

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

**Defense Motion**

For Reconsideration of Ruling on D-026

2 September 2008

1. **Timeliness:** This motion is filed within the timeframe established by R.M.C. 905.
2. **Relief requested:** The defense respectfully requests the Military Commission to reconsider its ruling on the Defense Motion to Compel Discovery (Documents Relating to Charge III), D-026, and order production of the documents requested therein.
3. **Facts:**
  - a. On 3 March 2008, the defense filed a Motion to Compel Discovery (Documents Relating to Charge III), D-026 (“Motion”), which sought production of various intelligence reports in the possession of the U.S. Government, and referenced in the “9/11 Report,” which tend to show that at least two of the named co-conspirators in Charge III (alleged principals of al-Qaeda), opposed the 9/11 attacks on the United States. (*See* Motion at 2.)
  - b. The government opposed the Motion. On 13 March 2008, the commission instructed the government to locate the reports. (Record at 185.) During oral argument on 11 April 2008, the prosecution acknowledged having reviewed the intelligence reports, but claimed that they were not “material to the preparation of the defense.” Trial counsel incorrectly stated that there was a “heightened standard” for the production of classified information (Record at 240), and that the defense did not have a “need to know” the information contained in the reports. (*Id.* at 244.)
  - c. On 23 April 2008, the Military Judge denied the Motion. In his ruling, the Military Judge specifically referenced his 4 April ruling on the Defense Motion to Strike the “enterprise” language from Charge III (D-019), asking rhetorically how proof that the individuals named in Charge III failed to agree to attacks referenced in language “struck by the commission in its ruling on D-019” would “make the existence or non-existence of a fact in issue more or less likely?” (*See* Ruling on D-026.)
  - d. On 19 August 2008, the government filed a Notice of Appeal from the Military Judge’s partial denial of the government’s motion for reconsideration of the Commission’s ruling on D-019 (and D-047). Pursuant to R.M.C. 908(b)(8), the Commission’s order denying the government’s motion is automatically stayed pending disposition of the appeal.

5. **Law and argument: The Military Commission should reconsider its ruling and compel the government to produce the requested documents.**

a. The Military Commissions Act (“M.C.A.”) states that “Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.” *See* 10 U.S.C. § 949j. The Regulation echoes the statute. *See* Regulation for Trial by Military Commissions 17-2(a) (“Pursuant to 10 U.S.C. § 949j, the defense counsel in a military commission shall have a reasonable opportunity to obtain witnesses and other evidence as provided by R.M.C. 701-703, and Mil. Comm. R. Evid. 505.”).

b. Moreover, Rule for Military Commission 701 requires the government to permit the defense to examine documents and things “within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and *which are material to the preparation of the defense* or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.” R.M.C. 701(c)(1) (emphasis added).<sup>1</sup>

c. The requested intelligence reports are clearly “material to the preparation of the defense” and should be produced. The Military Commission’s ruling on D-026 was at least in part, if not wholly, predicated on the Commission’s decision to strike the “enterprise” language from Charge III. Since the “enterprise” language of Charge III is now operative pending the completion of the government’s interlocutory appeal, the requested reports are clearly material. The Commission should therefore reconsider its ruling and order production of the requested intelligence reports.

d. The government alleges that certain named individuals conspired to commit certain offenses, including the 9/11 attacks and that Mr. Khadr joined an “enterprise of persons” engaged in hostilities against the United States (as evidence by, *inter alia*, the 9/11 attacks), and sharing a common criminal purpose to commit various offenses ostensibly in violation of the law of war. (*See* Charge Sheet.) The government’s evidence will undoubtedly include evidence of the 9/11 attacks themselves as evidence of the “common criminal purpose” of the enterprise. Evidence tending to show that named co-conspirators (i.e., alleged al-Qaeda principals) did not agree to or even opposed the 9/11 attacks, thus, on its face, directly negates

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<sup>1</sup> The Discussion accompanying R.M.C. 701(c) instructs the military commission judges to look to *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), which applied Federal Rule of Criminal Procedure 16 addressing discovery, for the proper materiality standard. In *Yunis*, the court ruled that the defendant was entitled to “information [that] is at least ‘helpful to the defense of [the] accused.’” *Id.* at 623 (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)); *see also United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (“materiality standard is not a heavy burden”) (internal quotations omitted); *United States v. Gaddis*, 877 F.2d 605, 611 (7th Cir.1989) (defining material evidence as evidence that would “significantly help [ ] in ‘uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal’”) (quoting *United States v. Felt*, 491 F.Supp. 179, 186 (D.D.C.1979)). Thus, the materiality standard set forth in R.M.C. 701(c) requires the prosecution to turn over any information that is “at least helpful to the defense.”

the government's proof that these individuals "conspired" to engage in "hostilities" against the United States and commit the object offenses.

e. Most importantly, however, this evidence undermines the proposition that al-Qaeda, as it will be portrayed by the government at trial, is (or was) a vast, monolithic organization, in which all members or "affiliates" shared a "common criminal purpose" that included the 9/11 attacks or similar atrocities. However, the defense expects the discovery sought in this motion to show that al-Qaeda is not and was not as uniform an entity as the government portrays it, and that there were many Islamic militants (and militant groups) in Afghanistan (such as Al Libbi's Libyan Islamic Fighting Group) that may have possessed jihadist goals and/or supported the Taliban, but who were not part of al-Qaeda. (*See* Def. Mot. to Compel, D-061.) This is particularly significant in light of the nature of Mr. Khadr's alleged links to al-Qaeda. The government has yet to complete production of documents relating to Mr. Khadr's father or Abu Laith, the former a named co-conspirator, the latter an unnamed co-conspirator. Mr. Khadr's father and Abu Laith are the only two alleged links between Mr. Khadr and the al-Qaeda organization. Evidence showing that alleged principals or other members of al-Qaeda opposed the activities of, or failed to share a "common criminal purpose" with, Osama bin Laden or other alleged al-Qaeda members tends to confirm the proposition that the group responsible for the 9/11 attacks actually consisted of a much smaller core of individuals centered around Bin Laden and directly supports the defense theory at trial. In light of the (potential) restoration of the "enterprise" language in Charge III, this evidence thus becomes directly relevant and, and indeed, exculpatory, let alone "material to the preparation of the defense."

f. Lastly, the fact that the documents requested are classified is of no moment. As it has often done, in oral argument on the Motion, the prosecution conflated the concepts of materiality under R.M.C. 701(c) and privilege under M.C.R.E. 505. Based on the foregoing, the requested documents clearly meet the low threshold of materiality. The government can either produce them to the defense (detailed counsel both possess TS/SCI clearance) or invoke the national security privilege and produce them to the Military Judge.

6. **Oral Argument:** The defense requests oral argument in connection with this motion pursuant to R.M.C. 905(h).

7. **Witnesses and evidence:** Matters submitted in support of D-026.

8. **Certificate of conference:** The defense has conferred with the prosecution and the prosecution does not consent to the commission granting requested relief.

9. **Attachments:** None.

/s/

William C. Kuebler  
LCDR, JAGC, USN  
Detailed Defense Counsel

Rebecca S. Snyder  
Assistant Detailed Defense Counsel

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR  
a/k/a "Akhbar Farhad"  
a/k/a "Akhbar Farnad"  
a/k/a "Ahmed Muhammed Khali"

D089

**GOVERNMENT'S RESPONSE**

**To the Defense's Motion  
For Reconsideration**

9 September 2008

1. **Timeliness:** This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b).
2. **Relief Requested:** The Government respectfully submits that the Defense's motion should be denied.
3. **Burden and Persuasion:** The Defense bears the burden of establishing by a preponderance of the evidence, that it is entitled to the requested relief. *See* Rule for Military Commissions ("RMC") 905(c)(2)(A).
4. **Facts:**
  - a. All of the facts necessary to deny this motion are contained in the original filings and the record from the hearing where the original motion to produce the subject documents was litigated.
5. **Discussion:**

As recognized in the Defense motion, the parties previously submitted briefs, provided oral argument, and the Military Judge denied production of the documents in question. The Defense made precisely the same arguments in its original motion (D026) as it does in this filing. The Government incorporates its response to D026 in this filing and respectfully requests the Military Judge consider the arguments contained therein.
6. **Oral Argument:** The Government does not believe oral argument is necessary to deny the Defense's motion. To the extent this Court requests it, however, the Government will be prepared for oral argument.
7. **Witnesses:** None.
8. **Conference:** Not applicable.
9. **Additional Information:** None.

**10. Submitted by:**

//s//

Jeffrey D. Groharing  
Major, U.S. Marine Corps  
Prosecutor

Keith A. Petty  
Captain, U.S. Army  
Assistant Prosecutor

John F. Murphy  
Assistant Prosecutor  
Assistant U.S. Attorney

UNITED STATES OF AMERICA

**RULING FOR D-089**

v.

**Defense Motion  
for Reconsideration of the  
Commission's Ruling on D-026**

OMAR AHMED KHADR  
a/k/a "Akhbar Farhad"  
a/k/a "Akhbar Farnad"  
a/k/a "Ahmed Muhammed Khali"

1. The Defense requests the Commission to reconsider its ruling on 23 April 2008 denying the defense motion to compel discovery of documents relating to Charge III. The Government opposes this motion.
2. The Defense filed this motion shortly after the Government filed a Notice of Appeal from the commission's partial denial of the Government's motion for reconsideration of the commission's ruling on D-019 and D-047 which struck certain language pertaining to an "enterprise" from Charge III. The United States Court of Military Commission Review dismissed the Government appeal on 3 October 2008 as beyond the appellate jurisdiction of the Court for being untimely filed.
3. The Defense has provided no new information or law in support of this motion to reconsider its prior ruling. In spite of that, the Commission will reconsider its prior ruling.
4. The Commission adheres to its prior analysis and ruling on this matter. Therefore, the motion is DENIED.

So Ordered this 9th day of October 2008.

  
Patrick J. Parrish  
COL, JA  
Military Judge