MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL-HADI AL-IRAQI**	**AE 15K** **Defense Motion For A Continuance:** **4 Jan 2016**

1. **Timeliness:**

This motion is timely filed pursuant to Rule for Military Commission (R.M.C.) 906 and Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.

2. **The Motion:**

The Defense hereby respectfully moves for a continuance pursuant to 10 USC 949e, which provides that "[t]he military judge in a military commission under this chapter may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just." In this case, the Defense is requesting no less than eighteen months[1] to prepare for trial.

3. **Argument and Authority:**

I. **Reasonable Cause:** Reasonable cause for a continuance in this case is the constitutional right of the Accused's to adequate and competent representation—and to the extent that such is practicable—to the counsel of his choice. The current Defense team needs to finish fully assembling; it needs to incorporate its new Pro Bono Civilian Counsel, along with the new GS-15 civilian counsel; it needs to become familiar with the previously supplied classified and unclassified discovery; it needs to pursue and obtain further classified and unclassified discovery

[1] The Defense clarifies herewith that eighteen months is the bare minimum amount of time given the complexities of this case, the legal issues and the volume of material involved. Suffice it to say, eighteen months is an extremely optimistic estimate.

Filed with TJ
5 January 2016

from the Government; and it needs to become competent in an extremely complicated area of the law—national security law[2]—but also in a rarely practiced area of law—the international law of war—both of which are for the most part entirely new areas of practice for all the current and prospective military and some of the civilian Defense Counsel. The Defense needs to inquire into the deepest and most obscure of legal issues which affect the Accused; and it needs to explore and where possible, challenge the legality of any Government legal theory that supports its actions against the Accused, to include the extent that the President's power as a so-called "unitary executive"[3] includes the authority to unilaterally and without any restraint save his own conscience to decide when, where and how to scoop up the Accused in 2006 and hold him as a de facto prisoner (albeit using the legal euphemism "detainee") until 2015 without triggering any

[2] These areas are "rarely practiced" in the sense that since the U.S. Supreme Court ruled on *Rasul v. Bush*, 542 U.S. 466 (2004), *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006), *Boumediene v. Bush*, 553 U.S. 723, (2008), and similar cases, the state of the law is in extreme flux due to passage of and amendments to the Military Commissions Act—an entirely new statutory scheme. The Act, in its brief life, has already raised unique questions about the legality and constitutionality of several provisions—it was after all designed by Congress to overturn or limit the consequences of the Supreme Court's adverse decisions limiting the ability of two branches of the federal government to concertedly act without any balanced oversight by the third branch—the judiciary. Indeed, the most recent example, *U.S. v. al Bahlul*, pending in the D.C. Court of Appeals, addresses an arcane issue of constitutional law—the limits, if any, on the Congress's ability to "define and punish" offenses as part of the "international law of war." Other challenging and unique issues presently working their way through the system include at least three challenges to the qualifications of the Judges at the Court of Military Commissions Review—from the propriety of judicial appointments to unclean appointments and conflicts of interest or the appearance of such conflicts in the judges. The instant case, not unlike all the other past and pending cases, presents its own unique challenges and arcane, substantive legal issues—both national and international—that must first be fully and properly understood in order to be fully and properly litigated. There is simply no reason at all that the instant case will not likewise present and confront novel and unique areas of groundbreaking legal concepts, interpretation and complexities. The bottom line is that these Commissions cases are exploring new areas of the law at practically every turn. As such, if this Commission case is to be anything substantive and not simply an exercise of illusory due process, the Defense will need time to properly prepare for trial. Finally, it should not be held against the Accused—for whatever speedy trial clock is applicable, be it constitutional or statutory—that the US is burning daylight experimenting with pushing and expanding the legal limits of its own power.

[3] To the extent that such an unchecked and imbalanced exercise of unlimited executive power and authority can in fact exist at all within our federal system consisting of constitutionally checked and balanced, limited federal power, it is disturbingly reminiscent of disgraced former President Nixon's outrageous declaration on 19 May 1977 that "…when the president does it, that means that it is not illegal;" that any of the Accused's rights—be they statutory or constitutional civil rights or basic human rights—have been negatively affected by any federal government actions—especially under such extraordinary, literally unchecked executive authority so reminiscent of the Divine Right of Kings and so contrary to the Rule of Law, the Defense intends to challenge them.

substantive constitutional or statutory due process rights, such as the right to counsel, speedy trial and other substantive limits on government power, generally, if not specifically.

a. On the issue of Pro Bono Civilian Counsel, the Commission will recall that the Accused first requested civilian counsel in May of 2007 at Guantanamo Bay. The Accused has renewed that request several times since then, including on the record at his arraignment in 2014[4]. On this point, the Government has in fact conceded as much at several 802s since September, with the Prosecutor, Mr. Viti, specifically asking to address the Accused's civilian counsel issue. Most recently, as documented by this Commission in its order of 25 Nov 2015, after the Defense averred at the last 802 that the Commissions could not proceed until the Pro Bono Civilian Counsel was detailed as the Defense Counsel in the case, the Government told the Commission that it "agreed with the Defense's position concerning the Commission's inability to proceed with substantive matters."[5] The continuance is requested, in part, to allow the Accused to receive the full benefit of competent representation in preparation of (and at) trial on charges derived from an extremely complicated case in several overlapping areas of distinctly complicated law.

b. **Discovery:** On the issue of outstanding discovery, the Defense has received approximately 73,000 pages of unclassified discovery and approximately 6,520 pages of classified discovery and 163 terabytes of audio recordings [redacted] When the full turnover of discovery and the corresponding tasks will be completed is simply incalculable by the Defense.

II. **Authority:** Aside from the quote in paragraph 2, above, the Military Commissions Act

[4] Transcript of Hearing of 18 June 2014, page 6, lines 3-8.
[5] Quoted from the Commission's Order of 25 Nov 15, AE 053D.

(MCA) is itself largely silent on the issue of continuances. The Trial Judiciary Rules of Court likewise only reference "continuances" once, and that is in Rule 4.3(b)(2). "Continuances" are hardly referenced at all in the Regulation for Trial by Military Commission, being found only in Rule 17-5. Given the dearth of primary authority on this issue, it is appropriate to examine other federal practice areas for guidance on when and how continuances are to be handled.

a. The nearest most applicable federal authority is the Uniform Code of Military Justice. Rule for Court-Martial (RCM) 906, which references "continuances" as a "motion for appropriate relief" in RCM 906(1). Of particular note is the "Discussion" section to that rule, which provides in relevant part that

> "[t]he military judge should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just. Article 40. Whether a request for a continuance should be granted is a matter within the discretion of the military judge. Reasons for a continuance may include: insufficient opportunity to prepare for trial…"

The Commission should note that the language used in the MCA, § 949e, quoted in paragraph 2, above, is nearly identical to the language used in Art 40 of the Uniform Code of Military Justice.

i. **Military Justice Precedent:** The leading military justice precedent is *U.S. v. Miller*, 47 M.J. 352 (1997), which sets forth the basis for determining when continuances, which are a matter of discretion for the Military Judge, are reasonable, necessary and appropriate. When a Military Judge fails in their exercise of discretion following a reasonable request for a continuance, their decision is reviewed using an "abuse of discretion" standard. On appeal, the reviewing court will consider the following factors in deciding whether to reverse the Trial Court for abuse of discretion in denying a reasonable continuance request. The "*Miller*" criteria for abuse of discretion include:

- Surprise;
- Timeliness of the request;
- Good faith of the moving party; and
- Prior notice.

It is important to note that inconvenience to a court—the *Miller* trial court's central issue which was reversed on appeal—is not a factor that is considered, and rightly so. Justice, especially in the Anglo-American tradition, is rarely efficient, economical or speedy, especially in a case such as the instant one where an entire statutory scheme has been created in reaction to justifiable and necessary legal setbacks dealt the Government by the U.S. Supreme Court.[6] Thus, applying the *Miller* factors to the instant case, the Defense avers as follows:

1. Surprise: There has been no surprise. This request, a natural and probable consequence of the complete change in Defense Counsel and the addition of a civilian counsel, and is completely foreseeable and is timely. The original request for civilian counsel was made in May of 2007, and was known to all parties to this case. The release by the Accused of his prior Defense Team was indeed unexpected, but it is the first time that the Accused has changed his Defense Counsel and it was not done for delay or any other improper reason;[7]

2. Timeliness of the request: This request is timely given the timing of the Accused's dismissal of his entire Defense team on 22 September 15; the first Declaration of Brigadier General John G. Baker filed on 21 September 2015; General Baker's release of his Defense Team on 22 September 15; General Baker's second Declaration filed on 30 October 2015; and the initial Notices of Appearance of the three current Military Defense Counsel on 13

[6] *Rasul v. Bush*, 542 U.S. 466 (2004), *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006), *Boumediene v. Bush*, 553 U.S. 723, (2008), etc.

[7] The Defense Team is aware of prior changes to the Accused's Defense Counsel, but will not go into them at this time beyond reminding the Commission and the Government of that which they already know: the prior changes in Military Defense Counsel were done largely against the Accused's wishes. And this point doesn't address the fact that the Accused's desire for civilian counsel has been rebuffed—by the government—which includes the office of Chief Defense Counsel—(General Baker excluded) at every turn since he first requested same in during his initial interrogation at Guantanamo in May, 2007.

November 15, which was followed by the Notice of Appearance of Pro Bono Civilian Counsel, Mr. Rushforth on 21 December 15. Additional Notices of Appearance by additional Defense Counsel will be forthcoming as soon as practicable.

3. Good faith of the moving party: Even though unexpected, the Accused's termination of his prior Defense Team was not done in bad faith or to unnecessarily delay matters—it was done because the Accused thought it needed to be done because, for any number of various reasons, the Accused lost confidence in his Defense Team and asked for a change. Even the Commission saw fit to not challenge that decision and took the step of not inquiring into the specific reasons why the Accused was displeased with his prior team[8]. By declining to inquire into reasons behind the Accused's decision, the Commission treated the Accused's request to dismiss his prior Defense Team as reasonable and appropriate—it can be presumed that the Commission determined that neither inquiry nor challenge were required[9]; and

4. Prior notice: Prior notice of the need for not only civilian counsel—be it Pro Bono or otherwise—but also for the time necessary for said counsel to delve into the case and become familiar with it, has been telegraphed since practically the first day the Accused was interrogated in May 2007. As indicated in paragraph II(a)(i)(3), above, the Commission itself, by granting the Accused's *only* request to release his Military Counsel, surely had prior notice that a

[8] Transcript of Hearing, page 665, lines 14-23.

[9] In the hearing transcript, on page 664, lines 17-21, the Commissions noted a lack of "good cause" behind the Accused's release of his Detailed Military Counsel, but the lack of good cause on the record was due to a lack of inquiry. It is therefore presumed that there was "good cause" because the record is devoid any evidence that good cause was lacking. *Quod erat demonstrandum*. The recent addition to the instant case of Mr. Rushforth and the pending addition of Ms. Premal Dharia, both of whom are highly—nay—exceptionally well qualified civilian counsel, makes that lack of inquiry moot since all of the Accused's concerns appear—at this time—to have been well sated. But the simple undisputed fact of the matter is that at every turn, for one reason or another, the Accused's request for a complete, balanced, trustworthy and loyal defense team—as measured from the perspective of not only the Accused and also from the perspective of the public at large that is entitled to a system that breeds confidence in the justness of the results—has been thwarted until now. It is for those reasons—systemic as they are—that the Defense hereby respectfully puts this Commission and the government on notice that it intends throughout this litigation to challenge and receive some type of final judgment on the legality, constitutionality and propriety of the entire Commissions system—either by attacking individual steps/stages within that system or the system as a whole—as applied to the Accused, for the reasons more clearly stated in footnote 1, above.

continuance request would be forthcoming. The Defense is entitled to seek *reasonable* refuge in the obvious implications of such important Commission decisions if such is beneficial to the Accused.

ii. The *Miller* court also dealt with the issue of civilian counsel appearing in addition to detailed military defense counsel. The court stated: "[w]here a military judge denies a continuance request made for the purpose of obtaining civilian counsel, prejudice to the accused is likely." Certainly in this case, where defense counsel had so little time to prepare, it would be difficult to find harmless error." *Id.* at 359. The *Miller* court went on to note that the new civilian attorney therein, Mr. Holmes, clearly "…articulated a number of actions he would have taken at the post-trial hearing had the continuance been granted and he had represented Miller at the post-trial hearing." Thus, the court noted: "[c]onsidering those reasonable actions which were not taken and the on-the-record admission that detailed [military] defense counsel was unprepared for the post-trial hearing, we conclude that Miller was prejudiced."

1. Pursuant to the *Miller* principle, the Defense states that the following factors all militate in favor the Commission ordering a reasonable continuance—the:

a. Recent appointment of detailed and assistant military defense counsel;

b. Decision of the Chief Defense Counsel, General John G. Baker, to appoint Pro Bono Civilian Counsel to this case;

c. Recent Notice of Appearance of Pro Bono Counsel, Mr. Rushforth, in the case;

d. A forward-leaning reading of the authorizing legislation by the Chief Defense Counsel that he has the statutory authority to appoint a GS-15 civilian attorney to represent the Accused along with military defense counsel;

e. Pending hiring and Notice of Appearance of a senior, extremely qualified criminal litigator as a GS-15 civilian attorney to assist the Accused's in preparing his defense;

f. Novel and unique legal issues faced by the Commission and its personnel (arising out of a confluence of often federal domestic law and convoluted, imprecise, conflicting, nuanced and amorphous international law); and

g. Volume of the discovery, both classified and unclassified, both past and future.

iii. **Federal Civilian Court Precedent:**[10] The US Supreme Court addressed the matter of continuances in *Avery v. Alabama*, 308 U.S. 444 (1940) and *Unger v. Sarafite*, 376 U.S. 575 (1964). The Court's guidance on the issue of continuance is right on point to the present posture of this case.

1. In *Avery*, at 446, the Court discussed the right to counsel imposed upon the states by the *Fourteenth Amendment, US Constitution.* The Court, noted that:

> "Since the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to assistance of counsel. In the course of trial, after due appointment of competent counsel, many procedural questions necessarily arise which must be decided by the trial judge in the light of facts then presented and conditions then existing. Disposition of a request for continuance is of this nature and is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed."

The Court further noted that

> "…the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be

[10] In the interest of economy and brevity, the Defense only quotes the relevant federal precedent and does not analyze the quoted material or its applicability to the instant case, as the Defense respectfully submits that same is obvious.

> given the assistance of counsel[11]. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."

The Court concluded by noting that "…the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial…" are integral to the right itself. Indeed, the right to counsel is meaningless if said counsel are unprepared and therefore ineffectively represent the Accused at trial.

2. In *Unger*, at the Court echoed its prior holding as follows:

> "The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. *Avery v. Alabama*, 308 U.S. 444. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. *Chandler v. Fretag*, 348 U.S. 3. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. *Nilva v. United States*, 352 U.S. 385; *Torres v. United States*, 270 F.2d 252 (C. A. 9th Cir.); cf. *United States v. Arlen*, 252 F.2d 491 (C. A. 2d Cir.)."

III. **Military Justice and Federal Civilian Court Precedent:** Applying the foregoing precedent to the instant case, *U.S. v. Miller* is instructive, not only as to specifying the exact test a Court is to use when confronted with a continuance request, but it also dealt with the issue of delaying a case to allow for the presence of civilian counsel, despite the detailing of Military Defense Counsel. Federal civilian court precedent is also persuasive, even though those courts are not dealing with distinctions between military and civilian counsel. But the Federal Courts do face challenges dealing with reconciling the conflicting schedules of prosecutors and public defenders—the latter arguably being the civilian equivalent to Detailed Military Counsel in the

[11] Cf. *Powell v. Alabama*, supra; *Moore v. Dempsey*, 261 U.S. 86 (1923).

sense that they are provided free of charge to the Accused by the Government. Based upon foregoing U.S. Supreme Court precedent, from which it is quite clear that military courts have taken their guidance in promulgating courts-martial rules governing the granting of continuances, the Defense respectfully submits that it has adequately demonstrated that the Accused is entitled to a reasonable continuance of sufficient and reasonable duration to allow it to adequately prepare for and wage all-out forensic combat against the Government's extremely serious allegations. A reasonable continuance of the substantive matters in this case is not only reasonably requested, but reasonably necessary under the unique facts and circumstances of this case.

a. **Delay Attribution:** On the ultimate issue of attributing to the Accused any delay of the looming "speedy trial clock"—either constitutional or statutory—which may affect or even eliminate the Government's ability to legally prosecute the Accused, the Accused will be reasonable in accepting responsibility for those delays which are clearly his responsibility: specifically the delay from 22 September 2015 up through the date that his new fully assembled civilian and military defense team are read-on and have met with the Accused and formed the required Attorney-Client relationship and been able to review the voluminous discovery material. But, as referenced in footnotes 1 and 7, above, the Accused will not accept and intends to fully litigate any and all legal theories that affect or could affect his criminal liability, the forum and jurisdiction for resolving that liability, and the calculation of delays not directly attributable to him and which are the result of a system that in practical terms, has been *Kafkaesque*—even Kabuki-like—in bringing him to trial. It is well-known to both this Commission and the Government (and it is therefore undisputed) that the Accused has asked repeatedly for civilian counsel—starting the day he was first interrogated at Guantanamo in May 2007, and repeatedly since then.

i. The Accused was initially provided civilian Habeas Corpus attorneys at no expense to himself—rendered by the Federal Public Defender's office—and which lasted from 2009 to 2013. Their representation of him was terminated due to budget cuts and sequestration and his habeas petition was withdrawn without prejudice. Around the same time as the 2013 sequestration-induced budget cuts, the Federal Public Defenders turned over their representation duties to Detailed Military Defense Counsel, since charges against the Accused had finally been preferred. From a justice or due process perspective, the most distressing aspect of this scenario is that right in the middle of the Federal Public Defender's representation, 2011, COL JP Caldwell, USMC, the then-Chief Defense Counsel, responded to the Accused's written request for Detailed Military Counsel that he was not entitled to same but that he "might" be able to help him obtain civilian counsel for a habeas petition. The obvious conclusion from that exchange is that the then-Chief Defense Counsel had no idea whatsoever that the Accused was already represented by civilian attorneys and was merely seeking to assemble his legal team of both civilian and military counsel—as had been provided in all other commissions cases—and which was denied due to fiscal limitations in the MCA.

ii. Fast forward to 2013, when charges are finally preferred against the accused, he gets his Detailed Military Counsel but does not get qualified civilian counsel because the Federal Public Defender habeas counsel has withdrawn due to budget constraints driven by fiscal issues of the federal budget, known as sequestration. He raises the issue over and over again, on the record, and is rebuffed for varying reasons—most notably the MCAs limit to using civilian attorneys in a volunteer capacity or at the expense of the accused—with the latter being an utterly laughable proposition given that the Government put the Accused in a position where he lacks any resources aside from the meager beneficence available from the Government which consists of the well-known, deplorable

conditions at Guantanamo. The most recent colloquy on this issue occurred on 22 September 2015[12] and the Accused made it clear that he had neither the resources nor the ability to retain civilian counsel on his own. And it was quite clear at that time that the Accused had lost confidence in his military counsel—clear enough that the Commission determined it was unnecessary to inquire into the basis for the Accused's release of his military counsel. This lack of confidence in military counsel is quite understandable—especially when one considers that the Government expects him to trust attorneys wearing the same uniforms as the military personnel who invaded his adopted homeland, sided with an armed insurgent enemy force seeking to overthrow his country's Government and with whom he had allegedly been engaged in armed combat.

iii. There is simply no acceptable legal reason that the Accused had to wait better than a year and a half after the preferral of charges to finally have assembled a civilian/military defense team that is capable of meeting the Accused's legal challenges. The Accused has asserted on the record that he has been confined for better than seven years[13]; and the Defense further asserts that he was kept incommunicado and denied the right to counsel for the first six months following being apprehended/taken into custody by the U.S. Government;[14] and since being apprehended/taken into custody by the U.S. Government, he has repeatedly been outright denied either military or civilian counsel for various reasons;[15] he was then later provided civilian counsel for habeas purposes but denied military counsel under the MCA; he then receives military counsel but is denied civilian counsel under the MCA. Given the foregoing, and the Defense is well-aware that the federal judiciary

[12] Transcript of Hearing, page 658, line 14 through page 664, lines 7. From 16 October 2006 to 16 April 2015 is nine years.
[13] Transcript of Hearing, page 669, lines 7-14.
[14] From 16 October 2006 to April 2007.
[15] Starting in May 2007, the government has asserted at various points since its first interrogation of the Accused that "capture" or "detention" or other similar words are not synonymous with "apprehension" or "custody" in the legal sense. The Defense disputes that and asserts that the U.S. Supreme Court's myriad decisions on custody make it clear—the government can call it what it wants—but the Accused has been in the continuous custody of the government and has not been free to leave since the government took complete and total control over his life on 16 October 2006. This and other issues will be fully investigated and litigated by the Defense.

has been reluctant to treat the U.S. Government as a monolith—but the Defense is also well aware—and asks the Commissions to note—that until the federal judiciary[16] actually treats the federal Government as a single, responsible entity whose overall actions, power, authority and conduct—when taken as a whole and not as isolated individual parts—are limited by the U.S. Constitution, then the U.S. Government is going to keep using convoluted and inconsistent processes and procedures which, as a measure of objective, substantive due process, are so ephemeral as to be non-existent, as a practical matter—a legal nullity.

4. **Requested Relief/Conclusion:**

Based upon the foregoing, the Defense respectfully requests that the Accused be allowed at the very least no less than eighteen months to prepare for trial. The Commission's prior scheduling order has already been mooted by the occurrence of events beyond its (and the Government's) control and most importantly, mostly beyond the control of the Accused, who is confined—trapped if you will—at Guantanamo without any ability whatsoever to engage in any self-help. The Accused must rely entirely upon the diligence of others to arrange for his representation and their preparation for trial. His team of representatives as presently configured are all new to the case, new to the unique areas of the law at issue in this case, new to having the requisite security clearances and most importantly, new to all the facts and the myriad, legal arcana that are an unavoidably part of this and the related cases.

5. **Conference Statement:** The Defense spoke at length about the need for a continuance with one of the prosecution team leads, Mr. Felice Viti, at approximately 1800, on 29 December 2015. The Defense spoke again with LTC David Long at 1500 on Wednesday, December 30, 2015. Mr. Viti followed up with an e-mail on Friday, 1 Jan 2016, clarifying the Government's position

[16] Which includes this Commission, even though it is an Article II body—which itself raises significant separation of powers concerns.

as follows: it had no objection to a continuance to allow Mr. Rushforth to be "detailed" as "lead" counsel. The Defense responded with an e-mail on Saturday, 2 January 2016, advising that the Defense was aware of the Government's clarified position and would discuss it and advise. The Defense followed up on Monday, 4 Jan 2016 with an e-mail and the parties held another teleconference at about 1430 that same day.

a. As a preliminary matter, the Government has no objection to an initial continuance during which time no substantive[17] matters will be addressed while Mr. Rushforth is brought into the case and ready to fully, competently and diligently litigate this matter. The Government limits its lack of objection to an initial continuance for the following purposes: 1) allow Mr. Rushforth to obtain his security clearance; and 2) for him to meet with the Accused to form an attorney client relationship.

b. The Government does in fact object to a continuance for the purposes of bringing any Department of Defense attorney onto the Defense Team. Mr. Viti stated that he believed that after Mr. Rushforth has obtained his security clearance read-ons and has met with the Accused, the prosecution and the Defense could at that time confer over the need for an additional continuance of substantive matters. Mr. Viti did state that the Government intends to object to any attempt by the Defense to "...attribute any and all delay resulting from the Accused's knowing and voluntary decision to terminate the attorney-client relationship with his prior counsel..."

c. The Defense and the Government agree that at a minimum, an interim continuance should be granted wherein all substantive proceedings are delayed until such time as Mr. Rushforth is read-on to the appropriate security clearance programs and has meet with the Accused. The

[17] An exchange of discovery material, being non-substantive, and other non-substantive matters, will be pursued by the parties during this continuance.

Defense and the Government are at odds over—and the Government does object to—the need for a continuance to allow Ms. Dharia, as Department of Defense attorney, to become fully immersed and read-on to the team[18].

d. Finally, the Defense and the Government are at odds over the amount of delay involved and against whom said delays—and the reasons therefore, either in whole or in part—should be attributed, and which will inevitably be litigated in the future.

6. **Attachment:**

A. Affidavit of Brent Rushforth, Pro Bono Civilian Counsel

B. Certificate of Service.

Respectfully Submitted,

//s//
ROBERT T. KINCAID, III
Major, USA
Detailed Defense Counsel

//s//
WENDALL HALL,
Major, USA
Assistant Detailed Defense Counsel

/s//
KEITH B. LOFLAND,
Lieutenant Commander, JAGC, U.S. Navy
Assistant Detailed Defense Counsel

[18] On this issue, the Defense simply points to the foregoing federal case law governing the effective assistance of counsel. Expeditiousness in trying a case to the detriment of an Accused's substantive due process rights is legally and constitutionally impermissible. It is the Defense position that there is simply no reasonable legal reason to grant a continuance for one new attorney to become prepared diligently and competently represent the Accused, but to simultaneously deny a continuance to another new attorney who has the same professional obligations vis a vis the client as does the first attorney to whom there is no objection. Accordingly, the Defense asks that the Government's limited objection be promptly overruled.

ATTACHMENT A

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL-HADI AL-IRAQI**	**Exhibit to AE 15K** **Defense Motion For A Continuance:** **4 Jan 2016**

AFFIDAVIT OF MR. BRENT RUSHFORTH

~~State of~~ DISTRICT of Columbia)
CITY OF) SS:
~~County of~~ WASHINGTON)

Before me, the undersigned notary public, this day, did personally appear Brent Rushforth, an individual known to me, who, being duly sworn according to law, deposes and states the following:

I, Brent Rushforth, have filed of record my Notice of Appearance as Pro Bono Civilian Counsel, following my due designation as such by the Chief Defense Counsel, Brigadier General John G. Baker, USMC. Although I have filed my appearance with this Commission, I affirmatively state under oath the following:

1. That as of this date, I have only been able to review a few hundred pages of documents, consisting mostly of public documents, such as unofficial transcripts and pleadings on file with the Commissions, along with the various rules and regulations governing the proceedings;
2. I have not, however, been able to participate in any substantive preparations for litigation, due mostly to my lack of the necessary security clearances. I have not reviewed a single classified document, of which I understand that there are presently approximately 6,500 pages. Neither have I been able to review any of the 73,000

pages of unclassified documents which, although unclassified, are still not available to me for various security policy reasons. Nor have I been able to access other discovery on various meet with the client, Mr. al-Hadi al-Iraqi;

3. I have met with each of the military personnel currently comprising the Defense Team, both lawyer and non-lawyer, and both officer and enlisted. But I have only been able to engage in extremely limited preparation for litigation and much more time is needed given the novel issues of law intrinsic to this case; the sensitive national security implications; the extremely complicated procedures for accessing to not only the evidence but also for contacting and meeting with my client.
4. Once my security clearance is approved, I will be able to undertake those mandatory, minimum, professional and legal obligations to my client, from document review to document preparation to discovery requests and discovery responses, etc.
5. I have also met with Ms. Premel Dharia, the soon-to-be-hired GS-15 Civilian Counsel, and she will also need the same consideration in getting up to speed with not only the law, but the evidence in this case, and I will need her hiring and processing onto the Defense Team to be expedited so that the two of us can fully, competently, professionally and responsibly prepare to litigate this complex, novel case.

Further, you Affiant sayeth naught.

Dated 4 January, 2016, at 2:03 o'clock, P .m.

Brent Rushforth

Subscribed and sworn to before me this 4th day of January, 2016.

Notary Public

(SEAL) My Commission Expires: 11-14-16

MICHAEL NEWTON
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires November 14, 2016

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ATTACHMENT B

CERTIFICATE OF SERVICE

I certify that on 4 Jan 2016, I filed AE 15K with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//
ROBERT T. KINCAID, III
Major, USA