

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  
(RAMZI BIN AL SHIBH)

**Defense Motion  
To Compel Discovery**

**(identities of medical and custodial  
personnel)**

22 Aug 2008

1. **Timeliness:** This Motion is timely filed within the rules prescribed for military commissions.
2. **Relief Sought:** On behalf of Mr. Ramzi bin al Shibh, the defense seeks to compel discovery of the names of medical or detention personnel mentioned in any medical or detention records the government has produced and may further produce in connection with Mr. bin al Shibh's pending competency hearing. The defense further seeks to compel contact information for these same individuals.

3. **Overview:**

The government has furnished detailed counsel with a portion of medical records generated since Mr. bin al Shibh has been in the custody of the Department of Defense (DOD). The government, however, has redacted the names of the prison and medical personnel mentioned in these records as having observed, evaluated, spoken with or diagnosed Mr. bin al Shibh. These individuals would be eyewitnesses and expert witnesses involved with Mr. bin al Shibh's condition and treatment. In order to review the evidence relating to Mr. bin al Shibh's medical situation, detailed counsel must be able to speak with these personnel whose identities have been systematically redacted.



e. On [REDACTED]

f. The [REDACTED]

g. Beginning on or about [REDACTED], Mr. bin al Shibh started taking [REDACTED]. He has continued to be observed, evaluated, spoken with and treated by personnel whose identity has been concealed from the defense.

**6. Law and Argument:**

**a. The M.C.A., R.M.C., Regulations for Trial by Military Commission, the Due Process Clause and International Law Require Disclosure of the Requested Information**

**(1) Disclosure is Required Under the Statute, Rules and Regulations Governing Military Commissions**

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

Another rule governing the military commissions, Rule 701(c)(1), requires the

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

The rules applicable to courts-martial are important to note. Discovery in the court-martial system is famously open. *See United States v. Williams*, 50 M.J. 436, 439 (C.A.A.F.

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<sup>1</sup>The relevant portion of Federal Rule of Criminal Procedure 16 is nearly identical to R.M.C. 701(c)(1). It states: “Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense.” Fed. R. Crim. Proc. 16(a)(1)(E)(i). Interpretations of that federal rule are therefore persuasive here.

1999)(“The military justice system has been a leader with respect to open discovery”) That system also has a solid record of upholding the defense opportunity for access to witnesses: that right is codified in the Uniform Code of Military Justice (UCMJ), and has been reiterated in many decisions of the military’s highest court. *See* Art. 46, U.C.M.J.; *United States v. Warner*, 62 M.J. 114, 119 (C.A.A.F. 2005)(“Under Article 46, the defense’s “opportunity to obtain witnesses and other evidence” is to be equal to the Government’s”); *United States v. Garries*, 22 M.J. 288, 290 (C.A.A.F. 1986). Military jurisprudence, moreover, specifically supports a broad discovery right with respect to mental health evidence. *See United States v. Kreutzer*, 61 M.J. 293, 301 (C.A.A.F. 2005)(Dispelling government’s contention that defense failure to interview certain mental health specialists who evaluated the accused was harmless error, and noting: “We have not limited military justice jurisprudence to a narrow use of mental health evidence”). The Court of Appeals for the Armed Forces (CAAF) recognizes the right of access to witnesses and evidence as part of an accused’s Sixth Amendment rights. *See United States v. Woolheater*, 40 M.J. 170, 173 (C.A.A.F. 1994). The CAAF has further held that “access alone is not enough: the defendant has the right to present legally and logically relevant evidence at trial.” *Id.*, citing *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038 (1973).

## **(2) Disclosure is required under the Due Process Clause**

The disclosure requirement under the R.M.C. 701(c) echoes a fundamental principle of U.S. law: The government’s failure to disclose “evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment ....” *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The government’s duty to disclose such evidence

encompasses exculpatory evidence, including impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *United States v. Mahoney*, 58 M.J. 346, 349 (C.A.A.F. 2003) (characterizing impeachment evidence as exculpatory evidence). Such evidence is “material” “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.* at 682.

“The message of *Brady* and its progeny is that a trial is not a mere ‘sporting event’; it is a quest for truth in which the prosecutor, by virtue of his office, must seek truth even as he seeks victory.” *Monroe v. Blackburn*, 476 U.S. 1145, 1148 (1986); *see also Bagley*, 473 U.S. at 675 (“The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur”).

### **(3) Disclosure is Required Under International Law**

The Military Commissions Act (M.C.A.) and the Manual for Military Commissions (M.M.C.) incorporate the judicial safeguards of Common Article 3 of the Geneva Conventions. *See* 10 U.S.C. § 948(b)(f) (“A military commission established under this chapter is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.”);<sup>2</sup> R.M.C., Preamble (stating that the Manual for Military Commissions “provides

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<sup>2</sup> Whether military commissions, in fact, comply with common article 3 is ultimately a judicial question that Congress does not have the power to answer. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the *judicial department* to say what the law is.”) (emphasis added). Any congressional attempt to legislate an answer to such a judicial question violates the bedrock separation of powers principle and has no legal effect. *See id.* at 176-77 (“The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”). Because a statute should be construed to avoid constitutional problems unless doing so would be “plainly contrary” to the intent of the legislature, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades*

procedural and evidentiary rules that [ . . . ] extend to the accused all the ‘necessary judicial guarantees’ as required by Common Article 3.”) They must, therefore, be read in light of Common Article 3 and international law surrounding that provision.

The Geneva Convention Relative to the Treatment of Prisoners of War prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” *See* Geneva Convention, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Common Article 3. The judicial safeguards required by Common Article 3 are delineated in article 75 of Protocol I to the Geneva Conventions of 1949.<sup>3</sup> Article 75(4)(g) provides that, “anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf *under the same conditions as witnesses against him.*”<sup>4</sup> (emphasis added).

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*Council*, 485 U.S. 568, 575 (1988); *see also* *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936), the only reasonable interpretation is that § 948b(f) requires military commissions to comply with common article 3.

<sup>3</sup> *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75, 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978 [hereinafter *Additional Protocol*]. The Protocol has not been ratified by the United States, but the U.S. government has acknowledged that Article 75 is customary international law. *See Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2797 (2006) (stating that the government “regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled”). *See also* Memorandum from W. Hays Parks, Chief, International Law Branch, DAJA-IA, et. al., to Mr. John H. McNeill, Assistant General Counsel (International), OSD (8 May 1986) (stating art. 75 of Additional Protocol I is customary international law). The Supreme Court has also relied on the Additional Protocol in construing the meaning of Common Article 3 of the Geneva Conventions as applied to military commissions. *See Hamdan*, 126 S.Ct. at 2796.

**b. Under Any Reading of Established Jurisprudence, the Witnesses to Mr. bin al Shibh's Medical Treatment and to his Behavior in Custody Must be Disclosed to the Defense**

When the prosecution reserves to itself the determination of what evidence ought be considered, it disregards its duty to seek justice, and usurps the role of the court, defense counsel and the trier of fact. *Cf. Brady v. Maryland*, 373 U.S. 83, 87-88, n.2 (1963). At this time, the government's position is: the defense is not be permitted to have an independent expert evaluation of Mr. bin al Shibh, and the defense cannot be permitted to interview the Department of Defense medical personnel who observed and treated Mr. bin al Shibh. The government therefore wants to control all aspects of the competency evaluation, unabashedly precluding Mr. bin al Shibh's defense from any role in the process. No rule authorizes the government that kind of control, and, in this case specifically, the government must not be afforded that kind of control. Its record in the treatment of detainees, and of Mr. bin al Shibh specifically,<sup>5</sup> demands that the defense be permitted to conduct independent investigation and evaluation of Mr. bin al Shibh's medical condition.

The defense request is quite simple here: provide the names of percipient witnesses to Mr. bin al Shibh's behavior and medical condition, so that interviews may be conducted to identify relevant facts for the commission's consideration in the competency hearing. The findings of the R.M.C. 706 board that is expected to evaluate Mr. bin al Shibh are not dispositive, and the defense has the right to present evidence at a competency hearing. *See* R.M.C. 909(d).

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<sup>5</sup> *See* Statement of Facts in D-014, Defense Motion to Dismiss for Outrageous Government Conduct.

The witnesses the defense seeks to interview are experts and eyewitnesses. It is well established in American jurisprudence that a violation of constitutional dimension arises “where the Government fails to disclose impeachment evidence that could have been used to impugn the credibility of the Government’s ‘key witness,’ see *Giglio v. United States*, 405 U.S. 150, 154-55, 92 S.Ct. 763 (1972), or that could have ‘significantly weakened’ key eyewitness testimony. *Kyles*, 514 U.S. at 441, 453, 115 S.Ct. 1555.” *Conley v. United States*, 415 F.3d 183, 189 (1st Cir. 2005). Eyewitness evidence is invariably potential impeachment evidence: an eyewitness may contradict discrete but critical facts offered by another witness; or, an eyewitness may fully challenge another’s testimony. It is entirely appropriate, therefore, to request in discovery all witnesses who have made observations of Mr. bin al Shibh’s condition. These witnesses sought here observed Mr. bin al Shibh on several occasions, over time. The commission would inevitably benefit from their assessments. The need to identify and interview all medical personnel is particularly acute when the government is expected to call medical personnel conducting the R.M.C. 706 evaluation, who will have only observed Mr. bin al Shibh on one occasion, and who will be drawing therefrom a conclusion that is pivotal to further proceedings against him. If the government’s witnesses testify as the only medical personnel who observed Mr. bin al Shibh, their observations will carry undue weight.<sup>6</sup>

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<sup>6</sup> The perceived reliability of eyewitness testimony is the subject of general controversy and challenges. See *United States v. Mathis*, 264 F.3d 321, 333-43 (3d Cir. 2001) (evaluating eyewitness issues as area of expertise and reversing trial court denial of expert on eyewitness observation); *United States v. Brown*, 49 M.J. 448 (C.A.A.F. 1998) (discussing eyewitness testimony in context of admissibility of expert testimony about eyewitness evidence). Numerous courts, including the U.S. court-martial system, have developed specific jury instructions to guide juries in the use of eyewitness evidence. See *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972) (developing and requiring use of jury instruction to govern eyewitness evidence); see also *United States v. McLaurin*, 22 M.J. 310, 312 (C.M.A.1986) (recommending use of jury instruction to address eyewitness testimony, as adopted in *Telfaire*); see also, Military Judge’s Benchbook (2003 ed.), § 7-7-2 (Military Jury Instruction regarding “Eyewitness

This commission system is purportedly intended to be virtually identical to the court-martial system. *See* Statement of Thomas Hartmann, BG, USAF, Dept. of Defense Press Conference, February 11, 2008 (“We are going to give them [the accused in this case] rights that are virtually identical to the rights we provide to our military members”). Accordingly, the rules should be clear: the defense is entitled to access to witnesses on an equal footing with the government. *See* U.C.M.J. Art. 46; *Warner*, 62 M.J. at 119. The government must not be allowed the free access it has to any medical personnel who treated Mr. bin al Shibh, while the defense is barred for interviewing these personnel. Such a state of affairs runs contrary to well-settled notions of military justice, but also to the commission rules themselves. *See* 10 U.S.C. § 949j.

### **c. Conclusion**

The integrity of these proceedings will be undermined if the defense is not afforded the opportunity to speak with the medical personnel who made observations of Mr. bin al Shibh. The Commission should therefore grant the requested relief.

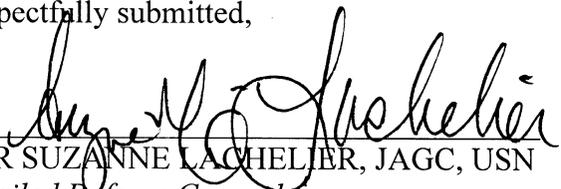
**7. Request for Oral Argument:** The defense does not request oral argument, unless requested by the government, or there is a dispute as to any material fact necessary for resolution of the issue presented here. If such a dispute were to arise, the defense reserves the right to request production of witnesses and to request a hearing and oral argument.

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identification and interracial identification”). And Supreme Court precedent has consistently guarded the jury from hearing unreliable eyewitness testimony. *See* *Watkins*, 449 U.S. at 352 (Brennan, J. dissenting) (outlining Supreme Court precedent limiting use of eyewitness evidence). It would be human nature, therefore, to give great weight to an eyewitness.

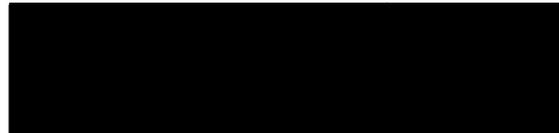
8. Conference with Opposing Counsel: On 22 August 2008, the defense conferred with the Prosecution regarding its requested relief. The prosecution opposes this motion.

Respectfully submitted,

By:   
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By:   
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Office of Military Commissions



UNITED STATES OF AMERICA

v.

**KHALID SHEIKH MOHAMMED;  
WALID MUHAMMAD SALIH MUBARAK  
BIN ‘ATTASH;  
RAMZI BINALSHIBH;  
ALI ABDUL AZIZ ALI;  
MUSTAFA AHMED AL HAWSAWI**

**D-023**

**Government Response**

to the  
Defense Motion to Compel Discovery  
(Identities of Medical and Custodial Personnel)

12 September 2008

1. **Timeliness:** This response is filed within the extension granted by the Military Judge.
2. **Relief Sought:** The Prosecution respectfully requests the Military Judge deny the Defense Motion to Compel Discovery relating to the identities of medical and custodial personnel as it lacks sufficient specificity to determine the relevancy or materiality of the personnel. Revealing the names of all medical or detention personnel in any medical or detention records the Prosecution has produced, over a period of six years, is not required under the Manual for Military Commissions, is not relevant to Mr. Bin al Shihb’s pending competency hearing, and could have a serious effect on the ability of JTF-GTMO to conduct its operations.
3. **Overview:** Revealing the names of *all* medical or detention personnel found in any medical or detention records the Prosecution has produced, for a period of close to six years, is not required under RMC 701, not relevant or material to Mr. Bin al Shihb’s pending competency hearing, and could have a serious effect on the ability of JTF-GTMO to conduct its operations.
4. **Burden of Proof:** As the moving party, the Defense bears the burden of persuasion. *See* Rule for Military Commissions (RMC) 905(c).
5. **Facts:**
  - a. On 1 July 2008 the Military Judge ordered a board be convened pursuant to RMC 706 to inquire into the mental capacity of the accused. The Military Judge ordered that the 706 Board, in its evaluation, make separate and distinct findings as to each of the following questions:
    - (A) Is the accused *presently* suffering from a mental disease or defect? If so, what is the clinical psychiatric diagnosis?
    - (B) Does the accused *have the present ability* to consult with his lawyers with a reasonable degree of cognitive understanding and does he have a rational as well as a factual understanding of the proceedings against him? If so, does the

accused have sufficient mental capacity to understand the nature of the proceedings against him (trial by commission) and to conduct or cooperate intelligently in the defense? *See* 1 July 2008 Order of Colonel Kohlmann (emphasis supplied).

- b. Upon Defense request, the Prosecution provided medical records of the accused dating from early 2003 until June 2008.

**6. Discussion:**

- a. The Defense seeks to compel discovery of the names and contact information of all medical or detention personnel mentioned in any medical or detention records the Prosecution has produced, spanning a period of the past five and a half years, which the Defense claims is “in connection with Mr. bin al Shibh’s pending competency hearing.” *Defense Brief* at pg 1. The Defense further claims that these witnesses are relevant as either “eyewitnesses or expert witnesses involved with Mr. bin al Shibh’s condition and treatment.” *Id.* The Defense is not entitled to such information, *in toto*, as the information is not relevant or material to the current inquiry.

- b. Under Rule for Military Commissions 909, the accused’s pending competency hearing will focus on whether the accused is *presently* suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of his case. *See* RMC 909(e)(2) (emphasis added). The relevant inquiry will therefore focus on the accused’s *present* mental condition. As such, having the identities and contact information of all medical and detention personnel from the time of the accused’s capture, over six years ago, is neither relevant or material to the determination of his present competency to stand trial and assist in his defense. Individuals who may have had some contact with him months or years ago are simply not eyewitnesses or expert witnesses to any relevant facts regarding this inquiry.

- c. While it is possible that some of the personnel may have information relevant to the RMC 909 inquiry, the Prosecution cannot presume to make its own determinations for the Defense regarding what witnesses it may want to call for the pending hearing. While the Defense may not currently have the names of personnel, it is able to identify specific records and request access to certain individuals referenced in those records, which would allow for the Prosecution to respond to such a request on a witness-by-witness basis. However, the absence of such a particularized request<sup>1</sup> requires the Prosecution to call upon the Military Judge to deny the Defense motion to compel all of the names of personnel. Blanket requests that lack specificity generally call for all or nothing responses, and are not requests that parties can efficiently litigate. It is also

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<sup>1</sup> The Prosecution recognizes that the Defense identifies individuals in specific records on two occasions (in Facts D and E). To the extent these medical records are of the accused from 14 months ago, and 9 months ago, respectively, the Prosecution’s position is that the information is not relevant to the current inquiry. On other occasions throughout its motion the Defense simply summarizes many of the records without identifying specific personnel from specific records.

important to note that both the Defense, and, more importantly, the doctors charged with evaluating the accused's competency, have the accused's medical records, and the Defense may present the records themselves as evidence in the RMC 909 hearing, as the Military Judge is not bound by the rules of evidence in such inquiries except with respect to privileges. *See* RMC 909 (e)(2).

d. Despite the Defense claim that the Prosecution wants to “control all aspects of the competency evaluation, unabashedly precluding Mr. bin al Shibh’s defense from any role in the process”(Mot to Compel Discovery at 8), nothing can be further from the truth. The Prosecution asserts no control over the competency evaluation. Whereas the Defense counsel have had access to the doctors, have been in contact with them and will be provided the full report and diagnosis, the Prosecution will receive only the ultimate findings of the 706 Board. While it is true that the Prosecution has taken the position that the Defense is not permitted to have an independent expert,<sup>2</sup> such a position is completely consistent with how 706 Boards are conducted on a regular basis in courts-martial of the United States around the world.

e. The Defense cites to both the Due Process Clause and International Law to support its motion. While the Prosecution has more fully briefed the non-applicability of the Due process clause to Ramzi bin al Shibh in its response to D-014, and incorporates its more exhaustive arguments herein, the Due Process Clause does not extend to alien unlawful enemy combatants, such as the accused, who are detained at Guantanamo Bay, Cuba, to be tried for war crimes. *See Johnson v. Eisentrager*, 339 U.S. 763, 783-85 (1950).

f. International Law is also not binding on this military commission. The accused is entitled to evidence and witnesses as set forth by the Military Commissions Act and the Manual for Military Commissions and not outside sources of law, to include International Law. Furthermore, the MCA both embodies and states the joint determination by both political branches of the federal government that the system of military commissions authorized thereby complies with Common Article 3: “A military commission established under this chapter is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of Common Article 3 of the Geneva Conventions.” 10 U.S.C. § 948b(f).

g. The Defense cites § 948b(f) in its brief, apparently for the proposition that “[t]he MCA *requires* that military commissions comply with Common Article 3 of the Geneva Conventions.” Mot. to Compel Discovery at 6 (emphasis added). However, that is clearly *not* what §948b(f) says. Rather, §948b(f) contains a *factual* statement—that “[a] military commission established under [the MCA] is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of Common Article 3 of the Geneva Conventions.”

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<sup>2</sup> *See* Prosecution response to D-017 for legal support of why an independent expert is not required.

h. Contrary to the Defense description of this modest sentence, §948b(f) is *not* written in the hortatory tense; it is not *commanding* the Secretary of Defense to abide by Common Article 3, nor is it stating that this commission should review each jot and tittle of the MCA and MMC for compliance with Common Article 3. Rather, §948b(f) states that the military commissions authorized by the MCA *do* comply with Common Article 3. This determination by Congress and the President as to the compliance of the Military Commissions Act—an Act that concerns foreign affairs, the war power and aliens—with a treaty must be accorded tremendous deference by a reviewing court. *See, e.g., Iceland S.S. Co., Ltd.—Eimskip v. U.S. Dep’t of the Army*, 201 F. 3d 451 (D.C. Cir. 2000) (“To the extent that the meaning of treaty terms are not plain, we give ‘great weight’ to ‘the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement.’”)

i. Furthermore, there is absolutely no doubt that Congress is *not* bound by international law, let alone by treaties it has repeatedly refused to ratify, such as Additional Protocol I to the Geneva Conventions, cited by the Defense. *See* Mot. to Compel Discovery at 7; *See, e.g., TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 302 (D.C. Cir. 2005) (“Never does customary international law prevail over a contrary federal statute.”). Even under the standard of Article 75 of Additional Protocol I to the Geneva Conventions, which does not apply, the Prosecution’s denial of names and contact information for *any* individual on medical records spanning six years would not violate the tenant that the Defense may “obtain the attendance and examination of witnesses on its client’s behalf under the same conditions as witnesses against him.” *See Mot. To Compel Discovery at 7*. The Defense simply did not identify, with any specificity that would allow for a witness-by-witness response, any relevant witnesses that would entitle the Defense to contact these individuals or know their identities.

j. In conclusion, it is also important to note that JTF-GTMO is an operational command responsible for, among other things, the care and custody of enemy combatants of the United States. That the guards and medical personnel that care for the enemy combatants of the United States have a legitimate concern to remain anonymous unless absolutely necessary should go without saying. If every person who has either treated Ramzi bin al Shibh or guarded him at some point in time during his six year detention, and were subsequently identified on a medical record, were made available to the Defense, regardless of whether they have any relevant information relating to the accused’s case, it would have an obvious deleterious impact on the functioning of a command if these individuals were to be contacted. To the extent that any JTF-GTMO personnel are requested with specificity, and deemed to be relevant to the current inquiry, the names and contact information of those witnesses will be made available to the Defense. However, absent such a showing of relevance and materiality, as required under RMC 701, these individuals must be able to maintain their anonymity and be able to perform their important duties without unnecessary involvement in these proceedings.

**7. Conclusion:** The Defense request for names and contact information for any medical or detention personnel over the past five and a half years should be denied.

8. **Request for Oral Argument:** The Prosecution does not request oral argument but reserves the right to respond to any oral argument the Defense may make.

9. **Respectfully submitted:**

/S/

Clay Trivett

Prosecutor

Office of Military Commissions

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED et al

**Commission Ruling  
D-023**

**Motion to Compel Discovery  
(Identities of Medical and Custodial  
Personnel)**

**16 September 2008**

**1. Nature of Motion:**

a. Detailed defense counsel for Mr. Bin Al Shibh (the accused) submitted D-023. The motion seeks discovery of “the names of medical or detention personnel mentioned in any medical or detention records the government has produced and may produce in connection with the accused’s pending competency hearing.”

b. The Commission has also considered the prosecution’s response to D-023.

**2. Discussion:**

a. At the initial hearing in this case, detailed defense counsel raised the issue of the accused’s mental capacity to make counsel election. The Military Judge directed that the matter be raised in proper motion format, deferred procedures concerning counsel election in the case of the accused, and directed that a RMC 706 inquiry be conducted in order to facilitate appropriate consideration of the issue at a hearing in accordance with RMC 909.

b. In the course of the litigation pertaining to this matter, the prosecution has provided discovery to the defense that includes numerous documents. Some of these documents contain the names of personnel involved in the detention and or medical treatment of the accused. The names have been redacted in the discovery provided to the defense.

c. RMC 701(j) provides that 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.

d. The prosecution resists production of names and contact information based on a lack of specificity in the defense request and an argument that such information is not relevant or material to the current inquiry.

e. Per RMC 909(b), a person is presumed to have the capacity to stand trial unless the contrary is established. Following the pending RMC 909 hearing, the Military Judge will determine whether a preponderance of the evidence establishes that the accused is presently suffering from a mental disease or defect rendering him incompetent to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case.

f. The relevant determination concerns the present mental capacity of the accused. That being said, past experiences of the accused and past observations of the accused may reasonably play a part in an analysis of his current mental capacity. In this regard, the defense is entitled to reasonable access to potential witnesses concerning these matters. The Commission also recognizes that the prosecution may have valid security concerns that drove the redaction of identities in the discovery materials in the first instance.

**3. Ruling:** The following action is directed:

(1) Not later than 19 September 2008, the defense will provide the prosecution with a specific list of the persons it wishes to interview with regard to the pending RMC 909 hearing. These persons should be identified by specific reference to the portions of the discovery material where the redacted references are made;

(2) Not later than 26 September 2008, the prosecution will either provide contact information regard these persons to the defense or provide a response to the defense citing a specific basis for such refusal. The prosecution's consideration of the requests should be informed by the Commission's determination herein that past experiences of the accused and past observations of the accused may reasonably play a part in an analysis of his current mental capacity. If security concerns impact the prosecution's consideration of the request, the prosecution should also consider whether such concerns can be addressed by seeking a protective order regarding the identity of the person in question, or whether an interview of the person could be arranged without revealing their identity.

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