

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 355A (GOV)

Government Response

To Defense Motion to Compel Provision of
Adequate Representation and Ensure
Continuity of Counsel

8 April 2015

1. Timeliness

This Response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.

2. Relief Sought

The Prosecution respectfully requests that the Commission deny AE 355 (WBA), the Defense Motion to Compel Provision of Adequate Representation and Ensure Continuity of Counsel.

3. Burden of Proof

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

4. Facts

Since 22 July 2011, the Accused has been represented before this Commission by Learned Counsel, Ms. Cheryl Bormann. *See* AE004 (WBA), "Detailing as Learned Counsel in the Military Commission Case of *United States v. Walid Muhammad Salih Mubarak Bin 'Attash (10014)*."

On 31 May 2011 and 25 January 2012, charges in connection with the 11 September 2001 attacks, which resulted in the death of over 2,976 men, women, and children, were sworn against Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin ‘Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi. Each was 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 4 April 2012, the Charges were referred jointly to this capital Military Commission and, on 5 May 2012, the five co-accused were arraigned.

During the arraignment, the Military Judge properly advised the Accused of his right to counsel. *See* Unofficial/Unauthenticated Transcript (Tr.) at 48-54. Further, the Military Judge informed Mr. Bin ‘Attash that Ms. Bormann, Major William Hennessy, and Captain Michael Schwartz had been detailed to represent him. *See id.* at 49. As he was advising the Accused of his rights, the Military Judge asked nine questions. *See id.* at 49-54. However, the Accused refused to respond to any of the Military Judge’s questions or personally acknowledge his rights. *See id.* Given the Accused’s refusal to make an election of counsel, the Military Judge determined that Major Hennessy, Captain Schwartz, and Ms. Bormann would represent him until such time as the Accused made other wishes known. *See id.* at 54.

During a session of this Commission on 28 January 2013, Ms. Bormann informed the Commission that “Major Hennessy, United States Marine Corps, has been removed from the Bin ‘Attash defense team.” *Id.* at 1305. The Military Judge inquired if there was a motion to that effect. *Id.* Learned Counsel responded that there was no such motion, but that her client agreed with Major Hennessy’s departure and was the one who began the process to have “Major Hennessy leave the team.” *See id.* at 1309. Sensing that Mr. Bin ‘Attash might not answer questions put to him, the Military Judge accepted Learned Counsel’s representations that her client agreed with Major Hennessy’s departure after the Accused refused to answer questions. *See id.* at 1311-12. The Military Judge directed Major Hennessy to file a motion seeking

withdrawal and stated “that’s the way it’s supposed to work It’s not supposed to come up at the last minute.” *See id.* at 1313. The Military Judge emphasized that when “counsel wishes to be released, they’ve got to file a written notice to that effect with the Commission.” *See id.* at 1314.

Lieutenant Commander James Hatcher was detailed to this Commission as defense counsel for Mr. Bin ‘Attash on 29 January 2013 by Colonel Karen E. Mayberry, USAF, Chief Defense Counsel. *See* AE004A (WBA).

Major Todd M. Swenson was detailed to this Commission as defense counsel for Mr. Bin ‘Attash on 27 June 2013. *See* 004E (WBA), Attachment B. Major Swenson first appeared on the record on 17 December 2013. *See* Tr. at 7268.

On information and belief, a military defense counsel departed Mr. Bin ‘Attash’s defense team in May 2014 due to retirement. *See* AE 355 (WBA) at 7. The Prosecution neither has knowledge as to the identity of this military counsel, nor whether this person was formally detailed to represent Mr. Bin ‘Attash before this Commission.

On or about 18 July 2014, Lieutenant Commander Hatcher received orders notifying him of his requirement to separate from the Naval Reserves no later than 1 April 2015, after having obtained 20 years of qualifying service. *See id.*, Attachment B.

This Commission held pretrial hearings on 11, 13, and 14 August 2014. *See* AE 313. Additionally, this Commission conducted an R.M.C. 802 conference in December 2015. Further, on 9, 11, and 12 February 2015 sessions of this Commission were held. *See* Tr. at 8247, 8265, 8369. The departure of Lieutenant Commander Hatcher was not brought to the Military Judge’s attention and no notice of his departure, other than within the instant pleading, has been filed.

On information and belief, Lieutenant Commander Hatcher detached from the Office of the Chief Defense Counsel on 30 January 2015. *See* AE 355 (WBA) at 11.

Currently, and to the Prosecution’s knowledge, Mr. Bin ‘Attash is represented by Learned Counsel and three detailed military defense counsel, only two of which (Major Swenson

and Captain Schwartz) have appeared on the record. *See id.* at 7. The Prosecution is unaware of the identity of the third detailed military defense counsel identified in the Defense filing.¹ *See id.*

According to the Defense filing, in June 2015, another unknown detailed military defense counsel is scheduled to de-mobilize. *See id.* at 18.

Pursuant to Chapter 9, paragraph 9-1.a. of the Regulation for Trial by Military Commission (R.T.M.C.), the Chief Defense Counsel serves as the sole authority for detailing qualified defense counsel to military commission cases. R.T.M.C. ¶ 9-1.a.

5. Law and Argument

I. The Law Provides Mr. Bin ‘Attash With Substantial Rights to Counsel and He Receives More Than That Required.

Within the instant motion, Learned Counsel for Mr. Bin ‘Attash requests “that the Commission direct the Department of Defense and all of its subordinate components, including the Department of the Army, the Department of the Navy, and the Department of the Air Force, to refrain from initiating any personnel action with respect to a detailed military defense counsel or detailed assistant military defense counsel that would result in the severance of the attorney-client relationship, without the express written consent of both the military defense counsel and Mr. Bin ‘Attash, or order of the Commission after the opportunity for a hearing on the matter.” AE 355 (WBA) at 1. In addition, Counsel requests that the Commission direct the Convening Authority to request two additional Department of Defense (DoD) civilian attorney billets be assigned to Mr. Bin ‘Attash’s team and that the billets be filled with experienced and qualified criminal defense attorneys interviewed, vetted, and selected by counsel for Mr. Bin ‘Attash. *See id.* at 2. However, in making these requests, the Accused cites no authority that authorizes the

¹ Pursuant to R.C. 4.2, “[m]ilitary counsel have made an appearance on behalf of the United States or an accused when such counsel are detailed by proper authority to a case which has been referred for trial by Military Commission.” Upon counsel being detailed, “the Chief Defense Counsel and the Chief Prosecutor *will* provide copies of detailing documents to the Chief Clerk of the Trial Judiciary, the Director, Office of Court Administration, *and to opposing counsel.*” R.C. 4.2.a.(2) (emphasis added).

Military Judge to take such actions, other than the assertion that a “Military Judge has broad discretion to take measures to ensure a fair trial.” *See id.* at 6.

Rule for Military Commission (R.M.C.) 502(d)(3) establishes the process and the authority for representation by civilian defense counsel in a Military Commission. R.M.C. 503(c) directs the detailing of military counsel to represent an accused, while the Regulation for Trial by Military Commission (2011) (R.T.M.C.) establishes the manner in which both trial and defense counsel are detailed and who details such counsel. Chapter 9 of that Regulation describes the detailing of Defense Counsel and places sole responsibility for detailing defense counsel with the Chief Defense Counsel, who ultimately maintains responsibility for the supervision of all defense activities. R.T.M.C. ¶¶ 9-1.a.2, 9-1.a.4.

R.M.C. 506 sets forth the Accused’s rights to counsel. In every case, an accused has the right to civilian counsel at no expense to the Government; the right to be represented by military defense counsel; and the right to military counsel of choice if reasonably available. *See* R.M.C. 506(a). An accused is not entitled to be represented by more than one military counsel except when the Chief Defense Counsel, in her sole discretion, details other counsel. *See id.*

The Military Commissions Act of 2009 further provides an accused in a capital case the additional right of counsel who is learned in applicable law relating to capital cases. *See* R.M.C. 506(b). Learned counsel are compensated in a manner consistent with procedures employed by federal courts at the maximum hourly rate for federal capital prosecutions. *See* R.T.M.C. ¶ 9-1.a.6.G.²

While the Accused in this case enjoys substantial rights to counsel, Learned Counsel for Mr. Bin ‘Attash now requests more. Ms. Bormann requests that the Commission issue an order that will dedicate two DoD civilian attorneys to represent Mr. Bin ‘Attash; attorneys that she will

² It should be noted that the right to Learned Counsel in capital cases is the only substantive difference in counsel rights between cases convened under the Military Commissions Act of 2009 and those convened pursuant to the Uniform Code of Military Justice. As such, members of the U.S. Military do not currently enjoy the right to Learned Counsel where the Government is seeking capital punishment for their actions.

vet and select personally. However, it should be noted, that the Accused already enjoys the services of more attorneys than the process requires, even more than required in a capital case under the Federal Guidelines. *See* 18 U.S.C.A §3005. There is no authority for compelling the federal government to expend additional funds where there are other available avenues. The Chief Defense Counsel has provided Mr. Bin ‘Attash with additional military detailed counsel, two more than required. In examining the record of trial, whenever a detailed counsel has left this team, the Chief Defense Counsel has replaced that counsel with another detailed counsel. Indeed, that is how the process was and is designed to operate and should continue to operate going forward.

II. The Commission Should Defer to the Chief Defense Counsel on Military Personnel Actions and Should Decline to Intervene In Military Personnel Matters Where Facts Remain Unknown.

Beyond the Defense request for the assignment of additional and personally-selected civilian defense counsel, Learned Counsel also seeks proactive measures to ensure Captain Schwartz will not face involuntary separation if he is non-selected for promotion to Major, or, if selected, that he will not face the prospect of a permanent change station (PCS).³ This Commission should resist the temptation to intervene in this matter at all, and certainly until the situation involving Captain Schwartz is further clarified, and at which time, counsel properly and timely notifies this Commission regarding the matter. Until clarity is available and provided, this Commission should appropriately defer to the Chief Defense Counsel and the duties conferred to her pursuant to the appropriate authorities. *See e.g.* R.T.M.C. ¶ 9-1.2 (“The Chief Defense Counsel shall supervise all defense activities and . . . ensure proper supervision and management of all personnel and resources assigned to the Office of the Chief Defense Counsel (OCDC), and

³ In a fleeting reference supporting the requested relief, Learned Counsel for Mr. Bin ‘Attash also mentions that in June 2015 she expects the departure of another detailed counsel from her team. *See* AE 355 (WBA) at 18. Slipping it into a brief is not the proper manner in dealing with this serious issue. The Prosecution hereby requests that the Military Judge conduct a hearing on the record to determine if this officer’s demobilization is with the consent of the Accused.

facilitate the proper representation of all accused referred to trial before a military commission appointed pursuant to the M.C.A.”)

This Commission has been engaged in pretrial hearings for nearly three years. Experience suggests that it is not unusual for counsel to come and go for a variety of reasons, some personal and others career- or case-related. Rule for Military Commissions (R.M.C.) 505(d)(2) provides specific options for severance of the attorney-client relationship. It authorizes four options (only three of those options apply here since individual military counsel has not been requested); first, the detailing authority may excuse detailed defense counsel for good cause⁴ shown on the record; second, defense counsel may be excused with the express consent of the accused; and third, defense counsel may be excused by the military judge upon application for withdrawal by the defense counsel. Although separation from active duty normally terminates a military attorney’s representation of the accused, *see United States v. Spriggs*, 52 M.J. 235, 246 (C.A.A.F. 2000), there are circumstances which may warrant an exception to this rule. *See United States v. Hohman*, 70 M.J. 98 (C.A.A.F. 2011); *United States v. Hutchins*, 69 M.J. 282, 290-91 (C.A.A.F. 2011). In cases where there is a procedural error in the severance of the status of a formerly detailed defense counsel upon his departure from active duty, the assignment of new counsel is sufficient to remedy the error. *See Hutchins*, 69 M.J. at 291-293. However, the Military Judge must conduct an inquiry to determine if good cause exists for the severance, and, unless properly notified, he is unable to do so.

Neither Lieutenant Commander Hatcher, nor any other member of Mr. Bin ‘Attash’s Defense Team, informed the Military Judge of Lieutenant Commander Hatcher’s impending departure, despite ample opportunity to do so. Their silence on this matter cannot be interpreted as procedural error by the Military Judge, and should be viewed as problematic given the

⁴ Pursuant to R.M.C. 505(f), “good cause” is defined to include “physical disability, military exigency, and other extraordinary circumstances which render the member, counsel, or military judge unable to proceed with the military commission within a reasonable time.” “Good cause” under this context does not include “temporary inconveniences which are incident to moral conditions of military life.” *See id.*

instruction provided by this Commission to Learned Counsel regarding the departure of Major Hennessy. *See* Tr. at 1314. The Military Judge should inquire of counsel for Mr. Bin ‘Attash as to the reason the Commission was not informed of Lieutenant Commander Hatcher’s departure prior to learning of it in the instant Motion.

The only removal that has occurred thus far is that of Lieutenant Commander Hatcher. Beyond his departure, Learned Counsel only substantively indicates that there is the potential for the departure of Captain Schwartz if he is once again non-selected for promotion or, if he is selected, that he may undergo a permanent change of station in the summer of 2016. This Commission should resist dealing with possibilities that are out of its control. If either of these prospects come to fruition, the Chief Defense Counsel should be prepared to detail a new military defense counsel as a replacement. Without clarity as to what the future holds for Captain Schwartz, it is impossible to address his situation. At least three possibilities exist: (1) he may be required to leave by the end of the year; (2) he may receive orders to change duties a year from now; or (3) he remains until this case concludes. If he is separated for failure to promote, he can request to represent the accused in his post-separation status as a military reservist. *See e.g.*, 10 U.S.C. Sections 12301, 12303; Air Force Instruction 36-2115, ¶1.19 (“Twice Deferred Reserve Officers. Officers separating from [active duty] may request unit or [individual mobilization augmentee] assignment by submitting a request for a waiver. . . .”). Quite simply, Learned Counsel cannot request this Commission to act on circumstances where the situation has not entirely developed and other courses of action have not been explored. Until such time, this Commission should appropriately decline to intervene on this matter, and other matters like it.

6. Conclusion

This Commission previously recognized the need for continuity of counsel. *See* AE 283B, Ruling. The Prosecution is equally cognizant. In the past, the Convening Authority has assisted in obtaining extensions of service where its assistance has been requested. The

Defense has cited no authority, and the Prosecution is aware of none, that provides for any of the requested relief in the instant motion. The Accused is represented by Learned Counsel and three detailed counsel. Going forward, should any of the detailed counsel face conditions that contemplate a severance of an existing attorney-client relationship, Learned Counsel should raise that issue as soon as practicable so that the Military Judge can conduct the appropriate and timely inquiry. There must be a proper transition of counsel. Defense Counsel should not have let Lieutenant Commander Hatcher's departure happen in the manner in which it occurred. All counsel and the Military Judge share responsibility to ensure that the record of trial in this case properly reflects the reasons for severance of an existing attorney-client relationship.⁵ The Defense Motion to Compel Provision of Adequate Representation and Ensure Continuity of Counsel should be denied.

7. Oral Argument

The Commission should deny the defense request for oral argument under Military Commissions Trial Judiciary Rule of Court 3.9 as oral argument is not necessary to resolve the Motion.

8. Witnesses and Evidence

At this time, the Prosecution does not rely on any witnesses or evidence to support this Response.

9. Additional Information

At this time, the Prosecution does not rely on additional information to support this Response.

⁵ It should be noted that the participants of this Commission were properly noticed of the severance of an attorney-client relationship as recently as 6 and 9 February 2015. On those dates, the Commission was properly notified of the release of Lieutenant Commander Kevin Bogucki from Mr. Binalshibh's Defense Team and was able to inquire on the record as to the basis. *See* AE 346 (RBS); Tr. at 8248. Further, the Court was noticed of the appearance of Major Alaina Wichner as his replacement. *See* Tr. at 8249.

ATTACHMENT A

