

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-____

Defense Motion for Resources Necessary
to Realize Sixth Amendment Right to
Self-Representation

Ali Abdul Aziz Ali

29 August 2008

1. **Timeliness**: This Motion is submitted timely and pursuant to the Military Judge's Order of 1 July 2008.

2. **Relief Sought**¹: At the direction of and with the consent of the *pro se* accused, Ali Abdul Aziz Ali, standby counsel respectfully request that the Commission grant Mr. Ali access to the resources necessary to advocate effectively in his own defense, including but not limited to:

- a. general office supplies, including paper, pens, pencils, and file folders;
- b. storage and working space in his cell for books and legal materials;
- c. access to a law library and legal research materials, including access to an Islamic library;
- d. a computer suitable for and capable of legal research and drafting legal pleadings. Such computer would have the following specifications:
 1. be accessible only to Mr. Ali in his cell, allowing him to work twenty-four hours per day and seven days per week;
 2. be equipped with a cordless printer and scanner;
 3. be equipped with software necessary to review the discovery;
 4. be equipped with software necessary to review and file pleadings, including Microsoft Word and PowerPoint;

¹ Standby counsel incorporate by reference Mr. Ali's *pro se* filing, D025, requesting a laptop and cordless printer/scanner. Subsequent to the filing of D025, Mr. Ali directed counsel request the additional resources set forth in this motion.

5. be equipped with a media card for reviewing resources electronically;
 6. be equipped with a DVD writer to incorporate discovery into pleadings and to allow pleadings to be copied for counsel; and
 7. be equipped with the means for access to electronic legal resources such as the Rules for Military Commissions, the Manual for Courts-Martial, and the Federal Rules of Evidence;
- e. a reliable means of timely filing legal pleadings with the Commission;
 - f. a translator who is a native speaker of Arabic, or in the alternative, access to English language translation software such as Rosetta Stone;
 - g. limited access to news and to the Commissions' proceedings;
 - h. information regarding the delivery and receipt of his mail;
 - i. ability to contact his family via telephone; and
 - j. a reliable method of communication with standby counsel and civilian consultant.²

3. Overview: Mr. Ali has both a constitutional and statutory right to represent himself before this Commission. *Faretta v. California*, 422 U.S. 806 (1975); R.M.C. 506(c). Beginning with his arraignment and continuing through the subsequent proceedings, Mr. Ali has exercised his right to advocate on his own behalf, while also being assisted by detailed and civilian counsel. An essential part of the right to self-representation is access to the legal and physical tools and resources required to present a defense. To date, Mr. Ali has been denied access to these materials, in violation of his right to self-representation under both the Sixth Amendment of the Constitution, as interpreted by *Faretta*, and subsequent cases and under the R.M.C.

4. Burden and Standard of Proof: As the moving party, the burden of persuasion lies with the defense. In addition, the defense bears the burden of proof on any question of fact. This burden is met by a showing of a preponderance of the evidence. R.M.C. 905(c).

5. **Facts:**

- a. On 5 June 2008, Mr. Ali was arraigned.
- b. At the 5 June 2008 arraignment, Mr. Ali expressed his desire to represent himself before the Commission.
- c. At the 9 July 2008 hearing before the Commission, Mr. Ali expressed his desire to represent himself as much as possible, with detailed military counsel serving as standby counsel and civilian counsel serving as legal advisors.
- d. At the 9 July 2008 hearing before the Commission, Mr. Ali informed the Military Judge that he had prepared a written motion but had been prevented from filing it.
- e. At the 9 July 2008 hearing before the Commission, Mr. Ali informed the Military Judge that he had written letters to the Military Judge but that the letters had not been delivered.
- f. At the 9 July 2008 hearing before the Commission, Mr. Ali informed the Military Judge that his self-representation at the prior hearing was impeded by the lack of translators who were native speakers of Arabic.
- g. Mr. Ali does not have access to a law library or legal research materials.
- h. Mr. Ali does not have access to a computer.
- i. Mr. Ali does not have access to basic office supplies.
- j. Mr. Ali has not received a copy of the discovery either in paper or electronically.
- k. On 7 August 2008, Mr. Ali petitioned both the Convening Authority and the Commander, Joint Task Force-Guantanamo for resources. To date, he has received no answer to his requests and no resources have been provided to him.³
- l. In addition to the Guantanamo Bay Detention Facility, the Department of Defense has also detained and held enemy combatants at the Naval Consolidated Brig in Charleston, South Carolina. Mr. Ali Saleh Kahlah Al-Marri is currently housed at the Brig. Mr. Al-Marri's conditions of confinement are markedly different from Mr. Ali's.
- m. Although he is uncharged, Mr. Al-Marri's living area contains "the cell that he sleeps in; a cell that has been converted to an Islamic library and study area; a cell for storage of legal documents and non-religious texts; and an indoor exercise area...[T]his area also

² This issue will be addressed via separate written motion. Mr. Ali incorporates by reference the authorities cited herein in his request for meaningful access to counsel.

³ Copies of the requests are attached to this Motion as **Attachments A** and **B**, respectively.

contains a personal computer for Mr. Almarri's use."⁴ Mr. Al-Marri has unfettered access to these areas; there is no need to shackle, chain, and transport him.

- n. Mr. Al-Marri receives weekly unmonitored phone calls with his attorneys.
- o. Mr. Al-Marri has access to a library that includes 384 volumes of religious texts.
- p. Mr. Al-Marri has been authorized two monitored telephone calls per year with his family.
- q. Mr. Al-Marri receives local, national, and Arabic news on a daily basis.

6. **Law and Argument:**

Mr. Ali has both a constitutional and a statutory right to representation by counsel.

A key part of the constitutional right to a fair trial is the right to assistance of counsel. This "clear constitutional rule," based on a centuries-long line of cases in the common law and now enshrined in the Sixth and Fourteenth Amendments of the U.S. Constitution, guarantees that "a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." *Faretta v. California*, 422 U.S. 806, 807 (1975). Accused in military cases also possess the constitutional right to assistance of counsel. *United States v. Barnes*, 63 M.J. 563, 565 (2006) ("An accused has a fundamental right to be represented by counsel at trial."); *see also United States v. Bowie*, 21 M.J. 453, 455 (1986) ("The sixth amendment grants an accused the right to the assistance of counsel in his defense."); *United States v. Palenius*, 2 M.J. 86, 89 (1977) ("The Sixth Amendment to the Constitution of the United States guarantees that an accused individual brought to trial on criminal charges must be afforded the right to the assistance of counsel before that person can be validly convicted and punished.").

⁴ Mr. Almarri has challenged the conditions of his detention in federal court. *See Almarri v. Gates*, Civil action No. 2:05-cv-02259-HFF-RSC (U.S. District Court South Carolina). In support of its pleadings, the government submitted a declaration prepared by John Pucciarelli, Commander, U.S. Naval Brig Charleston, South Carolina, detailing the conditions imposed on Almarri. A copy of Commander Pucciarelli's declaration is attached as **Attachment C**.

Mr. Ali's right to representation arises also from both federal statute and the Rules for Military Commissions. Federal law codifies the right to representation and guarantees that "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." 28 U.S.C. § 1654. The Rules for Military Commissions similarly provide that "[t]he accused has the right to be represented before a military commission by civilian counsel if provided at no expense to the Government, and by the detailed defense counsel." R.M.C. 506(a).

Mr. Ali, an accused before a military commission, therefore possesses a clear right based in the Sixth Amendment, in federal law, and in the Rules governing this Commission, to representation by counsel.

Inherent in Mr. Ali's right to representation by counsel is the right to self-representation.

Inherent in Mr. Ali's right to representation by counsel is the right to dispense with counsel and represent oneself. *Faretta v. California*, 422 U.S. 806, 821 (1975) ("The Sixth Amendment, when naturally read, thus implies a right of self-representation."). In *Faretta*, the Court held that "[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Id.* at 819. The reasoning behind this principle is simple enough: "[t]he right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Id.* See also *Bowie*, 21 M.J. at 455 (quoting *Faretta*).

The right to self-representation, like the right to representation by counsel, is strongly rooted both in the Constitution and in the common law.⁵ As the Court explained:

⁵ The Court in *Faretta* traced the long history of the right to self-representation and observed that:

Faretta's holding was based on the longstanding recognition of a right of self-representation in federal and most state courts, and on the language, structure, and spirit of the *Sixth Amendment*. Under that Amendment, it is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who has the right to confront witnesses, and who must be accorded 'compulsory process for obtaining witnesses in his favor.' The Counsel Clause itself, which permits the accused 'to have the Assistance of Counsel for his defence,' implies a right in the defendant to conduct his own defense, with *assistance* at what, after all, is his, not counsel's trial.

McCaskle v. Wiggins, 465 U.S. 168, 174 (1984).

The constitutional right of an accused to self-representation is also codified in the Rules for Military Commissions. R.M.C. 506(c), which is itself copied verbatim from the Rules for Courts Martial, guarantees that "[t]he accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally." R.M.C. 506(c); R.C.M. 506(d) ("The accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally."). R.M.C. 506(c), like its counterpart R.C.M. 506(d), sets forth and is based on the holding in *Faretta* guaranteeing a constitutional right to self-representation. *United States v. Mix*, 35 M.J. 283, 285 (1992) ("The current standards regarding the right of self-representation based on *Faretta* ... are set forth in RCM 506(d), Manual for Courts-Martial."). Consequently, military accused, just like accused in civilian courts, possess the right to proceed in their cases *pro se*. *Bowie*, 21 M.J. at 456 ("we conclude that a military accused who so chooses may 'go it alone,' release his counsel, and appear *pro se*").

The Commission's decision regarding resources must account for the complexity of preparing a defense in this a capital case. The Supreme Court has held that "the penalty of death

[i]n the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation. Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92, enacted by the First Congress and signed by President Washington one day before the *Sixth Amendment* was proposed, provided that 'in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of... counsel....'

is qualitatively different from a sentence of imprisonment, however long,” and because of that difference, “there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.” *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

The distinction between capital and all other cases is deeply embedded in our jurisprudence. For nearly two centuries, the Supreme Court has recognized that in capital cases, doubtful factual and legal issues that might be decided in favor of the government in a non-capital case must instead be decided for the defendant “*in favorem vitae* [in favor of life].” *United States v. Smith*, 27 F.Cas. 1167, 1168, 1169 (2 Mason 143) (C.C. D.Mass. 1820) (Story, J., in circuit) (“If the present were a capital case, it would be our duty to adhere to the very letter of established doctrines in favorem vitae”); *see also e.g. United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 628 (1818) (Marshall, C.J.) (“[I]n expounding a law which inflicts capital punishment, no over rigid construction ought to be admitted”); *Andres v. United States*, 333 U.S. 740, 752 (1948) (“In death cases doubts such as those presented here should be resolved in favor of the accused.”); *Williams v. Georgia*, 349 U.S. 375, 391 (1955) (“That life is at stake is of course another important factor in creating the extraordinary situation. The difference between capital and non-capital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant.”). And it has long been understood that the need for heightened reliability governs discretionary decisions as well as strictly legal ones. *See e.g. United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824) (Story, J.) (no abuse of discretion where trial ruled mistrial in capital case; nevertheless, “in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner”); *United*

Faretta, 422 U.S. at 813.

States v. Matthews, 26 F.Cas. 1205, 1206 (C.C. S.D.N.Y. 1843) (severing joint indictments for murder solely because they were capital cases, “in favor of life”).

Mr. Ali’s right to self-representation exists in tension with the Supreme Court’s concern for reliability in both guilt and punishment. *Cf. Indiana v. Edwards*, ___ U.S. ___, 128 S. Ct. 2379, 2386-87 (2008) (discussing the demands of self-representation beyond simple competency to stand trial). However, the likelihood that a panel would reach a reliable result is greatly enhanced by providing Mr. Ali with the basic tools necessary to meet the prosecution’s case. Consequently, the Commission should rule in favor of providing Mr. Ali with access the materials necessary to prepare his defense as well as access to his counsel who can assist him in drafting and filing the appropriate motions.

The ability to present a defense is an essential part of Mr. Ali’s right to self-representation.

Mr. Ali’s “right to self-representation necessarily includes and is premised upon a right to prepare a defense.” *Taylor v. List*, 880 F.2d 1040, 1047 (9th Cir. 1989). This right ensures the ability of the accused to make his voice heard – to tell his side of the story – to the court, and in this case, to the world. Moreover, the right of the accused to prepare and present a defense encompasses several specific elements:

A defendant’s right to self-representation plainly encompasses certain specific rights to have his voice heard. The *pro se* defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in *voir dire*, to question witnesses, and to address the court and the jury at appropriate points in the trial.

McCaskle, 465 U.S. at 174. Taken together, the specific rights guaranteed by the Sixth Amendment to the *pro se* accused protect not only the interests of the accused, but also the integrity of the court and the appearance of “the fair administration of American justice.”

Faretta, 422 U.S. at 818. As the Ninth Circuit explained:

We do not believe that a defendant who exercises his right, under *Faretta*, to conduct his own defense must subject himself to the possibility that he will have, through circumstances wholly beyond his control, no opportunity to prepare that defense. The right guaranteed by the *fourteenth* and *sixth amendments* to reject a lawyer and represent oneself is premised upon the right of the defendant to make a defense.

Milton v. Morris, 767 F.2d 1443, 1445 (9th Cir. 1985).

Mr. Ali is entitled to the resources necessary to carry out his right to present a defense.

Although the Supreme Court has not directly addressed the specific resources required to carry out a *pro se* defendant's right to present a defense, the Court "has often recognized the constitutional stature of rights that, though not literally expressed in the document, are essential to due process of law in a fair adversary process." *Faretta*, 422 U.S. at 820.

The Ninth Circuit has held that the sort of resources requested here by Mr. Ali are essential to carry out his right to self-representation. In *Milton*, the Court held that "[a]n incarcerated defendant may not meaningfully exercise his right to represent himself without access to law books, witnesses, or other tools to prepare a defense." *Milton*, 767 F.2d at 1446. Similarly, the Ninth Circuit held that, "time to prepare and some access to materials and witnesses are fundamental to a meaningful right of representation." *Taylor v. List*, 880 F.2d 1040, 1047 (9th Cir. 1989). *See also United States v. Sarno*, 73 F.3d 1470, 1491 (9th Cir. Cal. 1995) *citing Milton*, 767 F.2d at 1446 ("We agree that the Sixth Amendment demands that a pro se defendant who is incarcerated be afforded reasonable access to 'law books, witnesses, or other tools to prepare a defense.'"); *Adams v. Carlson*, 488 F.2d 619, 630 (7th Cir. 1973) (prison security precautions designed to provide prisoners with "minimal access" to their attorneys unconstitutional); *United States v. Ruedlinger*, 1997 U.S. Dist. LEXIS 19244 (D. Kan. 1997) ("The Sixth Amendment demands that a pro se defendant who is incarcerated be afforded

reasonable access to law books, witnesses, or other tools to prepare a defense.”) (quotations omitted).

The Department of Defense has in the case of Mr. Almarri provided an “enemy combatant” with the type of resources that Mr. Ali has requested. The geographic and jurisdictional distinctions in their detention are moot as a result of the Supreme Court’s decision in *Boumediene v. Bush*, 533 U.S. ____ , 128 S. Ct. 2229 (2008) (rejecting the government’s premise that habeas jurisdiction rests on *de jure* sovereignty and noting that the United States by “virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty”). The most significant difference between them is that unlike Mr. Almarri, Mr. Ali is pending trial and has grounded his request in both the Sixth Amendment and Military Commissions Act.

Because this is a capital case, the Commission should resolve in favor of Mr. Ali any questions regarding his constitutional right to defense resources. As discussed above, “the penalty of death is qualitatively different from a sentence of imprisonment, however long,” and because of that difference, “there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.” *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). The concern for heightened reliability in capital case procedures is a principle of fundamental due process. Indeed, as Justice Harlan explained, concurring in *Reid v. Covert*, 354 U.S. 1 (1957) – another extraterritorial capital military prosecution – there is a special need for heightened due process in military capital trials because of the danger of unlawful influence created by the command structure:

So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial where the judge and trier of fact are not responsive to the command of the convening authority. I do not concede that whatever process is ‘due’ an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution

in a capital case. The distinction is by no means novel . . . nor is it negligible, being literally that between life and death. *Id.*, 354 U.S. at 77.

Accord, id., 354 U.S. at 45–46 (Frankfurter, J., concurring) (“These cases involve the validity of procedural conditions for determining the commission of a crime in fact punishable by death. The taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights.”).

Mr. Ali currently lacks all means of preparing and presenting a defense. Despite his timely and reasonable requests, Mr. Ali has been isolated from any means to prepare his case. In addition to being affirmatively denied resources necessary to present his defense, even Mr. Ali’s initial efforts to file the pleadings were impeded. Although Mr. Ali’s motions were recently given filing designations, no has a procedure been finalized for the filing of motions by the *pro se* accused.

Through lack of resources, Mr. Ali has effectively been denied his right to present a defense; a right guaranteed him under the Sixth Amendment of the Constitution. Moreover, as in *Taylor* and *Milton*, access to the resources requested in this motion is fundamental to a meaningful exercise of Mr. Ali’s right of self-representation.

7. Request for Oral Argument: The Defense requests oral argument to allow for thorough consideration of the issues raised by this motion. R.M.C. 905(h) provides that “Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have an evidentiary hearing concerning the disposition of written motions.”

8. Request for Witnesses: None.

9. Conference with Opposing Counsel: The defense attempted to confer with the

prosecution via e-mail regarding their position on the requested relief. The prosecution has not yet responded to the defense.

10. **Additional Information:** None.

11. **Attachments:**

- a. Memorandum for the Hon. Susan J. Crawford (August 7, 2008)
- b. Memorandum to the JTF Commander (to be provided under separate cover at a later date)
- c. *Al-Marri v. Rumsfeld*, 05-CV-2259 (HFF-RSC), Dkt. No. 48: Response by United States to Motion re: Prolonged Isolation and Unlawful Conditions of Confinement, Exhibit 1, Declaration of John Pucciarelli (April 10, 2008).


Respectfully submitted,

FOR: 


Ali Abdul Aziz Ali, *Pro Se*

LCDR Brian Mizer, JAGC, USN
MAJ Amy Fitzgibbons, JA, USAR

Standby Counsel for Mr. Ali
Office of the Chief Defense Counsel
Office of Military Commissions



Jeffery Robinson
Amanda Lee
Schroeter Goldmark & Bender
Advisory Civilian Counsel



Attachment A

7 AUG 2008

MEMORANDUM FOR THE HONORABLE SUSAN J. CRAWFORD,
CONVENING AUTHORITY, OFFICE OF MILITARY COMMISSIONS

SUBJECT: Request on Behalf of Ammar Al Baluchi (Ali Abdul Aziz Ali) (ISN 10018) for Resources Necessary to Prepare His Defense

1. With the assistance of counsel, Mr. Al Baluchi has requested that the Commander, Joint Task Force-Guantanamo Bay provide him with access to the resources necessary to prepare a defense, consistent with his decision to represent himself. The Office of the Chief Defense Counsel has no budget to provide Mr. Al Baluchi with the resources that he has requested nor does the Office of the Chief Defense Counsel control Mr. Al Baluchi's conditions of confinement. Accordingly, Mr. Al Baluchi requests the Convening Authority provide the funds necessary to meet his request for resources.¹

2. **Background:** In March 2003, Mr. Al Baluchi was apprehended in Karachi, Pakistan. The U.S. Government or its agents have detained him incommunicado for the last five years. In 2006, he was transferred to Guantanamo Bay, where he continues to be detained in isolation. On 9 May 2008, the Convening Authority referred Mr. Al Baluchi's case for joint trial by military commission authorized to impose the death penalty. Military counsel for Mr. Al Baluchi, LCDR Brian Mizer and MAJ Amy Fitzgibbons were detailed on 7 April 08 and 1 May 08, respectively. LCDR Mizer visited with Mr. Al Bauchi approximately three times prior to the arraignment. MAJ Fitzgibbons did not meet Mr. Al Baluchi until the day of the arraignment based on the government's inability to provide her with an interim top secret security clearance.

When questioned by the military judge at the arraignment, Mr. Al Baluchi waived his right to counsel and elected to represent himself. The military judge ordered additional individual hearings for each of the five co-accused. Prior to this hearing, Mr. Al Baluchi attempted to file a motion with the Commission which he had handwritten. Representatives from the Office of the Staff Judge Advocate refused to deliver the motion to the Commission. At the hearing, Mr. Al Baluchi again attempted to file the motion with the Commission. The military judge advised Mr. Al Baluchi to work through standby counsel to file motions.

Currently, Mr. Al Baluchi has some yellow legal paper and safety pens. He has one "legal bin" for the storage of his legal papers. Right now, his legal bin is full at about 2,000 pages. He is entitled to have three books in his cell at one time chosen from a list

¹ Consistent with the Defense Motion to Dismiss for Unlawful Influence, the *pro se* accused maintain that BG Hartmann unlawfully influenced the charging process in this case and must, at the least, be disqualified from further participation in this case, including the provision of legal advice regarding the defense requests for resources.

of books approved for detainees. There is no area in which he can work on legal motions or conduct research for his case. There is no law library. Mr. Al Baluchi's access to news is extremely limited. Counsel may not provide Mr. Al Baluchi with news articles without providing a justification to the OSJA regarding their relevance to his case. Legal books require a similar justification. Mr. Al Baluchi has not spoken to his family in his five years of detention.

On 1 August 2008, the military paralegals accepted approximately 80,000 pages of discovery on behalf of the *pro se* accused. In e-mail communications with defense counsel, the prosecution represented that the *pro se* accused would be provided with a laptop with the discovery pre-loaded. To date, Mr. Al Baluchi has not received a laptop computer nor have standby counsel been contacted regarding the delivery of the discovery to Mr. Al Baluchi.

Mr. Al Baluchi does not have regular meaningful contact with his standby counsel or his civilian consultants. There is no secure phone line between Guantanamo Bay and the offices of his standby counsel or his civilian consultants. Legal mail is classified as TS/SCI and must be personally picked up by counsel. Consequently, Mr. Al Baluchi is completely cut off from counsel when they are not physically at GTMO.

3. **Specific Requests:**

The defense has not been consulted regarding the resources Mr. Al Baluchi will require for his defense. It is the defense's understanding that, ultimately, the Commander, JTF-GTMO, possibly after consultation with other government agencies, determines Mr. Al Baluchi's conditions of confinement. Mr. Al Baluchi assumes that the Convening Authority is authorized to provide funding to meet his resource requests, if authorized by the Commander, Joint Task Force Guantanamo. Consequently, Mr. Al Baluchi is petitioning both the Convening Authority and the Commander simultaneously, with notice to the prosecution, to facilitate action on his resource request. Mr. Al Baluchi specifically requests:

a. A laptop computer with capabilities that would allow for meaningful review of the over 80,000 pages of electronic discovery. Providing Mr. Al Baluchi a computer with these specifications is justified to allow him to effectively represent himself, and to receive the advice of standby counsel while protecting the government's interests in maintaining physical and national security. First, each *pro se* accused must be provided their own computer based on the trial schedule and volume of discovery. Shared computers also present the risk that an individual accused's defense strategy may be inadvertently revealed to another *pro se* accused. Mr. Al Baluchi requests a tablet PC with a finger print reader to ensure that he and members of his defense team are the only persons able to access his laptop. This technology is readily available on commercial laptops.

Second, Mr. Al Baluchi requests that he be provided a cordless printer and scanner, which would allow him to print and scan documents necessary for his filings. Mr. Al

Baluchi understands that he would not be permitted to have cords in his cell; necessitating a cordless system. Mr. Al Baluchi proposes that the printer/scanner could be located outside of his cell if it had Bluetooth capability. With Bluetooth, he could activate the scanner/printer as needed, again avoiding the security risks associated with cords and wires.

As his own lawyer, Mr. Al Baluchi plans to conduct legal research, review the discovery and file briefs (as he has already). To compile these documents, he will need to be able to integrate the discovery into his pleadings. Mr. Al Baluchi intends to rely on standby counsel to review and help him edit his pleadings. For these reasons, Mr. Al Baluchi's computer should have a built-in DVD writer.

As previously stated, Mr. Al Baluchi has no storage space in his cell for legal books and documents. His "legal bin" is full at close to 2,000 pages. It makes sense to provide Mr. Al Baluchi with legal resource materials on CD. Accordingly, the computer issued to him should be equipped with a media card, so that he can read and use legal resource materials electronically.

Finally, Mr. Al Baluchi requests that his laptop be loaded with software that will allow him to effectively view and organize the discovery materials. The standby military counsel currently have access to Concordance and Case Map software. These programs would allow Mr. Al Baluchi to search through the thousands of pages of discovery he will be given. Right now, the prosecution has elected to provide the documents to standby counsel in .tif format, which means that they must be viewed as images and are not searchable; creating a near impossible task given the volume of discovery. Consequently, Mr. Al Baluchi requests that the prosecution provide its Concordance "load files" to him as well as to his standby counsel so that he can review the thousands of pages of discovery.

b. The opportunity for better communication with standby counsel and civilian consultants. Mr. Al Baluchi will address his inability to consult with his standby counsel in a separate request, which he incorporates by reference.

c. Mr. Al Baluchi requests a work space and additional storage space for his legal materials. As he is currently confined, there is insufficient space for his legal paperwork much less legal and other books necessary to the preparation of his defense. Mr. Al Baluchi requests that arrangements be made for access to a dayroom equipped with a desk and chair, as well as, some legal resources.

d. Access to an Islamic Library. Mr. Al Baluchi's case is a political one. He will rely on Islamic law and texts to make his arguments. At present, he has limited access to Islamic reading materials. He is only permitted to have a couple books in his cell at a time. They are exchanged weekly. Many of the books on the list approved for high value detainees relate to the Shia branch of Islam, whereas Mr. Al Baluchi is a Sunni. Access to Islamic materials could be either electronic or hardcover.

e. Access to legal pads, pens, and file folders. Mr. Al Baluchi is permitted to use flexible safety pens and legal pads. It is extremely difficult to write more than a few pages with the flexible, plastic pens. He requests access to additional materials to assist in the preparation of his defense, such as pens, paper and file folders.

f. Limited access to news and Commissions' proceedings. Mr. Al Baluchi requests limited access to the news and information regarding other terrorism prosecutions via controlled Internet access. Currently, his access to the news is limited to redacted copies of the U.S.A. Today which are routinely delivered weeks after they are published. Information relevant to his defense is available in the public domain and could be accessed quickly through a controlled internet connection. Mr. Al Baluchi also requests permission to review the transcripts in other Commissions' proceedings to gain an understanding of how his case will proceed procedurally.

g. Ability to contact family. via telephone. Mr. Al Baluchi requests that he be permitted to contact his family via phone prior to the trial. Mr. Al Baluchi's family has evidence in mitigation relevant to his sentencing case. Further, they may be able to assist Mr. Al Baluchi in identifying resources and evidence which would assist in his defense.

h. Information regarding the delivery and receipt of mail. Mr. Al Baluchi continues to request information regarding his incoming and outgoing mail. The mail is one of the few tools Mr. Al Bauchi has available to him in developing his defense. *See*, Request dated 4 August 2008.

i. Translator who is a native speaker of Arabic. At the arraignment, Mr. Al Baluchi objected to the quality of the Commission's translators. Specifically, he explained to the Military Judge that he speaks a dialect of Gulf Arabic. Consequently, the Commission's interpreters were difficult to understand. Mr. Al Baluchi has access to an interpreter with a TS/SCI clearance. Unfortunately, this interpreter is not a native speaker, not familiar with the Gulf dialect, and has limited experience as a translator. The prosecution has represented that it will not provide Arabic copies of any of the discovery asserting that the *pro se* accused must rely on the translators provided to them. The government's decision to force Mr. Al Baluchi to rely on an unqualified interpreter amounts to a denial of meaningful access to discovery. Accordingly, Mr. Al Baluchi requests that a qualified native speaker be provided to assist him in understating and using the discovery materials provided by the government. Mr. Al Baluchi clearly has some ability to speak and write in English. However, it is extremely difficult for him to understand legal terminology and concepts in English. A translator who is a native speaker will also have a shared understanding of Mr. Al Baluchi's culture, which would allow the translator to provide relevant explanations, examples and comparisons.

4. **Cases and Authorities:**

In support of this request, Mr. Al Baluchi relies on the U.S. Constitution, as well as, his and statutory rights under the Military Commissions Act to self-representation. In addition, Mr. Al Baluchi requests the Convening Authority and Commander consider the

conditions under which the Navy currently houses Mr. Ali Saleh Kahlah Almarri.² Mr. Almarri, like Mr. Al Baluchi, is also alleged to be an enemy combatant. However, unlike Mr. Al Baluchi, the government has not charged Mr. Almarri. Under Mr. Almarri's current conditions of confinement, he has extensive resources which allow him to conduct legal research and to receive regular visits and calls from his attorneys, despite the lack of charges in his case.

The Supreme Court recognized in *Faretta v. California*, 422 U.S. 806 (1975) that the Sixth Amendment right to counsel necessarily permits a defendant to waive his right to counsel and engage in self-representation. The Rules for Military Commission codify this constitutional right: “[t]he accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally.” R.M.C. 506(c). When an accused makes this election, the military judge may require that defense counsel remain present as standby counsel. *Id.*

In determining Mr. Al Baluchi's access to resources, it is important to understand the parameters of the right to self-representation. Although the concept is untested in these Military Commissions proceedings, the Supreme Court has held that the Sixth Amendment right to counsel grants the accused the right to *personally* make his defense. The focus must be on whether the “defendant had a fair chance to present his own case in his own way.” *McKaskle v. Wiggins*, 465 U.S. 168, 176 (1974). In *McKaskle*, the Supreme Court held that allowing the defendant to preserve actual control over the case that he presents to the jury is the core of the *Faretta* right. *Id.* at 177. The Court identified specific tasks the *pro se* defendant must be permitted to undertake:

“A defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard. The *pro se* defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in *voir dire*, to question witnesses, and to address the court and the jury at appropriate points in the trial.”

Id. at 174.

Mr. Al Baluchi cannot advocate for himself as *McKaskle* requires without the fundamental tools necessary to prepare a defense. Mr. Al Baluchi's specific requests are directly linked to his ability to defend himself. Without a computer, he will be unable to manage and review the over 80,000 pages of discovery that the prosecution intends to deliver. He has no access to legal texts or even a space in which he can work on motions. The Guantanamo Military Commissions are unique in their procedures and substantive offenses. In order to defend himself, Mr. Al Baluchi must become familiar with the Commissions' process. To do so, he will require access to Commissions' transcripts.

² Mr. Almarri has challenged the conditions of his confinement in federal court. *See Almarri v. Gates*, Civil Action No. 2:05-cv-02259-HFF-RSC (U.S. District Court South Carolina). In support of its pleadings, the government submitted a declaration prepared by John Pucciarelli, Commander, U.S. Naval Brig Charleston, South Carolina, detailing the conditions imposed on Almarri. A copy of Commander Pucciarelli's declaration is attached for your reference.

Further, both military law and federal law can provide persuasive authority in support of his motions and arguments. The United States has conducted terrorism trials in federal court. In fact, some of the same witnesses who will testify against Mr. Al Baluchi have testified in federal terrorism trials. In order to effectively represent himself, Mr. Al Baluchi will need to become familiar with these trials as they provide significant insight into the government's theory of prosecution. For this reason, Mr. Al Baluchi has a legitimate need for access to news. Additionally, the Military Commissions have been the subject of criticism and debate in media and academia. Such coverage is invaluable to a layperson's understanding of the legal challenges which could be pursued. Finally, unlike pretrial detainees in federal custody, he does not have the ability to meaningfully communicate with his family or anyone else outside the detention facility in order to assist him in obtaining the resources necessary to defend against capital charges.

Given the facts of this particular case, standby counsel cannot compensate for the lack of resources available to Mr. Al Baluchi. First, Mr. Al Baluchi does not have the means to effectively communicate with standby counsel. The process for the delivery and receipt of mail has never been provided to Mr. Al Baluchi in writing. It is his understanding that unless counsel are at GTMO, his mail will be subject to screening and lengthy delays. He cannot contact them at short notice to alert them to issues or materials that he might need. He has no access to his civilian consultants when they are not on the island. Finally, given his treatment over the last five years, Mr. Al Baluchi cannot form a relationship of trust with his standby counsel.

Mr. Al Baluchi's requests are not unreasonable in light of the seriousness of the charges and the Department of Defense's willingness to provide such accommodations to Ali Saleh Kahlal Almarri. The conditions of Mr. Almarri's confinement stand in stark contrast to those imposed upon Mr. Al Baluchi. According to John Pucciarelli, Commanding Officer, Naval Consolidated Brig, Charleston, South Carolina, Mr. Almarri has daily access to "a cell that has been converted to an Islamic library and study area; a cell for storage of legal documents and non-religious texts, and an indoor exercise area...this area also contains a personal computer available for Almarri's use." Mr. Almarri has daily access to 384 volumes of religious texts and the Commander is considering providing him with books on CD. Almarri is permitted to receive weekly unmonitored calls to his attorneys and has also been authorized two monitored calls with his family per year. The resources requested by Mr. Al Baluchi are similar to those already available to Mr. Almarri. The differences in their current confinement conditions appear arbitrary on their face when viewed in light of Mr. Al Baluchi's compelling statutory and constitutional right to self representation.

5. Conclusion:

Mr. Al Baluchi respectfully requests the Convening Authority authorize funding to meet his specific requests for resources so that he may effectively represent himself before the Military Commission. Mr. Al Baluchi requests a written response to this memorandum, specifying the Convening Authority's position with respect to each of the requested items. Mr. Al Baluchi intends to file motions with the Commission related to

resources. To that end, he requests notice of any proposed or approved set of procedures or rules that address how and to what extent the government will provide resources to the *pro se* accused.

Respectfully Submitted,

Signed on 6 August by MAJ Fitzgibbons with consent of
Ammar Al Baluchi (Ali Abdul Aziz Ali)
Pro Se

Brian Mizer
LCDR, USN, JAGC

Amy Fitzgibbons
MAJ, USAR, JA

Standby counsel for Mr. Al Baluchi

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-035
Government Response**

to the
Defense Motion for Resources Necessary to
Realize Sixth Amendment Right to Self-
Representation

Ali Abdul Aziz Ali

15 September 2008

1. **Timeliness:** This response is filed within the time allowable by the Military Commissions Trial Judiciary Rules of Court. The Prosecution sought and received an extension until 15 September 2008 to file this response.
2. **Relief Sought:** The Government respectfully requests the Military Judge deny the Defense Motion.
3. **Burden of Proof:** As the requesting/moving party, the accused bear the burden of persuasion. *See* Rule for Military Commissions (RMC) 905(c).
4. **Facts:**
 - a. On 5 June 2008, the accused was arraigned.
 - b. On 9 July 2008, the accused restated his desire to represent himself.
 - c. On or before 9 July 2008, the accused was given a copy of the Military Commissions Act, the Manual for Military Commissions, the Military Commissions Trial Judiciary Rules of Court, and the Regulation for Trial by Military Commissions in English and Arabic.
 - d. On 7 August 2008, the accused submitted a request to the Convening Authority asking for various items he deemed necessary to defend himself.
 - e. On 28 August 2008, standby counsel provided Trial Counsel with the same list standby counsel gave to the Convening Authority.
 - f. Apparently having no difficulty in communicating with the pro se accused they are assisting, standby counsel filed this motion on 29 August 2008.

g. On or about 22 September 2008, Trial Counsel will provide the accused with a laptop computer loaded with discovery provided to standby counsel and software necessary to prepare pleadings in this case.

5. Discussion:

a. The Military Commissions Act does not require the relief requested. This Commission informed the accused of the difficulties that surround self-representation. He willingly accepted the challenge with a full understanding of those difficulties.

b. The accused is an alien unlawful combatant without voluntary connections to the United States and is held in Cuba. Under settled Supreme Court doctrine, the accused lacks any claim to the protections of the Bill of Rights. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Johnson v. Eisentrager*, 339 U.S. 763 (1950). The Supreme Court decision in *Boumediene v. Bush*, 128 S. Ct 2229 (2008) is equally unhelpful. In *Boumediene*, the Supreme Court addressed a narrow question--- whether the Suspension Clause of the United States Constitution, Art. I, Section 9, Clause 2, applies to alien enemy combatants detained at Guantanamo Bay, Cuba, who are being held solely upon a determination of a Combatant Status Review Tribunal. The Court concluded that uncharged enemy combatants at Guantanamo Bay must, after some period of time, be afforded the right to challenge their detention through habeas corpus. In reaching that conclusion, the Court considered both the historical reach of the writ of habeas corpus, *see* 128 S. Ct. at 2244-51, and “the adequacy of the process” that the petitioners had received, *see id.* At 2262-74. The Court signaled no intention of extending the individual rights protections of the Constitution to alien enemy combatants tried by military commission.

c. While there is no legal right to the items that the accused requests, the Prosecution will provide the following items: a laptop computer loaded with all discovery already provided to standby counsel in this case. The computer has been purchased and is at Guantanamo. The Prosecution will attempt to configure it in the next week and make delivery to the accused before the next session of the Commission on 22 September 2008. The computer will be equipped with software so the accused can view the evidence turned over in discovery. He will have access to

the computer throughout the day and will be permitted to keep it in his cell. The computer will be equipped with a media playing software so he can review the evidence and the many videos in this case. The Prosecution will arrange for software capable of preparing pleadings. He will be given additional office supplies but not pens/pencils, other than the safety pen he has at his disposal, for safety reasons. As previously indicated, he has legal resources at his disposal in both Arabic and English. In addition, procedures are in place for him to file pleadings with the Commission as evidenced by the several he has already filed. Without committing to it, the Prosecution will look into language translation software such as Rosetta Stone. The accused already has access to limited news articles.

d. As more discovery is turned over in the near future, it will necessary to load it onto the accused's computer. This will be done in his presence to ensure he understands that no one is interested in seeing his defense or the materials he is preparing for filing with the Commission.

6. **Conclusion:** The Prosecution has spent considerable expense, time and effort to ensure that the accused gets what he needs to represent himself. The Command at JTF-GTMO has been extremely helpful in this effort.

7. **Request for Oral Argument:** The Government does not request oral argument but reserves the right to respond to any oral argument the defense may make.

8. **Respectfully submitted,**

//S//

Robert L. Swann
Prosecutor
Office of Military Commissions