

UNITED STATES	)	
	)	ORDER
V.	)	
	)	MOTIONS FOR SPECIAL RELIEF
KHALID SHEIKH MOHAMMED;	)	D-010 AND D-011
WALID MUHAMMAD SALIH	)	
MUBARAK BIN 'ATTASH;	)	
RAMZI BIN AL SHIBH;	)	
ALI ABDUL AZIZ ALI;	)	1 JULY 2008
MUSTAFA AHMED AL HAWSAWI)	)	

1. The Commission has considered the motion for special relief submitted by the Detailed Counsel for Mr. Bin al Shibh (D-010), the Government response thereto and the Defense reply.
2. The Commission has also considered the joint motion for special relief (D-011) submitted at the request of Mr. Sheikh Mohammed and Mr. Bin Attash, and Detailed Defense Counsel for Mr. Bin al Shibh and Mr. al Hawsawi, and the Government response thereto.
3. Standby Defense Counsel for Mr. Ali also seeks to join in the motion in D-011 on behalf of Mr. Ali. The Commission notes that in the motion and a separate email, dated 23 June 2008, Standby Defense Counsel for Mr. Ali indicates that Mr. Ali has indicated his desire to withdraw his *pro se* representation request and proceed with representation by the Detailed Military Defense Counsel. Standby Defense Counsel also indicates, however, that "The Defense fully expects that Mr. al Baluchi (Mr. Ali) may seek to proceed *pro se* while in the courtroom and in the presence of three of the defendants. The Defense further expects that Mr. al Baluchi (Mr. Ali) will move between proceeding *pro se* and with representation throughout the trial." (Name of accused as reflected on the charge sheet added)
  - a. Although Mr. Ali would clearly be permitted to withdraw from his *pro se* status, this matter will need to be clarified in court, and with the understanding that he will not be permitted to change back and forth between represented and *pro se* status. Until such time that Mr. Ali clearly withdraws from his *pro se* status, Detailed Military Defense Counsel will continue to operate only the status of Standby Defense Counsel.
  - b. Accordingly, since Standby Defense Counsel makes no representation that his joining in the motion in D-011 is with the consent of Mr. Ali, Mr. Ali will not be viewed as being a part of the joint motion.

c. While there may be little or no practical consequence to this distinction, the Commission finds the distinction worthy of note so that all parties remain clear on status of counsel.

4. On 13 June 2008, in D-010, Mr. Bin al Shibh sought an enlargement of time as to the 13 June 2008 ordered deadline to file pleadings with regard to the issue raised by Detailed Defense Counsel concerning Mr. Bin al Shibh's competence to make a *pro se* representation election. In that same motion Mr. Bin al Shibh also requested a continuance of the hearing scheduled for this matter on 10 July 2008. (The motion also requests modification of all other ordered litigation milestones in this case.) In its response to D-010 the Government did not oppose "a reasonable extension of time for the Defense to file a motion on the issue of the accused's competency" but did oppose a modification that would delay the 10 July 2008 hearing date with regard to this matter.

5. In D-010 the Defense proffers several different bases for the requested relief. Only one requires discussion with regard to the resolution of this issue. In support of its motion the Defense claims that "the government has not provided discovery to the defense that is germane to this issue." In its response, the Government essentially concedes the crux of the Defense claim with regard to the status of the discovery issue. As of the date of the Government response (23 June 2008), the Government states that "The Prosecution will soon provide the medical records of the accused" to the Defense. The Government goes on to describe various efforts that are underway with regard to the discovery process and further identifies a number of areas of potential dispute between the Government and the Defense with regard to discovery. The Commission notes that an order was issued on 25 June 2008 directing the Commander, Joint Task Force—Guantanamo Bay, Cuba, to provide "any and all medical records...related to" Mr. Bin al Shibh to the Prosecution for release to Detailed Defense Counsel. Resolution of the discovery issues is beyond the scope of the Commission's consideration of this motion. It is clear however, that the discovery process in this case has not matured to the point where Defense may reasonably be expected to competently litigate the issue in question with regard to Mr. Bin al Shibh.

6. While the Commission will grant a continuance of the trial schedule concerning the mental capacity motion raised by Detailed Defense Counsel for Mr. Bin al Shibh, additional action is also required to move that issue toward resolution. RMC 909 governs the issue of capacity of an accused to stand trial by Military Commission. After referral of charges, the military judge may conduct a hearing to determine the mental capacity of an accused, either *sua sponte* or upon request of either party. RMC 909 contemplates that the results of an inquiry pursuant to RMC 706 is reasonably a part of the hearing conducted by the Military Judge. Accordingly, based on the matters addressed in D-010, the Commission has determined that an order directing an inquiry into the mental capacity of Mr. Bin al Shibh in accordance with RMC 706 is appropriate. An order to that effect will be issued concurrent with this ruling. The due date and hearing date of the Defense motion in this regard will be established in anticipation of the completion of that process.

7. With regard to the discovery matters noted by the Defense, it appears that while the Government is seeking to comply with portions of the Defense discovery request, the Government is also taking the position that the Defense request is too both too broad, as it pertains to this issue, and premature, because if the accused is granted *pro se* status Mr. Bin al Shibh might "take an entirely different approach to pre-trial discovery" and thereby presumably not request similar discovery on his own behalf. While the Commission reserves judgment on the viability of the Government suggestion, it is clear that, absent resolution of the discovery aspect of this matter between the parties, an additional hearing will be required following a proper and specific discovery motion by the Defense and a full response by the Government. Neither the Defense discovery request nor the references to discovery concerns in this motion constitute a discovery motion that places the matter properly before the Commission for resolution.

8. In D-011 the Defense requests a continuance in the form of modification of the entire litigation schedule. This request is premised on a number of bases, to include: the incomplete status of the discovery process; the volume of discovery provided thus far; the limited ability of counsel to meet with the represented accused and similarly limited ability of standby counsel and RMC 506(d) personnel (non counsel advisors) to meet with the *pro se* accused; the logistic challenges associated with the handling of classified material; the complexity of the case; the capital nature of the case; and the *pro se* status of several accused. In its response, the Government agrees that some adjustment of the established litigation schedule might be appropriate, but urges a shorter delay than requested by the Defense.

9. If operated properly, the Military Commission process should provide a workable trial system that can deal with the complex dynamics of a world wide theater of military operations. While this process might differ in some regards from trial procedures in other courts, its design does not contemplate a truncated process of justice. In this regard, some aspects of the litigation process might reasonably take longer than would be expected in other trial systems. In the Commission's view, the investment of a reasonable amount of additional time at this stage of the proceedings is a prudent course of action that will contribute greatly toward achievement of a just result, and not simply a conclusion of the process one way or the other.

10. While the Commission generally concurs in the appropriateness of granting the Defense requests for enlargement of time and continuance, the Government has also correctly identified a number of matters that can and should be addressed during the currently scheduled session. Accordingly, a number of modifications will be made to the previously ordered litigation schedule.

11. At the sessions, now scheduled to begin on 9 July 2008, the Commission intends to address the issue of what role, if any, perceived or actual intimidation between the several accused played or is playing in the *pro se* elections requested by the several accused. Concerns about this matter were expressly raised by the comments made by Major Jackson during the last session of the Commission and impliedly by the email sent by LCDR Mizer (via LN1 Lindee) concerning "Notification of Acceptance of Counsel"

dated Monday 6/23/2008 1:50 PM. The Commission intends to discuss this matter with each of the accused on the record and in five separate sessions where each of the accused will appear outside the presence of the other accused.

12. In order to facilitate this process, the following schedule is provided:

- 1330 9 July 2008: Hearing with Mr. Al Hawasawi
- 1630 9 July 2008: Hearing with Mr. Ali
- 0830 10 July 2008: Hearing with Mr. Bin Al Shibh
- 1330 10 July 2008: Hearing with Mr. Bin Attash
- 1600 10 July 2008: Hearing with Mr. Sheikh Mohammed
- 0830 11 July 2008: Hearing with all accused if necessary

13. As part of the inquiry as described in paragraph 11, the Commission also intends to discuss the provisions of RMC 906(b)(7) concerning severance of charges in the event it appears that an accused or the Government is prejudiced by a joint or common trial.

14. With regard to the matter of severance, the Government is directed to prepare a brief addressing the Government's position on severance of the proceedings for one or more or all of the accused. This brief will be due to the Commission and opposing counsel and the *pro se* parties not later than 18 July 2008. If any accused wishes to provide a response to the Government brief, it shall be submitted not later than 25 July 2008. If any accused wishes to file a separate brief on the issue of severance which is not a response to the directed Government brief, it may do so. Such brief, if filed, will be due not later than 25 July 2008.

15. The following revised trial schedule is ordered in response to the continuance requests by the Defense. Pursuant to RMC 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 originally ordered litigation schedule. The Commission further finds that all delay associated with this modification is the responsibility of the Defense for the purposes of RMC 707 accountability.

- a. 18 July 2008: Brief regarding the severance issue due from the Government.
- b. 25 July 2008: Due date if any accused wishes to file a separate motion on the issue of severance which is not a response to the directed Government brief.
- c. 30 July 2008: Production completion date for all required and agreed upon requested discovery.
- d. 01 August 2008: Initial RMC 706 report due from the board to the Military Commissions Trial Judiciary Staff, trial counsel and the defense counsel for Mr. Bin al Shibh.

e. 08 August 2008: Full RMC 706 report due to the defense counsel for Mr. Bin al Shibh.

f. 14 August 2008: Severance Motion hearing in GTMO if necessary.

g. 15 August 2008: RMC 909 competency hearing with regard to Mr. Bin al Shibh.

h. 29 August 2008: Law Motions due to the military judge and opposing counsel and other *pro se* parties. In general, law motions are those which require no evidentiary hearing to determine. If any counsel/*pro se* party intends to submit more than ten (10) law motions, that counsel/*pro se* party will tell the military judge and opposing counsel/other *pro se* parties the total number of law motions which counsel intend to present NLT 1200 hours, 27 August. The military judge will advise counsel/other *pro se* parties of a revised schedule to present the motions.

*Note 1: Motions will have as their underlying legal premise no more than one legal basis. If there is more than one legal basis, then there should be more than one motion. Law motions include motions relative to sentencing.*

*Note 2: Motions, response, and reply due dates are a No Later Than date. Counsel for both sides are advised that any motion, response, or reply which is ready for submission prior to the due date should be submitted when completed. The efficient and proper process of motion practice will NOT be enhanced by delivering multiple motions, responses, or replies to the Commission or opposing party at the last possible moment.*

i. 10 September 2008: Discovery Motions Due

j. 24 September 2008 : Hearing on Law and Discovery Motions in GTMO

k. TBD: Evidentiary Motions. Evidentiary motions due to the military judge and opposing counsel/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 1: See Notes 1 and 2 above.*

*Note 2: 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.*

l. TBD: Hearing in GTMO re Evidentiary Motions.

m. 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.*

n. 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.*

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

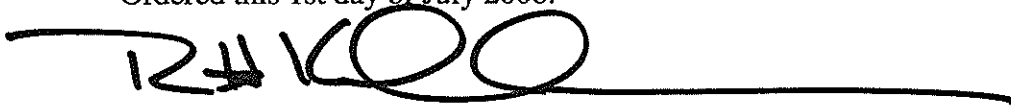
p. TBD: Assembly and Voir Dire for Panel Members.

q. TBD: Beginning of trial on the merits.

r. Counsel should direct their attention to the Rules of Court, RC 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 RC 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.

s. 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 1st day of July 2008:

A handwritten signature in black ink, appearing to read "RH KOOL", written over a horizontal line.

Ralph H. Kohlmann  
Colonel, United States Marine Corps  
Military Judge