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ACTION MEMO

GENERAL COUNSEL

13 May 2009

FOR: THE SECRETARY OF DEFENSE

FROM: Jeh C. Johnson, General Counsel

SUBJECT: Changes to the Manual for Military Commissions

- Pursuant to Executive Order, the interagency Task Force on Detention Policy has developed five rules changes for the Manual for Military Commissions ("MMC").
- The Military Commissions Act of 2006 ("MCA") provides that the Secretary of Defense may modify the MMC, and shall submit a report to the Senate Armed Services Committee ("SASC") and the House Armed Services Committee ("HASC") describing such modifications not later than 60 days before the date on which they are to go into effect.
- Modification of the MMC, via these five rules changes, does not, in and of itself, entail any commitment to employ military commissions for the trial of any detainees; it simply improves the process in the event that commissions are subsequently used.
- In the pending military commissions cases, the current 120-day continuance expires on 20 May. It is important that trial counsel make their motions for a second continuance in the nine referred cases today, if at all possible. Doing so should allow enough time for the defense to respond and for the military judges presiding over these cases to rule on the motions. The grounds for a continuance will be much firmer if trial counsel can argue that Congress has been notified of these five rules changes, but that the changes cannot go into effect for 60 days. (If the motions for continuance are denied, we will have to withdraw the referred cases to comply with the terms of the Executive Order.)
- Attached to this memorandum are the five proposed MMC rules changes (TAB A). Those proposed rules changes and the reasons for making them are summarized as follows:
    - Rule for Military Commission ("R.M.C.") 202. The findings of the Combatant Status Review Tribunals are, in practice, insufficient to establish the factual predicate for jurisdiction of military commissions. The requisite finding is thus currently made by military judges at military commissions. The change to R.M.C. 202 is proposed to codify the existing practice for determining jurisdiction that is being utilized by

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military commission judges to make findings sufficient to establish jurisdiction.

- R.M.C. 301(e). An accused may voluntarily introduce his or her own prior hearsay statements and exercise his or her right not to testify and be subject to cross-examination. In such circumstances, the Discussion section following R.M.C. 301 currently requires the military judge to instruct panel members that they may consider the fact that the accused chose to avoid cross-examination, and that his or her prior statements are not sworn, when determining the weight to accord to his or her prior hearsay statements. Removing the Discussion section for R.M.C. 301 eliminates an instruction that is widely viewed as unfairly detrimental to the accused.

- Military Commission Rule of Evidence ("M.C.R.E.") 304(c). Currently, statements made before December 30, 2005, may be admitted even if the interrogation methods used to obtain those statements amount to cruel, inhuman, or degrading treatment as defined by the Detainee Treatment Act. The proposed rule change would eliminate the difference in the criteria for the admissibility of statements made before and after December 30, 2005. As amended, M.C.R.E. 304(c) would provide that in all cases where the degree of coercion used to obtain a statement is disputed, a military judge may admit the statement only if he or she finds that it was not obtained using interrogation methods that constitute cruel, inhuman, or degrading treatment (and if the statement is reliable and sufficiently probative, and that the interests of justice would best be served by admission of the statement into evidence).

- R.M.C. 506. Changing R.M.C. 506 to allow an accused to select a military defense counsel of his or her choosing brings military commissions practice more in line with courts-martial practice and gives the accused greater latitude in making personal defense choices.

- M.C.R.E. 803(c). Reversing the burden of proof in M.C.R.E. 803(c) takes the burden of disproving reliability away from the opponent of the hearsay evidence, and returns the burden of proving reliability to the proponent. This is generally the norm in U.S. Courts, including courts-martial.

- Each of these changes can be accomplished without new legislation. The changes will enhance protections for the accused and bring military commissions practice more in line with courts-martial practice. Furthermore, these rules changes are based on the experience gained through application of the existing rules over the

last two years, and each will serve to support full and fair military commission trials. I have been directly involved in the development of these rules changes, and I am available to brief you on these if necessary.

- These five changes represent extensive work by the interagency Task Force on Detention Policy, which includes representatives from the Department of Defense, both uniformed and civilian, the Department of Justice, and other Executive Branch departments and agencies. All representatives concurred in the appropriateness of these changes, and during a meeting held on May 7, 2009, the Principals Committee reached a consensus to recommend these changes to the President. The President has now approved the course of action requiring adoption of these rules changes.
- DoD, DOJ and the White House have also determined to formulate legislative changes to the MCA, and we are working on that project now.

RECOMMENDATION: I recommend that you approve notice of these rules changes by initialing below. If you approve of the attached rules changes, I recommend you sign the attached letters (TAB B) formally reporting to the SASC and the HASC these changes as required by the MCA.

Approve RG Disapprove_____ Other_____

COORDINATION: TAB D

Attachments:
As stated
Sample Motion for Continuance (Tab C)

In brief, the changes are:

1. Remove references to the Combatant Status Review Tribunal within Rule for Military Commission 202 and specify that a commission is a "competent tribunal" for purposes of determining the jurisdictional predicate;

2. Remove the discussion section within Military Commission Rule of Evidence 301, which directs the military judge to instruct commission members to consider that the accused did not subject himself to cross-examination if the accused introduces his own hearsay statements at trial but does not testify;

3. Modify Military Commission Rule of Evidence 304 to render inadmissible all evidence the judge deems to have been secured as a result of cruel, inhuman, or degrading treatment within the meaning of the Detainee Treatment Act;

4. Provide for a right of individual military counsel in Rule for Military Commissions 506, permitting a right to counsel of choice within the office of the Chief Defense Counsel;

5. Modify Military Commission Rule of Evidence 803(c) to reverse the burden of proof regarding hearsay statements from a requirement that the opponent establish unreliability to a requirement that the proponent establish reliability.

1. *Remove references to the Combatant Status Review Tribunal within Rule for Military Commission 202.*

Rule for Military Commissions (R.M.C.) 202 currently states that a finding by a Combatant Status Review Tribunal ("CSRT") or by another "competent tribunal" is dispositive for purposes of jurisdiction for trial by military commission, as provided in 10 U.S.C. § 948d. In practice, however, CSRTs determine whether an individual is an "enemy combatant," not whether an individual is an "unlawful enemy combatant." In the military commission case against Salim Ahmed Hamdan, the military judge decided that the CSRT's findings were insufficient to establish jurisdiction, because the CSRT decided enemy combatant status, not unlawful enemy combatant status. The commission made its own determination that Hamdan was an "unlawful enemy combatant," thereby satisfying the jurisdictional predicate required by the MCA. In doing so, it concluded that the commission was an "other competent tribunal established under the authority of the President or the Secretary of Defense," the finding of which as to unlawful enemy combatant status is dispositive for purposes of jurisdiction under 10 U.S.C. § 948d and R.M.C. 202. This proposed rule modification would eliminate the rule text that provides that a CSRT determination of "unlawful enemy combatant" status is dispositive for jurisdictional purposes and would establish that a military commission is a "competent tribunal" to determine that the accused is an unlawful enemy combatant and thus subject to commission jurisdiction.

R.M.C. 202(b) would, therefore, read as follows (the areas crossed through would be deleted; areas underlined would be added):

Rule 202. Persons subject to the jurisdiction of the military commissions

(a) *In general.* The military commissions may try any person when authorized to do so under the M.C.A.

(b) *Competent Tribunal.* A military commission is a competent tribunal to make a finding sufficient for jurisdiction.

~~(b) *Determination of unlawful enemy combatant status by Combatant Status Review Tribunal or other competent tribunal dispositive.* A finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by a military commission under the M.C.A. The determination by the tribunal shall apply for purposes of military commission jurisdiction without regard to any pending petitions for review or other appeals.~~

Discussion

Military commissions have personal jurisdiction over alien unlawful enemy combatants. *See* 10 U.S.C. § 948c. A military commission is a competent tribunal to make a finding sufficient for jurisdiction. *See* 10 U.S.C. § 948a(1)(ii) and § 948d(c).~~The M.C.A. recognizes, however, that with respect to individuals detained at Guantanamo Bay, the United States relies on the Combatant Status Review Tribunal ("C.S.R.T.") process to determine an individual's combatant status. The C.S.R.T. process includes a right of appeal to the United States Court of Appeals for the District of Columbia Circuit. Because the C.S.R.T. process provides detainees with the opportunity to challenge their status, the M.C.A. recognizes that status determination to be dispositive for purposes of the personal jurisdiction of a military commission. The M.C.A. provides that an individual is deemed an unlawful enemy combatant for purposes of the personal jurisdiction of a military commission if the individual has been determined to be an unlawful enemy combatant by a C.S.R.T. or other competent tribunal. Where combatant status of the accused may otherwise be relevant, the parties may establish the accused's status by evidence adduced in accordance with the commission rules. The determination of an individual's combatant status for purposes of establishing a commission's jurisdiction does not preclude him from raising any affirmative defenses, nor does it obviate the Government's obligation to prove beyond a reasonable doubt the elements of each substantive offense charged under the M.C.A. and this Manual.~~

~~*Combatant Status Review Tribunal.* The M.C.A. provides that an alien determined to be an unlawful enemy combatant by a C.S.R.T. shall be subject to military commission jurisdiction, whether the C.S.R.T. determined was made "before, on, or after the date of the enactment" of the M.C.A. *See* 10 U.S.C. § 948a(1)(ii). At the time of the enactment of the M.C.A., C.S.R.T. regulations provided that an individual should be deemed to be an "enemy combatant" if he "was part of or supporting al Qaeda or the Taliban, or associated forces engaged in armed conflict against the United States or its coalition partners." The United States previously determined that members of al Qaeda and the Taliban are unlawful combatants under the Geneva Conventions.~~

~~*Other Competent Tribunal.* The M.C.A. also provides that an individual shall be deemed an "unlawful enemy combatant" if he has been so determined by a competent tribunal established consistent with the law of war. *See* 10 U.S.C. § 948a(1)(ii).~~

~~The M.C.A. does not require that an individual receive a status determination by a C.S.R.T. or other competent tribunal before the beginning of a military commission proceeding. If, however, the accused has not received such a determination, he may challenge the personal jurisdiction of the commission through a motion to dismiss.~~

(c) *Procedure.* The jurisdiction of a military commission over an individual attaches upon the swearing of charges.

2. *Remove the discussion section within Military Commission Rule of Evidence 301 that directs the military judge to instruct members to be wary of hearsay statements offered by an accused who does not testify.*

Military Commission Rule of Evidence ("M.C.R.E.") 301 addresses the privilege against self-incrimination that applies in military commission proceeding. Although a defendant before a commission is privileged from testifying against himself, the discussion section of the rule directs that if the defendant offers his own prior hearsay statements but does not testify at the proceeding, the military judge "shall instruct" the members of the commission that they may consider the fact that the accused chose not to be cross-examined on the hearsay statements, and that his statements are not sworn testimony. The proposed rule change would eliminate the requirement of this instruction and leave the issue of instructions to the discretion of the military judge. M.C.R.E. 301 would read (deletions are crossed through):

Rule 301. Privilege concerning compulsory self-incrimination

* * * * *

(e) *Waiver by the accused.* When an accused testifies voluntarily as a witness, the accused thereby waives the privilege against self-incrimination with respect to the matters concerning which he or she so testifies. If the accused is on trial for two or more offenses and on direct examination testifies concerning the issue of guilt or innocence as to only one or some of the offenses, the accused may not be cross-examined as to guilt or innocence with respect to the other offenses unless the cross-examination is relevant to an offense concerning which the accused has testified.

~~**Discussion**~~

~~If the accused voluntarily introduces his own prior hearsay statements through the direct examination of a defense witness, but the accused exercises his right not to testify himself at the proceeding, the military judge shall instruct the members prior to the beginning of their deliberations: "The accused has the absolute right to testify as a witness or to choose not to testify in this proceeding. That the accused exercised (his)(her) right not to testify should not be held against (him)(her). However, in this case, the accused has voluntarily offered his prior statements as part of (his)(her) defense by eliciting those statements through other defense witnesses. At the same time, the accused, by electing not to testify in the proceeding, has prevented the Government from subjecting those statements to cross-examination. In evaluating the weight to be accorded to the accused's hearsay statements, you may consider the fact that the~~

~~accused chose not to be cross-examined on those statements and that those statements were not sworn testimony."~~

3. *Remove the distinction between pre- and post-Detainee Treatment Act statements analyzed for coercion.*

Under M.C.R.E. 304(c), the admissibility of statements allegedly obtained through coercion depends upon satisfaction of certain criteria, which differ depending on whether the statements were obtained before or after December 30, 2005, the date of enactment of the Detainee Treatment Act ("DTA"). M.C.R.E. 304(c) provides that a judge may admit an allegedly coerced statement made ***before*** the effective date of the Detainee Treatment Act only if the military judge finds that the statement is reliable and sufficiently probative, and that the interests of justice would best be served by admission of the statement into evidence. By contrast, a military judge may admit a statement made ***after*** the effective date of the Detainee Treatment Act only if he or she finds that the statement is reliable and sufficiently probative, that the interests of justice would best be served by admission of the statement into evidence, *and* that the interrogation methods used to obtain the statement did not amount to cruel, inhuman or degrading treatment.

The proposed rule change would eliminate the difference in the criteria for the admissibility of statements made before and after December 30, 2005. As amended, M.C.R.E. 304(c) would provide that in *all* cases where the degree of coercion used to obtain a statement is disputed, a military judge may admit the statement only if he or she finds that it was not obtained using interrogation methods that constitute cruel, inhuman, or degrading treatment (and if the statement is reliable and sufficiently probative, and that the interests of justice would best be served by admission of the statement into evidence).

The applicable portions of M.C.R.E 304(c) would read as follows (deletions are crossed through):

Rule 304. Confessions, admissions, and other statements

(a) *General rules.*

* * * * *

(b) *Definitions.*

* * * * *

(c) *Statements allegedly produced by coercion.* When the degree of coercion inherent in the production of a statement offered by either party is disputed, such statement may only be admitted if ~~in accordance with this section~~.

(1) ~~As to statements obtained before December 30, 2005, the~~

~~military judge may admit the statement only if the military judge finds that (A) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (B) the interests of justice would best be served by admission of the statement into evidence.~~

~~(2) As to statements obtained on or after December 30, 2005, t~~ the military judge ~~may admit the statement only if the military judge~~ finds that (i) the totality of the circumstances renders the statement reliable and possessing sufficient probative value;
(ii) the interests of justice would best be served by admission of the statement into evidence; and (iii) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment as defined in section 1003(d) of the Detainee Treatment Act, Pub. L. 109-148 (2005) (codified at 42 U.S.C. 2000dd(d)

4. *Provide for a right of individual military counsel, permitting a right to counsel of choice within the office of the Chief Defense Counsel*

Rule for Military Commissions 506 establishes the right of the accused to be represented by civilian counsel, if provided at no cost to the government, and detailed defense counsel. However, the rules currently do not provide for a right of "individual military counsel" ("IMC")—military counsel of the defendant's selection—as provided in the rules for courts-martial (Rule for Courts-Martial 506). An accused before a military commission who desires to request a military defense counsel other than the one detailed to him has no basis in the existing rules for the request. The proposed rule would permit the accused to make such a request, but to accommodate the unique nature of commissions, the group of officers available to act as IMC would be limited to those officers already detailed to the Office of Military Commissions.

Rule for Military Commissions 506, in pertinent part and as rewritten, would be as follows (the areas underlined would be added):

Rule 506. Accused's rights to counsel

(a) *In general.* The accused has the right to be represented before a military commission by civilian counsel if provided at no expense to the Government, and <u>by either</u> the defense counsel detailed <u>or by military counsel of the accused's own selection, if reasonably available.</u> The accused is not entitled to be represented by more than one military counsel.

Discussion

See R.M.C. 502(d)(3) for determining qualifications for civilian defense counsel. See R.M.C. 502(d)(6) and 505(d)(2) concerning the duties and substitution of defense counsel. These rules and this Manual do not prohibit participation on the defense team by consultants not expressly

covered by section (d) of this rule, as provided in such regulations as the Secretary of Defense may prescribe, subject to the requirements of Mil. Comm. R. Evid. 505.

(b) Individual Military Counsel

(1) Reasonably available. Counsel are not reasonably available to serve as individual military counsel unless detailed to the Office of Military Commissions to perform defense counsel duties when the request is received by the Office.

(2) Procedure. Subject to this section, the Secretary may prescribe procedures for determining whether a requested person is "reasonably available" to act as individual military counsel. Requests for individual military counsel shall be made by the accused or the detailed defense counsel with notice to the trial counsel. If the requested person is not reasonably available under this rule, the Chief Defense Counsel shall deny the request and notify the accused. If the requested counsel is not among those listed as not reasonably available in this rule, the Chief Defense Counsel shall make an administrative determination whether the requested person is reasonably available. This determination is a matter within the sole discretion of that authority.

5. *Reverse the burden of proof regarding hearsay statements from a requirement that the opponent establish unreliability to a requirement that the proponent establish reliability.*

Currently, M.C.R.E. 803 requires a person opposing the admissibility of a hearsay statement to bear the burden of establishing that the statement is unreliable. The proposed rule change would shift the burden to require the proponent of hearsay evidence to establish its reliability, as is generally the norm in U.S. courts and as provided in the rules of evidence governing courts-martial. The change would also eliminate an apparent discrepancy between the rule text and the discussion, which states that the proponent of a statement "still has the burden of demonstrating that the evidence is admissible under Mil. Comm. R. Evid. 401 and 403." While hearsay admissibility remains much broader than in domestic courts, the expansive admissibility standard would be consistent with international standards, such as those employed in international criminal tribunals.

As currently drafted, Military Commission Rule of Evidence 803 provides in pertinent part:

* * * * *

(c) Hearsay evidence otherwise admissible under subsection (b)(1) shall not be admitted if the party opposing the admission of the evidence demonstrates by a preponderance of the evidence that the evidence is unreliable under the totality of the circumstances.

Discussion

The M.C.A. recognizes that hearsay evidence shall be admitted on the same terms as other evidence because many witnesses in a military commission prosecution are likely to be foreign nationals who are not amenable to process, and other witnesses may be unavailable because of military necessity, incarceration, injury, or death. Because hearsay is admissible on the same terms as other evidence, the proponent still has the burden of demonstrating that the evidence is admissible under Mil. Comm. R. Evid. 401 and 403.

As modified, the rule would read:

> **(c) Hearsay evidence otherwise admissible under subsection (b)(1) shall not be admitted unless the proponent of the evidence demonstrates by a preponderance of the evidence that the evidence is reliable under the totality of the circumstances.**

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

MAY 15 2009

The Honorable Carl Levin
Chairman, Committee on Armed Services
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In accordance with section 949a(d) of the Military Commissions Act of 2006 ("MCA"), attached please find the proposed modifications to procedures for military commissions under the MCA. As required by the MCA, I have consulted with the Attorney General prior to prescribing these procedures and rules for cases triable by military commission.

cc:
The Honorable John McCain
Ranking Member

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

MAY 15 2009

The Honorable Ike Skelton
Chairman, Committee on Armed Services
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

In accordance with section 949a(d) of the Military Commissions Act of 2006 ("MCA"), attached please find the proposed modifications to procedures for military commissions under the MCA. As required by the MCA, I have consulted with the Attorney General prior to prescribing these procedures and rules for cases triable by military commission.

cc:
The Honorable John M. McHugh
Ranking Member

UNITED STATES OF AMERICA	GOVERNMENT MOTION
	For Appropriate Relief
v.	
	13 May 2009
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1. **Timeliness**: This motion is timely filed.

2. **Relief Requested**: In the interests of justice, the Government respectfully requests the Military Commission grant an additional 120-day continuance of the proceedings in the above-captioned case, until 17 September 2009.[1]

3. **Overview**: A second continuance is in the interests of justice, and, given the circumstances, outweighs the interests of both the public and the accused. On 22 January 2009, the President ordered comprehensive reviews of detention policy (including military commissions), and of all the individual detainees at Guantanamo (including the accused[s] in this military commissions case). Those reviews are not yet complete, but significant progress has been made. The President has decided to work to reform substantially and retain military commissions as one available and appropriate forum, along with Article III courts, for the prosecution of detainees at Guantanamo (attachment X). As a first step, and as a result of the Detention Policy Task Force's initial work, on 10 May, 2009 the Secretary of Defense published and notified Congress of five significant proposed changes to the Manual for Military Commissions (attachment D), including rules that would exclude all statements obtained by the use of cruel, inhuman or degrading treatment, impose additional conditions on the use of hearsay, and provide the accused greater latitude in the selection of counsel. As required by law, however, proposed modifications to the procedures in effect in military commissions cannot take effect for 60 days from 10 May. The Administration is committed to taking further steps to ensure that commissions are part of an overall system that best protects U.S. national security and foreign policy interests while also insisting that justice is done in the case of every single detainee. These steps will include working with the Congress now and in the future to reform our military commissions system to better serve those purposes. The Administration will shortly be proposing legislation to amend the Military Commissions Act of 2006, Pub. L. 109-366, not only to make the five rule changes noted above statutory, but also to make other significant changes to the commissions, including revising the rules governing classified evidence and further revising the rules regarding the admissibility of evidence. We anticipate that these changes will nevertheless permit cases pending before commissions to proceed, though no

[1] The Government is seeking similar 120-day continuances in the other pending military commissions cases.

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decisions have yet been made as to which specific detainees will continue to be prosecuted before commissions or whether they might be prosecuted in Article III courts, or whether some alternative disposition of the detainees might be recommended. Given all this, the Government submits that the interests of the public and the defendant would not be served by denying the continuance in this case.

4. **Burden and Persuasion**: As the moving party, the Government bears the burden of persuasion. RULE FOR MILITARY COMMISSIONS (R.M.C.) 905(c), MANUAL FOR MILITARY COMMISSION (MMC), 2007.

5. **Facts**:

a. On 22 January 2009, the President issued Executive Order (E.O.) 13492, "Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities" (attachment A). This E.O. directed an inter-agency review of "the status of each individual currently detained at Guantánamo." E.O. 13492, §4(a). The review participants[2] were tasked, first, to "determine, on a rolling basis and as promptly as possible with respect to the individuals currently detained at Guantánamo, whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States," and second, in the cases of those individuals not approved for release or transfer, "to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution . . ." *Id.* at §4(c)(2)-(3).

b. E.O. 13492 also directed the Secretary of Defense to "ensure that during the pendency of the Review . . . all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered . . . are halted." *Id.*, *§* 7 (emphasis added).

c. On 22 January 2009, the President also issued E.O. 13493, "Review of Detention Policy Options" (attachment B). E.O. 13493 established a Detention Policy Task Force co-chaired by the Attorney General and the Secretary of Defense, "to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice." E.O.13493, § 1(e) The E.O. directs that this Task Force complete its work in 180 days (i.e. by 21 July 2009). *Id.* at §1(d).

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[2] E.O. 13492 directed that the following officers participate in the review: The Attorney General, the Secretaries of Defense, State, and Homeland Security, the Director of National Intelligence, the Chairman of the Joint Chiefs of Staff, and such other officers or employees of the United States as determined by the Attorney General. E.O. 13492, §4(b).

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d. Consistent with the President's order that steps be taken sufficient to halt military commissions during the pendency of the review, the Secretary of Defense ordered that no new charges be sworn or referred to commissions, and directed the Chief Prosecutor of the Office of Military Commissions to seek continuances of 120 days in all cases that had been referred to military commissions (attachment C).

e. In accord with that direction, on [date], the Government sought a continuance in the above-captioned case until 20 May 2009, which the court granted on [date].

f. In compliance with E.O. 13492, the Detainee Review Task Force is actively considering detainees' cases. It has made recommendations resulting in decisions to transfer or release more than 30 individuals. The status of the defendant[s] in the above-captioned case is under active consideration by one of the Task Force's Detainee Review Teams, which will make a recommendation on the disposition of the defendant to the principals appointed by the President pursuant to E.O. 13492 (attachment A). Under E.O. 13492, the Secretary of Defense must ensure that these proceedings are halted at least until that review is complete.

g. Further, as a result of the initial work of the Detention Policy Task Force, the Secretary of Defense has published five proposed changes to the Manual for Military Commissions (attachment D):

(1) Delete R.M.C. 202(b), MMC 2007, eliminating the dispositive effect, for purposes of jurisdiction for trial by a military commission under the M.C.A., of a prior determination by a Combatant Status Review Tribunal (or other competent tribunal) that an individual is an "unlawful enemy combatant."

(2) Revise R.M.C. 506, MMC 2007, to establish a right to "individual military counsel" of the accused's own choosing, provided the requested counsel is assigned as a defense counsel within the Office of the Chief Defense Counsel and is "reasonably available."

(3) Remove the language in the "Discussion" under MILITARY COMMISSION RULE OF EVIDENCE (M.C.R.E.) 301, MMC 2007, that directs the military judge to instruct the members they should consider the fact the accused did not subject himself to cross-examination when he offers his own hearsay statement at trial but does not testify.

(4) Prohibit the use of statements obtained by cruel, inhuman or degrading treatment, regardless of when the statements were obtained. This would be accomplished by removing the distinction, in the standard for admissibility, between statements obtained before 30 December 2005 and those obtained on or after that date – which now potentially permits the admission of statements obtained by the use of cruel, inhuman or degrading treatment prior to 30 December 2005 – and applying the standard currently in M.C.R.E. 304(c)(2), MMC 2007, to all statements.

(5) Revise M.C.R.E. 803(c), MMC 2007 to give the proponent of hearsay that is not otherwise admissible under M.C.R.E. 803(a) the burden of demonstrating that a reasonable

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commission member could find the evidence sufficiently reliable under the totality of the circumstances to have probative value.

h. Pursuant to Section 949a(d) of Title 10, United States Code, the Secretary of Defense must inform the Committees on Armed Services of both the House and Senate of proposed modifications to the procedures in effect for military commissions at least 60 days before they go into effect.

i. The Secretary communicated these changes to the Armed Services Committees on 11 May 2009, and they are scheduled to go into effect on 7 July 2009.

j. The Administration also is working with the Congress on legislation to amend the Military Commissions Act of 2006, Pub. L. 109-366 in order to codify these rule changes and to further change the law governing military commissions. Other significant changes being considered are revisions to the rules governing the use of classified information, further revisions of the rules concerning the admissibility of evidence, and adjustments to the class of individuals subject to the jurisdiction of the commissions.

k. In short, the interagency teams are actively engaged in a thorough assessment of all the issues directed for review by the President. However, at this point that work is not complete and, while much has been accomplished, the Government does not at this time know precisely how the military commissions will be reformed, or even what the disposition of this particular detainee will be, including whether he will be tried by military commission. As stated before, the review of this individual is not complete, and the 180-day Detention Policy Review is not due to be completed until July 21, 2009.

6. **Argument**:

a. Rule for Military Commissions (RMC) 707(b)(4)(E)(i) authorizes the military judge of a military commission to grant a continuance of the proceedings if the interests of justice are served by such action and outweigh the best interests of both the public and the accused in a prompt trial of the accused. For all of the reasons stated above, the Government submits that it would not serve the interests of justice or the defendant to deny the motion for continuance.

b. The requested continuance is in the interests of justice, as it will permit the President and his Administration to complete a thorough review of all pending cases and of the military commissions process as a whole.

c. The interests of justice served by granting the continuance outweigh the interests of both the public and the accused. Granting a continuance of the proceedings is in the interests of the accused and the public, as the Administration's review of the commissions process and its pending cases might result in changes that would (1) necessitate re-litigation of issues in this case; or (2) if the case were to proceed at some later date, produce legal consequences affecting the options available to the Administration and the accused. It would be inefficient and potentially unjust to deny the continuance motion in this case before there is a final decision to

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proceed with this military commission—a commission that would, if resumed, proceed under a new set of rules.

d. Extending the continuance in this case for an additional 120 days, from 20 May until 17 September 2009, will permit adequate time for the Administration to complete its review of the military commissions process and of the pending cases, to take appropriate actions to implement the five rules changes noted above, and to work with the Congress to further revise and reform the commissions process to ensure that it best serves the national security and foreign policy interests of the United States and the interests of justice. The reason for seeking the requested delay, therefore, is not inconsistent with the interests of justice. To the contrary, it is intended to ensure the President has the time and opportunity to complete the policy and case-by-case reviews and to propose and implement changes to military commissions law and procedure, some of which will be best effected by legislation. In these circumstances, the additional delay of 120 days is not prejudicial to the defendants nor is it inconsistent with the interests of the public.

7. Scope of Request: Questions have arisen concerning the scope and effect of continuances that the Government has sought and that the judges have granted in commissions cases. The Executive Order directs the Secretary to take steps "sufficient to halt the proceedings," and it was in accord with that obligation that the Secretary directed the Chief Prosecutor to seek the continuances that are now in place.[3]

[3] The Government's previous motions requesting continuances did not attempt to define the scope of the requested continuance; but in some cases, military judges have defined the scope of the continuance in ordering it. In the case against Ahmed Khalfan Ghailani, for instance, the continuance issued by the military judge expressly contemplated that discovery by the parties would continue, and that the judge would continue to take certain actions that do not require a "session." *See* Ruling on Government Motion for Continuance, *United States v. Ghailani* (Feb. 13, 2009). Similarly, in the case against the five charged September 11th co-conspirators, *United States v. Khalid Sheikh Mohammed*, the military judge recently issued a ruling (in response to a defense motion for relief related to the submission to the court of a document by the defendants) in which he assumed the prosecutors had not sought—and the military judge, in his earlier ruling on the continuance, had not ordered—"a 'halt' to any and all actions related to this case, but merely on the record hearings with counsel, the accused, and the military judge." The military judge concluded that his ruling was consistent with the prosecution's request and his earlier grant of a continuance, because "[s]ince recessing on 21 January 2009, the military judge has not called the Military Commission *into session*." Order on Defense Motion for Special Relief, *United States v. Mohammed* (Mar. 18, 2009) (emphasis added). *See* R.M.C. 905(h) (providing that the military judge may dispose of written motions without a session of the commission).

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The United States wishes to clarify the scope of the continuances that it now seeks. The Government does not seek to preclude the parties from submitting any filings, if they wish. The purpose of this motion is, in effect, to preserve the status quo as it existed on January 22, 2009 and as it exists on this date, and to preclude any unnecessary judicial decisions on contested questions until the President decides whether and on what terms, and as to which accused, the military commissions will resume. For that reason, the Government is asking the court not to take any actions in the case—whether or not any "sessions" of court are involved—with the exception of any rulings the court must make (including a ruling on the instant motion itself) in order to preserve the status quo as of this date to the greatest practicable extent.

8. **Conclusion**: For the foregoing reasons, the military commission should extend the previously granted continuance of further proceedings in the above-captioned case until 17 September 2009, and adopt the attached Findings of Fact, Conclusions of Law and Order. (Attachment E).

8. **Oral Argument**: The Government does not request oral argument, but is prepared to argue should the commission find it helpful.

9. **Witnesses and Evidence**: No witnesses. The Government respectfully requests the commission to consider the attachments to this motion as evidence of the asserted facts.

10. **Certificate of Conference**: The Government has conferred with the Defense and the Defense XXXXX.

11. Attachments:

A. E.O. 13492
B. E.O. 13493
C. Secretary of Defense Order XX
D. Amendments to Manual for Military Commissions, 2007
E. Proposed Findings of Fact and Conclusions of Law
F. Olsen Declaration
G. Martins, Wiegmann, and Benkert Declarations

12. <u>Submitted by</u>:

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