any prosecution involving national security, the government is responsible for

protecting informat ion that has been properl y classified by the Executive Branch. Accord ingly,

the government has proposed narrowly tailored procedures to reduce the risk of unauthorized

disclosures of classified infonnat ion- to wh ich there is no First Amend ment right- where

disclosure could cause exceptionally grave damage to national security. The ACLU attempts to

substitute its judgment for the intelligence professionals within the Executive Branch in

determining whether and to what extent the sources and methods employed by the United States

can be protected to safe guard national security. The Supreme Court has cautioned aga inst even

judic ial interference with the legitimate interest and responsibilities of the Executive Branch in

assessin g whether the disclosure of classified informat ion may lead to an unacceptable risk of

compromising national security. The ACLU's requested relief would force the gove rnment into

the unenviable position of having to pred ict the accused's possible future behavior knowing that

the ir interests are clearly inconsistent with the interests of the national security. As such, the

ACLU's motion should be denied.

4. Burden of Proof.

As the moving party, the ACLU must demonstrate by a preponderance of the evidence

th at the reque sted relief is warranted. R.M.C. 905(c)(1)-(2).

5. Facts.

On 3 1 May 20 II and 26 January 20 12, pursuant to the Military Commissions Act of

2009, charges related to the II September 200 1 terrorist attacks were sworn aga inst Khalid

guantanamo.html ("9111 defendants ignore judge at Guantanamo hearing"); http://www.nj.com/newslindex.ssfl2012l04/nLrnilitary_basc_one_oCsix_si.html (.. N.J.military base one of six sites to broadcast alleged Sept. II mastermind's
arraign ment") ;http://www .n ypost.co rn/plne wsllocallf ami I ies_ outraged_auri bu nal_ farce_En auNo8n Ej Kh YL vkeKu wQO?utlll_ llledium=rss&ut1ll3ontent=Local ("Families outraged at tribunal's farce")

Filed with T J
16 May 2012

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Sheikh Mohammad, Walid Muhammad Salih Bin Attash, Ramzi Binalshibh, Ali Abdul Az iz Ali,

and Mustafa Ahmed Adam a1 Hawsawi (coll ective ly referred to as the "accused"). These

charges were referred jointly to this capital Military Commission on 4 Apri1 20 12. The accused

are charged with Conspiracy, Attacking Civilians, Attack ing Civili an Objects, Intentionall y

Causin g Serious Bcxlily Injury, Murder in Violation of the Law of War, Destruction of Property

in Violation of the Law of War, Hijack ing an Aircraft, and Terrorism.

The arra ignment for th is Commission was held on 5 May 20 12. Pursuant to an order

signed by the Military Judge on 26 April 20 12, the proceed ings were transmitted to multiple sites

in the continental United States. See AE7B.

On II September 200 1, a group of al Qaeda operatives hijacked four c ivili an airliners in

the United States. After the hijackers killed or incapacitated the a irline pilots, a pilot-h ijacker

deliberately slammed American Airlines Flight II into the North Tower of the World Trade

Center in New York, New York. A second pilot-h ijacker intentionall y flew United Airlines

Fl ight 175 into the South Tower of the World Trade Center. Both towers coll apsed soon

thereafter. Hijackers also deliberately slammed a third airliner, American Airlines Flight 77, into

the Pentagon in Northern Virgini a. A fourth hij acked a irliner, United Airlines Flight 93, crashed

in to a field in Shanksville, Pennsylvani a, after passengers and crew resisted the hijackers and

fought to reclaim control of the aircraft. A total of 2,976 people were murdered as a result of al

Qaeda's II September 200 1 attacks on the United States. Numerous other c ivili ans and military

personnel also were injured. The al Qaeda leadersh ip pra ised the attacks, vowing that the United

States would not "enjoy security" until al Qaeda's demands were met. The United States

Congress responded on 18 September 200 1 with an Authorization for Use of Military Force.

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"waterboard" technique was used on three detainees; and the fact that information learned from

HVDs in th is program helped identify and locate a1 Qaeda members and disrupt planned terrorist

attacks. See id.; see also CIA Interr.604 0 Td (alpecto (rupt)Tj 0T1_2 170.338 0 Tr-2.443 Td (attac9.45 Tm (11 84 Tc -4

s 11j 0.81 8Tc 599.26

t

s 11j 0.8287 Tf 599.26 nd 1 (A)Tj g 0.d38.33 654.T Tc 2.43l 0 11.2 421.1.3 8 654.2 681.011 g m (8 11j 0.08 305T65)599.26 s 11j 0.8366.5f 599.26 8 11j 0.08 369Tc 1599.26 A

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E, Proposed Order at '1142. The proposed order also provides that an unoffic ial, unauthenticated, uncl assifi ed transcript of each proceeding shall be made ava il able for public release. AE 0 13, Attachment E, Proposed Order at '1\ 47.
On 3 May 20 12, the government fil ed its response to the defense Motion to End
Presumptive Classification (AE 009A), which set forth the legal authority for the Executive Branch detennination that the statements of the accused are prope rl y presumptively classified until reviewed by an OCA. The ACLU's motion contains all egations that the government has previously addressed in AE 009 and AE 0 13, and the government respectfully reque sts that those

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transmiss

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Order 13526, and meets the conditions set forth in Section 1.I(a).3 Th is determination provides

a means to restrict the unauthorized disclosure of c lassifi ed information that could cause

exceptionally grave damage to the national security from an individual accused who does not

hold a security clearance and who owes no duty of loyalty to the United States. Without a

process to protect classifi ed informat ion that may be contained within the statements of the

accused, the gove rnment would be in the unenviable position of having to pred ict the accused's

possible future behavior knowing that the ir interests are clearly inconsistent with the interests of

the national security.

The ACLU's assertions that presumptive classification of the statements of the accused

prevents public access ignores the princ ipal that, "[t]here is no First Amendment right to reveal

properl y classified infonnation. " AE 009, p. 22. See, e.g., Stillman v. C.I.A., 3 19 F.3d 546, 548

3 Executive Order 13526 is the current presidential order governing the classification of national security information. Section 1.1 (a) provide87a04046.0261 2.96 TbTc 5Tj 0.29Td 48 Tc 9039 g 0.6.226 Td (in3 Tm (1.103 g 0.0316. 94 9.4 449

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(D.c. Cir. 2003) (" If the Government c lassified the informat ion properl y, then [appellant] simply

has no first amendment ri ght to publish it."); see also, SlIepp v. United States, 444 U.S. 507, 510

n.3 (1980) (''The Government has a compelling interest in protecting both the secrecy of

information important to our national security and the appearance of confidentiality so essenti al

to the effective operation of our forei gn intelligence service. "); see also, A CLU v. DOD, 584

FSupp. 2d 19,25 (D.D.C. 2008)(,'There is obviously no First Amend ment ri ght to receive

classified information. ") The protections that the government seeks in th is case are narrowly

ta ilored to protect the unauthorized disclosure of classified in format ion, and do not amount to a

suppression of any and all statements of the accused, as evidenced by the

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The ACLU's position is further undermined by the princ iple that even when classified

infonnation has been leaked to the public domain, it remains c lassifi ed and cannot be further

disclosed unl ess it has been declassifi ed or "officially acknowledged," wh ich entails that it "must

already have been made public through an official and documented disclosure." Wolf v. CIA,

473 F.3d 370, 378 (D.C. Cir. 2007) (internal quotations and c itations omitted) (recogni zing that

"the fact that informat ion exists in some form in the public domain does not necessaril y mean

that offic ial disclosure will not cause [cogni zable] hann" to government interests); see also

Fitzgibbol1 v. CIA, 9 11 F.2d 755, 765 (O.c. CiL 1990) ("[J]n the arena of intelligence and

forei gn relations, there can be a critical difference between official and unofficial disclosures.");

UI/ited States v. MOl/ssaol/i, 65 Fed. Appx. 88 1, 887 n.5 (4th Or. 2(03) ("[I]t is one thing for a

reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed

sources, to say that it is so; it is quite another th ing for one in a position to know of it officiall y to

say that it is so.") (quoting Alfred A Kllopf, Ill c. v. Colby, 509 F.2d 1362, 1370 (4th CiL 1975));

see also Af"har v. Dep't of State, 702 F.2d 11 25, 1 130 (OL CiL 1983) ("[E]ven if a fact ... IS

the subject of widespread media attention and public speculation, its official acknowledgement

by an authoritative source might we ll be new informat ion that could cause damage to the

national security. ").

7. Conclusion.

The ACLU's attempt to substitute its judgment for that of the intelligence professionals

with in the Executive Branch in determining whether and to what extent the sources and methods

employed by the United States can be protected to safeguard national security should be rejected.

Instead, such decisions should be left to the Executive Branch, wh ich has the legitimate interest

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CERTIFICATE OF SERVICE

I certify that on the 16th day of May 20 12, I tiled AE 0 130, the Government's Response to the ACLU Motion for Public Access with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record and counsel for the ACLU.

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16 May 2012

IIsll
Joanna Baltes
Deputy Trial Counsel
Office of the Ch ief Prosecutor
Office of Military Commissions

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