MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHAIBAH, AMAR AL BALUCHI ("ALI ABDUL AZIZ ALI"), MUSTAFA AHMED ADAM AL HAWSAWI	**AE 175B (MAH)** **Mr. Hawsawi's Response** to Government Motion for Trial Scheduling Order Filed: 12 July 2013

1. Timeliness: This response is timely filed in accordance with Rule of Court 3.

2. Relief Sought: The Defense requests that this Commission deny the Government Motion for Trial Scheduling Order.

3. Overview: The Prosecution complains of litigation that is unnecessarily prolonged and does not serve the interests of justice. The irony of this complaint drips thick from the pages of the Prosecution's motion.

United States Government officials, openly and shamelessly jockeying for political position, have seen fit to delay this trial for more than 10 years by concocting one substandard system of "justice" after another while in the process mutilating time-honored constitutional principles. Now, the right side of the Government's mouth sanctimoniously preaches that the schedule this commission has set does not serve the interests of justice, even as the left side continues to perpetuate delay through its "position of the day" approach to litigation. By impeding legitimate access to discoverable information, denying relevant witnesses, providing substandard facilities, denying adequate resourcing, and engaging in obstructive tactics that continue to feed a system which is ultimately a breeding-ground for protracted litigation, the

prosecution has done nothing but unnecessarily prolong litigation, thereby undermining the very interests of justice it purports to champion.

Given the number of pending motions, the proven and inescapable difficulties of litigating in Guantanamo, the Defense's legal and ethical responsibilities to obtain material discovery and investigate this case -- setting a trial schedule at this time would be illusory and unproductive. An actual trial date cannot yet be envisioned, in view of where the case stands, and particularly the complexities and delays inherent in litigation that involves the presumptions of classification the Government has imposed here.

The reasonable course of action is to pursue the litigation of currently pending motions, and to re-visit the question of a trial schedule when there is a clearer picture of the prospective course of the case. The Government's demand to rush this case to judgment, particularly in light of its complicity in the delay of the case for more than 10 years, should not be allowed to run roughshod over legitimate and valuable interests in due process and the fair administration of justice -- principles that require advocates responsible for the defense in a capital case to investigate, review and litigate all proper avenues of defense.

4. Facts:

a. There are numerous motions pending resolution before this commission. Several of these address the ongoing encroachment of and need to protect the attorney privileges, defense work-product data losses,[1] fundamental questions about the commission's jurisdiction,[2] as well as basic discovery and witness requests related to the pending motions.[3]

[1] AE-133, Joint Emergency Defense Motion to Remove Sustained Barrier to Attorney-Client Communication and Prohibit Any Electronic Monitoring and Recording of Attorney-Client Communication in any Location, including Commission Proceedings, Holding Cells, and Meeting Facilities and to Abate Proceedings (Jan. 31, 2013); AE-155A, Defense Motion to Abate Proceedings due to the Government's Violation of Privilege as it Pertains to Electronic Files, Communications, and Investigation (Apr. 12, 2013); AE-177, Defense Motion to Compel Production of Discovery of Information Related to Government Intrusion into Electronic or Physical Spaces Containing Defense-Related and/or Defense-Produced Materials (Jun. 19, 2013).

[2] *See, e.g.*, AE-008, Defense Motion to Dismiss due to Defective Referral (Apr.19, 2012); AE-104, Defense Motion to Dismiss The Charges Because The Military Commission Act of 2009 Exceeds Congress' Power Under the Define and Punish Clause (Oct. 24, 2012); AE-119, Defense

b. A number of pending motions involve issues surrounding a protective order governing the handling of potential national security information, and assuring privileged written communications between counsel and clients.[4]

c. The discovery process and defense investigation for this case are in progress. It is expected – as in any capital case – that additional motions will need to be litigated as this case, and the defense investigation, proceed.

5. Law and Argument:

A. The Prosecution's Request for a Trial Date Ignores the 10-Year Delay the Government Engineered, and the Impediments Which Government Actions Continue to Provoke

The Prosecution's "position of the day" approach to litigation has done nothing but undermine the interests of justice and unnecessarily prolong pre-trial litigation. For instance, following the Prosecution's contention that the Defense did not have any duty to examine the accused's conditions of confinement because the International Committee of the Red Cross (ICRC) was conducting examinations,[5] the Defense asked the Prosecution to produce records it possesses from its communications with the ICRC regarding confinement conditions.[6] The Prosecution refused to produce the requested records, arguing that they are not relevant. Then, it again refused when the Defense filed a motion to compel production of these records – this time

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Motion to Dismiss and to Compel a Status Determination Pursuant to Article 5 of the Geneva Conventions (Jan. 10, 2013); AE-167, Defense Motion to Compel Discovery (Jun. 3, 2013).

[3] *See, e.g.*, AE-047, Defense Motion to Compel Discovery in Support of Defense Motion to Dismiss due to Unlawful Influence (Jun. 13, 2012); AE-064, Defense Motion to Compel Discovery (Aug. 6, 2012); AE-144H (MAH), Defense Motion to Compel Witnesses in Support of Defense Motion 144A (MAH Sup) (Jun. 7, 2013).

[4] AE-013, Government Motion to Protect Against Disclosure of National Security Information (Apr. 26, 2012); AE-018, Government Motion for Privileged Written Communications Order (Apr. 30, 2012); AE-032, Defense Motion Joint Defense Motion for Appropriate Relief to Protect Right to Counsel by Barring Invasion of Privileged Attorney-Client Communications, (May 14, 2012).

[5] *See* AE-108A, Government Response to Defense Motion to Compel Examination of Accused's Conditions of Confinement (Dec. 19, 2012), at 3-4, fn. 1.

[6] *See* AE-108C, Defense Motion to Compel Discovery in Support of Defense motion for Appropriate Relief to Compel Examination of Conditions of Confinement (Jan. 8, 2013), Att. B, C.

confessing that it had not even looked at the documents in question,[7] and claiming vaguely that any disclosure would be detrimental to the security of U.S. military personnel.[8] At a hearing on this motion, the Prosecution again conceded that, in fact, it had never even seen the requested records;[9] it then requested a delay, so that it could review the records and assess for itself whether they were in fact discoverable – thus seeking to put off the process further, almost six months after the Defense first asked for these records.[10] The Prosecution's failure to examine the records before getting to court to argue on the motion related to them, calls into question its understanding of its obligations under the law.[11]

Another example of the Prosecution's obstructive decision-making that has promoted delays in this case involves its handling of a motion which has been pending from the time of arraignment. The Prosecution first submitted a sworn declaration from an FBI agent, claiming Mr. Hawsawi spoke the English language, in an effort to argue that defense counsel did not need a translator.[12] When the Defense challenged the Prosecution's claim, the Government refused to grant the Defense a language expert.[13] The Defense then agreed to use the Government's chosen substitute experts. These experts asked for additional information with which to conduct their analysis – the Prosecution however, contended the requested information is not relevant, despite the fact that the Prosecution has no expertise in the field of linguistics. Later, the Prosecution again changed its position and argued the information is classified and would not be released until the defense signed the protective order.

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[7] *See* AE-108F, Government Response to AE-108C (Jan. 22, 2013), at 6; AE-013GG-1, Government Response to AE-013GG (AAA) Defense Motion to Amend E-013AA Protective Order #1 to Protect Confidential ICRC Materials, at 13.
[8] *See* AE-013GG-1, at 16.
[9] *See* Transcript (Jun. 18, 2013, 10:43am -12:17pm), at 3075-76, 3078-80.
[10] The Defense first asked the Government to produce the ICRC records on December 27, 2012. *See* AE-108C, Defense Motion to Compel Discovery in Support of Defense motion for Appropriate Relief to Compel Examination of Conditions of Confinement (Jan. 8, 2013), Att. B.
[11] *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (regardless of government's good or bad faith, it violates due process when it withholds evidence that is material either to guilt or punishment); *see also, Smith v. Cain*, ___ U.S. ___, 132 S.Ct. 627, 630 (2012) (Court reversed conviction and, reiterating *Brady*, refused to speculate as to the impact the withheld evidence might have had on the jury).
[12] *See* AE-008C, Government Response to Mr. Mohammed's Second Supplement to Defense Motion to Dismiss for Defective Referral (May 25, 2012), at 4-5, 7, Att. J.
[13] *See* AE-064A, Government Response to Mr. Hawsawi's Motion to Compel Assistance of Expert (Aug. 15, 2012).

Continuous litigation under the rules governing handling of classified materials has also been necessitated because of the Prosecution's persistent use of classified matters and classification rules as both a sword and a shield with which to preclude access to information. Any instance where the Prosecution contends that a given matter involves classified information leads to unavoidable delays, because it triggers operation of these classified litigation rules. The U.S. Government wishes to handle many aspects of this case in secrecy; given this position, the Government cannot also be heard to complain when the very secrecy it demands results in time-consuming litigation.

The Government's pervasive and pernicious attempts to control and monitor the judicial process and attorney-client relationship from outside the courtroom have also led to additional delays of this case. In January 2013, it was uncovered that some outside government agency or agencies were able to cut the audio feed that broadcasts sound from the courtroom to the gallery in Guantanamo, and to three remote locations in the United States that are open to victims or the press. The Military Judge ordered the Prosecution to ensure that no third parties could control the courtroom's audio feed.[14] In the same period, it was also discovered that audio-recording equipment, disguised as smoke detectors, was affixed in the shacks where defense counsel meet with the accused; [15] it was further disclosed that the accused had been steered to the meetings spaces where these recording devices were in place.[16] The discovery of illicit monitoring devices launched an investigation,[17] witness testimony on the matter,[18] and consequent need for production of information related to monitoring of the defense, so that legal errors arising from this issue could be heard.[19] The litigation on these outside monitoring concerns remains on

[14] Transcript (Jan. 28, 2013, 1:31pm to 2:46pm), at 1446.
[15] Transcript (Feb. 12, 2013, 1:00pm to 2:37pm), at 1984-85.
[16] *See* AE-133B(MAH) (Exhibit); Transcript (Feb. 13, 2013, 10:28am – 12:02pm), at 2223-26; Transcript (Feb. 13, 2013, 1:02pm – 2:36pm), at 2291-93.
[17] *See* AE-144, Government Notice of On-Going Command Investigation (Feb. 21, 2013)
[18] Transcript (Jan. 28, 2013).
[19] *See* AE-133, Joint Emergency Defense Motion to Remove Sustained Barrier to Attorney-Client Communication and Prohibit Any Electronic Monitoring and recording of Attorney-Client Communication in any Location, including Commission Proceedings, Holding Cells, and Meeting Facilities and to Abate Proceedings (Jan. 31, 2013) (and pleadings associated with AE-133); AE-177, Defense Motion to Compel Production of Discovery of Information Related to Government Intrusion into Electronic or Physical Spaces Containing Defense-Related and/or Defense-produced Materials (June 19, 2013).

going.

As if the delays provoked by these "outside forces" were not sufficiently egregious, this case has been plagued with further interruptions stemming from severe problems encountered with computers, including defense e-mails and electronic files not segregated from the Prosecution's, and loss of electronic files containing privileged defense work-product.[20] As a result, the commission had to delay proceedings for two months, effectively finding that the public and accused's interests in a prompt trial were outweighed by the interests of justice that required delay because of the Government's infringements of the privilege.[21] The Prosecution has aimed to minimize these severe problems, ignoring the very real fact that countless defense work hours have had to be devoted to tracing where missing files may be, identifying what files were deleted, and re-creating work-product where that was possible. These obstacles remain the subject of litigation to-date,[22] perpetuating inevitable delays as the defense tries to meet its ethical obligations to assure protection of attorney-client communications and attorney work-product.

Added to the delays provoked by computer concerns and invasions of the privilege have been the delays resulting from substandard workspaces – facilities that are owned and controlled solely by the Government, in Guantanamo. Beginning in October 2012, there was a months-long closure of defense working spaces, due to rampant mold and a rodent infestation that environmental health specialists said made the workspaces unsanitary.[23] Some nine months later,

[20] *See* AE-155, Emergency Defense Motion to Abate for Information Technology Compromise, or to Continue Hearing Apr. 11, 2013); AE-155A, Defense Motion to Abate Proceedings due to the Government's Violation of Privilege as it Pertains to Electronic Files, Communications, and Investigation (Apr. 12, 2013).
[21] *See* AE-155D, Order on Emergency Defense Motion to Abate for Information Technology Compromise or to Continue Hearings (Apr. 17, 2013).
[22] *See* AE-177, Defense Motion to Compel Production of Discovery of Information Related to Government Intrusion into Electronic or Physical Spaces Containing Defense-Related and/or Defense-produced Materials (June 19, 2013).
[23] *See* AE-95, Defense Emergency Motion Seeking Adequate, Safe Workspaces, or, in the Alternative, to Delay Future Hearings Until Unsafe Conditions of Workspaces Are Properly Assessed and Remediated Based on New Information of Serious and Imminent Health Risk (Oct. 15, 2012); AE-95B, Emergency Defense Motion to Compel Appointment and Funding of Defense Expert Consultant in the Areas of Industrial Hygiene, Preventive Medicine in Public Health, and Preventive Medicine in Occupational Medicine (Oct. 16, 2013).

the workspace issues are still under litigation.[24]

At this juncture and with this record, it is disingenuous for the Prosecution now to demand a prompt scheduling of trial.

B. A Trial Schedule Cannot Be Set, Given the Numerous Pending Motions that Have Yet to Be Heard and Filed

There are numerous motions yet to be heard, and numerous outstanding discovery and witness questions related merely to pending motions, not even to the upcoming litigation surrounding the case-in-chief. Resolution of these pending motions has been delayed for many reasons, including the simple fact that trying a case between the United States and Guantanamo presents substantial difficulties, and continual but unpredictable obstacles. The multiple delays outlined above are accompanied by relentless technical obstacles to progress in the courtroom itself, with the Prosecution's insistence on using video-teleconferencing technology that is, at best, halting in Guantanamo.[25] Furthermore, litigation has been on-going since arraignment of the case regarding a protective order for the management of proceedings and discovery, when potential national security information is involved; multiple motions are pending merely on the questions surrounding this protective order, and no final decisions have been reached on this issue.[26] In addition, as a result of the inability of counsel and the clients accused here to have written communications in which the attorney-client privilege is protected, communications are limited to face-to-face meetings in Guantanamo, further rendering the progress of the case laborious and unpredictable.[27] A communications protective order is under negotiation with

[24] *See* AE-95C, Government Response Emergency Defense Motion to Compel Appointment and Funding of Defense Expert Consultant in the Areas of Industrial Hygiene, Preventive Medicine in Public Health, and Preventive Medicine in Occupational Medicine (June 12, 2013).
[25] *See* AE-150, Defense Motion to Compel Personal Appearance of Mr. MacDonald (March 22, 2013), at 3 (detailing how use of VTC technology with witness testimony stalled proceedings)
[26] *See* AE 13, Government Motion to Protect Against Disclosure of National Security Information (with upwards of 15 related motions) involves the form of a protective order for the handling of potential national security information by counsel and their teams, all of whom already have TS security clearances by virtue of working on this case.
[27] *See* AE-18, Government Motion for Privileged Written Communications Order (and pleadings relating to AE-18); AE-32, Joint Defense Motion for Appropriate Relief to Protect Right to Counsel by Barring Invasion of Attorney-Client Privilege (and pleadings related to AE-32).

respect to this fundamental matter, but no resolution is in sight.[28] Added to these problems is the fact that discovery litigation relating to the case-in-chief is only just beginning, since the Prosecution is in the process of providing its discovery to the Defense. Inevitably, because of the complexity of this case and the severity of the death penalty, the discovery process will engender additional motions and litigation of matters surrounding necessary defense investigation that has yet to occur.

C. Compelling a Trial Schedule Now Would Violate the Right and Obligation to Investigate a Capital Case, Leading to Further Errors of Constitutional Dimension

The Government routinely touts this case as the largest investigation ever undertaken in U.S. history.[29] In light of this Government investigation of unprecedented scale, and the decision to seek the death penalty, the Defense has a right – indeed, an ethical duty – to conduct its own investigation.[30] "The 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.'"[31] The Guidelines further instruct that "[c]ounsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports."[32] Any perceived need to move expeditiously a capital case to trial does not outweigh the obligations of defense counsel in a capital case to conduct a thorough investigation – and pushing the Defense into expediting its work will lead to ineffective assistance of counsel claims.[33]

This case naturally entails overseas investigation in several countries. Establishing a

[28] *See* AE-18M, Joint Defense Submission of Proposed Order Regarding Privileged Written Communications (June 28, 2013); AE-18N, Government Response to AE-18M (July 5, 2013).
[29] http://www.fbi.gov/about-us/history/famous-cases/9-11-investigation (noting that at one time, the FBI had over half its agents working on the investigation)
[30] *See Rompilla v. Beard,* 545 U.S. 374 (2005) (defense counsel has obligation to investigate, even where defendant and his family discouraged it)
[31] *Wiggins v. Smith,* 539 U.S. 510, 524 (2003), quoting American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 11.4.1.C (1989).
[32] ABA Guideline 11.4.1.D.
[33] *See, e.g., U.S. ex. rel. Emerson v. Gramley,* 883 F.Supp. 225, 243 (N.D. Ill. 1995)(despite recognizing pressing trial schedule that was placed on defense counsel, court finds ineffective assistance of counsel because time-constraints do not overshadow the right of a defendant in a capital case to benefit from thorough investigation of his case).

hearing schedule that requires counsel to be in Guantanamo for weeks on end, as the Prosecution proposes, makes it impossible for defense counsel to concurrently conduct the necessary and complex investigation this death penalty case demands. Mr. Hawsawi's defense simply does not have the number of counsel, not to mention the thousands of case agents, which the U.S. Government has had (and continues to have) at its disposal for more than a decade. Attempting to compel defense counsel to abide by an unrealistic schedule, particularly when considering the unprecedented challenges and magnitude of this case, will merely lay the ground for later claims of ineffective assistance of counsel.

D. Conclusion

The continual and unpredictable obstacles arising from litigating this case in Guantanamo, along with the Government's own conduct which in itself perpetuates delays, the numerous motions still pending, and the required defense case investigation that must still take place – all make setting a trial schedule illusory. Given the number of fundamental issues that are still awaiting resolution in order to envision a reasonable progress of this case, any trial scheduling at this stage is of no purpose. The better course, for now, is to proceed with the important pending issues before the commission and, once these matters are resolved, to revisit the question of a trial schedule.

6. Request for Oral Argument: Mr. Hawsawi does not request oral argument on this motion.

7. Request for Witnesses and Evidence: None.

8. Additional Information: None.

9. Attachments:

A. Certificate of Service

//s//
WALTER B. RUIZ
CDR, JAGC, USN
Detailed Defense Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 12th day of July, 2013, I caused to be electronically filed **AE175B(MAH), Defense Response to Government Motion for Trial Scheduling Order,** with the Clerk of the Court, and caused to be served the foregoing on all counsel of record by e-mail.

//s//
WALTER B. RUIZ
CDR, JAGC, USN
Detailed Defense Counsel