

UNITED STATES OF AMERICA

Commission Ruling
D-020

Motion to Allow *Ex Parte* Applications

v.

KHALID SHEIK MOHAMMED et al

6 October 2008

1. **Nature of Motion:**

a. This joint motion seeks to allow *ex parte* consideration of their petitions for expert assistance and other resources.

b. The Commission has also considered the prosecution's response to D-020, the defense reply, the oral argument regarding this motion and the supplement submitted by the defense on 30 September 2008.

2. **Discussion:**

a. MCA, Section 949j(a) provides that "Defense counsel in a military commission [shall] have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense." MCA, Section 949j is consistent with Article 46, UCMJ.

b. RMC 703(d) sets forth the rules established by the Secretary of Defense pertaining to employment of expert witnesses at government expense. RMC 703(d) is a virtual mirror of RCM 703(d), Manual for Courts-Martial, United States (2008). In military practice, requests for expert assistance are also addressed within the context of RCM 703. *See generally U.S. v. Bresnahan*, 62 M.J. 137 (2005); *U.S. v. Warner*, 62 M.J. 114 (2005).

c. Both sides agree that the rules governing this issue do not preclude an accused from seeking *ex parte* consideration of an expert witness/assistance request by the Military Judge if "the circumstances are 'unusual.'" *U.S. v. Kaspers*, 47 M.J. 176, 180 (1997) quoting *U.S. v. Garries* 22 M.J. 288, 291 (1986). The defense, however, essentially asks the Commission to invalidate the RMC 706(d) such that all requests for

expert witnesses/assistance would be addressed by the Military Judge on an *ex parte* basis. The Commission does not find any appropriate basis to take such action in this case.

d. Within the defense argument, however, the Commission recognizes that there may be some situations in this case where, based on a specific set of facts, unusual circumstances could exist such that the reliability of the proceedings could be enhanced by the funding of an expert witness/assistant without initial notice to the prosecution or other governmental agencies. Unusual circumstances would not include situations where compliance with RMC 703(d) might merely provide a window into some aspect of a possible defense trial strategy. *See Kaspers* at 180.

e. It is also worthy of note that in the event the Commission were to direct employment of an expert witness/assistant on an *ex parte* basis, administration of the resource would still be funded and managed by the Office of Military Commissions in compliance with and the Regulation for Military Commissions, Section 13-7. In legal proceedings under the MCA or the UCMJ, the military judge has no authority to authorize the expenditure of Federal funds. His or her authority is limited to requiring the Convening Authority to provide an ordered expert witness/assistant or to abate the proceeding. In any event, the expenditure of Federal funds requires justification and production of an audit trail. Additionally, the rules concerning expert witnesses/assistants contemplate consideration of the using existing government personnel resources as adequate substitutes for specifically requested civilian experts when appropriate. The Military Commissions Trial Judiciary is not organized or intended to carry out the administrative aspects of these functions. This organizational aspect of the Military Commissions militates against the use of *ex parte* proceedings absent unusual circumstances

f. Any *ex parte* application to the Military Judge for employment of an expert witness/assistant consistent with this opinion should contain all of the information called for within the provisions of RMC 703(d). Additionally, the request should contain a detailed explanation (supported as possible by relevant attachments) of what unusual circumstances exist such that *ex parte* relief is necessary. In the event the Military Judge determines that the request fails to make an adequate showing of unusual circumstances so as to justify *ex parte* consideration, the defense will be advised accordingly such that they can decide whether to proceed through the standard procedure established in RMC 703(d). In any event, the *ex parte* application will be attached to the record as a sealed exhibit.

3. **Ruling:**

a. That portion of the defense motion seeking to invalidate the provisions of RMC 703(d) is denied.

b. Any accused may, based on unusual circumstances, seek *ex parte* relief from the Military Judge consistent with the discussion above.

A handwritten signature in black ink, appearing to read 'R. H. KOHLMANN', written over a horizontal line.

RALPH H. KOHLMANN
Colonel, U.S. Marine Corps
Military Judge