

UNITED STATES OF AMERICA

v.

KHALID SHEIKH MOHAMMED, WALID
MUHAMMAD SALIH MUBARAK BIN
'ATTASH, RAMZI BIN AL SHIBH, ALI
ABDUL AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

Defense Motion

To Dismiss for Lack of Personal Jurisdiction or
for an Evidentiary Hearing and for Stay of All
Proceedings Pending Resolution of This
Motion

1 July 2008

This Motion is filed under undue time constraints and discovery limitations. The Motion is filed at this time to preserve the question presented

- Timeliness:** This Motion is timely filed within the deadline prescribed by the Commission in the Schedule for Trial and Order, dated 9 June 2008.
- Relief Sought:** On behalf of Mr. Ramzi bin al Shibh, the defense moves under R.M.C. 905(b) and 907(b)(1)(A) for dismissal of the charges on the ground that the Commission lacks personal jurisdiction over him. In the alternative, the defense requests an evidentiary hearing at which the government must establish personal jurisdiction, by a preponderance of the evidence. Because this motion goes to the power of the Court to act, the Commission must decide it before deciding any other pending matters. Accordingly, the defense moves to stay all other matters in this case until the jurisdictional issue has been resolved.
- Overview:** The accused seeks a dismissal of the charges because this Commission lacks personal jurisdiction over him. In the alternative, the accused requests an evidentiary hearing at which the government has the burden of proving, by a preponderance of the evidence, that he is an "alien unlawful enemy combatant." Because this motion goes to the power of the Court to act, the Commission must decide it before deciding any other pending matters. The accused therefore requests a stay of all other proceedings until the Commission has decided this motion.

4. **Burden and Standard of Proof:** The government has the burden of proving the Commission's personal jurisdiction over the accused by a preponderance of the evidence. *See United States v. Khadr*, CMCR 07-001, at 24; R.M.C. 905(c)(1), 905(c)(2)(B).

5. **Facts:**

- a. The accused, Mr. bin al Shibh, was arrested on 11 September 2002.
- b. On 9 March 2007, a Combatant Status Review Tribunal ("CSRT") determined that Mr. bin al Shibh is an "enemy combatant." [Attachment A]
- c. On 9 May 2008, the charges against Mr. bin al Shibh were referred capital, for trial by military commission. [AE 001].
- d. Mr. bin al Shibh was arraigned on 5 June 2008.

6. **Law and Argument:**

a. Under the Military Commission Act, this Commission has personal jurisdiction only over "alien unlawful enemy combatants." 10 U.S.C. §§ 948c, 948d(a), 948D(B); *see Khadr v. United States*, 2008 U.S. App. LEXIS 13285, at *3-*4 (D.C. Cir. June 20, 2008); *Khadr*, CMCR 07-001, at 8-9; R.M.C. 201(b)(1), (b)(2), (b)(3)(D), 202(a). The statute defines an "unlawful enemy combatant" as "(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or (ii) a person who . . . has been determined to be an unlawful enemy combatant by a [CSRT]" 10 U.S.C. § 948a(1)(A).

- b. The CSRT found only that Mr. bin al Shibh is an "enemy combatant"; it did not

find that he is an "alien unlawful enemy combatant." See Transcript of CSRT, at .¹ Because the CSRT did not make such a finding, its determination does not give the Commission personal jurisdiction over Mr. bin al Shibh. See *Khadr*, CMCR 07-001, at 8-16.

c. Although the Commission did not obtain personal jurisdiction over Mr. bin al Shibh through the CSRT determination, *Khadr* holds that the Commission may determine for itself whether Mr. bin al Shibh is an "alien unlawful enemy combatant." *Khadr*, CMCR 07-001, at 20-25; see R.M.C. 201(b)(3) (Commission always has jurisdiction to determine its own jurisdiction). Thus, unless the Commission dismisses the charges outright for lack of personal jurisdiction, it should hold an evidentiary hearing to determine the jurisdictional issue.

d. At the hearing on this motion, the government has the burden of proving by a preponderance of the evidence that Mr. bin al Shibh is an "unlawful enemy combatant." *Khadr*, CMCR 07-001, at 24; see R.M.C. 905(c)(1), 905(c)(2)(B); *United States v. Hamdan*, MC, Order on Reconsideration of Ruling on Motion to Dismiss for Lack of Jurisdiction (Dec. 19, 2007).²

e. The Commission must determine whether it has personal jurisdiction over Mr. bin al Shibh before it conducts other proceedings in this case. The government's compliance with

¹ The CSRT process and determination violated Mr. bin al Shibh's right to due process and other constitutional rights in a variety of respects. The rights violated include, among others, the failure to provide any right to counsel, the absence of any right of confrontation, and the lack of a right to examine all evidence against him. See *Boumediene v. Bush*, ___ U.S. ___, 2008 WL 2369628, * 28 (June 12, 2008) (comparing process afforded to defendants in other proceedings and finding that "the procedural protections afforded to the detainees in the CSRT hearings are far more limited, and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review."). Because of the numerous due process and constitutional concerns with the CSRT process itself, we reserve the right to challenge the CSRT process and determination in any appropriate forum, including before this Commission and in a habeas corpus action.

² By contrast, if Mr. bin al Shibh raises the defense of lawful combatancy at trial, the prosecution will have the burden of proving beyond a reasonable doubt that he is an unlawful enemy combatant. See *Khadr*, CMCR 07-001, at 7; R.M.C. 916(b).

the pre-referral criteria in the Rules for Military Commissions,³ combined with the "unambiguous allegation in the [charge sheet] that Mr. [bin al Shibh] is 'a person subject to trial by military commission as an alien unlawful enemy combatant,' entitled the military commission to initially and properly exercise *prima facie* personal jurisdiction over the accused *until such time as that jurisdiction was challenged by a motion to dismiss for lack thereof*, or proof of jurisdiction was lacking on the merits." *Khadr*, CMCR 07-001, at 21 (emphasis added).

f. Under *Khadr*, the Commission had *prima facie* personal jurisdiction over Mr. bin al Shibh until the filing of this motion--that is, "until such time as that jurisdiction was challenged by a motion to dismiss."⁴ At this point, *after* the filing of the motion to dismiss, the Commission has jurisdiction only to determine its own jurisdiction, R.M.C. 201(b)(3)--by conducting an evidentiary hearing to determine whether the government can prove by a preponderance of the evidence that Mr. bin al Shibh was an "alien unlawful enemy combatant." As *Khadr* makes clear, the Commission lacks jurisdiction to conduct further proceedings of any other kind until such time (if ever) that the government establishes that Mr. bin al Shibh is an "alien unlawful enemy combatant." *See generally Ruhrgas Ag v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) ("Personal jurisdiction . . . is an essential element of the jurisdiction of a district . . . court, without which the court is powerless to proceed to an adjudication.") (quotation omitted); *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006) (jurisdiction, including personal jurisdiction, "is the power of a court to try and determine a case and to render a valid judgment").

³ We assume (without conceding) that the government has complied facially with the pre-referral criteria in the Rules for Military Commissions.

⁴ For reasons we will set out in a separate motion, any exercise of jurisdiction by the Commission over Mr. bin al Shibh violates his right to due process and other constitutional rights. We assume (without conceding), for purposes of this motion only, that the Military Commissions Act and the Rules for Military Commissions provide the sole criteria for determining the jurisdiction of the Commission.

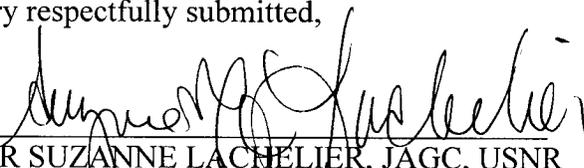
7. **Request for Oral Argument:** The defense requests oral argument and an evidentiary hearing.

8. **Conference with Opposing Counsel:** On 1 July 2008, the defense conferred with the Prosecution regarding its requested relief. The prosecution opposes this motion.

9. **Attachment:**

A. Transcript of CSRT for ISN 10013

Very respectfully submitted,

By: 
CDR SUZANNE LACHELIER, JAGC, USNR
Detailed Defense Counsel for
■ *Ramzi bin al Shibh*

 Counsel

By: 
LT RICHARD E.N. FEDERICO, JAGC, USN
Detailed Defense Counsel for
Ramzi bin al Shibh



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D-012

Prosecution Response to the Defense Motion
To Dismiss for Lack of Personal Jurisdiction or
for an Evidentiary Hearing and for Stay of All
Proceedings Pending Resolution of This
Motion

8 July 2008

1. Timeliness: Although the Government's response is timely filed, in light of Mr. Bin al Shibh's pending request to represent himself, the Detailed Defense Counsel's motion to dismiss the charges for lack of personal jurisdiction is premature.
2. Relief Sought: The Defense motion should not be entertained at this time. In the alternative, insofar as it requests a dismissal of the charges against Mr. Bin al Shibh, or a stay of all proceedings pending its resolution, the Defense motion should be denied.
3. Overview: In light of Mr. Bin al Shibh's request to represent himself, the Detailed Defense Counsel's motion to dismiss the charges for lack of personal jurisdiction is premature. However, if the military judge decides to entertain this motion at this time, he should determine that this military commission currently has, and retains, *prima facie in personam* jurisdiction over Mr. Bin al Shibh until the accused *successfully* challenges such jurisdiction. This commission's *prima facie* jurisdiction over the accused does not divest at the moment a motion challenging the jurisdiction is filed, nor does such a challenge require that all commission matters cease pending resolution of the issue of jurisdiction. This is the best and clearest reading of the Court of Military Commission Review ("CMCR") decision in *United States v. Khadr*.¹ Adherence to this principle is paramount in the instant case, as the important issue of whether Mr. Bin al Shibh may represent himself in these proceedings must first be decided by the Military Judge before any other motions filed on his behalf may be entertained.
4. Burden and Standard of Proof: In a properly raised motion to dismiss for lack of jurisdiction, the burden of persuasion shall be upon the prosecution. RMC 905(c)(1), 905(c)(2)(B).

¹ Although not binding on this commission, the view that a military commission retains *prima facie* jurisdiction absent a *successful* challenge by the Defense is also the view taken by the Military Judge (Colonel Brownback) in *Khadr*. Upon remand of the *Khadr* case from the CMCR, Judge Brownback stated "If what you're asking me to do is to say that I have jurisdiction -- the commission has jurisdiction over Mr. Khadr at this time and until such time as that jurisdiction might be *successfully* challenged, you have it." 8 November 2007 Transcript, pg 90 (emphasis added).

5. Facts:

a. On 9 May 2008, the Convening Authority referred nine different charges against Mr. Bin al Shibh: Conspiracy; Attacking Civilians; Attacking Civilian Objects; Intentionally Causing Serious Bodily Injury; Murder in Violation of the Law of War; Destruction of Property in Violation of the Law of War; Hijacking or Hazarding a Vessel or Aircraft; Terrorism; and Providing Material Support for Terrorism. Each of these nine charges separately and unambiguously alleges that Mr. Bin al Shibh is a person subject to trial by military commission as an alien unlawful enemy combatant. See Charge Sheet.

b. On 5 June 2008, Mr. Bin al Shibh was arraigned. During this initial session Mr. Bin al Shibh requested that he be allowed to represent himself and indicated that he did not wish to be represented by his detailed defense counsel. The Military Judge neither granted nor denied this request, and allowed for the detailed defense counsel to file a motion for unspecified relief regarding RMC 909 matters. The Military Judge did not invite the detailed defense counsel to file any motions other than those relating to the accused's competence to make a *pro se* representation election.

c. On 5 June 2008, Mr. Bin al Shibh openly admitted to the commission – on the record – that he tried to become a suicide hijacker on 11 September 2001, but that he could not get a visa to enter the United States (or words to that effect).²

d. On 1 July 2008, the Military Judge, *sua sponte*, ordered an RMC 706 Board be conducted that will inquire into the mental capacity of Mr. Bin al Shibh.

6. Law and Argument:

THE DETAILED DEFENSE COUNSEL'S MOTION CHALLENGING THE JURISDICTION OF THIS MILITARY COMMISSION IS PREMATURE

a. In light of Mr. Bin al Shibh's pending request to represent himself, the Detailed Defense Counsel's motion³ to dismiss the charges for lack of personal jurisdiction is premature. While normally detailed defense counsel would not require an invitation from the military judge to file motions it deemed necessary, this cannot be the case when an accused has requested to represent himself and in doing so has specifically disavowed the participation of his detailed defense counsel.

b. The first and most pressing matter before this military commission must be to determine whether or not to grant Mr. Bin al Shibh's request to represent himself. If the military judge determines that the accused competently and properly made his *pro se* representation election, then the accused will have the opportunity personally to determine the course of his defense, which may or may not include a challenge to the

² As of this writing, the Prosecution has not yet received a copy of the draft transcript of the arraignment.

³ This statement assumes that the accused did not expressly authorize the Detailed Defense Counsel to file this motion on his behalf, as the Prosecution is aware of no averment to suggest that he has.

jurisdiction of this commission.⁴ Based on his in-court statement admitting that he attempted to gain entry into the United States in order to be a suicide hijacker on September 11th, it is possible that the accused, acting *pro se*, may not want to challenge his status as an alien unlawful enemy combatant.

c. As the right to self representation is specifically granted by the Military Commissions Act, *see* MCA §949a(b)(1)(D), and the accused is presumed to be competent to stand trial, *see* RMC 909(b), the Military Judge must protect the accused's rights in this regard and not entertain any motion, *at this time*, that does not bear on the issue of whether the accused competently elected to represent himself. If the accused's request to represent himself is denied by the military judge for any reason, or if the accused decides to be represented by counsel, it goes without saying that the Defense could then file a challenge to the jurisdiction of the commission.

**THE MERE FILING OF THIS DEFENSE MOTION DOES NOT DIVEST THE
MILITARY COMMISSION OF ITS *PRIMA FACIE* JURISDICTION OVER
THE ACCUSED**

d. If the Military Judge decides to entertain the motion filed by the Defense at this time, he should deny both the Defense request to dismiss the charges outright, as well as its request to stay all other matters pending resolution of the issue of jurisdiction.

e. Although unclear as to the grounds for its first request, the Defense nevertheless moves this military commission to dismiss the charges outright for lack of personal jurisdiction. There is simply no support in law or fact for this request.

f. The CMCR made clear that a military commission has *prima facie in personam* jurisdiction over an accused where: charges have been properly and formally sworn against the accused pursuant to the Rules for Military Commissions; and the Convening Authority has referred the case for trial pursuant to the Rules after receiving pre-trial advice that determined that the military commission would have jurisdiction over the accused and the charges; and each offense referred for trial clearly alleges the express jurisdictional language used in the M.C.A., that the accused is "a person subject to trial by military commission as an alien unlawful enemy combatant." *See U.S. v. Khadr*, CMCR (2007-001) at 21.

g. In the present case, the compliance with the above-described pre-referral criteria, combined with the unambiguous allegation in the charge sheet that the accused is "a person subject to trial by military commission as an alien unlawful enemy combatant," entitles this military commission to initially and properly exercise *prima facie* personal jurisdiction over Mr. Bin al Shibh. This jurisdiction exists until such time as that jurisdiction is successfully challenged by a motion to dismiss for lack thereof, or proof

⁴ There is no prejudice to the accused by not considering this motion at this time, as challenges to the jurisdiction of the military commission are never waived. *See* RMC 907(b). "RMC 907 B allows an accused to raise a 'Motion to Dismiss for Lack of Jurisdiction,' and recognizes lack of jurisdiction as a non-waivable ground for dismissal of charges at any stage of the proceedings." *See U.S. v. Khadr* (CMCR 2007-001) at 24.

of jurisdiction is lacking on the merits.

h. On 9 May 2008, the Convening Authority referred nine different charges against Mr. Bin al Shibh: Conspiracy; Attacking Civilians; Attacking Civilian Objects; Intentionally Causing Serious Bodily Injury; Murder in Violation of the Law of War; Destruction of Property in Violation of the Law of War; Hijacking or Hazarding a Vessel or Aircraft; Terrorism; and Providing Material Support for Terrorism. Each of the nine charges was sworn by a person subject to the Uniform Code of Military Justice, and separately and unambiguously alleges that Mr. Bin al Shibh is a person subject to trial by military commission as an alien unlawful enemy combatant. *See Charge Sheet*. The Convening Authority referred these charges after receiving pre-trial advice that a military commission would have jurisdiction over the accused and the charges. *See Pre-Trial Advice to the Convening Authority (Attachment A)*.

i. It is clear that in this case against Mr. Bin al Shibh, the United States has facially complied with all of the pre-referral criteria contained in the Rules for Military Commission, and has set forth unambiguous allegations in the charge sheet that Mr. Bin al Shibh is a person subject to trial by military commission as an alien unlawful enemy combatant. As such, the military commission has *prima facie* personal jurisdiction over the accused, and the request to dismiss the charges outright should be denied.

THE MILITARY COMMISSION MAY CONSIDER OTHER MATTERS PRIOR TO THE JURISDICTIONAL MOTION

j. The Defense alternatively states that, absent an outright dismissal of the charges, the commission must determine whether it has personal jurisdiction over Mr. Bin al Shibh before it conducts other proceedings in this case. *See Defense Brief, pg 1*. This statement is a misreading of the CMCR's *Khadr* decision and a misunderstanding of the nature of *prima facie* jurisdiction.

k. Black's Law Dictionary defines "prima facie" as "a fact presumed to be true unless *disproved* by some evidence to the contrary." *See BLACKS LAW DICTIONARY* 1189 (6th ed. 1991). Therefore, by its own definition, *prima facie* jurisdiction cannot and would not automatically divest simply upon a *challenge* by the defense, but would rather require that jurisdiction be disproved by "evidence to the contrary" (which would constitute a successful challenge). If jurisdiction does not automatically divest upon challenge, it stands that the military commission is free to address other matters prior to addressing the jurisdictional question. The best and clearest reading of the CMCR's decision in *Khadr* is to require that the challenge to the jurisdiction of the commission *be successful* for *prima facie* jurisdiction to divest. In this matter, the commission will maintain personal jurisdiction over the accused until such time that the Prosecution, after a hearing before the military judge, fails to establish by a preponderance of the submitted evidence that the accused is an alien unlawful enemy combatant as defined in MCA §948a(1)(A)(i). There is no requirement that all other matters be stayed pending such a hearing and resolution. Indeed, under the circumstances of this case, where the present motion was filed by counsel who have been rejected by the accused during the pendency of the accused's

request to represent himself, there can be no harm in first addressing issues other than the one raised in defense counsels' present motion.

l. The Defense citations to RMC 201, *Ruhrgas Ag v. Marathon Oil*, and *United States v. Harmon* are equally misplaced. While these sources correctly state the premise that jurisdiction is required for a court to try and determine a case, not one of these sources stands for the proposition the Defense posits here; namely that, once personal jurisdiction is challenged, a court that already has *prima facie* jurisdiction may consider no other matters until the challenge is resolved.

m. While there may be instances where a military commission may want to consider its *in personam* jurisdiction immediately upon challenge, prior to taking up other matters, it is in no way required to do so. Indeed, doing so in the instant case would likely infringe upon the accused's pending request to represent himself in these proceedings and personally conduct his defense. Due to the circumstances surrounding Mr. Bin Al Shibh's request to represent himself, and the military commission's ability to exercise jurisdiction over the accused notwithstanding the mere filing of the instant motion, defense counsels' request to stay all proceedings pending resolution of the issue of *in personam* jurisdiction should also be denied.

7. Request for Oral Argument: The Prosecution does not request oral argument, but reserves the right to respond to any oral argument by the Defense.

8. Conference with Opposing Counsel: On 1 July 2008, the defense conferred with the Prosecution regarding its requested relief. The Prosecution opposed this motion.

9. Attachment:

A. Legal Advisor's pre-trial advice to the Convening Authority in *United States v Mohammed, et al.*

Respectfully submitted,



Clay Trivett, Jr.
Prosecutor
Office of Military Commissions

UNITED STATES OF AMERICA

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D-012
Defense Reply

To Government Response to Defense Motion
to Dismiss for Lack of Personal Jurisdiction or
for an Evidentiary Hearing and for Stay of All
Proceedings Pending Resolution of This
Motion

18 July 2008

1. **Timeliness:** This Reply is timely filed within the deadline prescribed by the Commission in its email of 11 July 2008 (granting an extension of time to file the reply, now due NLT 1600, 18 July 2008).

2. **Additional Relevant Facts:**

a. Mr. bin al Shibh is being administered a [REDACTED]

b. Mr. bin al Shibh has been undergoing mental health treatment since at least 06 September 2006, when he apparently first came into the custody of the Department of Defense.

c. [REDACTED]

d. On 08 July 2008, Mr. bin al Shibh filed a second motion to dismiss for lack of personal jurisdiction, based on another legal argument, namely that the government's outrageous conduct in seizing him and holding him for almost six years before charging him, deprives this commission of jurisdiction. Mr. bin al Shibh thus has two pending motions challenging the personal jurisdiction of this Commission over him.

3. **Law and Argument:**

I. **SUPREME COURT PRECEDENT REQUIRES THAT JURISDICTIONAL MATTERS BE ADJUDICATED BEFORE A CASE MAY PROCEED**

*"Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates."*¹

"The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well

¹ The Federalist Papers, No. 8, as quoted by Jane Mayer in *The Dark Side: The Inside Story of How the War on Terror Turned Into a War on American Ideals.*(2008 ed.)

*meaning but without understanding.”*²

These warnings bear repeating today, in light of the government’s position here. The government argues that this commission should not address the instant motion to dismiss until a competency evaluation is completed for Mr. bin al Shibh. Should Mr. bin al Shibh be found competent to stand trial, the government posits, he may not wish to challenge jurisdiction but, rather, he may choose to pursue a sentence a death so he can become a martyr. *See* D-012, Government Response, Pg. 3, ¶ 6.b. And the government wants to ensure that this commission is prepared to oblige such a choice.

The government makes this argument knowing, presumably, that personal jurisdiction is the *sine qua non* in the adjudication of any case. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583, 119 S.Ct. 1563 (1999)(“Personal jurisdiction . . . is ‘an essential element of the jurisdiction of a district ... court,’ without which the court is ‘powerless to proceed to an adjudication,’” quoting *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 382, 57 S.Ct. 273 (1937)). Surely the government did not actually intend to claim that it may seek to impose the death penalty on an accused, regardless of whether it has jurisdiction to even try him. Such a position is unconscionable and, not surprisingly, the government cites no legal authority to support it.

Indeed, Supreme Court precedent has consistently, and for more than a century, supported the very contrary position: questions of jurisdiction are resolved first, before any issue affecting the merits. *See Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 93-95, 118 S.Ct. 1003 (1998)(“The requirement that jurisdiction be established as a threshold matter ‘spring[s] from the nature and limits of the judicial power of the United States’ and is ‘inflexible

² *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J.), as quoted by Jane Mayer in *The Dark Side*, *supra*.

and without exception.”, quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 511 (1884)). In *Steel Co.*, the Supreme Court specifically eschewed the concept of “hypothetical jurisdiction.” See *Steel Co.*, 523 U.S. at 94 (rejecting an approach, “hypothetical jurisdiction,” that would permit addressing merits questions before jurisdictional questions, because that approach “carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers.”) The Court went on to cite “a long and venerable line of our cases” in support of its holding. *Id.* at 94-95, citing *Ex parte McCardle*, 7 Wall. 506, 514, 19 L.Ed. 264 (1868)(“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”); *Mansfield, C. & L.M.R. Co.; Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453, 20 S.Ct. 690 (1900)(“On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.”)

II. DEFENSE COUNSEL HAVE STANDING TO FILE A MOTION TO DISMISS ON BEHALF OF MR. BIN AL SHIBH, WHOSE COMPETENCY IS IN QUESTION

The government is using a purported concern for Mr. bin al Shibh’s right to self-representation in order to try and forestall resolution of the question of jurisdiction. It raises this supposed concern noting, all too eagerly, Mr. bin al Shibh’s desire, expressed at arraignment, to martyr himself, and knowing that it has been [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The government's position, once again, has no merit in the law. Federal case law holds that, in a capital case, counsel may file pleadings for a petitioner, and petitioner cannot contravene counsel's actions, where that petitioner's competence is in question. *See Hammett v. Texas*, 448 U.S. 725, 100 S.Ct. 2905 (1980)(finding that petitioner's choice to withdraw petition that was filed against his will could be honored "in the absence of any issue as to [his] competence."(emphasis added)); *see also, Gilmore v. Utah*, 429 U.S. 1012, 1014 (1976) (Burger, C.J., concurring)(rejecting next-friend intervention in post-conviction proceedings where defendant was "duly found to be competent by the [] courts" to make a knowing and voluntary waiver of access to the courts). Furthermore, the Commission here has refused to accept Mr. bin al Shibh's attempt to waive assistance of counsel. Accordingly, defense counsel's standing to file the instant motion on Mr. bin al Shibh's behalf, and to have it timely adjudicated, is unquestionable.

III. FURTHER PROCEEDINGS IN THIS COMMISSION MUST BE STAYED UNTIL THE GOVERNMENT HAS MET ITS BURDEN AND SHOWN FACTS ESTABLISHING ITS CLAIM OF PERSONAL JURISDICTION OVER MR. BIN AL SHIBH

The government's position also cannot stand in view of the substance of this motion to dismiss, which challenges the personal jurisdiction of this Commission to try Mr. bin al Shibh. This Military Commission is, by definition, a court of limited statutory jurisdiction established by the Military Commissions Act of 2006 ("MCA"). *See United States v. Khadr*, CMCR 07-001, at 13. ("Congress in the MCA was carefully and deliberately defining status for the express purpose of specifying the in personam criminal jurisdiction of military commission trials."). The C.M.C.R. has ruled that the MCA grants the Commission personal jurisdiction only over "alien unlawful enemy combatants" and, further, that the Commission does not obtain jurisdiction over Mr. bin al Shibh simply by virtue of a Combatant Status Review Tribunal determination that he

is an “alien enemy combatant” or the formalist compliance with pre-referral procedures . *Id.*, at 16. Without personal jurisdiction, the Commission “is powerless to proceed to an adjudication.” *Ruhrgas*, 526 U.S. at 584; *cf. Khadr*, at 2.

The Prosecution nonetheless argues that the filing of the motion to dismiss does not divest the military commission of its *prima facie* jurisdiction over the accused. In that this motion to dismiss is quite properly before the Commission, this jurisdictional challenge, on its face, is more than adequate to place the burden of production on the Prosecution to show that personal jurisdiction is present in this case. And it is the government’s burden:

The burden of raising the special defense that one is entitled to lawful combatant immunity rests upon the individual asserting the claim. *Lindh*, 212 F. Supp. 2d at 557-58. Once raised before a military commission, the burden then shifts to the prosecution to prove beyond a reasonable doubt that the defense does not exist. R.M.C. 916(b).

Khadr, at 7.

The Prosecution claims a *prima facie* showing of jurisdiction based solely on its formalistic compliance with pre-referral criteria contained in the Rules of Military Commission, and on the unsupported allegation in the charge sheet that Mr. bin al Shibh is an alien unlawful enemy combatant. As *Khadr* made clear, however, a necessary prerequisite to proceeding is a finding, by an appropriate tribunal, that the accused is an alien unlawful enemy combatant. *Id.* The Prosecution has not met this burden. No tribunal has yet established Mr. bin al Shibh’s status in such a way as to place him under the jurisdiction of this Commission; no legal opinion to the convening authority can change this inescapable conclusion.³

³ The Defense does not address the question whether the Commission is a proper forum, or whether it affords the appropriate procedural protections, for making a determination regarding Mr. bin al Shibh’s combatant status. *See* Geneva Convention III, Art. 5. The Defense therefore does not concede anything regarding such issues, and reserves the right to raise, at a later date, any argument regarding the proper forum and procedures for determining Mr. bin al Shibh’s status in this respect.

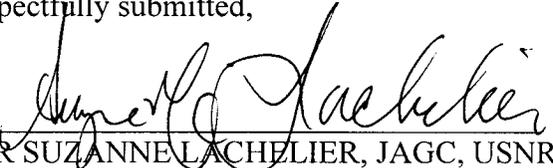
The Prosecution further argues that, should the Commission choose to consider the defense's motion, the Commission should not stay proceedings to hold a hearing regarding its jurisdiction over Mr. bin al Shibh. Paralleling the federal case law cited above, *Khadr* establishes that personal jurisdiction over the accused is the *sine qua non* of Commission proceedings as well. *Id.* Until the question whether Mr. bin al Shibh is an alien *unlawful* enemy combatant is resolved, the Commission is without power to proceed. Proceeding with this commission without adjudicating this matter would be *ultra vires*, contravening the clear instructions of Congress in enacting the MCA. The Prosecution would have this Commission exceed its statutory powers by refusing to permit defense counsel to serve as Mr. bin al Shibh's representatives.

In light of established Supreme Court precedent regarding matters of personal jurisdiction and competency, the government's position must be rejected. Mr. bin al Shibh respectfully requests that this Commission adjudicate the merits of this motion to dismiss, while staying the entirety of the remaining proceedings until personal jurisdiction is determined.

4. **Request for Oral Argument:** The defense requests a hearing and oral argument to resolve D-012.

5. **Attachments:** None.

Respectfully submitted,

By: 
CDR SUZANNE LACHELIER, JAGC, USNR
LT RICHARD E.N. FEDERICO, JAGC, USN
Detailed Defense Counsels for
Ramzi bin al Shibh
Office of the Chief Defense Counsel

