

UNCLASSIFIED//FOR PUBLIC RELEASE

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

UNITED STATES OF AMERICA

v.

**KHALID SHAIKH MOHAMMAD;
WALID MUHAMMAD SALIH
MUBARAK BIN ‘ATTASH;
RAMZI BINALSHIBH;
ALI ABDUL AZIZ ALI;
MUSTAFA AHMED ADAM
AL HAWSAWI**

AE 616M (GOV)

Government Response

To Mr. Ali’s Motion to Continue
Testimony by the Interpreter Currently
Scheduled for a Closed Session During the
March 2019 Hearings

19 March 2019

1. Timeliness

The Prosecution timely files this Response pursuant to AE 616L, Expedited Briefing Order.

2. Relief Sought

The Prosecution respectfully requests that this Commission deny the requested relief set forth in AE 616K (AAA), Mr. Ali’s Motion to Continue Testimony by the Interpreter Currently Scheduled for a Closed Session During the March 2019 Hearings, without oral argument.

3. Burden of Proof

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

4. Facts

The Prosecution incorporates by reference the facts as stated in AE 616D (GOV), Government Response to Mr. Ali’s Objection to Closure of Interpreter’s Testimony, which are largely classified.

On 29 January 2019, following oral argument on AE 616A (AAA),¹ Mr. Ali's Objection to Closure of Interpreter's Testimony, and at the request of Defense counsel, the Commission notified the parties "that the Judge has determined that [the Interpreter's] testimony scheduled for Wednesday, 30 January 2019 will take place in closed session." Attachment B.

On 1 March 2019, the Commission issued AE 616J, Ruling Pursuant to Rule for Military Commission 806(b)(2). In doing so, the Commission determined that closure of the hearing for purposes of the Interpreter's testimony is necessary for the following reasons:

- (a) Taking the Interpreter's testimony in an open session could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities;
- (b) Taking the Interpreter's testimony in a closed session is necessary to protect the physical security of the Interpreter and his or her family;
- (c) Lesser measures short of closing the proceedings are insufficient to protect national security or the physical security of the Interpreter and his or family. . . . Here the identity of the Interpreter is classified and his or her very appearance before an open session, with or without a pseudonym or disguise, makes the disclosure of a classified fact highly probable. Further, unlike trained law enforcement personnel, the Interpreter likely lacks the technical skill to ensure his or her answers remain unclassified.

AE 616J at 3 (internal citations omitted). Further, the Commission also determined, "[g]iven the pre-trial nature of the Interpreter's testimony, the Commission finds that the Accused's presence is not necessary, but will entertain steps to mitigate their absence such as taking recesses during the Interpreter's testimony to afford Defense Counsel the opportunity to confer with the Accused." *Id.* at 3–4. Last, the Commission found that the denial of public access to the Interpreter's testimony can be mitigated "by ordering the Government to expeditiously conduct a classification review of the unofficial/unauthenticated transcript and produce a redacted copy of the transcript to the public," within ten (10) days. *Id.* at 4.

¹ See Unofficial/Unauthenticated Transcript ("Tr.") at 22237–56; Official/Unauthenticated Transcript at 21559–85.

On 14 March 2019, 44 days after the Commission issued its initial ruling, 13 days after the Commission followed-up its ruling with its written findings, and only 11 days before this Commission is set to commence its March 2019 hearings session, Defense counsel for Mr. Ali filed a Petition for Writ of Mandamus with the United States Court of Military Commission Review (“U.S.C.M.C.R.”) seeking to overturn this Commission’s ruling and direct that it take “unclassified”² testimony from the Interpreter in open session. *See* AE 616K (AAA), Attach. B.

On that same day, the U.S.C.M.C.R. issued an order establishing the panel to review the Defense Petition for Writ of Mandamus as well as the briefing schedule. *Id.*, Attach. C. Notably, the U.S.C.M.C.R. ordered that the “Respondent shall respond to petitioner’s writ within seven (7) calendar days” and “Petitioner’s reply, if any, shall be filed within three (3) calendar days after respondent’s response is filed.” *Id.* Therefore, all briefing on the Defense Petition for Writ of Mandamus will be complete no later than Monday, 25 March 2019.

On 15 March 2019, Defense counsel for Mr. Ali filed a separate Motion for Issuance of Stay of Military Commission Proceedings.³ *See* Mot. for Issuance of Stay, *Ali v. United States*, No. 19-002 (U.S.C.M.C.R. Mar. 15, 2019). In so doing, the Defense requested the U.S.C.M.C.R. to order the Commission to stay any proceedings pertaining to the Interpreter’s testimony until such time as the U.S.C.M.C.R. considers its Petition for Writ of Mandamus. All briefing on the Defense stay motion will be complete no later than Wednesday, 20 March 2019. *See* U.S.C.M.C.R. Rule of Practice 21(c).

On that same day, Defense counsel for Mr. Ali also filed a Motion To Disqualify Judges for Failure to Maintain the Independence Required of an Article I Court. *See* Mot. To Disqualify Judges, *Ali v. United States*, No. 19-002 (U.S.C.M.C.R. Mar. 15, 2019).⁴ In filing its motion, the

² For the reasons stated in AE 616D (GOV), the Prosecution reiterates that such testimony is classified.

³ This separate motion was filed in contravention of U.S.C.M.C.R. Rule of Practice 22(b), which requires a request for a stay pending review of a petition for extraordinary relief to be included in the petition.

⁴ Defense counsel for Mr. Ali have thrice filed the same motion with the U.S.C.M.C.R. *See* Mr. Ali’s Motion To Dismiss Appeal for Failure To Maintain the Independence Required of an

Defense requested the U.S.C.M.C.R. to “disqualify its own judges and waive jurisdiction over [Mr. Ali’s] petition for a writ of mandamus in favor of review by the United States Court of Appeals for the District of Columbia Circuit.” *Id.* at 2. All briefing on the Defense disqualification motion will be complete no later than Wednesday, 20 March 2019. *See* U.S.C.M.C.R. Rule of Practice 21(c).

On 15 March 2019, the Prosecution filed AE 619K (GOV) with the Commission. Within its Response to Mr. Ali’s Response to the Docket Order (Proposed Order of March), the Prosecution respectfully requested “the testimony that was ordered in AE 350RRR, Order, take place at 0900 on Thursday, 28 March 2019.” AE 619K (GOV) at 2.

5. Law and Argument

The Commission should deny the instant motion without oral argument. Within their motion, Defense counsel for Mr. Ali request that this Commission “continue . . . the taking of testimony by the Interpreter in closed session during the March 2019 hearings, until such time as the [U.S.C.M.C.R.] has considered [Mr. Ali’s] Petition for Writ of Mandamus.” AE 616K (AAA) at 1. In support of this request, the Defense summarily argues that “[u]nless the [U.S.C.M.C.R.] acts with unprecedented dispatch . . . it will not have the opportunity to rule before the [Interpreter’s testimony].” *Id.* at 6. Thus, the Defense asserts, this Commission should preemptively act and stay its order in AE 616J. *Id.* at 6. However, in making this argument, the Defense motion is notably deficient in citation to any legal authority for the relief it seeks. Given the clear lack of authority and justification cited in the motion, as well as the prudential concerns of granting the requested relief under the circumstances, this Commission should deny the Defense motion without oral argument.

Article I Court, *United States v. Mohammad*, No. 17-003 (U.S.C.M.C.R. Nov. 14, 2017); Mr. Ali’s Motion To Disqualify Judges for Failure To Maintain the Independence Required of an Article I Court, *Ali v. United States*, No. 18-003 (U.S.C.M.C.R. Mar. 7, 2019); Mr. Ali’s Motion To Disqualify Judges for Failure To Maintain the Independence Required of an Article I Court, *Al Hawsawi v. United States*, No. 18-004 (U.S.C.M.C.R. Mar. 7, 2019). Briefing on these three motions was completed on 13 March 2019.

As an initial matter, the Defense have not demonstrated sufficient facts or justification warranting a continuance under the circumstances. It is well established that “the granting or refusal of a continuance is a matter within the discretion of the judge who hears the application, and is not subject to review absent a clear abuse.” *United States v. Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978) (footnote omitted). Further, because issuing a writ of mandamus is a “drastic and extraordinary”⁵ remedy and “available only in ‘extraordinary situations,’”⁶ there is no automatic right to a continuance pending its consideration by a reviewing appellate court. *See Chevron Corp. v. Donziger*, 970 F. Supp. 2d 214, 221 (S.D.N.Y. 2013) (denying request for continuance pending appellate review of mandamus petition where “defendants are unlikely to prevail” on petition); *cf. Nken v. Holder*, 556 U.S. 418, (2009) (“[A] stay ‘is not a matter of right, even if irreparable injury might otherwise result to the appellant.’” (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926))); *Woodson v. Surgitek*, 57 F.3d 1406, 1416 (5th Cir. 1995) (“Moreover, because [mandamus] requests are only granted in exceptional circumstances, the Federal Rules of Civil Procedure do not provide for an automatic stay of district court proceedings while a petition for writ of mandamus is pending.”); *see also Harrison v. City of New Braunfels*, No. 03-02-00645-CV, 2004 Tex. App. LEXIS 2031, at *7 (Tex. App. Mar. 4, 2004) (“[A]ppellants’ counsel moved for a continuance in order to file an *immediate* petition for writ of mandamus challenging the striking of the expert. The court granted the continuance from the April 17 setting; the court did not, however, stay any trial court proceedings pending the outcome of the petition for writ of mandamus.”). Based on the facts now before the Commission, it is simply unnecessary and inappropriate for the Commission to grant the relief the Defense requests.

The Commission has now twice determined that closure is appropriate after considering written briefings and hearing oral argument from the parties and making the requisite factual

⁵ *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004).

⁶ *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc).

findings. The Defense offers no sound reason to believe the U.S.C.M.C.R. will grant him extraordinary relief premised on the same facts and arguments and reviewed under the “daunting”⁷ standard of mandamus. Notably, in addition to requesting a continuance from the Commission, Defense counsel for Mr. Ali have also requested the U.S.C.M.C.R. grant a stay of these proceedings. The U.S.C.M.C.R. will have approximately one week to rule on this motion prior to the Interpreter’s testimony,⁸ and can determine for itself whether the Defense has made the stringent showing on the merits to entitle Mr. Ali to a stay. The Commission therefore need not grant a continuance to enable the U.S.C.M.C.R. to determine whether a stay is warranted. To the extent that the U.S.C.M.C.R. has a compressed timeline to review Mr. Ali’s stay motion, Mr. Ali’s own delay in filing at the U.S.C.M.C.R. manufactured that urgency and undermines his entitlement to any equitable relief.

In addition to the relief being unnecessary under the circumstances, the Commission should also deny the Defense motion on prudential grounds. Before issuing AE 616J, the Commission received substantial briefing (both oral and written) on the critical balance between a public trial and the protection of national security information regarding the Interpreter’s prospective testimony. After having done so, the Commission fashioned a carefully crafted order (AE 616J) that ordered the closure of the Interpreter’s testimony, but attempted to mitigate any denial of public access to his testimony by expediting the production of a redacted, unclassified unofficial/unauthenticated transcript. AE 616J at 4. This order was, and continues to be, entirely appropriate under the circumstances. The fact that the Defense has now filed a Petition for Writ of Mandamus with the U.S.C.M.C.R. based on the Commission’s order on this issue makes ever more evident the fact that the Defense will attempt to delay Commission proceedings on any issue that is decided against them by simply filing additional mandamus

⁷ *In re Khadr*, 823 F.3d 92, 100 (D.C. Cir. 2016).

⁸ The Prosecution assumes for the purpose of this argument that the Commission grants its request in AE 619K (GOV) that any testimony from the Interpreter occur on Thursday, 28 March 2019.

petitions, regardless of merit. This “Delay Wins the Day” strategy should not be rewarded or incentivized. If the Commission were to grant continuances in response to every mandamus petition the Defense files, this Commission would be forever frustrated in its mandate to seek justice for the 2,976 men, women, and children murdered on September 11, 2001. To prevent this, the Commission should adhere to its rulings and defer to its superior courts as to whether (a) a petition for writ of mandamus has merit, and (b) whether a stay of proceedings is warranted under the circumstances. This is the only way to ensure that such petitions are not strategically abused so as to obstruct this Commission from proceeding to trial. Therefore, and for the reasons stated previously, the Commission should deny the Defense motion without oral argument.

6. Conclusion

For the reasons set forth above, the Prosecution respectfully requests that this Commission deny the requested relief set forth in AE 616K (AAA), Mr. Ali’s Motion to Continue Testimony by the Interpreter Currently Scheduled for a Closed Session During the March 2019 Hearings, without oral argument.

7. Oral Argument

The Prosecution does not request oral argument. Further, the Prosecution strongly posits that this Commission should dispense with oral argument as the facts and legal contentions are adequately presented in the material now before the Commission and argument would not add to the decisional process.⁹ However, if the Commission decides to grant oral argument to the Defense, the Prosecution requests an opportunity to respond.

8. Witnesses and Evidence

The Prosecution will not rely on any witnesses or additional evidence in support of this motion.

⁹ See R.C. 3.5.m. (“IAW R.M.C. 905(h), the decision to grant oral argument on a written motion is within the sole discretion of the Military Judge.”).

9. Additional Information

The Prosecution has no additional information.

10. Attachments

- A. Certificate of Service, dated 19 March 2019
- B. E-mail from Ms. [REDACTED] to Commission Parties, dated 29 January 2019

Respectfully submitted,

//s//

Clay Trivett
Managing Trial Counsel

Christopher M. Dykstra
Major, USAF
Assistant Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 19th day of March 2019, I filed AE 616M (GOV), Government Response To Mr. Ali's Motion to Continue Testimony by the Interpreter Currently Scheduled for a Closed Session During the March 2019 Hearings, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//

Christopher Dykstra
Major, USAF
Assistant Trial Counsel

ATTACHMENT B

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From: [REDACTED] CIV OSD OMC TJ (US)
To: [REDACTED] Swann, Robert Lee CIV OSD OMC OCP (USA); Christopher M. Dykstra; clayton.trivett [REDACTED]
CLAYTOGT; [REDACTED] Cox, Dale J (John) CIV OSD OMC OCP (US); DALEJC; Dastoor, Neville F CPT USARMY
OSD OMC OCP (US); Dykstra, Christopher M Maj USAF OSD OMC OCP (US); EDWARDR; Furr, Jeffery C SSgt
USMC OSD OMC OCP (US); Gibbs, Rudolph P Jr CIV OSD OMC OCP (US); Groharing, Jeffrey D CIV OSD OMC
OCP (USA); Fulmines, Heather A CTR OSD OMC OCP (US); HEATHERF; [REDACTED] CIV OSD OMC OCP (US);
[REDACTED] MSgt USAF OSD OMC OCP (USA); jeffrey.groharing [REDACTED] JEFFERCF; JEFFREDG; [REDACTED]
SSgt USMC OSD OMC OCP (USA); [REDACTED] SSG USARMY (US); BENJAMM3; Martins, Mark S
BG USARMY OSD OMC OCP (US); MICHASW6; Michael.warbel [REDACTED] Mills, Benjamin A Maj USMC OSD OMC
OCP (US); HARIDIVT; Thravalos, Haridimos V CIV DLSA (US); NEVILLFD; NICOLEAT; O'Sullivan, Michael J CIV
OSD OMC OCP (US); PASCUALT; ROBERTLS; [REDACTED] LTC USARMY OSD OMC OCP (US);
RUDOLPPG; Ed.Ryan [REDACTED] Ryan, Edward R CIV (US); Tate, Nicole A CIV (US); Tarez-Patin, Pascual A
CIV OSD OMC OCP (USA); [REDACTED] Capt USAF OSD OMC OCP (US); Trivett, Clayton G CIV (USA); Zelnis,
Charles R CIV OSD OMC OCP (US); OSD NCR OMC List MCDO Team Mohammad; OSD NCR OMC List MCDO
Team Bin Attash; OSD NCR OMC List MCDO Team RBAS; OSD NCR OMC List MCDO Team Hawsawi; [REDACTED]
[REDACTED] TSgt USAF OSD OMC (US); Andreu, Mark E Capt USAF (USA); [REDACTED] SSG USARMY OSD OMC
(USA); [REDACTED] PO1 USN CNO (US); [REDACTED] CIV (USA); Connell, James G III CIV (USA);
[REDACTED] CIV (US); [REDACTED] CIV DLSA (US); [REDACTED]
CIV DLSA (USA); [REDACTED] SFC USARMY OSD OMC (US); Pradhan, Alka CIV (US); Sutter, Ann Marie
Maj USAF OSD OMC (US); Thomas, Sterling R Lt Col USAF (USA); [REDACTED] CIV OSD OMC (USA)
Cc: [REDACTED] OSD Pentagon OMC List Trial Judiciary; Baker, John G BGen USMC (US); [REDACTED] CIV OSD OMC (USA);
[REDACTED] CDR USN (USA); OSD Pentagon OMC List Convening Authority of Court Admin
Subject: U.S. v. KSM et al - AE 616 closure ruling - email advance notice
Date: Tuesday, January 29, 2019 5:41:50 PM

Good Afternoon All,

Per request of the Defense, the parties are notified that the Judge has determined that witness testimony scheduled for Wednesday, 30 January 2019 will take place in closed session. Written ruling to follow.

The proceedings will begin at 0900.

[REDACTED]
[REDACTED]
Senior Attorney-Advisor, Trial Judiciary
Office of Military Commissions