

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 to Compel Meaningful Access
to Counsel

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:** At the direction and with the consent of the *pro se* accused, Messers Mohammed and Ali, through counsel, respectfully requests the Commission compel the government to provide them with meaningful access to their standby counsel and civilian consultant attorneys. They specifically request:

a. The Commission order the Commander, Joint Task Force-Guantanamo Bay (JTF), provide a secured phone line from Camp 7 to the defense SCIF in Arlington, Virginia; and

b. The Commission order the Convening Authority or the JTF Commander provide a courier located at Guantanamo Bay with the appropriate security clearance to receive draft pleadings and legal correspondence from the accused and transmit those pleadings to standby counsel via the defense point to point system.

3. **Overview:** From the outset of this prosecution, the accused's ability to communicate with counsel has been significantly impeded by the geographic distance separating them from counsel, the classification of their communications as TS/SCI, the requirement that all counsel possess a TS/SCI clearance, the lack of a consistent process for the delivery and receipt of written communications, and, most importantly, their inability to communicate with counsel when they are not physically at Guantanamo Bay. Counsel relied, in part, on these problems in their request for a delay in the arraignment. *See*, Appellate Exhibit 21. At the arraignment, both elected to

proceed *pro se* with the assistance of standby counsel and civilian consultants. Their ability to file pleadings and receive the benefit of counsels' advice continues to be frustrated by these obstacles to their access. Relying on the 14th and 6th Amendment to the United States Constitution, as well as, the right to self-representation as set forth in the Military Commissions Act, Messers Mohammed and Ali respectfully request the Commission grant the requested relief.

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. Facts¹:

a. LCDR Mizer and MAJ Fitzgibbons were detailed military counsel for Mr. Ali on 7 April and 1 May 2008, respectively. LCDR Mizer was not cleared to meet with Mr. Ali until 20 April 2008. At the time, the government had not completed MAJ Fitzgibbons' security investigation. Counsel jointly requested a delay in the arraignment based, in part, on their lack of opportunity to meet, and consult with, Mr. Ali prior to the arraignment. The request was denied. The government cleared MAJ Fitzgibbons to meet with Mr. Ali the night before the arraignment. At the arraignment, counsel renewed their objection to the Military Judge's decision directing Mr. Ali to elect counsel. The objection was denied.

b. Upon questioning by the Military Judge, Mr. Ali elected to waive counsel and proceed *pro se*. The Military Judge appointed LCDR Mizer and MAJ Fitzgibbons as standby counsel to Mr. Ali. The Military Judge acknowledged that he would allow two civilian counsel, Mr. Jeffery Robinson and Ms. Amanda Lee, who had not yet met Mr. Ali, to act as civilian consultants, if otherwise qualified.

c. Mr. Robinson and Ms. Lee first met Mr. Ali on 9 July 2008, immediately before his individual session with the Military Judge regarding his election of counsel. They did not appear at the arraignment or meet with Mr. Ali earlier because they lacked the requisite security clearances.

d. Prior to the 9 July hearing, Mr. Ali attempted to file a motion and a letter with the Commission through the Staff Judge Advocate, both were rejected because there was no system in place for their receipt.

¹ Standby counsel for Mr. Mohammed reserve the right to file additional facts relevant to this motion in a supplemental pleading.

e. At the 9 July hearing, Mr. Ali expressed several concerns. First, Mr. Ali explained to the Judge that his handwritten motions were not being accepted and that he didn't have the ability to properly research and draft motions on his own:

See, the thing is so complicated. Now I am pro se. I should have kind of more opportunity or access to, say, member of Commission, the judge, I have, should have access to computer or something that I could file or write something, you know, or at least a law library that could help me, but I have nothing here.

Draft Transcript, *U.S. v. Mohammed, et. al.* at page 14 (9 July 2008).

f. Mr. Ali then explained to the Military Judge that his inability to contact counsel was creating misunderstanding within the defense team:

But again the problem is I cannot get in touch with the defense team themselves. They cannot attend the island until they get through a very weird process. And the way I write letters, they don't get them until they personally be present on the island, so even the problem is not so with the defense team themselves--the process I mean.

This logistical issue is creating problem. That's the thing I want to mention. And these problems sometime are so sensitive, you know. Now I got this email and—the email from the judge, I mean. The email was written--the way the email came, as if the standby counsel was acting like, like acting by his own, you know, not saying my words which I couldn't--at the time I got the email, I couldn't do anything, I couldn't write to him or write to the Court, just to explain, just to clarify, hey, there was a small misunderstanding, misinterpretation problem.

Id. at page 14-15.

g. Finally, Mr. Ali informed the Military Judge that in the future, he wanted counsel to file motions for him with his permission and consent. The Military Judge confirmed that motions could be submitted by standby counsel, so long as, they included a representation that motions were presented at Mr. Ali's agreement or by his direction.

h. Mr. Ali accurately summarized the logistical obstacles that both he and Mr. Mohammed face in his comments to the Military Judge. At present, counsel do not have a timely, privileged way of communicating with the *pro se* accused when they are not at Guantanamo. The only option available to counsel is the detainee mail system, which is slow and cumbersome based on the volume of mail that is received and Guantanamo's geographic isolation.

i. The detainee mail system operates differently when counsel are present at

Guantanamo. Counsel may drop off and receive mail dependant on the Assistant Staff Judge Advocate's schedule. When he is able to visit the "high value detainees," he collects and delivers mail. However, given his many duties, this is not a scheduled or reliable process.

j. On 18 August 2008, Mr. Ali, through standby counsel, requested, in writing, that the JTF Commander provide him with meaningful access to counsel through a secure phone line and a cleared document courier. The Commander has not responded to Mr. Ali's request.

k. On 22 August 2008, Mr. Ali, through standby counsel, forwarded his written request to the Convening Authority to obtain the resources necessary to fund a secure phone line and courier. The Convening Authority has not responded to Mr. Ali's request.

6. **Law and Argument:**

The *pro se* accused's desire to share responsibility for the drafting and filing of motions is consistent with their statutory and constitutional right to self-representation. Further, the investigation, required in this a capital case, requires the ability to contact the *pro se* accused regularly. Finally, the *pro se* accused's due process right of access to the courts is impaired by the failure to provide them with a reliable means of communicating with counsel. The Constitution and the Military Commission Act compel the relief requested to ensure that the *pro se* accused can prepare a defense, to safeguard the fairness of these proceedings, and to guarantee the *pro se* accused's ability to effectively petition the Commission.

When viewed in the context of constitutional precedent, the statutory provision of standby counsel necessarily implies the ability to communicate with counsel.

The provision of standby counsel in the Military Commissions Act is consistent with Supreme Court and military caselaw, which recognizes the critical role standby counsel fulfill by assisting the accused in the exercise of his right to self-representation and ensuring the fairness of the proceedings. The appointment of standby counsel is a meaningless formality when counsel are denied access to the accused to advise and assist him. Most importantly, at this stage in the proceedings, standby counsel require meaningful access to the *pro se* accused in order to

assist them in drafting pleadings on their own, to review and explain the complicated pleadings counsel believe should be filed on their behalf and to receive their direction regarding the investigation of their case. Further, the *pro se* accused desire the assistance of counsel in reviewing the discovery and developing their defense. This type of assistance falls squarely within the constitutional parameters of standby counsel's role and is necessary to protect the *pro se* accused's statutory and Sixth Amendment right to self-representation.

The Military Commissions Act grants the accused the right to self-representation subject to the accused conforming "his deportment and the conduct of the defense to the rules of evidence, procedure and decorum applicable to trials by military commission." 10 U.S.C. § 949a(b)(3)(A). The Act further states that the self-representation right may be partially or totally revoked. 10 U.S.C. § 949(b)(3)(B). In the event the military judge revokes the right, "detailed defense counsel of the accused or an appropriately authorized civilian counsel shall perform the functions necessary for the defense." *Id.* The Act does not define the role of standby counsel.

The Rules for Military Commission (R.M.C.) are also largely silent on the role of standby counsel. R.M.C. 501 requires that detailed counsel act as standby counsel if an accused elects, and is competent, to undertake self-representation. Neither the Rules nor the Commentary to R.M.C. 501, flesh out the contours of standby counsel's role. The Rules make one additional reference to standby counsel in the context of discovery. R.M.C. 701(a)(4) states: "[S]tandby defense counsel shall examine the evidence and be prepared to provide advice to the accused."

In the only contested trial before these Military Commissions, *United States v. Salim Hamdan*, the accused elected to be represented by civilian and detailed military counsel. Consequently, there is no practical model for standby counsel; the role remains undefined and untested in these Commissions.

In *McKaskle v. Wiggins*, 465 U.S. 168 (1984), the Supreme Court defined parameters of the role of standby counsel and reconciled the concept of standby counsel with the defendant's Sixth Amendment right to self-representation. The Court set two limits on the involvement of standby counsel: "First, the *pro se* defendant is entitled to preserve actual control over the case that he presents to the jury. . . . Second, participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself." *McKaskle*, 465 U.S. at 178. Outside the presence of the jury, standby counsel may "address the court freely on his own behalf" so long as any disagreements between the counsel and the defendant are resolved in the defendant's favor. *Id.* at 179. The trial judge need only be capable of "differentiating the claims presented by a *pro se* defendant from those presented by standby counsel." *Id.* At its core, the self-representation right guarantees that the defendant "have his voice heard." *Id.* at 174. *McKaskle* contemplates that standby counsel assist the accused, and, if necessary, speak for the *pro se* accused with his consent, particularly in pretrial matters, conducted outside the presence of the panel.

In *United States v. Bowie*, 21 M.J. 453 (1986), the Court of Military Appeals (CMA), relying on *Farretta v. California*, 422 U.S. 806 (1975), held that the right to self-representation applied in military courts-martial and noted the benefit of appointing standby counsel when the accused waived representation. In *United States v. Beatty*, 25 M.J. 311, 315 (1987), the CMA expanded on the purposes served by the appointment of standby counsel. "Such an appointment is a means to reconcile the accused's desire for self-representation with the public's need to assure that courts run smoothly and that justice is done-and is perceived to have been done. Of course, the standby counsel must not interfere with an accused's control over the case, for the right to counsel belongs to the accused rather than to his lawyer."

Nowhere is the accused and public's need for justice greater than in a capital case. In order to obtain a just result, these proceedings must be both reliable and reflect an individualized determination of culpability and punishment. Because "death is different," the United States Constitution requires that "extraordinary measures [be taken] to insure that" the *pro se* accused are "afforded process that will guarantee, as much as is humanly possible, that [a sentence of death not be] imposed out of whim, passion, prejudice, or mistake." *Caldwell v. Mississippi*, 472 U.S. 320, 329 n.2 (1985) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1981) (O'Connor, J., concurring)). Consequently, this need for heightened reliability has compelled the Supreme Court to invalidate "procedural rules that *tend[ed]* to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination." *Beck v. Alabama*, 447 U.S. 625, 638 (1980) (emphasis added). *See also Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (noting that the Court's "duty to search for constitutional error with painstaking care is never more exacting than in a capital case.") (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987)). In this instance, the *pro se* accused are not seeking extraordinary measures but merely the realization of the assistance of standby counsel, consistent with Supreme Court precedent, in the preparation of their defense.

The individualized consideration requirement discussed in the Supreme Court's capital jurisprudence is firmly rooted in the Eighth Amendment. "[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304-305 (1976). The defense's ability to present this

evidence to the fact finder will be directed by the *pro se* accused and entirely contingent upon counsels' ability to communicate with them efficiently.

During the initial election of rights, the Military Judge explained to the co-accused that their ability to conduct any investigation in this case would be substantially hampered by their status and detention at Guantanamo Bay. Consequently, the task will fall to counsel to investigate and develop "constitutionally indispensable" evidence in mitigation. Standby counsel will rely heavily on the *pro se* accused to direct the investigation. Accordingly, standby counsel and the *pro se* accused must be provided the ability to contact each other when clarification or direction is necessary. It is not difficult to imagine a situation in which timely clarification of a fact is necessary to an investigation. At present, standby counsel would be required to fly to Guantanamo (a process which effectively impacts an entire work week) or rely on the mail system, which based on an optimistic estimate, could take three weeks or longer to allow for receipt and response. By granting the requested relief, the Military Judge significantly improves counsels' ability to consult with the *pro se* accused and to develop relevant evidence in mitigation.

Standby counsel can represent an important constitutional safeguard in a capital case. However, presently, in this case, the safeguard, and its consequent impact on the fairness of the proceedings, is illusory given the current obstacles to communication.

Standby counsels' ability to assist the *pro se* accused has been significantly impaired by their lack of communication with them when counsel are not present at Guantanamo. In previous filings, counsel have catalogued for the Commission the difficulties that they have encountered travelling to, and working at, Guantanamo Bay. While on the island, counsel may only meet with the accused during an approved meeting time. The JTF can only accommodate

visitation for three “high value detainees” at any one time. This includes meetings with habeas counsel for those “high value detainees” who are not charged. If an accused takes notes or gives counsel notes for a draft pleading, those notes are treated as TS/SCI and must be transported to the defense SCIF by two persons with the appropriate clearances. The same process would be repeated if an accused required the notes at a subsequent meeting.

To date, both Mr. Mohammed and Mr. Ali have drafted motions for the Commission. For future motions, they would like to have the opportunity for counsel to review their drafts and to assist them in putting their pleadings in the proper format. As the Military Judge is aware, the accused lack even the most basic resources necessary for self-representation. As Mr. Ali explained in the last session, there are also motions that he would like counsel to draft and file for him once he has had the opportunity to review them. Presently, counsel cannot send draft motions to Guantanamo in an efficient and privileged manner. Consequently, standby counsel have delayed filing significant constitutional motions within the original time frame established by the Military Judge.²

Mr. Ali has requested the ability to contact counsel via secure phone line. This technology is readily available at Guantanamo; the defense possesses a secure phone line in its Expeditionary Legal Complex (ELC) SCIF and assumes that JTF-GTMO and the other agencies operating at Guantanamo also have secure phone lines. The defense proposes that, much like in a civilian facility, the secure phone line run from the high value detainee detention area to the defense SCIF in Arlington, Virginia. This set-up would eliminate the need to transport any “high-value detainee” and would all the “high-value detainees” who are currently charged by

² On 27 August 2008, the Military Judge granted the joint defense request for an enlargement of time to file law motions. *See*, Military Commission’s Order (D-022) (dated 27 August 2008).

providing them with greater access to their counsel.³

In order to exchange written materials, the defense requests the Commission compel the provision of a courier to assist the defense in utilizing the point to point system available in the ELC SCIF. The courier would have to be an agent of the defense team based on their access to attorney-client materials. The courier would be responsible for collecting pleadings and legal mail from the high value detainees, transporting them to the SCIF, uploading them on the point to point system and notifying counsel that materials required attention. The courier could also accept materials from counsel for delivery to the accused. In this manner, the government's interest in security is protected and Mr. Ali still retains the ability to consult with counsel in writing, as needed.

The Sixth Amendment Right to Counsel and the 14th Amendment Right of Access to the Courts precludes the restrictions imposed in this case.

The Supreme Court has consistently recognized that as a corollary to the Fourteenth Amendment's guarantee of due process of law, prisoners must be afforded reasonable access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights. *See Procnier v. Martinez*, 416 U.S. 396, 419 (1974). Each jurisdiction shoulders an affirmative burden of ensuring that its prisoners have such access. *Bounds v. Smith*, 430 U.S. 817 (1977), which includes providing the inmates with a reasonable opportunity to seek and receive the assistance of attorneys. *Martinez, supra*, 416 U.S. at 419. "Regulations and practices that unjustifiably obstruct the availability of professional representation or the right of access to the courts are invalid." *Id.*

³ In D-024, the Joint Defense Request for Religious Accommodation, the accused referred to the conditions under which Mr. Ali Saleh Kahlah Al-Marri is detained without charge as an enemy combatant at the Naval Consolidated Brig in Charleston, South Carolina. According to the Brig Commander, Mr. Al-Marri receives weekly unmonitored phone calls with his attorneys.

The Supreme Court has recognized, “to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.” *Maine v. Moulton*, 474 U.S. 159, 170 (1985). *See also Wolfish v. Levi*, 573 F.2d 118, 133 (2d Cir.1978) (“[O]ne of the most serious deprivations suffered by a pretrial detainee is the curtailment of his ability to assist in his own defense.”), *rev'd on other grounds, Bell v. Wolfish*, 441 U.S. 520 (1979); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051 (8th Cir.1989) (when pretrial detainees' interest in effective communication with attorneys is “inadequately respected during pre-trial confinement, the ultimate fairness of their eventual trial can be compromised”).

Presently, the *pro se* accused have neither the resources to access the Commission on their own,⁴ nor the ability to communicate with counsel to petition the Commission with their assistance. The compelling rights at stake, the right of access to the courts and the right to self-representation cannot be overcome by any governmental assertion that the proposed relief is too costly. Reports estimate that the ELC cost \$12 million dollars to build. The ELC is equipped with secure phone lines, as are the defense offices within the ELC.⁵ The courier accommodation is designed to take advantage of the point to point technology already available to the defense within the ELC. Accordingly, the financial burden to the government is minimal in light of the expenditures already undertaken to try the accused at Guantanamo. Further, the requested relief will conserve judicial resources in the long run by facilitating the *pro se* accused's ability to comply with the Commissions' motions deadlines.

Mr. Ali has requested access to counsel through the Convening Authority and the JTF Commander; both have been nonresponsive to his requests. His prosecution continues to move

⁴ *See* D-025, Mr. Ali's *pro se* filing to the Commission regarding his lack of resources and the need for a competent translator.

⁵ *See* , Melia, Michael, *GITMO Build Temporary Legal Compound* (dated November 10, 2007) posted on www.abcnews.go.com.

forward, despite the failure to address these fundamental issues. Mr. Ali, joined by Mr. Mohammed, now respectfully request that the Military Judge compel the government to provide them with the ability to communicate with counsel in a timely and reliable manner so that they can direct their defense.

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 conferred with the Prosecution regarding the relief requested in this motion. The Prosecution objects to the motion.

11. **Additional Information:** None.

12. **Attachments:**

- a. Request to Commander, JTF-GTMO, for Meaningful Access to Counsel (dated 18 August 2008).
- b. Request to Convening Authority for Meaningful Access to Counsel (dated 22 August 2008).

Respectfully submitted,

FOR: 151
Khalid Sheikh Mohammed, *Pro Se*

CAPT Prescott L. Prince, JAGC, USNR
LTC Michael Acuff, JA, USAR
Standby Counsel for Mr. Mohammed
Office of the Chief Defense Counsel
Office of the Military Commissions



FOR: [Signature]
Ali Abdul Aziz Ali, *Pro Se*

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

22 August 2008

MEMORANDUM FOR THE HONORABLE Susan J. Crawford, Convening Authority,
Office of Military Commissions

SUBJECT: Request for Meaningful Access to Counsel (Ammar Al Baluchi ISN [REDACTED])

1. On 18 August 2008, Mr. Al Baluchi petitioned the Commander, JTF-GTMO for meaningful access to his standby counsel and civilian consultant attorneys. At present, the Commander has yet to answer the request. However, his Staff Judge Advocate has solicited suggestions from the Chief Defense Counsel to facilitate access to counsel, with respect to all the detainees currently charged. As you know, Mr. Al Baluchi's case is pending trial; his need for access to counsel is compelling and immediate. In your role as Convening Authority, you have the ability to grant requests for resources necessary to prepare a defense.¹ Accordingly, Mr. Al Baluchi requests that you provide the personnel and monetary resources necessary to install a secure phone line and provide one or more couriers with the appropriate level of security clearance to assist Mr. Al Baluchi and his standby counsel in exchanging written materials in a timely manner. Mr. Al Baluchi's request to the Commander, JTF-GTMO is enclosed for your review. Mr. Al Baluchi incorporates this memorandum by reference and relies on the authorities cited therein in petitioning you for resources.

2. On behalf of Mr. Al Baluchi, Major Fitzgibbons can address your questions and concerns. She can be reached at [REDACTED] or via e-mail at [REDACTED]

Respectfully submitted,

/s/ electronically by MAJ Fitzgibbons for Mr. Al Baluchi
AMMAR AL BALUCHI (ISN [REDACTED])
Pro Se

BRIAN MIZER
LCDR, JAGC, USN

AMY S. FITZGIBBONS
MAJ, JA, USAR

Standby Counsel for Mr. Al Baluchi

¹ The defense objects to the Legal Advisor's on-going participation in this case until the Commission has resolved the D-001, Joint Defense Motion to Dismiss the Charges and Specifications for Defective Referral due to Unlawful Influence.

Attachment B

18 August 2008

MEMORANDUM THRU Staff Judge Advocate, Joint Task Force Guantanamo

FOR Rear Admiral David M. Thomas, Jr., Commander, Joint Task Force Guantanamo

SUBJECT: Request for Meaningful Access to Counsel (Ammar Al Baluchi ISN 10018)

1. Mr. Al Baluchi respectfully requests the Commander permit him meaningful access to his standby counsel and civilian consultant attorneys. Currently, Mr. Al Baluchi can only communicate with counsel when they are physically at Guantanamo Bay. Even then, the ability to communicate with counsel is constrained by the number of interview slots and the lack of a consistent process for the delivery and receipt of written communications. The defense proposes two measures that would facilitate Mr. Al Baluchi's communications with counsel. First, the defense requests that the Commander approve the provision of a secured phone line. Second, the defense requests the Commander provide a courier with the appropriate security clearance who can deliver legal mail and draft pleadings to and from the *pro se* accused in *U.S. v. Mohammed, et. al.*

2. The defense requested relief is supported by the 14th Amendment's due process right of access to the courts and the 6th Amendment right to self-representation. These rights are necessarily interrelated, particularly in this case, where the Military Judge appointed standby counsel to assist Mr. Al Baluchi.

3. At his most recent hearing, Mr. Al Baluchi raised concerns about the filing of legal pleadings. Mr. Al Baluchi explained that the lack of meaningful contact with counsel has contributed to misunderstandings and has frustrated his ability to file pleadings:

ACC [MR ALI]: Regarding like you know the complexity of our situation, the counsel that cannot meet us or write us regularly, the authorities or government kind of is not finding the proper solutions, I, the motions to be written is all, it was under my permission, my authority, and the same thing in the future, I hope it to be so. But I just want you to consider that any motion received, there wouldn't be any chance of misunderstanding or anything.

The Military Judge advised Mr. Al Baluchi to work with counsel to both draft and file his legal pleadings. The Military Judge further advised Mr. Al Baluchi that he may draft these motions personally or they may be drafted by counsel and filed after he has had the opportunity to review

them:

MJ [COL KOHLMANN]: Well, with regard to motions, if they are submitted on your behalf by standby counsel. There will need to be a representation in there that this is presented with your agreement or by your direction.

ACC [MR ALI]: Sure.

MJ [COL KOHLMANN]: And then as far as making sure that it represents your views, I would certainly urge Lieutenant Commander Mizer and Major Fitzgibbons, and I have confidence in their abilities to communicate with you as best they can to capture the full intent and your full position on the different points. Now, is it going to be perfect every time? Probably not. But we're all going to do the best we can, and then when we come to Court to argue a motion, you will argue the motion unless you request that somebody else does it for you. And then I'll determine at that time whether that's appropriate. But their participation is governed by how much you want them to be involved in the case. Okay.

The transcript demonstrates that the Military Judge clearly envisions a system in which Mr. Al Baluchi has meaningful access to counsel so that he may, in fact, direct his defense.

4. The Supreme Court has consistently recognized that as a corollary to the Fourteenth Amendment's guarantee of due process of law, prisoners must be afforded reasonable access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights. *See Procunier v. Martinez*, 416 U.S. 396, 419 (1974). Each jurisdiction shoulders an affirmative burden of ensuring that its prisoners have such access, *Bounds v. Smith*, 430 U.S. 817 (1977), which includes providing the inmates with a reasonable opportunity to seek and receive the assistance of attorneys. *Martinez, supra*, 416 U.S. at 419. “Regulations and practices that unjustifiably obstruct the availability of professional representation or the right of access to the courts are invalid.” *Id.*

5. The resultant prejudice to Mr. Al Baluchi cannot be understated. The Supreme Court has recognized that “to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.” *Maine v. Moulton*, 474 U.S. 159, 170 (1985). *See also Wolfish v. Levi*, 573 F.2d 118, 133 (2d Cir.1978) (“[O]ne of the most serious deprivations suffered by a pretrial detainee is the curtailment of his ability to assist in his own defense.”), *rev'd on other grounds, Bell v. Wolfish*, 441 U.S. 520 (1979); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051 (8th Cir.1989) (when pretrial detainees' interest in effective communication with attorneys is “inadequately

respected during pre-trial confinement, the ultimate fairness of their eventual trial can be compromised”).

6. Currently, Mr. Al Baluchi cannot contact counsel to speak with us if he has a question or concern regarding his case. Rather, he must wait until counsel visit or send mail that is presumably subject to screening. Neither Mr. Al Baluchi nor counsel have a clear understanding of how Mr. Al Baluchi’s mail is screened and processed. It is counsels’ understanding that detainee mail is consolidated and subject to screening, regardless of whether it is designated as legal mail. Given the volume of detainee mail, the process is slow and cumbersome and does not represent an adequate means for attorney-client communication. The process for sending and receiving written legal communication is different when counsel are present at Guantanamo. Counsel may leave legal mail for Mr. Al Baluchi with the SJA. The SJA representative delivers the mail when it is convenient for him to travel to Camp 7, as part of his duties. The delivery of mail is contingent on the nature and extent of his duties on any given day. Mr. Al Baluchi recognizes and appreciates the SJA representative’s efforts in delivering his legal mail; however, this is not an adequate or reliable substitute for a systematic approach to attorney-client communication.

7. Further, there are limitations on counsels’ ability to pick up mail and consequently, to draft motions for Mr. Al Baluchi. Anything that Mr. Al Baluchi writes is presumptively TS/SCI. The regulations regarding transport of these materials require two individuals, one with courier authorization to move the legal mail from the legal office to the defense SCIF on the other side of the island. For the past month, LCDR Mizer and LN1 Lindee have been engaged in the trial of *U.S. v. Hamdan*. Major Fitzgibbons does not have courier authorization, although she applied for a courier card a month ago. These security measures have further complicated Mr. Al Baluchi’s ability to secure legal advice.

8. Mr. Al Baluchi requests access to a secure phone line so that he may communicate with counsel in a timely manner regarding the status of his case. Standby counsel have access to a secure phone line in their Arlington SCIF. Although there are secure phone lines at the ELC, it is extremely burdensome to both the government and Mr. Al Baluchi to transport him to the ELC in the event that he needs to reach counsel. Rather, the defense requests that a line be established in a secure location at the camp in which he is currently held. The JTF staff could then coordinate with counsel to establish a schedule for the receipt of calls consistent with camp administration. In previous submissions, Mr. Al Baluchi has referred to the conditions under which Mr. Almarri is detained by the Department of Defense at the Charleston Naval Brig. Although he is not charged, Mr. Almarri is allowed regular telephonic contact with his attorneys. In contrast, Mr. Baluchi’s capital murder trial is imminent. His need for regular and meaningful contact with his attorneys should likewise be accommodated.

9. At present, Mr. Al Baluchi and counsel are attempting to draft and co-ordinate the filing of motions. Mr. Al Baluchi has chosen to represent himself before the Commission. As counsel, Mr. Al Baluchi controls every aspect of the litigation. “He

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.” *McKasle v. Wiggins*, 465 U.S. 168 (1984).

10. Recognizing the complexity of this case, the Military Judge appointed standby counsel to assist Mr. Al Baluchi. Mr. Al Baluchi is writing his own motions and has requested that counsel draft motions for his review as well. This necessarily requires an exchange of information. As you know, Mr. Al Baluchi’s communications, including draft motions, are classified as TS/SCI. Consequently, an individual with the appropriate security clearance must move these documents. The Office of the Convening Authority recognized the difficulties and dangers associated with hand-carrying these materials and provided the defense with a point to point electronic transfer system. The system allows counsel to transmit their classified notes and other materials from the ELC SCIF to our SCIF in Arlington, Virginia. Mr. Al Baluchi proposes that JTF (or the Convening Authority) provide a courier to pick up and deliver draft pleadings and legal mail to and from Mr. Al Baluchi using the point to point system. This individual must be walled off from the prosecution and have the appropriate security clearance to move materials from Camp 7 or the JTF-SJA’s office to the ELC SCIF. The courier would then load the materials into the point to point system, where they could be viewed and responded to by counsel.

11. The Office of the Staff Judge Advocate appreciates the need for the charged detainees to communicate with counsel and has engaged the Chief Defense Counsel to seek his input to improve the overall ability of detainees to communicate with counsel. Although these are positive initial steps, Mr. Al Baluchi’s need for relief is pressing and immediate. The Military Judge has set a deadline of 29 August for the filing of legal motions. Although the Military Judge may allow some delay, Mr. Al Baluchi’s motions will undoubtedly be due within the next two to three months. For this reason, Mr. Al Baluchi is petitioning you individually in the hope that you will provide some intermediate relief to him.

12. On behalf of Mr. Al Baluchi, Major Fitzgibbons can address your questions and concerns. She can be reached at [REDACTED].

Respectfully submitted,

/s/ electronically by MAJ Fitzgibbons for Mr. Al Baluchi
AMMAR AL BALUCHI (ISN 10018)

Pro Se

BRIAN MIZER
LCDR, JAGC, USN

AMY S. FITZGIBBONS

MAJ, JA, USAR

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-36
Government Response**

to the
Defense Motion to Compel Meaningful Access
To Counsel

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:** No additional facts are required for resolution of this motion.
5. **Discussion:**
 - a. Standby counsel for Ali Abdul Aziz Ali and Khalid Sheikh Mohammed seek an order from this Commission directing the Commander, Joint Task-Force – Guantanamo Bay, Cuba, to install a secure phone line in their detention facility so that they can speak and consult with their standby counsel. The accused also desire someone who would forward draft pleadings from Guantanamo to Virginia using the Government provided defense point- to- point system so that these pleadings may be reviewed and edited by standby counsel prior to filing. In support for these requests, standby counsel express frustration with the difficulty of assisting clients hundreds of miles from Arlington, Virginia.

b. The Military Commissions Act does not require the relief requested. This Commission informed both accused of the difficulties that surround self-representation. Both willingly accepted the challenge with a full understanding of those difficulties. The Prosecution should not have to install phone lines or provide additional assets in this case, other than those the Prosecution addresses in its response to D-035. The solution is simple. If standby counsel wish to communicate with their clients in a more timely fashion and if distance is truly the impediment, then standby counsel should find ways to eliminate the distance. No one is impeding access to these accused.

c. Furthermore, standby counsel for both of these accused have an office in Guantanamo equipped with a secure point- to- point system that enables communication between Guantanamo and Arlington, Virginia. They have paralegals assigned to their teams that routinely travel to Guantanamo Bay that can assist in sending privileged communications or drafts of pro se filings over the system to waiting attorneys in Virginia. Standby counsel for both Ali and Mohammed have available assets and alternatives that enable them to meet their aims of providing effective assistance and representation.

6. **Conclusion:** Although the Prosecution takes no position on whether any of the accused should be representing themselves, we point out that they have the right to represent themselves. The Prosecution should not have to accommodate unreasonable requests particularly when there other reasonable alternatives.

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,**

Robert L. Swann
Prosecutor
Office of Military Commissions

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