UNITED STATES OF AMERICA v. Mohammed Jawad	**Defense Motion To Compel Discovery Pursuant to RMC 701(l) and 905(b)(4)** June 2, 2008

1. **Timeliness:** This motion is timely.

2. **Relief Requested:** Pursuant to R.M.C. 701(l) and R.M.C. 905(b)(4) the defense seeks an order compelling discovery.

3. **Overview:** The government has failed to meet its discovery obligations in a timely manner, severely hindering the defense's efforts to prepare for motion hearings and trial. Numerous discovery requests have gone unanswered.

4. **Facts:**

a. I was detailed to this case on 29 Apr 2008, (replacing Col J. Michael Sawyers) who was excused at the end of March. That same day, I served a discovery request on the trial counsel and asked for a prompt response. (Attachment 1) Trial counsel responded the same day that he would do so. Although I have received some discovery from the government (detailed below), I have yet to receive a formal response to my discovery request.

b. After the 7 May hearing in this case, at an R.M.C. 802 conference with Judge Brownback, Judge Brownback directed trial counsel to provide a list of discovery previously provided to Col Sawyers, so that I could make sure that I had everything that the government had turned over. This list has not been provided.

c. I have sent several supplemental discovery responses requesting specific items believed to be in possession or obtainable by the government, but not independently obtainable by the defense. (See Attachments 2-5)

d. The scheduled hearing date for law motions is 19 June.

e. The Trial Counsel has stated that he has provided me all the evidence that he has in his possession related to Mr. Jawad and I have no reason to doubt him. I have been provided with the CSRT report and numerous intelligence reports and records of interviews. However, there are still numerous documents and records that I need to fully and adequately prepare a defense.

f. I have received partial detention records (DIMS report) covering the period from February 2003 to 24 May 2006. I need the complete records. The DIMS report I received is a limited, possibly unclassified version, which does not include the names of the individuals entering the information into DIMS. The Khadr defense team was provided with a different version which includes more information, including the names of the individuals entering the information. I need the full version which includes the names so that I can identify the individuals involved in the mistreatment of Mr. Jawad. These are the only eyewitnesses to the alleged torture and will best be able to describe Mr. Jawad's physical and mental condition. I also need the names of the guards who responded to Mr. Jawad's suicide attempt. I need the names of the guards who disciplined Mr. Jawad on various occasions, such as by "removing comfort items" so I can find out what items were removed.

g. I have received electronic medical records in an unreadable format utilizing a proprietary military health software system to which I do not have access. I need a full paper set of the records or a copy of the software.

h. I have requested further information on the "Frequent Flyer" program and sent a specific discovery request on the SIPRnet to trial counsel on 22 May. (I don't believe my request was classified, but thought the discovery materials which would be provided in response might be). Trial counsel informed me that he promptly forwarded my request to JTF-GTMO. JTF-GTMO appears to be the source of the delay. In order to prepare for

the 19 June hearing on D-008, the defense requests the military judge order OMC-P and JTF-GTMO to produce the following records:

A. All documents relating to or describing any frequent detainee cell movement, sleep deprivation or sleep disruption program, including, but not limited to "Operation Snowman," "Frequent Flyer" and the "Special Move" program, tending to answer the following questions:

   What was the nature and purpose of these programs?
   Who developed or proposed them?
   Who approved them?
   Why and when were the names of the program changed?
   Who approved the use of the program against Mr. Jawad?
   For what reason(s)?
   Under what authority?

B. The defense specifically requests: (1) any orders approving these programs or rescinding approval for these programs from any authority; (2) any documents relating to the procedures utilized to gain approval for use of these programs on any individual detainee; (3) a complete list of detainees upon whom the procedures were utilized, including the dates administered and number of cell moves involved; (4) any documents or presentations utilized to train guards on the procedures for these programs; (5) any documents describing the criteria to be utilized in the selection and approval of candidates for the program; (6) any medical or mental health reviews or assessments conducted prior to during or after the administration of these programs for the purpose of determining the suitability of any detainee for the program, or the ongoing or aftereffects of such programs; (7) any legal reviews concerning these programs; (8) any correspondence to USSOUTHCOM or SECDEF regarding these programs; (9) any complaints concerning these programs filed by any employee of DoD or other federal agencies, including the FBI, provided to

any level of command or at JTF-GTMO or elsewhere (such as the IG), and any reports or investigations prompted by these complaints; (10) any complaints filed by any detainee concerning these programs; (11) any complaints filed by any observers, including the ICRC regarding these programs;

i. Pertaining to filing D-008, the defense requested on 27 May to be provided with the following document (Attachment 2):

C. Camp Delta Standard Operation Procedures – dated 1 March 2004. This document, known as CDSOP/04 is believed to be "a revised update to Joint Task Force Guantanamo (JTF-GTMO) standard operating procedures (SOP) for Camp Delta [...] and establishes policies and procedures for the security, treatment, care, and accountability for detainees [...] at JTF-GTMO in general and Camp Delta in particular."

The document has not been provided.

j. Pertaining to filing D-008, the defense requested on 25 May the following documents (Attachment 3):

D. The full classified version of the AR 15-6 Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility Guantanamo conducted by Lt Gen Randall Schmidt, known as the Schmidt report, Dated 1 Apr 05 as Amended 9 Jun 05.

E. The full classified version of the Vice Admiral Albert T. Church, III, Inspector General comprehensive review of Department of Defense (DoD) interrogation operations, the unclassified executive summary of which was released in March 05.

F. The CDR USSOUTHCOM memo of June 2, 2003, providing further guidance on the implementation of the 16 Apr 03 SECDEF approved interrogation techniques.

G. DIMS reports on Mohammed Jawad from 25 May 2006 to the present.

None of these documents have been provided.

k. Pertaining to Defense filing D-004, on 14 May, the defense requested the following documents (Attachment 4):

H. A complete, unredacted version of the investigation conducted by Brig Gen Clyde Tate in September 2007, including all attachments and exhibits.

I. All correspondence, including e-mail, from any personnel in the office of the Legal Advisor to the Convening Authority to any personnel in the Office of the Chief Prosecutor concerning the selection of the Jawad case for charging, the nature of the charges, and/or the timing of the swearing of charges, from the date of the appointment of the current Legal Advisor (1 July 07) to the date of swearing of charges on 9 Oct 07.

J. A copy of the resignation letter of Col Davis, former Chief Prosecutor.

K. Any letters or correspondence appointing an interim or acting Chief Prosecutor upon the resignation of Col Davis until the appointment of Col Morris as Chief Prosecutor.

L. Any other materials in the possession of the government potentially relevant to the exercise of unlawful influence by the Legal Advisor to the Convening Authority or any other official.

None of the documents specifically requested have been provided. No other materials have been provided.

l. On 29 May, the defense requested the following documents, also pertaining to Defense filing D-004 (Attachment 5):

> M. All relevant correspondence sent to and from Col Morris Davis' official Government Outlook account at OMC-P during his tenure as Chief Prosecutor be turned over to the defense. The defense specifically requests all e-mail correspondence mentioning Mohammad Jawad by name or other reference e.g. "that kid who threw the hand-grenade" or referencing the sequencing of swearing of charges between 1 July 07 and 9 Oct 07. The defense requests that all correspondence to and from Lt Col Britt, Brig Gen Thomas Hartmann, Susan Crawford, William Haynes, and any trial counsel now or previously assigned to the Jawad case and Col Morris that could even conceivably have any relevance to the subject be provided.
>
> N. Any e-mail correspondence sent between 4 Oct 07 and 9 Oct 07 between anyone in the office of the Convening Authority and any person in the Office of the Chief Prosecutor concerning the decision to swear charges against Mohammed Jawad on 9 Oct 2007.

5. **Law and Argument:** The defense is entitled to reasonable access to the evidence. "Each party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence."[1] "The defense shall have reasonable opportunity to obtain witnesses and other evidence as provided in these rules."[2] Items which are "material to the presentation of the defense" must be provided, or at least the defense must be given an opportunity to examine them.[3] R.M.C. 701(a)(3) states "[t]he military judge may specify the time, place and manner of

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[1] R.M.C. 701(j).
[2] R.M.C. 703(a).
[3] R.M.C. 703(c)(1-3).

discovery and may prescribe such terms and conditions as are necessary to the interests of justice." The military judge may compel production of discovery.[4]

The materials sought are believed by the defense to be relevant, material and necessary to the preparation of the defense, specifically defense filing D-004 and D-008, scheduled for the 19 June hearing. There is a good faith basis for each of the specific requests filed as set forth in motions D-004 and D-008 and in individual discovery requests. The government's tardiness in providing even an interim request to defense discovery requests is inexcusable. The defense notes that the government has repeatedly pushed for an early trial date in this case; meanwhile, their discovery responses have been slow in forthcoming and meager in content. Such a combination does not serve the interests of justice.

In light of the government's extreme sluggishness in responding to defense discovery requests, the government should not be given the customary seven days to respond to this motion. The defense can not afford to wait another week or more to get these materials. The defense requests that the government be ordered to respond to this motion within 48 hours of receipt.

6. **Request for Oral Argument:** If the requested relief is not granted on the basis of the written motion, the defense requests oral argument.

7. **Request for public release:** The defense requests permission to publicly release this filing, the government's response to this pleading, and the court's ruling as soon as possible.

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[4] R.M.C. 905(b)(4)

Respectfully Submitted,

By: DAVID J. R. FRAKT, Major, USAFR
Detailed Defense Counsel

[redacted]

8. **Attachments:**

1. Discovery Request dated 29 April 2008

2. Supplemental Discovery Request dated 27 May 2008

3. Supplemental Discovery Request dated 25 May 2008

4. Supplemental Discovery Request dated 14 May 2008

5. Supplemental Discovery Request dated 29 May 2008

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS

29 April 2008

MEMORANDUM FOR OMC OFFICE OF THE CHIEF PROSECUTOR
TRIAL COUNSEL: LTC Vandeveld

FROM: Defense Counsel

SUBJECT: Request for Discovery-U.S. v. Jawad

1. Pursuant to Rules for Military Commission (R.M.C.) 701, the defense requests the government furnish all documents or information in its possession, or known or discoverable by the government, which directly or indirectly mentions or pertains to the accused or any government witnesses or which is otherwise relevant to this case. This includes but is not limited to:

(1) Any statements, reports, or intelligence;

(2) Agent's notes;

(3) Internal data pages;

(4) Interview logs and logs of all visitors of the accused while detained at Guantanamo Bay, Cuba;

(5) Informant's notes;

(6) All messages and other documents used to communicate between the various levels of investigators, including staff summary sheets or memoranda sent to DoD and its staff to keep investigators apprised of the situation or operation;

(7) All documents from any Combatant Status Review Tribunals or other detention status reviews concerning the accused.

e. Disclosure of the existence of, and the opportunity to listen to, any and all tapes, audio or video, made by and/or between any and all parties involved in this case;

f. Disclosure of all evidence seized from the person or property of the Accused, or believed to be owned by the Accused, that the Prosecution intends to offer into evidence against the Accused at trial.

g. Any matter the Prosecution seeks to have judicially noticed.

h. The names, locations, and phone numbers, including business addresses, of all witnesses and potential witnesses used in developing the case against the Accused, including any pretrial hearing to determine personal jurisdiction/unlawful enemy combatant status, and any potential rebuttal case. I specifically request a list of all interrogators, with their current business phone, e-mail and address

i. A written list of documents and other items of all evidence (and their locations) the Prosecution intends to use at findings or sentencing, including the rebuttal cases of both.

j. Access to any physical evidence in the custody or control of the Government that was seized, recorded, or otherwise considered, during the investigation of this case, whether or not the Government relied upon it,

k. Any video, photographs or other records of physical evidence similarly uncovered by the Government, whether or not the physical evidence itself is now in the Government's custody or control.

l. Any known evidence tending to diminish the credibility of the Accused and all potential witnesses including, but not limited to, prior civilian or military convictions and evidence of other character, conduct, or bias bearing on witness credibility.

m. Any information concerning places where the accused was detained prior to arriving at Guantanamo Bay Naval Base, Cuba. Specifically, I request all information related to how the accused was transported, vessels or vehicles used to transport the accused, and the length and manner of detention on any said vessels.

n. Disclosure of any immunity or leniency granted to a witness or to potential witnesses.

o. Access to all relevant personnel, medical, and mental health records of all potential witnesses who may testify against the Accused on the merits or in sentencing.

p. Copies of any results of scientific reports or experiments which are within the possession, custody, or control of the Government; the existence of which are known by the Prosecution; or by the exercise of due diligence may be known; and which are material to the preparation of the Defense, or are intended for use by the Government as evidence at trial.

q. Any and all information concerning the Behavioral Science Consultation Team, to include the number of members assigned, specific identities and educational background of each member, and the protocols/techniques utilized in training interrogators on conducting actual interrogations.

r. Access to pertinent background information of the prospective commission members, to include any and all data related to the Convening Authority's selection of commission members and the criteria used in their selection.

s. Notice of any intent to monitor conversations between defense counsel and the accused and the circumstances surrounding the decision to engage in said monitoring.

t. Any and all information, correspondence, or email traffic concerning any promises, concessions, agreements, understandings made by officials of the United States government with the government to which the accused holds citizenship.

u. Any other evidence in the possession of the Government or otherwise known to the Prosecution, which reasonably may tend to:

(1) negate the guilt of the Accused; (e.g. exculpatory information)

(2) reduce the guilt of the Accused to the offenses charged; or

(3) reduce the potential punishment, including any mitigating or extenuation circumstances

v. The names, locations, and phone numbers, including business addresses, of all prison guards/security personnel who have had direct personal contact with the Accused while in U.S. Government custody.

w. The names of all detainees (including phone numbers and addresses, if no longer at Guantanamo) who have had contact with the Accused during his captivity/detention, particularly those with adjacent cells, and the dates of arrival/departure of any such detainees.

x. The complete medical records of the accused, including mental health records.

2. The Defense is making this request on the grounds that the Accused cannot properly prepare for the trial of this matter without production and inspection of the documents and items requested.

3. The Defense requests that the Government inform the Defense Counsel if it does not intend to comply with any of the provisions of this request.

4. The Defense expects that the Government will make a reasonably diligent effort to comply with this information request; and, as to any particular requested information, the Defense will regard any non-response or response without comment as an affirmative assertion by the Government that the requested information does not exist.

5. I understand that the Government has already provided significant discovery materials to prior defense counsel, which, in turn, has now been furnished to me. If discovery has already been provided, you may simply reply to that effect. Of course, this is a continuing request, and as such, this request includes any information that you may later discover before, during, or after the trial of this case.

//signed//
DAVID J. R. FRAKT, Major, USAFR
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that I delivered the original of this discovery request to trial counsel on 29 April 2008 via e-mail.

//signed//
DAVID J. R. FRAKT, Major, USAFR
Defense Counsel

Frakt, David, MAJ, DoD OGC

From: Frakt, David, MAJ, DoD OGC
Sent: Tuesday, May 27, 2008 3:09 PM
To: Vandeveld, Darrel, LTC, DoD OGC; Ashmawy, Omar, CPT, DoD OGC; Spragg, Isaac, CPT, DoD OGC
Cc: V[redacted] Frakt, David, MAJ, DoD OGC
Subject: Supplemental Discovery Request
Signed By: [redacted]

The defense requests the following items:

Camp Delta Standard Operation Procedures - 1 March 2004
CDSOP/04 is believed to be "a revised update to Joint Task Force Guantanamo (JTF-GTMO) standard operating procedures (SOP) for Camp Delta [...] and establishes policies and procedures for the security, treatment, care, and accountability for detainees [...] at JTF-GTMO in general and Camp Delta in particular"

Thank you.

David J. R. Frakt, Major, USAFR
Defense Counsel
Office of Military Commissions
[redacted]

Frakt, David, MAJ, DoD OGC

From: Frakt, David, MAJ, DoD OGC
Sent: Sunday, May 25, 2008 10:01 AM
To: Vandeveld, Darrel, LTC, DoD OGC; Ashmawy, Omar, CPT, DoD OGC; Spragg, Isaac, CPT, DoD OGC
Cc: [redacted] Frakt, David, MAJ, DoD OGC
Subject: Supplemental Discovery Request
Signed By: [redacted]

The defense requests the following items:

1. The full classified version of the AR 15-6 **Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility** Guantanamo conducted by Lt Gen Randall Schmidt, known as the Schmidt report, Dated 1 Apr 05 as Amended 9 Jun 05

2. The full classified version of the Vice Admiral Albert T. Church, III, Inspector General comprehensive review of Department of Defense (DoD) interrogation operations.investigation, the unclassified version executive summary of which was released in March 05.

3. The CDR USSOUTHCOM memo of June 2, 2003, providing further guidance on the implementation of the 16 Apr 03 SECDEF approved interrogation techniques.

4. DIMS reports on Mohammed Jawad from 25 May 2006 to the present.
The defense asserts that these reports are relevant and necessary to the defense to establish whether the treatment of Mr. Jawad was in accordance with US and international law, and to establish whether there was any official coverup of the maltreatment of Mr. Jawad.

David J. R. Frakt, Major, USAFR
Defense Counsel
Office of Military Commissions
[redacted]

Frakt, David, MAJ, DoD OGC

From: Frakt, David, MAJ, DoD OGC
Sent: Wednesday, May 14, 2008 11:25 AM
To: [redacted]
Cc: [redacted]
Subject: RE: US v Jawad - Supplemental Discovery Request
Signed By: [redacted]

The defense requests the following items. This supplements the defense discovery request dated 29 April 2008:

1. A complete, unredacted version of the investigation conducted by Brig Gen Clyde Tate in September 2007, including all attachments and exhibits.

2. All correspondence, including e-mail, from any personnel in the office of the Legal Advisor to the Convening Authority to any personnel in the Office of the Chief Prosecutor concerning the selection of the Jawad case for charging, the nature of the charges, and/or the timing of the swearing of charges, from the date of the appointment of the current Legal Advisor (1 July 07) to the date of swearing of charges on 9 Oct 07.

3. A copy of the resignation letter of Col Davis, former Chief Prosecutor.

4. Any letters or correspondence appointing an interim or acting Chief Prosecutor upon the resignation of Col Davis until the appointment of Col Morris as Chief Prosecutor.

5. Any other materials in the possession of the government potentially relevant to the exercise of unlawful influence by the Legal Advisor to the Convening Authority or any other official.

The defense believes these items are necessary and relevant in establishing whether there is a basis to seek relief in this case for unlawful influence exercised by the Legal Advisor to the Convening Authority or any other official. The defense believes there is a good faith basis for this request based on the testimony of Col Davis in the Hamdan case.

Respectfully submitted,

David J. R. Frakt, Major, USAFR
Defense Counsel
Office of Military Commissions
[redacted]

Frakt, David, MAJ, DoD OGC

From: Frakt, David, MAJ, DoD OGC
Sent: Thursday, May 29, 2008 9:10 AM
To: [redacted]
Cc: [redacted]
Subject: Defense Supplemental Discovery Request related to D04 Motion to Dismiss (Unlawful Influence)
Signed By: [redacted]

The defense has been informed that there are numerous e-mails sent to and from Col Morris Davis, former Chief Prosecutor, that are highly relevant to D004 Motion to Dismiss(Unlawful Influence) and may specifically contradict assertions made in the Government response thereto.

1. The defense requests that all relevant correspondence sent to and from Col Morris Davis' official Government Outlook account at OMC-P during his tenure as Chief Prosecutor be turned over to the defense. The defense specifically requests all e-mail correspondence mentioning Mohammad Jawad by name or other reference e.g. "that kid who threw the hand-grenade" or referencing the sequencing of swearing of charges between 1 July 07 and 9 Oct 07. The defense requests that all correspondence to and from Lt Col Britt, Brig Gen Thomas Hartmann, Susan Crawford, William Haynes, and any trial counsel now or previously assigned to the Jawad case and Col Morris that could even conceivably have any relevance to the subject be provided.

2. The defense also requests any e-mail correspondence sent between 4 Oct 07 and 9 Oct 07 between anyone in the office of the Convening Authority and any person in the Office of the Chief Prosecutor concerning the decision to swear charges against Mohammed Jawad on 9 Oct 2007.

3. The defense requests that a complete copy of Col Morris Davis' correspondence be provided to him so that he can prepare for his testimony in the upcoming 19 June hearing.

4. Please inform me immediately if you intend to comply with this request for discovery and your intended date of completion. If you do not intend to comply, or do not believe you can complete the search and turn over the data prior to 15 June 07, please inform me immediately.

5. This discovery request is sent under the assumption that this data has been preserved in accordance with applicable law and regulations. The defense assumes that all correspondence sent to and from Col Davis official Gov't Outlook account during his tenure has been preserved. Please inform me if you believe any of the data referenced has been destroyed, and, if so, when, by whom, for what reason, and under whose authority.

Thank you in advance for your prompt cooperation to this discovery request.

David J. R. Frakt, Major, USAFR
Defense Counsel
[redacted]

UNITED STATES OF AMERICA v. Mohammed Jawad	**Government Response to Defense Motion to Compel Discovery Pursuant to RMC 701(l) and 905(b)(4)** June 9, 2008

1. **Timeliness:** The defense motion is not untimely, but premature in some respects, as outlined below. The government has already furnished to defense counsel the evidence it plans to use in its case-in-chief, with only a few exceptions[1], all of the accused's statements, and all potentially exculpatory or mitigating information. The Commission has issued only one order concerning discovery, following a Rules for Military Commission (R.M.C.) 802 session before Judge Brownback; the government has complied with this single order.

2. **Facts:**[2]

a. I was detailed to this case on 29 Apr 2008, (replacing Col J. Michael Sawyers) who was excused at the end of March. That same day, I served a discovery request on the trial counsel and asked for a prompt response. (Attachment 1) Trial counsel responded the same day that he would do so. Although I have received some discovery from the government (detailed below), I have yet to receive a formal response to my discovery request.

Government's Response: Agreed; however, the Government provided the prior defense attorney, COL Sawyers, with a complete copy of discovery even before this case was referred to the Commission, so that the defense could participate in witness deposition in an informed manner.

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[1] E.g., photographs of the wounds of the alleged victims taken during the course of their initial medical treatment.

[2] This response will state the government's position in bolded format, following the defense's numbered/lettered paragraphs, for the Commission's convenience.

b. After the 7 May hearing in this case, at an R.M.C. 802 conference with Judge Brownback, Judge Brownback directed trial counsel to provide a list of discovery previously provided to Col Sawyers, so that I could make sure that I had everything that the government had turned over. This list has not been provided.

Response: Judge Brownback's order actually states that the government furnish the defense with a *copy* of the discovery provided earlier, which the government has done. The prosecution has consulted with the defense, which agrees with that the prosecution has complied with Judge Brownback's order, at least in this respect.

c. I have sent several supplemental discovery responses requesting specific items believed to be in possession or obtainable by the government, but not independently obtainable by the defense. (See Attachments 2-5)

Response: The defense has submitted several supplemental requests.

d. The scheduled hearing date for law motions is 19 June.

Response: Admitted; emphasis on *law* motions, which by definition do not require that any evidence be taken.

e. The Trial Counsel has stated that he has provided me all the evidence that he has in his possession related to Mr. Jawad and I have no reason to doubt him. I have been provided with the CSRT report and numerous intelligence reports and records of interviews. However, there are still numerous documents and records that I need to fully and adequately prepare a defense.

Response: See the immediately foregoing response. 19 June 2008 is the date set for law motions; the defense has filed disparate motions that, in the defense's view, require evidence to be taken, e.g., fact motions.

f. I have received partial detention records (DIMS report) covering the period from February 2003 to 24 May 2006. I need the complete records. The DIMS report I received is a limited, possibly unclassified version, which does not include the names of the individuals entering the information into DIMS. The Khadr defense team was

provided with a different version which includes more information, including the names of the individuals entering the information. I need the full version which includes the names so that I can identify the individuals involved in the mistreatment of Mr. Jawad. These are the only eyewitnesses to the alleged torture and will best be able to describe Mr. Jawad's physical and mental condition. I also need the names of the guards who responded to Mr. Jawad's suicide attempt. I need the names of the guards who disciplined Mr. Jawad on various occasions, such as by "removing comfort items" so I can find out what items were removed.

Response: The Prosecution will obtain the JDIMS records, the system which evidently replaced the DIMS system, pertaining to Jawad, if they exist. From evidence currently in the Prosecution's possession, it does not appear as though Mr. Jawad has been mistreated, but the Prosecution is continuing to investigate the matter through the offices of JTF-GTMO. As to the *Khadr* case, it may well be that there is no information of the sort provided in that case. Furthermore, it does not appear that Mr. Jawad attempted suicide; the Prosecution will submit to the Commission a review of Mr. Jawad's medical records, which will elucidate the otherwise-cryptic and truncated DIMS entries regarding Mr. Jawad's actions and treatment.

g. I have received electronic medical records in an unreadable format utilizing a proprietary military health software system to which I do not have access. I need a full paper set of the records or a copy of the software.

Response: The Prosecution has requested that JTF-GTMO convert the records into .pdf format, and will provide them to the defense as soon as they are received.

h. I have requested further information on the "Frequent Flyer" program and sent a specific discovery request on the SIPRnet to trial counsel on 22 May. (I don't believe my request was classified, but thought the discovery materials which would be provided in response might be). Trial counsel informed me that he promptly forwarded my request to JTF-GTMO. JTF-GTMO appears to be the source of the delay. In order to prepare for

the 19 June hearing on D-008, the defense requests the military judge order OMC-P and JTF-GTMO to produce the following records:

A. All documents relating to or describing any frequent detainee cell movement, sleep deprivation or sleep disruption program, including, but not limited to "Operation Snowman," "Frequent Flyer" and the "Special Move" program, tending to answer the following questions:

What was the nature and purpose of these programs?
Who developed or proposed them?
Who approved them?
Why and when were the names of the program changed?
Who approved the use of the program against Mr. Jawad?
For what reason(s)?
Under what authority?

Response: JTF-GTMO has been and is currently collecting records responsive to this request; the requests concern actions occurring over four years ago, after several personnel rotations, and hence the search is time-consuming and, when complete, the results will be made available to the defense.

B. The defense specifically requests: (1) any orders approving these programs or rescinding approval for these programs from any authority; (2) any documents relating to the procedures utilized to gain approval for use of these programs on any individual detainee; (3) a complete list of detainees upon whom the procedures were utilized, including the dates administered and number of cell moves involved; (4) any documents or presentations utilized to train guards on the procedures for these programs; (5) any documents describing the criteria to be utilized in the selection and approval of candidates for the program; (6) any medical or mental health reviews or assessments conducted prior to during or after the administration of these programs for the purpose of

determining the suitability of any detainee for the program, or the ongoing or aftereffects of such programs; (7) any legal reviews concerning these programs; (8) any correspondence to USSOUTHCOM or SECDEF regarding these programs; (9) any complaints concerning these programs filed by any employee of DoD or other federal agencies, including the FBI, provided to any level of command or at JTF-GTMO or elsewhere (such as the IG), and any reports or investigations prompted by these complaints; (10) any complaints filed by any detainee concerning these programs; (11) any complaints filed by any observers, including the ICRC regarding these programs;

Response: See the foregoing. The government respectfully submits that information concerning other detainees is irrelevant and immaterial to the instant motion; in addition, request (8) is overbroad and (9) implicates individual and statutory privacy rights and is overbroad. The government is working to collect responsive information, will review it for applicable privileges against disclosure, and will provide an accounting to the defense once the information, if any, is received from the other agencies/commands implicated in the request.

i. Pertaining to filing D-008, the defense requested on 27 May to be provided with the following document (Attachment 2):

> C. Camp Delta Standard Operation Procedures – dated 1 March 2004. This document, known as CDSOP/04 is believed to be "a revised update to Joint Task Force Guantanamo (JTF-GTMO) standard operating procedures (SOP) for Camp Delta [...] and establishes policies and procedures for the security, treatment, care, and accountability for detainees [...] at JTF-GTMO in general and Camp Delta in particular."

The document has not been provided.

Response: This document will be provided when obtained, if it exists.

j. Pertaining to filing D-008, the defense requested on 25 May the following documents (Attachment 3):

D. The full classified version of the AR 15-6 Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility Guantanamo conducted by Lt Gen Randall Schmidt, known as the Schmidt report, Dated 1 Apr 05 as Amended 9 Jun 05.

Response: The Prosecution will make this document available for review by the defense at the defense's convenience, in the offices of the Prosecution, which is a secure storage facility.

E. The full classified version of the Vice Admiral Albert T. Church, III, Inspector General comprehensive review of Department of Defense (DoD) interrogation operations, the unclassified executive summary of which was released in March 05.

Response: Id.

F. The CDR USSOUTHCOM memo of June 2, 2003, providing further guidance on the implementation of the 16 Apr 03 SECDEF approved interrogation techniques.

Response: Id., when obtained.

G. DIMS reports on Mohammed Jawad from 25 May 2006 to the present.

Response: The government has been informed, and believes, that the Joint Detainee Information System (JDIMS) replaced the DIMS system on or about the date specified in the defense request. The government has requested these records from JTF-GTMO and will produce them upon receipt.

None of these documents have been provided.

k. Pertaining to Defense filing D-004, on 14 May, the defense requested the following documents (Attachment 4):

H. A complete, unredacted version of the investigation conducted by Brig Gen Clyde Tate in September 2007, including all attachments and exhibits.

Response: The Prosecution will make this report available for inspection by the defense, in the offices of the Prosecution.

I. All correspondence, including e-mail, from any personnel in the office of the Legal Advisor to the Convening Authority to any personnel in the Office of the Chief Prosecutor concerning the selection of the Jawad case for charging, the nature of the charges, and/or the timing of the swearing of charges, from the date of the appointment of the current Legal Advisor (1 July 07) to the date of swearing of charges on 9 Oct 07.

Response: This request intrudes deeply into the deliberative process, implicates the attorney-client and work-product privilege, and is otherwise overbroad. The defense has interviewed LTC Britt, the acting Chief Prosecutor at the time the charges were sworn, and LTC Britt's recommendation to the Convening Authority has been furnished to the defense. The Legal Advisor to the Convening Authority has been identified as a witness in the defense's motion to dismiss for Unlawful Influence (D-004), as has the former Chief Prosecutor, Col. Morris Davis. These witnesses should suffice to satisfy the foregoing request.

J. A copy of the resignation letter of Col Davis, former Chief Prosecutor.

Response: The defense is in contact with Col. Davis, and can presumably obtain a copy of the letter from him.

K. Any letters or correspondence appointing an interim or acting Chief Prosecutor upon the resignation of Col Davis until the appointment of Col Morris as Chief Prosecutor.

Response: If this document exists, it will be provided.

L. Any other materials in the possession of the government potentially relevant to the exercise of unlawful influence by the Legal Advisor to the Convening Authority or any other official.

The Prosecution denies that there has been any unlawful influence as asserted by the defense. The request is overbroad in any event.

None of the documents specifically requested have been provided. No other materials have been provided.

l. On 29 May, the defense requested the following documents, also pertaining to Defense filing D-004 (Attachment 5):

M. All relevant correspondence sent to and from Col Morris Davis' official Government Outlook account at OMC-P during his tenure as Chief Prosecutor be turned over to the defense. The defense specifically requests all e-mail correspondence mentioning Mohammad Jawad by name or other reference e.g. "that kid who threw the hand-grenade" or referencing the sequencing of swearing of charges between 1 July 07 and 9 Oct 07. The defense requests that all correspondence to and from Lt Col Britt, Brig Gen Thomas Hartmann, Susan Crawford, William Haynes, and any trial counsel now or previously assigned to the Jawad case and Col Morris that could even conceivably have any relevance to the subject be provided.

Response: This request intrudes deeply into the deliberative process, implicates the attorney-client and work-product privilege, and is otherwise overbroad. The defense has interviewed LTC Britt, the acting Chief Prosecutor at the time the charges were sworn, and LTC Britt's recommendation to the Convening Authority has been furnished to the defense. The Legal Advisor to the Convening Authority has been identified as a witness in the defense's motion to dismiss for Unlawful Influence (D-004), as has the former Chief Prosecutor, Col. Morris Davis. These

witnesses should suffice to satisfy the foregoing request, which is otherwise overbroad.

N. Any e-mail correspondence sent between 4 Oct 07 and 9 Oct 07 between anyone in the office of the Convening Authority and any person in the Office of the Chief Prosecutor concerning the decision to swear charges against Mohammed Jawad on 9 Oct 2007.

Response: This request intrudes deeply into the deliberative process, implicates the attorney-client and work-product privilege, and is otherwise overbroad. The defense has interviewed LTC Britt, the acting Chief Prosecutor at the time the charges were sworn, and LTC Britt's recommendation to the Convening Authority has been furnished to the defense. The Legal Advisor to the Convening Authority has been identified as a witness in the defense's motion to dismiss for Unlawful Influence (D-004), as has the former Chief Prosecutor, Col. Morris Davis. These witnesses should suffice to satisfy the foregoing request, which is otherwise overbroad.

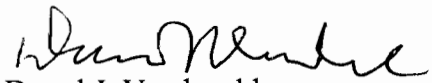
5. **Law and Argument:** While defense is entitled to reasonable access to the evidence in this case, the instant requests concern not the Prosecution's case-in-chief, or any potentially mitigating or exculpatory evidence, which the Prosecution has provided. The foregoing requests may be "material to the presentation of the defense," and, with the foregoing exceptions and subject to the assertion of any applicable privileges determined by the Prosecution upon its receipt of the evidence requested, the information will be provided to the defense. However, the defense requests have only been submitted to the Prosecution relatively recently, and simply cannot be obtained as easily or as quickly as the defense imagines or would like.

In that sense, the defense's motion to compel is premature, and should be denied or a modified order issued once the information has been obtained.

6. **Request for Oral Argument:** An R.C.M. 802 session will in all likelihood resolve these questions, if necessary, once the Prosecution obtains and reviews the information sought.

7. **Request for public release:** The Prosecution objects to any release of these pleadings, since the request is premature, may implicate classified evidence, and involves issues of no great moment in the public debate over the Commissions or the case against Mr. Jawad. Release of the pleadings poses a substantial risk that the public will be mislead into thinking that the Prosecution is attempting to withhold evidence unfairly, when the exact opposite is true.

Respectfully Submitted,



Darrel J. Vandeveld
LTC, JA, USAR
Prosecutor

UNITED STATES OF AMERICA v. Mohammed Jawad	**D-010** **Supplemental Defense Motion To Compel Discovery Pursuant to RMC 701(l) and 905(b)(4) and Request For Other Appropriate Relief** July 14, 2008

1. **Timeliness:** This motion is timely.

2. **Relief Requested:** Pursuant to R.M.C. 701(l) and R.M.C. 905(b)(4) the defense seeks an order compelling discovery, and/or abatement of the proceedings or a delay, or dismissal of charges.

3. **Overview:** The government continues to fail to meet its discovery obligations in a timely manner, violating the Rules for Military Commission, severely hindering the defense's efforts to prepare for motion hearings and trial and denying Mr. Jawad's right to due process and a fair trial Numerous discovery requests have gone unanswered or been unfairly summarily denied. The government's unreasonable actions must be addressed in a meaningful way.

4. **Facts:**

a. Defense counsel was detailed to this case on 29 Apr 2008. That same day, the defense served a discovery request on the trial counsel and asked for a prompt response. Trial counsel responded the same day that he would do so. (Attachment 1) Although the defense has received some discovery from the government, the defense has yet to receive a formal response to the discovery request, despite numerous reminders.

b. The defense has sent several supplemental discovery responses requesting specific items believed to be in possession or obtainable by the government, but not independently obtainable by the defense. (See Attachments 2-5 of D-010 and Attachments 2-4 of this filing). Only a fraction of the requested information has been provided.

c. The next scheduled hearing date for law motions is 13-14 August. The next scheduled deadline for submitting motions and requesting witnesses is 21 July. On 22 May, the defense made a supplementary request seeking information about sleep deprivation programs generally and their use on Mohammad Jawad and other detainees. Receiving no response, the defense filed a motion to compel, D-010, on June 2, 2008. The military commission has not ruled on this motion. The relevance of the requested information should be apparent from the evidence presented at the 19 June hearing and subsequent filings. The defense renews its motion to compel production of the following information:

A. All documents relating to or describing any frequent detainee cell movement, sleep deprivation or sleep disruption program, including, but not limited to "Operation Sandman," "Frequent Flyer," and the "Continuous Cell Transfer" program, tending to answer the following questions:

   What was the nature and purpose of these programs?
   Who developed or proposed them?
   Who approved them?
   Why and when were the names of the program changed?
   Who approved the use of the program against Mr. Jawad?
   For what reason(s)?
   Under what authority?

B. The defense specifically requests: (1) any orders approving these programs or rescinding approval for these programs from any authority; (2) any documents relating to the procedures utilized to gain approval for use of these programs on any individual detainee; (3) a complete list of detainees upon whom the procedures were utilized, including the dates administered and number of cell moves involved; (4) any documents or presentations utilized to train guards on the procedures for these programs; (5) any documents describing the criteria to be utilized in the selection and approval of candidates for the program; (6) any medical or mental health reviews or assessments conducted prior to during or after the administration of these programs for the purpose of determining the suitability of any detainee for the program, or the ongoing or aftereffects of such programs; (7) any legal reviews concerning these programs; (8) any correspondence to USSOUTHCOM or SECDEF regarding these programs; (9) any complaints concerning these programs filed by any employee of DoD or other federal agencies, including the FBI, provided to any level of command or at JTF-GTMO or elsewhere (such as the IG), and any reports or investigations prompted by these complaints; (10) any

> complaints filed by any detainee concerning these programs; (11) any complaints filed by any observers, including the ICRC regarding these programs;

Although the defense was able to develop some information about sleep deprivation programs on its own initiative and through interviews of Maj Gen Hood and Esteban Rodriguez, the record the defense was able to build on sleep deprivation programs at Guantanamo remains woefully incomplete. As referenced in several recent defense supplemental filings, many detainees were subjected to sleep deprivation and there are numerous documents in government hands related to the use of sleep deprivation against detainees. The most recent example: on Saturday, July 12, the Hamdan defense team was provided with evidence (DIMS report) that their client was subjected to nearly 50 days of "Operation Sandman," another sleep deprivation/interruption program. The charged detainees in the three commission cases that are closest to trial have all been subjected to sleep deprivation, but no documents about the origin or approval of these programs have been provided to any of the defense teams. This is a travesty.

d. Pertaining to filing D-008, the defense requested on 25 May the following documents:

> D. The full classified version of the AR 15-6 Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility Guantanamo conducted by Lt Gen Randall Schmidt, known as the Schmidt report, Dated 1 Apr 05 as Amended 9 Jun 05.
>
> E. The full classified version of the Vice Admiral Albert T. Church, III, Inspector General comprehensive review of Department of Defense (DoD) interrogation operations, the unclassified executive summary of which was released in March 05.

A motion to compel production of these documents was filed on 2 June, D-010. After the motion was filed, the defense was provided the opportunity to review these two documents in the OMC-P SCIF. The defense identified numerous highly relevant pages of these two documents which were classified secret and had been redacted from the publicly releasable version. Defense counsel tabbed the most relevant pages for ready identification. The defense then re-requested the entire documents (after establishing their

direct relevance), but at least the tabbed pages. Neither the tabbed pages, nor the entire documents have been provided. Trial counsel claims that the government is attempting to get clearance to provide these documents to the defense.[1] Perhaps an order from the military judge would help. The defense renews its motion to compel production of these documents.

e. Pertaining to Defense filing D-004, on 14 May, the defense requested the following documents:

> Any other materials in the possession of the government potentially relevant to the exercise of unlawful influence by the Legal Advisor to the Convening Authority or any other official.

No documents or materials have been provided in response to this request. The defense subsequently learned of the existence of a chart developed by the Legal Advisor to the Convening Authority which is highly relevant to the issue of unlawful influence and was referred to both in the testimony of Brig Gen Hartmann and in the Deposition of CAPT McCarthy. The defense requested this document personally from Brig Gen Hartmann during his testimony and reiterated that request in writing on 7 July in a supplemental discovery request. (Attachment 2) The request states:

> The defense request the following items mentioned by CAPT McCarthy at the July 3 deposition:
>
> 1. 4 page fold out timeline chart (or a facsimile thereof) created by the legal advisor to the Convening Authority and shown to senior military leaders in November 2007
> 2. E-mail message from CAPT McCarthy to Col Morris, Chief Prosecutor, dated 18 or 19 June 2008, regarding his intent to come forward and testify depending on the nature of Brig Gen Hartmann's testimony.

Trial counsel responded on 8 July requesting that we forward the request related to the chart to the Convening Authority. Defense counsel immediately forwarded the request (with the government's reply) to Mr. Michael Chapman, Deputy Legal Advisor to the

[1] The fact that the prosecutors do not have the independent power to provide relevant documents that are in their possession to the defense is highly disturbing and yet more evidence of the premature decision to swear charges in this case. If the government can't provide the most basis relevant discovery at the time of charging, they should defer the swearing of charges until they have secured the necessary authorizations.

Convening Authority. (Attachment 3) The discovery request has never been acknowledged by Mr. Chapman or anyone else in the Office of the Legal Advisor or Office of the Convening Authority. After I requested that the Trial Counsel also independently seek to obtain the chart, Trial Counsel reported that he had requested the chart himself through a representative at the Legal Advisor's office. The chart has not been provided.

As for CAPT McCarthy's e-mail message, Trial Counsel responded, via e-mail:

> [C]an you state the relevance? Finding the e-mail would require us to access COL M's JTF-GTMO account, which can't be done remotely.

Defense counsel replied via e-mail:

> As for the e-mail, it is hard to assess the relevance without reading it, but based on what CAPT McCarthy said, he identified himself prior to the 19 June hearing as a potential rebuttal witness, with possible exculpatory information, or at least information helpful to the defense. I believe the Chief Prosecutor had an ethical obligation to provide such information to the defense. He did not. If there was any doubt about the obligation to provide the information to the defense prior to the hearing, then that doubt should have been erased after Brig Gen Hartmann testified, when the Chief Prosecutor surely knew that Brig Gen Hartmann had been less than fully candid with the tribunal. Or is it Col Morris' position that he had no knowledge about these VTCs at all?
>
> Thus, the e-mail is relevant both as to the unlawful influence motion and as potential evidence of prosecutorial misconduct, as addressed in the first defense supplement to D-004.

No further response was received. The requested e-mail has not been provided.

f. On 14 July at 0956, the defense made the following supplemental discovery request (Attachment 3):

> The defense requests all information possessed by any agency of the United States government, or reasonably obtainable by the government, concerning:
>
> A. Hekmatyar Gulbuddin (HG)
> B. The Hezbi-al Islami Group (HIG)
> C. The decision to declare HG a wanted terrorist
> D. The Decision to declare HIG a terrorist organization
> E. U.S. Support, official or unofficial, of HG.

Defense counsel provided the following justification and commentary:

> The basis of the request is the government's assertion that Mohammad Jawad is or was a member of HIG and had sworn fealty to HG, and that such membership supports the government's assertion of personal jurisdiction over Mr. Jawad as an unlawful enemy combatant and the assertion of subject matter jurisdiction over Mr. Jawad's actions as violations of the law of war.
>
> Please forward this request to the appropriate custodians of records and copy the defense. It is not an acceptable response to tell the defense to seek such records from the records custodian.
>
> Please inform the defense if you do not intend to comply with this request or provide the requested information so that we may take the matter up with the military commission at an appropriate time.
>
> Thank you in advance for your cooperation.

The immediate response, received five minutes later (at 1001) via e-mail from trial counsel:

> In accordance with RMC 703(f)(4)(A), kindly direct your request to the appropriate custodian of records. You may find this unacceptable, but I would urge you to follow the rules. (Attachment 3)

This cavalier denial is, in defense's view, not a good faith response to a legitimate discovery request. Obviously, no effort was made in the intervening five minutes to determine whether OMC-P has any relevant documents in its possession. The defense has no way of identifying what agency has what documents or who is deemed to be the records custodian of unknown documents. Even if we did have some inkling of which agency was the official custodian of a certain group of records, it would be futile to request the documents from anyone other than the prosecution. The Defense has repeatedly explained to trial counsel that there is not a single government agency that will provide a single document to the defense, especially classified documents, without the explicit approval of OMC-P. The defense has previously provided the military commission multiple examples of this "records custodian run around". At the 19 June hearing, the military judge seemed to the defense counsel to express skepticism and displeasure at the use of this tactic by the government, but the government persists. This

latest invocation of the "records custodian" rule is particularly unreasonable because the government has specifically referred to HG and HIG in multiple filings. For example, in Government Response to D-004 p. 4, paragraph E, the government made the following factual assertion:

> E. Jawad himself claimed to be affiliated with Hezbollah – e Islami Gulbuddin [sic] or "HIG," a terrorist organization specially-designated as such by the US Department of State in February, 2003, presumably as a result of terrorist attacks carried out by its members in the Kabul area, of which Jawad's may have been among the first.

Perhaps even more pertinent to the discovery request is Government Response to D-012, page 3, paragraph 3c, which reads as follows:

> c. [Defense fact] Mr. Jawad is not a member of al Qaida or the Taliban, nor is he alleged to be. The defense has been presented with some intelligence reports tending to suggest that Mr. Jawad may have been recruited and equipped with hand grenades by insurgents, possibly affiliated with Hezb-e-Islami Gulbuddin, (HIG) an organization founded by Hekmatyar Gulbuddin, a former Prime Minister of Afghanistan. This group was declared by the U.S. to be a terrorist organization on 19 Feb 2003, more than two months after the alleged attack by Mr. Jawad. **Government Response: Jawad has admitted his recruitment, training, and continued involvement in HIG. The Government is prepared to present testimony and documents, currently classified, to substantiate these claims.**

(Bold in original)

These passages demonstrated that the government has information relating to HG and HIG that they believe is relevant.

5. **Law and Argument:** The defense is entitled to reasonable access to the evidence. "Each party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence."[2] "The defense shall have reasonable opportunity to obtain witnesses and other evidence as provided in these rules."[3] Items which are "material to the presentation of the defense"

[2] R.M.C. 701(j).
[3] R.M.C. 703(a).

must be provided, or at least the defense must be given an opportunity to examine them.[4] R.M.C. 701(a)(3) states "[t]he military judge may specify the time, place and manner of discovery and may prescribe such terms and conditions as are necessary to the interests of justice." The military judge may compel production of discovery.[5]

The materials sought are believed by the defense to be relevant, material and necessary to the preparation of the defense. There is a good faith basis for each of the specific requests as exhaustively detailed above and in multiple filings, as well as in the individual discovery requests. The government's tardiness in providing even an interim response to defense discovery requests is inexcusable. The defense notes that the government has repeatedly pushed for an early trial date in this case; meanwhile, their discovery responses continue to be slow in forthcoming and meager in content. Such a combination does not serve the interests of justice.

CONCLUSION

In light of the government's extreme bad faith disregard and/or denial of defense discovery requests, merely compelling the government to provide the requested information is no longer sufficient. The defense has chronicled numerous examples of the government's failure to abide by court rules and procedures and rules of professional responsibility, and other forms of prosecutorial misconduct. At some point, the commission simply has to say "enough is enough." The military commission should follow the lead of the International Criminal Court, which recently "ordered the release of the court's first defendant, a Congolese warlord charged with the coercive recruitment of thousands of child soldiers, saying he could not receive a fair trial due to withheld evidence."[6] It is incredibly ironic that a real war criminal, a recruiter of child soldiers, in a legitimate war crimes tribunal established under international law, may go free due to the "prosecutor's refusal to share certain documents" while a child soldier, a victim of just such a recruiter, continues to be prosecuted by the country that unsigned the Rome

[4] R.M.C. 703(c)(1-3).
[5] R.M.C. 905(b)(4)
[6] Nora Boustany, Congolese Accused of Recruiting Child Soldiers Ordered Set Free, Washington Post, July 3, 2008 (Attachment 4).

Statute and backed out of the International Criminal Court citing a lack of due process to the criminally accused.[7] At a minimum, the proceedings should be delayed, or abated, until such time as the prosecution provides comprehensive responses to the discovery requests. More appropriately, the charges should be dismissed with prejudice.

6. **Request for Oral Argument:** If the requested relief is not granted on the basis of the written motion, the defense requests oral argument.

7. **Request for public release:** The defense requests permission to publicly release this filing, the government's response to this pleading, and the court's ruling as soon as possible.

Respectfully Submitted,

By: DAVID J. R. FRAKT, Major, USAFR

And: KATHARINE DOXAKIS, LCDR, USN
Detailed Defense Counsel

[redacted]

Attachments:

1. E-mail dated 29 April 2008

2. Supplemental Discovery Request dated 7 and 8 July 2008

3. Supplemental Discovery Request dated 14 July 2008

4. Washington Post Article

[7] See, Background Briefing on the International Criminal Court by Senior Defense Official http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3528 (Explaining the President's decision to unsign the treaty, the unnamed Senior Defense Official stated: "In the prosecutions, Americans would not be entitled to all of the protections that our Constitution affords to Americans in criminal prosecutions. . . .there are evidentiary protections in American law that wouldn't necessarily apply in the International Criminal Court.")

Attachment 1

Frakt, David, MAJ, DoD OGC

From: Vandeveld, Darrel, LTC, DoD OGC
Sent: Tuesday, April 29, 2008 11:40 AM
To: Frakt, David, MAJ, DoD OGC
Subject: RE: discovery request.doc
Signed By: [redacted]

Will do, Dave.

Darrel

From: Frakt, David, MAJ, DoD OGC
Sent: Tuesday, April 29, 2008 11:12 AM
To: Morris, Lawrence, COL, DoD OGC; Vandeveld, Darrel, LTC, DoD OGC; Ashmawy, Omar, CPT, DoD OGC
C[redacted]
Subject: discovery request.doc

Attached please find a discovery request in the Jawad case. Thanks in advance for your prompt response.

V/R

David J. R. Frakt, Major, USAFR
Defense Counsel
Office of Military Commissions
[redacted]

<<...>>

Attachment 2

Frakt, David, MAJ, DoD OGC

From: Frakt, David, MAJ, DoD OGC
Sent: Tuesday, July 08, 2008 12:17 PM
To: [redacted]
Cc: [redacted]
Subject: FW: Supplementary Discovery Request
Signed By: [redacted]

Mr. Chapman -

Brig Gen Hartmann testified at the June 19 hearing in the case of U.S. v. Jawad that he had developed a chart with a timeline for pending prosecutions. The chart was shown to General and Flag officers within JTF-GTMO and SOUTHCOM and possible elsewhere within the Defense Department in November 2007. CAPT McCarthy JTF GTMO SJA, described the chart as a 4 page foldout chart with a detailed timeline on it. During Gen Hartmann's testimony, I requested that Gen Hartmann provide this chart to me. He has not done so. I have also requested the chart from OMC-P. They have suggested that I direct my request to the office of the Convening Authority (see below). I don't really know who has the chart or how it was created, but I am requested that a facsimile or electronic version of the chart be prepared and that I be provided a copy. In addition, I would like to know exactly to whom Brig Gen Hartmann showed the chart, and when. The chart and the information about the uses to which it was put is highly relevant to the Defense Motion to Dismiss for Unlawful Influence D-008 in the Jawad case.

Please consider this to be a formal discovery request for records within the custody of the Office of the Convening Authority or Legal Advisor to the Convening Authority. If you believe this request should be directed to another office or individual, please advise me or forward the message as you see fit. If you do not intend to provide the requested documents and information, please advise me as soon as possible so that I may take the matter up with the military commission.

Thank you very much in advance for your assistance in this matter.

David J. R. Frakt, Major, USAFR
Defense Counsel
[redacted]

From: [redacted]
Sent: [redacted]
To: Fra[redacted]
Subject: FW: Supplementary Discovery Request

Dave and Katie: No objection to the first request, but would ask that you direct the request to the Convening Authority, which should have custody of the chart. As to the second, can you state the relevance? Finding the e-mail would require us to access COL M's JTF-GTMO account, which can't be done remotely.

Thanks,

Darrel

From: Frakt, David, MAJ, DoD OGC
Sent: Monday, July 07, 2008 9:37 AM
To: [redacted]
Cc: [redacted]
Subject: Supplementary Discovery Request

The defense requests the following items mentioned by CAPT McCarthy at the July 3 deposition:

1. 4 page fold out timeline chart (or a facsimile thereof) created by the legal advisor to the Convening Authority and shown to senior military leaders in November 2007

2. E-mail message from CAPT McCarthy to Col Morris, Chief Prosecutor, dated 18 or 19 June 2008, regarding his intent to come forward and testify depending on the nature of Brig Gen Hartmann's testimony.

Please advise the defense immediately if you do not intend to comply with this discovery request, so that I may seek an order to compel discovery from the military judge.

Thank you,

David J. R. Frakt, Major, USAFR
Defense Counsel
[redacted]

Attachment 3

Frakt, David, MAJ, DoD OGC

From: Vandeveld, Darrel, LTC, DoD OGC
Sent: Monday, July 14, 2008 10:01 AM
To: Frakt, David, MAJ, DoD OGC
Cc: [redacted]
Subject: RE: Supplemental Discovery Request: U.S. v. Jawad (HG and HIG)
Signed By: [redacted]

In accordance with RMC 703(f)(4)(A), kindly direct your request to the appropriate custodian of records. You may find this unacceptable, but I would urge you to follow the rules.

[redacted]e, SSG, DoD OGC; Galvan,

Subject: Supplemental Discovery Request: U.S. v. Jawad (HG and HIG)

The defense requests all information possessed by any agency of the United States government, or reasonably obtainable by the government, concerning:

A. Hekmatyar Gulbuddin (HG)
B. The Hezbi-al Islami Group (HIG)
C. The decision to declare HG a wanted terrorist
D. The Decision to declare HIG a terrorist organization
E. U.S. Support, official or unofficial, of HG.

The basis of the request is the government's assertion that Mohammad Jawad is or was a member of HIG and had sworn fealty to HG, and that such membership supports the government's assertion of personal jurisdiction over Mr. Jawad as an unlawful enemy combatant and the assertion of subject matter jurisdiction over Mr. Jawad's actions as violations of the law of war.

Please forward this request to the appropriate custodians of records and copy the defense. It is not an acceptable response to tell the defense to seek such records from the records custodian.

Please inform the defense if you do not intend to comply with this request or provide the requested information so that we may take the matter up with the military commission at an appropriate time.

Thank you in advance for your cooperation.

David J. R. Frakt, Major, USAFR
Defense Counsel
Office of Military Commissions
[redacted]

Attachment 4

washingtonpost.com

Congolese Accused of Recruiting Child Soldiers Ordered Set Free

Advertisement
Open Now Member FDIC
ING DIRECT
Save your money
Oh my, what big pockets you have.

By Nora Boustany
Washington Post Foreign Service
Thursday, July 3, 2008; A11

Judges at the International Criminal Court on Wednesday ordered the release of the court's first defendant, a Congolese warlord charged with the coercive recruitment of thousands of child soldiers, saying he could not receive a fair trial due to withheld evidence.

The judges cited prosecutors' refusal to share certain documents that tended to exculpate the defendant, Thomas Lubanga Dyilo. He will remain in custody pending a ruling on an appeal that prosecutors were expected to file.

In a telephone interview from The Hague, where the court is based, chief prosecutor Luis Moreno-Ocampo said the dispute involved documents that his office had obtained from the United Nations under a confidentiality agreement.

Some of the information in the papers could be considered to exonerate the defendant, Moreno-Ocampo said, such as a promise by Lubanga to demobilize. The prosecutor's office asked U.N. officials to consent to disclose the documents, but they declined, he said, citing security concerns.

"The judges said we cannot proceed, so now we are working on a proposal with the United Nations that would make certain documents available under certain conditions," he said.

His office expressed confidence that the problem would be cleared up and that the trial would begin in September. "There will be justice for Lubanga's victims," Moreno-Ocampo pledged.

The court was set up by treaty to try people accused of genocide, crimes against humanity and other extreme offenses, with 106 countries taking part. The United States is not part of the court, citing concerns that its powers would become politicized and be used unfairly against its citizens.

Lubanga, founder and leader of the Union of Congolese Patriots, was the first suspect to be arrested and turned over to the court, on March 17, 2006, after an arrest warrant was issued at the request of Moreno-Ocampo.

Since the court began operating, the prosecutor has launched probes in four countries -- Uganda, Congo, the Central African Republic and Sudan. Twelve arrest warrants have been issued; four people have been detained.

View all comments that have been posted about this article.

UNITED STATES OF AMERICA v. Mohammed Jawad	**D-010** **Government Response to Defense Supplemental Motion To Compel Discovery Pursuant to RMC 701(l) and 905(b)(4) and Request For Other Appropriate Relief** 8 August 2008

1. **Timeliness:** This Government response to defense motion is filed within the timelines established by the Military Commissions Trial Judiciary Rules.

2. **Relief Requested:** Denial of the requested relief, much of which has already been provided or will be provided.

3. **Overview:** There is no basis for the defense's claims that the government has refused or otherwise failed to comply with the defense's multiple and continuing requests. RMC 701 sets forth the government's obligations with specificity, and the government has complied with every aspect of the pertinent rules. The production of the substantive evidence in this case occurred on 17 November 2007, even before charges had been sworn. Subsequent requests by the defense have been transmitted, as directed by the Military Judge, by the government to the custodian of the records sought. The process often takes longer than the government would like, but the government is proceeding with all due diligence. Much of what the defense has asked for does not exist, but those documents that do exist have been requested from the custodians of the documents. While it is true that the government has not responded in writing, line-by-line, to the defense's initial discovery request, there is no requirement in the MMC that the government do so. However, when a trial date is set by the Commission, the government will respond to the defense's initial request. The defense has been very cooperative in reaching accommodations when witnesses or other evidence is unavailable or difficult to obtain, and the government will strive for the same level of cooperation.

4. **Facts:**

a. Defense counsel first asserts that the Government has failed to comply with its discovery obligations by failing to provide "information about sleep deprivation programs generally and their use on (the accused) and other detainees." (*See* Supplemental Defense Motion at page 2). The government position is that it has fully complied with its discovery obligation in that it has provided the defense with all documentation in trial counsel's possession concerning "sleep deprivation program" issues. The government has acknowledged that Mr. Jawad experienced frequent moves from 7 May to 20 May 2004, and has provided the defense with all the documents concerning that episode and the program in general.

b. As to the two classified reports the defense has requested (Lt Gen Schmidt's Report and VADM Church's Report), the government has sought permission from the appropriate agencies to provide these reports to the defense. The government has permitted the defense to inspect the reports and will provide the reports as soon as the equity holders in the reports grant permission, or if the Commission orders their production. Defense agrees this is the current status as to these two requested reports. (*See* Supplemental Defense Motion, page 4).

c. The defense has requested any documents in the possession of the Government "potentially relevant to the exercise of unlawful influence by the Legal Advisor to the Convening Authority or any other official." (*See* Supplemental Defense Motion, page 4). Despite the fact that the Government could not envision a more overbroad request, trial counsel has nonetheless attempted to comply by providing the Defense with all documentation collected thus far concerning this potential issue.

d. The defense states it has not received a "chart developed by the Legal Advisor to the Convening Authority" which is "highly relevant to the issue of unlawful influence." (*See* Supplemental Defense Motion, page 4). The Government has provided the defense with

the chart, and declarations from BGen Hartmann and COL Morris as to the particular features of the chart.

e. The defense has requested an apparent email between CAPT McCarthy and COL Morris, the Chief Prosecutor, OMC-P. (*See* Supplemental Defense Motion, page 5). Without commenting on the baseless and inappropriate ethical insinuations raised by the defense concerning the Chief Prosecutor and the Legal Advisor to the Convening Authority, the defense has utterly failed to establish a relevant or material fact that would justify producing emails from one officer to another which likely contain significant amounts of "internal, deliberative process" material—not subject to discovery.

f. The defense has requested "all information possessed by any agency of the United States government, or reasonably obtainable by the government" concerning various aspects of the Hezbi-al Islami Group (HIG). In paragraph c., above, the Government stated it could not envision a more overbroad request. This non-specific request for *any and all* information from *any and all* government organizations concerning a group with a 20+ year existence is, in fact, more overbroad that the requested material in paragraph c.

5. Summary and Conclusion. The Government has fully complied with its discovery requirements under RMC 701. As a final comment, the Defense, in its Supplemental Defense Motion, repeatedly states that the Government never provided them with a "response to defense discovery requests," or was "tardy" in doing so. If the defense is stating that the Government has not complied with their discovery obligations, they are wrong. If the defense is stating (or implying) that the Government has an obligation under applicable rules of discovery to respond to their written discovery requests with a written discovery response, they are wrong again.

6. Request for Oral Argument. The Government desires oral argument.

7. Defense Request for Immediate Public Release. The Government objects to any premature public release of this, or any, motion and response thereto.

Respectfully Submitted,

DOUGLAS M. STEVENSON
Lt Col, USAF
Prosecutor

UNITED STATES OF AMERICA v. Mohammed Jawad	**D-010** **Reply to Government Response to** Supplemental Defense Motion To Compel Discovery Pursuant to RMC 701(l) and 905(b)(4) and Request For Other Appropriate Relief AND MOTION FOR SANCTIONS August 11, 2008

1. **Timeliness:** The defense motion was filed 14 July 08. The government response was filed 8 August 08. The government falsely claimed in their motion that their response was timely, although it is actually 19 days late. No request for an extension was filed. The government not only fails to respond to discovery requests in a timely fashion, but they can't even be bothered to comply with commission rules on responding to motions.[1] The defense reply, in contrast, is timely.

2. **Relief Requested:**

a. Pursuant to R.M.C. 701(l) and R.M.C. 905(b)(4) the defense seeks dismissal of the charges.

b. In the alternative, the defense requests an order compelling discovery; or

c. Abatement of the proceedings; and,

d. The defense requests a standing order (or preferably a change to the MCTJRC) that would require the government to respond, in writing, to all defense discovery requests within seven calendar days, absent leave of the commission for good cause shown or the consent of the defense for a longer period.

e. Attribution of all delay since 29 April 08 to the government for speedy trial purposes.

f. Appropriate sanctions against the government.

Reply to specific paragraphs in the Government Response:

[1] The defense notes that this filing is signed by Lt Col Douglas Stevenson, Prosecutor. The defense has not been provided any notification that Lt Col Stevenson has been detailed to this case.

3. **Overview:** The government's claim that "There is no basis for the defense's claim that the government has refused or otherwise failed to comply with the defense's multiple and continuing requests" is surely one of the biggest whoppers to be issued from a government legendary for the audacity of its prevarications. It is hard to imagine how the government can even keep a straight face when they state they have "complied with every aspect of the pertinent rules." The government's interpretations of their discovery obligations are inconsistent with the right of the accused to a fair trial and indicative of the complete and utter disdain of the government for the rule of law.

4. **Facts:**

ACTUAL FACTS: The defense submitted a standard discovery request on 29 Apr 2008, the same day that current lead defense counsel was detailed to the case. The defense asked for a prompt response. Trial counsel responded the same day that he would do so. After the first hearing on 7 May 08, Judge Brownback held an 802 session on 8 May. During this session, lead defense counsel informed the Judge that the defense had not received a response to the discovery request as promised. Trial counsel responded that he had provided "all the discovery" to the prior defense counsel. The defense informed Judge Brownback that it didn't seem like the defense had everything. Judge Brownback then directed the trial counsel to provide an index of what had been provided to prior counsel so the defense could ascertain if everything was still together. Trial counsel then offered to provide a complete duplicate set of discovery instead. Judge Brownback concurred and ordered that he do so. The trial counsel did then send a large batch of discovery to the defense. This discovery material was not organized or indexed in any meaningful way that was apparent to the defense. After reviewing the material and attempting to place the discovery in some kind of logical order, a lengthy and time-consuming process, the defense concluded that the materials provided were not responsive to the vast majority of the specific line items in the discovery request. Furthermore, the defense has recently learned that certain key documents in the possession of the government, including sworn statements from the first Americans to interrogate Mr. Jawad in U.S. custody, and records pertaining to another suspect in the grenade attack, which the government acknowledges should have been provided to the

defense, were not, either through oversight or neglect. Throughout the summer, the defense has repeatedly renewed its request for a response to the initial discovery request, providing several reminders to trial counsel of the number of days that had elapsed since the request was sent. Each and every reminder has been disregarded. As of the date of this filing, 104 days have passed without a response. The government has now offered an explanation for its unfathomable behavior. They now claim that there is no requirement to do so, and that "if the defense is stating (or implying) that the Government has an obligation under applicable rules of discovery to respond to their written discovery requests with a written discovery response, they are wrong."

As the defense became aware of specific items of evidence that were of particular relevance and in the possession of, or obtainable by, the government, the defense submitted supplemental discovery requests. Many of these were previously submitted as Attachments 2-5 of D-010 and Attachments 2-4 of the Supplement to D-010. Several more have been filed since. Only a small fraction of the requested information has been provided and many of the requests have seemingly been ignored completely.

Reply to specific paragraphs in the Government Response, continued:

a. The government has not turned over all information about the frequent flyer program. The discovery provided, consisting primarily of prison logs, is haphazard and incomplete, and includes no information about several detainees known to have been subjected to the frequent flyer program through other sources. The defense has not been provided a single document purporting to provide the authority for the frequent flyer program, any legal review of the program, any document ordering that any individual detainee be subjected to the program, any complaints about the program, or any documentation about the origins of the program. It is simply impossible to believe that dozens of detainees were subjected to a formalized program and there is no paper trail other than a few entries in the log books or DIMS showing that detainees were moved around. Either all documents relating to this program were intentionally destroyed, or the government simply hasn't looked hard enough.

b. Both the Church Report and Schmidt-Furlow report contain highly relevant information about the frequent flyer program and sleep deprivation. The government's refusal to turn over these documents to the defense is nothing less than obstruction of justice. These documents are in the possession of the prosecution. On information and belief, the prosecution has entered into so-called "gentlemen's agreements" with various government agencies under which the prosecution is allowed to have all manner of classified documents so long as they promise not to provide them to the defense. These agreements are more properly called "conspiracy to obstruct justice." There is no lawful basis for such agreements. The government is blatantly and intentionally violating their obligation to provide exculpatory evidence, and is in clear violation of discovery rules which require that neither party "unreasonably impede" the other party's access to evidence. The prosecution claims the government has requested permission from the Secretary of Defense and that he must personally approve the release of these reports, which he has apparently not done. This proves that the conspiracy to withhold exculpatory information about detainee abuse extends to the highest levels of government. The government must be forced to explain itself on the record.

c. The defense concedes that its request for "any documents potentially relevant to the exercise of unlawful influence by the Legal Advisor" is broad, but it is not overly broad. The Chief Prosecutor is in a position to know what documents he has that are relevant to this request, such as internal complaints, investigation reports and other documents which have not been released to the defense. The defense would point out that many prosecutors have resigned from OMC-P, including the former Chief Prosecutor, citing unlawful influence and ethical breaches. There must be some records pertaining to these resignations. The defense does not believe the government has provided all pertinent documents. Requests for specific pertinent documents, such as the e-mails from CAPT McCarthy to COL Morris on June 18 and June 20 have been denied.

d. A chart was provided. Brig Gen Hartmann's declaration, submitted by the government, indicates that there are several versions of the chart. Only the 1 Nov 07 version has been provided. The evolution of the chart is highly relevant.

e. CAPT McCarthy indicated in his sworn deposition that he e-mailed COL Morris with some kind of warning about Brig Gen Hartmann's testimony on 18 June and later indicated that there was another relevant e-mail sent 20 June. The defense has previously provided a detailed justification for this request. CAPT McCarthy is not a member of OMC-P and therefore there is no "deliberative process" privilege. The government is simply fabricating justifications in their desperation to avoid providing this e-mail to the defense. The fervor of their desire to withhold these e-mails is in itself strong evidence of the relevance of these e-mails. Importantly, the government does not say that they have reviewed the e-mail and that it is not relevant. Rather, they attempt to put the burden on the defense to prove the contents of a document to which we have been denied access. The defense requests that the trial counsel be ordered to review the e-mails in question, and then inform the commission if he has a good faith belief that they are not pertinent or that some privilege applies. If trial counsel is willing to make such a claim on the record, the defense requests that the commission conduct an in camera inspection of the e-mails and determine their relevance.

f. The government's apparent basis for claiming that Mr. Jawad is an "unlawful enemy combatant" is his alleged association with HIG. Indeed, his alleged association with this group appears to be the primary basis for the CSRT's designation of Mr. Jawad as an enemy combatant. The CSRT's conclusion appears to be based on inaccurate information provided by the government about HIG. If the government intends to make HIG an issue at the trial, then they are obligated to provide records about HIG in the government's possession.

5. **Law and Argument**

The commission has already had to intercede more than once in response to unreasonable and dilatory prosecution discovery tactics.[2] Over a dozen supplemental discovery requests for specific relevant items have gone unanswered. Over 100 days have passed without a written response to the defense discovery request. The government now says that "when a trial date is set by the Commission, the government will respond to the defense's initial request." This completely unacceptable response is a classic example of putting the cart before the horse. The Commission should steadfastly refuse to set a trial date until the government meets its discovery obligations. Without a detailed, line-by-line response to all of the defense discovery requests, the defense simply cannot begin to prepare for trial. It is impossible for the defense to estimate the amount of time necessary to prepare without knowing what evidence does and doesn't exist, the names and contact information of potential witnesses, and other standard routine information requested. If the government's response to various items within the requests is a refusal to provide the requested information, as they have already done repeatedly on many items the defense has requested, then additional motions to compel will be necessary before a trial date can even be contemplated.

The government's willful refusal to comply with their discovery obligations has effectively denied the accused the right to a speedy trial. The commission should attribute all delay from the time of the initial request (29 April 08) until the time of the response to the government. The government is solely responsible for the fact that the defense is unprepared to go to trial. Their eleventh hour and woefully inadequate excuse that they are "proceeding with all due diligence", but that "the process often takes longer than the government would like" underscores the fact that the charges were rushed to swearing and referral before the government had fully prepared the case, and that they hadn't done their "due diligence" prior to swearing, exactly as former Chief Prosecutor Col Morris Davis testified. In this regard, it is worth noting that the CITF determined that Mr. Jawad was a "prime candidate" for a military tribunal in May 2004. The

[2] E.g. the McCarthy deposition, the "records custodian run-around" (commission order 21 July) and the government's blanket refusal of witnesses without even speaking to them, prompting the commission scheduling order for production of witnesses.

government has had over four years since the determination was made to prosecute Mr. Jawad to get their act together and have failed miserably to do so.

CONCLUSION

The government's actions with regard to discovery, culminating in their odious response to the Supplement to D-010, are completely at odds with the government's promise of fair and open trials. The government has made a mockery of due process and acted with contempt for the rule of law. The only way to preserve the integrity of the commission is to dismiss the charge.

6. **Request for Oral Argument:** If the requested relief is not granted on the basis of the written motion, the defense requests oral argument.

7. **Request for public release:** The defense requests permission to publicly release this filing, the government's response to this pleading, and the court's ruling as soon as possible.

Respectfully Submitted,

//signed//
By: DAVID J. R. FRAKT, Major, USAFR
Detailed Defense Counsel
Office of the Chief Defense Counsel

[redacted]