

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY**

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD,
WALID MUHAMMAD SALIH MUBARAK
BIN 'ATTASH,
RAMZI BIN AL SHIBH,
ALI ABDUL AZIZ ALI,
MUSTAFA AHMED ADAM
AL HAWSAWI

AE355B(WBA)

Defense Reply to Government Response to
Defense Motion to Compel Provision of
Adequate Representation and Ensure Continuity
of Counsel

Date Filed: 15 April 2015

1. Timeliness: This Reply is timely filed.

2. Law and Argument:

A. Necessity of Civilian Defense Counsel

The Prosecution on the instant case is afforded the virtually-limitless resources of the Department of Justice and the Department of Defense. Yet, the Prosecution argues that Mr. bin 'Atash can effectively defend his life before this Commission with the use of two lawyers, only one of whom has any complex criminal defense experience. The Prosecution has a vested interest in denying resources to Mr. bin 'Atash's defense – it eliminates obstacles and paves the way for an easier conviction and a death sentence untested by the adversarial system. In this case born out of the largest criminal investigation in the history of the United States, involving hundreds of thousands of pages of classified and unclassified discovery and countless potential witnesses and experts dispersed throughout the world, the Prosecution suggests that Mr. bin 'Atash utilize the services of a constantly-rotating skeleton crew composed of the bare minimum

required in every case under the Military Commissions Act (regardless of the case's scope, complexity, and longevity). *See, e.g.*, AE355A(GOV) at 5 (“[w]hile the Accused in this case enjoys substantial rights to counsel, Learned Counsel for Mr. Bin ‘Attash [sic] now requests more.”); *Id.* at 4 (concluding that Mr. bin ‘Atash has “more [counsel] than that required.”).

The Prosecution's Response focuses on the numerical baseline minimums established in the Military Commissions Act – baselines for every capital case, regardless of complexity. The Commission must ignore such transparent attempts to leave Mr. bin ‘Atash virtually defenseless and instead focus on what is actually required to sustain an effective capital defense in a case lasting many years. The Military Commissions Act and the law applicable in article III courts speak of “minimum” rights to “at least” a certain number of attorneys; what will be required on any particular case will vary from case to case. *See* 10 U.S.C. § 948a(b)(2)(C); 10 U.S.C. § 949c(b); 18 U.S.C. § 3005. The Prosecution's claim that Mr. bin ‘Atash can defend his life before this capital Military Commission utilizing a minimal number of defense counsel, most of whom are constantly rotating and many of whom are entirely unqualified to perform capital defense work, is absurd. The Prosecution's objection to additional civilian defense counsel is particularly troubling given the Prosecution's ability to draw at will from the civilian ranks of the most experienced prosecutors in the United States – the Department of Justice. The Prosecution's disingenuous motivations are demonstrated by the Prosecution's concurrent objection to the basic protections against involuntary severance of the attorney-client relationship requested in AE355(WBA) with respect to detailed military defense counsel.

The Prosecution argues that Mr. bin ‘Atash is adequately represented without evincing any understanding of what is required of Mr. bin ‘Atash's defense team. Alternatively, the Prosecution argues that “[t]here is no authority for compelling the federal government to expend

additional funds where there are other available avenues” – the “other available avenues” remain unspecified but are presumably military defense counsel detailed by the Chief Defense Counsel. AE355A(GOV) at 6. The Prosecution’s claim that the Commission lacks authority to compel the appointment of additional Department of Defense civilian defense counsel is at odds with the Prosecution’s earlier position on this issue. For example, in response to a past request for appointment of additional civilian defense counsel by Mr. Hawsawi, the Prosecution indicated that such appointment was “within the Court’s discretion.” AE30A at 1. The Prosecution’s Response merely states the obvious: there is no authority that *requires* the Government to provide additional civilian defense counsel on every case (just as there is no authority that requires a psychologist or physician or ballistics expert on every case).

Mr. bin ‘Atash is entitled to the “raw materials integral to the building of an effective defense.” *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). In this case, both Learned Counsel and the Chief Defense Counsel have determined that such “raw materials” include the provision of additional civilian defense counsel unencumbered by the military personnel system, and the Chief Defense Counsel, who is responsible for “facilitat[ing] the proper representation of all accused referred to trial before a military commission,” has informed the Convening Authority of this requirement. R.T.M.C. § 9-1(a)(2); *see also* R.T.M.C. § 9-4. Upon receiving such a request from counsel or from the Chief Defense Counsel, it is the Convening Authority’s responsibility to ensure that resources necessary for a fair trial are made available to Mr. bin ‘Atash. R.T.M.C. § 2-3(a)(10). Where the Convening Authority fails to act, it is well within this Commission’s authority to compel the Convening Authority to fund the creation of additional civilian defense counsel billets for Mr. bin ‘Atash’s defense team – a benefit recently afforded to the Trial Judiciary itself.

The Convening Authority's support of a request placed by the Trial Judiciary for additional experienced and qualified civilian counsel has, in recent days, focused attention on the Convening Authority's multiple past denials of similar requests placed by Mr. bin 'Atash and by the Office of the Chief Defense Counsel. The Chief Defense Counsel has informed counsel that one Department of Defense civilian defense counsel will be made available to Mr. bin 'Atash, and the process of filling this position has only just begun. This grudging, incomplete, and as-yet unfulfilled accommodation does not render this portion of Mr. bin 'Atash's motion moot. Considerable uncertainty remains regarding this putative single civilian defense counsel position, the provision of a single DoD civilian defense counsel does not provide the full relief requested in AE355(WBA), and Mr. bin 'Atash's lack of legal support, set to reach a crisis-point in the coming months, cannot be adequately remedied by the perfunctory addition of a lone DoD civilian attorney to the bin 'Atash team.

B. Necessity of Measures to Protect Sanctity of Attorney-Client Relationship with Respect to Detailed Military Defense Counsel

In AE355A(GOV), the Prosecution objects to Mr. bin 'Atash's attempt to maintain his relationship with his detailed military counsel. The Prosecution opposes Mr. bin 'Atash's request that the Commission exercise its clear authority under M.C.R.E. 505(d)(2)(B)(ii) to require "good cause shown on the record" prior to involuntary severance of the attorney-client relationship. This request should be uncontroversial, as the severance of an existing attorney-client relationship without good cause is structural error mandating reversal on appeal. *See, e.g., United States v. Catt*, 1 M.J. 41, 48 (C.M.A. 1975) ("we have consistently held that the unlawful severance of an existing attorney-client relationship dictates reversal without regard to the amount of prejudice sustained."). The Prosecution cites *United States v. Hutchins*, 69 M.J. 282

(C.A.A.F. 2011) for the proposition that “[i]n 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.” AE355A(GOV) at 7. *Hutchins* is inapposite to the situation presented in this case. *Hutchins* involved mere “oversights and omissions in addressing the issue of severance on the part of defense counsel” – a severance requested by the defense counsel himself – and did not involve “any decision by the military judge to deny pertinent relief requested by the defense...” *Id.* at 292. This case is the polar opposite. The relief at issue here seeks to prevent severances imposed by the Government, not requested by defense counsel, and in this case (unlike *Hutchins*), Mr. bin ‘Atash has requested relief at the trial level.

The Prosecution’s claim that the involuntary severance of long-standing attorney-client relationships in a capital case amounts to nothing more than, at most, a harmless “procedural error” demonstrates a naïve “plug and play” philosophy where, in the Prosecution’s view, the Chief Defense Counsel can simply “detail a new military defense counsel as a replacement.” AE355A(GOV) at 8. However, this claim is both legally and factually untenable.

Legally, the law is clear: defense counsel “are not fungible items” and an accused “is absolutely entitled to retain an established relationship with counsel in the absence of demonstrated good cause.” *United States v. Baca*, 27 M.J. 110, 119 (C.M.A. 1988). The Commission has acknowledged the sanctity of this relationship on multiple occasions, noting that “[o]nce an attorney-client relationship is formed and once [the attorney] appears before the commission, the only person, absent good cause, who can release that person is the accused.” *Tr.* at 1314. Any effective attorney-client relationship must be based on a certain level of trust and understanding. “A defendant...must have confidence in the attorney who will represent him

or her.” *United States v. Nichols*, 841 F.2d 1485, 1502 (10th Cir. 1988); *see also Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981) (describing “basic trust between counsel and client” as the “cornerstone of the adversary system.”). Mr. bin ‘Atash is entitled to the services of not just any military lawyer detailed by the Chief Defense Counsel, but of those defense counsel with whom he has developed a level of trust and confidence. When these defense counsel are severed from the case, the Chief Defense Counsel cannot simply impose new counsel upon Mr. bin ‘Atash (even if the Chief Defense Counsel had the resources to do so). “The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant – not an organ of the State interposed between an unwilling defendant...In such a case, counsel is not an assistant, but a master...” *Faretta v. California*, 422 U.S. 806, 820 (1975).

Factually, the Prosecution’s Response ignores reality. Even if continuity, trust, confidence, experience, and institutional knowledge were not critical factors, the Chief Defense Counsel does not possess the resources to regularly place new, unconflicted defense counsel (military or civilian) on the bin ‘Atash defense team. The Office of the Chief Defense Counsel has been and continues to be significantly understaffed. The Office of Chief Defense Counsel presently is at 61% manning for military attorneys, and at any given time all or nearly all attorneys are assigned to other cases, many presenting direct conflicts with Mr. bin ‘Atash. Within a matter of months, the Office of Chief Defense Counsel expects to be at no better than 45% manning – a figure that may drop as low as 35% based upon additional potential involuntary personnel actions. The Chief Defense Counsel has repeatedly requested additional military assets both from the Convening Authority and the military departments (most recently raising the issue directly with the Convening Authority on 2 April 2015), but the United States

has failed to provide necessary and requested resources. No solution to the Office's worsening personnel shortfall is on the horizon.

Because the Prosecution can offer no reasoned legal or factual opposition to Mr. bin 'Atash's basic and uncontroversial request for additional support and for support unencumbered by involuntary military personnel actions, the Prosecution instead attempts to distract attention from the merits of Mr. bin 'Atash's request by accusing counsel of failing to follow appropriate rules with regard to the departure of LCDR Hatcher.¹ *See, e.g.,* AE355A(GOV) at 7-8 (“[n]either Lieutenant Commander Hatcher, nor any other member of Mr. Bin 'Attash's [sic] Defense Team, informed the Military Judge of Lieutenant Commander Hatcher's impending departure, despite ample opportunity to do so...The Military Judge should inquire of counsel for Mr. Bin 'Attash [sic] 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 Prosecution's assertion that the Commission and the Prosecution were not informed of LCDR Hatcher's departure is false. LCDR Hatcher was required by the United States Navy to separate from the Office of the Chief Defense Counsel by 31 January 2015, not 1 April 2015 as suggested by the Prosecution. LCDR Hatcher received his separation orders on 22 October 2014. On a prior occasion, counsel had, through tremendous effort, been able to forestall the Navy's involuntary severance of LCDR Hatcher's attorney-client relationship with Mr. bin

¹ The Prosecution additionally suggests that the defense has failed to comply with the Commission's rules regarding detailed military defense counsel who have not appeared on the record before the Commission. *See* AE355A(GOV) at 4 n.1; *Id.* at 6 n.3 (requesting that the “Military Judge conduct a hearing on the record to determine if this officer's [impending] demobilization is with the consent of the Accused.”). This Commission has previously indicated that counsel are not required to enter a formal appearance with the Commission or exchange detailing documents unless counsel will be signing pleadings or speaking before the Commission. *See generally Tr.* at 4142. The Commission has consistently distinguished between detailed military defense counsel and “counsel of record.” For example, on 27 February 2014, Mr. bin 'Atash requested that the Commission reschedule the August 2014 hearings based upon the anticipated absence of detailed military defense counsel who had not entered an appearance before the Commission. AE2363D(WBA) at 3. The Commission responded by indicating that “[i]n that he is not a counsel of record, the presence of [detailed defense counsel] at the August session is neither required nor a matter of concern for the Commission at this time.” AE263F at 3.

‘Atash by pursuing multiple avenues and aided by filing a motion with the Commission. *See* AE305(WBA). In the most recent instance, LCDR Hatcher had already received separation orders requiring mandatory retirement (something that the instant motion seeks to prevent in the future), and counsel were unable to convince the Navy to reverse course.

Contrary to the Prosecution’s assertion, counsel filed notice with the Commission prior to the first session of the Commission at which LCDR Hatcher would no longer be present. *See* AE305E(WBA) (filed 6 February 2015). The Commission and the Prosecution both were in possession of this Notice prior to the February 2015 hearings. In AE305E, counsel accurately noted that LCDR Hatcher would be absent because “[t]he United States Navy has forced LCDR Hatcher to retire, causing his departure from the Office of the Chief Defense Counsel.” The Notice filed by the defense reflects the fact that the departure was not a voluntary decision on the part of either LCDR Hatcher or Mr. bin ‘Atash but was simply a personnel decision of the Navy imposed on Mr. bin ‘Atash without his consent. The Notice accurately reflects the fact that LCDR Hatcher’s forced departure was without good cause, without “request of the accused,” and without “application for withdrawal by such counsel,” as required by R.M.C. 505(d)(2)(B). The Notice is not in the same format as AE346(RBS), cited favorably by the Prosecution, because Mr. bin ‘Atash will not voluntarily consent to severance of the attorney-client relationship.

In its continued attempt to undercut the effectiveness of Mr. bin ‘Atash’s defense, the Prosecution argues that the Commission is powerless to prevent the severance of the attorney-client relationship. The Prosecution is simply incorrect. Military courts have “been extremely protective of the relationship between an accused and his detailed counsel.” *United States v. Hanson*, 24 M.J. 377, 379 (C.M.A. 1987). Military judges are “tasked with insuring that courts-martial are conducted in a fair, orderly, and efficient manner,” and judges are provided with “the

authority and latitude necessary to perform this difficult job.” *United States v. Thomas*, 22 M.J. 57, 58 (C.M.A. 1986); *see also* AE350(WBA) at 29 (noting that military judges have “broad discretion” in carrying out duties when there is a nexus to the case) (quoting *United States v. Quintanilla*, 46 M.J. 37, 41 (C.A.A.F. 2001)).

In this case, the Commission possesses the broad discretion to take appropriate action. There is an absolute, direct, and indisputable nexus to the Commission, because both forms of relief requested by Mr. bin ‘Atash directly impact Mr. bin ‘Atash’s representation before this Commission. The law is clear that, under such circumstances, a military judge errs by failing to take “appropriate action to address [severance] prior to [defense counsel’s] departure from active duty...” *United States v. Hohnman*, 70 M.J. 98, 99 (C.A.A.F. 2011). This duty is particularly acute in a capital case, where “[t]he unique severity and irrevocable nature of capital punishment, infuses the legal process with special protections to insure a fair and reliable verdict and capital sentence.” *Loving v. United States*, 62 M.J. 235, 236 (C.A.A.F. 2005).

Action to protect the sanctity of the attorney-client relationship is consistent with this Commission’s past practice. Where the Commission has in the past declined to intercede in military affairs, it has done so because “the Defense has not shown [that such affairs] are within the jurisdiction of the Commission.” AE332C at 2 (declining to intercede in Mr. Hawsawi’s medical treatment). While Mr. bin ‘Atash disputes the Commission’s reasoning with respect to such decisions, the present request is far different. When the sanctity of the attorney-client relationship is at stake, the Commission has not hesitated to take action to protect the right to counsel. *See, e.g.*, AE254JJ at 2-3 (temporarily barring use of female guards during transport, concluding that while the Commission “lacks authority to engage [] issues...save as they impact on specific cases and issues properly before the Commission,” the female guards policy satisfies

the nexus because it is “alleged to interfere with the ability of Defense Counsel to see the Accused and thereby prepare for trial.”).

The Prosecution additionally suggests that Mr. bin ‘Atash’s request is not ripe and that the Commission should decline to intercede until “the situation involving Captain Schwartz is further clarified...” AE355(GOV) at 6. However, the Prosecution’s suggestion that the Commission await additional “clarification” is nothing more than an invitation for the Commission to shirk its important responsibility to ensure that Mr. bin ‘Atash’s defense is not continually hampered and set back by involuntary military personnel decisions. AE355(WBA) is not speculative; it addresses realities of military life that will impact nearly every involved Servicemember over the course of this long-lasting trial – a trial the length of which the military personnel system was not designed to accommodate. Mr. bin ‘Atash has already been forced on two occasions to endure the loss of his longest-serving defense counsel, and he is now faced with additional, inevitable losses in the near future, unless the Commission takes action. The issue is not confined to Capt Schwartz; it is structural in nature, and it is capable of repetition, making it more than ripe for this Commission’s attention. *See generally Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam) (“capable of repetition, yet evading review” exception to mootness applies where “(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.”).

For the foregoing reasons, and those set forth in AE355(WBA), Mr. bin ‘Atash requests that the Commission direct the Department of Defense and all of its subordinate components 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 severance of the attorney-client

relationship without the express written consent of both the military defense counsel and Mr. bin 'Atash or order of the Commission after the opportunity for a hearing on the matter.

Additionally, Mr. bin 'Atash requests that the Commission direct the Convening Authority to fund one additional Department of Defense civilian attorney billet (in addition to the as-yet unfulfilled billet now supposedly allotted to Mr. bin 'Atash defense team) to be assigned to Mr. bin 'Atash's defense team and to be filled by an experienced and qualified criminal defense attorney interviewed, vetted, and selected by counsel for Mr. bin 'Atash.

3. Oral Argument: Mr. bin 'Atash reiterates his request for oral argument on the subject motion.

4. Attachments:

A. Certificate of Service

//s//
CHERYL T. BORMANN
Learned Counsel

//s//
TODD M. SWENSEN
Maj, USAF
Defense Counsel

//s//
MICHAEL A. SCHWARTZ
Capt, USAF
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Attachment A

CERTIFICATE OF SERVICE

I certify that on 15 April 2015, I electronically filed the **Defense Reply to Government Response to Defense Motion to Compel Provision of Adequate Representation and Ensure Continuity of Counsel** with the Trial Judiciary and served it on all counsel of record by e-mail.

//s//
CHERYL T. BORMANN
Learned Counsel

Attachment A