

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

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| <b>UNITED STATES OF AMERICA</b><br><br><b>v.</b><br><br><b>KHALID SHAIKH MOHAMMAD;<br/>WALID MUHAMMAD SALIH<br/>MUBARAK BIN ‘ATTASH;<br/>RAMZI BINALSHIBH;<br/>ALI ABDUL AZIZ ALI;<br/>MUSTAFA AHMED ADAM<br/>AL HAWSAWI</b> | <b>AE 619K (GOV)</b><br><br><b>Government Response</b><br>To Mr. Ali’s Response to Docket Order<br>(Proposed Order of March)<br><br>15 March 2019 |
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**1. Timeliness**

The Prosecution timely files this Response pursuant to Military Commissions Trial Judiciary Rule of Court (“R.C.”) 3.7.

**2. Law and Argument**

As an initial matter, the Prosecution defers to the Commission as to the sequence of motions that are currently listed on the docket order for the March 2019 hearing sessions (AE 619B). In that regard, the Prosecution generally takes no position on the proposed sequencing of motions currently outlined within AE 619C (AAA), Mr. Ali’s Response to Docket Order (Proposed Order of March). However, the Prosecution provides the following information for the Commission’s consideration in advance of the R.M.C. 802 session to be held on 23 March 2019:

- 1) Although not included on the current docket order,<sup>1</sup> the Prosecution objects to any further oral argument on the issues related to the AE 595 motion series. At this time, the issues have been thoroughly briefed, both orally and in-writing, and further oral argument would not add to the decisional process.<sup>2</sup>

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<sup>1</sup> Defense counsel for Mr. Ali are proposing oral argument on AE 595X (WBA) and AE 595W (WBA) in their Proposed Order of March. AE 619C (AAA) at 1.

<sup>2</sup> As stated in 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.”

- 2) Again, although not included on the current docket order,<sup>3</sup> the Prosecution objects to any further oral argument on the issues related to the AE 524 motion series. At this time, the facts and legal contentions regarding AE 524NN (GOV) are adequately presented in the material now before the Commission and oral argument would not add to the decisional process.
- 3) The Prosecution objects to the Defense request to defer oral argument on AE 620 (AAA), Mr. Ali's Motion to Compel Documents and Information Concerning the United States Pre-9/11 Law-of-War Detainees Associated with al Qaeda. AE 619C (AAA) at 4–5 n.11. The briefing cycle for the Defense motion is complete. *See* AE 620B (AAA). If the Commission determines oral argument is necessary to resolve the issues raised in AE 620 (AAA), the Prosecution asserts there is no justification such oral argument should not occur during the March 2018 hearing sessions.
- 4) The Prosecution requests the testimony that was ordered in AE 350RRR, Order, take place at 0900 on Thursday, 28 March 2019.
- 5) In a separate pleading, the Prosecution will be respectfully withdrawing AE 575 (GOV).

The Prosecution also notes the position taken by Defense counsel for Mr. Mohammad that he “must object to holding argument on any matters other than those pertaining to the potential conflicts of interest described in the AE 615 series, and/or to the recusal due to conflict of interest of the Military Judge as sought in the AE 595 series.” AE 619I (KSM) at 1. To begin with, this Commission has already determined “that no member of the (5) Defense Teams is currently operating under a conflict of interest . . . ,” AE 613E/AE 615P, Ruling, at 6, and “there is . . . no appropriate basis [for the Military Judge’s] recusal” in this case. AE 595O, Ruling, at 9. Further, the United States Court of Military Commission Review recently considered the Defense position and stated:

Appellee Mohammad argues without citation that his counsel is ethically precluded from filing a brief in the Government’s appeal until they have resolved the conflict issue to their satisfaction. We find this argument wanting. They also have not persuasively explained why they can continue to prosecute a petition for mandamus seeking to disqualify the Military Judge while the same alleged conflict requires

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<sup>3</sup> Defense counsel for Mr. Ali are proposing oral argument on AE 524RR (AAA Sup), AE 524TT (RBS Sup), and AE 524HHH (AAA) in their Proposed Order of March. AE 619C (AAA) at 2

them to seek suspension of litigation in the Government's appeal. *See* Appellee Reply to Mot. to Suspend 3-4 (Feb. 27, 2019).

Order at 2 n.1, Mot. to Suspend Briefing, *United States v. Mohammad, et al.*, No. 17-003 (U.S.C.M.C.R., Mar. 6, 2019). Given this, the Commission should adhere to its ruling on the record that “if counsel choose to not participate, notwithstanding clear findings by the commission issued after a careful factual inquiry, then this could constitute waiver of their right to participate . . . .” Unofficial/Unauthenticated Transcript at 22192.

More generally, efforts such as the foregoing are consistent with the increasingly naked defense strategy, before every forum from the Commission to the U.S. Supreme Court, to prevent trials from ever reaching the merits, in part, by attempting to ensure that no motion, petition, or appeal ever sits for long on a completed briefing cycle in which a ruling, and thus the progression toward justice, is imminent. Indeed, because “accommodations to counsel are often the precursor” of a docket that affords “no real firm treatment of issues, no timely resolution of motions,” denial of the implicit requested relief of supplementation in AE 619C (AAA) and reconsideration in AE 619I (KSM) is necessary for the Commission to maintain control of its docket. *See Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 151–52 (D.C. Cir. 1996).

### **3. 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. However, if the Military Commission decides to grant oral argument to the Defense, the Prosecution requests an opportunity to respond.

### **4. Witnesses and Evidence**

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

**5. Additional Information**

The Prosecution has no additional information.

**6. Attachments**

A. Certificate of Service, dated 15 March 2019

Respectfully submitted,

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Clay Trivett  
Managing Trial Counsel

Christopher Dykstra  
Major, USAF  
Assistant Trial Counsel

Mark Martins  
Chief Prosecutor  
Military Commissions

# ATTACHMENT A

**CERTIFICATE OF SERVICE**

I certify that on the 15th day of March 2019, I filed AE 619K (GOV), Government Response To Mr. Ali's Response to Docket Order (Proposed Order of March), with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

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Christopher Dykstra  
Major, USAF  
Assistant Trial Counsel