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unclassified 4/3/09

UNITED STATES OF AMERICA

v.

KHALID SHEIKH MOHAMMED,
WALID MOHAMMED SALIH MUBARAK BIN 'ATTASH,
RAMZI BIN AS SHIBH,
'ALI 'ABDUL 'AZIZ 'ALI,
MUSTAFA AHMED ADAM AL HAWSAWI

**MOTION TO DISMISS MILITARY AND
CIVILIAN STANDBY COUNSEL**

Military Judge:

1. I sent a letter to the Commissions on Wednesday, January 21st, 2009 regarding the dismissal of Mr. Scott McKay as my civilian standby counsel; however, I have yet to receive a response from the Commissions.
2. As you know, none of the attorneys have been chosen by my own selection, but rather, by what you call the Chief Defense Counsel. From the first hearing, what you called an arraignment, I chose to be my own counsel and to defend myself because I believe that Allah is sufficient to defend me, as mentioned in the Holy Quran: "Surely I will defend the believers."
3. Now I wish to excuse both my civilian and military standby counsel.
4. First, the civilian counsel, Mr. David Nevin and Mr. Scott McKay.
5. Secondly, the military counsel, LtCol Michael Acuff. You have told me in the past that I am required to have a military lawyer. However, 10 USC section 949a(b)(D) provides that: "The accused shall be permitted to represent himself..." Therefore, I wish to represent myself without the assistance of any lawyers. With this, I would like to excuse LtCol Acuff as well.

Rec'd by
LSS 31 Mar 09

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6. In the event that the commissions refuse my request to excuse LtCol Acuff, I do not wish for him to sit at the table with me during the Court sessions. In this case, I would not object to him sitting elsewhere in the courtroom.

Signed:



Khalid Sheikh Mohammed
Guantanamo Bay, Cuba.

Dated: 13-Mar-2009.

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**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

D-105

v.

KHALID SHEIKH MOHAMMED, WALID
MUHAMMAD SALIH MUBARAK BIN
'ATTASH, RAMZI BIN AL SHIBH, ALI
ABDUL AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

Notice of Objection of Standby Counsel

18 September 2009

- 1. Timeliness:** This Notice is timely filed for consideration by the Military Judge in considering the *pro se* Accused's request in D-105.
- 2. Relief Sought:** Standby defense counsel for Mr. Mohammed respectfully notes his objection to the *pro se* D-105 motion and requests the Commission deny the motion.
- 3. Overview:** *Pro se* accused filed D-105 on 13 March 2009, requesting the dismissal of civilian standby counsel Mr. David Nevin and Mr. Scott McKay, and of military detailed standby counsel LTC Michael Acuff. This pleading provides notice to the Commission of the objection of military counsel to D-105.
- 4. Burdens of Proof and Persuasion:** As the moving party, Mr. Mohammed bears the burden of proof on any question of fact. This burden is met by a showing of a preponderance of evidence. *See* R.M.C. 905(c).
- 5. Facts:**
 - a. Standby counsel is an attorney, duly licensed to practice law in the state of Tennessee and before these Military Commissions. Pursuant to RMC 503(c), on 28 April 2008 standby counsel was detailed to serve as Assistant Detailed Defense Counsel for Mr. Khalid Sheikh Mohammed in this case.
 - b. In open court on 5 June 2008, the Military Judge granted Mr. Mohammed's request to represent himself.¹ Thereafter, pursuant to Rules for Military

¹ Counsel would note that the colloquy granting Mr. Mohammed the right to represent himself obviously did not address those new considerations for evaluating the ability to act *pro se* first pronounced by the United States Supreme Court approximately two weeks after Mr. Mohammed was

Commissions (RMC), Rule 501(b), counsel's status became that of standby counsel.² In addition, two civilian attorneys, Mr. David Z. Nevin and Mr. Scott McKay, entered appearances for Mr. Mohammed, and after his election to proceed *pro se* have served as advisory counsel.

c. On 8 April 2009, D-105, Mr. Mohammed's *pro se* motion to dismiss all counsel, was docketed. The Court has indicated that it plans to take up D-105 at the hearing presently scheduled for 21 September 2009.³ See MJ-017. The Court should deny the motion. For the record and to provide the Military Commission the opportunity before hearing to consider the reasons for counsel's objection, standby counsel hereby provides the Military Commission this Notice of Objection of Standby Counsel to D-105.

6. **Law and Argument**

D-105 SHOULD BE DENIED ON ITS MERITS

a. Plainly, the Military Judge may not dismiss all detailed military counsel, whose presence in the case is mandated by both the MCA and the RMC. The Military Commissions Acts (MCA) provides at 10 USC § 948k(a)(1) that "[t]rial counsel and military defense counsel *shall be* detailed for each military commission under this chapter." (Emphasis added). RMC 501(b) provides that "[m]ilitary trial and defense counsel *shall be* detailed to military commissions by the Chief Prosecutor and Chief Defense Counsel, respectively." (Emphasis added).

given the right to act *pro se*. See *Indiana v. Edwards*, 554 U.S. 208, 128 S.Ct. 2379, 171 L.Ed. 2d 345 (2008).

² Navy CAPT Prescott L. Prince was originally detailed to serve as Detailed Defense Counsel for Mr. Mohammed, and Lieutenant Colonel (LTC) Michael Acuff was detailed as Assistant Detailed Counsel. Mr. Mohammed moved for the dismissal of CAPT Prince, and the motion was granted by the Military Judge at the December 2008 court proceeding. Since that time LTC Acuff has acted as detailed military defense counsel, and Mr. Nevin and Mr. McKay have served as civilian advisory counsel.

³ The hearing presently scheduled for 21 September 2009 will occur during one of the holiest of Islamic religious observances, Eid al-Fitr (the Festival of Fast-Breaking). Although the exact dates of this Islamic holiday cannot precisely be determined in advance because of the nature of the Islamic lunar calendar, it is predicted that Eid Al Fitr will occur this year on 20 September 2009 and be celebrated for a total of three days. <http://islam.about.com/od/calendar/f/2009eidalfitr.htm>; see also <http://www.timeanddate.com/holidays/us/eid-al-fitr>. Holding a hearing at this time will effectively force Mr. Mohammed to choose between his right to practice his religion and his right to defend himself. This would violate his rights under the First Amendment, the Eighth Amendment, and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a), and would infringe on his statutory and Sixth Amendment rights to self-representation. Proceeding with a hearing during Eid will also exacerbate the hostility that exists between the Accused and the Military Commissions and further erode the reliability of these proceedings; and will be seen as an insult to Muslims around the world.

b. The involvement of detailed defense counsel is mandated even with a *pro se* Accused, since RMC 501(b) also provides that “[s]hould an accused, pursuant to his request, be deemed competent to represent himself, detailed defense counsel *shall* serve as standby counsel.” (Emphasis added). Indeed, the existence of classified evidence in this case requires the continued involvement of standby counsel.⁴ Finally, dismissing military counsel would be directly contradictory to the Military Judge’s prior refusal to dismiss military counsel and his admonition to Mr. Mohammed that he would not be allowed to dismiss his remaining military counsel.

c. The Military Judge also should deny D-105 as to Mr. Nevin and Mr. McKay. Their continued participation is essential for standby counsel to fulfill his obligations as standby counsel, and for the Military Commission to ensure that standby counsel is prepared to perform competently.

d. This is a capital case, and as a result, exacting standards must be met to assure that it is fair. “[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.” *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

e. As a result, the United States Constitution requires that “extraordinary measures [be taken] to insure that the Accused ‘is afforded process that will guarantee, as much as is humanly possible, that [a sentence of death not be] imposed out of whim, passion, prejudice, or mistake.’” *Caldwell v. Mississippi*, 472 U.S. 320, 329 n.2 (1985) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1981) (O’Connor, J., concurring)). Indeed, “[t]ime and again the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case.” *Caspari v. Bolden*, 510 U.S. 383, 393 (1994) (quoting *Strickland v. Washington*, 466 U.S. 668, 704-705 (1984) (Brennan, J., concurring in part and dissenting in part)). See also *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (noting that the Court’s “duty to search for constitutional error with painstaking care is never more exacting than in a capital case.”) (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987)). This elevated level of due process applies both to the guilt and penalty phases of the case. *Beck v. Alabama*, 447 U.S. 625, 638 (1980).

f. The present case also is extraordinary in its scope. According to the government, the investigation into the crimes charged against the accused has been the largest in

⁴ For example, RMC 701(a)(4) provides that “[i]n the event that the accused has elected to represent himself and the military judge has approved that election, standby defense counsel shall examine the [classified] evidence and be prepared to provide advice to the accused.”

United States history. *See* Appellate Exhibit 25 (Government Request for Protective Order Number 3). Because Mr. Mohammed was tortured while in the custody of the United States of America, the case requires a detailed analysis of the effects of this mistreatment, including the effects on the admissibility of any statement made by Mr. Mohammed. The case also involves allegations of activities occurring on multiple continents and in diverse countries, and witnesses who speak a variety of foreign languages. It involves a cultural and religious context which is very different from my own. It involves the many complexities of national security law, including the management and presentation of classified evidence. It involves international humanitarian law. It involves, in purely quantitative terms, a huge volume of discovery.

g. The primary obligation of standby counsel is to take over active defense of the case if it becomes necessary at any point in the proceedings, including mid-trial, with as little disruption and delay as possible. The MCA states at 10 USC § 949a(b)(3)(B) that if the Accused loses or waives the right to represent himself, “the detailed defense counsel of the accused or an appropriately authorized civilian counsel *shall* perform the functions necessary for the defense.” (Emphasis added). In that event, both the Military Commission and Mr. Mohammed will be entitled to constitutionally effective assistance of counsel. Anything less would amount to mere window dressing, standby counsel in name only.

h. The United States Supreme Court frequently has emphasized that the representation of a capital defendant requires specialized training, skill, and experience in the investigation and presentation of evidence at both the guilt and penalty phases of the case. The Court has “long referred to” the American Bar Association (ABA) standards “as ‘guides to determining what is reasonable’” in the representation of capital defendants. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting *Strickland*, 466 U.S. at 688); *see also Williams v. Taylor*, 529 U.S. 362, 396 (2000). *See ABA Revised Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, in 31 Hofstra L. Rev. 913 (2003) (also available online at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf>.)

i. It also is now recognized that the defense of capital cases, even ones much less complex than this case, requires a team approach. ABA Guideline 10.4 (The Defense Team). This particularly includes counsel learned in the law of capital punishment and mitigation specialists, *see, e.g.*, Supplemental Mitigation Guideline 4.1A, (The Capital Defense Team: The Role of Mitigation Specialists), Supplemental Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, in 36 Hofstra

Law Rev 677, 680 (Spring 2008).⁵ Adequate defense of this case also requires the efforts of linguists, investigators, and trial specialists.

j. Standby counsel does not meet the minimum qualifications contained in the ABA Guidelines to serve as lead counsel in a capital case. Standby counsel has not in fact served as counsel in even an “ordinary” capital case – and this is certainly no “ordinary” capital case. But even a fully capably qualified attorney would not be expected to handle such an extraordinary case alone – even a capital case tried before a courts-martial. To be prepared to function competently as standby counsel, standby counsel will require the assistance of attorneys who possess the wealth of experience and ability that Mr. Nevin and Mr. McKay bring to this case. There is simply no good reason to dismiss Mr. Nevin and Mr. McKay and thereby force the extensive delays necessary to enable replacement counsel to replicate the many hours expended over fifteen months researching the law, becoming familiar with myriad motions and orders, and investigating the facts of the case.

**THE HEARING VIOLATES THE DIRECTIVE FROM THE PRESIDENT
OF THE UNITED STATES TO HALT ALL PROCEEDINGS**

k. Taking action on D-105 violates the directive from the President of the United States to halt all proceedings before the military commissions. Executive Order 13492 directs the Secretary of Defense to take “steps sufficient to ensure that during the pendency of the Review . . . all proceedings of [the] military commissions . . . are halted.” In accordance with this Order from the President of the United States, the government on 16 September 2009 filed a motion for an additional 60-day continuance of the proceedings until 16 November 2009. *See* P-012. The government, consistent with EO 13492, argues that the Commission should “preserve the status quo as it existed on 22 January 2009 and as it exists today” *Id.* Obviously, to alter the status of Mr. Mohammed’s counsel relationships – even in a way that he has requested – does not preserve the *status quo*. On the contrary, to hold a hearing on 21 September 2009 on pending *pro se* motions in which significant rights of the Accused are at stake would violate the specific and lawful Executive

⁵ As the Court explicitly noted with approval in *Wiggins*, “[t]he ABA Guidelines provide that investigations into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor,” and that the scope of the necessary investigation that counsel should consider includes the defendant’s “medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences.” *Wiggins*, 539 U.S. at 524 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93; 11.8.6, p. 133 (1989) (Court’s emphasis)).

Order to “halt[]” “all proceedings.” *See also* Declaration of Jeh C. Johnson, General Counsel for the Department of Defense, dated 15 September 2009. (Attachment A to P-012). Accordingly, the hearing presently scheduled for 21 September 2009 should not occur.

CONCLUSION

1. For the reason cited herein, standby counsel submits this Notice of Objection by Standby Counsel to D-105 and asks the Military Judge to deny this motion in its entirety.

7. **Oral Argument:** Standby counsel requests oral argument.
8. **Request for Witnesses:** Witnesses are not requested at this time.
9. **Certificate of Conference:** The *pro se* Accused did not consult with the prosecution before the filing of his motion to dismiss counsel.
10. **Additional Information:** "The Military Judge has the sole authority to determine whether or not any given matter shall be released." *See* RC 3.9.c; *see also* R.M.C. 801; Reg. ¶¶ 19-5, 19-6. The Commission should seek to strike a balance of protecting Mr. Mohammed’s right to a fair trial, the improper or unwarranted publicity pertaining to the case, and the public understanding of the Military Commissions. *See* Reg. ¶ 19-1. The release of pleadings and rulings is essential for the public, writ large, to be able to assess and evaluate the legitimacy of United States judicial proceedings being held on a military base overseas and in a fortified courtroom. At a minimum, providing the public the opportunity to read and evaluate the pleadings and rulings would contribute to Mr. Mohammed being able to have a “public trial.” *See* U.S. Constitution, Sixth Amendment. The Accused has previously requested that all pleadings in his case be released. The defense hereby respectfully requests that the Military Judge authorize the Assistant Secretary of Defense for Public Affairs (or designee) to release this pleading and any and all responses, replies, and/or rulings under the same designation to the public at the earliest possible date.

11. Attachments

None.

Respectfully submitted,

/s/ Michael L. Acuff
LTC Michael Acuff, JA, USAR

Standby Counsel for Mr. Mohammed
Office of the Chief Defense Counsel
Office of Military Commissions
1600 Defense Pentagon, Room 3B688
Washington, D.C. 20301

UNITED STATES OF AMERICA v. KHALID SHEIKH MOHAMMED, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL-AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	D-105 Defense Motion to Dismiss Military and Civilian Standby Counsel Order
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1. On 14 April 2009, the Military Commission received a motion from Mr. Sheikh Mohammed requesting the Commission grant his request to excuse all military and civilian standby counsel.¹ In the alternative, if the Commission requires standby counsel, Mr. Sheikh Mohammed requests that only Lieutenant Colonel Michael Acuff remain but that he not sit at the table with him during the Court sessions. The government will not file a formal response.

2. The Commission will take up this matter at the next scheduled session in this case. Until that time, all appointed military and civilian standby counsel will continue to assist and counsel Mr. Sheikh Mohammed in the preparation of his defense.

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 underlying defense motion will also be provided to the Clerk of Court for

public release, after appropriate redactions for privacy and security considerations. The 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 14th day of April 2009:

/s/
Stephen R. Henley
Colonel, US Army
Military Judge

¹ Mr Sheikh Mohammed represents himself before this commission and is 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".