

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

**Defense Motion**

For Further Arrangements Concerning  
Detainee Witnesses at Trial

2 July 2008

1. **Timeliness:** This Motion is filed within the time frame permitted by the Military Commissions Trial Judiciary Rules of Court and the Military Judge's orders, including the Ruling on D-042 which established 2 July 2008 as the filing deadline for any remaining pretrial motions including motions for reconsideration of rulings previously issued and new motions based on the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. \_\_\_\_ (2008). While the instant Motion does not seek reconsideration of a previously issued Ruling, it does concern final logistical arrangements for implementation of the Commission's prior Rulings related to the Defense's previous requests to interview and call to the witness stand eight high-value detainees who have personal knowledge of relevant facts.

2. **Relief Sought:** Defendant Salim Ahmed Hamdan moves for a pretrial order requiring the Government to make final logistical arrangements for the production of the following eight witnesses who will be called to testify at trial:

2.1 Khalid Shayk Muhammad

2.2 Ramzi bin al-Shib

2.3 Abu Faraj al-Libi

2.4 Abdul-Rahim al-Sharqawi

2.5 Walid bin Attash

2.6 Abdul Rahim al-Nashri

2.7 Abdul Hadi al-Iraqi

## 2.8 Mustafa Ahmed al-Hawsawi

In each instance where the Defense is aware that a witness is represented by counsel, the Defense has advised counsel that their clients will be called to testify at trial. The Defense therefore also requests that the Commission require the Government to make whatever arrangements are necessary to permit any counsel who wishes to do so to participate either in person or by phone at the time his or her client is called to testify.

In addition, Hamdan moves for a pretrial order requiring the Government to arrange for the Defense to conduct an in-person interview during the week of July 14 of witnesses Khalid Shayk Muhammad, Walid bin Attash, Abdul Hadi al-Iraqi, and Mustafa Ahmed al-Hawsawi in order to prepare for each of these witness's trial testimony, and to make whatever arrangements are necessary to permit any counsel for these witnesses who wishes to do so to participate either in person or by phone at the time of the interview. (Pretrial interviews are not requested of the remaining four witnesses because each of them has counsel who have objected to any contact of their clients by counsel for the Defense. Accordingly, they will be called to the witness stand without the benefit of a pretrial interview.)

**3. Overview:** The availability of these eight detainee witnesses has been the subject of various motions and rulings over the past six months. Now that the trial date has been reconfirmed for 21 July 2008, or as soon thereafter as all pretrial motions are resolved, the Defense seeks assurance that the Government has taken all necessary steps to arrange for the production of the eight detainee witnesses at trial, including arrangements for an in-person interview of the four detainee witnesses whose counsel have not objected to being contacted by the Defense.

**4. Burden and Standard of Proof:** As the moving party, the Defense has the burden of

proving by a preponderance of the evidence that it is entitled to the relief requested.

**5. Facts:** The following uncontroverted facts are relevant and material to the Commission's resolution of this Motion.

A. During the hearings commencing 5 December 2007, the Commission determined that "certain security obstacles" prevented certain high value detainees from testifying in court on short notice.

B. On 7 December 2007 the Commission issued its Ruling on Motion to Compel Production of Witnesses. In his Ruling, the Military Judge confirmed his previous decision not to compel the Government on short notice to produce certain high value detainee witnesses for testimony at the hearing on 5-6 December 2007, particularly in light of special security procedures governing access to the high value witnesses who were acknowledged to be "extremely highly placed members of al-Qaeda." Those three witnesses were Messrs. Khalid Shayk Muhammad, Ramzi bin al-Shib, and Abu Faraj al-Libi.

C. In his 7 December 2007 Ruling, the Military Judge observed that Mr. Abdul al-Sharqawi was not subject to any special security measures, and that he was represented by habeas counsel who may or may not permit his client to be interviewed by the Defense. Subsequent communications determined that counsel for Mr. al-Sharqawi would not permit his client to be interviewed outside his presence. The Defense was not able to make arrangements for a subsequent interview with the witness while counsel for Mr. al-Shawqawi was present at Guantanamo.

D. On 13 December 2007, the Defense submitted a Special Request for Relief renewing its request for access to the three high value detainee witnesses, Messrs. Muhammad, bin al-Shib, and Faraj al-Libi. The Prosecution responded on 14 December 2007 that it believed

the issue was controlled by the 7 December 2007 Ruling.

E. In an email dated 17 December 2007, the Military Judge clarified that his 7 December 2007 Ruling did not preclude the Defense from future access to the three high value detainees, and in the same email the Military Judge required the Government to determine "exactly what [security] obstacles exist to the Defense's access to these witnesses". Further motion practice and briefing ensued, and the Commission heard oral arguments at Guantanamo Bay on 7 February 2008 regarding Defense access to a total of eight high value detainees being held at Guantanamo whom the Defense intended to call as witnesses at trial.

F. On 13 February 2008, the Commission issued its Ruling on Motion to Compel Access to High Value Detainees (D-011). In his Ruling, the Military Judge granted the Defense's Motion conditioned on a limitation that the Defense's initial access to the eight detainee witnesses be limited to written questions and written answers that would be cleared by a designated Government Security Officer who would redact any portion of a witness's response that he believed would endanger the national security or reveal classified information. The Government was ordered to appoint a Security Officer and Linguist by no later than 19 February 2008. The Military Judge also observed that counsel for the Defense was required to determine if any of the eight witnesses was represented by counsel and, if so, to "act accordingly."

G. On 19 February 2008 at 19:17 hours, the Government informed the Military Judge and the Defense of the identities of the Security Officer and the Linguist, but sought additional clarification that each be permitted to consult with various "federal agencies" for the purpose of identifying classified information. The Government also indicated that both the Security Officer and the Linguist would have to be "read into" certain programs before commencing their duties. The Military Judge provided the requested clarification the next

morning, 20 February 2008.

H. On 19 February 2008, the Government also filed a Request to Stay the 13 February Ruling.

I. On 29 February 2008, the Government moved for reconsideration of the Commission's 13 February 2008 Ruling.

J. On 3 March 2008, the Defense sent its written questions to the Government Security Officer for transmission to the following four high value detainees:

Khalid Shayk Muhammad

Walid bin Attash

Abul Hadi al-Iraqi

Mustafa Ahmed al-Hawsawi

Written questions were not sent to the other four high value detainees for the following reasons.

Counsel for Ramzi bin al-Shib, Abu Faraj al-Libi, and Abdul Rahim al-Nashri each had separately indicated that they objected to the Defense contacting their clients. Counsel for Abdul Rahim al-Sharqawi had indicated that his client should not be interviewed without counsel present.

K. On 6 March 2008, the Government submitted a further request for clarification, seeking to preclude the written questions from being delivered to the high value detainees pending the Military Judge's reconsideration of the 13 February 2008 Ruling.

L. On 14 March 2008, the Commission issued its Ruling on Reconsideration (P-004). In his Ruling, the Military Judge declined to reconsider the 13 February 2008 Ruling, but provided further clarification to the effect that the Government Security Officer was authorized also to redact any information in the detainees' written answers that appeared to be an attempt to

"communicate some message to a colleague or a confederate."

M. On 18 March 2008, the Defense sent revised written questions to the Government Security Officer for transmission to the four high value detainees listed in paragraph J, above, as permitted by the Commission's 13 February and 14 March 2008 Rulings. The reason for the revisions was certain mis-translations by the Government Linguist as identified by the Defense translator when reviewing the Government's Arabic translations of the Defense's 3 March 2008 written questions.

N. On 24 March 2008, the Government Security Officer sought further guidance from the Commission based on his understanding that "according to the Intelligence Agencies, anything related to the HVD's including the questions the Defense submitted will be considered classified." The Military Judge replied that he had "difficulty understanding how the questions alone, prior to their being answered, could possibly be classified."

O. On 27 March 2008, the Government Security Officer confirmed that the written questions had been sent to Guantanamo Bay for delivery to the four high value detainees identified in paragraph J, above.

P. On 31 March 2008, the Government Security Officer advised that the written questions would be delivered "sometime this week to the detainees."

Q. On 14 April 2008, the Government Security Officer advised that written answers had been received from detainee ISN 10024 (presumably Khalid Shayk Muhammad).

R. On 30 April 2008, written answers from Khalid Shayk Muhammad were released by the Government Security Officer to the Defense.

S. Following receipt of the written answers from Khalid Shayk Muhammad, the Defense took certain actions based on the information contained in the written answers. First, it

filed its Special Request for Relief seeking *in camera* review of two redactions made by the Government and for related relief. Second, the Defense provided the Military Judge with an *in camera* copy of Khalid Shayk Muhammad's written answers so the Commission could determine whether they provide "an adequate basis to justify the Defense calling that detainee as a fact witness at trial . . . based on his personal knowledge of the issues as demonstrated by his answers to written questions." Third, the Defense supplemented its witness list to include Khalid Shayk Muhammad as a trial witness based on the information conveyed in his written answers, stating "it is clear that he [KSM] has personal knowledge based on first-hand experience regarding facts that are highly relevant and material to the pending case against Mr. Hamdan, facts exculpatory to the charges on which Mr. Hamdan is being tried, consistent with and, indeed, going beyond the Defense proffer of evidence. . . ." Fourth, the Defense wrote to the Prosecution, disclosing that based on his written answers Mr. Muhammad would be listed as a trial witness, and suggesting that the Prosecution allow the Defense to meet with Mr. Muhammad in person for the sole purpose of conducting a witness interview on the topics about which he has indicated he is prepared to testify. (*See*, correspondence, Attachment 1.)

T. In its 15 May 2008 Reply to Special Request for Relief, the Defense indicated the following regarding the written answers supplied by Khalid Shayk Muhammad:

"The written answers received from Mr. Muhammad on 30 April 2008 meet the standard set forth in the Military Judge's 13 February 2008 Ruling, and demonstrate that the witness, in fact, does have personal knowledge based on first-hand experience regarding evidence that is relevant and material to the pending case, evidence that is responsive and exculpatory. The answers establish the veracity of the proffer of testimony made by the Defense even before it was permitted to communicate with this witness."

U. On 2 June 2008, the Commission issued its Ruling on Motion for Access to HVD Clients by Habeas/DTA Counsel. In his Ruling, the Military Judge declined to enter any order

facilitating habeas counsel's travel to Guantanamo Bay to consult with their clients regarding whether or not to answer the Defense's written questions, based on a finding that the Government was not obstructing travel by counsel or their access to clients.

V. On 4 June 2008, the Commission issued its Ruling on Continued Access to High Value Detainees. In his Ruling, the Military Judge addressed the issue of the Defense's listing of Khalid Shayk Muhammad as a trial witness, observing that the Government opposed Khalid Shayk Muhammad's trial testimony because it had not been permitted to see the witness's written answers. The Military Judge found that this was not an adequate basis on which to object to Khalid Shayk Muhammad's trial testimony, indicating that if the Government wanted to object to the Defense proffer of the witness' trial testimony, then it should conduct its own interview of Mr. Muhammad either in person or by written questions. The Government's objection to Khalid Shayk Muhammad testifying at trial was not sustained.

W. As of the date of this filing, 2 July 2008, the Defense has not received a response from the Government regarding the Defense request to conduct an in person interview with Khalid Shayk Muhammad prior to his trial testimony based on the information contained in his written answers. (*See*, paragraph S, above.)

X. On 5 June 2008, high value detainee Walid bin Attash advised counsel for the Defense that he had provided to the Government Security Officer written answers to the Defense's written questions. Following an exchange of emails between the Defense and the Government Security Officer urging that the answers be supplied expeditiously, Mr. bin Attash's written answers were finally received yesterday, 1 July 2008. (*See*, email exchanges, Attachment 2.) Based on his written answers, the Defense listed Mr. bin Attash as a trial witness. The answers received from Mr. bin Attash amply demonstrate that the Defense proffer

regarding the testimony of Mr. bin Attash was sufficiently accurate to justify calling him to testify at trial. (*See*, questions and answers provided *in camera* to the Military Judge as Attachment 3.)

Y. At their arraignment on 5 June 2008, three of the five high-value detainees present (which included four of the witnesses at issue here) were permitted to speak informally among themselves and with counsel present in the courtroom. They also were permitted to pass notes among themselves. At one point in the proceedings, the detainees were overheard to express surprise that Mr. Hamdan was still detained at Guantanamo, given their understanding of his activities prior to capture. (*See*, Mizer Declaration at Attachment 4.)

Z. As of the date of this filing, 2 July 2008, neither of the following witnesses has supplied written answers to the Defense's written questions:

Abdul Hadi al-Iraqi

Mustafa Ahmed al-Hawsawi

Absent receipt of written answers from these two witnesses, the Defense has listed both as trial witnesses based on its previous proffer. It is the Defense's position that the written answers supplied by Khalid Shayk Muhammad and Walid bin Attash adequately demonstrate that the Defense proffer regarding the testimony of all the high value detainees is sufficiently accurate to justify calling each of them to testify at trial, particularly when the Government has not allowed the Defense to interview any of the witnesses and the Defense has no means of compelling all of them to supply written answers.

AA. As of the date of this filing, 2 July 2008, the Defense has not been permitted to seek written answers from each of the following witnesses because counsel for each witness has objected to the Defense contacting their client:

Ramzi bin al-Shib

Abu Faraj al-Libi

Abdul Rahim al-Sharqawi

Abdul Rahim al-Nashri

Absent the ability to seek written answers from these four witnesses, the Defense has listed all four as trial witnesses based on its previous proffer. It is the Defense's position that the written answers supplied by Khalid Shayk Muhammad and Walid bin Attash adequately demonstrate that the Defense proffer regarding the testimony of all the high value detainees is sufficiently accurate to justify calling each of them to testify at trial, particularly when the Government has not allowed the Defense to interview any of the witnesses and the Defense has no means of compelling all of them to supply written answers.

**6. Law and Argument:** All of the legal considerations pertinent to the Defense's desire to interview and call as trial witnesses the eight detainees that were the subject of the Commission's 13 February 2008 Ruling have been fully briefed, argued, decided reconsidered, re-briefed, re-argued and re-decided. The question before us now is how to accommodate the needs of the Defense to offer exculpatory evidence through the testimony of these eight witnesses while simultaneously protecting the Government's legitimate national security interests.

A. The Defense Has the Right to Call Witnesses With Relevant Knowledge

The Military Commissions Act provides the Defense a right to call witnesses and to require that witnesses be compelled to appear and testify. 10 USC Section 949j(a) and (b). The Rules for Military Commissions expressly provide that the Defense shall have a reasonable opportunity to obtain witnesses to testify at trial if such testimony is deemed relevant and necessary. R.M.C. 703. Military Commission Rules of Evidence provide that probative

evidence shall be admitted unless prejudicial, confusing, or a waste of time. Mil. Comm. R. Evid. 401, 402 and 403. A witness is considered competent to testify on matters about which he or she has personal knowledge. Mil. Comm. R. Evid. 601 and 602.

Here there is no doubt that each of the eight witnesses identified has relevant evidence that is probative of the issues before the commission, and that their testimony will be based on personal knowledge about which each is competent to testify. There has been no suggestion made that these witnesses' testimony will be prejudicial, confusing, or a waste of time. Indeed, the Commission already has determined preliminarily for purposes of discovery that the Defense has made a colorable claim to call the eight detainees as trial witnesses. 13 February 2008 Ruling at 3. Similarly, there is no doubt that the subject matter on which the eight witnesses are expected to testify is relevant. As the Commission previously ruled, "the issue of whether the accused was 'merely a driver' or knew the unlawful purpose and was actively engaged in the unlawful work of al-Qaeda seems to be very much at issue." 14 March Ruling on Reconsideration at 3.

Although unnecessary to this Motion, the Defense also notes that the United States Constitution provides the Accused an opportunity to call witnesses in defense of a criminal charge, as guaranteed by the Sixth Amendment. Following the Supreme Court's decision earlier this month in *Boumediene v. Bush*, 553 U.S. \_\_\_ (2008), we now know that the Constitution extends to detainees at Guantanamo regardless of their status as off-shore enemy combatants, further justifying the Defense request that these eight witnesses be made available at trial so that the Accused may invoke his Constitutional right to put on evidence that he is not guilty of the charges brought against him.

B. The Defense Has Made a Colorable Claim to Call the Detainees as Witnesses

As indicated in the Commission's 13 February 2008 Ruling, the Defense has made a colorable claim to call the eight detainees as witnesses. This is even more true today, as established by the following six indicators.

(1) The eight individuals whom the Defense seeks to call to testify at trial were admittedly in a position during the relevant time period to have pertinent information regarding Hamdan's role, if any, in the activities that form the basis for the charges he now faces. As the Military Judge already found, Hamdan is charged with conspiracy and his alleged co-conspirators "are the very leaders of al-Qaeda. . ." The Military Judge further found that these eight witnesses "are themselves highly-placed members of al-Qaeda" with apparent knowledge of al-Qaeda activities whom the Defense believes "may testify" that the Accused was not a member of the al-Qaeda inner circle, that he did not conspire to plan, or have foreknowledge of, any al-Qaeda attacks, but was merely a driver in the motor pool. 13 February 2008 Ruling at 1. It is difficult to imagine eight witnesses now in captivity with the requisite knowledge of al-Qaeda activities prior to Mr. Hamdan's apprehension in 2001 who would be more able to shed light on the role Mr. Hamdan played, if any, in the activities that give rise to the charges against him.

(2) The proffer made by the Defense in January of this year based on Lt. Commander Mizer's in-person interview with Mr. Nasser al-Bahri, a former deputy chief of security for al-Qaeda from 1996 until 2000 -- a witness who unquestionably has the ability to testify regarding the eight witnesses' personal knowledge of relevant facts -- provides a factual basis to conclude that the eight witnesses do, in fact, have personal knowledge of relevant facts. The Government has shown nothing in the intervening six months since the Mizer Affidavit was submitted to suggest that it inaccurately projects the testimony of these eight witnesses, despite

the fact that the Government has exclusive access to the eight witnesses and the benefit of thousands of hours of interrogations of these witnesses.

(3) The written answers received from one of the eight witnesses, Khalid Shayk Muhammad, clearly establish that the proffer made by the Defense three months prior was accurate regarding the ability of these witnesses to testify regarding pertinent facts. The Commission found on 13 February that the Defense "believed" that these eight witnesses "may testify" that the Accused was not a member of the al-Qaeda inner circle, that he did not conspire to plan any al-Qaeda attacks, but was merely a driver in the motor pool. As a result of the written answers received from Mr. Muhammad on April 30, the Defense now understandably believes that these eight witnesses "will testify" that the Accused was not a member of the al-Qaeda inner circle, that he did not conspire to plan any al-Qaeda attacks, and that he was merely a driver in the motor pool.

(4) The written answers received yesterday from a second of the eight witnesses, Walid bin Attash, clearly establish that the proffer made by the Defense six months prior was accurate regarding the ability of these witnesses to testify regarding pertinent facts. Again, while the Defense believed in January that these eight witnesses "may testify" that the accused was uninvolved in any conspiracy to harm Americans, as of the date of this filing based, in part, on the written answers of Mr. bin Attash, the Defense now believes that the eight witnesses "will testify" to that effect on personal knowledge about which they are competent to testify.

(5) None of the witnesses who received written questions has provided written answers that arguably demonstrate they were not in a position to have personal knowledge of Mr. Hamdan's activities that give rise to the charges against him. In other words, although not every one of the eight witnesses has provided written answers demonstrating his knowledge and

willingness to testify, the two who have provided answers show overwhelmingly that their testimony is relevant. Equally important, neither of the two witnesses has said anything that would suggest that the eight witnesses lack relevant knowledge.

(6) At their 5 June 2008 arraignment, three of the five high value detainees in court that day, a group which included four of the witnesses who are the subject of this Motion, were overheard to express surprise that Hamdan was still detained at Guantanamo given what they knew about his activities prior to capture. While this information is hearsay and not under oath, it is entirely consistent with the previous Defense proffer and all other indicators listed above.

C. There is Nothing More the Defense Reasonably Can Be Expected to Provide the Prosecution to Justify Calling the Detainees as Witnesses in Compliance with Rule 703

It is anticipated that the Prosecution will argue that the Defense still has not met its burden of submitting a "synopsis of the expected testimony" of each witness sufficient to show its relevance and necessity. R.M.C. 703. In fact, the Government's objection has nothing to do with the adequacy of the synopsis provided of each witness's anticipated testimony. The Government's objection is focused solely on national security concerns that are easily managed and arguably moot in light of the deference afforded to certain of the high value detainees at their 5 June 2008 arraignments.

Under the circumstances, and in light of the exclusive control of these eight witnesses exercised by the Government, the Defense has done everything it can to show the relevance and necessity of their expected testimony. If the Government continues to doubt the veracity of any of these eight witnesses, the Government should conduct its own personal interview or submit its

own set of written questions to try to establish that its doubts are legitimate.

The logic employed by the Commission in its 4 June 2008 Ruling on Continued Access to High Value Detainees (D-011) applies to all eight of these witnesses, not just to Khalid Shayk Muhammad. In that Ruling, the Military Judge pointed out that the Government enjoys full and unfettered access to witness Khalid Shayk Muhammad, and therefore if the Government seriously doubts the veracity of his proffered testimony, then the Government should conduct its own interview and submit meaningful evidence rather than continuing to challenge the "adequacy of the Defense proffer".

"Trial Counsel [the Prosecution] has access to this witness, as the Government has openly announced that it is holding him at Naval Base Guantanamo Bay. . . if Trial Counsel challenge the Defense proffer, it should conduct its own investigation by interviewing KSM or submitting its own written questions, as the witness is clearly in the Government's hands."

Ruling at 2. The same is true for the other seven witnesses. If the Government seriously doubts the Defense proffer, it can submit evidence over which it exercises complete control, rather than simply criticize the adequacy of the Defense proffer as the Defense gamely attempts to submit evidence over which it has absolutely no control.

D. The Government's National Security Objection is Limited and Manageable

The Government has not identified any reason other than "national security" concerns to oppose the Defense's right to interview these eight witnesses and call them to testify at trial. As indicated in the Court's 14 March 2008 Ruling on Reconsideration, the only national security concern identified by the Government relates to the possible disclosure of post-apprehension activities conducted by U.S. Intelligence agencies. "On this record, the Government's interests in protecting information that may be damaging to the National Security are limited to certain aspects of post-apprehension interaction with U.S. Intelligence agencies." Ruling at 3. Counsel

for the Defense previously volunteered, and the Military Judge already decided, that inquiry of these eight witnesses would be circumscribed to avoid that sensitive subject matter. This did not change on reconsideration, when the Military Judge ruled that "the Commission has circumscribed the permissible areas of questioning" to exclude the one area of identified concern, post-apprehension intelligence gathering activities of the U.S. intelligence agencies.

7. **Request for Oral Argument:** The Defense requests oral argument on this Motion to be scheduled the week of 14 July 2008.

8. **Request for Witnesses:** The Defense does not request witnesses on this Motion.

9. **Conference with Opposing Counsel:** The Defense has consulted with the Prosecution regarding the relief sought in this Motion, and no resolution was achieved.

10. **Attachments:**

Attachment 1: 2 May 2008 Defense letter to Prosecution, disclosing that based on his written answers Mr. Muhammad would be listed as a trial witness, and suggesting that the Prosecution allow the Defense to meet with Mr. Muhammad in person for the sole purpose of conducting a witness interview on the topics about which he has indicated he is prepared to testify.


Attachment 2: Email exchanges between the Defense and the Government Security Officer urging that the bin Attash answers be provided expeditiously.

Attachment 3: Written questions submitted to Mr. bin Attash and (*in camera*) copy of his written answers received on 1 July 2008. (Answers provided *in camera* and redacted on Prosecution copy of this Attachment.)

Attachment 4: Mizer Declaration regarding 5 June 2008 arraignment of five high-value detainees.

11. **Conclusion:** Based on the foregoing, the Defense respectfully requests the Commission enter the relief sought in this Motion.

Respectfully submitted,

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UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

D-051

**Prosecution Response to Defense Motion for  
Further Arrangements Concerning Detainee  
Witnesses at Trial**

**11 July 2008**

1. **Timeliness:** This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge's scheduling order of 7 July 2008.
2. **Relief Sought:** The defense motion should be denied.
3. **Overview:** The Defense motion simply ignores and attempts to bypass the rules governing these proceedings and the underpinnings of the Military Judge's previous court orders that authorized and governed Defense access to some of the Nation's most dangerous detainees. In addition, the motion utterly disregards the significant national security issues implicated by the Defense request. With respect to six of the detainees at issue, the Defense fails to properly synopsise anticipated testimony in a manner sufficient to establish relevance and necessity. Accordingly, the Government will take no action with respect to their production as witnesses and the Commission should reject the Defense motion and deny any request for production of these detainees. With respect to the two high value detainees (HVDs) who have provided written answers to the Defense through interrogatories, the Defense request for production fails for two reasons: (a) the Defense has not complied with Military Commission Rule of Evidence (MCRE) 505(g); and (b) even if it had, the requested witness production must be denied pursuant to 10 U.S.C. §§949d(f) and 949j(c), RMC 703(c)(2)(D), and MCRE 505(a), as it presents the unreasonable risk of unauthorized disclosure of national security information requiring an alternative to the requested production and testimony. Accordingly, the Government will take no action with respect to the production as witnesses of these two HVDs; however, it will review the written questions and answers of these two HVDs (if provided by the Defense or the Commission) in order to determine whether the Prosecution will stipulate to the admissibility of the written materials or otherwise agree to an alternative designed to prevent the unauthorized disclosure of classified information that would almost certainly result from the requested witness production.
4. **Burden of Proof:** As the moving party, the Defense bears the burden of persuasion on this motion. *See* Rule for Military Commissions (RMC) 905(c)(2)(A).
5. **Discussion:**
  - a. This Commission permitted the Defense to have access, through written interrogatories, to eight detainees, including seven high value detainees (HVDs). The Commission designed and authorized this written access regime—over the strenuous objections of the Government—in order to allow the Defense to determine whether any of the detainees in question could and/or would provide exculpatory information for use by the accused at trial. The Defense submitted written questions to only four of the detainees (all HVDs). Of those four,

apparently only two detainees have provided responses to the questions that were submitted by the Defense. Accordingly, the Government will first address the group of six detainees who either did not receive or did not answer written questions from the Defense, and will then address the two HVDs who provided written answers to the Defense questions.

### **THE SIX DETAINEES**

b. The Defense submitted questions to, and received no responses from, two detainees: Abdul Hadi al-Iraqi and Mustafa Ahmed al-Hawsawi. The Defense elected not to submit questions to four detainees: Ramzi Binalshibh, Abu Faraj al Libi, Abdul Rahim al-Nashiri, and Rahim al-Sharqawi. With respect to these six detainees, the Defense has not met its burden under RMC 703(c)(2)(B)(i) to provide “a synopsis of the[ir] expected testimony sufficient to show its relevance and necessity.” The Defense synopses for these detainees have not changed at all from the bald assertions that amounted to nothing more than conjecture by the Defense many months ago as part of the underlying litigation regarding these access issues.

c. When the Defense first sought access to these detainees, the Government argued that the Defense was not entitled to such access under the statute and rules governing this Commission and also asserted that the requested access could compromise national security through the unauthorized disclosure of highly classified information. In support of its original response on this issue, the Government attached a declaration (the “Hilton Declaration”) that detailed the risk and possible harm to national security implicated by the access request. Of course, in support of their access request, the Defense was relying upon an affidavit by Detailed Defense Counsel that summarized the statements of an admitted al Qaeda terrorist who provided rank speculation as to what certain detainees at issue might say if they agreed to testify for the accused. The Commission concluded that the Defense met the very low threshold of making a “colorable claim” (a standard not found anywhere in the MCA or MMC) that the detainees “may have potentially exculpatory evidence.” 13 February 2008 D-011 Ruling on Motion to Compel Access, p.3. The Ruling also stated that:

The Commission finds that the Defense’s interests in determining whether these witnesses will speak to them, and what these witnesses will say on behalf of the accused, can be accommodated without hazarding the Government’s interests in protecting the information it seeks to protect. The interests of both parties in a fair trial demand that the Defense be able to determine whether potentially exculpatory witnesses located at Guantanamo Bay, the site of the trial, will actually testify as alleged in the [Defense synopses].

*Id.* at 3-4. The Government disagreed with the Commission and the legal standard it used in deciding the issue and moved for reconsideration. In denying reconsideration, the Commission slightly modified its original access order to accommodate additional security concerns raised by the Government’s reconsideration motion, but upheld its previous ruling regarding access through written questions (with all questions going in and all answers coming back being reviewed and redacted, if necessary, by a Security Officer).

d. The Commission acknowledged that, [t]he Government’s concerns for National Security are well taken,” and that it envisioned a process for defense access that addressed and protected those national security concerns. 14 March 2008 P-004 On Reconsideration Ruling, p.2. The Military Judge also stated that:

The Commission sees these initial “interviews” of witnesses with potentially exculpatory evidence as part of the process of discovery, and as an element of the “adequate opportunity” to prepare its case assured by RMC 701(I) . . . After the Defense has determined what, if anything, these witnesses will say, it may seek to compel their production at trial. Should that occur, the Defense will have to provide a “synopsis of the expected testimony sufficient to show the relevance and necessity” of each witness’s testimony, as required by RMC 703.

*Id.* at 1.

e. That time has now arrived—and the Defense has nothing more to offer in support of production of these six detainees than it had back in February when it somehow barely cleared the newly created “colorable claim” standard to gain pretrial access to them. In fact, the Defense did not even avail itself of the opportunity to submit questions to four of these detainees; and the silence of the two remaining HVDs who refused to respond to the Defense essentially answers the questions the Defense (and the Commission, through its favorable rulings) sought to determine with this access: “whether these [detainees] will speak with [Defense counsel], and what these [detainees] will say on behalf of the accused . . .” 13 February 2008 Ruling at 3.

f. As a result, the uncorroborated and anemic synopses of possible testimony originally provided by the Defense for these six witnesses have not changed. Accordingly, the bare speculation originally proffered regarding what these detainees *might* say *if* they testified (as told to Defense Counsel by an al Qaeda terrorist) is all that now supports the current defense request for production.<sup>1</sup> The Defense cannot dodge the unavoidable conclusion that their proffer simply and utterly fails to satisfy the standard articulated in RMC 703(c)(2)(B)(i), which requires the Defense to provide “a synopsis of the [detainees’] expected testimony sufficient to show its relevance and necessity.”<sup>2</sup> The synopsised testimony of these six detainees cannot be said to be “expected”—nor is the Defense’s attempt to show relevancy and necessity even remotely “sufficient.” Accordingly, pursuant to RMC 703(c)(2)(B)(i) and RMC 703(c)(2)(D), the Government submits that the production of these six detainees is not required and it will take no

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<sup>1</sup> Of course, the Defense attempts to bootstrap to its present argument the apparent success it had in eliciting supposedly favorable information out of two of the accused’s other fellow al Qaeda associates. The Commission should reject such a baseless argument.

<sup>2</sup> In its original Reply Brief seeking pretrial access, the Defense indicated its understanding that it would be required to meet a higher threshold at this witness production stage when it acknowledged that, “[t]he right to interview, however, is not held to the same standard of materiality and relevance required for the production of a witness at trial.” D-011 Defense Reply, p.6.

further action on the Defense request. To the extent it is necessary, the Military Judge should enter a ruling denying the Defense request for production of these six detainees.<sup>3</sup>

### THE TWO HVDs

g. The Government will now address the two HVDs who apparently have provided answers to the Defense interrogatories. The two detainees in question are Khalid Sheikh Muhammad and Walid Bin Attash. Due to the compressed schedule for responding to this and the many other recently filed Defense motions, the Government will move directly to the major problem with the Defense request to produce these two HVDs as witnesses—that is, the national security concerns implicated by the request. The Government, while emphatically not waiving its claims over the following disputed issues, will assume solely for purposes of the instant argument that the Defense synopses of the testimony in question establish the relevance and necessity of the two HVDs, that the Defense has secured the agreement of the HVDs to testify in this matter, and that notice of the two HVDs as defense witnesses was timely. Even if all of these disputed (or at least unresolved) issues were decided in the Defense’s favor, the request would nonetheless fail as the defense has not complied with its obligation to provide proper notice to the Government and this Commission under MCRE 505(g). The lack of such notice has deprived the parties of the opportunity to coordinate and possibly negotiate a resolution that would adequately address the interests of both parties—or to call upon the Commission to resolve important issues related to the protection of national security information. Under the circumstances, the Government submits that the requested production of these two HVDs for purposes of unfettered trial testimony is not required and must be denied pursuant to 10 U.S.C. §§949d(f) and 949j(c), RMC 703(c)(2)(D), and MCRE 505(a).

h. At this juncture, there can be no doubt but that the Defense clearly has had notice and knowledge of the relevant national security concerns, and absolutely understands that these two HVDs cannot be called to the stand in this trial as the Defense currently proposes—i.e., as if they were just ordinary witnesses—without reasonably expecting that such production and testimony would cause the disclosure of classified information. The pleadings, attachments, rulings, and the pretrial access regime in this case make clear that the Defense fully understands that its witness production request cannot be treated and granted as if routine. In addition, Detailed Defense Counsel in this matter is also detailed to another commission case involving the same two HVDs at issue here. *See* Def. Mot., Att. 4. And in that case, Defense Counsel is subject to a lengthy protective order that states, among many other things, that “[a]ny statements made by the accused [including Khalid Sheikh Muhammad and Walid Bin Attash] are presumptively Classified Information,” and sets forth extraordinary procedures (inside the courtroom and elsewhere) for the protection of the very same highly classified information implicated by the instant Defense request in this matter. *See* Attachment 1. Although the protective order in that case does not control these proceedings, it is relevant to the present Defense request and to the obligations on the parties to properly employ the rules relating to

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<sup>3</sup> Although it is unnecessary since the defense request should be rejected for the reasons stated above, the request could also be denied as untimely, pursuant to RMC 703(c)(2)(C), or—with respect to the five HVDs—on national security grounds, pursuant to 10 U.S.C. §§949d(f) and 949j(c), RMC 703(c)(2)(D) and MCRE 505(a) and (g).

classified information in this matter. In addition, the cited materials are instructive to the parties and Military Judge in this case regarding the extent to which the parties either need to come to some agreement, stipulation, or resolution on their own, or properly notice the issue for the Military Judge and seek the proper protections under MCRE 505 for the protection of the highly classified information at issue.

i. Accordingly, if the Defense persists in its request for production of these two HVDs at trial, the Government proposes the following course of action. In the interests of resolving this issue as expeditiously as possible in light of the impending trial date, the Defense or the Commission should immediately provide the Government with all of the questions sent to and all of the answers received from each of these two HVDs.<sup>4</sup> Once the Government receives these materials, we will immediately review them and consult with the Defense about the possibility of stipulating to some or all of the materials. If a stipulation is not something that can be agreed upon, the parties will be responsible for proposing other alternatives to unfettered live trial testimony of either or both these two HVDs for this Commission's consideration and resolution. Such other alternatives may include taking depositions of the two HVDs—which would require and involve only appropriately-cleared attorneys and other necessary personnel; or the use of extraordinary courtroom security procedures similar to those being used in the commission proceedings involving these same currently charged HVDs—which, of course, would require all persons in the courtroom to obtain/possess the appropriate security clearance level, and would require the accused to be absent from any live testimony since he cannot be given access to such classified information. Of course, the Government reserves the right to propose other alternatives or advance any other appropriate claims or arguments relating to this Defense request.<sup>5</sup>

j. Accordingly, pursuant to 10 U.S.C. §§ 949d(f) and 949j(c), RMC 703(c)(2)(D) and MCRE 505(a) and (g), the Government does not intend to take steps to produce either of these two HVDs for trial. The Government remains available to discuss with Defense Counsel all of the options discussed above or any other reasonable alternatives.<sup>6</sup>

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<sup>4</sup> There really should be no dispute at this late stage about disclosure to the Government. Indeed, such disclosure is now required by RMC 701(g)(1)(A). To the extent the Defense (erroneously) believes that it needs an order from the Commission before it can disclose these materials to the Government, the Commission should immediately order disclosure.

<sup>5</sup> For example, the Manual for Military Commissions also precludes the Defense's requested production here because the HVDs are "unavailable." *See* RMC 703(b)(3) (the Defense "is not entitled to the presence of [an unavailable] witness"). The RMCs provide that a witness may be deemed "unavailable" where, *inter alia*, his testimony is privileged or where he is detained. *See id.* discussion note (incorporating by reference Military Rule of Evidence 804(a)(1) and (6), the latter of which incorporates by reference UCMJ Art. 49(d)(2)). Here, the HVDs' testimony is protected by the national security privilege, and the high-value detainees are detained under stringent security measures. To be sure, the Defense may move to compel access even where a witness is "unavailable," but only after making a showing that the expected testimony "is of central importance to the resolution of an issue essential to a fair trial, and there is no adequate substitute for such testimony." RMC 703(b)(3)(B).

<sup>6</sup> The Prosecution incorporates by reference prior arguments it has made in its written and oral submissions to the Commission on this matter.

6. **Request for Oral Argument:** The Defense has requested that oral argument on the motion be scheduled for the week of 14 July 2008. The Prosecution will be prepared for oral argument as scheduled by this Commission.

7. **Request for Witnesses:** No witnesses are necessary for this motion.

8. **Conference with Opposing Counsel:** N/A.

9. **Attachments:** *United States v. Mohammed*, et al., Protective Order #3, Protection of Classified Information at Arraignment and Other Pretrial Proceedings (4 June 2008).

Respectfully submitted,

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/s/  
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/s/  
Mr. Clayton Trivett  
Department of Defense