

UNITED STATES OF AMERICA

v.

RAMZI BIN AL SHIBH

**Defense Motion
for Special Relief
to Delay Arraignment**

19 May 2008

1. **Timeliness:** This special request for relief is filed within the time this commission has prescribed, in its order of 14 May 2008, for a request for delay in the scheduled arraignment.
2. **Relief Sought:** The defense respectfully submits that a continuance of the arraignment is necessary and in the interests of justice. Concomitantly, the defense seeks an extension of time in which to file voir dire questions to be submitted to the military judge.
3. **Burden of Proof:** The defense bears the burden of proof, pursuant to R.M.C. 905(c) on any question of fact; this burden is met by a showing of a preponderance of evidence.
4. **Facts:**
 - a. On 14 May 2008 the Military Judge ordered that the arraignment in this case take place on 5 June 2008. This arraignment is to be held aboard Guantanamo Naval Station, Cuba. In the same order, the military judge also provided deadlines for filing a request for continuance (19 May), submission of notice of appearance by civilian counsel (19 May), and submission of written questions to voir dire the military judge (26 May).
 - b. Detailed counsel have only met three times with Mr. Bin al Shibh. The initial meeting was delayed due to requirements which the

government, via the Convening Authority, imposed on defense counsel. Specifically, the government sought to issue a protective order and obtain counsel's signature on a memorandum of understanding regarding the treatment of classified information. Detailed counsel's meeting with Mr. Bin al Shibh was delayed because the government was unable timely to administer this process of issuing an order and MOU. The meeting was further delayed because the government then made counsel's signing of the MOU a condition precedent to any meeting between counsel and Mr. Bin al Shibh.

- c. Travel to Guantanamo Bay Naval Station is arduous in that the flights to the base are limited to only a few possible options a week, even these options are unreliable in their arrival times (if, that is, the flight is not canceled altogether), and counsel are required to reserve seats weeks in advance. Flight arrangements take inordinate amounts of time. Counsel rely on an active duty military paralegal to make these arrangements; this paralegal is also assigned to two other commission cases, and handles numerous other administrative tasks for the Office of the Chief Defense Counsel.
- d. Along with the above travel difficulties involved in meeting with Mr. Bin al Shibh, the Staff Judge Advocate's Office for Joint Task Force-Guantanamo (SJA JTF-GTMO), which handles visits with any camp detainees at the prison, requires defense counsel to provide 14 days' notice prior for any visit with any detainee. In addition, counsel may only meet in only two time slots per day with any client: the morning from approximately 0830 until 1130, and the afternoon from approximately 1300 until 1630. Finally, per the SJA's office, JTF-GTMO, counsel for 'high value' detainees may not divide the meeting times to share with fellow counsel, so that each could meet with their client for a shorter period in the morning.
- e. The government has decreed that all information derived from any so-called 'high value' detainee, such as Mr. Bin al Shibh, is classified as TOP SECRET (TS/SCI). Accordingly, reference notes detailed counsel take during interviews are classified TS/SCI, and must be maintained in an area that has been certified to that security level (also referred to as "Sensitive Compartmented Information Facility" or "SCIF"). There is no such area available to detailed counsel aboard Guantanamo Naval Station. The one room presently certified as a SCIF that is available to detailed counsel is located in the Office of the Chief Defense Counsel, in Arlington, VA. That room does not have working computers for counsel to use, and it is occupied by computer technician contractors ostensibly there to maintain the system that is to be put in place; these technicians must be asked to leave the room every time counsel enter to discuss their case together.

- f. The absence of a SCIF, and of a mechanism for transferring classified information back to Arlington, VA, also means that any classified discovery that defense may receive cannot be taken to discuss with the client on-board Guantanamo, cannot be carried off Guantanamo, cannot be maintained with the defense in Guantanamo, and can only be held in the one room that is a certified SCIF, in Arlington, VA.
- g. To-date, the government has not provided to the defense any substantive information, including the information considered by the Convening Authority prior to referral; specifically, the defense has not receive the “binder” that the Legal Advisor to the Convening Authority references in his advice to the Convening Authority, given during the referral process.

5. Discussion:

RIGHT TO COUNSEL. At the arraignment, Mr. Bin al Shibh will be asked to state by whom he wants to be represented. Although detailed military counsel have met with him on several occasions, detailed counsel requires additional time to establish a working relationship with Mr. Bin al Shibh. Detailed counsel should be granted deference with this request as it has many obstacles to overcome in this pursuit, including but not limited to the fact that it is reasonable to expect that the accused has an inherent distrust of all U.S. military personnel. Mr. Bin al Shibh also has not yet been able to meet with civilian counsel, since that counsel's security clearance remains pending adjudication with the government.

LACK OF RESOURCES/FACILITIES. As referenced above, the defense must operate in an extremely challenging environment in representation of Mr. Bin al Shibh due to the government’s decision to classify information derived from him and from any other ‘high value’ detainee. The practical effect of the lack of a SCIF is that detailed counsel’s notes are taken from them, sealed in a signed envelope, and maintained at the office of the SJA JTF-GTMO. Detailed counsel have no means of taking the notes

back with them to their offices in Arlington, VA; detailed counsel are unable to work with the notes in their offices on-board Guantanamo Naval Station; and counsel cannot even confer with each other about any discussions had with any 'high value' detainee, unless they return to Arlington, VA, and enter the SCIF located in the office, but only after finding a time when the SCIF is free from third-parties so counsel can discuss privileged matters. The defense therefore cannot even begin to develop any case strategy because substantive discussions are precluded everywhere but in one room in the Office of the Chief Defense Counsel in Arlington, VA. The defense is without a reasonable alternative to remedy this major limitation as the Office of the Chief Defense Counsel has no budget of its own, nor the authority to certify its own SCIF. The government has not fulfilled its obligations to ensure the defense has the proper resources to defend Mr. Bin al Shihb.

LACK OF DISCOVERY. The defense has not received any substantive discovery the government is required to provide. *See* R.M.C. 701. In addition, the defense does not have the ability to receive, store, or analyze this information due to the absence of the requisite certified area, or SCIF, where classified information can be examined, as discussed above. Thus, the defense has no understanding of the volume of evidence or scope of legal issues that may be germane to this case. Under these conditions, it would be impossible for the defense to come to any realistic agreement about a trial schedule at the time of arraignment.

TRAVEL AND VISITATION PROBLEMS. Taken together, the logistical issues involved in traveling to Guantanamo, coupled with the SJA JTF-

GTMO's restrictions on client visits, inherently build in weeks of delay to the process of communicating with Mr. Bin al Shibh.

TRIAL SCHEDULE. On 14 May, the Military Judge stated that at the arraignment he "will establish a full schedule for the litigation of this case." The military judge further ordered that counsel discuss scheduling prior to the arraignment and endeavor to agree upon a schedule. Based upon the foregoing, the defense is unable to participate in any meaningful discussions about a reasonable trial schedule.

6. **Relief Requested:** The defense respectfully requests as follows:
- a. An extension of time for the arraignment until a date to be determined, with the specification that the entire period for this extension of time does not constitute excludable delay, for speedy trial purposes, under R.M.C. 707. This request for an extension of time serves the interest of justice in that it seeks to assure the resources necessary for adequate representation by counsel. The defense does not stipulate that the requested delay should be attributed to the defense as excludable delay, and does not waive the right to assert possible speedy trial violations based upon this, or future, delays in the proceedings.
 - b. As the government controls the security clearance adjudication process, the defense is unable to determine when civilian counsel will be cleared to meet personally with Mr. Bin al Shibh. The defense requests that the Military Judge order the government to provide the defense and the Judge an update regarding the status of this clearance, no later than 1630 on 09 June 2008.
 - c. As the government controls the construction and certification of a SCIF, the defense is unable to handle classified information in a manner that would permit adequate representation of Mr. Bin al Shibh. The defense requests that the Military Judge order the government to provide the defense and the Judge with a status report on the completion of the required facilities no later than 1730 on 09 June 2008.
 - d. An extension of time to file a notice of appearance for any additional civilian counsel, until a date to be determined (for further discussion of this concern, *see* "Ramzi Bin al Shibh Motion for Modification of Commission Order dtd 14 May 08").

- e. An extension of time to file written questions to voir dire the military judge until a date to be determined, no later than one week prior to the date of arraignment.
- 7. **Certificate of Conference:** The defense has conferred with the trial counsel in this case. The government opposes this motion.
- 8. **Oral Argument:** The Defense does not request oral argument on this motion.
- 9. **Witnesses/Evidence:** Not applicable.

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Suzanne M. Lachelier
CDR, JAGC, USN
Detailed Defense Counsel

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Richard E.N. Federico
LT, JAGC, USN
Detailed Defense Counsel