

MILITARY COMMISSION REPORTER

VOLUME 2

SECOND PAMPHLET
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WASHINGTON COLLEGE OF LAW
AMERICAN UNIVERSITY



**MILITARY COMMISSION
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EDITORS' NOTE

The *Military Commission Reporter* seeks to include every unclassified decision, order, and ruling issued by the military commissions conducted at the U.S. Naval Base, Guantánamo Bay, Cuba, and all substantive opinions and rulings of the United States Court of Military Commission Review. This second volume encompasses cases decided after June 1, 2009. It also includes a 2008 decision from the *Hamdan* case that we received after volume 1 went to press.

NIMJ is making this volume available on-line in periodic pamphlets as decisions are released. A hard-copy version of the complete volume will be published in due course. Counsel are encouraged to send NIMJ copies of any decisions that have not been included.

Cases reproduced in this pamphlet may be cited as, for example, *United States v. Hamdan*, 2 M.C. 1 (2008).

For further information, readers are invited to visit NIMJ's Web site at www.wcl.american.edu/nimj, as well as that of the Department of Defense Office of Military Commissions at www.dod.mil/news/commissions.html.

NIMJ welcomes your comments on the *Military Commission Reporter*. Please write to us at National Institute of Military Justice, 4801 Massachusetts Avenue, N.W., Washington, D.C. 20016, or via email at nimj@wcl.american.edu.

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UNITED STATES COURT OF MILITARY COMMISSION REVIEW

**UNITED STATES V. SALIM AHMED HAMDAN
PANEL**

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Captain Eric E. Geiser, U.S. Navy

**UNITED STATES V. MOHAMMED JAWAD
PANEL**

Chief Judge Frank J. Williams
Colonel David R. Francis, U.S. Air Force
Captain Daniel E. O'Toole, U.S. Navy

**UNITED STATES V. ALI HAMZA AHMAD SULIMAN AL BAHLUL
PANEL**

Chief Judge Frank J. Williams
Colonel David L. Conn, U.S. Army
Colonel Cheryl H. Thompson, U.S. Air Force

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

Military Commission

July 14, 2008

RULING
ON MOTION TO DISMISS
(EX POST FACTO)
(D-012)

and

DEFENSE REQUEST
TO ADDRESS SUPPLEMENTAL
AUTHORITY ON D-012
(D-050)

Keith J. Allred
Captain, U.S. Navy
Military Judge

The Defense has moved this Commission to dismiss referred charges for lack of subject matter jurisdiction. Specifically, they claim the charges of Conspiracy and Providing Material Support for Terrorism violate the prohibition against *ex post facto* application of the law, found in the Constitution, Common Article 3 of the Geneva Conventions, and in the law of nations. The Government opposes the motion, arguing variously that the Constitution does not protect aliens held outside the United States, and that even if it does, there is ample precedent in the Law of Armed Conflict for the trial of these offenses by military commission as violations of the Law of Armed Conflict.

BURDEN OF PERSUASION

The Defense characterizes its motion as one challenging the Commission's jurisdiction, and argues that the burden should be on the Government to prove jurisdiction, in accordance with R.M.C. 905(c)(2)(B). The Government denies that this is a jurisdictional issue, and argues that the burden remains on the Defense, as moving party, in accordance with R.M.C. 905(c)(2)(A). Because a military commission has narrowly constrained jurisdiction as to offenses, the Commission assigns the burden to the Government to demonstrate that the offenses with which the accused is charged were violations of the law at the time Mr. Hamdan engaged in the actions with which he is charged.

DOES THE CONSTITUTION OF THE
UNITED STATES PROTECT MR. HAMDAN?

The Commission has previously determined that an alien unlawful enemy combatant held outside the sovereign borders of the United States, who has no voluntary connection to the United States other than his confinement, cannot claim the protections of the Constitution. *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007); *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1428 (11th Cir. 1995) *cert. den.* 516 U.S. 913 (1995); *DKT Mem'l Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 284 (D.C. Cir. 1989). In light of the Supreme Court's recent ruling, the Defense requests reconsideration and argues that the Constitution does protect detainees held in Guantanamo, and specifically Mr. Hamdan.

Boumediene v. Bush, 533 U.S. ____ (2008) [hereinafter *Boumediene*].

In addition, the Defense points out that the *Ex Post Facto* clause of the Constitution is not a substantive protection to be claimed by individual claimants, but a substantive limitation on the power of Congress. “There is a clear distinction between...prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only ‘throughout the United States’ or among the several states. Thus, when the Constitution declares that ‘no bill of attainder or *ex post facto* law shall be passed,’...it goes to the competency of Congress to pass a bill *of that description*.” *Downes v. Bidwell*, 182 U.S. 244, 276-77 (1901). Thus, the Defense argues, whether the *ex post facto* protections of the Constitution protect aliens in Guantanamo Bay, the Constitution prohibits Congress from enacting *ex post facto* legislation. This Commission concludes that Congress is not authorized to pass *ex post facto* legislation, and thus will review the MCA prohibitions against conspiracy and material support for terrorism to determine whether they are such offenses.

To prevail on this motion, the Government must show that conspiracy and material support for terrorism were traditional violations of the law of armed conflict when he engaged in the conduct with which he is charged.

CONSPIRACY

The parties have argued this issue with commendable skill and passion. The Defense points to the plurality’s holding that conspiracy is not a “clear and

unequivocal” violation of the common law of war (citing *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 & n. 34); that there has been no “universal agreement and practice” establishing conspiracy as a violation of the law of war (citing *Ex Parte Quirin*, 317 U.S. 1, 30); the rejection of conspiracy as a war crime by the Nuremberg Tribunal on the ground that “[t]he Anglo-American concept of conspiracy was not a part of European legal systems and arguably not an element of the internationally recognized laws of war” (citing T. Taylor, *Anatomy of the Nuremberg Trials: A Personal Memoir* 36 (1992)); an *Amicus Curiae* Brief of Specialists in Conspiracy and International Law before the Supreme Court; and the conclusion of a U.N. Special Rapporteur who concluded that conspiracy is not an offense under the laws of war (citing U.N. Doc. A/HRC/6/17/Add. 3 (Nov. 22, 2007)).

The Government responds that the Supreme Court’s opinion in *Hamdan* should be read in light of the absence (at the time) of Congressional action to define violations of the law of war under its Constitutional authority to “define and punish” offenses against the laws of nations, and cites Justice Kennedy’s observation that “Congress, not the Court, is the branch in the better position to undertake the sensitive task” of determining whether conspiracy is a war crime. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2809 (Kennedy, J., concurring). The Government notes that conspiracy convictions of Nazi saboteurs were upheld in *Ex Parte Quirin*, 317 U.S. 1 (1942) and *Colepaugh v. Looney*, 235 F.2d 429, 431, 433 (10th Cir. 1956), cert. den., 352 U.S. 1014 (1957). In the Pacific theater, “orders establishing the jurisdiction of military commissions in various theaters of operation provided that conspiracy to violate the laws of war was a cognizable offense.”

Hamdan at 2834 (Thomas, J., dissenting). The World War II military tribunals of several European nations recognized conspiracy to violate the laws of war as an offense triable before military commissions, and military commissions in the Netherlands and France tried conspiracy to violate the laws of war, as did the International Military Tribunal at Nuremberg with respect to four specific types of conspiracies. *Hamdan* at 2836, n. 14 (Thomas, J., dissenting). The conspirators who assassinated Abraham Lincoln were tried and punished by a military commission for conspiracy, and an 1865 Opinion of the Attorney General declares that “to unite with banditti, jayhawkers, guerillas or any other unauthorized marauders is a high offense against the laws of war; the offence is complete when the band is organized or joined.” 11 Op. Atty. Gen. at 312.

MATERIAL SUPPORT FOR TERRORISM

Once again, the question here is whether “Material Support for Terrorism,” criminalized by 18 U.S.C. § 950v(25), is sufficiently well established as a violation of the law of war that exposing Mr. Hamdan to punishment for that offense is not an *ex post facto* application of the law.

For this offense, the Defense points again to the U.N. Special Rapporteur, who concluded in 2007 that terrorism, providing material support for terrorism, wrongfully aiding the enemy, spying and conspiracy “go beyond offences under the law of war.” *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, 12, U.N. Doc. A/HRC/6/17/Add. 3 (Nov. 22,

2007). American military tribunals have never tried this offense, and it is not listed as a war crime in the U.S. War Crimes Act, 18 U.S.C. § 2441, or the U.S. Army’s *Law of War Handbook* (2005). A Congressional Research Service report prepared for members of Congress recently concluded that “defining as a war crime ‘material support for terrorism’ does not appear to be supported by historical precedent.”¹ Nor is the offense mentioned in any of the treaties or statutes that define law of war offenses: the Hague Conventions, the Rome Statute of the International Criminal Court, nor the International Criminal Tribunals for the Former Yugoslavia, Rwanda or Sierra Leone.

In reply, the Government argues that violations of Common Article 3 (such as “violence to life and person” of those “taking no active part in hostilities”) are widely considered to be war crimes and have been criminalized by the U.S. War Crimes Act, 18 U.S.C. § 2441; Providing Material Support for Terrorism and Providing Material Support for an International Terrorism Organization have been violations of federal law, with provisions made for the prosecution of extra-territorial offenses, since 1993. (18 U.S.C. § 2339A and 2339B). U.N. Security Council Resolutions 1189 and 1373 condemn terrorism and require member states to criminalize it; and the United States is a party to twelve international treaties that prohibit kidnappings, hijackings, bombings, and the killing of innocent civilians and other acts of “terrorism.” In essence, the Government argues in part that because terrorism is con-

¹ Jennifer K. Elsea, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparisons with Previous DOD Rules and the Uniform Code of Military Justice*, 12 (CRS, updated Sep. 27, 2007), available at <http://www.fas.org/sgp/crs/natsec/RL33688.pdf>.

demned by international law, and material support for terrorism is a violation of U.S. federal law, material support for terrorism has traditionally been a crime under the law of armed conflict, or at least that Hamdan must have known his conduct was not “innocent when done.”

The Government offers evidence of U.S. practice during the American Civil War. An 1894 Congressional document asserted that during the war, there were “numerous rebels...that...furnish the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents [we]re banding together in several of the interior counties for the purpose of assisting the enemy to rob, to maraud, and to lay waste to the country. All such persons are by the laws of war in every civilized country liable to capital punishment.” H.R. Doc. No. 65, 55th Cong. 3d Sess., 234 (1894). Likewise, Colonel Winthrop wrote that during the Civil War numerous persons were “liable to be shot, imprisoned, or banished, either summarily where their guilt was clear or upon trial and conviction by a military commission” based upon their support for unlawful combatants. Winthrop, *Military Law and Precedents*, 784.

In addition, the language of General Orders establishing the jurisdiction for military commissions during the Civil War suggests the existence of an offense similar to “providing material support for terrorism” existed during that conflict: “There are numerous rebels...that... furnish the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents are banding together in several areas of the interior counties for the purpose of assisting the

enemy to rob, to maraud, and to lay waste to the country. *All such persons are by the laws of war in every civilized country liable to capital punishment* (emphasis added). Numerous trials were held under this authority.” *Hamdan v. Rumsfeld, supra*, at 817 n.9 (Thomas, J., dissenting) (quoting from H.R. Doc. No. 65, 55th Cong. 3d Sess., 234 (1894)). Thereafter Justice Thomas cites several General Court-Martial Orders in which convictions were upheld for “being a guerilla.” The meaning of this term is made clear by Colonel Winthrop, who explains under his description of “Irregular Forces in War,” the meaning of the term “Guerillas.” The term encompasses “irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders...” Winthrop, at 783. After a discussion of these forces, which a modern reader might understand to be a description of “unlawful combatants,” Winthrop continues in this vein:

But a species of armed enemies whose employment in a military capacity was not and could not be justified were the so called “guerillas” or our late civil war. [Note 55 inserts here “Called ‘guerillamarauders’ in the act of July 2, 1864, c. 215 and the 105th Article of War. They were also styled, in different localities, “bush-whackers,” “jayhawkers,” “regulators,” etc. Prof. Leiber (inst. § 82, 84) refers to them as “highway robbers or pirates” and “armed prowlers.”] These were persons acting independently, and generally in bands, within districts of the enemy’s country or on its borders, who engaged in the killing, disabling and robbing of peaceable citizens or soldiers, in plunder and pillage, and even in the ransacking of towns, from motives

mostly of personal profit or revenge.” Winthrop, at 783-784 and note 55.

Only in light of the further clarification provided in this footnote does the difference between the two types of Civil War “guerillas” appear. Traditional guerillas were irregular forces who supported the Confederate armed forces, and for whom the protection of prisoner of war status was sometimes claimed. Winthrop, at 783. The “guerillas” of the civil war era, i.e., those described in the numerous General Court-Martial Orders Justice Thomas refers to in *Hamdan*, at 817 n.9, were more akin to (and actually referred to as) “spies,” “bridge-burners,” “pirates,” “highway robbers” and “guerilla-marauders.” They were subject to trial by military commission, along with those who “join, belong to, act, or cooperate” with them. *Ibid.* They acted entirely without the law, “plundered the property of peaceable citizens,” and usually for motives of personal profit or revenge. In modern parlance, they might be referred to as terrorists, or those who provided material support for terrorism. At least in American Civil War practice, they were subject to trial by military commission for their activities.

The Government concedes that although the offense of “providing material support for terrorism” does not appear in any international treaty or list of enumerated offenses, the *conduct* now criminalized by the MCA provision has long been recognized as a violation of the law of war. 18 U.S.C. § 950v(b)(24) defines the offense of Terrorism such that any person “who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages

in an act that evinces a wanton disregard for human life...” shall be punished. Intentionally killing or inflicting great bodily harm upon a protected person is clearly a violation of the law of war. Taking all this history into account, the Government argues that Congress merely *defined* as “Material Support for Terrorism” conduct that was already proscribed and subject to trial by military commission.

The evidence for both Conspiracy and Material Support for Terrorism is mixed. Absent Congressional action under the Define and Punish clause to identify offenses as violations of the law of war, the Supreme Court has looked for “clear and unequivocal” evidence that an offense violates the common law of war, *Hamdan*, at 2780 and n. 34, or that there is “universal agreement and practice” for the proposition. *Ex Parte Quirin*, 317 U.S. 1, 30 (1942). But where Congress has acted under its Constitutional authority to define and punish offenses against the law of nations, a greater level of deference to that determination is appropriate. Quoting from an opinion by the U.S. District Court for the Southern District of New York, the Government argues:

[E]ven assuming that the acts described in 18 U.S.C. §§ 2332 and 2332a are not *widely* regarded as violations of international law, it does not necessarily follow that these provisions exceed Congress’ authority under [Article I, § 8] Clause 10. Clause 10 does not merely give Congress the authority to punish offenses against the law of nations; it also gives Congress the power to “define” such offenses. Hence, provided that the acts in question are recognized by at least some members of the international community as being offenses against the law of

nations, Congress arguably has the power to criminalize these acts pursuant to its power to *define* offenses against the law of nations. See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159 (1820) (Story, J.) (“Offenses ...against the law of nations cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations... [T]herefore...there is a peculiar fitness in giving the power to define as well as to punish.”) Note, Patrick L. Donnelly, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 Cornell L. Rev. 599, 611 (1987) (Congress may define and punish offenses in the international law, notwithstanding a lack of consensus as to the nature of the crime in the United States or in the world community).

United States v. Bin Laden, 92 F. Supp. 2d 189, 220 (S.D.N.Y. 2000), *criticized on other grounds* by *United States v. Gatlin*, 216 F.3d 207, 212 n.6 (2d Cir. 2000); see also Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 Harv. Int'l L. J. 121, 142 (2007) (“we might assume... that Congress, representing the United States’ sovereign lawmaking body within the international system, has at least some leeway to aid in the development of the category of international offenses by pushing the envelope beyond where it already is”).

CONCLUSION AND DECISION

In enacting the MCA, Congress asserted that “The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission... Because the provisions of the subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crime that occurred before the date of the enactment of this chapter.” MCA § 950p(a),(b). Thus, Congress was clearly aware of the Constitutional limitation of its power, and indicated its sense that it had complied with that limitation. In light of Congress’ enumerated power to define and punish offenses against the law of nations, and its express declaration that in doing so, it has not enacted a “new crime that did not exist before its enactment,” the Commission is inclined to defer to Congress’ determination that this is not a new offense. There is adequate historical basis for this determination with respect to each of these offenses.

The Government has shown, by a preponderance of the evidence, that Congress had an adequate basis upon which to conclude that conspiracy and material support for terrorism have traditionally been considered violations of the law of war.

The Motion to Dismiss for Lack of Subject Matter Jurisdiction Over *Ex Post Facto* Charges is DENIED as to both offenses.

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED, et al.

Military Commission

June 11, 2009

COMMISSION RULING
REGARDING PROSECUTION MOTION
FOR AN ADDITIONAL
120-DAY CONTINUANCE
(P-010)

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

1. This matter having come before the Military Commission upon Government motion to grant a second 120-day continuance in this case until 17 September 2009;¹ and having considered the parties' written submissions, to include the Defense opposition;² and for good cause shown; the Military Commission finds that the interests of justice served by continuing further substantive proceedings to allow a review of the factual and legal

¹ On 21 January 2009, the Military Commission granted, over objection, a Government motion to continue this case to 20 May 2009. See P-009, *Commission Ruling Regarding Government Motion for 120-Day Continuance*. On 14 May 2009, the Government filed this supplemental motion requesting an additional 120-day delay.

² On 9 June 2009, Mr. Ali, proceeding in *pro se* capacity, filed a response opposing the Government's requested 120-day continuance. While filed out of time, the Military Commission finds good cause to consider the Defense response. See Military Commissions Rule of Court (R.C.) 3.6.b.

bases for continued detention of the above-named accused currently held at Guantanamo Bay, Cuba; to determine whether each can be transferred or 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 and the interests of justice,³ outweigh the best interests of each accused and the general public in a prompt trial.

2. That said, while Messrs. al Shibh and al Hawsawi have indicated a desire to proceed *pro se*,⁴ their detailed military defense counsel have raised questions regarding their competency to stand trial. As such, the Military Commission cannot resolve the representation issue until an incompetence determination hearing is held pursuant to Rule for Military Commission (R.M.C.) 909(e).⁵

3. While a halt to all substantive pretrial and trial proceedings pending inter-agency

³ The President has tasked that the review with respect to those persons currently detained at Guantanamo Bay be completed on a "rolling basis and as promptly as possible." See Executive Order 13492 of January 22, 2009, "Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities."

⁴ *Pro se* legal representation refers to the circumstance of a person representing himself or herself without a lawyer in a court proceeding. *Pro se* is a Latin phrase meaning "for oneself."

⁵ R.M.C. 909 provides, in pertinent part, that, after referral of charges, the military judge may conduct a hearing to determine the mental capacity of the accused. Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of his case.

review of this case is warranted, deferring discovery obligations related to a competency determination, appears not. Specifically, the Government has not demonstrated to the Military Commission's satisfaction why the underlying medical examinations and other investigations which must be completed prior to conducting the above referenced incompetence determination hearings cannot proceed during this period. In addition, 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 R.M.C. 909 incompetence determination hearings for Messrs. al Shibh and al Hawsawi can proceed on or about 21-25 September 2009.

4. Accordingly, the Government's motion is GRANTED. Except as provided in paragraph 5 below, all Military Commission sessions are continued to no earlier than 17 September 2009.

5. A session pursuant to R.M.C. 803⁶ is scheduled for 16 July 2009 in Guantanamo Bay, Cuba where the Military Commission

⁶ A military judge may call the Commission into session without the presence of the members to dispose of interlocutory matters and hear motions. See Discussion to R.M.C. 803.

will conduct a status conference to address any unresolved discovery matters related to the incompetence determination hearings for Messrs. al Shibh and al Hawsawi. While Messrs. Sheikh Mohammed, bin 'Attash and Ali may attend, the Military Commission will hear only from the prosecution and detailed military defense counsel for Messrs. al Shibh and al Hawsawi and only as to issues related to the R.M.C. 909 hearing. No other matters will be addressed at this session. Motions, if any, related to R.M.C. 909 hearings should be filed by 1200 (EDT) 25 June 2009, responses by 1200 (EDT) 2 July 2009 and replies by 1200 (EDT) 7 July 2009. Absent good cause shown for continued delay, said incompetence determination hearings are scheduled for 21-25 September 2009.

6. The Military Commission directs that a copy of this order be served upon each accused, the Prosecution, and all civilian and military defense counsel of record, and that it be provided to the Clerk of Court for public release. The underlying Government motion and Mr. Ali's response will also be provided to the Clerk of Court for public release, after appropriate redactions for privacy and security considerations. The Military Commission further directs the Clerk of Court to have this order translated into Arabic and served upon each of the above-named accused.

So ordered this 11th day of June 2009.

UNITED STATES
v.
IBRAHIM AHMED MAHMOUD
AL QOSI

Background

Ibrahim Ahmed Mahmoud al Qosi is a Sudanese citizen. He was captured in Afghanistan in 2001 and allegedly served as the treasurer for one of the business fronts for al-Qaeda operations. He allegedly served as Osama bin Laden's driver and bodyguard, having joined al-Qaeda in 1989.

Military Commission

Charges were sworn against Mr. al Qosi on February 8, 2008. The Convening Authority referred charges on March 5, 2008.

Charges

Providing Material Support for Terrorism (Violation of 10 U.S.C. § 950v[b][25]): Intentionally provided services as a bodyguard, driver, fighter, and supplier for al-Qaeda.

Conspiracy (Violation of 10 U.S.C. § 950v[b][28]): Provided security, transportation and supply services to al-Qaeda camps in Jalalabad and Kandahar.

UNITED STATES OF AMERICA

v.

IBRAHIM AHMED MAHMOUD AL QOSI

Military Commission

July 16, 2009

RULING: GOVERNMENT MOTION FOR
APPROPRIATE RELIEF
(120-DAY CONTINUANCE)
(P-002)

Nancy J. Paul
Lieutenant Colonel, U.S. Air Force
Military Judge

1. On 15 May 2009, the Government filed a Motion for Appropriate Relief, requesting that any further proceedings in the above action be delayed until at least 17 September 2009. On 22 May 2009, the Defense filed a Defense Response to Government Motion for Appropriate Relief, asking the request be denied. On 28 May 2009, the Government filed a Reply to Defense Response for Appropriate Relief. On 15 July 2009, the Defense filed a Submission of Attachments to their 22 May 2009 Defense Response. The Defense also filed a Bench Brief on the Issue of Excludable Delay on 15 July 2009. On 16 July 2009, the Government filed a Government Response to the Defense Submission of Attachments to Defense Response to Government Motion for Appropriate Relief (120-Day Continuance).

2. On 22 January 2009, the President issued Executive Order (E.O.) 13493 which directed an interagency Task Force to

“conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice.” The E.O. directed the Task Force to complete its work by 21 July 2009.

3. On 23 January 2009, the Government requested a continuance until 20 May 2009. The Defense did not file an opposition to the request. On 20 May 2009, the Commission granted the continuance.

4. The review being conducted by the Task Force has yet to be finalized. However, on 15 May 2009, the SecDef published and notified Congress of five significant changes to the Manual for Military Commissions (MMC). They include proposed changes to jurisdictional issues; establishment of a right to “individual military counsel”; removal of the requirement to instruct the members regarding an accused not being subject, in some situations, to cross-examination when he offers his own hearsay statement but does not testify; prohibition of the use of statements, in some situations, obtained by cruel, inhuman or degrading treatment, regardless of when the statements were obtained; and revision of one of the rules dealing with hearsay evidence. Additionally, there remains the possibility that any charges of material support for terrorism may be dismissed.

5. The Government submits, as they did in their January 2009 continuance request, that this Motion for an additional conti-

nance is in the best interest of justice. They argue that the continuance will serve the interests of justice and the accused, as it will permit the President and his Administration to complete a thorough review of all pending cases and of the military commissions process as a whole. They further assert that it would be inefficient and potentially unjust to both the Government and the Defense to deny the continuance.

6. The Defense requested the Government motion be denied. They argue that the Court had not excluded the previous 120-day continuance for speedy trial purposes, that the continuance has and will further interfere with the accused's ability to prepare for trial by failing to provide discovery and/or access to relevant witnesses, and that the Government will continue its obstructive tactics during any additional continuance. However, subsequent to the 22 May 2009 Defense Response, the Government did provide the Defense with over 2500 pages of discovery, as well as the contact information for two potentially relevant witnesses.

7. On 15 May 2006, the Defense filed a Submission of Attachments to the 22 May 2009 Defense Response to the Government Motion for Appropriate Relief (120-Day Continuance). On 16 July 2009, the Government filed a response to the Defense's request to submit attachments and asked that the Court not consider these documents. In essence, the matters submitted by the Defense in the Attachment consisted of several documents submitted to the Guantanamo Review Task Force in support of the accused's repatriation to Sudan. The submission con-

tained, in part, letters from family members, a letter to the Secretary of State, and affidavits from the Civic Aid International Organization in Sudan. In support of their request that the charges be dismissed and the request for a continuance be denied, the Defense argues that the accused's chance at repatriation is diminished if he carries the stigma of a charged detainee. Whether the accused is a proper candidate for repatriation to Sudan is not a question to be answered by the Commission. Nor is it a compelling reason to deny the continuance. It is the responsibility of the Interagency Task Force, not the Commission, to review the detainee's case and make a recommendation regarding his final disposition and whether that includes repatriation to Sudan. Therefore, while the Commission did review the matters contained in the 15 July 2009 Submissions of Attachments; they were considered irrelevant in regards to the Commission's determination of whether or not to grant the requested 120-day continuance.

8. Additionally, the Defense has previously filed a Motion to Suppress statements of the accused, alleging they were the products of torture and/or coercion. The Defense has also filed a Motion to Dismiss Charge II (Material Support for Terrorism), alleging an invalid *ex post facto* law and that this offense does not properly constitute a violation of the law of war. Given the proposed extensive changes to the MCA, which include the ban on admission of statements obtained by cruel, inhuman and degrading treatment as well as the removal of the Material Support for Terrorism from those offenses chargeable under the MCA, it would be premature and injudicious for the Commission to proceed and rule on these motions at this time.

9. When the Commission granted the 26 January 2009 Government Request for a Continuance, it did so after having made a determination that the interests of justice served by the continuance outweighed the best interests of both the public and the accused. Accordingly, that delay should be excluded when determining any time period under R.M.C. 707.

10. The Court further finds that continuing these proceedings until 17 September 2009 is in the interests of justice as well as the best interests of both the public and the accused. The continuance will allow time for the proposed changes to the military commission rules to be implemented. It would be an injustice to the accused should the Commission continue, especially given the likely extensive changes to the MCA. Additionally, there was no evidence presented that the Government requested this continuance for the purpose of obtaining unnecessary delay, or for any other inappropriate reason.

WHEREFORE, based on the above, the Government Motion for Appropriate Relief (120-Day Continuance) is GRANTED. The proceedings will be continued until 17 September 2009. The time period from 23 January 2009 to 17 September 2009 is excludable for speedy trial purposes under R.M.C. 707.

However, should the Government request a subsequent delay for the same or similar reasons as set forth in their 15 May 2009 Continuance Request, any request will be considered by the Court with increased scrutiny and skepticism.

UNITED STATES OF AMERICA

v.

MOHAMMED KAMIN

Military Commission

July 23, 2009

RULING: GOVERNMENT MOTION FOR
APPROPRIATE RELIEF (120-DAY
CONTINUANCE)

W. Thomas Cumbie
Colonel, U.S. Air Force
Military Judge

1. On 4 April 2008, the Convening Authority referred to a military commission one Charge and six Specifications alleging that Mr. Mohammed Kamin provided material support for terrorism in violation of 10 U.S.C. § 950v(b)(25).

2. On 22 January 2009, the President issued Executive Order (E.O.) 13493 which directed an interagency Task Force to “conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice.” The E.O. directed the Task Force complete its work by 21 July 2009.

3. The review being conducted by the Task Force has yet to be finalized. However, on 15 May 2009, the Secretary of Defense published and notified Congress of five significant changes to the Manual for Military Commissions (MMC). They include changes to jurisdictional issues; establishment of a right to “individual military counsel”; removal of the requirement to instruct the members regarding an accused not being subject, in some situations, to cross-examination when he offers his own hearsay statement but does not testify; prohibition of the use of statements, in some situations, obtained by cruel, inhuman or degrading treatment, regardless of when the statements were obtained; and revision of one of the rules dealing with hearsay evidence.

4. On 23 January 2009, the Government requested a continuance until 20 May 2009 in this case. On 30 January 2009, the Defense responded, stating that “if the Military Judge grants the government’s requested relief...the defense respectfully requests the Commission establish forthwith a trial schedule and set a date for the first hearing to be held in Guantanamo Bay, Cuba, to litigate motions pending related to discovery.” On 9 February 2009, the Commission granted the continuance.

5. On 15 May 2009, the Government filed a Motion for Appropriate Relief, requesting any further proceedings in the above action be delayed until at least 17 September 2009. The Government submits, as they did with their January 2009 continuance request, that this Motion for an additional continuance is in the best interest of justice. They argued that the continuance will serve the interests of justice and the accused, as it will permit the President and his Administration to complete a thorough review of all pending

cases and of the military commissions process as a whole. They further assert that it would be inefficient and potentially unjust to both the Government and the Defense to deny the continuance.

6. On 18 May 2009, the Defense filed a Defense Response to the Government Motion for Appropriate Relief. In its response, the Defense agreed that an additional 120-day continuance was appropriate and further agreed that “the interests of justice are best served by allowing the government additional time to work with the Congress to revise rules governing trial by military commission to ensure additional rights and protections are afforded Mr. Kamin.” However, the Defense requested a hearing to litigate the scope of the continuance and to litigate motions pending relating to discovery (D-014 through D-021). On 29 June 2009, the Commission granted the Defense request for a hearing and scheduled the hearing to be held at Guantanamo Bay on 15 July 2009.

7. At the hearing held on 15 July, the Defense significantly amended its position regarding the Government motion for a continuance. The Defense now requested that the Commission dismiss charges in this case, with prejudice. The Defense request is based on the possibility that Congress may determine that the offense of “material support for terrorism” is not an offense triable by military commissions. The Defense request is further based on statements made to the Senate Armed Services Committee by the Honorable Jeh Johnson, General Counsel, Department of Defense (AE 035) and by Mr. David Kris, Assistant Attorney General (AE 036). Both Mr. Johnson and Mr. Kris indicated that

President Obama made clear that military commissions are to be used for violations of the law of war. Both expressed serious reservations as to whether providing material support for terrorism is a traditional violation of the law of war. Both questioned whether a conviction for providing material support for terrorism would survive appellate review.

8. In its oral argument, the Defense alleges that:

a. The Administration has shifted positions on the basic fundamental question as to whether or not the Constitution applies in Guantanamo Bay;

b. The basic jurisdiction of this Commission itself is likely to change and, in fact, no longer exist as it is currently written; and

c. The Task Force directed by the President’s Executive Order to look at Mr. Kamin’s case, and all others, is not going to give serious consideration to transfer and release, when it knows that he has had criminal charges pending for the last year.

9. The Commission finds that, if there is ultimately a shift which gives the accused more rights, that shift obviously inures to the benefit of the accused. If the proposed changes to the statute change jurisdiction significantly, the proper remedy is for the Government to withdraw and re-prefer the Charge. Finally, there is no evidence before the Commission to suggest that the task force reviewing Mr. Kamin’s case is less likely to consider transfer and release because charges are pending. The Commission is confident that the task force will review Mr. Kamin’s case and make a recommendation regarding

disposition based on the available and admissible *evidence*.

10. The Commission finds that, while there is a possibility that Congress may determine that the offense of “material support for terrorism” will not be tried in a military commission, the law has not changed. As of today, “material support for terrorism” remains a viable offense. The Commission finds that it would be premature to dismiss the charges in this case based on speculation regarding what Congress may or may not do.

11. The Commission finds that the interests of justice are served by granting the requested continuance in this case and that such interests outweigh the best interests of both the public and the accused in a prompt trial. A continuance will give Congress and the Administration time to determine whether “material support for terrorism” will remain an offense under the Military Commissions Act. Further, a continuance will allow Congress time to revise rules governing trial by military commission to ensure additional rights and protections afforded by Mr. Kamin.

12. The Commission directs the Government to continue to provide full, complete and timely discovery during the continuance.

WHEREFORE, based on the above, the Government Motion for a continuance until 17 September 2009 is GRANTED. The Defense request to dismiss the Charge and its Specifications, with prejudice, is DENIED. All time since 23 January 2009 to 17 September 2009 will be excludable for speedy trial purposes under R.M.C. 707.

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED, et al.

Military Commission

July 24, 2009

ORDER: DEFENSE MOTION
TO COMPEL DISCOVERY: NAMES OF
PSYCHIATRIC TECHNICIANS AND
CORPSMEN MENTIONED IN JTF-GTMO
MEDICAL RECORDS
(D-078)

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

1. Ramzi bin al Shibh was captured by Pakistani Forces in Karachi, Pakistan, on or about 11 September 2002 and transferred to Guantanamo Bay, Cuba, on or about September 2006, where he remains under the control of Joint Task Force-Guantanamo Bay personnel. Charges were sworn on 15 April 2008 and referred to trial by military commission on 9 May 2008. The accused was arraigned on 5 June 2008. On 1 July 2008, the Military Commission ordered a board convened pursuant to Rule for Military Commission (R.M.C.) 706¹ to inquire into the present

¹ If there is reason to believe that an accused lacked mental responsibility for any offense or lacks the capacity to stand trial, the military judge may order an inquiry into the mental condition of the accused. See R.M.C. 706(a). When a mental examination is ordered, the board shall make separate and distinct findings as to each of the following questions: (A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (B)

mental capacity of the accused and scheduled an incompetence determination hearing² for 21 January 2009. Two Government delays have continued the hearing to begin no earlier than 21 September 2009. The Defense now moves this Commission to compel the Government to disclose contact information for all psychiatric technicians and medical corpsmen who assisted any physician in treating the accused since the accused's arrival to Guantanamo Bay in September 2006. The Government opposes the motion. Under the circumstances, the Military Commission finds good cause to order relief, though not the particular remedy sought by the Defense.

2. In several filings submitted to the Military Commission, the Prosecution asserts that it has provided Defense counsel with copies of all medical and mental health records pertaining to the accused since his arrival at Guantanamo Bay in September 2006, amounting to hundreds of documents. The Government has also provided Defense counsel access to at least ten physicians identified in those medical and mental health records for follow-up interview. The Defense

What is the clinical psychiatric diagnosis? (C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct? (D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense? R.M.C. 706(c)(2).

² No person may be brought to trial by military commission if that person is mentally incompetent. Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case. R.M.C. 909(e).

now moves this Commission to compel the Government to disclose contact information for each psychiatric technician and medical corpsman who worked for any physician who treated the accused. The Defense asserts that follow-up interviews are necessary, as the physicians relied upon the technician's observations of and daily contact with the accused in preparing written reports. The Government responds that any information the technicians may provide is already contained in the medical and mental health records previously given to the Defense, and any further inquiry regarding *past* observations and impressions of the accused beyond those contained in the documentary record is not relevant to an assessment of the accused's *present* mental competency.

3. The Military Commission finds that, if a physician relied upon a technician to prepare his or her written report of the accused, some follow-up interview would be helpful to the Defense in preparing for the incompetence determination hearing, including exploring a particular technician or corpsman's recollection of behavior, demeanor and actions of the accused not reflected in the written reports and expanding on representations attributed to them by the physician.

4. In resolving this pretrial discovery issue, it is not necessary for the Military Commission to consider whether such testimony would be admissible at trial, as an accused is entitled at this stage of the proceedings to a reasonable opportunity to obtain evidence helpful to him.³ However,

³ See generally *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989) (accused entitled to production of evidence if helpful to a fair resolution of the case).

the Commission recognizes it must also strike the appropriate balance between this basic discovery right and materiality of the information to the sole issue currently before the Commission – the mental competency of the accused.

5. Therefore, NLT 15 August 2009, the Prosecution will facilitate access by Defense counsel to those psychiatric technicians and/or medical corpsmen used by any physician in preparing medical and mental health reports of the accused since 21 September 2008, one year before the scheduled R.M.C. 909 hearing. Consistent with paragraph 3(2) of the Military Commission's 16 September 2008 ruling in D-023, the actual names and current duty locations of these persons can be protected.

6. The Military 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 Military Commission further directs the Clerk of Court to have this Order translated 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 24th day of July 2009.

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED, et al.

Military Commission

July 24, 2009

ORDER: DEFENSE MOTION
TO COMPEL DISCOVERY OF JTF
MEDICAL RECORDS AND TEST
RESULTS
(D-081)

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

1. On 31 December 2008, Defense for Mr. bin al Shibh moved to compel disclosure of all “medical examinations, tests, results and reports performed on [the accused] while he was in the custody of the Joint Task Force-Guantanamo (JTF-GTMO).”¹ The Prosecution’s response of 7 January 2009, ratified on the record at the 16 July 2009 Rule for Military Commission (R.M.C.) 803² session, asserts that all medical records and test results have been produced, albeit with some substitutes as approved by the military judge, to include

¹ Ramzi bin al Shibh was captured by Pakistani Forces in Karachi, Pakistan on or about 11 September 2002 and transferred to Guantanamo Bay, Cuba on or about September 2006, where he remains under the control of JTF-GTMO personnel.

² A military judge may call the military commission into session to give “statutory sanction to pretrial and other hearings without the presence of members concerning those matters which are amenable to disposition on either a tentative or final basis by the military judge.” See Discussion to R.M.C. 803.

a CT scan, radiologic examination report, procedure worksheet-diagnostic radiology, procedure worksheet-CT scan, and a summary description by “Dr. A.” The Government further asserts that additional contemporary medical and mental health records will be provided forthwith.

2. It is hereby ORDERED that the Government will provide any undisclosed JTF-GTMO medical and mental health records pertaining to the accused in its possession to Defense counsel NLT 1 August 2009.³ Defense counsel will review all records, reports, examinations, tests, and similar material produced by the Government and shall supplement D-081 NLT 15 August 2009 with a specific request for relief, if the accused’s discovery request remains unresolved.

3. 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 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 24th day of July 2009.

³ The Government acknowledges its continuing obligation to provide the Defense with medical and mental records of the accused’s current treatment regimen. The Government will provide any such records on the 15th and 30th of each month.

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED, et al.

Military Commission

July 24, 2009

MILITARY COMMISSION ORDER
REGARDING PRO SE FILINGS
(MJ-014)

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

1. On 21 January 2009, the Military Commission granted, over objection, a Government motion to continue this case until 20 May 2009.¹ On 14 May 2009, the Government filed a supplemental motion requesting an additional 120-day delay until 17 September 2009.² On 11 June 2009, the Military Commission granted the Government motion, finding that the interests of justice served by continuing further substantive proceedings to allow a review of the factual and legal bases for continued detention of the above-named accused currently held in Guantanamo Bay, Cuba; and to determine whether each can be transferred or 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

¹ See P-009, *Commission Ruling Regarding Government Motion for 120-Day Continuance*.

² See P-010, *Commission Ruling Regarding Prosecution Motion for Additional 120-Day Continuance*.

policy interests of the United States and the interests of justice;³ outweighed the best interests of the accused and the general public in a prompt trial.

2. Consistent with the Military Commission's 21 January and 11 June 2009 orders, argument on all filings by Messrs. Sheik Mohammed, Ali, and bin 'Attash⁴ was deferred pending a determination of the status of this case by the Administration's task force review.⁵ However, the Military Commission concludes that further postponement in addressing several of these filings would now be contrary to the Supreme Court's directive that "the costs of delay can no longer be borne by those who are held in custody." *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008). Therefore, it is ORDERED that the Military Commission will hear argument on 21 September 2009 at Guantanamo Bay, Cuba, on the following motions: D-105 (Motion to Dismiss Military and Stand-by Counsel – Mohammed); D-109 (Motion to Compel Arabic Translation of All Commission Sessions); D-110 (Motion for Public Release of All Prior Commission Sessions); D-111 (Motion to Compel Research Supplies

³ The President has tasked that the review with respect to those persons currently detained at Guantanamo Bay be completed on a "rolling basis and as promptly as possible." See Executive Order 13492 of January 22, 2009, "Review and Disposition of Individuals Detained at the Guantanamo Naval Base and Closure of Detention Facilities."

⁴ All are proceeding *pro se*. *Pro se* legal representation refers to the circumstance of a person representing himself or herself without a lawyer in a court proceeding. "*Pro se*" is a Latin phrase meaning "for oneself." While Messrs. al Hawsawi and bin al Shihb also desire to represent themselves, both are pending R.M.C. 909 incompetence determination hearings.

⁵ Deferral was appropriate to ensure that the task force did not make a recommendation that would render unnecessary or otherwise inefficient further expenditure of judicial and party resources in this matter.

and Materials); D-112 (Motion to Receive Matters from Stand-by Counsel); D-113 (Motion to Dismiss Military and Stand-by Counsel – Ali); D-114 (Boycott of SJA and Commission Sessions); and D-127 (Motion to Dismiss Civilian and Stand-by Counsel – bin ‘Attash).

3. The Military Commission directs that a copy of this order be served upon the Prosecution and all civilian and military defense counsel of record, and that it be provided to the Clerk of Court for public release. The Military Commission further directs the Clerk of Court to have this order translated into Arabic and served upon each of the above-named accused.

So ordered this 24th day of July 2009.

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED, et al.

Military Commission

August 6, 2009

RULING: DEFENSE MOTION FOR
APPROPRIATE RELIEF: DISCLOSURE
OF INTERROGATION TECHNIQUES
APPLIED BY THE UNITED STATES
DURING QUESTIONING OF RAMZI BIN
AL SHIBH
(D-082)

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

1. Detailed military defense counsel for Mr. bin al Shibh move this Military Commission to compel the Government to disclose the specific “enhanced interrogation techniques”¹ allegedly used on the accused by any U.S. government agency at any time, asserting such evidence is necessary in order to prepare for the Rule for Military Commission (R.M.C.) 909 incompetence determination hearing.² The Government opposes the motion.

¹ Enhanced interrogation techniques (EITs), also referred to as “alternative procedures” and “harsh questioning,” are terms used to describe interrogation methods allegedly used by various U.S. government agencies to extract information from some individuals captured in connection with the current overseas contingency operation.

² No person may be brought to trial by military commission if that person is mentally incompetent. Trial may proceed unless it is established by a preponderance of the evidence that the accused is

2. This Military Commission is tasked by the Supreme Court with balancing the Government’s “interest in protecting sources and methods of intelligence gathering” against a detainee’s need “to find out or present evidence to challenge the Government’s case against him,” *Boumediene v. Bush*, 128 S. Ct 2229, 2269, 2276 (2008). The Military Commission finds the alternatives to full disclosure provided to the Defense by the Government, as approved by the military judge, along with witness testimony regarding post-interrogation observations of the effect of the techniques actually applied, is sufficient to prepare for the narrow issue now before the Commission, the R.M.C. 909 hearing to determine whether Mr. bin al Shibh is currently competent to stand trial by military commission.³ In other words, evidence of specific techniques employed by various governmental agencies to interrogate the accused is not sufficiently helpful or beneficial to the Defense to overcome the classified information privilege and not essential to a fair resolution of the incompetence determination hearing in this case.

3. The Defense motion to compel disclosure of the specific interrogation techniques used or evidence of any coercive techniques applied during any interrogation of Mr. bin al Shibh, to include duration, sequencing, location, limitations, and timing of those techniques, if any, in order to

presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case. *See* R.M.C. 909 (e).

³ The Military Commission further finds that there is no reasonable likelihood that the requested evidence will affect the judgment of the trier of fact on the narrow issue before it, the accused’s mental competency to stand trial. *See, e.g., United States v. Valenzuela-Bernal*, 458 U.S. 858, 874 (1982).

prepare for the R.M.C. 909 hearing is DENIED.

4. 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 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 6th day of August 2009.

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED, et al.

Military Commission

November 3, 2008

ORDER:
MOTION FOR ENLARGEMENT OF TIME
IN WHICH TO FILE LAW MOTIONS
(D-047 & D-049)

Ralph H. Kohlmann
Colonel, U.S. Marine Corps
Military Judge

1. D-047 is a special request for relief from the Defense (bin 'Attash) for an indefinite enlargement of time to file law motions. D-049 is a joint defense special request for relief for an enlargement of time to file law motions until a date not earlier than 9 January 2009. By implication, both requests also contemplate a continuance of the established hearing date for law motions on 8 December 2008, or the scheduling of additional hearing dates for law motions filed after the previously ordered deadline.

2. D-047 is premised on claimed difficulties Mr. bin 'Attash is encountering in dealing with matters associated with his case and communicating with his standby counsel. D-049 is premised on the volume of work associated with the planned motions by the Defense.

3. The Commission has also considered the Prosecution's responses to D-047 and

D-049. The Prosecution opposes the requested relief.

4. On 9 June 2008, the Commission issued the initial litigation schedule for this case. The due date for law motions was set for 11 July 2008. The hearing date for law motions was set for 28 July 2008.

5. On 1 July 2008, the Commission granted a continuance request by the Defense that enlarged the filing time for law motions to 29 August 2008. The hearing date for law motions was continued until 24 September 2008.

6. On 27 August 2008, the Commission granted a second continuance request by the Defense that enlarged the filing time for law motions to 3 November 2008. The hearing date for law motions was continued until 8 December 2008. (The Commission notes that, per its 27 August 2008 order, requests for deviations from the filing due date for law motions were required to be submitted within 7 days prior to the date established. While the Defense apparently relied on language in that order regarding coordination associated with the *transmission* of large numbers of motions, the provision in question is intended only to reduce computer problems that might be occasioned by near simultaneous transmission of large numbers of PDF files. In the future, the parties are advised to submit any requests for deviation from ordered *filing* dates in accordance with the Commission's instructions.)

7. In D-049, the Defense indicates that the several accused are prepared to file at least sixteen joint law motions not later than the ordered 3 November 2008 filing deadline. The Defense asks that they be permitted to file those motions on 3 November 2008, and

then be permitted to augment those filings with the remainder of their planned law motions at a later date.

8. With the understanding that at least sixteen joint law motions will be filed by the Defense not later than 3 November 2008, the Commission finds that the interests of justice will be best served in this case by providing the Defense additional time to prepare their additional planned law motions. It is also understood that this additional time will benefit the Defense in its preparation for other stages of the trial process.

9. The sixteen motions referred to in D-049 should be filed today in accordance with the Commission's previous order. Any other motions that are ready now should be filed today as well. Any remaining law motions, other than those pertaining to capital sentencing issues, will be due to the Commission and opposing counsel not later than 17 November 2008.

10. Any remaining law motions beyond those submitted by 17 November 2008, to include any pertaining to capital sentencing issues, will be due to the Commission and opposing counsel not later than 12 January 2008.

11. The previously scheduled hearing date for law motions of 8 December 2008 remains in place for the following purposes:

- a. To receive evidence and hear oral argument re D-001 (Joint motion to dismiss for unlawful influence);
- b. To address the status of the discovery process;

- c. To hear oral argument on designated law motions submitted on 3 November 2008; and

- d. To address other matters to be designated by future correspondence.

12. The following modifications to the trial schedule are ordered in response to the continuance request by the Defense. Pursuant to R.M.C. 707, the Commission finds that these delays serve the interest of justice, and outweigh the interest of the public and the parties in abiding by the previously ordered litigation schedule. The Commission further finds that all delay associated with this modification is the responsibility of the Defense for the purposes of R.M.C. 707 accountability.

- a. 17 November 2008: Any remaining law motions other than those pertaining to capital sentencing issues will be due to the Commission and opposing counsel and other *pro se* parties.

- b. 8-12 December 2008: Hearing in GTMO on matters described in paragraph 11 above.

- c. 12 January 2009: All law motions pertaining to capital sentencing issues due to the military judge and opposing counsel and other *pro se* parties.

- d. TBD: Hearing/s in GTMO on additional law motions.

- a. TBD: Discovery Motions Due.

- e. TBD: Evidentiary motions due to the military judge and opposing counsel and other *pro se* parties. In general, evidentiary motions are those which deal

with the admission or exclusion of specific or general items or classes of evidence.

Note: Defense witness requests associated with any motions should be submitted to the trial counsel in accordance with R.M.C. 703 simultaneously with the filing of the motion (or Defense response in the case of a Government motion) in question. The Government response to any witness request will be due within five days of the submission of the request. Any Defense motion for production of witnesses in conjunction with a motion will be due to the court and opposing counsel within five days of receipt of a denied witness request.

f. TBD: Hearing in GTMO re Evidentiary Motions.

g. TBD: Submission of requested group *voir dire* questions for the Military Commission Members.

Note: The military judge intends to conduct all group voir dire questioning of the members per R.M.C. 912. The military judge's group voir dire will take counsel's requested questions into account as appropriate. The military judge will also conduct the initial follow-up individual voir dire based on responses to the group questions. Counsel will be permitted to conduct additional follow-up voir dire.

h. TBD: Defense Requests for Government Assistance in Obtaining Witnesses for use on the merits. See R.M.C. 703.

Note: The Government response to any witness request will be due within five days of the submission of the request. Any

Defense motion for production of witnesses in conjunction with a motion will be due to the court and opposing counsel within five days of receipt of a denied witness request.

i. TBD: Hearing re Witness Production Motions and any unresolved matters.

j. TBD: Assembly and *Voir Dire* for Panel Members.

k. TBD: Beginning of trial on the merits.

13. Counsel should direct their attention to the Rules of Court, R.C. 3, Motions Practice, and specifically Form 3-1, 3-2, and 3-3, for the procedures the Commission has established for this trial. All motions, responses, and replies shall comport with the terms of R.C. 3.6 in terms of timeliness. Any request for extension of any response or reply deadline associated with this hearing will be submitted before the deadline for the reply or response.

14. Requests for deviations from the timelines for hearings or for submission of motions established by this order must be submitted not later than 20 days prior to the date established, except for law motions for which requests for deviations from the due date must be submitted within 7 days prior to the date established.

Ordered this 3rd day of November 2008.

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Military Commission

June 1, 2009

ORDER
(D-107)

Patrick J. Parrish
Colonel, U.S. Army
Military Judge

1. The Commission conducted a R.M.C. 803 session at Guantanamo Bay, Cuba, on 1 June 2009.

2. Based upon the expressed desires of the accused at that session, the Commission orders the following:

a. At the request of the accused, Ms. Rebecca Snyder, CDR Walter Ruiz and Mr. Michael Paradis are relieved as counsel for the accused.

b. Although Mr. Khadr initially expressed a desire to discharge all of his defense counsel pursuant to R.M.C. 505((d)(2)(B)(i)), he also rejected exercising his right to proceed *pro se*, representing himself. The Commission will not allow him to be unrepresented by counsel during this portion of the proceedings. Therefore, at the specific request of the accused, LCDR William Kuebler is ordered to remain as detailed counsel for the accused, at least through 13 July 2009.

c. At the request of the accused, the Commission orders the Chief Defense Counsel not to interfere with communications between LCDR Kuebler and Mr. Khadr, and orders the Government to provide LCDR Kuebler with transportation to Guantanamo on scheduled flights as is reasonably appropriate to represent Mr. Khadr at least through 13 July 2009.

d. The parties are ordered to file briefs with the Commission not later than 12 June 2009 regarding the issue of what conduct constitutes "good cause" for removal of a defense counsel without the consent of the accused, whether the Chief Defense Counsel's determination of good cause is subject to judicial review, and whether or not the reassignment or permanent change of station of military defense counsel constitutes good cause.

e. A hearing is scheduled for 13 July 2009 at 0900 hours to resolve any remaining issues regarding representation of the accused, and to hear oral argument on the Government motion for a continuance through 17 September 2009.

UNITED STATES OF AMERICA
Appellee

v.

SALIM AHMED HAMDAN
Appellant

Court of Military Commission Review
Case 09-002

July 30, 2009

RULING ON APPELLANT'S REQUEST
FOR EXTENSION OF TIME TO FILE
BRIEF ON BEHALF OF APPELLANT

Before
BEISTER, CONN, GEISER

Appellant's Request for Extension of Time to File Brief on Behalf of Appellant received 29 July 2009, and which was not opposed by the Appellee, is GRANTED. Appellant's Assignment of Errors and Brief on Behalf of Appellant are due no later than 5:00 p.m. Eastern Time on 16 October 2009. Appellee's Reply Brief is due not later than 5:00 p.m. Eastern Time on 4 December 2009.

For the Court:
Leroy F. Foreman
Clerk of Court

UNITED STATES OF AMERICA
Appellant

v.

MOHAMMED JAWAD
Appellee

Court of Military Commission Review
Case 08-004

July 31, 2009

RULING ON MOTION TO DISMISS
APPEAL AS MOOT

Before
WILLIAMS, FRANCIS, O'TOOLE

On 31 July 2009, at the direction of the Convening Authority, the charges against Mohammed Jawad were withdrawn and dismissed without prejudice. Upon consideration of the direction of the Convening Authority, the appeal of the United States is DISMISSED as moot.

For the Court:
Leroy F. Foreman
Clerk of Court

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED, et al.

Military Commission

August 20, 2009

RULING: DEFENSE MOTION TO
RECONSIDER RULING ON MOTION TO
COMPEL DISCOVERY: NAMES OF
PSYCHIATRIC TECHNICIANS AND
CORPSMEN MENTIONED IN JTF-GTMO
MEDICAL RECORDS
(D-078)

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

1. Ramzi bin al Shibh was captured by Pakistani Forces in Karachi, Pakistan, on or about 11 September 2002 and transferred to Guantanamo Bay, Cuba, on or about September 2006, where he remains under the control of Joint Task Force-Guantanamo Bay personnel. Charges were sworn on 15 April 2008 and referred to trial by military commission on 9 May 2008. The accused was arraigned on 5 June 2008. On 1 July 2008, the Military Commission ordered a board convened pursuant to Rule for Military Commissions (R.M.C.) 706¹ to inquire into the present

¹ If there is reason to believe that an accused lacked mental responsibility for any offense or lacks the capacity to stand trial, the military judge may order an inquiry into the mental condition of the accused. *See* R.M.C. 706(a). When a mental examination is ordered, the board shall make separate and distinct findings as to each of the following questions: (A) At

mental capacity of the accused and scheduled an incompetence determination hearing² for 21 January 2009.³

2. On 22 December 2008, the Defense moved this Commission to compel the Government to disclose contact information for all psychiatric technicians and medical corpsmen that assisted any physician in treating the accused since the accused's arrival to Guantanamo Bay in September 2006. The Government opposed the motion.

3. In its 24 July 2009 order, this Commission observed that, if a physician relied upon a technician to prepare his or her written report of the accused, some follow-up interview would be helpful to the Defense in preparing for the incompetence determination hearing, including exploring a particular technician or corpsman's recollection of behavior, demeanor and actions of the accused not reflected in the written reports and expanding on representations attributed to them by the physician.

the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (B) What is the clinical psychiatric diagnosis? (C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct? (D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense? R.M.C. 706(c)(2).

² No person may be brought to trial by military commission if that person is mentally incompetent. Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case. R.M.C. 909(e).

³ Two Government delays have continued the hearing to begin no earlier than 21 September 2009.

However, the Commission also recognized it must strike the appropriate balance between this basic discovery right and materiality of the information to the sole issue currently before the Military Commission – the *current* mental competency of the accused. The Military Commission ultimately ordered the Prosecution to facilitate access by defense counsel to those psychiatric technicians and medical corpsmen used by any physician in preparing medical and mental health reports of the accused since 21 September 2008, one year before the scheduled R.M.C. 909 hearing.

4. On 18 August 2009, the Defense moved this Commission to reconsider that part of the order limiting access to those psychiatric technicians and medical corpsmen who treated the accused since 21 September 2008, and requested the Commission now require the Government to facilitate access to any technician or corpsmen who observed and provided treatment to the accused since September 2006, the date the accused was transferred to Guantanamo Bay, Cuba. The Government opposes the motion to reconsider.

5. The Defense's additional legal precedent and argument submitted in support of its request for reconsideration is unpersuasive and does not rise to the extraordinary circumstances, manifest injustice or clear error required to warrant modifying or changing the Military Commission's original ruling.⁴ The Defense

⁴ A motion for reconsideration is appropriate where "the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Trans, Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). A motion

has not yet established the materiality of past observations and impressions of the accused by psychiatric technicians and medical corpsmen, beyond those contained in the documentary record since 21 September 2008, to an assessment of the accused's present mental competency.⁵ Therefore, the Defense motion for reconsideration is hereby DENIED.

6. The Military 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 Military Commission further directs the Clerk of Court to have this Order translated 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 20th day of August 2009.

for reconsideration may also be granted to "correct a clear error or prevent manifest injustice." *In re Terrorist Attacks* on September 11, 2001, 2006 U.S. Dist Lexis 11741 (S.D.N.Y. Mar. 20 2006) (quoting *Doe v. New York City Dept of Soc. Svcs*, 709 F.2d 782, 789 (2d Cir. 1983).

⁵ If defense counsel can identify a particular technician or corpsman who treated or observed the accused between September 2006 and 20 September 2008, and provide a reason why that person could reasonably assist counsel in clarifying or adding to the information already provided to the Defense by a treating physician, or otherwise contained in the medical and mental health records, they may make that request.

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED, et al.

Military Commission

August 20, 2009

RULING: DEFENSE SPECIAL REQUEST
FOR RELIEF AND MOTION FOR
APPROPRIATE RELIEF: EXTENSION OF
TIME TO SUBMIT WITNESS LIST AND
INDEFINITE CONTINUANCE OF THE
R.M.C. 909 HEARING UNTIL THE
EXECUTIVE REVIEW IS COMPLETED
AND THE LAW APPLICABLE TO TRIAL
BY MILITARY COMMISSION IS
SETTLED
(D-131 & D-132)

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

1. On 5 August 2009, the Military Commission issued a pretrial order requiring the Defense to submit its proposed witness list for the Rule for Military Commission (R.M.C.) 909 incompetence determination hearing by 20 August 2009 and to submit any witness production motions by 31 August 2009. On 17 August 2009, detailed counsel for Mr. al Hawsawi filed a special request for relief seeking an enlargement of time to submit the witness list. Counsel asserts that, as the Convening Authority has not identified the forensic psychologist previously ordered produced by the Military

Commission,¹ the Defense will need at least one month to consult with him or her once named to adequately prepare for the scheduled 22-25 September 2009 hearing. On 18 August 2009, counsel for Messrs. al Hawsawi and bin al Shibh filed a joint motion for appropriate relief seeking a delay in the R.M.C. 909 hearings and an indefinite continuance for all commission proceedings until resolution of pending legislation in Congress amending the Military Commissions Act of 2006 and the ongoing interagency review of this case is complete. The Government opposes both the special request for relief and the motion for appropriate relief.

2. The Military Commission acknowledges that the evidence phase of the R.M.C. 909 hearings may not be complete by 25 September 2009. Additional sessions may be required, as circumstances dictate. Further, consistent with its orders in P-009 and P-010, the Military Commission does not anticipate issuing a ruling on either accused's competency to stand trial before the Interagency Task Force operating pursuant to Executive order 13492 of 22 January 2009, has made its recommendations and the Review Panel in connection with the same has made a decision as to the disposition of this case. Additionally, although amendments to the Military Commissions Act of 2006 have been proposed, none of the pending legislative changes appear to impact the R.M.C. 909 hearing and the Defense has not presented a compelling argument why the Commission should not begin hearing from witnesses and receiving documentary evidence relevant to the sole issue before it, the

¹ See D-117 Ruling (*Defense Motion for Appropriate Relief: Appointment of Expert Consultants*).

accused's current competency to stand trial by military commission.

3. The Defense request to extend the filing deadline for its R.M.C. 909 witness list and motions to delay the R.M.C. 909 hearing and indefinitely continue all military commission sessions are DENIED. Absent extraordinary circumstances compelling further delay, the Military Commission will begin the incompetence determination hearing on 22 September 2009.

4. The Military 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 Military Commission further directs the Clerk of Court to have this order translated into Arabic and served upon each of the above-named accused. The underlying Defense motion will also be provided to the Clerk of Court for public release, after appropriate redactions for privacy and security considerations.

So ordered this 20th day of August 2009.

UNITED STATES OF AMERICA

v.

AHMED MOHAMMED AHMED HAZA
AL DARBI

Military Commission

August 20, 2009

DOCKETING ORDER

James L. Pohl
Colonel, U.S. Army
Military Judge

1. On 13 February 2009, the Commission granted the Government's request for a continuance until 21 May 2009. The purpose of the continuance was to give the new Administration time to review the military commission process and individual cases.

2. On 19 May 2009, the Commission granted the Government's request for a second continuance until 24 September 2009. The purpose of the continuance was to give the new Administration additional time to complete its review of the military commission process and individual cases as well as completion of any changes to the Military Commission Act.

3. Accordingly, to ensure the orderly processing of the current pending charges against the accused and provide all parties with sufficient notice to prepare, the next hearing in this case will take place at 0900 hours on 24 September 2009 at Guantanamo Bay, Cuba.

4. Any requests for additional continuances will be addressed on the record at the hearing on 24 September 2009. No further continuance requests will be granted without a hearing, although the Commission will consider the merits of any such request at the hearing.

5. At the hearing, the Commission will:

a. Hear oral arguments on Prosecution motion P-007 – Motion to Reconsider the Military Judge's Ruling Excluding Parts 5, 6, and 7 of the Al Qaeda Plan;

b. Hear oral arguments on Defense motion D-017 – Motion to Pre-Admit the PBS Documentary, *Torturing Democracy*, and the Documentary, *Taxi to the Dark Side*.

c. Hear oral arguments on Prosecution motion P-010 – Motion for Access to the Accused for Medical and Mental Health Evaluation and for Reciprocal Discovery Concerning Accused's Physical and Mental Health.

d. Address outstanding discovery issues including but not limited to production of defense witness for motions and trial.

e. Update the trial schedule.

6. The Commission authorizes the public release of this order.

So ordered this 20th day of August 2009.

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED, et al.

Military Commission

August 24, 2009

RULING: DEFENSE MOTION FOR
APPROPRIATE RELIEF: ORDER
GRANTING ACCESS TO VIEW AND
INSPECT CIA DETENTION FACILITIES/
MOTION TO COMPEL (BIN AL SHIBH)
(D-121 & D-130)

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

1. Detailed military defense counsel for Mr. bin al Shibh move this Military Commission to enter orders requiring the Government to give counsel information pertaining to and an opportunity to view and inspect facilities allegedly used to detain the accused between the date of his apprehension by Pakistani military forces on or about 11 September 2002 and his transfer to the control of Joint Task Force-Guantanamo personnel in September 2006.¹ The Defense argues that the information is necessary in order to prepare for the Rule for Military Commis-

¹ The Military Commission previously denied a Defense motion to compel disclosure of specific “enhanced interrogation techniques” allegedly used on the accused during this period by persons working for U.S. government agencies. *See* D-082 *Ruling: Defense Motion for Appropriate Relief: Disclosure of Interrogation Techniques Applied by the United States During Questioning of Ramzi bin al Shibh*.

sion (R.M.C.) 909 incompetence determination hearing.² The Government opposes the motions, in part,³ asserting that, under the circumstances, evidence of specific locations where the accused was actually detained prior to September 2006 and details of the environment and setting while held there is simply not relevant to determining whether the accused is currently competent to stand trial by military commission.

2. This Military Commission is tasked by the Supreme Court with balancing the Government’s “interest in protecting sources and methods of intelligence gathering” against a detainee’s need “to find out or present evidence to challenge the Government’s case against him,” *Boumediene v. Bush*, 128 S.Ct. 2229, 2269, 2276 (2008). Assuming that any facilities used to detain the accused prior to September 2006 still exist, the physical plant and on-site conditions are not likely to be those which existed at the time of the accused’s detention and an inspection of the scene now would serve little purpose to document the facility which existed at that time. Additionally, while the Commission finds some information about the circumstances of past detention is relevant to a determination of

² No person may be brought to trial by military commission if that person is mentally incompetent. Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case. R.M.C. 909(e).

³ The Government concedes that some information regarding the accused’s detention before being turned over to the control of JTF-GTMO personnel on or about September 2006 is relevant to a current competency determination in this case.

current competency,⁴ under the facts of this case, it is not necessary for defense counsel to view the actual situs of the accused's prior detention(s).⁵ Given that the Defense was previously permitted to view the location of the accused's current confinement⁶ and the Prosecution's apparent concession the accused suffers from a Delusional Disorder-Persecutory Type, the Military Commission concludes that the evidentiary value in inspecting detention facilities that may have housed the accused before September 2006 and information regarding the conditions while held there is de minimus and not material to the narrow issue now before it. In other words, except for paragraph 3 below, evidence of past conditions of detention and specific locations where the accused was held before September 2006 is not material to a fair resolution of the incompetence determination hearing in this case.⁷

⁴ The Defense cites *Comer v. Schriro*, 480 F.3d 960 (9th Cir. 2007) for the proposition that conditions of confinement are relevant to a competency determination. However, *Comer* involved a remand by the Ninth Circuit to the District Court to determine whether the conditions of the defendant's incarceration rendered his decision to waive his habeas appeal right involuntary.

⁵ See generally *United States v. Culpepper*, 834 F.2d 879, 883 (10th Cir. 1987).

⁶ The Military Commission previously granted a Defense request to inspect certain aspects of the current conditions of confinement at Camp 7. See D-41 *Ruling: Defense Motion for Appropriate Relief – View Conditions of Confinement* (“the Defense may view the accused's cell, the two adjacent cells, the recreation room, the medical room and the media room”).

⁷ The Military Commission further finds that there is no reasonable likelihood that the requested evidence will affect the judgment of the trier of fact on the narrow issues before it, the accused's mental competency to stand trial. See, e.g., *United States v. Valenzuela-Bernal*, 458 U.S. 858, 874 (1982).

3. The Defense motions for a Military Commission order compelling the Government to allow the defense counsel access to and information about any and all facilities used to detain the accused from September 2002 to September 2006, in order to prepare for the R.M.C. 909 hearing, is hereby GRANTED, in part. The Government will provide the information set forth in paragraphs 6c(i-iv) of its classified *ex parte* 20 August 2009 response to D-130, a classified Defense motion to compel dated 12 August 2009, to the Defense, subject to the applicable protective orders, no later than 27 August 2009. In all other respects, the Defense motions are hereby DENIED.⁸

4. 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 review and public release. The Commission further directs the Clerk of Court to have this order translated into Arabic and served upon each of the above-named accused. The underlying unclassified Defense motions and Government responses will also be provided to the Clerk of Court for public release, after appropriate redactions for privacy and security considerations.

So ordered this 24th day of August 2009.

⁸ The Military Commission may supplement its findings prior to authentication of the record of trial.

UNITED STATES OF AMERICA

v.

MOHAMMED KAMIN

Military Commission

August 24, 2009

ORDER: INQUIRY INTO THE MENTAL
CAPACITY OR MENTAL
RESPONSIBILITY OF THE ACCUSED

W. Thomas Cumbie
Colonel, U.S. Air Force
Military Judge

1. After considering the Defense Request for the Military Commission to Order a New Inquiry into the Mental Health of the Accused (D-027), the Government's Response, the Defense Supplement to D-027 and the Government's response thereto, the Military Commission hereby ORDERS:

(a) That an inquiry into the mental capacity of Mohammed Kamin be conducted in accordance with Rule for Military Commissions 706;

(b) That the inquiry shall be conducted by a board consisting of two persons who are physicians or clinical psychologists. At least one member of the board shall be either a psychiatrist or a clinical psychologist. The board shall not include either COL [REDACTED], U.S. Army, or CAPT [REDACTED], U.S. Navy, both of whom sat on the prior R.M.C. 706 sanity board. If a Pashto-speaking

physician or clinical psychologist is reasonably available within the time constraints of the schedule set forth in paragraph 6 below, he or she should be appointed; in any event, the Government will designate a Pashto-speaking interpreter to assist the board in its inquiry. Unless ordered by this Commission, this interpreter may not disclose anything learned during the inquiry, except to defense counsel (LCDR Richard Federico, JAGC, USN; CPT Clay West, JA USAR). The Defense may choose to have its assigned interpreter present when the accused is examined, and the Government must provide reasonable notice to the Defense as to when the inquiry is to be conducted;

(c) That this evaluation shall include an opportunity for the board to meet and confer with Mr. Kamin at an appropriate location as determined by the Commander, Joint Detention Group, Joint Task Force Guantanamo. If Mr. Kamin refuses to attend the sanity board voluntarily, JTF-GTMO shall forcibly extract Mr. Kamin from his cell and compel him to attend the board;

(d) That the board convened by this order, in its evaluation, shall make separate and distinct findings as to each of the following questions:

(1) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? If so, what is the clinical diagnosis?

(2) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect,

unable to appreciate the nature and quality or wrongfulness of his conduct?

(3) Is the accused presently suffering from a mental disease or defect? If so, what is the clinical psychiatric diagnosis?

(4) Does the accused have the present ability to consult with his lawyers with a reasonable degree of cognitive understanding and does he have a rational as well as a factual understanding of the proceedings against him? If so, does the accused have sufficient mental capacity to understand the nature of the proceedings against him (trial by commission) and to conduct or cooperate intelligently in the defense?

(e) That examinations and tests shall be conducted, if appropriate and required, to answer the questions set forth in paragraph 4, above, and a thorough review of the accused's available medical records shall also be conducted; and

(f) The Defense has requested that additional unspecified matters be considered by this board. The sanity board may, in its discretion, consider additional matters raised by the Defense, but is not required to conduct any test or review any material which the board concludes is unnecessary to answer the questions listed in paragraph 1(d) above.

2. The sanity board ordered in paragraph 1(a) above shall be completed as expeditiously as possible, consistent with a

medically competent and thorough examination, to answer the specified questions. Consequently, it is FURTHER ORDERED that:

(a) Not later than 21 September 2009, the board shall prepare a summarized report consisting of only the board's ultimate conclusions as to all questions specified in paragraph 1(d). This report will be prepared in three copies. The Military Commissions Trial Judiciary Staff, trial counsel and defense counsel will be telephonically notified when this report is ready to be picked-up. At the option of the officer responsible for the summarized report, it may be faxed or e-mailed to the Military Commissions Trial Judiciary Staff, trial counsel, and defense counsel;

(b) Not later than 28 September 2009, the board shall prepare its full report. This report shall be placed into a sealed envelope and provided only to LCDR Richard Federico, JAGC, USN, and CPT Clay West, JA, USAR. The full report will NOT be faxed or e-mailed unless specifically requested by LCDR Richard Federico, JAGC, USN, or CPT Clay West, JA, USAR; and

(c) Under no circumstances will the full report, matters considered by the board during its inquiry, or any statements made by the accused to the board (or evidence derived therefrom) be disclosed to anyone other than LCDR Richard Federico, JAGC, USN or CPT Clay West, JA, USAR, without express, written authorization from the military judge or defense counsel.

3. Additionally, it is FURTHER ORDERED:

(a) That the Government shall provide Dr. [REDACTED], Ph.D., expert consultant in clinical and forensic psychiatry for the Defense, an opportunity to meet with Mr. Kamin to conduct an independent mental health examination of Mr. Kamin, provided Mr. Kamin agrees to meet with Dr. [REDACTED] voluntarily. Mr. Kamin shall not be forcibly extracted from his cell nor compelled to attend this meeting; and

(b) That the Government shall provide detailed defense counsel (LCDR Richard Federico, JAGC, USN, and CPT Clay West, JA, USAR) the opportunity to meet with Mr. Kamin prior to the examination by Dr. [REDACTED], to advise Mr. Kamin regarding the mental health examinations, provided Mr. Kamin agrees to meet with the counsel voluntarily. Mr. Kamin shall not be forcibly extracted from his cell nor compelled to attend meetings with counsel.

4. Nothing in this order shall be construed as authorizing more than one forced cell extraction of the accused, and only for purposes of the sanity board ordered in paragraph 1(a) above. The defense counsel and Dr. [REDACTED] may also attempt to meet with Mr. Kamin during the period of time he is extracted for purposes of the sanity board; however, if Mr. Kamin refuses to meet with counsel or Dr. [REDACTED], he shall not be forcibly extracted at another time for either of those purposes.

5. Telephone numbers: Military Commissions Trial Judiciary Staff: [REDACTED]; LCDR Richard Federico, JAGC, USN, Defense Counsel: [REDACTED]; CPT Clay West, JA, USAR, Defense Counsel: [REDACTED].

So ordered this 24th day of August 2009.

UNITED STATES OF AMERICA
Appellee

v.

ALI HAMZA AHMAD SULIMAN AL
BAHLUL
Appellant

Court of Military Commission Review
Case 09-001

September 2, 2009

RULING ON APPELLANT'S MOTION TO
WAIVE PAGE LIMIT

Before
WILLIAMS, CONN, THOMPSON

Appellant's Request for a waiver of the 30-page limitation for Appellant's merits brief in the above-captioned case is hereby GRANTED. Appellant's brief is not to exceed 50 pages, including tables of authorities and certificates of counsel.

For the Court:
Mark Harvey
Deputy Clerk of Court

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED, et al.

Military Commission

September 17, 2009

COMMISSION RULING REGARDING
PROSECUTION MOTION FOR
ADDITIONAL 60-DAY CONTINUANCE
(P-012)

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

1. This matter having come before the Military Commission upon Government motion to grant a third continuance in this case until 16 November 2009;¹ and having considered the parties' submissions, and for good cause shown; the Military Commission finds that the interests of justice served by continuing the Rule for Military Commission (R.M.C.) 909 incompetence determination hearing² for Ramzi bin al

¹ On 21 January 2009, the Military Commission granted, over objection, a Government motion to continue this case to 20 May 2009. *See* P-009, *Commission Ruling Regarding Government Motion for 120-Day Continuance*. On 14 May 2009, the Commission granted a Government motion for an additional 120-day delay to 17 September 2009. *See* P-010, *Commission Ruling Regarding Prosecution Motion for Additional 120-Day Continuance*.

² No person may be brought to trial by military commission if that person is mentally incompetent. Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature of the

Shibh, currently docketed for 21-25 September 2009, to allow the Administration time to determine whether he can be transferred or 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 and the interests of justice,³ outweigh the best interests of the accused and the general public in a prompt trial. As such, the unopposed government motion to continue the incompetence determination hearing for Mr. bin al Shibh to begin no earlier than 16 November 2009 is GRANTED.

2. The Government also requests the Commission "refrain from taking any actions in the case...to preserve the status quo...to the greatest extent possible" until the Attorney General, in consultation with the Secretary of Defense, has determined the appropriate forum to prosecute the above-named accused. The Prosecution asserts that defense counsel for Messrs. al Hawsawi and bin al Shibh do not object to the Government's petition to halt further proceedings in this case, to include all on-the-record sessions, until no earlier than 16 November 2009. However, as Messrs. Sheikh Mohammed, bin 'Attash and Ali are proceeding *pro se*,⁴ and have not yet indicated

proceedings or to conduct or cooperate intelligently in the defense of the case. R.M.C. 909(e).

³ The President has tasked that the review with respect to those persons currently detained at Guantanamo Bay be completed on a "rolling basis and as promptly as possible." *See* Executive Order 13492 of January 22, 2009, "Review and Disposition of Individuals Detained at Guantanamo Bay Naval Base and Closure of Detention Facilities."

⁴ *Pro se* legal representation refers to the circumstances of a person representing himself or herself without a lawyer in a court proceeding. *Pro se* is a Latin phrase

whether they, too, will join in the requested continuance, the Commission will hear argument as to this part of the motion at a session convened pursuant to R.M.C. 803 in Courtroom 2, Guantanamo Bay, Cuba, on 21 September 2009.

3. The Military Commission directs that a copy of this order be served upon each accused, the Prosecution and all civilian and military defense counsel of record, and that it be provided to the Clerk of Court for public release. The underlying Government motion will also be provided to the Clerk of Court for public release, after appropriate redactions for privacy and security considerations. The Military Commission further directs the Clerk of Court to have this order translated into Arabic and served upon each of the above-named accused.

So ordered this 17th day of September 2009.

meaning "for oneself". Messrs. al Hawsawi and bin al Shibh have indicated on numerous occasions a desire to also proceed *pro se*. Even if the Military Commission ultimately determines both accused are competent to stand trial, the Prosecution might still attempt to limit the accused's self-representation rights by insisting upon trial defense counsel when the accused lacks the mental capacity to conduct his own defense. See *Indiana v. Edwards*, 128 S. Ct. 2379 (2008). That issue, however, is not currently before this Commission and can be resolved only if the accused are determined competent to stand trial.

UNITED STATES OF AMERICA

v.

AHMED MOHAMMED AHMED HAZA
AL DARBI

Military Commission

September 17, 2009

DOCKETING ORDER

James L. Pohl
Colonel, U.S. Army
Military Judge

1. The hearing previously scheduled for 24 September 2009 is hereby re-scheduled for 23 September 2009 at Guantanamo Bay, Cuba. At the hearing, the Commission will hear oral argument regarding P-015, the Government's motion for a third continuance of all proceedings in this case.

2. The Commission authorizes the public release of this order.

So ordered this 17th day of September 2009.

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED, et al.

Military Commission

September 21, 2009

COMMISSION RULING REGARDING
PROSECUTION MOTION FOR
ADDITIONAL 60-DAY CONTINUANCE
AND SCHEDULING ORDER FOR 21
SEPTEMBER 2009 COMMISSION
SESSION
(P-012)

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

1. On 21 January 2009, over Defense objection, this Commission granted a Government motion for a 120-day continuance in this case. On 14 May 2009, the Commission granted, again over Defense objection, a second Government delay for an additional 120 days, but did docket a session to run 21 through 25 September 2009 to begin receiving evidence on the pending Rule for Military Commission (R.M.C.) 909 incompetence determination hearing for Mr. bin al Shibh.

2. On 16 September 2009, the Government filed a third request asking the Commission to: (1) grant an additional 60-day delay and (2) continue the scheduled R.M.C. 909 incompetence hearing to begin no earlier than 16 November 2009. The detailed defense counsel for Mr. bin al Shibh did not oppose the

motion to continue the R.M.C. 909 hearing, which the Commission subsequently granted on 17 September 2009. Detailed defense counsel for Messrs. bin al Shibh and al Hawsawi did not oppose the 60-day continuance. Since the Commission had not received a formal reply from the three *pro se* accused regarding the Government's third continuance request, it scheduled today's session to hear argument on this part of the Government motion. Since the subject involved a matter which affected each of the five accused, all were invited to attend. However, on 21 September 2009, the Commission received a translated filing from Messrs. Sheikh Mohammed, bin 'Attash and Ali, dated 18 September 2009, in which they stated they do not object to the 60-day continuance. Therefore, the unopposed motion for a 60-day continuance is thereby GRANTED.

3. What remains are the pending *pro se* filings which are not joined by and do not relate to Messrs. bin al Shibh and al Hawsawi. Accordingly, only the three *pro se* accused that have joined in the motions being heard,¹ their standby counsel and government counsel may be present in the courtroom. In other words, because Messrs. bin al Shibh and al Hawsawi would have no right to attend this proceeding if the cases were being tried

¹ The *pro se* filings are: D-105 (Dismiss Military Standby Counsel and Civilian Legal Advisors – Mohammed); D-109 (Compel Arabic Translation of All Commission Sessions); D-110 (Public Release of All Prior Commission Sessions); D-111 (Compel Research Supplies and Materials); D-113 (Dismiss Military Standby Counsel and Civilian Legal Advisors-Ali); D-114 (Boycott of SJA and Commission Sessions); and D-127 (Dismiss Military Standby Counsel and Civilian Legal Advisors-bin 'Attash).

separately, they are not authorized to attend this session of the Military Commission.²

4. The Military Commission directs that a copy of this order be served upon each accused, the Prosecution and all civilian and military defense counsel of record, and that it be provided to the Clerk of Court for public release. The Military Commission further directs the Clerk of Court to have this order translated into Arabic and served upon each of the above-named accused.

So ordered this 21st day of September 2009.

² The privilege of attending every proceeding is never absolute. Assuming, but not deciding, that the Due Process Clause of the Fifth Amendment applies to the accused in this case, a defendant is not required to be granted the privilege of attending every hearing or session of court. *See, e.g., Kentucky v. Stincer*, 482 U.S. 730 (1987). Due process only requires that “a defendant be allowed to be present ‘to the extent that a fair and just hearing would be thwarted by his absence.’” *Snyder v. Massachusetts*, 291 U.S. 97, 108 (1934). In this case, given the Commission has granted the unopposed motion for a 60-day continuance, the 21 September 2009 session will now only address motions filed by the three *pro se* accused. Accordingly, Messrs. bin al Shibh and al Hawsawi are not necessary to resolve the legal issues to be addressed; their presence would not contribute to the fairness of the proceeding; and their attendance has no reasonably substantial relation to an issue that involves them personally.

UNITED STATES OF AMERICA
Appellee

v.

ALI HAMZA AHMAD SULIMAN AL
BAHLUL
Appellant

Court of Military Commission Review
Case 09-001

September 29, 2009

RULING ON REQUESTS FOR
EXTENSIONS OF TIME TO FILE BRIEFS

Before
WILLIAMS, CONN, THOMPSON

Appellee's Request for Extension of Time to file a responsive brief received 23 September 2009, and which was not opposed by the Appellant, is GRANTED. Appellee's Responsive Brief is due not later than 5:00 p.m. Eastern Time on 15 October 2009. On concurrence of both Government and Defense Appellate Counsel, the deadline for submission of *amicus* briefs on behalf of Appellant is hereby correspondingly extended to 5:00 p.m. Eastern Time, 15 October 2009.

For the Court:
Mark Harvey
Assistant Clerk of Court

UNITED STATES OF AMERICA
Appellee

v.

ALI HAMZA AHMAD SULIMAN AL
BAHLUL
Appellant

Court of Military Commission Review
Case 09-001

September 29, 2009

RULING ON REQUEST TO FILE BRIEF
AS AMICUS CURIAE

Before
WILLIAMS, CONN, THOMPSON

Request of Professor Jordan J. Paust, as Counsel for *Amicus Curiae* Human Rights Committee of the American Branch of the International Law Association, to file a brief as *Amicus Curiae* (received 23 September 2009) is hereby GRANTED.

For the Court:
Mark Harvey
Assistant Clerk of Court

UNITED STATES OF AMERICA

So ordered this 1st day of October 2009.

v.

MOHAMMED KAMIN

Military Commission

October 1, 2009

ORDER: EXTENSION OF TIME TO
COMPLETE R.M.C. 706 EVALUATION
(D-27)

W. Thomas Cumbie
Colonel, U.S. Air Force
Military Judge

1. On 31 August 2009, the Defense filed a motion requesting an extension of time for completion of the summarized R.M.C. 706 report until 2 November 2009, and for an extension of the complete R.M.C. 706 report until 9 November 2009. The Government has not responded to this motion, but the Defense motion indicates that the Government does not oppose it. In accordance with the Commission's oral approval of the extension granted at that time, the motion is GRANTED.

2. The Commission finds that delaying the proceedings until after 9 November 2009 is in the interests of justice, as well as the best interests of both the public and the accused. Accordingly, the period of this delay will be excluded from speedy trial requirements under R.M.C. 707.

3. This order and the pleadings related to it are authorized for public release pursuant to Rule 3.9 of the Rules of Court.

UNITED STATES OF AMERICA

v.

MOHAMMED KAMIN

Military Commission

October 1, 2009

ORDER: GOVERNMENT MOTION FOR
CONTINUANCE
(P-003)

W. Thomas Cumbie
Colonel, U.S. Air Force
Military Judge

1. On 16 September 2009, the Government filed a motion requesting a third continuance in this case, until on or after 16 November 2009, to allow the executive branch to complete its evaluation and recommendation regarding the forum for trial of this matter, as well as for Congress to enact revisions to the Military Commissions Act and for the Department of Defense to promulgate new regulations reflecting those proposed statutory changes. The Commission previously granted the Government two continuances in the interest of justice for these reasons, for the eight months since 22 January 2009. The Defense opposes this continuance, and requests dismissal of the case.

2. On 24 August 2009, the Commission granted a Defense motion for a new sanity board in this case. On 31 August 2009, the Defense requested an additional delay in the deadlines for completing the sanity board until 9 November 2009, and that

motion was granted by this Commission on 29 September 2009.

3. The Commission notes that 16 November 2009, the date requested by the United States as the end date of its requested continuance, is the first available date on which proceedings could be conducted at Guantanamo Bay after the completion of the sanity board report on 9 November 2009. Thus, the Government is requesting at most a 7 day delay beyond that already approved by this Commission, and in reality is requesting no delay at all.

4. The Military Commission finds that the facts and law regarding this motion are completely articulated in the written pleadings received, that the Defense request for oral argument essentially repeats the same arguments raised by the Defense at oral argument conducted on the second continuance motion. The Commission finds that, while there is a possibility that Congress may determine that the offense of "material support for terrorism" will not ultimately be tried in a military commission, the law has not changed. As of today, "material support for terrorism" remains a viable offense under the Military Commissions Act. The Commission finds that it would be premature to dismiss the Charge in this case based on speculation regarding what Congress may or may not do. The Commission further finds that oral argument regarding this motion would not meaningfully assist the Commission in rendering a decision in this matter.

5. Accordingly, it is ORDERED that:

(a) The Government motion for a continuance until 16 November 2009 is GRANTED. The Commission finds that the requested continuance does not delay

any proceedings in this case beyond the extensions of time already granted to the Defense in this case for completion of the R.M.C. 706 reports; that the interests of justice are served by granting the requested continuance in this case and that such interests outweigh the best interests of both the public and the accused in a prompt trial.

(b) A hearing is set to decide the mental responsibility and mental capacity of the accused on 16 November 2009 at Guantanamo Bay, Cuba.

(c) The Defense motion to dismiss the Charge and its Specifications with prejudice is DENIED.

6. All time from 23 January 2009 through 16 November 2009 will be excluded from speedy trial requirements under R.M.C. 707.

7. This order and the pleadings related to it are authorized for public release pursuant to Rule 3.9 of the Rules of Court.

So ordered this 1st day of October 2009.

UNITED STATES OF AMERICA

v.

MOHAMMED KAMIN

Military Commission

October 1, 2009

ORDER: MOTION TO COMPEL
PRODUCTION OF DOD GENERAL
COUNSEL AS WITNESS
(D-30)

W. Thomas Cumbie
Colonel, U.S. Air Force
Military Judge

1. On 28 September 2009, the Defense filed a motion requesting this Commission to compel the production of Department of Defense General Counsel Jeh Johnson as a witness to testify regarding the Government's motion for a continuance in this case until 16 November 2009. The Government opposes the motion.

2. The Commission, having granted the Government continuance (P-003), DENIES this motion as moot.

3. This order and the pleadings related to it are authorized for public release pursuant to Rule 3.9 of the Rules of Court.

So ordered this 1st day of October 2009.

UNITED STATES OF AMERICA
Appellee

v.

ALI HAMZA AHMAD SULIMAN AL
BAHLUL
Appellant

Court of Military Commission Review
Case 09-001

October 27, 2009

RULING ON APPELLEE'S REQUEST TO
STAY APPELLATE PROCEEDINGS

Before
WILLIAMS, CONN, THOMPSON

Appellee's request of 15 October 2009 to stay appellate proceedings and filing of the Government's brief is DENIED without prejudice. Appellee's Responsive Brief is due not later than 4:30 p.m. Eastern Time on 30 October 2009.

For the Court:
Leroy F. Foreman
Clerk of Court

UNITED STATES OF AMERICA
Appellee

v.

ALI HAMZA AHMAD SULIMAN AL
BAHLUL
Appellant

Court of Military Commission Review
Case 09-001

October 27, 2009

RULINGS ON REQUESTS TO FILE BRIEF
AS *AMICUS CURIAE*

Before
WILLIAMS, CONN, THOMPSON

The following motions of *Amicus Curiae* to submit a brief are GRANTED:

- (1) United States Intelligence Community motion filed on 26 October 2009, and brief filed on 15 October 2009.
- (2) Historians, Political Scientists, and Constitutional Law Scholars motion and brief filed on 15 October 2009.
- (3) Montana Pardon Project, Clemens P. Work, and University of Montana School of Law Criminal Defense Clinic motion and brief filed on 15 October 2009.
- (4) National Institute of Military Justice, Human Rights Watch, Professor Stephen I. Vladeck, and Professor David S. Weissbrodt motion and brief filed on 15 October 2009.

The Historians, Political Scientists, and Constitutional Law Scholars motion filed on 15 October 2009 to exceed page limitations is DISMISSED as moot. Brief of *Amicus Curiae* meets all page limitation requirements set forth in CMCR Rules of Practice 14 and 16.

For the Court:
Leroy F. Foreman
Clerk of Court

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED, et al.

Military Commission

October 28, 2009

ORDER: DEFENSE MOTION FOR
APPROPRIATE RELIEF: RELEASE OF
AUDIO AND VIDEO RECORDINGS AND
TRANSCRIPT OF 21 SEPTEMBER 2009
MILITARY COMMISSION SESSION
(D-134)

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

1. On 2 October 2009, defense counsel for Mr. bin al Shibh filed a motion for appropriate relief requesting this Commission order the production of all audio and video recordings of the Military Commission session held on 21 September 2009 in Guantanamo Bay, Cuba and production of a written transcript of that session. In a 6 October 2009 response, the Government indicated it did not oppose release of the transcript once authenticated by the military judge but did oppose release of any audio recordings. The Government asserts there are no video recordings of this hearing.

2. That part of the Defense motion requesting a copy of the authenticated transcript of the 21 September 2009 Military Commission session is GRANTED. In accordance with Rule 3.9 of the Rules of Court, the Commission directs public

release of pages 1245 thru 1278. As no video tape of the session apparently exists, the Defense request to release it and the court reporter audio tapes is DENIED.

3. 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 to have this order translated 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 28th day of October 2009.

UNITED STATES OF AMERICA

v.

AHMED MOHAMMED AHMED HAZA
AL DARBI

Military Commission

October 30, 2009

DOCKETING ORDER

James L. Pohl
Colonel, U.S. Army
Military Judge

1. On 13 February 2009, the Commission granted the Government's request for a continuance until 21 May 2009. The purpose of the continuance was to give the new Administration time to review the military commission process and individual cases.

2. On 19 May 2009, the Commission granted the Government's request for a second continuance until 24 September 2009. The purpose of the continuance was to give the Administration additional time to complete its review of the military commission process and individual cases, as well as completion of any changes to the Military Commissions Act.

3. On 24 September 2009, the Commission granted the Government's request for a third continuance until 23 November 2009. The purpose of the continuance was to give the Administration additional time to complete its review of the military commission process and individual cases, as well as completion

of any changes to the Military Commissions Act.

4. At the 24 September hearing, the Commission set 2 December 2009 as the date for the next hearing. The Commission also set 11 January to begin the evidentiary hearing for issues relating to the treatment of the accused and the circumstances surrounding statements allegedly taken from the accused.

5. At the 2 December hearing, the Commission will:

a. Hear oral arguments on Prosecution motion P-007 – Motion to Reconsider the Military Judge's Ruling Excluding Parts 5, 6, and 7 of the Al Qaeda Plan.

b. Hear oral arguments on Defense motion P-017 – Motion to Pre-Admit the PBS Documentary, *Torturing Democracy*, and the Documentary, *Taxi to the Dark Side*.

c. Hear oral arguments on Prosecution motion P-010 – Motion for Access to the Accused for Medical and Mental Health Evaluation and for Reciprocal Discovery Concerning Accused's Physical and Mental Health.

d. If necessary, hear oral arguments on Defense motion D-024 – Notice Regarding Military Defense Counsel.

e. Hear oral arguments on Defense motion D-025 – Motion to Halt Proceedings and Dismiss for Lack of Subject Matter Jurisdiction.

f. Address outstanding discovery issues including, but not limited to, production of Defense witness for motions and trial.

g. Update the trial schedule.

6. The Commission authorizes the public release of this order.

So ordered this 30th day of October 2009.

UNITED STATES OF AMERICA

v.

MOHAMMED KAMIN

Military Commission

November 10, 2009

DOCKETING ORDER
(MJ-005)

W. Thomas Cumbie
Colonel, U.S. Air Force
Military Judge

1. On 1 October 2009, the Commission granted the Government's request for a third continuance until 16 November 2009. The purpose of the continuance was to give the Administration additional time to complete its review of the military commission process and individual cases as well as completion of any legislative changes to the Military Commissions Act.

2. In the Order granting the continuance (P-003), the Commission set 16 November 2009 as the date for the next hearing. This was predicated upon the completion of the 706 reports which, as of this date, have just been completed and provided to the Defense. In the interim, the Defense has filed a number of motions in *U.S. v. Kamin*.

3. Accordingly at the session now scheduled for 18 November 2009, the Commission will:

a. Hear an update from the Defense on their review of the 706 reports and their expectations on a 909 hearing;

b. Hear an update from the Defense on the progress of discovery efforts;

c. Hear oral arguments on D-031, Defense Motion for Appropriate Relief: An Order for Production of Discovery: Memoranda and Opinions Regarding Providing Material Support for Terrorism;

d. Hear oral arguments on D-032, Defense Motion for Appropriate Relief: Order to Require the Government to Provide Notice of Transfer;

e. Hear oral arguments on Defense Motion D-033, Defense Motion for Appropriate Relief: An Order for Production of Discovery: Photographs of JTF-GTMO Camps; and

f. Hear oral arguments on Defense Motion D-034, Defense Motion for Appropriate Relief-An Order for Production of Discovery: Contact Information for Individuals Involved in Mr. Kamin's Capture.

g. Establish the trial schedule.

4. The Commission authorizes the public release of this order.

So ordered this 10th day of November 2009.

UNITED STATES OF AMERICA
Appellee

For the Court:
Mark Harvey
Deputy Clerk of Court

v.

ALI HAMZA AHMAD SULIMAN AL
BAHLUL
Appellant

Court of Military Commission Review
Case 09-001

November 10, 2009

RULING ON MOTIONS TO ATTACH,
FOR LEAVE TO FILE SUPPLEMENTAL
BRIEF AND APPELLEE'S MOTION FOR
WAIVER OF PAGE LIMIT

Before
WILLIAMS, CONN, THOMPSON

Appellant's Appendices A through I, submitted to the Court on 1 September 2009, Appellee's Appendices A through I, submitted to the Court on 21 October 2009 and 2 November 2009, are ADMITTED. Appellant's emails submitted on 16 and 19 October 2009 are ADMITTED.

Appellee's Motion of 21 October 2009 for Waiver of Page Limitation is GRANTED.

Appellant's Motion of 30 October 2009 for Leave to File Supplemental Brief is GRANTED, insofar as the Court's review shall be limited to the issue of sentence appropriateness under the Military Commission Act of 2009.

UNITED STATES OF AMERICA

v.

IBRAHIM AHMED MAHMOUD AL QOSI

Military Commission

November 20, 2009

DOCKETING ORDER
(MJ-009)

Nancy J. Paul
Lieutenant Colonel, U.S. Air Force
Military Judge

1. The Commission has previously established 2 December 2009 as the date for the next session in this case.

2. Both the Government and Defense have filed several motions in which they requested oral arguments. Accordingly, at the 2 December 2009 session, the Commission will hear oral argument on the following:

a. D-018, Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder);

b. D-019, Defense Motion to Dismiss for Lack of Jurisdiction (Common Article 3);

c. D-020, Defense Motion to Dismiss for Lack of Jurisdiction (Equal Protection);

d. D-021, Defense Motion to Dismiss for Lack of Jurisdiction (Absence of Armed Conflict);

e. D-022, Defense Motion to Dismiss all Charges for Vagueness; and

f. D-023, Defense Motion for Article 5 Status Determination, or Alternatively, Dismissal for Lack of Personal Jurisdiction.

3. On 17 November 2009, the Government requested the Defense be ordered to provide timely notice of any change, modification, amendment or supplement to any outstanding Defense motions, as several of the outstanding Defense motions concern matters of law under the Military Commissions Act of 2006, which has been repealed. Accordingly, to prevent a delay in these proceedings, it is hereby ORDERED that the Defense provide notice of any changes, modification, amendments or supplements to any outstanding Defense motions previously filed by 1700 hours on 24 November 2009.

4. Additionally, at the 2 December 2009 Session, the Commission will establish a trial schedule.

5. The Commission authorizes the public release of this Order.

UNITED STATES OF AMERICA

v.

IBRAHIM AHMED MAHMOUD AL QOSI

Military Commission

December 3, 2009

RULING: DEFENSE MOTION FOR
ARTICLE 5 STATUS DETERMINATION,
OR, ALTERNATIVELY, DISMISSAL FOR
LACK OF PERSONAL JURISDICTION
(D-023)

Nancy J. Paul
Lieutenant Colonel, U.S. Air Force
Military Judge

On 19 December 2008, the Defense filed a motion requesting the Commission order an Article 5 status determination, or, alternatively, dismiss the charges for lack of jurisdiction. On 9 January 2009, the Government filed a response to the motion. On 14 January 2009, the Defense filed a reply to the Government's response and, on 24 November 2009, the Defense filed an addendum to their original motion. Essentially, the Defense now asserts that the Commission lacks personal jurisdiction over the Accused under the Military Commissions Act (MCA) of 2009, as it has not yet been determined that the accused is an alien unprivileged enemy belligerent. The Government opposed the original motion, arguing, in part, that the military judge may determine the accused's status at trial. No written response was provided by the Government as to the Defense amended motion. All documents submitted to the Commission, as well as

arguments presented by both sides, were considered in making the following finding.

FACTS

1. On 8 February 2008, the Convening Authority referred the charges and specifications against the accused to trial by military commission, alleging he was subject to trial by military commission as an alien unlawful enemy combatant under the Military Commission Act (MCA) of 2006.

2. On 28 October 2009, changes to the MCA were enacted, and the MCA of 2009 changed the jurisdiction of a military commission to offenses committed by an alien unprivileged enemy belligerent.

3. On 24 November 2009, the Government requested that they be allowed to amend the charges to conform with the new jurisdictional requirements of the MCA of 2009. The Commission had ruled that the Government is allowed to make a change to the charge sheet by deleting the words "alien unlawful enemy combatant" and substituting therefore the words "alien unprivileged enemy belligerent." Thus, it is likely that the Government will be alleging the accused is subject to trial by military commission as an alien unprivileged enemy belligerent.

LAW AND DISCUSSION

4. The burden is on the Government to show by a preponderance of the evidence that the accused is subject to the jurisdiction of this Commission.

5. As discussed above, 10 U.S.C. § 948c, MCA of 2009 states that military commissions have personal jurisdiction over any alien unprivileged enemy belligerent. 10

U.S.C. § 948a, MCA of 2009, defines an unprivileged enemy belligerent as an individual (other than a privileged belligerent) who (A) has engaged in hostilities against the United States or its coalition partners; (B) has purposely and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the offense alleged. It further defines privileged belligerent as an individual belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War.

6. To date, no military commission or any other forum has found the accused to be an alien unprivileged enemy belligerent. The accused is within his rights to request such a determination. He is, in essence, properly challenging the personal jurisdiction of the Military Commission through this motion to dismiss.

7. 10 U.S.C. § 948d, MCA of 2009, states that a military commission is a competent tribunal to make a finding sufficient for jurisdiction. While the Defense asserts that the only competent authority to make such a determination is an Article 5 hearing, applying the procedures set forth in Army Regulation (AR) 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, this Commission does not concur. While AR 190-8 may provide useful guidance, that regulation is not determinative of jurisdiction in a military commission. Additionally, this Commission does not concur with the Government's assertion that the military judge should defer determination on the

accused's status until conclusion of the presentation of the evidence at trial.

8. Under the MCA of 2009 and current commission case law, the military judge has the power and authority to hear evidence concerning and ultimately decide the accused's status and whether jurisdiction attaches. When challenged by the accused, a determination regarding personal jurisdiction should be made by the military judge prior to presentation of any evidence on the merits. In addition, under Rule for Military Commissions 201, a military commission always has the authority to determine whether it has jurisdiction.

9. The determination of an individual's combatant status for purposes of establishing a commission's jurisdiction does not preclude him from raising any affirmative defenses, nor does it obviate the Government's obligation to prove beyond a reasonable doubt the elements of each substantive offense. In other words, a pretrial finding by the military judge by a preponderance of the evidence that the accused is an alien unprivileged enemy belligerent does not eliminate the requirement for the commission members to find beyond reasonable doubt the accused's status if an element of the offense.

CONCLUSION

Wherefore, based on the above, the Defense position that an Article 5 status tribunal is a prerequisite to establishing the jurisdiction of this Commission is rejected, and the relief sought from that position is denied. The Government request that this Commission defer ruling on its personal jurisdiction over the accused until after the presentation of proof at trial is also denied. A hearing will be held 6 January 2010, at which

time the Government will be required to establish personal jurisdiction of the accused by a preponderance of the evidence.

UNITED STATES OF AMERICA

v.

IBRAHIM AHMED MAHMOUD AL QOSI

Military Commission

December 3, 2009

RULING: GOVERNMENT MOTION TO
AMEND CHARGES
(P-010)

Nancy J. Paul
Lieutenant Colonel, U.S. Air Force
Military Judge

On 24 November 2009, the Government filed a Notice to Amend Charges. On 2 December 2009, the Government orally presented this Motion, providing the Commission and Defense with the proposed Amended Charges (AE 49). All documents submitted to this Commission, as well as arguments presented by both sides, were considered in making the following finding.

FACTS

1. On 8 February 2008, two charges, each consisting of a single specification, were originally sworn against the accused alleging conspiracy and providing material support for terrorism. The offenses were referred by the Convening Authority on 5 March 2008, under the authority of the Military Commissions Act of 2006.

2. The accused was arraigned on these charges on 10 April 2008. Since then, the Commission has convened sessions on

numerous occasions, including 22 May 2008, 23 July 2008, 19 November 2008, 15 July 2009, 21 October 2009 and 2 December 2009, the last session being in accordance with the Military Commissions Act (MCA) of 2009.

3. As reflected in the proposed changes, the Government seeks permission to amend the charges as follows:

a. Delete “alien unlawful enemy combatant” and substitute “unprivileged enemy belligerent”;

b. Amend the acts alleged in paragraphs a through i of the original Charge I, Conspiracy, to those in paragraphs a through l of AE 49; and

c. Expand the time frame for the acts alleged in Charge I, Conspiracy, and Charge II, Providing Material Support for Terrorism, by four years, that is, from 1996 to 1992.

LAW AND DISCUSSION

4. The MCA of 2009, 10 U.S.C. § 1804(c), CHARGES AND SPECIFICATIONS, states, in pertinent part:

“SEC. 1804. PROCEEDINGS UNDER
PRIOR STATUTE

-Not withstanding the amendment made
by section 1802-

(1) any charges or specifications sworn or referred pursuant to chapter 47A of title 10, United States Code (as such chapter was in effect on the day before the date of the enactment of this Act), shall be deemed to have been sworn or referred pursuant to chapter 47A of title 10,

United States Code (as amended BY SECTION 1802); and

(2) any charges or specifications described in paragraph (1) may be amended, without prejudice, as needed to properly allege jurisdiction under chapter 47A of title 10, United States Code (as so amended), and crimes triable under such chapter.”

5. This is an issue of first impression for military commissions. However, under the guidance provided by 10 U.S.C. §948b(c), while the Uniform Code of Military Justice (UCMJ) does not, by its terms, apply to trial by military commission, the procedures for military commission are based upon the procedures applicable to general courts-martial and may be used as a reference. The Commission notes that the Rules for Courts-Martial (R.C.M) and the 2006 Rules for Military Commission (R.M.C), which is not likely to substantially change even if amended in accordance with the MCA of 2009, are substantially identical regarding changes to charges and specifications.

6. Under both R.M.C. 603 and R.C.M. 603, changes to referred charges are considered as either “minor” or “major.” R.M.C. 603 states: “Minor changes in charges and specifications are any except those which add a party, offenses or substantial matter not fairly included in those previously preferred or which are likely to mislead the accused as to the offenses charged.”

7. The discussion accompanying the R.M.C. 603(a) adds clarity by stating that:

“Minor changes include those necessary to correct inartfully drafted or redundant specifications; to correct a misnaming of the accused; to allege the proper article; or to correct other slight errors. Minor charges also include those which reduce the seriousness of an offense, as when the value of an allegedly stolen item in a larceny specification is reduced, or when a desertion specification is amended to allege only unauthorized absence.”

8. In contrast, R.M.C. 603(d) directs that major changes may not be made over the objection of the accused unless the charges are withdrawn and re-referred. R.M.C. 603 directs that changes or amendments to charges or specifications other than minor changes may not be made over the objection of the accused unless the charge or specification is preferred anew. The Defense has objected to the amendments proposed by the Government.

9. Each of the Government’s proposed amendments must be addressed separately as their impact differs. The MCA of 2009, 10 U.S.C. §948c, states that any alien unprivileged enemy belligerent is subject to trial by military commission. Thus, the substitution of the term “unprivileged enemy belligerent” for “alien unlawful enemy combatant” is clearly jurisdictional in nature and directly authorized by the MCA of 2009. As a matter of note, the jurisdictional language and the proposed change in this regard, under the normal charging practices of the UCMJ, this change would be considered “minor” in nature.

10. However, the proposed amendments to the overt acts alleged in Charge I are more troubling in nature, as the four-year expansion of time and addition of overt acts

dramatically change the nature of the offense alleged. When considering the distinction between “minor” and “major” amendments to charges and specifications, the military appellate system has focused on a two-pronged test used by our federal system. (see *U.S. v. Sullivan*, 42 M.J. 360; 1995 CAAF LEXIS 87; *U.S. v. Moreno*, 46 M.J. 216; 1997 CAAF LEXIS 1372; and *U.S. v. Smith*, 49 M.J. 269; 1998 CAAF LEXIS). Essentially, amendment is permitted if no new or additional offenses are charged and if the substantial rights of the accused are not prejudiced. As to the second test, *Sullivan* sets out the proposition that what must be avoided is denying the accused a chance to effectively defend himself by failing to provide notice of the charges he is facing.

11. In the case at hand, trial preparation has been ongoing for almost 2 years, numerous motions have been filed and numerous sessions have been held based on the charges referred in February 2008. In contrast, the Government now proposes expanding the time frame of the offenses alleged from five years (1996-2001) to nine years (1992-2001), as well as the general substance of the overt acts alleged in Charge I. While the basic elements of the offense conspiracy do not change, nor is a greater punishment possible, the scope of the crimes the accused must defend against will have shifted dramatically. The Government does not seek to “correct a slight error” with these amendments; rather, it seeks to fundamentally alter the charges against the accused. Therefore, the proposed changes, in regards to the overt acts alleged, are major changes which cannot be made over the objection of the accused at this point in the proceedings.

CONCLUSION

12. The proposed deletion of the words “alien unlawful enemy combatant” and substitution of the words “unprivileged enemy belligerent” in each charge is specifically authorized under the MCA of 2009 and is not only a minor change but also one needed to properly allege jurisdiction. It is therefore, allowed.

13. However, the changes proposed by the Government in regards to the overt acts alleged in Charge I and the time periods alleged in Charge I and Charge II are essentially new and additional offenses and contain substantial matters not fairly included in those previously referred. Additionally, significantly changing the charges and specifications at this juncture at this point in the Commission process brings unfair surprise to the accused.

Wherefore, based on the above, the Government’s motion to amend the charges is granted, in part only. The Government may amend the charges and specifications by changing the jurisdictional basis for the charges from “alien unlawful enemy combatant” to “alien unprivileged enemy belligerent.” All other proposed amendments are denied.

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