

UNITED STATES OF AMERICA

**Commission Ruling
D-035**

**Motion to for Resources Necessary to
Realize Sixth Amendment Right to
Self-Representation**

v.

KHALID SHEIK MOHAMMED et al

6 October 2008

1. Nature of Motion:

a. This joint motion seeks to compel provision of a list of resources to the accused for their use in conjunction with their *pro se* representation (Sheikh Mohammed, Bin Attash, Ali) or in order to participate with counsel in the preparation of their defense (Bin Al Shibh, Al Hawsaw).

b. The Commission has also considered the prosecution's response to D-035, the supplement submitted by the defense on 29 August 2008, the oral argument regarding this motion, and the supplement filed by the prosecution on 30 September 2008.

2. Discussion:

a. The accused's counsel and *pro se* rights in this case are set forth in MCA, Section 949a(b)(C-D).

b. The Commission understands that the Government has already agreed to make the following materials available to the *pro se* accused:

- (1) Writing materials that comport with detention facility security standards;
- (2) A laptop style computer loaded with discovery materials (with review software) and word processing software; and
- (3) Copies of MCA, MMC, MCTJ RCs, and the Regulation for Trial by Military Commissions.

c. The accused were fully advised by the Military Judge that one of the many problems associated with an election to waive the right to counsel and proceed *pro se* is that as incarcerated persons they would necessarily not be in as good a position to prepare a defense as a professional attorney. This is not to say that the *pro se* accused are in any way being sanctioned by the Commission for their *pro se* election. Instead, the simple reality of the situation is that there are limits on what the Government must provide to the accused under an umbrella of reasonable access to materials for the preparation of the defense. Reasonable access does not equate to a right or an entitlement to be placed on the same footing as a technologically state of the art law office.

d. The case law setting forth guidelines for provision of materials necessary for preparation of a defense to incarcerated accused speaks most directly to *pro se* accused, vice those represented by counsel. Arguably, a *pro se* accused has a stronger basis for provision of such materials since he or she has waived the right to counsel and is fully responsible for his own defense. It is worthy of note, however that this case is proceeding as a joint trial and involves voluminous discovery materials. In this regard, the Commission concurs with the defense position that the accused in this case that are represented by counsel should not be placed in a position inferior to the *pro se* accused in terms of being able to review discovery materials and cooperate intelligently in the preparation and presentation of the their defense.

e. Given the fact that the Government has already agreed to make computer resources available to the *pro se* accused in this case, the Commission finds that it is also reasonable that some additional materials be provided for used on those computers. These materials will include:

- (1) Electronic versions of the MCA, MMC, MCTJ RCs, and the Regulation for Trial by Military Commissions;
- (2) A copy of the U.S. Constitution, the Detainee Treatment Act, and the Geneva Conventions; and
- (3) A legal dictionary.

f. D-035 also seeks provision of pleadings and rulings from several other cases and access to a broad range of news and internet research sources applicable to the defense in this case. While the Commission will not direct the Government to secure or prepare matters of this nature, should the accused choose to coordinate with their stand by counsel to have such matters loaded onto electronic storage devices, the Government should facilitate timely provision of the loaded materials to the accused in conjunction with appropriate security measures. Only materials redacted for operational and privacy concerns, akin to those provided as RC 3.9 releases, will be provided.

g. With regard to the translation issues associated with D-035, MCA, Section 948l makes the following provision: "Under such regulations as the Secretary of Defense may prescribe, the convening authority [may] detail to or employ for the military commission interpreters who shall interpret for the commission and, as necessary for trial counsel and defense counsel and for the accused." RMC 502(e) and the Regulation for

Trial by Military Commission, Section 7-3 provide for provision of interpreters for the defense as necessary. The Commission would expect the defense to pursue provision of interpreter services for the defense teams to the extent necessary under these provisions. In the event that the defense determines that that translation software is reasonably available, they may renew their request for provision of that item.

h. The Government has represented that current provisions provide for the accused to have access to materials associated with their defense for eight hours a day. Given the volume of the discovery materials and the legal issues associated with this case, the Commission finds that this is an inadequate period of time for the accused to have an opportunity to work on their cases. At the same time, the Commission understands that operational and security concerns in the detention facility may make unlimited access an unreasonable situation. Accordingly, the Commission directs that procedures in the detention facility be adjusted appropriately in order to facilitate access to materials associated with the defense for no less than twelve hours a day. [Battery resources for the computers should also be sufficient to provide for use of the computers during this twelve hour period.]

i. The Commission has determined that reasonable access to materials necessary for the preparation of the defense does not extend to extend to:

- (1) Internet access;
- (2) Powerpoint software;
- (3) a DVD writer;
- (4) Printers and scanners;
- (5) Special provisions regarding telephone contact with family members;
- or
- (6) Special provisions regarding contact with stand by counsel or civilian consultants. [Note: This matter will be addressed separately in conjunction with D-036.]

3. **Ruling:** The Defense motion is granted in part and denied in part. The Government shall provide both the *pro se* accused and the accused represented by counsel in this case access to materials necessary for the preparation of the defense consistent with the discussion above.



RALPH H. KOHLMANN
Colonel, U.S. Marine Corps
Military Judge