

	)	<b>IN THE COURT OF MILITARY</b>
	)	<b>COMMISSION REVIEW</b>
	)	
<b>UNITED STATES OF AMERICA,</b>	)	<b>APPELLANT RESPONSE TO</b>
	)	<b>APPELLEE MOTION FOR</b>
Appellant,	)	<b>EXTENSION OF TIME TO</b>
	)	<b>RESPOND</b>
	)	
	)	C.M.C.R. Case No. 08-003
v.	)	
	)	Tried at Guantanamo Bay, Cuba
	)	on 13 August 2008
	)	before a Military Commission
<b>OMAR AHMED KHADR</b>	)	convened by M.C.C.O. #07-02
a/k/a "Akhbar Farhad"	)	
a/k/a "Akhbar Farnad"	)	Presiding Military Judge
a/k/a "Ahmed Muhammed Khali,"	)	Colonel Patrick J. Parrish <sup>1</sup>
	)	
Appellee.	)	DATE: 28 August 2008

**TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY  
COMMISSION REVIEW**

RELIEF SOUGHT

The Government respectfully opposes the Appellee Motion for Extension of Time to Respond ("Defense Motion"). As explained below, no extension of time is warranted.

STANDARD FOR GRANTING RELIEF

This Court may extend the time limits provided for in the Court of Military Commission Review Rules of Practice when "required for a full, fair, and expeditious consideration of the case." C.M.C.R.R. 21(a).

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<sup>1</sup> Appellant notes that it inadvertently misstated Colonel Parrish's middle initial in its opening brief. This error will be corrected in subsequent filings.

## ARGUMENT

THE DEFENSE HAS NOT SHOWN THAT AN EXTENSION OF TIME IS  
REQUIRED TO RESPOND TO THE GOVERNMENT'S OPENING BRIEF.

In recognition of the interlocutory appeal provisions of the Military Commissions Act of 2006, *see* 10 U.S.C. § 950d(a)(1)(A), and the Manual for Military Commissions (“Manual”), *see* Rule for Military Commissions (“R.M.C.”) 908(a)(1), the Court of Military Commission Review provided for expedited consideration of interlocutory appeals, *see* C.M.C.R.R. 14(c)(1). Under C.M.C.R. Rule 14, the Defense has 10 days to respond to an interlocutory appeal.

In the instant case, the Notice of Appeal was filed with the Court on 19 August 2008. Under C.M.C.R. Rule 14(c)(1), the Government's opening brief was due 10 days later, on 29 August 2008. However, with expedition in mind, the Government filed its opening brief three days early, on 26 August 2008.

Additionally, recognizing that the rules for an interlocutory appeal set an expedited briefing schedule, trial counsel provided advanced notice to Defense counsel on Friday, 22 August 2008, that the Government's opening brief would largely track the Government's 11 July 2008 Motion for Reconsideration before the Military Commission. *See Attachment A*. As a result, Defense counsel were in a position to begin working on their response to Appellant's opening brief by at least 22 August 2008—*14 days before the Defense answer brief would be due*.

The Defense has not demonstrated that an extension of time is required to respond to the Government's brief—a brief the Defense in effect has had in its possession since the Motion for Reconsideration was filed on 11 July 2008. In seeking a delay, the

Defense cites continuing proceedings in the Military Commission below. However, that argument proves too much. Virtually all interlocutory appeals will be pursued concurrent with a Military Commission proceeding. In precise recognition of this fact, the Secretary of Defense expressly provided that motions before the Military Commission may proceed while an interlocutory appeal is pending, so long as they do not relate to the charges and specifications at issue in the interlocutory appeal. *See* R.M.C. 908(b)(8). Here, the pending motions referenced in the Defense Motion do not relate to the charge of enterprise Conspiracy, and permitting the Military Commission and Court of Military Commission Review proceedings to continue on parallel tracks is exactly the procedure contemplated by the Manual.

Second, the Defense in its motion argues that its election not to respond in writing to the Government's Motion for Reconsideration before the Military Commission below justifies its claimed need for additional time to respond to the pending appeal. That argument is not persuasive. As an initial matter, we note that the legal status of the enterprise Conspiracy theory is not some novel issue the Government devised without warning to the Defense. Rather, this issue was first raised *by the Defense over seven months ago*, in their 11 January 2008 brief to the Military Commission. *See* Exhibit H, Appendix, Appellant's Opening Brief. Thus, Defense counsel have already researched and briefed the legal issue. Second, after having an opportunity to review the Government's Motion for Reconsideration below, Defense counsel decided to rely upon their original filing. *See* Exhibit B (attached hereto) (e-mail of Military Judge permitting Defense counsel either to submit a response to the Government's Motion for Reconsideration or instead to rely upon their original filing). Merely because an attorney

elects not to respond to a motion in no way indicates that such attorney has not researched the relevant legal issues in making the decision not to file a response, especially, as is the case here, where the attorney not filing the response is the party who originally briefed the issue. Consequently, the Defense's decision not to submit a formal answer to the Motion to Reconsider, but rather to rely upon their earlier filing, does not demonstrate counsel has not adequately researched and considered the relevant legal issues, and is certainly not the necessity required for granting a continuance under C.M.C.R. Rule 21.

Finally, the Defense seeks a delay based on the "complex constitutional and other legal issues that will need to be researched and responded to virtually from scratch." Def. Mot. at 3. As an initial matter, the Government notes that Appellant's opening brief does not rely on the Constitution at all. In any event, whatever non-constitutional legal issues may be implicated by this appeal were presumably all vetted by the Defense prior to filing its 11 January 2008 motion before the Military Commission.<sup>2</sup>

### CONCLUSION

As indicated in the Government's Notice of Appeal, the Military Commission has set a trial date of 8 October 2008 for this case. Granting the Defense a 20-day extension of time to file its response in the C.M.C.R. would create a significant likelihood of forcing a continuance in the Military Commission below, and would undermine the

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<sup>2</sup> In support of its motion, the Defense also relies on its claim that it has fewer detailed counsel than the Prosecution in the Commission below. *See* Def. Mot. at 3. Such a claim has no bearing on a request for additional time, especially where, as trial counsel believes is the case here, this matter is the only case to which the two detailed Defense counsel are presently assigned. This Court should reject the alleged basis for granting an extension of time.

expedited review procedures for interlocutory appeals set forth in the C.M.C.R. Rules of Practice. *See, e.g.*, C.M.C.R.R. 22(b) (“Appeals under this Rule will, whenever practicable, take priority over all other proceedings before the CMCR.”). Moreover, the reasons proffered by the Defense in support of its motion for an extension of time would presumably exist in most interlocutory appeals before this Court, and therefore should not serve as a basis for deviating from Rule 14(c)’s reasonable briefing schedule.

Accordingly, the Defense Motion for Extension of Time to Respond should be denied.<sup>3</sup>

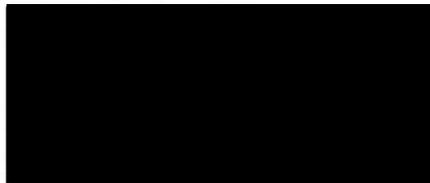
APPENDIX

Attachments A and B are the subject of the Government’s Motion to Attach, filed concurrently herewith.

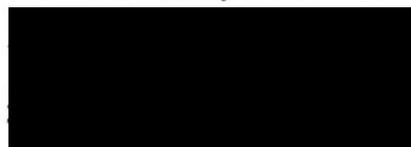
Respectfully submitted,



Jordan A. Goldstein  
U.S. Department of Justice



Jeffrey D. Groharing  
Major, U.S. Marine Corps  
Office of Military Commissions

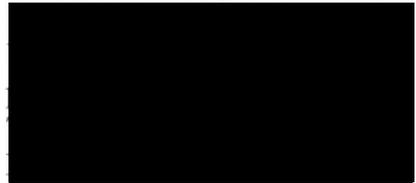


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<sup>3</sup> In the event the Court grants the Defense Motion for Extension of Time, the Government respectfully reserves the right to seek reconsideration should the Defense also obtain a continuance of the proceedings below.



Keith A. Petty  
Captain, U.S. Army  
Office of Military Commissions



John F. Murphy  
U.S. Department of Justice  
Office of Military Commissions



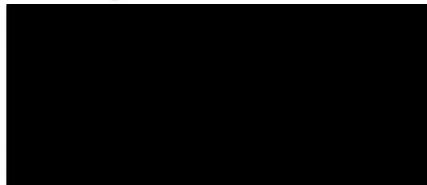
Trial Counsel

**CERTIFICATE OF SERVICE**

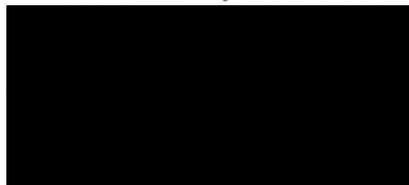
I certify that a copy of the foregoing was e-mailed to William C. Kuebler, LCDR, JAGC, USN, Detailed Defense Counsel on this 28th day of August 2008.



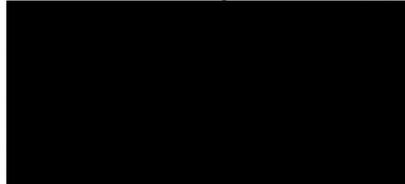
Jordan A. Goldstein  
U.S. Department of Justice



Jeffrey D. Groharing  
Major, U.S. Marine Corps  
Office of Military Commissions



Keith A. Petty  
Captain, U.S. Army  
Office of Military Commissions



John F. Murphy  
U.S. Department of Justice  
Office of Military Commissions



Trial Counsel

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	)	<b>ATTACH</b>
Appellant,	)	
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<b>OMAR AHMED KHADR</b>	)	convened by M.C.C.O. #07-02
a/k/a "Akhbar Farhad"	)	
a/k/a "Akhbar Farnad"	)	Presiding Military Judge
a/k/a "Ahmed Muhammed Khali,"	)	Colonel Patrick J. Parrish
	)	
Appellee.	)	DATE: 28 August 2008

**TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY  
COMMISSION REVIEW**

RELIEF SOUGHT

Appellant hereby moves to attach the following documents to Appellant Response to Appellee Motion for Extension of Time to Respond, filed concurrently herewith:

- A. E-mail from Jeffrey D. Groharing, Major, USMC, to William Kuebler, LCDR, JAGC, USN, et al., *Re: CMCR Brief (22 Aug. 2008)*.
- B. E-mail from Patrick J. Parrish, COL, JA, to Rebecca S. Snyder, et al., *Re: P-007, U.S. v. Khadr – Gov't Motion for Reconsideration of Rulings on D019 and D047 (11 July 2008)*.

These documents are necessary to support the factual basis for Appellant's concurrently filed responsive motion. Accordingly, the Court should grant the Motion to Attach.

Respectfully submitted,



Jordan A. Goldstein  
U.S. Department of Justice



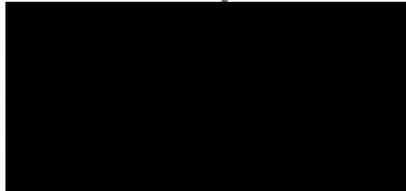
Jeffrey D. Groharing  
Major, U.S. Marine Corps  
Office of Military Commissions



Keith A. Petty  
Captain, U.S. Army  
Office of Military Commissions



John F. Murphy  
U.S. Department of Justice  
Office of Military Commissions



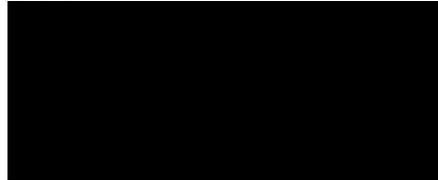
Trial Counsel

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was e-mailed to William C. Kuebler, LCDR, JAGC, USN, Detailed Defense Counsel on this 28th day of August 2008.



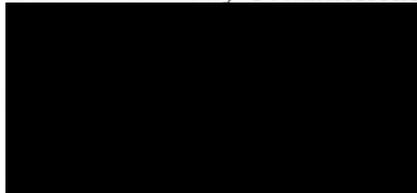
Jordan A. Goldstein  
U.S. Department of Justice



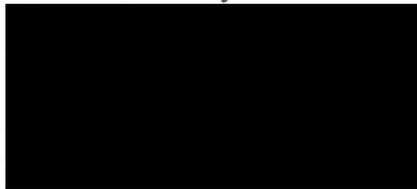
Jeffrey D. Groharing  
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Office of Military Commissions



Keith A. Petty  
Captain, U.S. Army  
Office of Military Commissions



John F. Murphy  
U.S. Department of Justice  
Office of Military Commissions



Trial Counsel

**Goldstein, Jordan A**

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**From:** [REDACTED]  
**Sent:** Friday, August 22, 2008 5:15 PM  
**To:** 'Kuebler, William, LCDR, DoD OGC'; 'Snyder, Rebecca, Ms, DoD OGC'  
**Cc:** 'Groharing, Jeff, Maj, DoD OGC'; Goldstein, Jordan A; 'Petty, Keith, CPT, DoD OGC'  
**Subject:** CMCR Brief

Bill,

Since the CMCR appeal is a fast-moving process, I just wanted to give you a heads-up on our upcoming brief. You have already seen our arguments in the pleadings filed in the commission, so I'm sure you've already researched the issues; however, to the extent it is helpful to you for planning purposes, our opening brief will largely (and unsurprisingly) track our motion for reconsideration.

V/R,

Jeff Groharing  
Major, U.S. Marine Corps  
Prosecutor, Office of Military Commissions  
[REDACTED]

8/28/2008

Attachment A

Goldstein, Jordan A

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**From:** [REDACTED]  
**Sent:** Friday, July 11, 2008 10:51 AM  
**To:** [REDACTED]  
**Cc:** [REDACTED]

**Subject:** P-007, U.S. v. Khadr - Gov't Motion for Reconsideration of Rulings on D019 and D047

**Attachments:** Government Motion for Reconsideration of D019 and D047.pdf



Government Motion  
for Reconsid...

Counsel: We will address the Government motion for reconsideration at the hearing set for 13 Aug 08. Defense may submit a response to the request for reconsideration or rely on its earlier briefs on the original motions. If the Defense feels compelled to respond to the motion for reconsideration, the response is due NLT 12 Aug 08.

Patrick J. Parrish  
COL, JA  
Military Judge

-----Original Message-----

**From:** Groharing, Jeff, Maj, DoD OGC [REDACTED]  
**Sent:** Friday, July 11, 2008 10:20 AM

[REDACTED]

**Subject:** U.S. v. Khadr - Gov't Motion for Reconsideration of Rulings on D019 and D047

Ma'am,

Please find the attached motion for reconsideration.

V/R, <<...>>

Jeff Groharing  
Major, U.S. Marine Corps  
Prosecutor  
Office of Military Commissions

[REDACTED]