

UNITED STATES OF AMERICA

**Commission Ruling
D-002-006**

**Motions
for Continuance of Initial
Session/Arrestment**

v.

KHALID SHEIK MOHAMMED et al

22 May 2008

1. Nature of Motion:

a. Detailed defense counsel for each of the five accused submitted D-002-006. Each submission seeks a continuance of the initial session previously ordered and scheduled for 5 June 2008. This ruling addresses all five of the noted continuance requests.

b. The five continuance requests express several common bases for the requested relief:

(1) Although the detailed defense counsel for each accused apparently possesses the requisite security clearances for performance of her or his duties, clearance granting procedures are still underway with regard to numerous assistant defense counsel and civilian defense counsel;

(2) The lack of security clearances for assistant defense counsel and civilian defense counsel has limited their involvement in the case with regard to matters such as meeting with clients, discussing the detailed defense counsel's meetings with the clients, and examining classified portions of discovery materials;

(3) Due to logistic and security factors, detailed defense counsel have had, to date, only a limited ability to meet with their clients;

(4) Defense office spaces at GTMO and in Washington DC are deemed inadequate to deal with the classified material associated with this case;

(5) Discovery matters have not been completed; and

(6) Several counsel have personal matters planned that conflict with the previously ordered initial session date of 5 June 2008.

c. The Commission finds that counsel have adequately covered all matters of import to this issue within the confines of the motions and the response, such that a reply to the response is not necessary.

2. Discussion:

a. Charges in this case were referred to the Commission for trial on 9 May 2008. The 5 June 2008 initial session was ordered by the Military Judge on 14 May 2008 after the Military Commission Trial Judiciary Staff received notice concerning the detailing of counsel as trial and defense counsel.

b. Service of charges upon the accused in accordance with RMC 602 was accomplished on 21 May 2008, thereby initiating the speedy trial provisions of RMC 707.

c. The initial session is intended to:

- 1) satisfy the RMC 707 requirement for arraignment of the accused in accordance with RMC 904 within 30 days of service of the referred charges; and,
- 2) provide the Military Judge the opportunity to advise the accused with regard to their rights to counsel and to ascertain whether or not the accused intend to exercise their counsel rights; and
- 3) ascertain what counsel, if any, will be representing the accused.

d. Some of the issues raised in D-002-006 are matters of consequence with regard to ensuring the defense is provided a full opportunity to prepare for trial. None of the issues raised in D-002-006, however, provide a valid basis for delaying the initial session and arraignment in this case. As noted in the prosecution response to D-002-006, the arraignment process does not require any decision making or action of consequence by the defense beyond the counsel right elections noted above. In this regard, it is typical for accused in military courts of all types to defer entry of motions and pleas during an initial court session. Additionally, it is well established that elections made at initial court sessions, to include counsel selections, are routinely changed at a later stage of the proceedings. Accordingly, the fact that all defense counsel are not yet fully integrated into the litigation process is not a valid basis in support of the continuance request.

e. Several of the defense submissions express concern that defense counsel other than the detailed defense counsel are not yet in a position to participate in development of possible voir dire of the Military Judge prior to the 26 May 2008 submission deadline established in the Commission order of 14 May 2008. In this regard, the Commission notes that the 26 May 2008 voir dire submission deadline applies only in the event counsel for an accused intend to conduct voir dire of the Military Judge at the initial session. In the event that counsel for the accused elect to defer voir dire of the Military Judge until the next session of the case, a later submission deadline will be established.

f. Similarly, the concerns expressed by the defense with regard to the adequacy of their working spaces is not a matter that justifies a delay of the initial session and arraignment in this case. Based on the representation in the prosecution response with regard to the approval of the SCIF for the ELC at GTMO, it appears that progress is being made with regard to dealing with the logistic challenges associated with this case. It is likely that the lawyers' tasks in this case are going to be difficult in several regards. If the office space concerns noted in D-002-006 remain unresolved such that the

inadequacy is interfering with the defense's responsibility with regard to their clients, the defense will be allowed to submit subsequent requests for relief concerning litigation milestones that will be established by the Military Judge.

g. The fact that discovery in accordance with the MMC has not yet been completed is not a proper basis for continuing the initial session and arraignment in any case. Discovery milestones will be established by the Military Judge and it is likely that some measure of litigation will be required before that process will be deemed complete.

h. The Commission regrets that the established litigation schedule conflicts with the personal plans of some of the counsel in this case. These personal conflicts, however, do not provide an appropriate basis for delaying the scheduled 5 June 2008 session. Starting the process and establishing a schedule will benefit all counsel with regard to avoiding future conflicts.

i. The Commission finds that the interests of justice in this case will be best served by completion of the initial session and arraignment as previously ordered on 5 June 2008. The Commission recognizes that there are many logistic and legal issues that will need to be addressed in this case. It is precisely because of the anticipated complexity of this case, that it is important that the process get underway.

3. Ruling: The defense requests in D-002-006 for continuance of the initial session and arraignment scheduled for 5 June 2008 are denied.

RALPH H. KOHLMANN
Colonel, U.S. Marine Corps
Military Judge