

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

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>KHALID SHAIKH MOHAMMAD; WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH; RAMZI BINALSHIBH; ALI ABDUL AZIZ ALI; MUSTAFA AHMED AL HAWSAWI</p>	<p>AE 175</p> <p>Government Motion For a Trial Scheduling Order and Notice of Status of Discovery</p> <p>14 June 2013</p>
--	---

1. Timeliness

This filing is timely pursuant to the Military Commissions Trial Judiciary Rule of Court (R.C.) 3.6 and Rule for Military Commission (R.M.C.) 905.

2. Relief Sought

The Prosecution respectfully requests a trial date of 22 September 2014 and adoption of the trial scheduling order set forth below. The Prosecution anticipates that its case-in-chief will last six to eight weeks.

3. Overview

This case is entering a new phase as the Prosecution’s anticipated discovery is nearly complete, and a firm trial scheduling order must now be set so the parties can properly plan for trial. The current practice of being in court for five days approximately every six weeks is inefficient and will result in litigation that is unnecessarily prolonged, and does not serve the interests of justice. The trial scheduling order requested below will remedy that problem.

4. Burden of proof

As the moving party, the Prosecution must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

5. Facts

On 31 May 2011 and 25 January 2012, charges in connection with the 11 September 2001 attacks were sworn against Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi. These charges were referred jointly to this capital Military Commission on 4 April 2012. The five co-accused were each charged with Conspiracy, Attacking Civilians, Attacking Civilian Objects, Murder in Violation of the Law of War, Destruction of Property in Violation of the Law of War, Hijacking an Aircraft, Terrorism, and Intentionally Causing Serious Bodily Injury.

On 19 April 2012, counsel for the Accused jointly filed the first motion to dismiss the instant proceedings. *See* AE 008. On 10 January 2013, defense counsel jointly filed their most recent challenge to the jurisdiction of the instant proceedings. *See* AE 119. Within the nearly fourteen months between the first and most recent filings, defense counsel have filed numerous other motions seeking dismissal of this case based on a claim that the Commission lacks jurisdiction over the Accused on the offenses for which each Accused is charged, and/or the referral process. *See, e.g.* AE 008; AE 031; AE 104; AE 105; AE 106; AE 107; AE 119.

On 5 May 2012, the Accused were arraigned. Following the arraignment, the Commission heard oral arguments in October 2012, January 2013, and February 2013. The Commission granted a Defense request to continue the April hearings, but denied the Defense request to abate the proceedings altogether. As such, the Prosecution continued to produce discovery to the Defense. Oral arguments have been scheduled for June, August, September, and October 2013.

On 20 December 2012, this Commission issued a protective order pertaining to unclassified material. *See* AE 014G. Since 20 December 2012, the Prosecution has disclosed more than 170,000 pages of unclassified discovery to defense counsel for each Accused.

On 9 February 2013, the Commission issued an Amended Protective Order pertaining to classified information. *See* AE 013AA. That same day, the Commission issued an Amended Memorandum of Understanding Regarding the Receipt of Classified Information. *See* AE

013BB. Counsel for four of the five defense teams have refused to sign the Memorandum of Understanding (MOU); consequently, the Prosecution has not disclosed classified materials to those defense counsel who have not yet signed the MOU.

On 15 May 2013 the Military Judge determined that the time which has transpired since arraignment (5 May 2012) until the date of the next session (17 June 2013) was excludable delay in accordance with R.M.C. 707(b) (4) (E) (i) and R.M.C. 707(c). *See* AE159 (Docketing Order).

As of the time of this filing, there are approximately 40 motions that have been filed that need to be ruled upon, many of which the Defense has requested to be heard in oral argument.¹

6. Law and Argument

A trial scheduling order will assist the parties and this Commission in moving forward toward trial. This case is entering a new phase as the Prosecution's anticipated discovery is nearly complete, and a firm trial scheduling order must now be set so the parties can properly plan for trial.

The current practice of being in court for five days approximately every six weeks is inefficient and will result in litigation that is unnecessarily prolonged, and does not serve the interests of justice. The trial scheduling order requested below will remedy that problem. The Prosecution respectfully requests that this Commission establish the below trial scheduling order, establishing deadlines for the filing of "Legal Motions" (motions challenging aspects of the law including jurisdictional challenges); "Discovery Motions" (to include motions to compel production of witnesses and evidence); and "Evidentiary Motions" (motions either challenging the admissibility of, or for the pre-admission of, evidence). Per the below requested trial scheduling order, these motions shall be argued at sessions to last four weeks each.

This motion is requested pursuant to R.C. 3.7.b(1) (stating the Commission "will ordinarily establish a deadline for the filing of motions."). The Prosecution further requests that

¹ The Defense is not entitled to Oral Argument on every motion it files and the Prosecution herein reiterates its position that many of these motions can and should be ruled upon without oral argument. *See* R.C. 3.9.

assembly and *voir dire* for panel members be scheduled, to immediately be followed by trial on the merits, which is anticipated to last six to eight weeks for the Prosecution case-in-chief.

As such, the Prosecution requests the following trial schedule milestones be established:²

- All Defense “Legal Motions” (including challenges to jurisdiction) and “Discovery Motions” shall be filed no later than 6 December 2013.
- Motions sessions to argue such “Legal Motions” and “Discovery Motions” shall be scheduled for 6 January 2014 to 31 January 2014 to litigate all outstanding legal and discovery motions.
- All “Evidentiary Motions,” to include all motions to suppress and motions to pre-admit, shall be filed by 1 April 2014.
- Litigation of all remaining evidentiary motions, including presentation of evidence and oral argument, shall be scheduled for 29 July to 22 August 2014.
- *Voir Dire* of the members shall begin on 22 September 2014 with trial to immediately follow. The Prosecution’s case-in-chief is expected to last six to eight weeks.

To date, the Prosecution has already produced to all five defense teams over 170,000 pages of discovery. The Defense can expect to receive the vast majority of unclassified discovery the Prosecution has identified for disclosure prior to the scheduled August 2013 hearings. This will be an entire year before the proposed trial and allows the Defense sufficient time to prepare for trial. Although voluminous, a substantial portion of the discovery consists of photographs of the destruction of the attacks on September 11, 2001, and other business records relating to the nineteen hijackers, which will not likely be areas of serious dispute.

The Prosecution also plans to file a detailed Trial Brief with the Commission, detailing what witnesses it intends to call, as well as what documents and exhibits it intends to have

² These dates are all assuming that all time is excludable for purposes of R.M.C. 707. The Prosecution stands ready to proceed to trial at any time should the Accused so request.

admitted into evidence, in advance of the “Evidentiary Motions” session proposed in April 2014, which will help further focus the Defense’s preparations.

The Prosecution is also prepared to provide over 6,700 classified documents to the Defense this July. However, defense counsel’s³ refusal to obey a lawful order from this Commission and sign the Memorandum of Understanding (“MOU”) for receipt of classified information will continue to halt the classified discovery process and delay the scheduling of trial. The Prosecution respectfully submits that this Commission should not stand idle while the Defense ignores its lawful order, and requests the Military Judge address this issue with counsel at the next hearing.

In order to facilitate the Accused’s ability to review the Prosecution’s discovery in this case, and to save room in the confinement facility, the Prosecution has arranged for the provision of Electronic Readers (“E-Readers”) to the Accused and counsel. The E-readers are laptops whereon Prosecution discovery can be viewed and electronically searched but which have no other functioning. The E-Readers will be available to the Accused beginning on 17 June 2013, should they want them, so they may review Prosecution discovery in their cells and during meetings with their counsel. These E-Readers contain the 170,000 pages of discovery already provided to the Defense that were approved for release to the Accused. These E-Readers are pre-positioned in the Accused’s confinement facility, and the defense counsel will each be provided identical E-Readers, loaded with the same discovery, during the 17 June sessions. These E-Readers may be brought into meetings of the Defense and the Accused, and they do not need to be reviewed by the Military Commission Privilege Team, as the materials on the E-Readers have already been cleared for release to defense counsel and the Accused, and all of the materials on the hard drive can be accounted for. The E-Readers will be made immediately available to the Accused upon their request. The Prosecution will also provide, on a rolling and updating basis, a searchable electronic index of the discovery that has been provided, complete

³ To date only counsel for Ali Abdul Aziz Ali has signed the MOU required per the Military Judge’s Order in AE 013BB.

with descriptions of the items. The index is currently 646 pages and will be provided to the Defense the week of 17 June 2013.

Periodically, as more discovery is provided, the Prosecution will ensure the hard drives of the E-Readers (Defense and Accused) are replaced with updated hard drives containing all of the discovery up to that date. As the E-Readers have no other computer functions enabled, there is no possibility that any privileged information will exist on the hard drives, which will be replaced as needed by the Prosecution. Defense counsel cannot and should not modify the E-Readers in any way.

This case has been referred and in litigation for more than a year. A trial scheduling order is necessary now that a majority of the discovery has been provided so that the parties can advance toward trial. Adopting the trial schedule proposed above will accomplish that goal and is in the best interests of justice.

7. Oral Argument

The government does not request oral argument.

8. Witnesses and Evidence

No witnesses or other evidence is anticipated at this time.

9. Certificate of Conference

At the time of this filing, counsel for Mr. Ali, Mr. Mohammad, and Mr. bin 'Attash indicated that they will be opposing this motion.

10. Additional Information

The government has no additional information.

11. Attachments

A. Certificate of Service, dated 14 June 2013.

ATTACHMENT A

