UNITED STATES OF AMERICA v. KHALID SHEIKH MOHAMMED, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL-AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	**D-126** Defense Motion for Appropriate Relief: Delay of Any Further Proceedings **Order**

1. Ramzi Bin al Shibh was captured by Pakistani forces in Karachi, Pakistan on or about 11 September 2002. Mustafa Ahmed Adam al Hawsawi was captured by Pakistani forces in March 2003. Both were transferred to Guantanamo Bay, Cuba on or about September 2006, where they remain today. Charges were referred to trial by military commission on 9 May 2008 and both men were arraigned on 5 June 2008. Military Commission sessions convened on 9-10 July 2008; 22-24 September 2008; 8 December 2008, and 19 and 21 January 2009. On 21 January 2009, this Military Commission granted the prosecution's request for a 120 day continuance until 20 May 2009 to allow the new Administration sufficient time to review the Military Commission process and decide the proper forum, if any, to prosecute these accused, among others, or make appropriate changes to the current military commission rules and procedures.

2. On 14 May 2009, the prosecution filed a supplemental motion requesting an additional 120 day continuance until 17 September 2009 to complete the review as well

as maintaining the status quo on all activity related to this case until then, which the Commission interpreted to include all discovery and related motions. On 11 June 2009, over objection, this Military Commission granted the prosecution request, in part. The Military Commission found that the interests of justice served by continuing further substantive proceedings to allow for interagency review of the factual and legal bases for continued detention of these accused and to determine whether each could be transferred, released or prosecuted for criminal conduct before a Military Commission or Article III court, or provided other lawful disposition consistent with the national security and foreign policy interests of the United States, outweighed the accused and general public's right to a prompt trial.

3. While the Military Commission granted a delay in all substantive pretrial and trial proceedings to no earlier than 17 September 2009, the prosecution did not demonstrate why the underlying medical examinations, investigation and case preparation which must be completed prior to conducting the outstanding Rule for Military Commission (RMC) 909 incompetence determination hearings could not proceed during the delay.[1] Therefore, the Commission scheduled a session for 16 July 2009 to address several

[1] The Commission observed that "deferring discovery obligations relating to a competency determination" and "postponing further discovery on this case required to resolve the outstanding competency questions until after 17 September 2009" would "likely result in delaying the competency determinations themselves, constituting an unjustified hardship on Messrs. Al Shibh and Al Hawsawi and affecting all five accused and the general public's right to a prompt trial."

matters related to the incompetence determination hearings for Messrs. bin al Shibh and al Hawsawi so that the parties could be ready to proceed on 21-25 September 2009 with the incompetence determination hearing. The parties were notified that no other matters would be addressed at this session and that the Military Commission intended to hear only hear from detailed military defense for Mr. bin al Shibh and Mr. al Hawsawi.

4. At 1613 hours on 9 July 2009, detailed military defense counsel for Mr. bin al Shibh filed a written motion for appropriate relief requesting the 16 July 2009 hearing be indefinitely deferred "until such time as the Executive has determined its course of action for the future of military commissions." The prosecution opposes the defense motion.

5. The defense submits that requiring the parties to address pretrial discovery matters relevant to an outstanding incompetence determination hearing in light of the uncertainty surrounding the continuation of the military commissions generally and pending rules changes specifically, would be "inefficient and potentially unjust." The Military Commission appreciates the difficulties counsel on both sides face in working within a system in which uncertainty is the norm and where the rules appear random and indiscriminate. That said, the specific reasons posited by defense counsel in support of an open-ended delay pending resolution of all conceivable issues by Congress and the Administration are unpersuasive given that none of proposed rule

changes attributed to the Executive and Legislative Branches thus far will have a direct impact on the only issue currently before the Commission - the RMC 909 incompetence determination hearings for Mr. bin al Shibh and Mr. Al Hawsawi. The defense assertion that, given the prevailing uncertainty surrounding what rules may subsequently apply to these military commissions, any benefit achieved by proceeding with the 16 July 2009 session is de minimus and does not serve the interests of justice is also misplaced. The impact that a hypothetical rule change may have on future military commissions is merely speculative. At this point, the Military Commission can only proceed with what it knows and if any rule changes do affect the RMC 909 hearings, the Military Commission can reconsider any prior ruling in light of those modifications upon the appropriate motion. [2]

6. The defense motion to indefinitely continue these proceedings is DENIED.[3]

7. The Commission directs that a copy of this order be served upon the prosecution and all defense counsel of record, and that it be provided to the Clerk of Court for public release. The Commission further directs the Clerk of Court to have this order translated

[2] Additionally, it is unnecessary now for this Military Commission to determine the degree to which each accused is entitled to constitutional and due process rights. The current military commission rules as interpreted by the military judge provide adequate protections and will ensure the fundamental fairness of the incompetency determination proceedings.
[3] A continuance may only be granted by the military judge. *See* RMC 906(b)(1).

into Arabic and served upon each of the above named accused. The underlying defense motion and government response will also be provided to the Clerk of Court for public release, after appropriate redactions for privacy and security considerations.

So Ordered this 13th Day of July 2009:

/s/
Stephen R. Henley
Colonel, U.S. Army
Military Judge

UNITED STATES OF AMERICA	**D-___**
v.	**Defense Motion For Appropriate Relief**
KHALID SHEIKH MOHAMMED, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	**For Delay of Any Further Proceedings** 9 July 2009

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

2. **Relief Requested:**

The defense requests that the hearing presently scheduled for 16 July 2009 be deferred until such time as the Executive has determined its course of action for the future of military commissions.

This motion is based on Messrs. Bin al Shibh and al Hawsawi's rights under Rule for Military Commissions (R.M.C.) 707, Rule for Courts-Martial 707, the Fifth and Sixth Amendments to the United States Constitution, Common Article 3 of the Geneva Conventions, the International Covenant on Civil and Political Rights, Article 75 of Additional Protocol I of the Geneva Conventions, and Customary International Law.

3. **Overview:** The defense moves to continue the hearing presently scheduled for 16 July 2009, on the grounds that 1) it does not serve the interests of justice to proceed in light of the uncertainty surrounding the constitutional provisions and rules that apply to military commissions and 2) since all pending discovery matters are not to be addressed at the 16 July

hearing, judicial economy dictates in favor of holding a hearing when all such matters may be addressed, under known rules and regulations.

4. **Burden of Proof:** The moving party bears the burden on a motion to continue. *See* R.M.C. 905(c).

5. **Relevant Facts:**

a. Status of Military Commissions

i. On 15 May 2009, the President announced proposed rule changes to the military commissions. [Attachment A][1] The President notified Congress of the proposed changes so as to comply with the Military Commission Act's 60-day notice requirement for regulation changes. Among other changes, the President's proposal will affect the jurisdiction of military commissions, the rules governing the admissibility of evidence, including the admissibility of statements of an accused, the accused's right to counsel, and the admissibility of hearsay evidence.

ii. The U.S. Senate presently has proposed certain changes to the Military Commissions Act (MCA). The changes proposed are the subject of on-going discussions between the Executive and the Senate. Specifically, at a hearing held before the Senate Armed Services Committee on 7 July 2009, government officials testifying indicated they intended to have further discussions with the Congress regarding the proposed MCA changes, our outlined

[1] U.S. Department of Defense Press Release No. 339-09, May 15, 2009, *"Defense Department Announces Proposed Rule Changes to Military Commissions."*

areas where the proposed legislative amendments could be further modified. *See* Statement of Hon. Jeh Johnson, General Counsel, Department of Defense, before the Armed Services Committee, U.S. Senate, dated 7 July 2009, at 1 ("We are confident that through close cooperation between the Administration and the Congress, reformed military commissions can emerge form this effort as a fully legitimate forum...") [Attachment B]; Statement of David Kris, Assistant Attorney General of the United States before the Armed Services Committee, United States Senate, dated 7 July 2009 ("We think the [Senate] bill is a good framework to reform the commissions, and we are committed to working with you on it...we would like to work with you because we have identified a somewhat different approach."), at 2 [Attachment C]; Statement of Vice Admiral Bruce Macdonald, JAGC, USN, before the Armed Services Committee, U.S. Senate, dated 7 July 2009, at 3-4. ("In reviewing your legislation, I believe that there are two areas in which our practitioners would benefit from some additional clarity," and proceeding with a discussion of rule of changes to the rules of evidence) [Attachment D]

iii. The purpose of the 7 July Senate hearing was "to receive testimony on legal issues regarding military commissions and the trial of detainees for violations of the law of war." Officials of the Executive Branch called to testify included Mr. Jeh Johnson, General Counsel for the Department of Defense (DoD), Mr. David Kris, Assistant Attorney General for National Security Affairs, Department of Justice (DoJ), and Admiral Bruce McDonald, Judge Advocate General of the Navy.

iv. The jurisdiction of this commission is also likely subject to change in the very near future. Currently, the MCA establishes jurisdiction for a military commission to try "any alien unlawful enemy combatant is subject to trial by military commission under this chapter."

10 U.S.C. 948c. "Alien unlawful enemy combatant" is a term of art, defined in § 948a(1) of the MCA. Sec. 1301 of the proposed National Defense Authorization Act, which has already been through "mark-up" at the Senate Armed Services Committee and was the subject of the hearing on 7 July, shifts the basis of jurisdiction. It provides that, "[a]ny alien unprivileged enemy belligerent having engaged in hostilities or having supported hostilities against the United States is subject to trial by military commission as set forth in this chapter." Sec. 1301, § 948c. The term "unprivileged enemy belligerent" is both rooted in customary international law and is specifically defined in § 948a(7) of the Senate Bill. This jurisdictional change has the approval of the Obama Administration. *See* Testimony of Hon. Johnson, Attachment B, at 1("Speaking on behalf of the Administration...the legislation discontinues the use of the phrase 'unlawful enemy combatant.' We in the Administration, effective March 13, have also discontinued using the phrase in our court filings identifying who we believe we have authority to detain at Guantanamo."), at 2.

v. At the hearing, in response to a question from Senator McCain regarding the constitutional rights that are applicable to detainees at Guantanamo, Mr. Kris testified that "the due process clause guarantees and imposes some requirements."[2] Mr. Johnson later testified, on behalf of the DoD: "it's our view that the detainees would not, whether in the United States or any place else, do not enjoy the full panoply of constitutional rights that an American citizen in this country would enjoy."[3]

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[2] David Johnston, *"In Senate, Debate on Detainee Legal Rights,"* N.Y. Times, July 8, 2009.
[3] *Id.*

vi. Reflecting the uncertainty surrounding the commissions generally, Messrs bin al Shibh and al Hawsawi have pending before this commission a motion seeking to have the Constitution and Bill of Rights treated as governing law in these proceedings. *See* D-059. They filed a supplemental brief to this motion on 25 June 2009, seeking to have this commission determine whether the Fifth and Sixth Amendments, specifically, apply to govern the conduct of the RMC 909 incompetence determination hearing, and also counsels' own representation of their clients at such a hearing. Though this motion was originally filed on 2 November 2008, no ruling has ever been made on this motion. The motion is not docketed for the 16 July hearing.

b. Discovery Matters Pending Related to RMC 909 Incompetence Determination Hearing

i. At the government's request, on 21 January 2009, this case was delayed for 120 days. *See* Ruling P-009. At the time this delay was granted, Messrs. bin al Shibh al Hawsawi had competency assessments pending, and were awaiting a hearing under RMC 909 to address these matters.

ii. Before the prosecution sought this initial delay of the commissions, the defense for Mr. bin al Shibh had no less than four motions to compel discovery pending. *See* D-075 (Classified); D-078, D-081, D-082 (Classified). These motions, which the defense filed on 14 November, 2008, 22 December 2008, 31 December 2008, and 5 January 2009, respectively, dealt directly with discovery concerns related to Mr. bin al Shibh's on-going competency assessment.

iii. Despite there having been two scheduled hearings of this case during that time period of November – January, at no time did the commission place these motions on calendar to be heard. *See* Attachments E, F. This failure to hear the motions occurred even though the commission had reviewed at least some of these motions. *See* Attachment G (noting the military judge had reviewed D-082). It also occurred despite defense counsels' special requests to the commission that discovery motions relating to Mr. bin al Shibh's competency assessment be heard at the scheduled hearings – hearings that were ostensibly set to address matters relating to this competency assessment. *See* Attachments H, I; *U.S. v. Mohammed, et al.,* transcript dated 19 January 2009, at 980-81 ("DC [CDR LACHELIER]: Sir, we also had D-075...that was a motion to compel discovery that is also related to the competency question...we did file a special request for relief seeking for that motion D-075 to be considered at this session as well."), 1005 ("ADC [LT FEDERICO]: Sir, earlier you referred to D-096. We believe that's a special request for relief that the defense filed regarding two motions pending to be placed on the agenda, D-075 and D-082. ... So I'd just bring that your attention now regarding scheduling, that we have asked that be placed on the agenda."); *U.S. v. Mohammed, et al.,* transcript dated 21 January 2009, at 3-6 ("DC [CDR LACHELIER]: We do believe that any continuance that is granted can be used to resolve issues regarding discovery and proceedings relating to the pending competency and access and the adequacy of the 706 evaluation that was conducted.").

iv. In addition to the above-referenced motions, other discovery matters directly pertinent to Mr. bin al Shibh's competency assessment remain unresolved and unheard. In a ruling issued on 30 October 2008, and after a hearing to discuss D-042 (classified) which seeks

to compel defense interviews of personnel who treated Mr. bin al Shibh when he was detained prior to Guantanamo, the Commission determined that "[p]ast experiences of the accused and past observations of the accused may reasonably play a part in an analysis of his current mental capacity." The Commission additionally found that: "the defense also reasonably seeks to conduct some measure of its own investigation beyond the four corners of the materials provided." *See* Ruling D-042. As the commission requested it to do, the defense provided the government with identifying information available for the personnel whom it wished to interview. Notwithstanding the defense's timely provision of the requested information, and the military judge's order, on 10 November 2008, the government refused to turn over any contact information for the personnel at issue, contending now that the individuals the defense sought to interview had observed Mr. bin al Shibh too long ago, would not have any relevant information, and in any event probably could not recall any information. *See* Government Response, D-078, ¶ 4.

6. Discussion:

Pursuant to R.M.C. 707((b)(4)(E)(i), a military judge shall grant a continuance or other departure from the requirements of this rule only upon finding that the interests of justice served by taking such action outweigh the best interest of both the public and the accused in a prompt trial of the accused."

In the present case, the interests of justice outweigh any factor in favor of holding a one-day hearing in Guantanamo. The hearing would have only de minimis value in moving this case forward in any event and, moreover, it would open this case to further legal challenges because of the current vagueness that clouds the rules governing military commissions proceedings.

I. The Interests of Justice Demand a Delay of Any Further Proceedings Because of the Prevailing Uncertainty Surrounding What Constitutional Provisions and Rules May Apply to Military Commissions

In its motion for an additional 120-day continuance, the government stated, "[i]t would be inefficient and potentially unjust to deny the continuance motion in this case before there is a final decision to proceed with this military commission – a commission that would, if resumed, proceed under a new set of rules." P-010, ¶ 6.c. This filing was submitted on 14 May 2009. The Military Judge issued a ruling, granting the continuance, on 11 June. Events subsequent to the government's filing of its motion, and the ruling issued by the commission, demonstrate that the uncertainty surrounding the progression of this case and the rules applicable to all military commissions have reached a critical mass. Indeed, the very jurisdiction of this commission is now going to the floor of the United States Senate for a fundamental shift, with full support of the Administration. These facts necessitate a continued pause to this case so that these issues may be resolved by a continued democratic dialogue between the Executive and the Congress.

In a motion before this commission, the defense has discussed in detail the difficulties of continuing representation of their clients without some certain in the constitutional provisions and rules that are applicable to the proceedings. *See* D-059. The reach of the due process clause and of the right to effective assistance of counsel are directly implicated in the conduct of any incompetence determination hearing. *See* D-059, Supplemental Brief, filed 25 June 2009. At present the parties have opposite views on the fundamental question as to whether the accuseds have any rights afforded under the Constitution. As the commission has determined not to hear the defense's motion that seeks clarity on this fundamental issue, the parties have no guidance on

what law to apply as the case moves forward, even on matters as seemingly simplistic as the production of discovery and expert consultants. *See* Attachment F.

The issue of whether the Constitution applies remains both a focus of the democratic dialogue and completely unsettled. Indeed, the government has conveyed conflicting positions on the issues. On the one hand, the prosecution in the present case contends the Constitution does not apply to "unlawful enemy combatants" being tried in Guantanamo. *See, e.g.,* D-059, Supplemental Brief. The Department of Justice (for whom the majority of the prosecutors in this case works), however, has asserted that aspects of due process do apply during military commissions at Guantanamo. *See* note 3, *supra*, ("the due process clause guarantees and imposes some requirements."). The DoD, asserts yet another position. *See* note 2, *supra*, ("it's our view that the detainees would not, whether in the United States or any place else, do not enjoy the full panoply of constitutional rights that an American citizen in this country would enjoy.")

Forging ahead under this legal haze will lead to a fundamentally unfair proceeding that will inevitably open itself to legal challenges. It is patent that the upcoming changes to the applicable rules (changes that are now a certainty in view of the recent testimony and statements of government officials), will affect how defense counsel should conduct their representation of their clients. Detailed counsel have ethical obligations that require them to be familiar with applicable rules: they cannot meet those obligations in this environment. Expecting the defense to proceed, when even the government is not in agreement as to the rules to apply to these proceedings, amounts to demanding ineffective assistance of counsel.

The prevailing uncertainty that presides over the military commissions ensures that discovery matters cannot be resolved at the July hearing. Neither the defense, the prosecution, nor the commission can be certain what procedures and rules currently govern the proceedings, nor will govern these proceedings should they continue in the future. The impending changes to the applicable laws and regulations foreshadow protracted legal complications in connection with any proceedings held under the existing fog of uncertainty. As the prosecution previously stated, "it would be inefficient and potentially unjust to deny the continuance motion in this case."

II. Holding a Hearing that Fails to Address all Discovery Matters and Investigation Issues Related to Competency Does not Serve the Interests of Justice or Judicial Economy

The government moved to continue the proceedings in this case for an additional 120 days, until 17 September 2009. *See* P-010. Though the commission has granted the government's motion for this second continuance of the proceedings, the Commission established a schedule for Messrs. bin al Shibh and al Hawsawi's RMC 909 competency proceedings, ordering the filing of any motions "related to the 909 hearing," and scheduling an incompetency determination hearing for 21-25 September 2009. *See* Commission Ruling, P-010, 11 June 2009, at ¶ 5.

This commission ruling included the following finding:

> postponing further discovery in this case required to resolve the outstanding competency questions until after 17 September 2009 will likely result in delaying the incompetence determination hearings themselves, constituting an unjustified hardship to Messrs. Al Shibh and Al Hawsawi and affecting all five accused and the general public's right to a prompt trial. As such, the

> Military Commission directs the government to comply with its discovery obligations under the Manual for Military Commissions and take all steps necessary to complete medical examinations and reports such that the RMC 909 incompetence determination hearings for Messrs. Al Shibh and Al Hawsawi can proceed.

Id. at ¶ 3.

Indeed, the very purpose of the 16 July hearing was to "conduct a status conference to address any unresolved discovery matters related to the incompetence determination hearings for Messrs. Al Shibh and Al Hawsawi." *Id.* at ¶ 5. The defense filed a number of motions related to the RMC 909 hearing.[4] These motions were in addition to four discovery-related motions that were already pending before this commission.[5] Notwithstanding its ruling in P-010, and the number of defense motions filed related to the hearing, the commission set an agenda to address a very limited number of matters. Addressing these matters will not resolve the outstanding discovery issues related to the pending incompetence determination hearing. The purpose of 16 July hearing is thus de minimis, as a number of discovery matters will be left unresolved, even after that hearing. These outstanding discovery matters include Mr. bin al Shibh's motion to compel classified items of discovery that are directly relevant to the competency determination; these motions were filed months ago, and numerous requests from the defense to resolve these matters have been ignored. *See* D-075, D-082.

Since all incompetence-related discovery matters that are pending before this commission are not scheduled to be heard at the 16 July hearing, there is no doubt that future proceedings will be necessary to address discovery. Going forward with the hearing now, therefore, does not

[4] *See* D-0115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125.

serve the interests of judicial economy. Great expense will be incurred in moving all personnel to Guantanamo, in mobilizing the security that is imposed on these hearings, and in coordinating the logistics of other public involvement -- for a one-day hearing of de minimis purpose.

III. Conclusion

Fundamental fairness, in light of expected changes to system, dictate that the proceedings be delayed until it is known what rules even apply to the proceedings. Judicial efficiency, moreover, also militates against going through the expense involved in mobilizing personnel for these proceedings in Guantanamo, for a one-day hearing that has no possibility of resolving the issues that need to be resolved – and a hearing that, in any event, will be subject to legal challenges if allowed to proceed under the legal uncertainty that governs the commissions at this time.

7. Attachments:

A. U.S. Department of Defense Press Release No. 339-09, May 15, 2009, *"Defense Department Announces Proposed Rule Changes to Military Commissions."*

B. Statement of Hon. Jeh Johnson, General Counsel, Department of Defense, before the Armed Services Committee, U.S. Senate, dated 7 July 2009

C. Statement of David Kris, Assistant Attorney General of the United States before the Committee on Armed Services, United States Senate, dated 7 July 2009

D. Statement of Vice Admiral Bruce Macdonald, JAGC, USN, before the Armed Services Committee, U.S. Senate, dated 7 July 2009

E. E-mail from Mr. James Polley, Trial Judiciary, "*United States v. Khalid Sheikh Mohammed, et al.*, Session Schedule," dated 15 January 2009

[5] *See* D-075 (classified), 078, 081, 082 (classified), 087

F. E-mail from Mr. James Polley, Trial Judiciary, "16 July Military Commission Agenda," dated 8 July 2009

G. E-mail from Mr. James Polley, Trial Judiciary, "Judicial Review of Classified Motions," dated 8 January 2009

H. E-mail from CDR Suzanne M. Lachelier, "*U.S. v. Mohammed, et al.*, Mr. bin al Shibh Special Request for Relief," dated 16 January 2009

I. E-mail from CDR Suzanne M. Lachelier, "*US v. Mohammed, et al.*: Defense (Mr. bin al Shibh) Special Request for Relief," dated 2 July 2009

8. **Request for Oral Argument:** No oral argument is requested. Additionally, the defense respectfully requests the commission provide a ruling on this motion forthwith so that, if granted, the parties can cancel scheduled travel and avoid incurring undue cost and delay.

9. **Conference with Opposing Counsel:** On 9 July 2009, defense counsel conferred with the prosecution regarding this motion. The government opposes this motion.

Respectfully submitted,

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Attachment A

D059

U.S. Department of Defense
Office of the Assistant Secretary of Defense (Public Affairs)

News Release

On the Web:
http://www.defenselink.mil/releases/release.aspx?releaseid=12680
Media contact: +1 (703) 697-5131/697-5132

Public contact:
http://www.defenselink.mil/faq/comment.html
or +1 (703) 428-0711 +1

IMMEDIATE RELEASE

No. 339-09
May 15, 2009

Defense Department Announces Proposed Rule Changes to Military Commissions

The President has determined to reform military commissions as an available forum, along with the federal courts, for the prosecution of detainees at Guantanamo.

As part of that, the secretary of defense will be sending to Congress several changes to the rules for military commissions. These rule changes do not require a change in law, but the law does require that DoD gives Congress 60 days' notice before the rules are implemented. DoD believes these rule changes will improve the process. The effect of these proposed rule changes are:

- Statements obtained using interrogation methods that constitute cruel, inhuman and degrading treatment will no longer be admitted as evidence at a trial.
- Limits use of hearsay. For hearsay, shifts the burden of proof to the party who offers it. The burden is no longer on the party who objects to hearsay to disprove its reliability; the burden is now on party who offers it to prove its reliability.
- To permit the accused greater latitude in selecting his defense counsel.
- To provide greater protections for the accused who refuses to testify. Current practice permits the judge to instruct the jury that it may consider the fact that the accused refused to testify and subject himself to cross-examination if he offers his own prior hearsay statements. This practice would be eliminated.
- Jurisdiction. The rule changes would codify existing practice that military commissions judges may establish the jurisdiction of their own courts. Under prior practice, jurisdiction for a military commission to hear a case was established by a prior Combatant Status Review Tribunal.

In the pending military commissions cases, the government will also seek an additional 120-day continuance of the cases, while the rule changes are reviewed by Congress, and the administration continues to develop its legislative proposals.

**Continuance date corrected on 15 May 2009.*

Attachment B

Testimony of Jeh Charles Johnson
General Counsel, Department of Defense
Hearing Before the Senate Armed Services Committee
"Military Commissions"
Presented On
July 8, 2009

Mr. Chairman and Senator McCain, thank you for the opportunity to testify here today.

I also thank this Committee for taking the initiative, on a bipartisan basis, to seek reform of military commissions. As you know, in his speech on May 21 at the National Archives, President Obama called for the reform of military commissions, and pledged to work with the Congress to amend the Military Commissions Act. So, speaking on behalf of the Administration, we welcome the opportunity to be here today, and to work with you on this important initiative.

Military commissions can and should contribute to our national security by becoming a viable forum for trying those who violate the law of war. By working to improve military commissions to make the process more fair and credible, we enhance our national security by providing the government with effective alternatives for bringing to justice those international terrorists who violate the law of war.

In May, the Administration announced five changes to the rules for military commissions that we believe go a long way towards improving the process. (I note that those changes were developed initially within the Defense Department, in consultation with both military and civilian lawyers, and have the support of the Military Department Judge Advocates General, the Staff Judge Advocate to the Commandant of the Marine Corps, and the Legal Counsel to the Chairman of the Joint Chiefs of Staff). My Defense Department colleagues and I have had an opportunity to review the language this Committee has included in the Defense Authorization Act, and it is our basic view that the Committee has identified virtually all of the same elements we believe are important to further improve the military commissions process. We are confident that through close cooperation between the Administration and the Congress, reformed military commissions can emerge from this effort as a fully legitimate forum, one

that allows for the safety and security of participants, for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in federal court, and for the just resolution of cases alleging violations of the law of war.

There are several changes to the Military Commissions Act reflected in the proposed legislation which I would like to highlight here, and which the Administration supports:

First, consistent with the rules changes approved by the Secretary of Defense and submitted to Congress in May, the legislation codifies a ban on the use in court of statements that were obtained by interrogation methods that amount to cruel, inhuman or degrading treatment. In my view, this change is a big one. The most prominent criticism we hear of the current Military Commissions Act is that it permits the use of such statements, if obtained before December 30, 2005. The statutory change which eliminates this possibility -- by itself -- will go a long way towards enhancing the legitimacy and credibility of commissions.

Second, I note that the legislation amends current law to clarify the government's obligations to disclose exculpatory evidence to the accused, including evidence that would tend to impeach the credibility of a government witness, or serve as mitigation evidence at time of sentencing. As you know, this clarification of the government's obligations would be consistent with the obligations prosecutors have now in civilian courts.

Third, the legislation would modify the rules on hearsay evidence, more closely resembling the rules used in civilian courts and in courts-martial.

Fourth, the legislation codifies our rules change to provide the accused with more latitude in the selection of military defense counsel, again making commissions' rules closer to those in courts-martial.

Fifth, the legislation discontinues the use of the phrase "unlawful enemy combatant." We in the Administration, effective March 13, have also discontinued using the phrase in our court filings identifying who we believe we have the authority to detain at Guantanamo.

The Administration supports these changes to existing law, though you will note that we prefer somewhat different language in several instances. As I said before, we believe that reformed military commissions can and should contribute to national security by affording a venue for bringing to justice those who violate the law of war, and for doing so in a manner that reflects American values of justice and fairness. We believe these reforms serve that purpose.

When considering this legislation, the Administration asks that the Congress also consider the following:

First, in Section 948r, concerning statements of the accused that can be admitted at trial, we ask that you consider the express incorporation of a "voluntariness" standard that, consistent with current law, takes account of the unique challenges and circumstances of the battlefield setting. We do not believe that soldiers on a battlefield should be required or even encouraged to provide *Miranda*-like warnings to those they capture—and we note that the current legislation expressly states that Article 31 of the Uniform Code of Military Justice is not applicable to military commissions. As you know, Article 31 requires *Miranda*-like warnings prior to official questioning of service members regarding alleged crimes.

The essential mission of our nation's military is to capture or kill the enemy, not to engage in evidence collection for eventual prosecution. However, in both American civilian courts and courts martial, statements of an accused are normally admitted only in the event they are found to be "voluntary." There is a concern that, as military commissions prosecutions progress, military commission judges and courts may apply this standard without taking adequate account of the critical circumstances. Thus, rather than jeopardize future prosecutions and convictions because a statement was admitted at trial that was not considered "voluntary," the Administration believes we should specifically codify a standard to assess voluntariness that, consistent with current law, accounts for the realities of military operations. This will decrease the likelihood that combat objectives may be confused with a law enforcement mission, while ensuring that valid convictions before military commissions will be sustained on appeal.

Second, we note that the legislation incorporates certain of the classified evidence procedures currently applicable in courts-martial, where there is relatively little precedent and practice regarding classified

information. We in the Administration believe that further work could be done to codify the protections of classified evidence, in a manner consistent with the protections that now exist in federal civilian courts. We believe that those protections would work better to protect classified information, while continuing to ensure fairness and providing a stable body of precedent and practice for doing so.

Third, concerning hearsay, while welcoming the Committee's further regulation of the use of such evidence, we in the Administration recommend somewhat different language for achieving this result that we look forward to discussing in more detail.

Fourth, we look forward to working with the Congress to ensure that the offenses that may be prosecuted in a military commission are consistent with the law of war. We note that Section 950p of the Military Commissions Act contains a statement recognizing that the offenses codified by that Act are "declarative of existing law," and "do not preclude trial for crimes that occurred before enactment" of the law. The Committee replaced the language currently in Section 950p with similar, but not identical, language. The Administration supports this type of statement, though we prefer the existing language in Section 950p. I note also that the Committee bill retains the offense of providing material support for terrorism. After careful study, the Administration has concluded that appellate courts may find that "material support for terrorism" -- an offense that is also found in Title 18 -- is not a traditional violation of the law of war. As you know, the President has made clear that military commissions are for law of war offenses. We thus believe it would be best for material support to be removed from the list of offenses triable by military commission, which would fit better with the statute's existing declarative statement.

We also believe that conspiracy, unlike material support, can in many cases be properly charged in military commissions as a traditional law of war offense, and we welcome the retention of that offense in the Committee bill. As a former prosecutor, it is my belief that by definition, many material support cases are also conspiracy cases.

With the removal of material support, we are supportive of recognizing the law of war origins of all codified offenses.

Fifth, we agree with the Committee that the scope of appellate review must be expanded to include review of factual as well as legal matters. However, we believe that an appellate court paralleling that of the service Courts of Criminal Appeals under Article 66 of the UCMJ, with additional review by the U.S. Court of Appeals for the D.C. Circuit, would best achieve the legitimacy and credibility we all seek,

In conclusion, I thank you again for taking the initiative in this important area of national security, and I look forward to your questions.

Attachment C

Department of Justice

STATEMENT OF

DAVID KRIS
ASSISTANT ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

ENTITLED

"MILITARY COMMISSIONS"

PRESENTED

JULY 7, 2009

Statement of
David Kris
Assistant Attorney General
Before the
Committee on Armed Services
United States Senate
For a Hearing Entitled
"Military Commissions"
Presented
July 7, 2009

Chairman Levin, Ranking Member McCain, and Members of the Armed Services Committee, thank you for the opportunity to discuss legislation that would reform the Military Commissions Act of 2006. As you know, a Task Force established by the President is actively reviewing the detainees held at Guantanamo Bay to determine whether they can be prosecuted or safely transferred to foreign countries. As the President stated in his May 21st speech at the National Archives, where feasible we plan to prosecute in Federal court those detainees who have violated our criminal law. Prosecution is one way — but only one way — to protect the American people, and the Federal courts have proven on many occasions to be an effective mechanism for dealing with dangerous terrorists.

The President has also made clear that he supports the use of military commissions to prosecute those who have violated the laws of war, provided that necessary reforms are made. Military commissions have a long history in our country dating back to the Revolutionary War. Properly constructed, they take into account the reality of battlefield situations and military exigencies, while affording the accused due process. The President has pledged to work with Congress to ensure that the commissions are fair, legitimate, and effective, and we are all here today to help fulfill that pledge. I thank this Committee for leading the effort to develop legislation on this important national security issue.

As you know, on May 15th, the Administration announced five rule changes as a first step toward meaningful reform. These rule changes prohibited the admission of statements obtained through cruel, inhuman, and degrading treatment; provided detainees greater latitude in the choice of counsel; afforded basic protections for those defendants who refuse to testify; reformed the use of hearsay by putting the burden on the party trying to use the statement; and made clear that military judges may determine their own jurisdiction. Each of these changes enhances the fairness and legitimacy of the commission process without compromising our ability to bring terrorists to justice.

These five rule changes were an important first step. This Committee has now taken the next step by drafting legislation to enact more extensive changes to the Military Commissions Act ("MCA") on a number of important issues. The Administration believes the Committee's bill identifies many of the key elements that need to be changed in the existing law in order to

make the commissions an effective and fair system of justice. We think the bill is a good framework to reform the commissions, and we are committed to working with you on it. With respect to some issues, we think the approach taken by the Committee is exactly right. In other cases, we believe there is a great deal of common ground between the Administration's position and the provision adopted by the Committee, but we would like to work with you because we have identified a somewhat different approach. Finally, there are a few additional issues in the MCA that the Committee's bill has not modified that we think should be addressed. I will outline some of the most important issues briefly today.

First, the Committee's bill would bar admission of statements obtained by cruel, inhuman, or degrading treatment. We support this critical change so that neither statements obtained by torture nor those obtained by other unlawful abuse may be used at trial.

However, we believe that the bill should also adopt a voluntariness standard for the admission of statements of the accused — albeit a voluntariness standard that takes account of the challenges and realities of the battlefield and armed conflict. To be clear, we do not support requiring our soldiers to give *Miranda* warnings to enemy forces captured on the battlefield, and nothing in our proposal would require this result, nor would it preclude admission of voluntary but non-*Mirandized* statements in military commissions. Indeed, we note that the current legislation expressly makes Article 31 of the Uniform Code of Military Justice inapplicable to military commissions, and we strongly support that. There may be some situations in which it is appropriate to administer *Miranda* warnings to terrorist suspects apprehended abroad, to enhance our ability to prosecute them, but those situations would not require that warnings be given by U.S. troops when capturing individuals on the battlefield. Voluntariness is a legal standard that is applied in both Federal courts and courts martial. It is the Administration's view that there is a serious risk that courts would hold that admission of involuntary statements of the accused in military commission proceedings is unconstitutional. Although this legal question is a difficult one, we have concluded that adopting an appropriate rule on this issue will help us ensure that military judges consider battlefield realities in applying the voluntariness standard, while minimizing the risk that hard-won convictions will be reversed on appeal because involuntary statements were admitted.

Second, the Committee has included a provision to codify the Government's obligation to provide the defendant with exculpatory evidence. We support this provision as well; we think it strikes the right balance by ensuring that those responsible for the prosecution's case are obliged to turn over exculpatory evidence to the accused, without unduly burdening every Government agency with unwieldy discovery obligations.

Third, the Committee bill restricts the use of hearsay, while preserving an important residual exception for certain circumstances where production of direct testimony from the witness is not available given the unique circumstances of military and intelligence operations, or where production of the witness would have an adverse impact on such operations. We support this approach, including both the general restriction on hearsay and a residual exception, but we would propose a somewhat different standard as to when the exception should apply, based on

whether the hearsay evidence is more probative than other evidence that could be procured through reasonable efforts.

Fourth, we agree with the Committee that the rules governing use of classified evidence need to be changed, but we would do so in a fashion that is more similar to the system provided in the Classified Information Procedures Act ("CIPA"), as it has been interpreted by Federal courts. While CIPA may need to be revised and updated in important respects to address terrorism cases more effectively, we believe it has generally worked well in both protecting classified information and ensuring fairness of proceedings. Importing a modified CIPA framework into the statute will provide certainty and comprehensive guidance on how to balance the need to protect classified information with the defendant's interests. It will also allow military judges to draw on the substantial body of CIPA case law and practice that has been developed over the years.

We are concerned with a provision in the Committee bill that allows the use of traditional CIPA practices — the use of deletions, substitutions, or admissions — only after an agency head or original classifying authority has certified that the evidence has been declassified to the maximum extent possible. This provision has no analogue in CIPA or the Uniform Code of Military Justice ("UCMJ"), and it suggests a potentially burdensome process of declassification where the traditional alternatives would be more efficient and would adequately protect the rights of the accused. We also believe there are a number of elements of CIPA law and practice that would substantially improve the way classified information issues are dealt with by the commissions, including for example establishing clear guidance on the propriety of *ex parte* hearings on classified information issues and setting substantive standards for provision of classified evidence to the defense in discovery. We would be happy to work with you and your staff on these issues.

Fifth, we share the objective of the Committee to empower appellate courts to protect against errors at trial by expanding their scope of review, including review of factual as well as legal matters. We also agree that civilian judges should be included in the appeals process. However, we think an appellate structure that is based on the service Courts of Criminal Appeals under Article 66 of the UCMJ, with additional review by the United States Court of Appeals for the District of Columbia Circuit under traditional standards of review, is the best way to achieve this result.

There are two additional issues I would like to highlight today that are not addressed by the Committee bill that we believe should be considered. The first is the offense of material support for terrorism or terrorist groups. While this is a very important offense in our counterterrorism prosecutions in Federal court under title 18 of the U.S. Code, there are serious questions as to whether material support for terrorism or terrorist groups is a traditional violation of the law of war. The President has made clear that military commissions are to be used only to prosecute law of war offenses. Although identifying traditional law of war offenses can be a difficult legal and historical exercise, our experts believe that there is a significant risk that appellate courts will ultimately conclude that material support for terrorism is not a traditional

law of war offense, thereby reversing hard-won convictions and leading to questions about the system's legitimacy. However, we believe conspiracy can, in many cases, be properly charged consistent with the law of war in military commissions, and that cases that yield material support charges could often yield such conspiracy charges. Further, material support charges could be pursued in Federal court where feasible.

Finally, we think the bill should include a sunset provision. In the past, military commissions have been associated with a particular conflict of relatively short duration. In the modern era, however, the conflict could continue for a much longer time. We think after several years of experience with the commissions, Congress may wish to reevaluate them to consider whether they are functioning properly or warrant additional modification.

In closing, I want to emphasize again how much the Administration appreciates the Committee's leadership, and the very thoughtful bill it has drafted. While there may be some areas of the bill on which we disagree with the approach taken or the specific language adopted, we think this bill represents a major step forward and we are optimistic that we can reach agreement on the important details. We would welcome the opportunity to conduct further discussions.

Thank you again for the opportunity to testify today, and I will be happy to answer any questions you have.

Attachment D

United States Navy

Biography

Vice Admiral Bruce MacDonald
Judge Advocate Generals Corps, United States Navy Judge Advocate General

Vice Admiral Bruce MacDonald was born in 1956 in Cincinnati, Ohio. He graduated from the College of the Holy Cross in 1978 with a Bachelor of Arts degree in English, and entered the Navy in May of that year.

MacDonald was commissioned an ensign in the unrestricted line through the Naval Reserve Officer Training Corps. Following the normal surface warfare pipeline, he reported to the USS *Hepburn* (FF 1055) in October 1979, where he served as the main propulsion assistant and navigator. After a two-year tour at Fleet Combat Training Center, Pacific, where he served as intermediate combat systems team training and advanced multi-threat team training course director, he was selected for the Law Education Program in 1984. He received his degree of Juris Doctor from California Western School of Law in 1987.

In 1987, MacDonald reported to Naval Legal Service Office, San Diego, where he served as senior defense counsel, trial counsel, and medical care recovery act claims officer. In 1990, he reported aboard USS *Independence* (CV 62) as the command judge advocate. After receiving a Master of Laws degree from Harvard Law School in Cambridge, Mass., in 1992, he was transferred to Seoul, Korea, where he served as chief, Operational Law Division, on the staffs of United Nations Command, Combined Forces Command and United States Forces, Korea. He also served as staff judge advocate on the staff of United States Naval Forces, Korea.

In August 1994, MacDonald reported aboard Naval Legal Service Office Northwest as its executive officer. In November 1996, he became the officer in charge of Trial Service Office West Detachment, Bremerton, Wash. In July 1997, he reported to Commander 7th Fleet in Yokosuka, Japan, as the fleet judge advocate. MacDonald assumed command of Naval Legal Service Office, Northwest, in August 1999, serving as commanding officer until June 2002. He was assigned to the Pentagon as the special counsel to the Chief of Naval Operations from June 2002 through October 2004. In November 2004, MacDonald became the deputy judge advocate general and commander, Naval Legal Service Command. In July 2006, MacDonald assumed his current position as judge advocate general of the Navy.

MacDonald is admitted to practice before the courts of the State of California and the United States District Court for the Southern District of California. His military decorations include the Navy Distinguished Service Medal, the Legion of Merit with two Gold Stars, the Defense Meritorious Service Medal, the Navy Meritorious Service Medal with Gold Star, the Navy Commendation Medal with Gold Star and the Navy Achievement Medal with Gold Star. He and his wife have one daughter.

Updated in March 2009

Chairman Levin, Ranking Member McCain, and Members of the Armed Services Committee, thank you very much for giving me the opportunity to testify today on the subject of military commissions.

In 2006, when this Committee was working to establish a permanent framework for military commissions through the Military Commissions Act, I had the opportunity to share my views with the Senate Judiciary Committee and House Armed Services Committee. At that time, I recommended that a comprehensive framework for military commissions should clearly establish the jurisdiction of military commissions, set baseline standards of structure, procedure, and evidence consistent with U.S. law and the law of war, and prescribe substantive offenses. I stated that the Uniform Code of Military Justice should be used as a model for the commissions process. Although our experiences of the last few years have shaped my perspectives on some of the rules that should apply to military commissions, I am pleased to say that this committee's legislative proposal addresses the concerns I had in 2006. Overall, I believe that this legislative proposal establishes a balanced framework to provide important rights and protections to an accused while also providing the government with the means of prosecuting alleged alien unprivileged enemy belligerents.

This legislation provides each accused with critical legal protections. These include:

- The right against self incrimination, the right to compulsory process and a reasonable opportunity to obtain witnesses and evidence, along with an expanded

right to exculpatory, as well as mitigating and impeachment evidence.

- The right to be present during all sessions of trial when evidence is to be offered and the right to confront witnesses.

- The right to self representation and the right to be represented by detailed military counsel, an expanded right to counsel of the accused's own choice if reasonably available, and the right to civilian counsel at the accused's expense.

- The right to appellate review, to include a review of factual sufficiency identical to the type of review currently conducted for courts-martial under the UCMJ.

Prosecution of alien unprivileged enemy belligerents has proven a challenge over the last few years. Your legislation establishes a more balanced framework to prosecute accused by modeling the procedures used in general courts-martial under the Uniform Code of Military Justice while recognizing the exigencies that exist on the battlefield in time of war.

Specific highlights of the legislation that I support include:

- A requirement that the government prove its case beyond a reasonable doubt.

- Protection against double jeopardy.

- A requirement that the proponent of hearsay evidence establish its reliability to an extent required by rules long recognized in trials by general courts-martial.

- Exclusion of statements obtained through the use of torture or cruel, inhuman or degrading treatment. For other statements, permits the military judge to determine admissibility in the interests of justice based upon the reliability of the statement under a totality of the circumstances analysis.

- Establishes clearly defined criminal offenses.

- Continues to recognize and rely upon an independent trial judiciary that has been the hallmark of military trials under the UCMJ.

In short, this legislation strikes the right balance between affording an accused the judicial guarantees recognized as indispensable by civilized people and our national security concerns.

In reviewing your legislation, I believe that there are two areas in which our practitioners would benefit from some additional clarity.

- Section 949d provides for the use of rules of evidence in trials by general courts-martial in the handling of classified evidence. This is consistent with our overall desire to use those procedures found within

the UCMJ and the Manual for Courts-Martial whenever possible. However, experience has shown that practitioners struggle with a very complex and unclear rule within the Military Rules of Evidence. The military rules do not have a robust source of informative or persuasive case law. Frankly, prosecutions using Military Rule of Evidence 505 are rare. In developing the rules for the handling of classified material during a military commission, it would be more prudent to rely upon the Classified Information Procedures Act (CIPA) used in Article III courts as a starting point. The use of CIPA as a touchstone for drafting provisions for use in the litigation of classified evidence in military commissions, complete with the definitional guidance that has developed over more than 20 years of jurisprudence in federal district courts, would provide practitioners with additional clarity in the area of classified evidence.

- Section 948r provides a test for determining the admissibility of allegedly coerced statements. I recommend you include a list of considerations a military judge should use in evaluating the reliability of those statements. Those considerations should include the degree to which the statement is corroborated, the indicia of reliability within the statement itself, and whether and to what degree the will of the person making the statement was overborne.

Once again, thank you very much for this opportunity to share my personal views on your legislation. I look forward to answering your questions and working with the Committee on this important endeavor.

Attachment E

Lachelier, Suzanne CDR OSD OMC Defense

From: Polley, James Mr OSD OMC Trial Judiciary [redacted]
Sent: Thursday, January 15, 2009 10:40 AM
To: [redacted]
Subject: FW: United States v. Khalid Sheikh Mohammed, et al., Session Schedule (U)
Signed By: [redacted]

UNCLASSIFIED

Judge Henley hs directed that the following be provided to counsel and other interested parties

v/r
James D. Polley, IV
Attorney Advisor
Trial Judiciary
[redacted]

-----Original Message-----
From: Henley, Stephen R COL OTJAG
Sent: Thursday, January 15, 2009 10:25 AM
To: Polley, James Mr OSD OMC Trial Judiciary; Deneke, William COL OSD OMC Trial Judiciary
Cc: Pohl, James L COL MIL USA
Subject: United States v. Khalid Sheikh Mohammed, et al., Session Schedule

Please forward to counsel and other persons as appropriate:

Counsel: the order of motions for the Commission session currently docketed for 19-21 January 2009 is expected as follows:

(1) MJ-12/D-089. MJ directive for briefs regarding impact of convening authority's referral of charges and defense motion for appropriate relief to compel arraignment and convening authority justification for re-referral of charges.

(2) D-085. Request of Mr Durkin to withdraw as civilian consultant.

(3) MJ directive regarding scope of Protective Order #7.

(4) D-081. Defense motion to compel discovery.

(5) D-087. Defense motion for expert access to Mr Bin Al Shibh.

(6) D-086. Defense motion to exclude co-accused from RMC 909 hearing.

(7) Presentation of evidence in RMC 909 competency hearing for Mr Bin Al Shibh.

Given the outstanding discovery issues, it appears unlikely that all evidence relevant to Mr Al Shibh's RMC 909 hearing can be presented at next week's session. In addition, there remains Mr Al Hawsawi's RMC 909 hearing, scheduled for a date to be determined. As such, the Commission does not intend to address MJ-010, the Commission directed brief on the capital punishment issue, during the 19-21 January 2009 session and will defer a formal entry of pleas.

/s/
Stephen R. Henley
Colonel, US Army
Military Judge

Attachment F

Lachelier, Suzanne CDR OSD OMC Defense

From: Polley, James Mr OSD OMC Trial Judiciary
Sent: Wednesday, July 08, 2009 9:41 AM
To: [redacted]
Subject: 16 July 2009 Military Commission Agenda (U)

UNCLASSIFIED

Jude Henley has directed that the following be provided to counsel and other interested parties. IAW the judge's instructions please provide to the pro se accused.

v/r
James D. Polley, IV
Attorney Advisor
Trial Judiciary
[redacted]

-----Original Message-----
From: Henley, Stephen R COL MIL USA OTJAG
Sent: Tuesday, July 07, 2009 5:33 PM
To: Deneke, William COL OSD OMC Trial Judiciary; Polley, James Mr OSD OMC Trial Judiciary
Subject: 16 July 2009 Military Commission Agenda

Please notify counsel in U.S. v. Khalid Sheikh Mohammed, et al, all pro se accused, and other persons as appropriate, as follows:

The prosecution's special request for relief to defer filing responses to D-122, D-123 and D-124 to 17 September 2009 is granted. The prosecution's special request for relief to defer filing a response to D-125 is denied. The response is due NLT 1300 (EDT) 13 July 2009.

The Military Commission anticipates hearing only from the prosecution and detailed military defense counsel and only on the following motions:

D-115
D-116
D-117
D-118
D-120
D-125

/s/
Stephen R. Henley
Colonel, JA
Military Judge

Attachment G

Lachelier, Suzanne CDR OSD OMC Defense

From: Polley, James Mr OSD OMC Trial Judiciary [redacted]
Sent: Thursday, January 08, 2009 4:32 PM
To: [redacted]

Subject: Judicial Review of Classified Motions (U)
Signed By: [redacted]

UNCLASSIFIED

Judge Henley has reviewed D-082 US v. Mohammed, et al.,Defense Motion to Compel Discovery (JTF records)(bin al Shibh)(Classified) and D-083: US v. Mohammed, et al, Filing with SSA (Khalid Sheikh Mohammed) (Classified).

v/r
James D. Polley, IV
Attorney Advisor
Trial Judiciary
[redacted]

Attachment H

Lachelier, Suzanne CDR OSD OMC Defense

From: Lachelier, Suzanne, CDR, DoD OGC
Sent: Friday, January 16, 2009 2:31 PM
To: Polley, James, Mr, DoD OGC
Cc: [redacted]

Subject: US v. Mohammed, et al., Mr. bin al Shibh, SPECIAL REQUEST FOR RELIEF
Signed By: [redacted]

Sir,
Detailed defense counsel for Mr. bin al Shibh submit the following Special Request for Relief:

1. Relief Requested:

Detailed defense counsel for Mr. bin al Shibh respectfully request that the docketing order be modified to include an opportunity for the commission to hear D-075 (classified TS//SCI [redacted], D-082 (classified TS//SCI [redacted], which are motions to compel discovery, and D-090, a motion to compel witnesses, all of which are related to Mr. bin al Shibh's competency hearing.

2. Facts:

a. On 19 December, 2008, the defense filed D-075 (classified TS//SCI [redacted], a motion to compel classified discovery directly related to the question of Mr. bin al Shibh's competency. The briefing on this motion, by both parties, has been completed.

b. On 19 December 2008, this Commission scheduled a competency hearing to take place on 19-21 January, 2009, regarding Mr. bin al Shibh.

b. On 31 December, 2009, the defense filed D-082 (classified TS//SCI [redacted], a further motion to compel discovery. The government filed its response to this motion on 12 January, 2009.

c. On 14 January, 2009, the defense filed D-090, a motion to compel witnesses to testify at the RMC 909 hearing in Mr. bin al Shbih's case. The government has opposed production of these witnesses, all of whom have been involved in Mr. bin al Shibh's care and custody since his capture in September 2002 and who possess observations relevant to a proper assessment of Mr. bin al Shibh's competency.

c. On 15 January 2009, this Commission issued an order, listing the motions that would be considered at the upcoming January session of this Commission. The Commission further indicated that, in light of the pending discovery issues relating to it, the R.M.C. 909 hearing that was scheduled for that session would likely not be completed at that session. The Commission's list of motions to be heard at the next session, however, did not include the above two motions that address discovery matters related to the 909

hearing.

3. Justification for Relief Requested:

The defense for Mr. bin al Shibh filed the above two motions in order to resolve outstanding discovery issues that would permit detailed counsel to come closer to being adequately prepared for the upcoming competency hearing. Without resolution of these discovery matters, detailed counsel cannot adequately prepare with their appointed mental health expert, cannot adequately conduct examination of the witnesses who are scheduled to testify at the next session, and accordingly cannot afford Mr. bin al Shibh an adequate and competent defense. Without resolution of discovery matters and production of necessary discovery relating to the RMC 909 hearing, counsel will not be competent to conduct the hearing, as required under SECNAVINST 5803.1C and U.S. Navy JAGINST 50803.1B (Rules of Professional Conduct), Rule 1.1 (Competence)("A covered attorney shall provide competent, diligent, and prompt representation to a client.

Competent representation requires the legal knowledge, skill, thoroughness and expeditious preparation reasonably necessary for representation.")

Since, as the Commission itself has noted, pending discovery disputes are prohibiting the RMC 909 hearing from reaching resolution, detailed counsel would seek to have these motions resolved, in addition to those the Commission has already placed on calendar.

4. Conclusion:

Detailed defense counsel respectfully request that this Commission hear argument regarding the above-cited motions, at the next scheduled session of 19 January 2009.

Very respectfully,

S.M. Lachelier
CDR, JAGC, USN
Office of the Chief Defense Counsel
Office of Military Commissions
[redacted]

Attachment I

Lachelier, Suzanne CDR OSD OMC Defense

From: Lachelier, Suzanne CDR OSD OMC Defense
Sent: Thursday, July 02, 2009 4:31 PM
To: [redacted]
Cc:

Subject: US v. Mohammed, et al.: Defense (Mr. bin al Shibh) Special Request for Relief (U)

UNCLASSIFIED

To the Judiciary:
Detailed defense counsel for Mr. bin al Shibh respectfully submit the following Special Request for Relief for Commission's consideration:
1. RELIEF REQUESTED:
a. The defense for Mr. bin al Shibh respectfully requests that the motions described below be heard at the hearing currently scheduled for 16 July 2009. Pusuant to the Military Judge's order of 11 June 2009, the hearing is set "to address unresolved discovery matters related to incompetence determination hearings for Messrs. bin al Shibh and Mr. al Hawsawi." Mr. bin al Shibh has a number of motions pending that affect the determination of these discovery matters, and respectfully requests that this Commission hear these motions at the upcoming hearing, so that defense counsel may adequately prepare for the competency hearing that is to occur the week of 21-25 September 2009.

2. FACTS:
A. On 21 January 2009, the Commission granted the Government's Motion for a 120-day continuance, finding that "the interests of justice" to allow the new Administration time to review this and other cases, and the Military Commission's process and rules as a whole, outweighed the best interests of the accused and public in a prompt trial. See Order, P-009, para. 1.
B. At the time that this continuance was granted, the defense for Mr. bin al Shibh had the following pending motions:
D-059 Motion for Appropriate Relief Requesting that the Commission Treat the Constitution and Bill of Rights as Governing Law

D-075 Motion to Compel Discovery (Classified)
D-078 Motion to Compel Access to Medical Personnel
D-081 Motion to Compel Discovery of JTF Records
D-082 Motion to Compel Discovery (Classified)
D-087 Motion to Compel Expert Access to Mr. bin al Shibh
C. On 14 May 2009, the government filed a motion with the Commission, seeking an additional 120-day continuance of this case, to 17 September 2009. See P-010, Prosecution Motion for Additional 120 Continuance, para. 2.

D. This Commission granted the government's motion, in part. As to the pending competence proceeding for Messrs. Bin al Shibh and al Hawsawi, the Commission ruled that "the government has not demonstrated to the Commission's satisfaction why the underlying

medical examinations and other investigation which must be completed prior to conducting the above referenced incompetence determination hearings cannot proceed during this period" of continuance. See Ruling P-010, para. 3. The Commission then set a hearing for 16 July 2009, for the purpose of addressing discovery matters relating to the pending incompetence determination hearings. The Commission instructed counsel to file motions by 25 June 2009.

E. In response to the Commission's instruction, on 25 June 2009, the defense for Mr. bin al Shibh filed the following motions:

D-059 Supplemental Brief in Support of Defense Motion D-059 Requesting that the Commission Treat the Constitution and Bill of Rights as Governing Law

D-082 Defense Reply to Motion to Compel Discovery (Classified)

D-115 Defense Motion for Appropriate Relief Seeking Order Granting Access of Defense Expert Consultant (Dr. Amador)

D-116 Defense Motion for Appropriate Relief Seeking Appointment of Defense Expert Consultant (Dr. Gur)

D-119 Defense Motion for Appropriate Relief to Transfer Mr. bin al Shibh to Communal Living Detention Facility

D-121 Defense Motion for Appropriate Relief To Examine Detention Facilities (Black Sites)
D-122 Defense Motion for Appropriate Relief Seeking Appointment of Death Penalty Mitigation Specialist
D-123 Defense Motion for Appropriate Relief Seeking Appointment of a Privilege Team to Review Classified Material
D-124 Defense Motion for Appropriate Relief Seeking Order to Disqualify Hon. Susan J. Crawford from acting as convening authority

D-XXX Defense Motion for Appropriate Relief Seeking Appointment of Defense Expert Consultant (Dr. Mullington)
F. The defense respectfully requests that all the above motions (listed in paragraphs B and E) be heard at the hearing currently scheduled for 16 July 2009.

3. Justification:
A. In order to comply with the Commission's instruction to prepare for an incompetence determination hearing the week of 21-25 September 2009, detailed defense counsel need to resolve matters related to discovery, investigation and expert assistance involved with the competency question. Defense counsel also need clarity as to their obligations to their client in this pending competency hearing.

B. The motions described in paragraphs 2.B. and 2.E., above, all address matters that will affect what information the defense may have in preparation for the hearing, what expert assistance the defense may obtain to help it prepare for this hearing, and how counsel generally can proceed at the incompetence determination hearing. Without resolution of these pending motions, defense counsel cannot adequately prepare for this hearing.

C. The commission would benefit if counsel were advised in advance of the motions they must prepare to argue for this hearing, which is to take place in just two weeks.

D. Resolution of all the above matters is critical to proceeding with Mr. bin al Shibh's case. The requested relief will serve the interests of justice by ensuring that defense counsel are better able to prepare and proceed with any upcoming hearings addressing competency. By granting the requested relief and hearing the matters described above, the Commission will facilitate the preparation for the incompetence determination hearing as the Commission intends in view of its 11 June Order, P-010.

Very respectfully,

S.M. Lachelier
CDR, JAGC, USN
Office of the Chief Defense Counsel

Office of Military Commissions

[redacted]

CAUTION: Information contained in this message may be protected by the attorney/client, attorney work product, deliberative process or other privileges. Do not disseminate further without approval from the Office of the Chief Defense Counsel.

UNITED STATES OF AMERICA

v.

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

D-126
Government Response
to the
Defense Motion For Appropriate Relief
For Delay of Any Further Proceedings
9 July 2009

1. **Timeliness:** This response is timely filed. Despite the Defense contention to the contrary, the Defense Motion requesting this continuance was not timely filed. This Commission imposed a deadline of 25 June 2009 for filing of all motions regarding the 16 July 2009 session. Furthermore, this Commission has repeatedly emphasized the requirement that all deviations from timelines for hearings must be submitted not later than 20 days prior to the date established for the hearing (**See** Orders 9 June 2008, 1 July 2008, and 27 August 2008.)

2. **Relief Sought:** The Government respectfully requests the Military Judge deny the Defense Motion for Appropriate Relief for Delay of Any Further Proceedings.

3. **Burden of Proof:** As the requesting/moving party, the accused bears the burden of persuasion. See Rule for Military Commissions (RMC) 905(c). Pursuant to RMC 707 (b)(4)(E)(i), the Military Judge shall grant a continuance "only upon finding that the interests of justice served by taking such action **outweigh** the best interests of both the public and the accused in a prompt trial of the accused." (Emphasis added).

4. **Facts**:

a. On 5 June 2008, the accused in this joint trial were arraigned. Since then, nine sessions have been held. Three of the accused currently are acting as their own counsel with the remaining two pending competency hearings. All accused have expressed a desire to represent themselves but cannot until competency has been determined by the Military Judge following a RMC 909 hearing.

b. On 11 June 2009, this Commission recognized that "deferring discovery obligations relating to a competency determination" and "postponing further discovery in this case required to resolve the outstanding competency questions until after 17 September 2009" would "likely result in delaying the competency determinations themselves, constituting an unjustified hardship on Messrs. Al Shibh and Al Hawsawi and affecting all five accused and the general public's right to a prompt trial."

c. On 11 June 2009, the Commission directed that a hearing or status conference be held at Guantanamo Bay, Cuba, on 16 July 2009 to address any unresolved discovery

matters related to the two RMC 909 hearings presently pending before the Commission and scheduled for resolution during the week of 21-25 September 2009.

d. The Defense filed this Motion to Continue the hearing scheduled for 16 July 2009 on 9 July 2009, nearly 30 days after first learning of the hearing on 16 July 2009 and only five days before the scheduled departure for Guantanamo Bay.

e. The hearing of 16 July 2009 is set to resolve a number of discovery issues that have been pending for a long time and six motions directly related to the 21-25 September 2009 hearing.

5. Discussion and Conclusion: The Defense for Messrs. Bin al Shihb and Al Hawsawi contend that the interests of justice outweigh any factor in favor of holding the status conference scheduled less than a week from now. Counsel for these accused believe that little can be achieved in a one day hearing. The Government strongly disagrees. Every session of this Commission is important both to the accused and the public. Despite what the Defense for two of the accused believe, much can be achieved next week.

The agenda is set to address no fewer than six motions all relating to discovery issues. The Defense for Mr. al Shibh would like the Commission to address other motions directly related to the competency hearing and states that because the Commission won't address all, then we should stop completely. This argument lacks all merit. For instance, nothing prevents this Commission from supplementing its agenda with motions directly related to the RMC 909 hearing such as D-042, D-075, or D-082, if it chooses to do so, or having another status conference between 16 July and 21 September 2009 so that all parties can be prepared to litigate what remains a roadblock to moving this case forward.

Further, the Defense contention that by moving forward, this Commission is opening itself to legal challenge has no merit. The rules regarding discovery are unlikely to change, but even if they do, then this Commission can reconsider any ruling it might issue in light of the change.

6. **Conclusion:** The Prosecution opposes the Defense Request for Delay and strongly urges this Commission to proceed with next week's session so that it can resolve pending discovery issues related to the RMC 909 hearings scheduled for 21-25 September 2009.

7. Request for Oral Argument: The Prosecution does not request oral argument.

8. **Respectfully submitted**,

Robert L. Swann
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Office of Military Commissions