UNITED STATES OF AMERICA	**Commission Ruling D-002-006**
	Motions for Continuance of Initial Session/Arraignment
v.	
KHALID SHEIK MOHAMMED et al	**22 May 2008**

1. Nature of Motion:

a. Detailed defense counsel for each of the five accused submitted D-002-006. Each submission seeks a continuance of the initial session previously ordered and scheduled for 5 June 2008. This ruling addresses all five of the noted continuance requests.

b. The five continuance requests express several common bases for the requested relief:

(1) Although the detailed defense counsel for each accused apparently possesses the requisite security clearances for performance of her or his duties, clearance granting procedures are still underway with regard to numerous assistant defense counsel and civilian defense counsel;

(2) The lack of security clearances for assistant defense counsel and civilian defense counsel has limited their involvement in the case with regard to matters such as meeting with clients, discussing the detailed defense counsel's meetings with the clients, and examining classified portions of discovery materials;

(3) Due to logistic and security factors, detailed defense counsel have had, to date, only a limited ability to meet with their clients;

(4) Defense office spaces at GTMO and in Washington DC are deemed inadequate to deal with the classified material associated with this case;

(5) Discovery matters have not been completed; and

(6) Several counsel have personal matters planned that conflict with the previously ordered initial session date of 5 June 2008.

c. The Commission finds that counsel have adequately covered all matters of import to this issue within the confines of the motions and the response, such that a reply to the response is not necessary.

2. Discussion:

a. Charges in this case were referred to the Commission for trial on 9 May 2008. The 5 June 2008 initial session was ordered by the Military Judge on 14 May 2008 after the Military Commission Trial Judiciary Staff received notice concerning the detailing of counsel as trial and defense counsel.

b. Service of charges upon the accused in accordance with RMC 602 was accomplished on 21 May 2008, thereby initiating the speedy trial provisions of RMC 707.

c. The initial session is intended to:

1) satisfy the RMC 707 requirement for arraignment of the accused in accordance with RMC 904 within 30 days of service of the referred charges; and,

2) provide the Military Judge the opportunity to advise the accused with regard to their rights to counsel and to ascertain whether or not the accused intend to exercise their counsel rights; and

3) ascertain what counsel, if any, will be representing the accused.

d. Some of the issues raised in D-002-006 are matters of consequence with regard to ensuring the defense is provided a full opportunity to prepare for trial. None of the issues raised in D-002-006, however, provide a valid basis for delaying the initial session and arraignment in this case. As noted in the prosecution response to D-002-006, the arraignment process does not require any decision making or action of consequence by the defense beyond the counsel right elections noted above. In this regard, it is typical for accused in military courts of all types to defer entry of motions and pleas during an initial court session. Additionally, it is well established that elections made at initial court sessions, to include counsel selections, are routinely changed at a later stage of the proceedings. Accordingly, the fact that all defense counsel are not yet fully integrated into the litigation process is not a valid basis in support of the continuance request.

e. Several of the defense submissions express concern that defense counsel other than the detailed defense counsel are not yet in a position to participate in development of possible voir dire of the Military Judge prior to the 26 May 2008 submission deadline established in the Commission order of 14 May 2008. In this regard, the Commission notes that the 26 May 2008 voir dire submission deadline applies only in the event counsel for an accused intend to conduct voir dire of the Military Judge at the initial session. In the event that counsel for the accused elect to defer voir dire of the Military Judge until the next session of the case, a later submission deadline will be established.

f. Similarly, the concerns expressed by the defense with regard to the adequacy of their working spaces is not a matter that justifies a delay of the initial session and arraignment in this case. Based on the representation in the prosecution response with regard to the approval of the SCIF for the ELC at GTMO, it appears that progress is being made with regard to dealing with the logistic challenges associated with this case. It is likely that the lawyers' tasks in this case are going to be difficult in several regards. If the office space concerns noted in D-002-006 remain unresolved such that the

inadequacy is interfering with the defense's responsibility with regard to their clients, the defense will be allowed to submit subsequent requests for relief concerning litigation milestones that will be established by the Military Judge.

g. The fact that discovery in accordance with the MMC has not yet been completed is not a proper basis for continuing the initial session and arraignment in any case. Discovery milestones will be established by the Military Judge and it is likely that some measure of litigation will be required before that process will be deemed complete.

h. The Commission regrets that the established litigation schedule conflicts with the personal plans of some of the counsel in this case. These personal conflicts, however, do not provide an appropriate basis for delaying the scheduled 5 June 2008 session. Starting the process and establishing a schedule will benefit all counsel with regard to avoiding future conflicts.

i. The Commission finds that the interests of justice in this case will be best served by completion of the initial session and arraignment as previously ordered on 5 June 2008. The Commission recognizes that there are many logistic and legal issues that will need to be addressed in this case. It is precisely because of the anticipated complexity of this case, that it is important that the process get underway.

3. **Ruling:** The defense requests in D-002-006 for continuance of the initial session and arraignment scheduled for 5 June 2008 are denied.

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

Sent: Thursday, May 29, 2008 5:09 PM

Subject: FW: U.S. v. Bin 'Attash: request for continuance

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

Sir, The defense respectfully submits the following request for continuance with the Court:

1. Timeliness: This request is filed within the timeframe established by the Military Judge's order of 14 May 2008.

2. Relief Requested: The Defense respectfully requests that this Commission grant a continuance of the 5 June 2008 arraignment date. The defense respectfully requests the Military Judge set the date for arraignment at such time that the government provides the necessary access, clearances and facilities to allow the defense to adequately represent the accused, Walid Muhammad Salih Mubarak Bin 'Attash (Mr. Bin 'Attash).

3. Overview: Detailed defense counsel have had limited access and opportunity to communicate with Mr. Bin 'Attash, and all communications that have transpired result in classified material which the defense is unable to secure in a defense controlled area. The communications with Mr. Bin 'Attash are further hindered by failing to obtain a translator with the requisite security clearance; the interim translator that has been used is assigned to another case. Additionally, the lack of a defense secured facility has also hindered communications within the defense team itself. If the Commission does not grant a continuance of the 5 June arraignment, the defense will not be in a position to be adequately prepared for arraignment and render effective assistance of counsel to Mr. Bin 'Attash.

4. Burdens of Proof and Persuasion: As the moving party, the defense bears the burden on this motion.

5. Facts:

a. Charges against Mr. Bin 'Attash were referred to this Military Commission on 9 May 2008 and served on the defense at 1705 hours, 12 May 2008. The charges allege a complex conspiracy spanning several years, involving alleged conduct taking place in or about 1996 to in or about May 2003.

b. Prior to referral, detailed defense counsel were unable to meet with Mr. Bin 'Attash. The only time detailed counsel have met with Mr. Bin 'Attash, a translator assigned to a co-accused's case was utilized. The defense requested translator does not

have the requisite clearance to assist and it is unknown if and when he will have the requisite clearance.

c. Defense counsel work areas, both at Guantanamo Bay, Cuba and Washington DC, lack a secured facility to store any classified material, to include all information derived from Mr. Bin 'Attash, or permit communications between counsel. The construction schedule for the SCIF in Washington DC has failed to materialize; it was to be built by the end of 2007 but construction has yet to begin.

6. Argument: The Military Commission Should Grant a Continuance in Order to Give the Defense an Adequate Opportunity to Prepare for Trial.

a. The Military Judge should grant the defense request for a continuance. It is within his authority to do so. MCA § 949e provides that the "military judge . . . may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just." Rule for Military Commission (RMC) 707 additionally provides for the granting of a continuance in the "interests of justice . . . ." Such action is necessary here to ensure that the accused has effective assistance of counsel. Like the Sixth Amendment, the MCA guarantees the right of the accused to the "assistance of counsel." MCA § 949a(b)(1)(C). Courts have long recognized that in order for the right to counsel to be meaningful, counsel must have adequate time to prepare a defense. Thus, the Supreme Court stated in Powell v. State of Ala., 287 U.S. 45 (1932): "It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case." Id. at 59. While a trial court's decision on a continuance request is generally reviewed for abuse of discretion, a trial court may not exercise its discretion over continuances so as to deprive the defendant or his attorneys of a reasonable opportunity to prepare. See, e.g., People v. Snow, 65 P.3d 749 (Cal. 2003); Phillips v. State, 386 N.E.2d 704 (1979) (Trial court must weigh Defendant's right to effective assistance, and to be effective, counsel must be given sufficient opportunity to adequately prepare his case.)

b. Due to matters outside the defense's control, and within the government's control, defense respectfully request a continuance until such time the government supplies: access to the client such that counsel may prepare a defense; the requisite clearance for the requested translator to assist in communications with Mr. Bin 'Attash; and the appropriately secured facilities to store classified material and allow for defense preparation of this case.

c. As these matters are outside of defense's control, the defense is unable to specify a date of availability. The defense respectfully requests a RMC 802 telephonic conference with all parties at an established interval of time to ascertain the progress of the requested items. Defense seeks only to fully and adequately represent Mr. Bin 'Attash at each stage of these proceedings and allow him the competency of counsel to which he is entitled.

7. Oral Argument: The Defense does not request oral argument in connection with this motion.

8. Witnesses: None.

9. Certificate of Conference: The Defense has conferred with the Prosecution regarding the requested relief. The Prosecution objects to the requested relief.

10. Additional Information: In making this request, Mr. Bin 'Attash does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in all appropriate forms.

Respectfully submitted by:
LCDR JAMES HATCHER, JAGC, USNR
Capt CHRISTINA JIMENEZ, USAF
Detailed Defense Counsel for Walid Muhammad Salih Mubarak Bin 'Attash

v/r
CHRISTINA M. JIMENEZ, Capt, USAF

Defense Counsel
Office of Military Commissions
Office of the Chief Defense Counsel
[redacted]

UNITED STATES OF AMERICA	)	**D-002; D-003; D-004; D-005; D-006**
	)	
	)	**Consolidated Prosecution Response**
	)	**To**
	)	
v.	)	**Defense Requests for Continuance**
	)	
	)	
KHALID SHEIKH MOHAMMED	)	
WALID MUHAMMAD SALIH	)	
MUBARAK BIN ATTASH	)	
RAMZI BINALSHIBH	)	
ALI ABDUL AZIZ ALI	)	
MUSTAFA AHMED ADAM AL	)	
HAWSAWI	)	**22 May 2008**

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

2. **Relief**. The Prosecution respectfully requests the Military Judge deny the Defense request for continuance.

3. **Overview**. Defense Counsel for each of the five accused have requested delays in the arraignment in this case. In order to comply with the Military Commissions Act (MCA) and Manual for Military Commissions (MMC), the accused must be arraigned within 30 days of service of charges. The Prosecution respectfully requests the Military Judge hold the initial session and advise the accused regarding their rights to counsel under the MCA and MMC, and conduct the arraignment of the accused as required under Rule for Military Commission (RMC) 707. The concerns raised by Defense Counsel in their filings can be addressed by the Military Judge during the initial session scheduled for 5 June 2008.

4. **Burden of proof.** As the moving party, the Defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. *See* RMC 905(c)(1), 905(c)(2)(A).

5. Facts.

a. The Convening Authority referred charges against each of the accused in the above captioned case on 9 May 2008.

b. On 14 May 2008, the Military Judge notified all parties that arraignment for the above-captioned case would be conducted on 5 June 2008.

c. Counsel for Walid Muhammad Salih Mubarak Bin Attash filed a request for continuance on 16 May 2008.

d. Counsel for each of the other four accused requested similar continuances on 19 May 2008.

e. Charges were served on each of the accused on 21 May 2008.

f. Pursuant to RCM 701(b), the Prosecution will serve copies of referral documents upon counsel for all accused as soon as practicable. The vast majority of documents will be served during the week of 26 May 2008. A few remaining classified items will be served after appropriate protective orders are issued.

g. On Monday, 19 May 2008, the SCIF for the Expeditionary Legal Complex was approved, providing secure office space at Guantanamo Bay, Cuba for Defense Counsel to discuss and store classified information, including any notes taken during meetings with their clients.

6. Discussion.

a. The Military Judge should deny the Defense requests for continuance.

(1) RMC 707(a)(1) requires an accused to be brought to trial within 30 days of service of the charges. An accused is brought to trial within the meaning of this rule at the time of arraignment under RMC 904. RMC 904 provides that arraignment shall be conducted in a military commission session and shall consist of reading the charges and specifications to the accused and calling on the accused to enter a plea. The accused need not enter pleas as part of the arraignment and has the option of reserving his pleas until a later time.

(2) During the initial session, and prior to arraignment of the accused, RMC 901 requires the Military Judge, in open session, to inform the accused of his rights to be represented by military or civilian counsel. While RMC 901 requires the Military Judge to ascertain from the accused by whom the accused chooses to be represented,[1] an accused is not bound by any elections made at the arraignment and is free to later amend his elections regarding counsel after discussing his options with detailed defense counsel and any subsequently approved civilian counsel.

(3) The Defense requests for continuance seemingly indicate varying levels of formation of attorney-client relationship between the accused and their detailed counsel, including questions whether an attorney-client relationship has actually been formed with some of the accused. The requests highlight the importance of conducting the initial session within the time period required under RMC 707.[2] The arraignment will provide an

[1] See RMC 901(d)(4)(D).

[2] The Prosecution notes that at least one of the accused has specifically argued that the requested delay should not be attributed to the Defense as excludable delay, and reserved the right to assert possible speedy trial violations based on this or future delays in the proceedings. See 19 May 2008 "Defense Motion for Special Relief to Delay Arraignment," filed by counsel for Ramzi Bin al Shibh. The Defense has asked the Military Judge to continue the arraignment beyond 30 days as required by RMC 707, and in the same breath seeks to reserve the right to later bring a challenge based on the Prosecution's inability to arraign the accused within the time periods required under the Manual for Military Commissions. Rather than support the Defense request for continuance, the Defense's position

opportunity for the Military Judge to advise each of the accused regarding their rights to counsel on the record and in open court, as required by RMC 707 and 901. Each of the accused will be provided an opportunity to make their elections or request additional time to meet with assigned counsel to discuss his counsel options.

(4) To postpone the arraignment when it is possible that some of these accused could refuse their detailed counsel in this case is unwarranted. Holding the initial session as scheduled will allow the court to resolve the issues of counsel in a timely manner so that the parties can complete discovery in this case and set an appropriate litigation schedule.

(5) Defense counsel for each of the accused have requested continuances primarily based on their asserted inability to adequately prepare to represent their clients based on lack of adequate facilities, and in certain cases, lack of approved security clearances for assistant detailed counsel and civilian counsel.[3] Defense Counsel in several requests also cite personal commitments that conflict with the scheduled 5 June 2008 arraignment.[4]

(6) All cleared defense counsel have access to TS/SCI approved office spaces and storage facilities, both at Guantanamo Bay, Cuba and in one of the Office of Military Commissions – Defense (OMC-D) offices spaces in the Washington, D.C. Area. On 19 May 2008, the Prosecution and Defense facilities at Guantanamo Bay, Cuba were approved for TS/SCI communications and storage of TS/SCI materials, including Defense notes of interviews with the accused. In addition to the SCIF currently available to the Defense in the Washington, D.C. area, the Office of the Convening Authority has advised the Prosecution that they expect additional TS/SCI office spaces to be completed at that office no later than the end of June. These spaces will allow for increased storage and provide additional office space to accommodate discussions of any TS/SCI information, including those related to communications with their clients.[5]

(7) Assistant Defense Counsel for Ali Abdul Aziz Ali and Mustafa Ahmed Adam al Hawsawi are awaiting final approval of TS/SCI clearances. As of the time of this filing, their

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highlights the importance of conducting the initial session and arraignment of the accused in a timely manner, as presently scheduled.

[3] The Defense in several filings request an 802 teleconference to establish an interval of time to ascertain the progress made on defense facilities and security clearances. The Prosecution intends to provide a proposed trial schedule to the Defense prior to travel to GTMO, and is prepared to discuss the current status of defense facilities and pending security clearances during that meeting. Of course, should the Military Judge consider it necessary to conduct a telephonic 802 teleconference the Prosecution is available.

[4] The personal commitments referenced in the Defense filings highlight the importance of conducting an initial session that will establish dates for subsequent sessions for this military commission. Convening a session, and establishing a litigation schedule, will better allow defense counsel assigned to these cases to plan their personal commitments, taking into account certain dates they will be required to be at Guantanamo Bay in order to represent their clients.

[5] Some of the Defense filings indicate Defense Counsel do not have the ability to transport notes taken during meetings with their clients to their office in the Washington, D.C. area. After becoming aware of this issue, the Prosecution inquired with the Office of the Convening Authority, who advised there was no restriction on transporting notes from Guantanamo Bay, to Washington, D.C., assuming they were properly marked and classified information was appropriately protected. Prior to traveling with classified information, counsel must obtain an appropriate courier card. The Prosecution will assist Defense Counsel in obtaining a courier card upon request.

requests were both pending with the Office of Personnel Management (OPM) and expected to be resolved by mid-June. Of course, the attendance of Assistant Defense Counsel is not required for the initial session. The presence of detailed Defense Counsel is sufficient for purposes of the arraignment.

(8) Defense Counsel in several of the filings cite the inability of civilian defense counsel to be approved and detailed prior to the arraignment. As indicated in the Defense filings, the Office of the Convening Authority is diligently processing all requests from civilian defense counsel and has requested OPM to "fast-track" the requests accordingly. As the Military Judge points out in his 19 May 2008, email, it is understood that civilian counsel may seek to join in the litigation at some time after the initial session. At the initial session, the Military Judge will advise each accused of his right to request civilian counsel. If an accused elects to request an approved civilian counsel, the counsel can be added at a later session.

(9) Additionally, in the Defense Joint Motion to Dismiss (D001), filed on 15 May 2008, Defense Counsel allege that the charges in the instant case were improperly referred to this Military Commission. In addition to the requirement to arraign the accused within 30 days of service of referred charges, it is imperative to resolve the outstanding contested motion as soon as possible. The Defense motion makes serious allegations claiming the Legal Advisor to the Convening Authority and other senior officials have "unlawfully influenced this military commission." The Defense requests the Military Judge to dismiss charges with prejudice, or in the alternative, disqualify the Legal Advisor from further participation in this case. This contested motion should be litigated at the earliest opportunity to resolve the serious issues raised therein.

(10) The interests of justice for the public and the accused in ensuring a prompt trial (*see* RMC 707(b)(4)(E)), are best served by ensuring that the accused are promptly advised in open court regarding the charges they are facing and that they understand their options regarding representation during these proceedings. The Prosecution respectfully requests the Military Judge deny the Defense requests to delay these proceedings, and hold the initial session on 5 June 2008, as scheduled.

7. **Oral argument.** The Prosecution does not request oral argument.

8. **Witnesses.** None.

9. **Certificate of conference**. As stated in each of the defense filings, the parties do not agree on the requested relief.

10. **Additional information.** None

11. **Attachments**. None.

12. **Submitted by**:

For Edward Ryan
Prosecutor
Department of Justice

Robert Swann
Prosecutor
Department of Defense

Thomas Swanton
Prosecutor
Department of Justice

For Jeffrey D. Groharing
Major, U.S. Marine Corps
Prosecutor

Clayton Trivett, Jr.
Prosecutor
Department of Defense

Sent: Thursday, May 22, 2008 5:19 PM

Subject: Commission Ruling: US v Mohammed et al, D-002-006
Follow Up Flag: Follow up
Flag Status: Red
Attachments: Mohammed et al Initial Session Cont.pdf

Col Kohlmann has directed that I forward the attached ruling in US v Mohammed et al to counsel and other interested persons.

V/R
Natalie Lewis Bley
Attorney Advisor
Military Commissions Trial Judiciary

Ms. Bley:
Please forward the attached ruling to the appropriate persons.
V/R,
Ralph H. Kohlmann
Colonel, U.S. Marine Corps

Sent: Thursday, May 22, 2008 12:55 PM

Subject: United States v. Mohammed et al-Prosecution Consolidated Response to D-002; D-003; D-004; D-005; D-006 (Requested Continuance)

Follow Up Flag: Follow up

Flag Status: Red

Attachments: Gov't Response - Defense Requests for continuance - 22 May 2008-filed.pdf

All,

Attached please find the Prosecution's consolidated response to D-002; D-003; D-004; D-005; D-006 (Prosecution's opposition to the Defense request for continuance of the arraignment).

v/r
Clay Trivett
Prosecutor
Office of Military Commissions

[redacted]

Subject: Re: RE: Motions to Continue, D-002, D003, D-004, D-005, D006, US v Mohammed et al.- Special Request for Relief

Follow Up Flag: Follow up
Flag Status: Red

Per Col Kohlmann, the special relief requested by the government counsel concerning the filing of a joint response and request to dispense with conference with defense counsel prior to filing resonse is granted.

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

[redacted]

> The government will file its response by 1300 today.
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> As the defense motions shared a majority of common issues, the
> governmentprepared a consolidated response, and respectfully makes a
> special request for relief (per Rule 3 of the Military Commissions
> Trial Judiciary Rules of
> Court) to file a consolidated response to D-2 through D-6 (with each
> defense filing designation listed in the caption of the government's
> response).
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> Furthermore, due to the expedited response deadline, the government
> will not be able to confer with the defense on whether they concur or
> object to this special request.

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> Thomas P. Swanton
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> Trial Attorney
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> U.S. Department of Justice
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> Subject: Motions to Continue, D-002, D003, D-004, D-005, D006, US v
> Mohammed et al.
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> Counsel in the cases of US v. Mohammed et al.:
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> COL Kohlmann has directed that the government respond to the motions
> to continue filed by counsel in the following cases by 1300 today, 22
> May 08.
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> D-002, Defense Motion to Continue, US v Walid Muhammad Salih
> MubarakBin 'Attash
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> D-003, Defense Motion to Continue, US v Ramzi Bin al Shibh
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> D-004, Defense Motion to Continue, US v Mustafa Ahmed Adam al Hawsawi
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> D-005, Defense Motion to Continue, US v Khalid Sheikh Mohammed
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> D-006, Defense Motion to Continue, US v Ali Abdul Aziz Ali

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> V/R
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> Natalie Lewis Bley
> Attorney Advisor
> Military Commissions Trial Judiciary
> [redacted]
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UNITED STATES OF AMERICA	**Commission Ruling D-002-006**
	Motions for Continuance of Initial Session/Arraignment
v.	
KHALID SHEIK MOHAMMED et al	**22 May 2008**

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(4) Defense office spaces at GTMO and in Washington DC are deemed inadequate to deal with the classified material associated with this case;

(5) Discovery matters have not been completed; and

(6) Several counsel have personal matters planned that conflict with the previously ordered initial session date of 5 June 2008.

c. The Commission finds that counsel have adequately covered all matters of import to this issue within the confines of the motions and the response, such that a reply to the response is not necessary.

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b. Service of charges upon the accused in accordance with RMC 602 was accomplished on 21 May 2008, thereby initiating the speedy trial provisions of RMC 707.

c. The initial session is intended to:

1) satisfy the RMC 707 requirement for arraignment of the accused in accordance with RMC 904 within 30 days of service of the referred charges; and,

2) provide the Military Judge the opportunity to advise the accused with regard to their rights to counsel and to ascertain whether or not the accused intend to exercise their counsel rights; and

3) ascertain what counsel, if any, will be representing the accused.

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e. Several of the defense submissions express concern that defense counsel other than the detailed defense counsel are not yet in a position to participate in development of possible voir dire of the Military Judge prior to the 26 May 2008 submission deadline established in the Commission order of 14 May 2008. In this regard, the Commission notes that the 26 May 2008 voir dire submission deadline applies only in the event counsel for an accused intend to conduct voir dire of the Military Judge at the initial session. In the event that counsel for the accused elect to defer voir dire of the Military Judge until the next session of the case, a later submission deadline will be established.

f. Similarly, the concerns expressed by the defense with regard to the adequacy of their working spaces is not a matter that justifies a delay of the initial session and arraignment in this case. Based on the representation in the prosecution response with regard to the approval of the SCIF for the ELC at GTMO, it appears that progress is being made with regard to dealing with the logistic challenges associated with this case. It is likely that the lawyers' tasks in this case are going to be difficult in several regards. If the office space concerns noted in D-002-006 remain unresolved such that the

inadequacy is interfering with the defense's responsibility with regard to their clients, the defense will be allowed to submit subsequent requests for relief concerning litigation milestones that will be established by the Military Judge.

g. The fact that discovery in accordance with the MMC has not yet been completed is not a proper basis for continuing the initial session and arraignment in any case. Discovery milestones will be established by the Military Judge and it is likely that some measure of litigation will be required before that process will be deemed complete.

h. The Commission regrets that the established litigation schedule conflicts with the personal plans of some of the counsel in this case. These personal conflicts, however, do not provide an appropriate basis for delaying the scheduled 5 June 2008 session. Starting the process and establishing a schedule will benefit all counsel with regard to avoiding future conflicts.

i. The Commission finds that the interests of justice in this case will be best served by completion of the initial session and arraignment as previously ordered on 5 June 2008. The Commission recognizes that there are many logistic and legal issues that will need to be addressed in this case. It is precisely because of the anticipated complexity of this case, that it is important that the process get underway.

3. **Ruling:** The defense requests in D-002-006 for continuance of the initial session and arraignment scheduled for 5 June 2008 are denied.

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

UNITED STATES OF AMERICA v. RAMZI BIN AL SHIBH	**Defense Motion for Special Relief to Delay Arraignment** **19 May 2008**

1. **<u>Timeliness</u>:** This special request for relief is filed within the time this commission has prescribed, in its order of 14 May 2008, for a request for delay in the scheduled arraignment.

2. **<u>Relief Sought</u>:** The defense respectfully submits that a continuance of the arraignment is necessary and in the interests of justice. Concomitantly, the defense seeks an extension of time in which to file voir dire questions to be submitted to the military judge.

3. **<u>Burden of Proof</u>:** The defense bears the burden of proof, pursuant to R.M.C. 905(c) on any question of fact; this burden is met by a showing of a preponderance of evidence.

4. **<u>Facts:</u>**

a. On 14 May 2008 the Military Judge ordered that the arraignment in this case take place on 5 June 2008. This arraignment is to be held aboard Guantanamo Naval Station, Cuba. In the same order, the military judge also provided deadlines for filing a request for continuance (19 May), submission of notice of appearance by civilian counsel (19 May), and submission of written questions to voir dire the military judge (26 May).

b. Detailed counsel have only met three times with Mr. Bin al Shibh. The initial meeting was delayed due to requirements which the

government, via the Convening Authority, imposed on defense counsel. Specifically, the government sought to issue a protective order and obtain counsel's signature on a memorandum of understanding regarding the treatment of classified information. Detailed counsel's meeting with Mr. Bin al Shibh was delayed because the government was unable timely to administer this process of issuing an order and MOU. The meeting was further delayed because the government then made counsel's signing of the MOU a condition precedent to any meeting between counsel and Mr. Bin al Shibh.

c. Travel to Guantanamo Bay Naval Station is arduous in that the flights to the base are limited to only a few possible options a week, even these options are unreliable in their arrival times (if, that is, the flight is not canceled altogether), and counsel are required to reserve seats weeks in advance. Flight arrangements take inordinate amounts of time. Counsel rely on an active duty military paralegal to make these arrangements; this paralegal is also assigned to two other commission cases, and handles numerous other administrative tasks for the Office of the Chief Defense Counsel.

d. Along with the above travel difficulties involved in meeting with Mr. Bin al Shibh, the Staff Judge Advocate's Office for Joint Task Force-Guantanamo (SJA JTF-GTMO), which handles visits with any camp detainees at the prison, requires defense counsel to provide 14 days' notice prior for any visit with any detainee. In addition, counsel may only meet in only two time slots per day with any client: the morning from approximately 0830 until 1130, and the afternoon from approximately 1300 until 1630. Finally, per the SJA's office, JTF-GTMO, counsel for 'high value' detainees may not divide the meeting times to share with fellow counsel, so that each could meet with their client for a shorter period in the morning.

e. The government has decreed that all information derived from any so-called 'high value' detainee, such as Mr. Bin al Shibh, is classified as TOP SECRET (TS/SCI). Accordingly, reference notes detailed counsel take during interviews are classified TS/SCI, and must be maintained in an area that has been certified to that security level (also referred to as "Sensitive Compartmented Information Facility" or "SCIF"). There is no such area available to detailed counsel aboard Guantanamo Naval Station. The one room presently certified as a SCIF that is available to detailed counsel is located in the Office of the Chief Defense Counsel, in Arlington, VA. That room does not have working computers for counsel to use, and it is occupied by computer technician contractors ostensibly there to maintain the system that is to be put in place; these technicians must be asked to leave the room every time counsel enter to discuss their case together.

f. The absence of a SCIF, and of a mechanism for transferring classified information back to Arlington, VA, also means that any classified discovery that defense may receive cannot be taken to discuss with the client on-board Guantanamo, cannot be carried off Guantanamo, cannot be maintained with the defense in Guantanamo, and can only be held in the one room that is a certified SCIF, in Arlington, VA.

g. To-date, the government has not provided to the defense any substantive information, including the information considered by the Convening Authority prior to referral; specifically, the defense has not receive the "binder" that the Legal Advisor to the Convening Authority references in his advice to the Convening Authority, given during the referral process.

5. <u>Discussion:</u>

RIGHT TO COUNSEL. At the arraignment, Mr. Bin al Shibh will be asked to state by whom he wants to be represented. Although detailed military counsel have met with him on several occasions, detailed counsel requires additional time to establish a working relationship with Mr. Bin al Shibh. Detailed counsel should be granted deference with this request as it has many obstacles to overcome in this pursuit, including but not limited to the fact that it is reasonable to expect that the accused has an inherent distrust of all U.S. military personnel. Mr. Bin al Shibh also has not yet been able to meet with civilian counsel, since that counsel's security clearance remains pending adjudication with the government.

LACK OF RESOURCES/FACILITIES. As referenced above, the defense must operate in an extremely challenging environment in representation of Mr. Bin al Shibh due to the government's decision to classify information derived from him and from any other 'high value' detainee. The practical effect of the lack of a SCIF is that detailed counsel's notes are taken from them, sealed in a signed envelope, and maintained at the office of the SJA JTF-GTMO. Detailed counsel have no means of taking the notes

back with them to their offices in Arlington, VA; detailed counsel are unable to work with the notes in their offices on-board Guantanamo Naval Station; and counsel cannot even confer with each other about any discussions had with any 'high value' detainee, unless they return to Arlington, VA, and enter the SCIF located in the office, but only after finding a time when the SCIF is free from third-parties so counsel can discuss privileged matters. The defense therefore cannot even begin to develop any case strategy because substantive discussions are precluded everywhere but in one room in the Office of the Chief Defense Counsel in Arlington, VA. The defense is without a reasonable alternative to remedy this major limitation as the Office of the Chief Defense Counsel has no budget of its own, nor the authority to certify its own SCIF. The government has not fulfilled its obligations to ensure the defense has the proper resources to defend Mr. Bin al Shibh.

LACK OF DISCOVERY. The defense has not received any substantive discovery the government is required to provide. *See* R.M.C. 701. In addition, the defense does not have the ability to receive, store, or analyze this information due to the absence of the requisite certified area, or SCIF, where classified information can be examined, as discussed above. Thus, the defense has no understanding of the volume of evidence or scope of legal issues that may be germane to this case. Under these conditions, it would be impossible for the defense to come to any realistic agreement about a trial schedule at the time of arraignment.

TRAVEL AND VISITATION PROBLEMS. Taken together, the logistical issues involved in traveling to Guantanamo, coupled with the SJA JTF-

GTMO's restrictions on client visits, inherently build in weeks of delay to the process of communicating with Mr. Bin al Shibh.

TRIAL SCHEDULE. On 14 May, the Military Judge stated that at the arraignment he "will establish a full schedule for the litigation of this case." The military judge further ordered that counsel discuss scheduling prior to the arraignment and endeavor to agree upon a schedule. Based upon the foregoing, the defense is unable to participate in any meaningful discussions about a reasonable trial schedule.

6. **Relief Requested:** The defense respectfully requests as follows:

a. An extension of time for the arraignment until a date to be determined, with the specification that the entire period for this extension of time does not constitute excludable delay, for speedy trial purposes, under R.M.C. 707. This request for an extension of time serves the interest of justice in that it seeks to assure the resources necessary for adequate representation by counsel. The defense does not stipulate that the requested delay should be attributed to the defense as excludable delay, and does not waive the right to assert possible speedy trial violations based upon this, or future, delays in the proceedings.

b. As the government controls the security clearance adjudication process, the defense is unable to determine when civilian counsel will be cleared to meet personally with Mr. Bin al Shibh. The defense requests that the Military Judge order the government to provide the defense and the Judge an update regarding the status of this clearance, no later than 1630 on 09 June 2008.

c. As the government controls the construction and certification of a SCIF, the defense is unable to handle classified information in a manner that would permit adequate representation of Mr. Bin al Shibh. The defense requests that the Military Judge order the government to provide the defense and the Judge with a status report on the completion of the required facilities no later than 1730 on 09 June 2008.

d. An extension of time to file a notice of appearance for any additional civilian counsel, until a date to be determined (for further discussion of this concern, *see* "Ramzi Bin al Shibh Motion for Modification of Commission Order dtd 14 May 08").

e. An extension of time to file written questions to voir dire the military judge until a date to be determined, no later than one week prior to the date of arraignment.

7. **Certificate of Conference:** The defense has conferred with the trial counsel in this case. The government opposes this motion.

8. **Oral Argument:** The Defense does not request oral argument on this motion.

9. **Witnesses/Evidence:** Not applicable.

//s//

Suzanne M. Lachelier
CDR, JAGC, USN
Detailed Defense Counsel

//s//

Richard E.N. Federico
LT, JAGC, USN
Detailed Defense Counsel

UNITED STATES OF AMERICA	)	**D-002; D-003; D-004; D-005; D-006**
	)	
	)	**Consolidated Prosecution Response**
	)	**To**
	)	
v.	)	**Defense Requests for Continuance**
	)	
	)	
KHALID SHEIKH MOHAMMED	)	
WALID MUHAMMAD SALIH	)	
MUBARAK BIN ATTASH	)	
RAMZI BINALSHIBH	)	
ALI ABDUL AZIZ ALI	)	
MUSTAFA AHMED ADAM AL	)	
HAWSAWI	)	**22 May 2008**

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

2. **Relief**. The Prosecution respectfully requests the Military Judge deny the Defense request for continuance.

3. **Overview**. Defense Counsel for each of the five accused have requested delays in the arraignment in this case. In order to comply with the Military Commissions Act (MCA) and Manual for Military Commissions (MMC), the accused must be arraigned within 30 days of service of charges. The Prosecution respectfully requests the Military Judge hold the initial session and advise the accused regarding their rights to counsel under the MCA and MMC, and conduct the arraignment of the accused as required under Rule for Military Commission (RMC) 707. The concerns raised by Defense Counsel in their filings can be addressed by the Military Judge during the initial session scheduled for 5 June 2008.

4. **Burden of proof.** As the moving party, the Defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. *See* RMC 905(c)(1), 905(c)(2)(A).

5. Facts.

a. The Convening Authority referred charges against each of the accused in the above captioned case on 9 May 2008.

b. On 14 May 2008, the Military Judge notified all parties that arraignment for the above-captioned case would be conducted on 5 June 2008.

c. Counsel for Walid Muhammad Salih Mubarak Bin Attash filed a request for continuance on 16 May 2008.

d. Counsel for each of the other four accused requested similar continuances on 19 May 2008.

e. Charges were served on each of the accused on 21 May 2008.

f. Pursuant to RCM 701(b), the Prosecution will serve copies of referral documents upon counsel for all accused as soon as practicable. The vast majority of documents will be served during the week of 26 May 2008. A few remaining classified items will be served after appropriate protective orders are issued.

g. On Monday, 19 May 2008, the SCIF for the Expeditionary Legal Complex was approved, providing secure office space at Guantanamo Bay, Cuba for Defense Counsel to discuss and store classified information, including any notes taken during meetings with their clients.

6. Discussion.

a. The Military Judge should deny the Defense requests for continuance.

(1) RMC 707(a)(1) requires an accused to be brought to trial within 30 days of service of the charges. An accused is brought to trial within the meaning of this rule at the time of arraignment under RMC 904. RMC 904 provides that arraignment shall be conducted in a military commission session and shall consist of reading the charges and specifications to the accused and calling on the accused to enter a plea. The accused need not enter pleas as part of the arraignment and has the option of reserving his pleas until a later time.

(2) During the initial session, and prior to arraignment of the accused, RMC 901 requires the Military Judge, in open session, to inform the accused of his rights to be represented by military or civilian counsel. While RMC 901 requires the Military Judge to ascertain from the accused by whom the accused chooses to be represented,[1] an accused is not bound by any elections made at the arraignment and is free to later amend his elections regarding counsel after discussing his options with detailed defense counsel and any subsequently approved civilian counsel.

(3) The Defense requests for continuance seemingly indicate varying levels of formation of attorney-client relationship between the accused and their detailed counsel, including questions whether an attorney-client relationship has actually been formed with some of the accused. The requests highlight the importance of conducting the initial session within the time period required under RMC 707.[2] The arraignment will provide an

[1] See RMC 901(d)(4)(D).

[2] The Prosecution notes that at least one of the accused has specifically argued that the requested delay should not be attributed to the Defense as excludable delay, and reserved the right to assert possible speedy trial violations based on this or future delays in the proceedings. See 19 May 2008 "Defense Motion for Special Relief to Delay Arraignment," filed by counsel for Ramzi Bin al Shibh. The Defense has asked the Military Judge to continue the arraignment beyond 30 days as required by RMC 707, and in the same breath seeks to reserve the right to later bring a challenge based on the Prosecution's inability to arraign the accused within the time periods required under the Manual for Military Commissions. Rather than support the Defense request for continuance, the Defense's position

opportunity for the Military Judge to advise each of the accused regarding their rights to counsel on the record and in open court, as required by RMC 707 and 901. Each of the accused will be provided an opportunity to make their elections or request additional time to meet with assigned counsel to discuss his counsel options.

(4) To postpone the arraignment when it is possible that some of these accused could refuse their detailed counsel in this case is unwarranted. Holding the initial session as scheduled will allow the court to resolve the issues of counsel in a timely manner so that the parties can complete discovery in this case and set an appropriate litigation schedule.

(5) Defense counsel for each of the accused have requested continuances primarily based on their asserted inability to adequately prepare to represent their clients based on lack of adequate facilities, and in certain cases, lack of approved security clearances for assistant detailed counsel and civilian counsel.[3] Defense Counsel in several requests also cite personal commitments that conflict with the scheduled 5 June 2008 arraignment.[4]

(6) All cleared defense counsel have access to TS/SCI approved office spaces and storage facilities, both at Guantanamo Bay, Cuba and in one of the Office of Military Commissions – Defense (OMC-D) offices spaces in the Washington, D.C. Area. On 19 May 2008, the Prosecution and Defense facilities at Guantanamo Bay, Cuba were approved for TS/SCI communications and storage of TS/SCI materials, including Defense notes of interviews with the accused. In addition to the SCIF currently available to the Defense in the Washington, D.C. area, the Office of the Convening Authority has advised the Prosecution that they expect additional TS/SCI office spaces to be completed at that office no later than the end of June. These spaces will allow for increased storage and provide additional office space to accommodate discussions of any TS/SCI information, including those related to communications with their clients.[5]

(7) Assistant Defense Counsel for Ali Abdul Aziz Ali and Mustafa Ahmed Adam al Hawsawi are awaiting final approval of TS/SCI clearances. As of the time of this filing, their

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highlights the importance of conducting the initial session and arraignment of the accused in a timely manner, as presently scheduled.

[3] The Defense in several filings request an 802 teleconference to establish an interval of time to ascertain the progress made on defense facilities and security clearances. The Prosecution intends to provide a proposed trial schedule to the Defense prior to travel to GTMO, and is prepared to discuss the current status of defense facilities and pending security clearances during that meeting. Of course, should the Military Judge consider it necessary to conduct a telephonic 802 teleconference the Prosecution is available.

[4] The personal commitments referenced in the Defense filings highlight the importance of conducting an initial session that will establish dates for subsequent sessions for this military commission. Convening a session, and establishing a litigation schedule, will better allow defense counsel assigned to these cases to plan their personal commitments, taking into account certain dates they will be required to be at Guantanamo Bay in order to represent their clients.

[5] Some of the Defense filings indicate Defense Counsel do not have the ability to transport notes taken during meetings with their clients to their office in the Washington, D.C. area. After becoming aware of this issue, the Prosecution inquired with the Office of the Convening Authority, who advised there was no restriction on transporting notes from Guantanamo Bay, to Washington, D.C., assuming they were properly marked and classified information was appropriately protected. Prior to traveling with classified information, counsel must obtain an appropriate courier card. The Prosecution will assist Defense Counsel in obtaining a courier card upon request.

requests were both pending with the Office of Personnel Management (OPM) and expected to be resolved by mid-June. Of course, the attendance of Assistant Defense Counsel is not required for the initial session. The presence of detailed Defense Counsel is sufficient for purposes of the arraignment.

(8) Defense Counsel in several of the filings cite the inability of civilian defense counsel to be approved and detailed prior to the arraignment. As indicated in the Defense filings, the Office of the Convening Authority is diligently processing all requests from civilian defense counsel and has requested OPM to "fast-track" the requests accordingly. As the Military Judge points out in his 19 May 2008, email, it is understood that civilian counsel may seek to join in the litigation at some time after the initial session. At the initial session, the Military Judge will advise each accused of his right to request civilian counsel. If an accused elects to request an approved civilian counsel, the counsel can be added at a later session.

(9) Additionally, in the Defense Joint Motion to Dismiss (D001), filed on 15 May 2008, Defense Counsel allege that the charges in the instant case were improperly referred to this Military Commission. In addition to the requirement to arraign the accused within 30 days of service of referred charges, it is imperative to resolve the outstanding contested motion as soon as possible. The Defense motion makes serious allegations claiming the Legal Advisor to the Convening Authority and other senior officials have "unlawfully influenced this military commission." The Defense requests the Military Judge to dismiss charges with prejudice, or in the alternative, disqualify the Legal Advisor from further participation in this case. This contested motion should be litigated at the earliest opportunity to resolve the serious issues raised therein.

(10) The interests of justice for the public and the accused in ensuring a prompt trial (*see* RMC 707(b)(4)(E)), are best served by ensuring that the accused are promptly advised in open court regarding the charges they are facing and that they understand their options regarding representation during these proceedings. The Prosecution respectfully requests the Military Judge deny the Defense requests to delay these proceedings, and hold the initial session on 5 June 2008, as scheduled.

7. **Oral argument.** The Prosecution does not request oral argument.

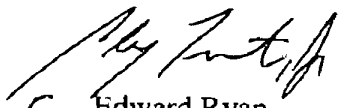
8. **Witnesses.** None.

9. **Certificate of conference**. As stated in each of the defense filings, the parties do not agree on the requested relief.

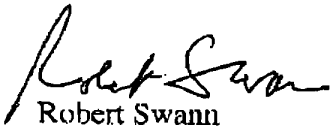
10. **Additional information.** None

11. **Attachments**. None.

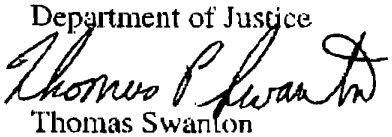
12. **Submitted by**:



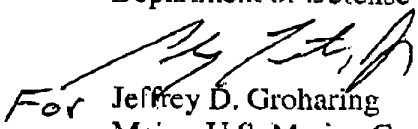
For Edward Ryan
Prosecutor
Department of Justice



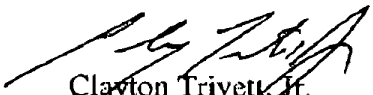
Robert Swann
Prosecutor
Department of Defense



Thomas Swanton
Prosecutor
Department of Justice



For Jeffrey D. Groharing
Major, U.S. Marine Corps
Prosecutor



Clayton Trivett, Jr.
Prosecutor
Department of Defense

Sent: Thursday, May 22, 2008 5:19 PM

Subject: Commission Ruling: US v Mohammed et al, D-002-006
Follow Up Flag: Follow up
Flag Status: Red
Attachments: Mohammed et al Initial Session Cont.pdf

Col Kohlmann has directed that I forward the attached ruling in US v Mohammed et al to counsel and other interested persons.

V/R
Natalie Lewis Bley
Attorney Advisor
Military Commissions Trial Judiciary

Ms. Bley:
Please forward the attached ruling to the appropriate persons.
V/R,
Ralph H. Kohlmann
Colonel, U.S. Marine Corps

Sent: Thursday, May 22, 2008 12:55 PM

Subject: United States v. Mohammed et al-Prosecution Consolidated Response to D-002; D-003; D-004; D-005; D-006 (Requested Continuance)

Follow Up Flag: Follow up

Flag Status: Red

Attachments: Gov't Response - Defense Requests for continuance - 22 May 2008-filed.pdf

All,

Attached please find the Prosecution's consolidated response to D-002; D-003; D-004; D-005; D-006 (Prosecution's opposition to the Defense request for continuance of the arraignment).

v/r
Clay Trivett
Prosecutor
Office of Military Commissions

Sent: Thursday, May 22, 2008 12:06 PM

Subject: Re: RE: Motions to Continue, D-002, D003, D-004, D-005, D006, US v Mohammed et al.- Special Request for Relief

Follow Up Flag: Follow up
Flag Status: Red

Per Col Kohlmann, the special relief requested by the government counsel concerning the filing of a joint response and request to dispense with conference with defense counsel prior to filing resonse is granted.

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

> The government will file its response by 1300 today.
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> As the defense motions shared a majority of common issues, the
> governmentprepared a consolidated response, and respectfully makes a
> special request for relief (per Rule 3 of the Military Commissions
> Trial Judiciary Rules of
> Court) to file a consolidated response to D-2 through D-6 (with each
> defense filing designation listed in the caption of the government's
> response).
>
>
> Furthermore, due to the expedited response deadline, the government
> will not be able to confer with the defense on whether they concur or
> object to this special request.

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> Thomas P. Swanton
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> Trial Attorney
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> U.S. Department of Justice
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> Subject: Motions to Continue, D-002, D003, D-004, D-005, D006, US v
> Mohammed et al.
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> Counsel in the cases of US v. Mohammed et al.:
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>
> COL Kohlmann has directed that the government respond to the motions
> to continue filed by counsel in the following cases by 1300 today, 22
> May 08.
>
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> D-002, Defense Motion to Continue, US v Walid Muhammad Salih
> MubarakBin 'Attash
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> D-003, Defense Motion to Continue, US v Ramzi Bin al Shibh
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> D-004, Defense Motion to Continue, US v Mustafa Ahmed Adam al Hawsawi
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> D-005, Defense Motion to Continue, US v Khalid Sheikh Mohammed
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> D-006, Defense Motion to Continue, US v Ali Abdul Aziz Ali

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> V/R
>
> Natalie Lewis Bley
> Attorney Advisor
> Military Commissions Trial Judiciary
> [redacted]
>
>
>
>

[redacted]

Sent: Monday, May 19, 2008 5:04 PM

[redacted]

Subject: U.S. v. Bin Al Shibh: Special Request For Relief

Attachments: Motion.Continuance.RBAS.19May08.doc

Motion.Continuance
.RBAS.19May0...

Sir -

Please accept the attached motion for special relief. This correspondence is submitted on behalf of Detailed Defense Counsel for Bin Al Shibh.

Very Respectfully,
Patrica A. Williams
SSG, US Army
Paralegal NCO

UNITED STATES OF AMERICA	**Commission Ruling D-002-006**
	Motions for Continuance of Initial Session/Arraignment
v.	
KHALID SHEIK MOHAMMED et al	**22 May 2008**

1. <u>Nature of Motion</u>:

a. Detailed defense counsel for each of the five accused submitted D-002-006. Each submission seeks a continuance of the initial session previously ordered and scheduled for 5 June 2008. This ruling addresses all five of the noted continuance requests.

b. The five continuance requests express several common bases for the requested relief:

(1) Although the detailed defense counsel for each accused apparently possesses the requisite security clearances for performance of her or his duties, clearance granting procedures are still underway with regard to numerous assistant defense counsel and civilian defense counsel;

(2) The lack of security clearances for assistant defense counsel and civilian defense counsel has limited their involvement in the case with regard to matters such as meeting with clients, discussing the detailed defense counsel's meetings with the clients, and examining classified portions of discovery materials;

(3) Due to logistic and security factors, detailed defense counsel have had, to date, only a limited ability to meet with their clients;

(4) Defense office spaces at GTMO and in Washington DC are deemed inadequate to deal with the classified material associated with this case;

(5) Discovery matters have not been completed; and

(6) Several counsel have personal matters planned that conflict with the previously ordered initial session date of 5 June 2008.

c. The Commission finds that counsel have adequately covered all matters of import to this issue within the confines of the motions and the response, such that a reply to the response is not necessary.

2. Discussion:

a. Charges in this case were referred to the Commission for trial on 9 May 2008. The 5 June 2008 initial session was ordered by the Military Judge on 14 May 2008 after the Military Commission Trial Judiciary Staff received notice concerning the detailing of counsel as trial and defense counsel.

b. Service of charges upon the accused in accordance with RMC 602 was accomplished on 21 May 2008, thereby initiating the speedy trial provisions of RMC 707.

c. The initial session is intended to:

1) satisfy the RMC 707 requirement for arraignment of the accused in accordance with RMC 904 within 30 days of service of the referred charges; and,

2) provide the Military Judge the opportunity to advise the accused with regard to their rights to counsel and to ascertain whether or not the accused intend to exercise their counsel rights; and

3) ascertain what counsel, if any, will be representing the accused.

d. Some of the issues raised in D-002-006 are matters of consequence with regard to ensuring the defense is provided a full opportunity to prepare for trial. None of the issues raised in D-002-006, however, provide a valid basis for delaying the initial session and arraignment in this case. As noted in the prosecution response to D-002-006, the arraignment process does not require any decision making or action of consequence by the defense beyond the counsel right elections noted above. In this regard, it is typical for accused in military courts of all types to defer entry of motions and pleas during an initial court session. Additionally, it is well established that elections made at initial court sessions, to include counsel selections, are routinely changed at a later stage of the proceedings. Accordingly, the fact that all defense counsel are not yet fully integrated into the litigation process is not a valid basis in support of the continuance request.

e. Several of the defense submissions express concern that defense counsel other than the detailed defense counsel are not yet in a position to participate in development of possible voir dire of the Military Judge prior to the 26 May 2008 submission deadline established in the Commission order of 14 May 2008. In this regard, the Commission notes that the 26 May 2008 voir dire submission deadline applies only in the event counsel for an accused intend to conduct voir dire of the Military Judge at the initial session. In the event that counsel for the accused elect to defer voir dire of the Military Judge until the next session of the case, a later submission deadline will be established.

f. Similarly, the concerns expressed by the defense with regard to the adequacy of their working spaces is not a matter that justifies a delay of the initial session and arraignment in this case. Based on the representation in the prosecution response with regard to the approval of the SCIF for the ELC at GTMO, it appears that progress is being made with regard to dealing with the logistic challenges associated with this case. It is likely that the lawyers' tasks in this case are going to be difficult in several regards. If the office space concerns noted in D-002-006 remain unresolved such that the

inadequacy is interfering with the defense's responsibility with regard to their clients, the defense will be allowed to submit subsequent requests for relief concerning litigation milestones that will be established by the Military Judge.

g. The fact that discovery in accordance with the MMC has not yet been completed is not a proper basis for continuing the initial session and arraignment in any case. Discovery milestones will be established by the Military Judge and it is likely that some measure of litigation will be required before that process will be deemed complete.

h. The Commission regrets that the established litigation schedule conflicts with the personal plans of some of the counsel in this case. These personal conflicts, however, do not provide an appropriate basis for delaying the scheduled 5 June 2008 session. Starting the process and establishing a schedule will benefit all counsel with regard to avoiding future conflicts.

i. The Commission finds that the interests of justice in this case will be best served by completion of the initial session and arraignment as previously ordered on 5 June 2008. The Commission recognizes that there are many logistic and legal issues that will need to be addressed in this case. It is precisely because of the anticipated complexity of this case, that it is important that the process get underway.

3. **Ruling:** The defense requests in D-002-006 for continuance of the initial session and arraignment scheduled for 5 June 2008 are denied.

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

Sent: Monday, May 19, 2008 12:52 PM

Subject: U.S. v. Hawsawi (Continuance Request)

Sir,

The Defense respectfully submits the following request for continuance with the Court:

1. Timeliness: This request is filed within the timeframe established by the Military Judge's order of 14 May 2008.

2. Relief Requested: The Defense respectfully requests that this Commission grant a continuance of the 5 June 2008 arraignment date. The defense respectfully requests the Military Judge set the date for arraignment at such time that the government provides the necessary access, clearances and facilities to allow the defense to adequately represent the accused, Mustafa Ahmed Adam al Hawsawi (Mr. Hawsawi).

3. Overview: In spite of timely submission, detailed Assistant Defense Counsel (ADC) has not been provided with adequate clearance to properly represent Mr. Hawsawi. As all communications between Mr. Hawsawi and counsel are classified, ADC has been unable to meet the client or discuss client meetings with Lead Defense Counsel (LDC). Further, the lack of a proper facility in which to discuss classified material has hindered the defense's ability to properly work on Mr. Hawsawi's case. Lastly, if Mr. Hawsawi requests civilian counsel, time is needed to located properly qualified counsel. If the Commission does not grant a continuance of the 5 June arraignment, the defense will not be in a position to be adequately prepared for arraignment and render effective assistance of counsel to Mr. Hawsawi.

4. Burdens of Proof and Persuasion: As the moving party, the Defense bears the burdens on this motion.

5. Facts:

a. On 18 March 2008, ADC's investigation for TS/SCI clearance was initiated. On 21 April 2008, ADC reported for duty at Office of Chief Defense Counsel. On 29 April 2008, ADC was detailed to Mr. Hawsawi's case. ADC has requested periodic updates regarding status of security clearance, however, the only status provided is that the investigation is pending.

b. On 9 May 2008, charges against Mr. Hawsawi were referred to this Military Commission. The defense was served at 1834 hours, 12 May 2008. The charges allege a complex conspiracy spanning several years, involving alleged conduct taking place in or about 1996 to in or about May 2003. To date, defense counsel have not received any discovery, including the referral binder referenced in the referral of charges, relating to Mr. Hawsawi's case.

c. Both LDC and ADC travelled to Cuba 14-15 May. Due to ADC's lack of adequate security clearance, she was unable to meet with Mr. Hawsawi.

d. Prior to referral, detailed defense counsel were unable to meet with Mr. Hawsawi. Since referral, LDC has only been able to meet with Mr. Hawsawi twice. ADC has not met with Mr. Hawsawi, however, he is aware that ADC has been detailed to represent him. Due to the presumptively classified nature of the communications from Mr. Hawsawi, his response cannot be relayed to ADC or to the court at this time.

e. Mr. Hawsawi has also been informed of his right to be represented by a qualified civilian counsel. Due to the presumptively classified nature of the communications from Mr. Hawsawi, his response cannot be relayed to the court at this time. If, however, Mr. Hawsawi wishes to exercise his right to civilian counsel, qualified counsel will need to be located.

f. Defense counsel cannot work with or discuss classified material in Guantanamo Bay. The secure facility in Cuba is not operational so counsel have no place to store work product, discuss classified material or prepare for their case while in Cuba. JTF staff is presently offering space in their secure space for note storage however this is not a long-term solution. Further, there is no adequate secure facility in Washington, DC for defense counsel to prepare their case. The construction for the facility in Washington, DC was to be completed by the end of 2007 but, to date, construction has not begun.

g. Lastly, Mr. Hawsawi's defense team has prior personal commitments that conflict with the 5 June 2008 arraignment date. LDC has a pre-paid college reunion trip scheduled for 4-8 June 2008. ADC has a real estate closing scheduled for 6 June 2008. The team paralegal is part of a dual-military family and her husband's operational commitments require him to be out of the area for the week of 2 June 2008. Accordingly, she will be the primary caregiver for their child during that time and cannot leave the Washington, DC area.

6. Argument: The Military Commission Should Grant a Continuance in Order to Give the Defense an Adequate Opportunity to Prepare for Trial.

a. The Military Judge should grant the defense request for a continuance. It is within his authority to do so. MCA § 949e provides that the "military judge . . . may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just." Rule for Military Commission (RMC) 707 additionally provides for the granting of a continuance in the "interests of justice . . . ." Such action is necessary here to ensure that the accused has effective assistance of counsel.

b. The MCA guarantees the right of the accused to the "assistance of counsel." MCA § 949a(b)(1)(C). Courts have long recognized that in order for the right to counsel to be meaningful, counsel must have adequate time to prepare a defense. Thus, the Supreme Court stated in Powell v. State of Ala., 287 U.S. 45 (1932): "It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case." Id. at 59. While a trial court's decision on a continuance request is generally reviewed for abuse of discretion, a trial court may not exercise its discretion over continuances so as to deprive the defendant or his attorneys of a reasonable opportunity to prepare. See, e.g., People v. Snow, 65 P.3d 749 (Cal. 2003); Phillips v. State, 386 N.E.2d 704 (1979) (Trial court must weigh Defendant's right to effective assistance, and to be effective, counsel must be given sufficient opportunity to adequately prepare his case.)

c. At arraignment, Mr. Hawsawi will be asked, among other things, to select his counsel. He will not be able to make an effective selection of counsel without having first the opportunity to meet with the counsel detailed and available to represent him. Further, that counsel (ADC and civilian counsel, if requested) will require adequate time once clearance is obtained to properly acquaint themselves with Mr. Hawsawi's case to adequately prepare for arraignment and trial.

d. As the significant matters outlined in a - f above are beyond the control of the defense, defense respectfully request a continuance until such time the government supplies: the requisite clearance for ADC and the appropriately secure facilities to store classified material and allow for defense preparation of this case. Further, time is required to locate qualified civilian counsel if Mr. Hawsawi requests civilian counsel.

e. As these matters are outside of defense's control, the defense is unable to specify a date of availability. The defense respectfully requests a RMC 802 telephonic conference with all parties at an established interval of time to ascertain the progress of the requested items. Defense seeks only to fully and adequately represent Mr. Hawsawi at each stage of these proceedings and allow him the competency of counsel to which he is entitled.

7. Oral Argument: The Defense does not request oral argument in connection with this motion.

8. Witnesses: None.

9. Certificate of Conference: The Defense has conferred with the Prosecution regarding the requested relief. The Prosecution objects to the requested relief.

10. Additional Information: In making this request, Mr. Hawsawi does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in all appropriate forms.

Respectfully submitted by:
MAJ JON JACKSON, USAR
LT GRETCHEN SOSBEE, JAGC, USN
Detailed Defense Counsel for Mustafa Ahmed Adam al Hawsawi

UNITED STATES OF AMERICA	)	**D-002; D-003; D-004; D-005; D-006**
	)	
	)	**Consolidated Prosecution Response**
	)	**To**
	)	
v.	)	**Defense Requests for Continuance**
	)	
	)	
KHALID SHEIKH MOHAMMED	)	
WALID MUHAMMAD SALIH	)	
MUBARAK BIN ATTASH	)	
RAMZI BINALSHIBH	)	
ALI ABDUL AZIZ ALI	)	
MUSTAFA AHMED ADAM AL	)	
HAWSAWI	)	**22 May 2008**

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

2. **Relief**. The Prosecution respectfully requests the Military Judge deny the Defense request for continuance.

3. **Overview**. Defense Counsel for each of the five accused have requested delays in the arraignment in this case. In order to comply with the Military Commissions Act (MCA) and Manual for Military Commissions (MMC), the accused must be arraigned within 30 days of service of charges. The Prosecution respectfully requests the Military Judge hold the initial session and advise the accused regarding their rights to counsel under the MCA and MMC, and conduct the arraignment of the accused as required under Rule for Military Commission (RMC) 707. The concerns raised by Defense Counsel in their filings can be addressed by the Military Judge during the initial session scheduled for 5 June 2008.

4. **Burden of proof.** As the moving party, the Defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. *See* RMC 905(c)(1), 905(c)(2)(A).

5. Facts.

a. The Convening Authority referred charges against each of the accused in the above captioned case on 9 May 2008.

b. On 14 May 2008, the Military Judge notified all parties that arraignment for the above-captioned case would be conducted on 5 June 2008.

c. Counsel for Walid Muhammad Salih Mubarak Bin Attash filed a request for continuance on 16 May 2008.

d. Counsel for each of the other four accused requested similar continuances on 19 May 2008.

e. Charges were served on each of the accused on 21 May 2008.

f. Pursuant to RCM 701(b), the Prosecution will serve copies of referral documents upon counsel for all accused as soon as practicable. The vast majority of documents will be served during the week of 26 May 2008. A few remaining classified items will be served after appropriate protective orders are issued.

g. On Monday, 19 May 2008, the SCIF for the Expeditionary Legal Complex was approved, providing secure office space at Guantanamo Bay, Cuba for Defense Counsel to discuss and store classified information, including any notes taken during meetings with their clients.

6. Discussion.

a. The Military Judge should deny the Defense requests for continuance.

(1) RMC 707(a)(1) requires an accused to be brought to trial within 30 days of service of the charges. An accused is brought to trial within the meaning of this rule at the time of arraignment under RMC 904. RMC 904 provides that arraignment shall be conducted in a military commission session and shall consist of reading the charges and specifications to the accused and calling on the accused to enter a plea. The accused need not enter pleas as part of the arraignment and has the option of reserving his pleas until a later time.

(2) During the initial session, and prior to arraignment of the accused, RMC 901 requires the Military Judge, in open session, to inform the accused of his rights to be represented by military or civilian counsel. While RMC 901 requires the Military Judge to ascertain from the accused by whom the accused chooses to be represented,[1] an accused is not bound by any elections made at the arraignment and is free to later amend his elections regarding counsel after discussing his options with detailed defense counsel and any subsequently approved civilian counsel.

(3) The Defense requests for continuance seemingly indicate varying levels of formation of attorney-client relationship between the accused and their detailed counsel, including questions whether an attorney-client relationship has actually been formed with some of the accused. The requests highlight the importance of conducting the initial session within the time period required under RMC 707.[2] The arraignment will provide an

[1] See RMC 901(d)(4)(D).

[2] The Prosecution notes that at least one of the accused has specifically argued that the requested delay should not be attributed to the Defense as excludable delay, and reserved the right to assert possible speedy trial violations based on this or future delays in the proceedings. See 19 May 2008 "Defense Motion for Special Relief to Delay Arraignment," filed by counsel for Ramzi Bin al Shibh. The Defense has asked the Military Judge to continue the arraignment beyond 30 days as required by RMC 707, and in the same breath seeks to reserve the right to later bring a challenge based on the Prosecution's inability to arraign the accused within the time periods required under the Manual for Military Commissions. Rather than support the Defense request for continuance, the Defense's position

opportunity for the Military Judge to advise each of the accused regarding their rights to counsel on the record and in open court, as required by RMC 707 and 901. Each of the accused will be provided an opportunity to make their elections or request additional time to meet with assigned counsel to discuss his counsel options.

(4) To postpone the arraignment when it is possible that some of these accused could refuse their detailed counsel in this case is unwarranted. Holding the initial session as scheduled will allow the court to resolve the issues of counsel in a timely manner so that the parties can complete discovery in this case and set an appropriate litigation schedule.

(5) Defense counsel for each of the accused have requested continuances primarily based on their asserted inability to adequately prepare to represent their clients based on lack of adequate facilities, and in certain cases, lack of approved security clearances for assistant detailed counsel and civilian counsel.[3] Defense Counsel in several requests also cite personal commitments that conflict with the scheduled 5 June 2008 arraignment.[4]

(6) All cleared defense counsel have access to TS/SCI approved office spaces and storage facilities, both at Guantanamo Bay, Cuba and in one of the Office of Military Commissions – Defense (OMC-D) offices spaces in the Washington, D.C. Area. On 19 May 2008, the Prosecution and Defense facilities at Guantanamo Bay, Cuba were approved for TS/SCI communications and storage of TS/SCI materials, including Defense notes of interviews with the accused. In addition to the SCIF currently available to the Defense in the Washington, D.C. area, the Office of the Convening Authority has advised the Prosecution that they expect additional TS/SCI office spaces to be completed at that office no later than the end of June. These spaces will allow for increased storage and provide additional office space to accommodate discussions of any TS/SCI information, including those related to communications with their clients.[5]

(7) Assistant Defense Counsel for Ali Abdul Aziz Ali and Mustafa Ahmed Adam al Hawsawi are awaiting final approval of TS/SCI clearances. As of the time of this filing, their

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highlights the importance of conducting the initial session and arraignment of the accused in a timely manner, as presently scheduled.

[3] The Defense in several filings request an 802 teleconference to establish an interval of time to ascertain the progress made on defense facilities and security clearances. The Prosecution intends to provide a proposed trial schedule to the Defense prior to travel to GTMO, and is prepared to discuss the current status of defense facilities and pending security clearances during that meeting. Of course, should the Military Judge consider it necessary to conduct a telephonic 802 teleconference the Prosecution is available.

[4] The personal commitments referenced in the Defense filings highlight the importance of conducting an initial session that will establish dates for subsequent sessions for this military commission. Convening a session, and establishing a litigation schedule, will better allow defense counsel assigned to these cases to plan their personal commitments, taking into account certain dates they will be required to be at Guantanamo Bay in order to represent their clients.

[5] Some of the Defense filings indicate Defense Counsel do not have the ability to transport notes taken during meetings with their clients to their office in the Washington, D.C. area. After becoming aware of this issue, the Prosecution inquired with the Office of the Convening Authority, who advised there was no restriction on transporting notes from Guantanamo Bay, to Washington, D.C., assuming they were properly marked and classified information was appropriately protected. Prior to traveling with classified information, counsel must obtain an appropriate courier card. The Prosecution will assist Defense Counsel in obtaining a courier card upon request.

requests were both pending with the Office of Personnel Management (OPM) and expected to be resolved by mid-June. Of course, the attendance of Assistant Defense Counsel is not required for the initial session. The presence of detailed Defense Counsel is sufficient for purposes of the arraignment.

(8) Defense Counsel in several of the filings cite the inability of civilian defense counsel to be approved and detailed prior to the arraignment. As indicated in the Defense filings, the Office of the Convening Authority is diligently processing all requests from civilian defense counsel and has requested OPM to "fast-track" the requests accordingly. As the Military Judge points out in his 19 May 2008, email, it is understood that civilian counsel may seek to join in the litigation at some time after the initial session. At the initial session, the Military Judge will advise each accused of his right to request civilian counsel. If an accused elects to request an approved civilian counsel, the counsel can be added at a later session.

(9) Additionally, in the Defense Joint Motion to Dismiss (D001), filed on 15 May 2008, Defense Counsel allege that the charges in the instant case were improperly referred to this Military Commission. In addition to the requirement to arraign the accused within 30 days of service of referred charges, it is imperative to resolve the outstanding contested motion as soon as possible. The Defense motion makes serious allegations claiming the Legal Advisor to the Convening Authority and other senior officials have "unlawfully influenced this military commission." The Defense requests the Military Judge to dismiss charges with prejudice, or in the alternative, disqualify the Legal Advisor from further participation in this case. This contested motion should be litigated at the earliest opportunity to resolve the serious issues raised therein.

(10) The interests of justice for the public and the accused in ensuring a prompt trial (*see* RMC 707(b)(4)(E)), are best served by ensuring that the accused are promptly advised in open court regarding the charges they are facing and that they understand their options regarding representation during these proceedings. The Prosecution respectfully requests the Military Judge deny the Defense requests to delay these proceedings, and hold the initial session on 5 June 2008, as scheduled.

7. **Oral argument.** The Prosecution does not request oral argument.

8. **Witnesses.** None.

9. **Certificate of conference**. As stated in each of the defense filings, the parties do not agree on the requested relief.

10. **Additional information.** None

11. **Attachments**. None.

12. **Submitted by**:

For Edward Ryan
Prosecutor
Department of Justice

Thomas Swanton
Prosecutor
Department of Justice

Clayton Trivett, Jr.
Prosecutor
Department of Defense

Robert Swann
Prosecutor
Department of Defense

For Jeffrey D. Groharing
Major, U.S. Marine Corps
Prosecutor

Sent: Thursday, May 22, 2008 5:19 PM

Subject: Commission Ruling: US v Mohammed et al, D-002-006

Follow Up Flag: Follow up

Flag Status: Red

Attachments: Mohammed et al Initial Session Cont.pdf

Col Kohlmann has directed that I forward the attached ruling in US v Mohammed et al to counsel and other interested persons.

V/R
Natalie Lewis Bley
Attorney Advisor
Military Commissions Trial Judiciary

Ms. Bley:
Please forward the attached ruling to the appropriate persons.
V/R,
Ralph H. Kohlmann
Colonel, U.S. Marine Corps

Sent: Thursday, May 22, 2008 12:55 PM

Subject: United States v. Mohammed et al-Prosecution Consolidated Response to D-002; D-003; D-004; D-005; D-006 (Requested Continuance)

Follow Up Flag: Follow up

Flag Status: Red

Attachments: Gov't Response - Defense Requests for continuance - 22 May 2008-filed.pdf

All,

Attached please find the Prosecution's consolidated response to D-002; D-003; D-004; D-005; D-006 (Prosecution's opposition to the Defense request for continuance of the arraignment).

v/r
Clay Trivett
Prosecutor
Office of Military Commissions

[redacted]

Sent: Thursday, May 22, 2008 12:06 PM

[redacted]

Subject: Re: RE: Motions to Continue, D-002, D003, D-004, D-005, D006, US v Mohammed et al.- Special Request for Relief

Follow Up Flag: Follow up
Flag Status: Red

Per Col Kohlmann, the special relief requested by the government counsel concerning the filing of a joint response and request to dispense with conference with defense counsel prior to filing resonse is granted.

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

[redacted]

> The government will file its response by 1300 today.
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>
> As the defense motions shared a majority of common issues, the
> governmentprepared a consolidated response, and respectfully makes a
> special request for relief (per Rule 3 of the Military Commissions
> Trial Judiciary Rules of
> Court) to file a consolidated response to D-2 through D-6 (with each
> defense filing designation listed in the caption of the government's
> response).
>
>
> Furthermore, due to the expedited response deadline, the government
> will not be able to confer with the defense on whether they concur or
> object to this special request.

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>
> Thomas P. Swanton
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> Trial Attorney
>
> U.S. Department of Justice
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>
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> _____
>
> [redacted]
> Subject: Motions to Continue, D-002, D003, D-004, D-005, D006, US v
> Mohammed et al.
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>
> Counsel in the cases of US v. Mohammed et al.:
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>
> COL Kohlmann has directed that the government respond to the motions
> to continue filed by counsel in the following cases by 1300 today, 22
> May 08.
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> D-002, Defense Motion to Continue, US v Walid Muhammad Salih
> MubarakBin 'Attash
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> D-003, Defense Motion to Continue, US v Ramzi Bin al Shibh
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> D-004, Defense Motion to Continue, US v Mustafa Ahmed Adam al Hawsawi
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> D-005, Defense Motion to Continue, US v Khalid Sheikh Mohammed
>
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> D-006, Defense Motion to Continue, US v Ali Abdul Aziz Ali

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> V/R
>
> Natalie Lewis Bley
> Attorney Advisor
> Military Commissions Trial Judiciary
> [redacted]
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UNITED STATES OF AMERICA	**Commission Ruling D-002-006**
	Motions for Continuance of Initial Session/Arraignment
v.	
KHALID SHEIK MOHAMMED et al	**22 May 2008**

1. Nature of Motion:

a. Detailed defense counsel for each of the five accused submitted D-002-006. Each submission seeks a continuance of the initial session previously ordered and scheduled for 5 June 2008. This ruling addresses all five of the noted continuance requests.

b. The five continuance requests express several common bases for the requested relief:

(1) Although the detailed defense counsel for each accused apparently possesses the requisite security clearances for performance of her or his duties, clearance granting procedures are still underway with regard to numerous assistant defense counsel and civilian defense counsel;

(2) The lack of security clearances for assistant defense counsel and civilian defense counsel has limited their involvement in the case with regard to matters such as meeting with clients, discussing the detailed defense counsel's meetings with the clients, and examining classified portions of discovery materials;

(3) Due to logistic and security factors, detailed defense counsel have had, to date, only a limited ability to meet with their clients;

(4) Defense office spaces at GTMO and in Washington DC are deemed inadequate to deal with the classified material associated with this case;

(5) Discovery matters have not been completed; and

(6) Several counsel have personal matters planned that conflict with the previously ordered initial session date of 5 June 2008.

c. The Commission finds that counsel have adequately covered all matters of import to this issue within the confines of the motions and the response, such that a reply to the response is not necessary.

2. Discussion:

a. Charges in this case were referred to the Commission for trial on 9 May 2008. The 5 June 2008 initial session was ordered by the Military Judge on 14 May 2008 after the Military Commission Trial Judiciary Staff received notice concerning the detailing of counsel as trial and defense counsel.

b. Service of charges upon the accused in accordance with RMC 602 was accomplished on 21 May 2008, thereby initiating the speedy trial provisions of RMC 707.

c. The initial session is intended to:

1) satisfy the RMC 707 requirement for arraignment of the accused in accordance with RMC 904 within 30 days of service of the referred charges; and,

2) provide the Military Judge the opportunity to advise the accused with regard to their rights to counsel and to ascertain whether or not the accused intend to exercise their counsel rights; and

3) ascertain what counsel, if any, will be representing the accused.

d. Some of the issues raised in D-002-006 are matters of consequence with regard to ensuring the defense is provided a full opportunity to prepare for trial. None of the issues raised in D-002-006, however, provide a valid basis for delaying the initial session and arraignment in this case. As noted in the prosecution response to D-002-006, the arraignment process does not require any decision making or action of consequence by the defense beyond the counsel right elections noted above. In this regard, it is typical for accused in military courts of all types to defer entry of motions and pleas during an initial court session. Additionally, it is well established that elections made at initial court sessions, to include counsel selections, are routinely changed at a later stage of the proceedings. Accordingly, the fact that all defense counsel are not yet fully integrated into the litigation process is not a valid basis in support of the continuance request.

e. Several of the defense submissions express concern that defense counsel other than the detailed defense counsel are not yet in a position to participate in development of possible voir dire of the Military Judge prior to the 26 May 2008 submission deadline established in the Commission order of 14 May 2008. In this regard, the Commission notes that the 26 May 2008 voir dire submission deadline applies only in the event counsel for an accused intend to conduct voir dire of the Military Judge at the initial session. In the event that counsel for the accused elect to defer voir dire of the Military Judge until the next session of the case, a later submission deadline will be established.

f. Similarly, the concerns expressed by the defense with regard to the adequacy of their working spaces is not a matter that justifies a delay of the initial session and arraignment in this case. Based on the representation in the prosecution response with regard to the approval of the SCIF for the ELC at GTMO, it appears that progress is being made with regard to dealing with the logistic challenges associated with this case. It is likely that the lawyers' tasks in this case are going to be difficult in several regards. If the office space concerns noted in D-002-006 remain unresolved such that the

inadequacy is interfering with the defense's responsibility with regard to their clients, the defense will be allowed to submit subsequent requests for relief concerning litigation milestones that will be established by the Military Judge.

g. The fact that discovery in accordance with the MMC has not yet been completed is not a proper basis for continuing the initial session and arraignment in any case. Discovery milestones will be established by the Military Judge and it is likely that some measure of litigation will be required before that process will be deemed complete.

h. The Commission regrets that the established litigation schedule conflicts with the personal plans of some of the counsel in this case. These personal conflicts, however, do not provide an appropriate basis for delaying the scheduled 5 June 2008 session. Starting the process and establishing a schedule will benefit all counsel with regard to avoiding future conflicts.

i. The Commission finds that the interests of justice in this case will be best served by completion of the initial session and arraignment as previously ordered on 5 June 2008. The Commission recognizes that there are many logistic and legal issues that will need to be addressed in this case. It is precisely because of the anticipated complexity of this case, that it is important that the process get underway.

3. **Ruling:** The defense requests in D-002-006 for continuance of the initial session and arraignment scheduled for 5 June 2008 are denied.

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

Sent: Monday, May 19, 2008 3:03 PM

Subject: Motion to Continue in the case of United States v. Khalid Sheikh Mohammed

UNITED STATES OF AMERICA,

v.

KHALID SHEIKH MOHAMMED,

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)

Defense Motion
For Continuance

19 MAY 2008

1. <u>Timeliness</u>: Timeliness: This request is filed within the timeframe established by the Military Judge's order of 14 May 2008.

2. <u>Relief Requested</u>: The Defense respectfully requests that this Commission grant a continuance of the 5 June 2008 arraignment date. The defense respectfully requests the Military Judge set the date for arraignment at such time that the government provides the necessary access, clearances and facilities to

allow the defense to adequately represent the accused, Khalid Sheikh Mohammed (Mr. Mohammed).

3. Overview: Counsel's ability to meet with Mr. Mohammed and form an attorney-client relationship in this death penalty case has been very limited and assistant detailed counsel has not met with Mr. Mohammed at the time of this request. Even when meetings have occurred, evolving security procedures have limited counsel's ability to appropriately represent Mr. Mohammed. Civilian counsel have not yet received the needed security clearances, affecting their involvement in the case, even to the extent of forming the initial attorney-client relationship.

Specific conflicts also exist for the date currently set by the Commission. Assistant Military Counsel has previously scheduled leave that involves family commitments for the week of the presently scheduled arraignment.

Arraignment marks the formal commencement of proceedings before the Commission. If the Commission does not grant the requested continuance, the Defense will be in the position of commencing the proceedings with an incomplete team and will thus not be prepared to render effective assistance of counsel to Mr. Mohammed.

4. Burden of Proof: The defense bears the burden of proof as the moving party on this motion and the standard is proof by a preponderance of evidence. RMC 905(c).

5. Facts:

a. Charges against Mr. Mohammed were referred to this Military Commission on 9 May 2008. The charges were not forwarded to Defense Counsel until 1705 hours, 12 May 2008. Counsel is not aware of whether they have yet been served on Mr. Mohammad as is required by R.M.C. Rule 602. The charges allege a complex conspiracy spanning several years, involving alleged conduct taking place over a number of years.

b. Prior to preferral of charges on 11 February 2007, Mr. Mohammad had been held without access to legal representation for a period of nearly 5 years after his capture on or about 1 March 2003. Defense Counsel was detailed on or about 8 April 2008 and met with Mr. Mohammad as soon as security "read ons" permitted and transportation could be arranged to Guantanamo. At this point, he has met with Mr. Mohammad on several occasions for a total of approximately 10 hours.

c. Assistant Defense Counsel was detailed on 28 April 2008, but he has not yet had an opportunity to meet with Mr. Mohammed. Mr. Mohammad is, however, aware that Assistant Defense Counsel has been appointed. (As a note to provide perspective, the Commission should be aware that Guantanamo JTF personnel request a two week advance notice of a meeting with a High Value Detainee (HVD) such as Mr. Mohammed and travel arrangements to Guantanamo frequently themselves call for such a lead time.) A joint meeting involving detailed defense counsel and assistant defense counsel scheduled for the week of 5 May – when assistant defense counsel was on Guantanamo for other work - was cancelled because detailed defense counsel's flight was cancelled. Assistant detailed defense counsel's first meeting with Mr. Mohammed is now scheduled for the week of 26 May

d. Numerous security issues affect the preparation of these cases even at these beginning stages. Following any meeting with Mr. Mohammed, all resultant written notes are immediately classified Top Secret / SCI (TS-SCI) and retained at Guantanamo where they are currently accessible only when counsel next meets with Mr. Mohammed. Defense counsel work areas, both at Guantanamo Bay, Cuba and Washington DC, lack a secured facility to store any classified material, to include even notes from meetings with Mr. Mohammed, or permit communications between counsel. Pending the construction of a larger SCIF in the Office of Military Commissions –Defense (OMC-D) office, all teams involved in the preparation of the cases of the 9-11 co-defendants can discuss any TS-SCI information only in a small office-sized shared facility in the OMC-D office in Rosslyn. The construction schedule for the SCIF in Washington DC has failed to materialize; construction on a facility that was to be completed before the end of 2007 has commenced, but may not be concluded until mid or late August 2008.

e. Mr. Mohammed's civilian counsel have not yet obtained TS-SCI security clearances. Consequently, information gained from Mr. Mohammed, by definition classified at the TS-SCI level, cannot be shared with these counsel. Even more significantly, these counsel are prohibited from meeting with Mr. Mohammed until they are TS-SCI qualified and cannot form any type of attorney-client relationship or even ask him whether he desires their legal representation. Counsel is advised that this should be completed within 5 weeks of the date of this motion, however.

f. Assistant Defense Counsel has scheduled leave that includes a family vacation for the week of the currently scheduled arraignment date. At this late date, these timeshare reservations cannot be cancelled without incurring substantial financial loss. Based on the climate existing among the accused at Guantanamo, counsel cannot envision that Mr. Mohammed will sign the required waiver of appearance of counsel containing the many certifications mandated by commission rules (i.e., that the accused certifies his belief that the counsel who will attend the hearing at competent to handle the hearing). Moreover, requesting said defendant to sign such a waiver would impair the attorney-client relationship.

6. <u>Argument</u>:

a. The Military Judge should grant the defense request for a continuance. It is within his authority to do so. MCA § 949e provides that the "military judge . . . may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just." Rule for Military Commission (RMC) 707 additionally provides for the granting of a continuance in the "interests of justice . . . ." Such action is necessary here to ensure that the accused has effective assistance of counsel.

b. Like the Sixth Amendment, the MCA guarantees the right of the accused to the "assistance of counsel." MCA § 949a(b)(1)(C). Courts have long recognized that in order for the right to counsel to be meaningful, counsel must have adequate time to prepare a defense. Thus, the Supreme Court stated in *Powell v. State of Ala.*, 287 U.S. 45 (1932): "It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case." Id. at 59.

c. Similarly, the Court frequently has emphasized that the representation of a capital defendant requires specialized training, skill and experience in the investigation and presentation of evidence at both the guilt phase and potential penalty phase of the case. The Court has "long referred to" the American Bar Association (ABA) standards "as 'guides to determining what is reasonable'" in the representation of capital defendants. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting Strickland, 466 U.S. at 688); *see, also, Williams v. Taylor*, 529 U.S. 362, 396

(2000). As the Court explicitly noted with approval in *Wiggins*, "[t]he ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor," and that the scope of the necessary investigation that counsel should consider includes the defendant's "'medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.'" *Wiggins*, 539 U.S. at 524 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93; 11.8.6, p. 133 (1989) (Court's emphasis)).

d. Equally significant, the Court also emphasized that the ABA Standards contemplate that counsel "'also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially,'" as well as "'to the court at sentencing.'" *Wiggins*, 539 U.S. at 524-525 (quoting ABA Guidelines 4-4.1, commentary, p. 4-55 (2d ed.1982) (emphasis added)). Accordingly, Mr. Mohammed should be entitled to, and counsel will require the assistance of expert assistants who are necessary to dispute the Government's case at both the guilt and any sentencing phase of the case. *See, e.g., Ake v. Oklahoma*, 470 U.S. 68 (1985).

e. Counsel's assessment is not offered in denigration of his own skills and ability, but reflects his dedication to his client and the recognition of his obligations under "well-defined norms" for handling such complex cases. *Wiggins*, at 254. The defense respectfully submits that there is no justification for preventing Mr. Mohammed from having the assistance that detailed military counsel deems necessary to his effective representation. *See Massaro v. United States*, 538 US 538 US 500, 503 (2003) ("ineffectiveness was evident from the record" where trial counsel failed to request continuance to evaluate new evidence). Nor will an enlargement of the time for civilian defense counsel to take the steps necessary to appear in this case compromise any legitimate interest of the parties:

f. While a trial court's decision on a continuance request is generally reviewed for abuse of discretion, a trial court may not exercise its discretion over continuances so as to deprive the defendant or his attorneys of a reasonable opportunity to prepare. See, e.g., *People v. Snow*, 65 P.3d 749 (Cal. 2003); *Phillips v. State*, 386 N.E.2d 704 (1979) (Trial court must weigh Defendant's right to effective assistance, and to be effective, counsel must be given sufficient opportunity to adequately prepare his case.)

g. Due to matters outside the defense's control, and within the government's control, defense respectfully request a continuance until such time the government supplies: access to the client such that counsel may prepare a defense; the requisite security clearances for members of the defense team; and the appropriately secured facilities to store classified material and allow for defense preparation of this case.

h. As these matters are outside of defense's control, the defense is unable to specify a date of availability. The defense respectfully requests a RMC 802 telephonic conference with all parties at an established interval of time to ascertain the progress of the requested items. Defense seeks only to fully and adequately represent Mr. Mohammad at each stage of these proceedings and allow him the competency of counsel to which he is entitled.

7. <u>Oral Argument</u>: The Defense does not request oral argument in connection with this motion but, as is noted above, does request a RMC 802 telephone conference with all parties to establish a hearing date.

8. <u>Witnesses</u>: None.

9. <u>Conference with Opposing Counsel</u>: The Defense has conferred with the Prosecution regarding the

requested relief. The Prosecution objects to the requested relief.

DATED this 19th day of May, 2008.

Respectfully submitted,

By_____/s/_____
Prescott L. Prince, CAPT, JAGC, USNR
Michael Acuff, LTCOL, JAGC, USAR
Detailed Defense Counsel for
Khalid Sheikh Mohammed
Office of Military Commissions

UNITED STATES OF AMERICA	)	**D-002; D-003; D-004; D-005; D-006**
	)	
	)	**Consolidated Prosecution Response**
	)	**To**
	)	
v.	)	**Defense Requests for Continuance**
	)	
	)	
KHALID SHEIKH MOHAMMED	)	
WALID MUHAMMAD SALIH	)	
MUBARAK BIN ATTASH	)	
RAMZI BINALSHIBH	)	
ALI ABDUL AZIZ ALI	)	
MUSTAFA AHMED ADAM AL	)	
HAWSAWI	)	**22 May 2008**

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

2. **Relief**. The Prosecution respectfully requests the Military Judge deny the Defense request for continuance.

3. **Overview**. Defense Counsel for each of the five accused have requested delays in the arraignment in this case. In order to comply with the Military Commissions Act (MCA) and Manual for Military Commissions (MMC), the accused must be arraigned within 30 days of service of charges. The Prosecution respectfully requests the Military Judge hold the initial session and advise the accused regarding their rights to counsel under the MCA and MMC, and conduct the arraignment of the accused as required under Rule for Military Commission (RMC) 707. The concerns raised by Defense Counsel in their filings can be addressed by the Military Judge during the initial session scheduled for 5 June 2008.

4. **Burden of proof.** As the moving party, the Defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. *See* RMC 905(c)(1), 905(c)(2)(A).

5. Facts.

a. The Convening Authority referred charges against each of the accused in the above captioned case on 9 May 2008.

b. On 14 May 2008, the Military Judge notified all parties that arraignment for the above-captioned case would be conducted on 5 June 2008.

c. Counsel for Walid Muhammad Salih Mubarak Bin Attash filed a request for continuance on 16 May 2008.

d. Counsel for each of the other four accused requested similar continuances on 19 May 2008.

e. Charges were served on each of the accused on 21 May 2008.

f. Pursuant to RCM 701(b), the Prosecution will serve copies of referral documents upon counsel for all accused as soon as practicable. The vast majority of documents will be served during the week of 26 May 2008. A few remaining classified items will be served after appropriate protective orders are issued.

g. On Monday, 19 May 2008, the SCIF for the Expeditionary Legal Complex was approved, providing secure office space at Guantanamo Bay, Cuba for Defense Counsel to discuss and store classified information, including any notes taken during meetings with their clients.

6. Discussion.

a. The Military Judge should deny the Defense requests for continuance.

(1) RMC 707(a)(1) requires an accused to be brought to trial within 30 days of service of the charges. An accused is brought to trial within the meaning of this rule at the time of arraignment under RMC 904. RMC 904 provides that arraignment shall be conducted in a military commission session and shall consist of reading the charges and specifications to the accused and calling on the accused to enter a plea. The accused need not enter pleas as part of the arraignment and has the option of reserving his pleas until a later time.

(2) During the initial session, and prior to arraignment of the accused, RMC 901 requires the Military Judge, in open session, to inform the accused of his rights to be represented by military or civilian counsel. While RMC 901 requires the Military Judge to ascertain from the accused by whom the accused chooses to be represented,[1] an accused is not bound by any elections made at the arraignment and is free to later amend his elections regarding counsel after discussing his options with detailed defense counsel and any subsequently approved civilian counsel.

(3) The Defense requests for continuance seemingly indicate varying levels of formation of attorney-client relationship between the accused and their detailed counsel, including questions whether an attorney-client relationship has actually been formed with some of the accused. The requests highlight the importance of conducting the initial session within the time period required under RMC 707.[2] The arraignment will provide an

[1] See RMC 901(d)(4)(D).

[2] The Prosecution notes that at least one of the accused has specifically argued that the requested delay should not be attributed to the Defense as excludable delay, and reserved the right to assert possible speedy trial violations based on this or future delays in the proceedings. See 19 May 2008 "Defense Motion for Special Relief to Delay Arraignment," filed by counsel for Ramzi Bin al Shibh. The Defense has asked the Military Judge to continue the arraignment beyond 30 days as required by RMC 707, and in the same breath seeks to reserve the right to later bring a challenge based on the Prosecution's inability to arraign the accused within the time periods required under the Manual for Military Commissions. Rather than support the Defense request for continuance, the Defense's position

opportunity for the Military Judge to advise each of the accused regarding their rights to counsel on the record and in open court, as required by RMC 707 and 901. Each of the accused will be provided an opportunity to make their elections or request additional time to meet with assigned counsel to discuss his counsel options.

(4) To postpone the arraignment when it is possible that some of these accused could refuse their detailed counsel in this case is unwarranted. Holding the initial session as scheduled will allow the court to resolve the issues of counsel in a timely manner so that the parties can complete discovery in this case and set an appropriate litigation schedule.

(5) Defense counsel for each of the accused have requested continuances primarily based on their asserted inability to adequately prepare to represent their clients based on lack of adequate facilities, and in certain cases, lack of approved security clearances for assistant detailed counsel and civilian counsel.[3] Defense Counsel in several requests also cite personal commitments that conflict with the scheduled 5 June 2008 arraignment.[4]

(6) All cleared defense counsel have access to TS/SCI approved office spaces and storage facilities, both at Guantanamo Bay, Cuba and in one of the Office of Military Commissions – Defense (OMC-D) offices spaces in the Washington, D.C. Area. On 19 May 2008, the Prosecution and Defense facilities at Guantanamo Bay, Cuba were approved for TS/SCI communications and storage of TS/SCI materials, including Defense notes of interviews with the accused. In addition to the SCIF currently available to the Defense in the Washington, D.C. area, the Office of the Convening Authority has advised the Prosecution that they expect additional TS/SCI office spaces to be completed at that office no later than the end of June. These spaces will allow for increased storage and provide additional office space to accommodate discussions of any TS/SCI information, including those related to communications with their clients.[5]

(7) Assistant Defense Counsel for Ali Abdul Aziz Ali and Mustafa Ahmed Adam al Hawsawi are awaiting final approval of TS/SCI clearances. As of the time of this filing, their

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highlights the importance of conducting the initial session and arraignment of the accused in a timely manner, as presently scheduled.

[3] The Defense in several filings request an 802 teleconference to establish an interval of time to ascertain the progress made on defense facilities and security clearances. The Prosecution intends to provide a proposed trial schedule to the Defense prior to travel to GTMO, and is prepared to discuss the current status of defense facilities and pending security clearances during that meeting. Of course, should the Military Judge consider it necessary to conduct a telephonic 802 teleconference the Prosecution is available.

[4] The personal commitments referenced in the Defense filings highlight the importance of conducting an initial session that will establish dates for subsequent sessions for this military commission. Convening a session, and establishing a litigation schedule, will better allow defense counsel assigned to these cases to plan their personal commitments, taking into account certain dates they will be required to be at Guantanamo Bay in order to represent their clients.

[5] Some of the Defense filings indicate Defense Counsel do not have the ability to transport notes taken during meetings with their clients to their office in the Washington, D.C. area. After becoming aware of this issue, the Prosecution inquired with the Office of the Convening Authority, who advised there was no restriction on transporting notes from Guantanamo Bay, to Washington, D.C., assuming they were properly marked and classified information was appropriately protected. Prior to traveling with classified information, counsel must obtain an appropriate courier card. The Prosecution will assist Defense Counsel in obtaining a courier card upon request.

requests were both pending with the Office of Personnel Management (OPM) and expected to be resolved by mid-June. Of course, the attendance of Assistant Defense Counsel is not required for the initial session. The presence of detailed Defense Counsel is sufficient for purposes of the arraignment.

(8) Defense Counsel in several of the filings cite the inability of civilian defense counsel to be approved and detailed prior to the arraignment. As indicated in the Defense filings, the Office of the Convening Authority is diligently processing all requests from civilian defense counsel and has requested OPM to "fast-track" the requests accordingly. As the Military Judge points out in his 19 May 2008, email, it is understood that civilian counsel may seek to join in the litigation at some time after the initial session. At the initial session, the Military Judge will advise each accused of his right to request civilian counsel. If an accused elects to request an approved civilian counsel, the counsel can be added at a later session.

(9) Additionally, in the Defense Joint Motion to Dismiss (D001), filed on 15 May 2008, Defense Counsel allege that the charges in the instant case were improperly referred to this Military Commission. In addition to the requirement to arraign the accused within 30 days of service of referred charges, it is imperative to resolve the outstanding contested motion as soon as possible. The Defense motion makes serious allegations claiming the Legal Advisor to the Convening Authority and other senior officials have "unlawfully influenced this military commission." The Defense requests the Military Judge to dismiss charges with prejudice, or in the alternative, disqualify the Legal Advisor from further participation in this case. This contested motion should be litigated at the earliest opportunity to resolve the serious issues raised therein.

(10) The interests of justice for the public and the accused in ensuring a prompt trial (*see* RMC 707(b)(4)(E)), are best served by ensuring that the accused are promptly advised in open court regarding the charges they are facing and that they understand their options regarding representation during these proceedings. The Prosecution respectfully requests the Military Judge deny the Defense requests to delay these proceedings, and hold the initial session on 5 June 2008, as scheduled.

7. **Oral argument.** The Prosecution does not request oral argument.

8. **Witnesses.** None.

9. **Certificate of conference**. As stated in each of the defense filings, the parties do not agree on the requested relief.

10. **Additional information.** None

11. **Attachments**. None.

12. **Submitted by**:

For Edward Ryan
Prosecutor
Department of Justice

Robert Swann
Prosecutor
Department of Defense

Thomas Swanton
Prosecutor
Department of Justice

For Jeffrey D. Groharing
Major, U.S. Marine Corps
Prosecutor

Clayton Trivett, Jr.
Prosecutor
Department of Defense

Sent: Thursday, May 22, 2008 5:19 PM

Subject: Commission Ruling: US v Mohammed et al, D-002-006

Follow Up Flag: Follow up

Flag Status: Red

Attachments: Mohammed et al Initial Session Cont.pdf

Col Kohlmann has directed that I forward the attached ruling in US v Mohammed et al to counsel and other interested persons.

V/R
Natalie Lewis Bley
Attorney Advisor
Military Commissions Trial Judiciary

Ms. Bley:
Please forward the attached ruling to the appropriate persons.
V/R,
Ralph H. Kohlmann
Colonel, U.S. Marine Corps

Sent: Thursday, May 22, 2008 12:55 PM

Subject: United States v. Mohammed et al-Prosecution Consolidated Response to D-002; D-003; D-004; D-005; D-006 (Requested Continuance)

Follow Up Flag: Follow up

Flag Status: Red

Attachments: Gov't Response - Defense Requests for continuance - 22 May 2008-filed.pdf

All,

Attached please find the Prosecution's consolidated response to D-002; D-003; D-004; D-005; D-006 (Prosecution's opposition to the Defense request for continuance of the arraignment).

v/r
Clay Trivett
Prosecutor
Office of Military Commissions

Sent: Thursday, May 22, 2008 12:06 PM

Subject: Re: RE: Motions to Continue, D-002, D003, D-004, D-005, D006, US v Mohammed et al.- Special Request for Relief

Follow Up Flag: Follow up
Flag Status: Red

Per Col Kohlmann, the special relief requested by the government counsel concerning the filing of a joint response and request to dispense with conference with defense counsel prior to filing resonse is granted.

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

Date: Thursday, May 22, 2008 10:15
Subject: RE: Motions to Continue, D-002, D003, D-004, D-005, D006, US v Mohammed et al.- Special Request for Relief

> The government will file its response by 1300 today.
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> As the defense motions shared a majority of common issues, the
> governmentprepared a consolidated response, and respectfully makes a
> special request for relief (per Rule 3 of the Military Commissions
> Trial Judiciary Rules of
> Court) to file a consolidated response to D-2 through D-6 (with each
> defense filing designation listed in the caption of the government's
> response).
>
>
> Furthermore, due to the expedited response deadline, the government
> will not be able to confer with the defense on whether they concur or
> object to this special request.

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> Thomas P. Swanton
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> Trial Attorney
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> U.S. Department of Justice
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> Subject: Motions to Continue, D-002, D003, D-004, D-005, D006, US v
> Mohammed et al.
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>
> Counsel in the cases of US v. Mohammed et al.:
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>
> COL Kohlmann has directed that the government respond to the motions
> to continue filed by counsel in the following cases by 1300 today, 22
> May 08.
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> D-002, Defense Motion to Continue, US v Walid Muhammad Salih
> MubarakBin 'Attash
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> D-003, Defense Motion to Continue, US v Ramzi Bin al Shibh
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> D-004, Defense Motion to Continue, US v Mustafa Ahmed Adam al Hawsawi
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> D-005, Defense Motion to Continue, US v Khalid Sheikh Mohammed
>
>
>
> D-006, Defense Motion to Continue, US v Ali Abdul Aziz Ali

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> V/R
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> Natalie Lewis Bley
> Attorney Advisor
> Military Commissions Trial Judiciary
>[redacted]
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UNITED STATES OF AMERICA	**Commission Ruling D-002-006**
	Motions for Continuance of Initial Session/Arraignment
v.	
KHALID SHEIK MOHAMMED et al	**22 May 2008**

1. Nature of Motion:

a. Detailed defense counsel for each of the five accused submitted D-002-006. Each submission seeks a continuance of the initial session previously ordered and scheduled for 5 June 2008. This ruling addresses all five of the noted continuance requests.

b. The five continuance requests express several common bases for the requested relief:

(1) Although the detailed defense counsel for each accused apparently possesses the requisite security clearances for performance of her or his duties, clearance granting procedures are still underway with regard to numerous assistant defense counsel and civilian defense counsel;

(2) The lack of security clearances for assistant defense counsel and civilian defense counsel has limited their involvement in the case with regard to matters such as meeting with clients, discussing the detailed defense counsel's meetings with the clients, and examining classified portions of discovery materials;

(3) Due to logistic and security factors, detailed defense counsel have had, to date, only a limited ability to meet with their clients;

(4) Defense office spaces at GTMO and in Washington DC are deemed inadequate to deal with the classified material associated with this case;

(5) Discovery matters have not been completed; and

(6) Several counsel have personal matters planned that conflict with the previously ordered initial session date of 5 June 2008.

c. The Commission finds that counsel have adequately covered all matters of import to this issue within the confines of the motions and the response, such that a reply to the response is not necessary.

2. Discussion:

a. Charges in this case were referred to the Commission for trial on 9 May 2008. The 5 June 2008 initial session was ordered by the Military Judge on 14 May 2008 after the Military Commission Trial Judiciary Staff received notice concerning the detailing of counsel as trial and defense counsel.

b. Service of charges upon the accused in accordance with RMC 602 was accomplished on 21 May 2008, thereby initiating the speedy trial provisions of RMC 707.

c. The initial session is intended to:

1) satisfy the RMC 707 requirement for arraignment of the accused in accordance with RMC 904 within 30 days of service of the referred charges; and,

2) provide the Military Judge the opportunity to advise the accused with regard to their rights to counsel and to ascertain whether or not the accused intend to exercise their counsel rights; and

3) ascertain what counsel, if any, will be representing the accused.

d. Some of the issues raised in D-002-006 are matters of consequence with regard to ensuring the defense is provided a full opportunity to prepare for trial. None of the issues raised in D-002-006, however, provide a valid basis for delaying the initial session and arraignment in this case. As noted in the prosecution response to D-002-006, the arraignment process does not require any decision making or action of consequence by the defense beyond the counsel right elections noted above. In this regard, it is typical for accused in military courts of all types to defer entry of motions and pleas during an initial court session. Additionally, it is well established that elections made at initial court sessions, to include counsel selections, are routinely changed at a later stage of the proceedings. Accordingly, the fact that all defense counsel are not yet fully integrated into the litigation process is not a valid basis in support of the continuance request.

e. Several of the defense submissions express concern that defense counsel other than the detailed defense counsel are not yet in a position to participate in development of possible voir dire of the Military Judge prior to the 26 May 2008 submission deadline established in the Commission order of 14 May 2008. In this regard, the Commission notes that the 26 May 2008 voir dire submission deadline applies only in the event counsel for an accused intend to conduct voir dire of the Military Judge at the initial session. In the event that counsel for the accused elect to defer voir dire of the Military Judge until the next session of the case, a later submission deadline will be established.

f. Similarly, the concerns expressed by the defense with regard to the adequacy of their working spaces is not a matter that justifies a delay of the initial session and arraignment in this case. Based on the representation in the prosecution response with regard to the approval of the SCIF for the ELC at GTMO, it appears that progress is being made with regard to dealing with the logistic challenges associated with this case. It is likely that the lawyers' tasks in this case are going to be difficult in several regards. If the office space concerns noted in D-002-006 remain unresolved such that the

inadequacy is interfering with the defense's responsibility with regard to their clients, the defense will be allowed to submit subsequent requests for relief concerning litigation milestones that will be established by the Military Judge.

g. The fact that discovery in accordance with the MMC has not yet been completed is not a proper basis for continuing the initial session and arraignment in any case. Discovery milestones will be established by the Military Judge and it is likely that some measure of litigation will be required before that process will be deemed complete.

h. The Commission regrets that the established litigation schedule conflicts with the personal plans of some of the counsel in this case. These personal conflicts, however, do not provide an appropriate basis for delaying the scheduled 5 June 2008 session. Starting the process and establishing a schedule will benefit all counsel with regard to avoiding future conflicts.

i. The Commission finds that the interests of justice in this case will be best served by completion of the initial session and arraignment as previously ordered on 5 June 2008. The Commission recognizes that there are many logistic and legal issues that will need to be addressed in this case. It is precisely because of the anticipated complexity of this case, that it is important that the process get underway.

3. **Ruling:** The defense requests in D-002-006 for continuance of the initial session and arraignment scheduled for 5 June 2008 are denied.

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

Edmonds, Matthew, SSG, DoD OGC

From: Fitzgibbons, Amy, MAJ, DoD OGC
Sent: Monday, May 19, 2008 3:06 PM
To: [redacted]
Cc:
Subject: U.S. v. Mohammad et al-Request for Arraignment Delay and Other Relief (Ali Azi Abdul Ali)
Signed By: [redacted]
Attachments: Dec of Mr. Robinson 5-19-08.pdf; Dec of Ms. Lee re NOA 5-19-08.pdf; Form 9-2 of Mr. Robinson 2-27-08.pdf; Form 9-2 Ms. Lee 2-25-08.pdf; Qualification Letter - Mr Robinson.pdf; Qualification Letter - Ms Lee.pdf; US v Hamdan ruling dtd 2008-05-16.pdf

Sir,

The defense, on behalf of Mr. Ali Abdul Aziz Ali, respectfully submits the following request for continuance in the
arraignment and an enlargement of to file its written voir dire:

1. Timeliness. This request for relief is filed within the time frame established by the Military Judge's order of 14 May 2008.

2. Relief Sought. The defense respectfully requests this Commission grant a delay in the arraignment scheduled for 5 June 2008 until such date that both military and civilian counsel possess the required security clearances and have the opportunity to consult with Mr. Ali. Although the defense does not control the processing of security clearances, the defense anticipates that detailed military counsel and at least one civilian counsel will be granted their clearances within 60 days. The defense also requests an enlargement of time to file both notice of appearance of civilian counsel and written voir dire to the Military Judge.

3. Overview. The defense respectfully requests a delay in the arraignment until a competent defense team is assembled to represent Mr. Ali. To date, lead counsel is the only attorney qualified to communicate with Mr. Ali. He cannot, alone, provide Mr. Ali with effective representation. Detailed counsel have diligently sought the assistance of civilian counsel with significant federal criminal litigation experience. These civilian counsel have been qualified by the Chief Defense Counsel to represent detainees conditioned on approval of their security clearances. Consequently, civilian counsel have not met with Mr. Ali and therefore, cannot ethically enter a notice of appearance. *See*, Declarations of Mr. Jeffrey Robinson and Ms. Amanda Lee. The defense seeks additional time for detailed military counsel and civilian counsel to meet with Mr. Ali. Civilian counsel may then file their notices of appearance and assist detailed counsel in representing Mr. Ali at arraignment.

The defense also seeks the opportunity to conduct a comprehensive voir dire of the Military Judge consistent with R.M.C. 902. The starting point for this voir dire will be

the written questions required by this Commission's order to be submitted on 26 May 2008. To allow for meaningful participation of all counsel, the defense requests an enlargement of time to file its written voir dire.

4. Statement of Facts.

a. LCDR Mizer was detailed to represent Mr. Ali on 7 April 2008. LCDR Mizer met with Mr. Ali shortly before the charges against him were referred to a commission authorized to impose the death penalty. Mr. Ali is receptive to working with both additional detailed counsel and civilian counsel. LCDR Mizer is also lead military counsel in *U.S. v. Salim Hamdan*.

b. On 16 May 2008, Judge Allred granted a defense request for delay in Mr. Hamdan's trial based on the need for a competency determination, the pending decision of the U.S. Supreme Court in *Boumediene v. Bush* and to allow counsel additional time to dissuade Mr. Hamdan from boycotting the proceedings. The *Hamdan* Commission is scheduled to hear motions on 14 July 2008. The trial is scheduled for two weeks beginning 21 July 2008. LCDR Mizer is unavailable to represent while in trial with Mr. Hamdan.

c. On 1 May 2008, the Chief Defense Counsel detailed Major Amy Fitzgibbons to Mr. Ali's case. The government has not yet approved Major Fitzgibbons' application for the required security clearances. As result, MAJ Fitzgibbons has not had the opportunity to meet with Mr. Ali or to speak with LCDR Mizer regarding his consultation with Mr. Ali. The Office of the Chief Defense Counsel has received assurances from the Office of the Secretary of Defense that MAJ Fitzgibbons' security clearance is being "fast tracked."

d. Mr. Jeffrey Robinson and Ms. Amanda Lee are civilian practitioners in Seattle, Washington. Both Mr. Robinson and Ms. Lee have extensive experience defending cases involving complex criminal litigation, including conspiracy and domestic terrorism. Based on their demonstrated competency, both Mr. Robinson and Ms. Lee were selected by the National Association of Criminal Defense Lawyers and the American Civil Liberties Union to participate in the John Adams Project. With the assistance of civilian practitioners, the project aims to create defense teams qualified to zealously and effectively represent detainees charged with capital offenses.

e. Mr. Robinson and Ms. Lee have been in contact with the Office of the Chief Defense Counsel since early February 2008. Both counsel applied to the Chief Defense Counsel for inclusion in the pool of civilian counsel qualified to represent detainees. On 10 April, both counsel were notified that they were qualified to represent detainees conditioned on their receipt of the appropriate security clearances. On 27 February, Mr. Robinson forwarded his completed SF 86 to the Office of the Chief Defense Counsel. Ms. Lee forwarded her application on 29 February.

f. On 16 May 2008, the Chief Defense Counsel requested the Security Manager for the Office of the Secretary of Defense provide a status update regarding civilian counsels' applications for TS/SCI clearances. The Security Manager indicated that Mr. Robinson's clearance had been transferred to the Office of Personnel Management and would be placed on the "fast track" for approval within approximately thirty-five days. Unfortunately, Ms. Lee's clearance was not given the same treatment. Subsequent to this conversation, the Chief Defense Counsel requested that Ms. Lee's clearance also

be "fast tracked."

g. No counsel has had the opportunity to meet with Mr. Ali since his charges were referred capitally.

5. Legal Argument and Authority.

a. Need for Qualified Counsel. At arraignment, Mr. Ali will make his first appearance before this Commission. At which time, he will be instructed by the Military Judge as to the nature of the charges against him as well as the choices he must make with respect to counsel and the entry of a plea. The assistance of counsel is critical to Mr. Ali's ability to understand the arraignment proceedings and to make intelligent and informed decisions at arraignment.

Mr. Ali is entitled to the assistance of competent counsel during all phases of the proceedings against him. *Powell v. Alabama*, 287 U.S. 45 (1932). In the context of a capital proceeding, the role of counsel assumes an even greater significance. For that reason, the American Bar Association adopted Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (hereinafter "Guidelines") (reprinted at Hofstra Law Review Summer 2003). The Guidelines represent "the national standard of practice for the defense of capital cases." Guideline 1.1 Their jurisdiction extends to trial before military commission. *See* Discussion to Guideline 1.1. The Guidelines recognize that the only effective approach to capital litigation involves the assembly of a capital defense team, which includes no fewer than two qualified defense counsel. Guideline 4.1. The qualification of counsel is governed by Guideline 5.1. The Guidelines adopt a qualitative approach in determining whether the defense team in the aggregate has the ability to provide high quality legal representation.

In the instant case, LCDR Mizer stands alone in the representation of Mr. Ali. He cannot effectively prepare Mr. Ali for arraignment absent the advice and assistance of additional counsel. Here, counsel stand willing to assist Mr. Ali but have been frustrated in their efforts by their lack of security clearances.

b. Significance of Arraignment. The arraignment is not a pro forma proceeding by any measure. First, Mr. Ali is going to be notified of the nature of the charges against him. Prior to the arraignment, particularly in a capital case, the defense should be given the opportunity to explain to Mr. Ali that his case has been referred capitally. Second, at arraignment, the Military Judge will discuss Mr. Ali's options with respect to the right to counsel. Presumably, the military judge will also explain to Mr. Ali that he has the right to represent himself in these proceedings. In order to make an informed decision, Mr. Ali must be provided the opportunity to consult with counsel. Mr. Ali's decision to work with counsel will have an enduring impact on the actual and perceived fairness of these proceedings. Through this request for delay, the defense is simply seeking the opportunity to establish an attorney-client relationship with Mr. Ali prior to his first appearance.

Finally, the arraignment is significant because it marks the point after which Mr. Ali may elect to absent himself from further proceedings with the permission of the military judge. *See* R.M.C. 804. Several military commissions, including *Hamdan*, are struggling with the prospect of boycotting accused. With a qualified team of counsel, the defense can begin to advise Mr. Ali regarding the military commissions' process and how his defense stands to benefit from his participation.

c. Significance of *Boumediene*. In December 2007, the Supreme Court heard oral arguments in the case of *Boumediene v. Bush*. The court is expected to release its ruling by the end of June. The issue before the Court is whether the Constitutional right to habeas corpus applies to detainees, such as Mr. Ali. In granting the defense request for delay in *Hamdan,* that Commission recognized the *Boumediene* decision will provide guidance regarding the applicability of the Constitution in these proceedings. The *Hamdan* Commission found delay ". . .permits all parties to have the benefit of a decision that may well change the tenor or conduct of the trial, and avoids the potential embarrassment, waste of resources, and prejudice to the accused that would accompany an adverse decision

mid-trial. . ."

The need for guidance regarding the applicability of the constitution is particularly compelling in this, a capital case. The Supreme Court has long recognized that substantive and procedural protections rooted in the Fourteenth and Eight Amendment to the U.S. Constitution are necessary in capital cases to ensure fairness and reliability. Given the potential impact of this ruling, the Commission should permit a relatively brief delay for its consideration.

d. Significance of Voir Dire. An accused has a constitutional right to an impartial judge. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927). Rule for Military Commission 902 (a) states that "a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." The military judge is cautioned to "broadly construe" the possible grounds for challenge, but he or she should not leave a given case "unnecessarily." RMC (d)(1), Discussion. The defense requires more time to adequately research the potential grounds for challenge and to develop written questions in response to the military judge's directive. In the event that the Military Judge grants a delay in the arraignment, no party is prejudiced by the grant of additional time to permit the defense team to collectively develop and submit its voir dire questions.

6. The Government opposes the defense requested relief.

7. Attachments. In support of the requested relief, the Defense submits the following:

a. Declaration of Jeffrey Robison, dated 19 May 2008;
b. Letter from Chief Defense Counsel to Mr. Robinson, dated 10 April 2008;
c. MC Form 9-2 of Mr. Robinson, dated 21 February 2008;
d. Declaration of Amanda Lee, dated 19 May 2008;
e. Letter from Chief Defense Counsel to Ms. Lee, dated 10 April 2008;
f. MC Form 9-2 of Ms. Lee, dated 25 February 2008; and
g. *U.S. v Hamdan* Ruling dated 16 May 2008.

Respectfully Submitted,

By:_____
LCDR BRIAN MIZER, JAGC, USN

MAJ AMY FITZGIBBONS, JAGC, USAR

<<...>> <<...>> <<...>> <<...>> <<...>> <<...>> <<...>>

UNITED STATES OF AMERICA, v. ALI ABDUL AZIZ ALI	**DECLARATION OF CIVILIAN DEFENSE COUNSEL** RE: NOTICE OF APPEARANCE AND AGREEMENT (MAY 19, 2008)

I, JEFFERY P. ROBINSON, hereby declare as follows:

1. I am a civilian attorney license to practice in the State of Washington. I make this declaration based upon personal knowledge. I am over the age of 18 and competent to testify to the matters set forth herein.

[redacted]

3. I have been notified of the Military Commission Trial Judge's directive of May 14, 2008, that "Civilian counsel who intend to be Civilian Defense Counsel (CDC) on this case shall provide a signed and completed copy of Form 4-1, the CDC Notice of Appearance and Agreement (See Rules of Court) via email to the MCTJ Staff NLT 1630 hours EDT, 19 May 2008."

4. I have been in communication for several weeks with Lt. Cmdr. Brian Mizer, who is detailed military counsel for Mr. Ali. I understand that Mr. Ali wishes to meet with Ms. Lee and me to confirm our representation of him as civilian defense counsel within the meaning of the Military Commissions Act.

5. I am familiar with the requirements of the Military Commissions Act, § 949c(3) for civilian defense counsel representing accused persons. I am a United States citizen. I am and active member in good standing licensed to practice law in the following jurisdictions: WASHINGTON STATE; UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON; NINTH CIRCUIT COURT OF APPEALS. I have not been the subject of any sanction of disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct.

6. I have signed a written agreement to comply with all applicable regulations or instructions for counsel, including the rules of court for conduct during the proceedings. I have attached MC Form 9-2, Affidavit and Agreement by Civilian Defense Counsel.

7. I have submitted the following application materials to be determined eligible for access to classified information at a level appropriate for the case. On February 27, 2008, I submitted the Questionnaire for National Security Positions, form SF86, and on April 10, 2008, I submitted the SCI Nondisclosure Agreement. I understand that the processing of my application for TS/SCI clearance is ongoing.

8. It is my intention to file MC Form 4-1, Notice of Appearance, at the earliest possible date consistent with the client's confirmation of my representation of him in this matter. Communication with Mr. Ali is impossible without the security clearance required in this case. I am available to travel to GTMO to meet with Mr. Ali as soon as I receive the requisite clearance. Until then, however, I have no ability to communicate in person with Mr. Ali on matters related to representation and the case. Without an effective avenue for communication, I do not believe I can in good conscience represent to the tribunal that I am competently or effectively representing Mr. Ali's interests.

9. Speaking to a client prior to the time of arraignment is important in any criminal case. This is especially true where, as here, the arraignment is a critical stage – a point at which rights and responsibilities are triggered or may be waived. In order for a client to make an informed decision about the consequences of his actions at arraignment, the client must have communicated with counsel, generally through meetings and discussions before the appearance at arraignment.

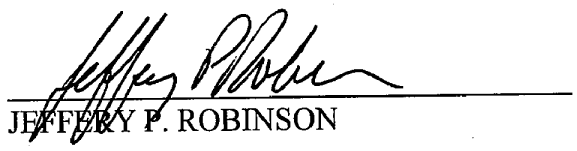
10. In a capital case the need for personal contact and discussion before arraignment is even more important. Counsel must be sure that the client understands that conviction may lead to his execution. The potential for execution may have an enormous impact on the client's decisions about the nature and course of his defense. A client may choose an aggressive defense that challenges any and all allegations made by the government. Or a client may decide to have counsel approach the government to negotiate a resolution that avoids the death penalty. A client may even determine that he wishes to plead guilty at arraignment or soon thereafter and concentrate the defense effort on the penalty phase.

11. I have 27 years of criminal trial experience, and I have been counsel in a capital murder case in Washington State. I am not currently certified in the state of Washington to be lead counsel in a capital murder case without the assistance of counsel experienced in the law of capital punishment. Therefore it will be necessary for other counsel to appear at a later date to insure that Mr. Ali has appropriate representation consistent with guidelines set by the American Bar Association and Washington State Superior Court Special Proceedings Rule 2.

12. In my experience, these are discussions that must begin before the arraignment date. Due to the lengthy process of obtaining the required security clearance in this matter, Ms. Lee and I have not been able to gain a detailed factual understanding of the case or to even meet with Mr. Ali. Thus, while we have no desire to evade a directive of the tribunal, we are in a position that prevents us from undertaking even the most basic tasks of representing Mr. Ali.

I declare under penalty of perjury under the laws of the State of Washington and of the United States of America that the foregoing is true and correct.

DATED in Seattle, Washington, this 19th day of May, 2008.



JEFFERY P. ROBINSON

UNITED STATES OF AMERICA, v. ALI ABDUL AZIZ ALI	**DECLARATION OF CIVILIAN DEFENSE COUNSEL** RE: NOTICE OF APPEARANCE AND AGREEMENT (MAY 19, 2008)

I, AMANDA E. LEE, hereby declare as follows:

1. I am a civilian attorney license to practice in the State of Washington. I make this declaration based upon personal knowledge. I am over the age of 18 and competent to testify to the matters set forth herein.

3. I have been notified of the Military Commission Trial Judge's directive of May 14, 2008, that "Civilian counsel who intend to be Civilian Defense Counsel (CDC) on this case shall provide a signed and completed copy of Form 4-1, the CDC Notice of Appearance and Agreement (See Rules of Court) via email to the MCTJ Staff NLT 1630 hours EDT, 19 May 2008."

4. I have been in communication for several weeks with Lt. Cmdr. Brian Mizer, who is detailed military counsel for Mr. Ali. I understand that Mr. Ali wishes to meet with Mr. Robinson and me to confirm our representation of him as civilian defense counsel within the meaning of the Military Commissions Act.

5. I am familiar with the requirements of the Military Commissions Act, § 949c(3) for civilian defense counsel representing accused persons. I am a United States citizen. I am and active member in good standing licensed to practice law in the following jurisdictions: WASHINGTON STATE; UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON; NINTH CIRCUIT COURT OF APPEALS. I have not been the subject of any sanction of disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct.

6. I have signed a written agreement to comply with all applicable regulations or instructions for counsel, including the rules of court for conduct during the proceedings. I have attached MC Form 9-2, Affidavit and Agreement by Civilian Defense Counsel.

7. I have submitted the following application materials to be determined eligible for access to classified information at a level appropriate for the case. On February 29, 2008, I submitted the Questionnaire for National Security Positions, form SF86, and on April 10, 2008, I submitted the SCI Nondisclosure Agreement. I understand that the processing of my application for TS/SCI clearance is ongoing.

8. It is my intention to file MC Form 4-1, Notice of Appearance, at the earliest possible date consistent with the client's confirmation of my representation of him in this matter. Communication with Mr. Ali is impossible without the security clearance required in this case. I am available to travel to GTMO to meet with Mr. Ali as soon as I receive the requisite clearance. Until then, however, I have no ability to communicate in person with Mr. Ali on matters related to representation and the case. Without an effective avenue for communication, I do not believe I can in good conscience represent to the tribunal that I am competently or effectively representing Mr. Ali's interests.

9. Speaking to a client prior to the time of arraignment is important in any criminal case. This is especially true where, as here, the arraignment is a critical stage – a point at which rights and responsibilities are triggered or may be waived. In order for a client to make an informed decision about the consequences of his actions at arraignment, the client must have communicated with counsel, generally through meetings and discussions before the appearance at arraignment.

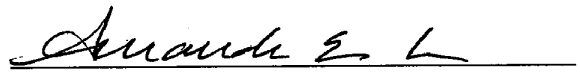
10. In a capital case the need for personal contact and discussion before arraignment is even more important. Counsel must be sure that the client understands that conviction may lead to his execution. The potential for execution may have an enormous impact on the client's decisions about the nature and course of his defense. A client may choose an aggressive defense that challenges any and all allegations made by the government. Or a client may decide to have counsel approach the government to negotiate a resolution that avoids the death penalty. A client may even determine that he wishes to plead guilty at arraignment or soon thereafter and concentrate the defense effort on the penalty phase.

11. I have been engaged in criminal defense practice for over eleven years. Prior to that, I clerked in federal district and appellate courts for five years. I served as designated capital clerks at both the district and appellate levels, and served on the Ninth Circuit Death Penalty Task Force. I am not currently certified in the state of Washington to be lead counsel in a capital murder case without the assistance of counsel experienced in the law of capital punishment. Therefore, it will be necessary for other counsel to appear at a later date to insure that Mr. Ali has appropriate representation consistent with guidelines set by the American Bar Association and Washington State Superior Court Special Proceedings Rule 2.

12. In my experience, these are discussions that must begin before the arraignment date. Due to the lengthy process of obtaining the required security clearance in this matter, Mr. Robinson and I have not been able to gain a detailed factual understanding of the case or to even meet with Mr. Ali. Thus, while we have no desire to evade a directive of the tribunal, we are in a position that prevents us from undertaking even the most basic tasks of representing Mr. Ali.

I declare under penalty of perjury under the laws of the State of Washington and of the United States of America that the foregoing is true and correct.

DATED in Seattle, Washington, this 19th day of May, 2008.



AMANDA E. LEE

AFFIDAVIT AND AGREEMENT BY CIVILIAN DEFENSE COUNSEL

Pursuant to the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *codified in part at* 10 U.S.C. § 948a, *et seq.*, the Manual for Military Commissions promulgated January 18, 2007, and Chapter 9 of the Regulations for Trial by Military Commission, I, Mandy E. Lee, make this Affidavit and Agreement for the purposes of applying for qualification as a member of the pool of civilian defense counsel available to represent the accused before military commissions and serving in that capacity.

I. Oaths or Affirmations. I swear or affirm that the following information is true to the best of my knowledge and belief:

A. I have read and understand the Secretary's Manual for Military Commissions, and all other Military Commissions Regulations, Orders, Instructions and Directives applicable to trial by military commissions. I will read all amendments, rescissions or promulgations pertinent to the aforementioned.

B. I am aware that my qualification as a civilian defense counsel does not guarantee my access to any information subject to the national security privilege under 10 U.S.C. § 949d(f).

II. Agreements. I hereby agree to comply with all applicable regulations and rules for counsel, including any rules of court governing proceedings, and specifically agree, without limitation, to the following:

A. I will notify the Chief Defense Counsel and, as applicable, the relevant military judge immediately if, after the execution of this Affidavit and Agreement but prior to the conclusion of proceedings (defined as the review and final decision of the Court of

Military Commission Review), there is any material change in any of the information provided in my application, including this Affidavit and Agreement, for qualification as member of the civilian defense counsel pool. I understand that such notification shall be in writing and shall set forth the substantive nature of the changed information.

B. I will be well prepared and will conduct the defense zealously, representing the accused throughout the military commission process, from the inception of my representation through the completion of any post-trial proceedings as detailed in 10 U.S.C. §§ 950a-950j and R.M.C. 1101-1209. Prior to undertaking representation of the accused, I will ensure that I can commit sufficient time and resources to handle the accused's case expeditiously and competently. In making this assessment, I am aware that the military judge may deny any request for a delay or continuance of proceedings based on reasons relating to matters that arise in the course of my law practice or other professional or personal activities that are not related to military commission proceedings, if in the military judge's determination such a continuation would unreasonably delay the proceedings.

C. The defense team shall consist entirely of myself, detailed defense counsel, and other personnel provided by the Chief Defense Counsel, the military judge, or the convening authority. I understand I must include the justification for particular individuals to be added to the defense team in a request to the Chief Defense Counsel, the military judge, or the convening authority as appropriate, and I will state any special requests regarding access to the accused, classified information, as defined at 10 U.S.C. § 948a(4), or privileged under 10 U.S.C. § 949d(f), R.M.C. 701, and Mil.

Comm. R. Evid. 505, or the ability to enter into a confidential relationship. Regarding entering into a confidential relationship, I understand that those determined eligible to receive attorney confidences or attorney work product containing facts specific to the case will be required to complete an affidavit similar to this Form prior to receiving any attorney confidences or attorney work product containing facts specific to the case. I further understand that those I request to have access to the accused, other detainees, or classified information will be required to obtain a security clearance and be specifically approved for access to each individual or item of classified information requested, prior to access being granted. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified information or privileged information. I will make no claim against the U.S. Government for any fees or costs associated with my conduct of the defense or related activities or efforts.

D. Recognizing that my representation does not relieve detailed defense counsel of duties specified in 10 U.S.C. § 949c(b) and R.M.C. 502(d)(6), I will work cooperatively with such counsel to ensure coordination of efforts and to ensure such counsel is capable of conducting the defense independently if necessary.

E. During my representation of an accused before a military commission, I will comply with the following restrictions on my travel and communications:

1. I will not discuss, transmit, communicate, or otherwise share documents or information that are classified or protected prior to their use at trial, with anyone except as is necessary to represent my client before a military commission. In the case of doubt regarding whether I may share information about a case with

another, I understand that I have an affirmative duty to request clarification from the Deputy General Counsel (Personnel and Health Policy) or military judge before discussing, transmitting, communicating, or otherwise sharing documents or information. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified information and material, or other protected information.

2. I understand that once proceedings have begun, I may be required by the military judge to remain at the site of the proceedings until he or she approves my departure.

3. I understand I will obtain prior approval from the convening authority for a country clearance for travel to Guantanamo Bay, Cuba.

F. At no time, to include any period subsequent to the conclusion of the proceedings, will I make any public or private statements regarding any closed sessions of the proceedings or any document or material constituting classified information under 10 U.S.C. § 948a(4) or subject to the national security privilege under 10 U.S.C. § 949d(f), R.M.C. 701, and Mil. Comm. R. Evid. 505. This restriction does not apply to discussions with other members of the defense team or the Chief Defense Counsel who are appropriately authorized to receive the specific classified information and privileged information in question, when such disclosure is related to the defense efforts on behalf of the accused during military commission proceedings or subsequent review. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified or privileged information.

G. I understand and agree to comply with all rules, regulations and instructions governing the handling of classified information and material or other privileged information.

H. I understand that there may be reasonable restrictions on the time and duration of contact I may have with my client, as imposed by the convening authority, the military judge, detention authorities, or regulation.

I. I understand that communications with an accused are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal services to the client.

J. I agree that I shall reveal to the Chief Defense Counsel, and any other appropriate authorities, information relating to the representation of my client to the extent that I reasonably believe necessary to prevent the commission of a future criminal act that I believe is likely to result in death or substantial bodily harm, or significant impairment of national security.

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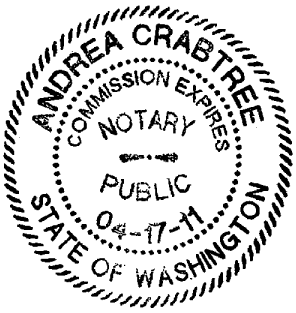
K. I understand and agree that nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as counselor for my client(s).

Dated this 25th day of February, 2008, at Seattle, Washington.

Mandy E. Lee
MANDY E. LEE

STATE OF WASHINGTON)
)
COUNTY OF KING)

Sworn to and subscribed before me, by Amanda E. Lee, this 25th day of February, 2008.



Andrea Crabtree
NOTARY: ANDREA CRABTREE
My commission expires: 4/17/2011

AFFIDAVIT AND AGREEMENT BY CIVILIAN DEFENSE COUNSEL

Pursuant to the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *codified in part at* 10 U.S.C. § 948a, *et seq.*, the Manual for Military Commissions promulgated January 18, 2007, and Chapter 9 of the Regulations for Trial by Military Commission, I, Jeffery P. Robinson, make this Affidavit and Agreement for the purposes of applying for qualification as a member of the pool of civilian defense counsel available to represent the accused before military commissions and serving in that capacity.

I. Oaths or Affirmations. I swear or affirm that the following information is true to the best of my knowledge and belief:

A. I have read and understand the Secretary's Manual for Military Commissions, and all other Military Commissions Regulations, Orders, Instructions and Directives applicable to trial by military commissions. I will read all amendments, rescissions or promulgations pertinent to the aforementioned.

B. I am aware that my qualification as a civilian defense counsel does not guarantee my access to any information subject to the national security privilege under 10 U.S.C. § 949d(f).

II. Agreements. I hereby agree to comply with all applicable regulations and rules for counsel, including any rules of court governing proceedings, and specifically agree, without limitation, to the following:

A. I will notify the Chief Defense Counsel and, as applicable, the relevant military judge immediately if, after the execution of this Affidavit and Agreement but prior to the conclusion of proceedings (defined as the review and final decision of the Court of

Military Commission Review), there is any material change in any of the information provided in my application, including this Affidavit and Agreement, for qualification as member of the civilian defense counsel pool. I understand that such notification shall be in writing and shall set forth the substantive nature of the changed information.

B. I will be well prepared and will conduct the defense zealously, representing the accused throughout the military commission process, from the inception of my representation through the completion of any post-trial proceedings as detailed in 10 U.S.C. §§ 950a-950j and R.M.C. 1101-1209. Prior to undertaking representation of the accused, I will ensure that I can commit sufficient time and resources to handle the accused's case expeditiously and competently. In making this assessment, I am aware that the military judge may deny any request for a delay or continuance of proceedings based on reasons relating to matters that arise in the course of my law practice or other professional or personal activities that are not related to military commission proceedings, if in the military judge's determination such a continuation would unreasonably delay the proceedings.

C. The defense team shall consist entirely of myself, detailed defense counsel, and other personnel provided by the Chief Defense Counsel, the military judge, or the convening authority. I understand I must include the justification for particular individuals to be added to the defense team in a request to the Chief Defense Counsel, the military judge, or the convening authority as appropriate, and I will state any special requests regarding access to the accused, classified information, as defined at 10 U.S.C. § 948a(4), or privileged under 10 U.S.C. § 949d(f), R.M.C. 701, and Mil.

Comm. R. Evid. 505, or the ability to enter into a confidential relationship. Regarding entering into a confidential relationship, I understand that those determined eligible to receive attorney confidences or attorney work product containing facts specific to the case will be required to complete an affidavit similar to this Form prior to receiving any attorney confidences or attorney work product containing facts specific to the case. I further understand that those I request to have access to the accused, other detainees, or classified information will be required to obtain a security clearance and be specifically approved for access to each individual or item of classified information requested, prior to access being granted. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified information or privileged information. I will make no claim against the U.S. Government for any fees or costs associated with my conduct of the defense or related activities or efforts.

D. Recognizing that my representation does not relieve detailed defense counsel of duties specified in 10 U.S.C. § 949c(b) and R.M.C. 502(d)(6), I will work cooperatively with such counsel to ensure coordination of efforts and to ensure such counsel is capable of conducting the defense independently if necessary.

E. During my representation of an accused before a military commission, I will comply with the following restrictions on my travel and communications:

1. I will not discuss, transmit, communicate, or otherwise share documents or information that are classified or protected prior to their use at trial, with anyone except as is necessary to represent my client before a military commission. In the case of doubt regarding whether I may share information about a case with

another, I understand that I have an affirmative duty to request clarification from the Deputy General Counsel (Personnel and Health Policy) or military judge before discussing, transmitting, communicating, or otherwise sharing documents or information. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified information and material, or other protected information.

2. I understand that once proceedings have begun, I may be required by the military judge to remain at the site of the proceedings until he or she approves my departure.

3. I understand I will obtain prior approval from the convening authority for a country clearance for travel to Guantanamo Bay, Cuba.

F. At no time, to include any period subsequent to the conclusion of the proceedings, will I make any public or private statements regarding any closed sessions of the proceedings or any document or material constituting classified information under 10 U.S.C. § 948a(4) or subject to the national security privilege under 10 U.S.C. § 949d(f), R.M.C. 701, and Mil. Comm. R. Evid. 505. This restriction does not apply to discussions with other members of the defense team or the Chief Defense Counsel who are appropriately authorized to receive the specific classified information and privileged information in question, when such disclosure is related to the defense efforts on behalf of the accused during military commission proceedings or subsequent review. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified or privileged information.

G. I understand and agree to comply with all rules, regulations and instructions governing the handling of classified information and material or other privileged information.

H. I understand that there may be reasonable restrictions on the time and duration of contact I may have with my client, as imposed by the convening authority, the military judge, detention authorities, or regulation.

I. I understand that communications with an accused are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal services to the client.

J. I agree that I shall reveal to the Chief Defense Counsel, and any other appropriate authorities, information relating to the representation of my client to the extent that I reasonably believe necessary to prevent the commission of a future criminal act that I believe is likely to result in death or substantial bodily harm, or significant impairment of national security.

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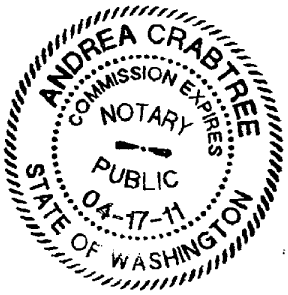
K. I understand and agree that nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as counselor for my client(s).

Dated this 21st day of February, 2008, at Seattle, Washington.

JEFFERY P. ROBINSON
Schroeter, Goldmark & Bender
810 Third Avenue, Suite 500
Seattle, WA 98104

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Sworn to and subscribed before me, by Jeffery P. Robinson, this 21st day of February, 2008.



NOTARY: ANDREA CRABTREE
My commission expires: 4/17/2011

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
[redacted]

April 10, 2008

Schroeter Goldmark & Bender
Attention: Jeffery P. Robinson
[redacted]

Reference: Qualification to practice before the Military Commissions

Dear Mr. Robinson,

I am pleased to inform you that your application for admission into the pool of qualified civilian defense counsel to practice before the Military Commissions has been conditionally approved.

Please remember that your Security Clearance may still be in the process of being issued/updated. **A Security Clearance is required so without one you will not be able to practice before the Commissions.** Your point of contact with respect to the Security Clearance is Ms. Clemencia Jemison and she may be reached at [redacted]

Sincerely,

Steven David
COL, USAR
Chief Defense Counsel

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

April 10, 2008

Schroeter Goldmark & Bender
Attention: Mandy Lee
[redacted]

Reference: Qualification to practice before the Military Commissions

Dear Ms Lee,

I am pleased to inform you that your application for admission into the pool of qualified civilian defense counsel to practice before the Military Commissions has been conditionally approved.

Please remember that your Security Clearance may still be in the process of being issued/updated. **A Security Clearance is required so without one you will not be able to practice before the Commissions**. Your point of contact with respect to the Security Clearance is Ms. Clemencia Jemison and she may be reached [redacted]

Sincerely,

Steven David
COL, USAR
Chief Defense Counsel

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

D-040

RULING ON MOTION
FOR CONTINUANCE OF HEARING
AND TRIAL DATES

16 May 2008

The Defense has moved the Commission for a continuance of the scheduled motions session now set for the week of May 27th, and of the trial dates, now set for the week of June 2nd, offering several grounds. The Government opposes the continuance, and rejects each of the Defense's bases for it. The Motion was submitted on May 13, the Government's opposition was filed on May 15th, and both parties submitted the matter without oral argument to permit a prompt resolution of the request. The parties are scheduled to travel to Guantanamo Bay for trial one week from tomorrow.

The Defense request was to permit time for a hearing into the competency of the accused to stand trial and participate in his defense, and for the Defense expert Dr. Keram to conduct additional examinations of the accused; to permit Defense Counsel to consider their ethical obligations in light of Mr. Hamdan's instructions that they not speak in his absence, as they observe he may have given those instructions while under a "diminished capacity"; to permit the completion of discovery and examination of the pocket litter; to await the decision of the United States Supreme Court in *United States v. Boumediene*, which is expected before the close of the Court's term on June 30th; and to permit the Defense more time to persuade Mr. Hamdan to withdraw from his boycott and attend the trial.

The Government argues that Mr. Hamdan's competence can be determined under RMC 706 without the need for any delay for an RMC 909 hearing, or for hiring a Defense psychiatrist to conduct further examinations; that there is adequate time for the Defense to resolve ethical questions before trial once the RMC 706 board is complete; that the Government has complied with all its discovery obligations, as the material the Defense claims to be waiting for is either not discoverable or is simply unavailable or unknown to the Government; that no federal court anywhere has delayed any hearing to await the decision of the Supreme Court in *Boumediene*; and that RMC 804 having been complied with, Mr. Hamdan may boycott the trial or not as he pleases. To the Government it is clear that Mr. Hamdan knows what he is doing and has made a knowing choice. The Government concludes with an argument that the Commission should deny the Motion because logistics and travel arrangements have already been made for twenty or more witnesses.

Having read the parties' brief and considered their arguments, the Commission finds:

1. That the issue of the accused's competence to participate in his own defense at trial has reasonably been raised, and that an RMC 706 board is warranted to resolve that issue. The Commission has ordered such a hearing. No delay is warranted to conduct the RMC 706 Board, and the services of the Defense expert are not required.

2. The ethical issues that face the Defense team can be easily resolved once the report of the RMC 706 Board is received. The Defense team has already indicated, unanimously, that they consider themselves to still be on the case, as they have not been discharged, and that the client may not direct them to present no defense when he has not discharged them. There is ample time to determine how or if that opinion might change if the client has diminished capacity, and the Defense will know what is to be done when the RMC 706 Board reports its conclusions.

3. The Commission is not inclined to grant a continuance to address the Defense's discovery objections. No mention of dissatisfaction with discovery was raised at our last session of court, when it was clear that we were making the final preparations for a trial beginning on 2 June. The Commission accepts the Government's declaration that much of what the Defense requests from 2001/2002 during an active conflict in Afghanistan is simply unavailable, and that the pocket litter, which the Defense had access to months ago, contains nothing discoverable or exculpatory other than what has already been provided.

4. The Supreme Court did hear oral arguments in the case of *Boumediene v. Bush* in December of 2007, and is expected to issue a ruling in that case not later than the end of June. That case addresses the applicability of the constitutional right to *habeas corpus* to detainees in Guantanamo Bay, and it is possible that the Court's decision will affect this case. The Court initially rejected a petition for certiorari, and then, *sua sponte* reversed itself and granted the petition. This means that five of the nine justices appear to believe that *Boumediene* needs to be modified or clarified. Contrary to the Government's assertion, it appears that other courts in the D.C. Circuit have indeed delayed or held cases, pending the outcome of *Boumediene*. For example, *Kiyemba v. Bush* No. 05-5487 (D.C. Cir. Sept. 7, 2007) and *Paracha v. Bush,* No. 05-5194 (D.C. Cir. Sept. 7, 2007) recalled mandates in cases the Court had previously dismissed for lack of jurisdiction; *Alhami v. Bush,* No. 05-359 (D.D.C. Oct. 2, 2007) granted petitioner's motion for a preliminary injunction blocking transfer of a detainee pending the Court's decision in *Boumediene*; *Razatullah v. Gates*, No. 06-1707 (D.D.C. Oct. 2, 2007) and *Al-Oshan v. Bush*, No. 05-0520 (D.D.C. Oct. 5, 2007) are examples of orders preserving the status quo of detainee cases.

Independent of these precedents from other courts, the issue before this Commission is whether a delay on one month, to await the Supreme Court's decision regarding the applicability of the Constitution to detainees at Guantanamo Bay, should or should not be granted. The Commission finds that it should. Doing so permits all the parties to have the benefit of a decision that may well change the tenor or conduct of the trial, and avoids the potential embarrassment, waste of resources, and prejudice to the accused that would accompany an adverse decision mid-trial, or the need to retry the case. The accused has been in confinement for six years, and another month's wait will not prejudice any party to the case. The Government may easily re-schedule its witnesses and their travel.

DECISION AND RULING

The Defense Motion for a Continuance is GRANTED. Assuming that the Supreme Court will in fact deliver its ruling before 30 June 2008, and that the ruling will be favorable to the

Government, the motions session now set for the week of 27 May is continued until Monday 14 July. The Trial, now set for the week of 2 June, is set for Monday 21 July, and the two weeks following. The Commission expects the parties to continue to work towards trial on those dates.

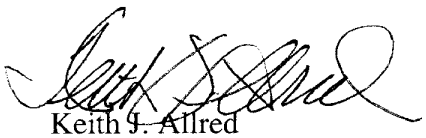
If the decision is adverse to the Government, or otherwise requires amendment of this schedule, the Commission will consult the parties and re-schedule such proceedings as may be necessary.

In light of this ruling, the ORDER to conduct an RMC 706 Board is modified as follows:

Trial Counsel shall inform the RCM 706 Board that the due date for its report is now Friday 13 June 2008.

Trial Counsel shall also provide to the members of the RCM 706 Board a transcript of the 29 April exchange between the Military Judge and Mr. Hamdan in which he declared his desire to "boycott" the balance of the proceedings. The Clerk of Court shall ensure that this exchange is promptly transcribed and provided to all the parties and the military judge.

So Ordered this 16th day of May 2008.



Keith J. Allred
Captain, JAGC, USN
Military Judge

UNITED STATES OF AMERICA	)	**D-002; D-003; D-004; D-005; D-006**
	)	
	)	**Consolidated Prosecution Response**
	)	**To**
	)	
v.	)	**Defense Requests for Continuance**
	)	
	)	
KHALID SHEIKH MOHAMMED	)	
WALID MUHAMMAD SALIH	)	
MUBARAK BIN ATTASH	)	
RAMZI BINALSHIBH	)	
ALI ABDUL AZIZ ALI	)	
MUSTAFA AHMED ADAM AL	)	
HAWSAWI	)	**22 May 2008**

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

2. **Relief**. The Prosecution respectfully requests the Military Judge deny the Defense request for continuance.

3. **Overview**. Defense Counsel for each of the five accused have requested delays in the arraignment in this case. In order to comply with the Military Commissions Act (MCA) and Manual for Military Commissions (MMC), the accused must be arraigned within 30 days of service of charges. The Prosecution respectfully requests the Military Judge hold the initial session and advise the accused regarding their rights to counsel under the MCA and MMC, and conduct the arraignment of the accused as required under Rule for Military Commission (RMC) 707. The concerns raised by Defense Counsel in their filings can be addressed by the Military Judge during the initial session scheduled for 5 June 2008.

4. **Burden of proof.** As the moving party, the Defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. *See* RMC 905(c)(1), 905(c)(2)(A).

5. Facts.

a. The Convening Authority referred charges against each of the accused in the above captioned case on 9 May 2008.

b. On 14 May 2008, the Military Judge notified all parties that arraignment for the above-captioned case would be conducted on 5 June 2008.

c. Counsel for Walid Muhammad Salih Mubarak Bin Attash filed a request for continuance on 16 May 2008.

d. Counsel for each of the other four accused requested similar continuances on 19 May 2008.

e. Charges were served on each of the accused on 21 May 2008.

f. Pursuant to RCM 701(b), the Prosecution will serve copies of referral documents upon counsel for all accused as soon as practicable. The vast majority of documents will be served during the week of 26 May 2008. A few remaining classified items will be served after appropriate protective orders are issued.

g. On Monday, 19 May 2008, the SCIF for the Expeditionary Legal Complex was approved, providing secure office space at Guantanamo Bay, Cuba for Defense Counsel to discuss and store classified information, including any notes taken during meetings with their clients.

6. Discussion.

a. The Military Judge should deny the Defense requests for continuance.

(1) RMC 707(a)(1) requires an accused to be brought to trial within 30 days of service of the charges. An accused is brought to trial within the meaning of this rule at the time of arraignment under RMC 904. RMC 904 provides that arraignment shall be conducted in a military commission session and shall consist of reading the charges and specifications to the accused and calling on the accused to enter a plea. The accused need not enter pleas as part of the arraignment and has the option of reserving his pleas until a later time.

(2) During the initial session, and prior to arraignment of the accused, RMC 901 requires the Military Judge, in open session, to inform the accused of his rights to be represented by military or civilian counsel. While RMC 901 requires the Military Judge to ascertain from the accused by whom the accused chooses to be represented,[1] an accused is not bound by any elections made at the arraignment and is free to later amend his elections regarding counsel after discussing his options with detailed defense counsel and any subsequently approved civilian counsel.

(3) The Defense requests for continuance seemingly indicate varying levels of formation of attorney-client relationship between the accused and their detailed counsel, including questions whether an attorney-client relationship has actually been formed with some of the accused. The requests highlight the importance of conducting the initial session within the time period required under RMC 707.[2] The arraignment will provide an

[1] See RMC 901(d)(4)(D).

[2] The Prosecution notes that at least one of the accused has specifically argued that the requested delay should not be attributed to the Defense as excludable delay, and reserved the right to assert possible speedy trial violations based on this or future delays in the proceedings. See 19 May 2008 "Defense Motion for Special Relief to Delay Arraignment," filed by counsel for Ramzi Bin al Shibh. The Defense has asked the Military Judge to continue the arraignment beyond 30 days as required by RMC 707, and in the same breath seeks to reserve the right to later bring a challenge based on the Prosecution's inability to arraign the accused within the time periods required under the Manual for Military Commissions. Rather than support the Defense request for continuance, the Defense's position

opportunity for the Military Judge to advise each of the accused regarding their rights to counsel on the record and in open court, as required by RMC 707 and 901. Each of the accused will be provided an opportunity to make their elections or request additional time to meet with assigned counsel to discuss his counsel options.

(4) To postpone the arraignment when it is possible that some of these accused could refuse their detailed counsel in this case is unwarranted. Holding the initial session as scheduled will allow the court to resolve the issues of counsel in a timely manner so that the parties can complete discovery in this case and set an appropriate litigation schedule.

(5) Defense counsel for each of the accused have requested continuances primarily based on their asserted inability to adequately prepare to represent their clients based on lack of adequate facilities, and in certain cases, lack of approved security clearances for assistant detailed counsel and civilian counsel.[3] Defense Counsel in several requests also cite personal commitments that conflict with the scheduled 5 June 2008 arraignment.[4]

(6) All cleared defense counsel have access to TS/SCI approved office spaces and storage facilities, both at Guantanamo Bay, Cuba and in one of the Office of Military Commissions – Defense (OMC-D) offices spaces in the Washington, D.C. Area. On 19 May 2008, the Prosecution and Defense facilities at Guantanamo Bay, Cuba were approved for TS/SCI communications and storage of TS/SCI materials, including Defense notes of interviews with the accused. In addition to the SCIF currently available to the Defense in the Washington, D.C. area, the Office of the Convening Authority has advised the Prosecution that they expect additional TS/SCI office spaces to be completed at that office no later than the end of June. These spaces will allow for increased storage and provide additional office space to accommodate discussions of any TS/SCI information, including those related to communications with their clients.[5]

(7) Assistant Defense Counsel for Ali Abdul Aziz Ali and Mustafa Ahmed Adam al Hawsawi are awaiting final approval of TS/SCI clearances. As of the time of this filing, their

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highlights the importance of conducting the initial session and arraignment of the accused in a timely manner, as presently scheduled.

[3] The Defense in several filings request an 802 teleconference to establish an interval of time to ascertain the progress made on defense facilities and security clearances. The Prosecution intends to provide a proposed trial schedule to the Defense prior to travel to GTMO, and is prepared to discuss the current status of defense facilities and pending security clearances during that meeting. Of course, should the Military Judge consider it necessary to conduct a telephonic 802 teleconference the Prosecution is available.

[4] The personal commitments referenced in the Defense filings highlight the importance of conducting an initial session that will establish dates for subsequent sessions for this military commission. Convening a session, and establishing a litigation schedule, will better allow defense counsel assigned to these cases to plan their personal commitments, taking into account certain dates they will be required to be at Guantanamo Bay in order to represent their clients.

[5] Some of the Defense filings indicate Defense Counsel do not have the ability to transport notes taken during meetings with their clients to their office in the Washington, D.C. area. After becoming aware of this issue, the Prosecution inquired with the Office of the Convening Authority, who advised there was no restriction on transporting notes from Guantanamo Bay, to Washington, D.C., assuming they were properly marked and classified information was appropriately protected. Prior to traveling with classified information, counsel must obtain an appropriate courier card. The Prosecution will assist Defense Counsel in obtaining a courier card upon request.

requests were both pending with the Office of Personnel Management (OPM) and expected to be resolved by mid-June. Of course, the attendance of Assistant Defense Counsel is not required for the initial session. The presence of detailed Defense Counsel is sufficient for purposes of the arraignment.

(8) Defense Counsel in several of the filings cite the inability of civilian defense counsel to be approved and detailed prior to the arraignment. As indicated in the Defense filings, the Office of the Convening Authority is diligently processing all requests from civilian defense counsel and has requested OPM to "fast-track" the requests accordingly. As the Military Judge points out in his 19 May 2008, email, it is understood that civilian counsel may seek to join in the litigation at some time after the initial session. At the initial session, the Military Judge will advise each accused of his right to request civilian counsel. If an accused elects to request an approved civilian counsel, the counsel can be added at a later session.

(9) Additionally, in the Defense Joint Motion to Dismiss (D001), filed on 15 May 2008, Defense Counsel allege that the charges in the instant case were improperly referred to this Military Commission. In addition to the requirement to arraign the accused within 30 days of service of referred charges, it is imperative to resolve the outstanding contested motion as soon as possible. The Defense motion makes serious allegations claiming the Legal Advisor to the Convening Authority and other senior officials have "unlawfully influenced this military commission." The Defense requests the Military Judge to dismiss charges with prejudice, or in the alternative, disqualify the Legal Advisor from further participation in this case. This contested motion should be litigated at the earliest opportunity to resolve the serious issues raised therein.

(10) The interests of justice for the public and the accused in ensuring a prompt trial (*see* RMC 707(b)(4)(E)), are best served by ensuring that the accused are promptly advised in open court regarding the charges they are facing and that they understand their options regarding representation during these proceedings. The Prosecution respectfully requests the Military Judge deny the Defense requests to delay these proceedings, and hold the initial session on 5 June 2008, as scheduled.

7. **Oral argument.** The Prosecution does not request oral argument.

8. **Witnesses.** None.

9. **Certificate of conference**. As stated in each of the defense filings, the parties do not agree on the requested relief.

10. **Additional information.** None

11. **Attachments**. None.

12. **Submitted by**:

For Edward Ryan
Prosecutor
Department of Justice

Thomas Swanton
Prosecutor
Department of Justice

Clayton Trivett, Jr.
Prosecutor
Department of Defense

Robert Swann
Prosecutor
Department of Defense

For Jeffrey D. Groharing
Major, U.S. Marine Corps
Prosecutor

Edmonds, Matthew, SSG, DoD OGC

From: Bley, Natalie, Ms, DoD OGC
Sent: Thursday, May 22, 2008 5:19 PM
To: [redacted]
Cc:
Subject: Commission Ruling: US v Mohammed et al, D-002-006
Follow Up Flag: Follow up
Flag Status: Red
Attachments: [redacted]

Col Kohlmann has directed that I forward the attached ruling in US v Mohammed et al to counsel and other interested persons.

V/R
Natalie Lewis Bley
Attorney Advisor
Military Commissions Trial Judiciary
[redacted]

Ms. Bley:
Please forward the attached ruling to the appropriate persons.
V/R,
Ralph H. Kohlmann
Colonel, U.S. Marine Corps

Edmonds, Matthew, SSG, DoD OGC

From: [redacted]

Sent: Thursday, May 22, 2008 12:55 PM

To: [redacted]

Cc:

Subject: United States v. Mohammed et al-Prosecution Consolidated Response to D-002; D-003; D-004; D-005; D-006 (Requested Continuance)

Follow Up Flag: Follow up

Flag Status: Red

Attachments: Gov't Response - Defense Requests for continuance - 22 May 2008 [redacted]

All,

Attached please find the Prosecution's consolidated response to D-002; D-003; D-004; D-005; D-006 (Prosecution's opposition to the Defense request for continuance of the arraignment).

v/r
Clay Trivett
Prosecutor
Office of Military Commissions

Edmonds, Matthew, SSG, DoD OGC

From: [redacted]
Sent: Thursday, May 22, 2008 12:06 PM
To: [redacted]
Cc:

Subject: Re: RE: Motions to Continue, D-002, D003, D-004, D-005, D006, US v Mohammed et al.- Special Request for Relief

Follow Up Flag: Follow up
Flag Status: Red

Per Col Kohlmann, the special relief requested by the government counsel concerning the filing of a joint response and request to dispense with conference with defense counsel prior to filing resonse is granted.

----- Original Message -----
From: [redacted]
Date: Thursday, May 22, 2008 10:15
Subject: RE: Motions to Continue, D-002, D003, D-004, D-005, D006, US v Mohammed et al.- Special Request for Relief

[redacted]

> The government will file its response by 1300 today.
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> As the defense motions shared a majority of common issues, the
> governmentprepared a consolidated response, and respectfully makes a
> special request for relief (per Rule 3 of the Military Commissions
> Trial Judiciary Rules of
> Court) to file a consolidated response to D-2 through D-6 (with each
> defense filing designation listed in the caption of the government's
> response).
>
>
> Furthermore, due to the expedited response deadline, the government
> will not be able to confer with the defense on whether they concur or
> object to this special request.

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> Thomas P. Swanton
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> Trial Attorney
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> U.S. Department of Justice
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> Sent: Thursday, May 22, 2008 9:39 AM
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> Subject: Motions to Continue, D-002, D003, D-004, D-005, D006, US v
> Mohammed et al.
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> Counsel in the cases of US v. Mohammed et al.:
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> COL Kohlmann has directed that the government respond to the motions
> to continue filed by counsel in the following cases by 1300 today, 22
> May 08.
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> D-002, Defense Motion to Continue, US v Walid Muhammad Salih
> MubarakBin 'Attash
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> D-003, Defense Motion to Continue, US v Ramzi Bin al Shibh
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> D-004, Defense Motion to Continue, US v Mustafa Ahmed Adam al Hawsawi
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> D-005, Defense Motion to Continue, US v Khalid Sheikh Mohammed
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> D-006, Defense Motion to Continue, US v Ali Abdul Aziz Ali

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> V/R
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> Natalie Lewis Bley
> Attorney Advisor
> Military Commissions Trial Judiciary
>[redacted]
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