

UNCLASSIFIED//FOR PUBLIC RELEASE
**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

ABD AL HADI AL-IRAQI

AE 015L

Government Response
To Defense Motion for a Continuance

19 January 2016

1. Timeliness

The Government timely files this response pursuant to Military Commissions Trial Judiciary Rule of Court (“R.C.”) 3.7.d.(1).

2. Relief Sought

The Government respectfully requests that the Commission deny the Defense Motion for a Continuance in its current form. Should the Commission grant a continuance, the Government respectfully requests that it be initially granted only until such time as Mr. Brent Rushforth, retained *pro bono* Civilian Defense Counsel, has obtained the appropriate security clearances necessary to represent the Accused.¹ The Government further respectfully requests that any additional continuance necessary to insure Mr. Rushforth is adequately prepared following his obtaining the required clearances be litigated at a later date, should the circumstances warrant it. Finally, the Government respectfully requests that any delay associated with the Accused’s recent exercise of his right to representation by civilian counsel at no expense to the United States and the detailing of new military counsel following the Accused’s release of his previously detailed military counsel be excluded for purposes of the speedy trial protections of Rule for Military Commissions (“R.M.C.”) 707(a)(2).

¹ The Defense misstates the Government’s position in subparagraph a. of the “Conference Statement” portion of its motion.

3. Overview

The Government does not oppose a continuance until such time as Mr. Rushforth, *pro bono* Civilian Defense Counsel, has completed the required security clearance process. Depending on how long that process takes, an additional continuance may be warranted at that time, but those issues, including the length of any such additional delay, are not yet ripe. Therefore, the Government opposes the Defense's blanket request² for a continuance insofar as it extends beyond the period necessary for Mr. Rushforth to obtain the appropriate clearances required to represent the Accused. The Accused already accepted and agreed not to object to delay associated with procuring him a new defense team. AE 053A, Enclosure (1). R.M.C. 707(a)(2) contemplates that any such reasonable delay granted by the military judge is excludable delay.

4. Burden of Proof/Persuasion

As the moving party, the Defense has the burden to demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

² As a threshold matter, it is not entirely clear to the Government what the Defense is requesting in this motion. Typically a motion for continuance is specific to a scheduled session (or sessions) of court. As discussed, *supra*, there are currently three sessions of the Commission scheduled in this case, but the Defense has not moved the Commission to continue any of them, either individually or *in toto*. Read in conjunction with the Commission's order, AE 053D, it is reasonable to conclude that the Defense is requesting to continue only the currently scheduled April 2016 and May 2016 sessions. However, the Defense's motion avers that the Defense will be ready for trial in "no less than eighteen months," which the Defense later characterizes as "an extremely optimistic estimate." AE 015K at 1. Indeed, since the only relief the Defense repeatedly requests in its continuance motion is "at least eighteen months to prepare for trial," the only reasonable inference is that the Defense anticipates, optimistically, being ready for trial in eighteen months. Should the Defense's optimism prove accurate, eighteen months from the date of the motion members could be empaneled and trial could begin. Either the Defense anticipates no further pre-trial litigation (unlikely, given Footnote 9 of its motion) or ignores the realities of scheduling litigation, to include pre-trial scheduling milestones to address issues the Defense wishes to raise pre-trial. If the Defense is inexplicably using the phrase "ready for trial" synonymously with "ready for pre-trial litigation" and is actually seeking an eighteen month delay before resuming pre-trial litigation, the Government opposes such an unreasonable request.

5. Facts³

The Accused was arraigned on 18 June 2014. During that hearing, the Military Judge discussed in detail with the Accused his right to counsel. The following relevant colloquy occurred between the Military Judge and the Accused:

MJ [CAPT WAITS]: Mr. Hadi, pursuant to the Manual for Military Commissions, the court has been notified or the commission has been notified that you are represented by Lieutenant Colonel Chris Callen and Major Robert Stirk, who are your detailed defense counsel. Do you understand this?

ACC [MR. AL HADI]: Yes, Your Honor, I understand that, but I would like to say something here, that I am in need of *another*⁴ civilian lawyer because of what's going on between Afghanistan and Iraq, and because it's very destructive from your government. So I would like to know that because my understanding that my lawyer will be leaving in several weeks.

Unofficial/Unauthenticated Transcript at 6 (emphasis added). The Military Judge discussed in great detail the Accused's right to civilian counsel, including the requirements in order for the Accused to be represented by civilian counsel. *Id.* at 7-9. The Accused indicated he understood his rights to both military and civilian counsel and that he had no questions about those rights "[f]or the time being" *Id.* at 9.

The colloquy continued:

MJ [CAPT WAITS]: Okay. So I will ask you at this time, Mr. Hadi, do you desire to be represented by Lieutenant Colonel Callen up until the 30th of September, and by Major Robert Stirk?

³ Instead of including a facts section in its motion for continuance, as required by R.C. 3.7.c.(3) and 3.10.a., the Defense opted to make a number of irrelevant accusations and arguments which the Government will not address in this response. Should the Defense choose to re-assert such claims in other motions for which they might bear some relevance, the Government will address those claims at that time, if merited. In the absence of a facts section by the party bearing the burden of persuasion, the Government will address facts it believes are relevant to the motion.

⁴ The Accused's reason for using the word "another" here is unclear. The Defense may now assert that he was referring to having been previously represented by a civilian counsel in his habeas proceedings. Ignoring for the moment that a petition for writ of habeas corpus is a civil matter, the more reasonable reading here in light of the Accused's reference to his then-current attorney, LTC Callen, "leaving in several weeks" is that the Accused simply wanted replacement counsel, and perhaps did not fully understand the distinction between military and civilian counsel at this point, as the Military Judge had not yet explained the difference. Regardless, as discussed *supra*, the Accused elected not to be represented by civilian counsel at that time.

ACC [MR. AL HADI]: Yes, I do.

MJ [CAPT WAITS]: At this time, do you want to be represented by *any other qualified counsel*, either military or civilian?

ACC [MR. AL HADI]: Not for the time being. Maybe later.

Id. at 9-10 (emphasis added).

At the next session of the Commission, 15 September 2014, the Military Judge reminded the Accused of his earlier rights advisement regarding counsel. *Id.* at 21. The Commission also memorialized an averment by the Defense that the Accused had “not proceeded with any effort to retain civilian counsel, which [he] mentioned at the arraignment.” *Id.* at 23. The Accused indicated he had no questions about his rights to counsel, but added that he thought civilian counsel would be “helpful to [his] defense team.” *Id.* The Military Judge, after again explaining the Accused’s right to civilian counsel, stated, “[I]f you desire to retain civilian counsel, that’s a matter that you need to take up with your detailed military counsel to pursue that option for you.” *Id.* The Accused replied, “Good.” *Id.*

On 7 May 2015, the Commission issued AE 015G, setting forth the hearing schedule for September 2015 through May 2016. On 25 November 2015, the Commission issued AE 015J amending two of the three remaining scheduled hearings from AE 015G.

On 22 July 2015, after the Commission denied the Defense request to continue the hearing, the Accused “temporarily” released his Detailed Defense Counsel, LtCol Thomas F. Jasper, USMC, and his Assistant Detailed Defense Counsel, Maj Robert B. Stirk, JA, USAF. Unofficial/Unauthenticated Transcript at 640, 643. On 22 September 2015, the Accused permanently released LtCol Jasper and Maj Stirk. AE 053A, Notice of Excusal of Defense Counsel. In his request to release LtCol Jasper and Maj Stirk, the Accused expressly stated, “I understand if my request to excuse both Lieutenant Colonel Jasper and Major Stirk is approved

that it may take the Chief Defense Counsel a significant period of time to provide me [sic] fully qualified defense team. I do not object to this delay.” *Id.*, Enclosure (1).⁵

On 22 September 2015, the Accused, for the first time in over a year, referenced civilian counsel on the record, only in response to questions by the Military Judge as specifically requested by the Government. Unofficial/Unauthenticated Transcript at 650, 658. In response to the Military Judge’s questions, the Accused stated that he did not have the means to hire civilian counsel and was not aware of civilian counsel willing to work *pro bono*. *Id.* at 659. The Accused conceded that civilian counsel at no expense to the United States was not an option currently available to him, but seemed satisfied that the CDC was pursuing a Department of Defense (“DoD”) employed civilian counsel. *Id.* at 660-663. The Military Judge explained to the Accused, and the Accused acknowledged, that procuring DoD-employed civilian counsel would not, “for that reason alone,” delay the proceedings. *Id.* at 662-663.

On 22 September 2015, MAJ Robert T. Kincaid III and MAJ Wendell Hall, JA, USA, were assigned by the CDC to the “Hadi al Iraqi team,” but not yet detailed to represent the Accused. AE 053C, Attachment B. Also on 22 September 2015, MAJ Kincaid’s clearance process was completed, and he met with the Accused on 23 September 2015. *Id.* On 1 October 2015, LCDR Keith Lofland, JAGC, USN was assigned to the “Hadi al Iraqi team,” but was not yet detailed to represent him. *Id.* On 2 October 2015, MAJ Hall received the necessary clearances to represent the Accused. *Id.* On 20 October 2015, LCDR Lofland received the necessary clearances to represent the Accused. *Id.* According to the CDC, on 24 October 2015, MAJ Kincaid was detailed to represent the Accused.⁶ *Id.* From 24-26 October 2015, MAJ

⁵ The Government assumes, based on the facts contained in Enclosure (1), that the Chief Defense Counsel (“CDC”) informed the Accused of the clearance process required for a civilian counsel and the delay resulting from that process.

⁶ MAJ Kincaid had previously signed at least three pleadings as “Assistant *Detailed* Defense Counsel”—AE 045B, AE 049J, and AE 051A—beginning as early as 30 June 2015. (Emphasis added.)

Kincaid, MAJ Hall, and LCDR Lofland met with the Accused multiple times.⁷ *Id.* On 30 October 2015, MAJ Hall and LCDR Lofland were detailed to represent the Accused. *Id.*

From 18-30 October 2015, the Deputy Chief Defense Counsel (“DCDC”) had a number of meetings with the Accused regarding *pro bono* civilian counsel. *Id.* On 30 October 2015, the Accused selected his *pro bono* civilian counsel. *Id.* On 13 November 2015, the Defense informed the Commission that the Accused “*will be exercising his right* to be represented by a civilian counsel at no expense to the United States.” AE 053C (emphasis added). In a telephonic R.M.C. 802 conference on 18 November 2015, the Defense informed the Commission that the identity of the *pro bono* civilian counsel was Mr. Rushforth.⁸ On 4 December 2015, the CDC identified an additional civilian counsel to be hired as a DoD employee and assigned to represent the Accused pursuant to Regulation for Trial by Military Commission (“R.T.M.C.”) 9-

⁷ As the Commission is aware, the Defense has previously drawn the distinction between being “internally assigned” by the CDC to the Accused’s case for the purpose of obtaining the necessary clearances, and being detailed to represent the Accused. “Detail” is a specific term of art in military practice, and in the attorney context establishes the authority to form an attorney-client relationship. *See, e.g.*, JAGINST 5803.1E, ¶6.a. (“[A]ttorneys will not establish attorney-client relationships with any individual unless detailed, assigned, or otherwise authorized to do so by competent authority.”). The source of concern for the Government is AE 053C, Attachment B, dated 30 October 2015, but filed 13 November 2015. Attachment B claims MAJ Hall and LCDR Lofland were detailed four days after their last meeting with the Accused. AE 053C claimed fourteen days later that each attorney had *already formed* an attorney-client relationship with the Accused. Unless the current detailed military defense counsel met with the Accused again after 30 October 2015 and before 13 November, the Accused’s attorney-client relationship with all three counsel must have been formed during the 24-26 October meetings. Thus, if the earlier “internal assignment” did not grant the authority to form an attorney-client relationship, the relationships for two of the three attorneys were formed without authority as they pre-dated the detailing for both MAJ Hall and LCDR Lofland. This in an important issue for a number of reasons, as it would backdate when the Accused was actually represented by counsel and is indicative of the Defense’s attempt to be opaque with respect to representation. It also would explain why MAJ Kincaid, an experienced defense counsel well familiar with the detailing process, repeatedly held himself out as “Assistant *Detailed* Defense Counsel” for several months prior. (Emphasis added.) To clarify, the Government is not attempting to pierce the veil of communications with the Accused regarding his counsel and their attorney-client relationship. Rather, given the myriad of issues regarding representation thus far in this case and to protect the record, the Government respectfully requests that the Commission clarify in whatever means it deems appropriate what authority to form an attorney client-relationship existed when.

⁸ In this conference, the CDC informed the Commission that he had identified two *pro bono* civilian counsel, Mr. Rushforth, and a second counsel from Baltimore, MD whose identity the Government does not know.

1.a.5. AE 053H. The same day, the DCDC initiated the security clearance process for the DoD civilian attorney. *Id.* On 8 December 2015, the CDC qualified Mr. Rushforth as able to represent the Accused, in accordance with R.T.M.C. 9-5. *Id.* The same day, the DCDC initiated the security clearance process for Mr. Rushforth requesting expedited processing. *Id.*

As of the date of this filing, the Government has produced to the Defense approximately 26,000 pages of unclassified discovery, 16,000 pages of classified discovery (just under half of which Mr. Rushforth can view with his current level of clearance), and 7 terabytes of additional materials.⁹

6. Law and Argument

R.M.C. 906(b)(1) squarely addresses motions for continuances. Not surprisingly, this rule and its discussion are virtually identical to Rule for Courts-Martial (“R.C.M.”) 906(b)(1). The discussion for both rules states, “The military judge should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just.” As the Commission acknowledged in its order, the Government agreed with MAJ Kincaid’s averment in the 18 November 2015 R.M.C. 802 conference that, pursuant to R.M.C. 906(b)(1), the Commission could not proceed on substantive matters until *pro bono* civilian counsel (identified in that conference as Mr. Rushforth) “was detailed as lead defense counsel.” AE 053D.

The Accused’s right to be represented before a military commission is established in R.M.C. 506. When that right takes effect is established by R.M.C. 503 which provides that “[a]s soon as practicable after charges are sworn . . . defense counsel shall be detailed . . .” R.M.C. 503(c).

Interestingly, the Accused’s rights to counsel before a military commission differ slightly from the Accused’s rights to counsel before a court-martial. The court-martial rule provides that

⁹ The Defense claimed in its motion that the Government had provided 73,000 pages of unclassified discovery, 6,520 pages of classified discovery, and 163 terabytes of other material. While the Defense underestimated the pages of classified discovery, it errantly tripled the pages of unclassified material actually received and significantly overestimated the amount of digital data by more than twenty times.

the Accused “has the right to be represented by civilian counsel if provided at no expense to the Government, *and either* by the military counsel detailed under Article 27 *or* military counsel of the accused’s own selection, if reasonably available.” R.C.M. 506(a) (emphasis added). The military commission rule provides that the Accused “has the right to be represented before a military commission by civilian counsel if provided at no expense to the Government, by military counsel detailed under R.M.C. 503, *or* by military counsel of the accused’s own selection, if reasonably available.” R.M.C. 506(a) (emphasis added). Thus, in a court-martial, the accused has the right to *pro bono* civilian counsel *and* one or the other type of military counsel. The Secretary of Defense, in promulgating R.M.C. 506(a), chose to deviate from R.C.M. 506(a) and changed the list to use only the disjunctive pronoun. The most basic tenets of statutory construction suggest that the modified rule grants the Accused in a military commission the right to only civilian counsel *or* one of the other type of military counsel. However, given that the Accused has now identified *pro bono* counsel, and given the Military Judge’s explanation of the Accused’s rights to the Accused, the Government believes the most prudent course of action is to allow the Accused to exercise his right to *pro bono* civilian counsel, regardless of the status of the other counsel representing him.

I. The Accused Has Never Unequivocally Invoked His Right to Civilian Counsel at No Expense to the Government.

The Defense’s repeated mischaracterization of the Accused’s right to civilian counsel being “denied” or “rebuffed” by the Government¹⁰ is demonstrably false and undermines the rest of the Defense’s arguments.

Previous Defense Counsel made a similar allegation in a motion to suppress based on alleged violations of Miranda and the 5th Amendment of the U.S. Constitution. AE 045. In that

¹⁰ The Defense’s grouping supervisory defense counsel under the umbrella of “the Government” for purpose of alleging government malfeasance may not seem unusual to the casual civilian observer, but it is an utterly foreign concept in the military system. *See* AE 015K, Footnote 7. That defense counsel and supervisory defense counsel are employed by the government does not make them government actors, even if acting negligently. Otherwise ineffective assistance of counsel claims would be attributable to “the Government.”

motion, the previous Defense team conflated the act of the Accused's asking *about* his right to counsel with the act of actually requesting counsel. The new Defense team in the current motion makes the same conflation.¹¹ In response to the Accused's question to Federal Bureau of Investigation agents about his right to counsel, the agents' statement to the Accused were consistent with R.M.C. 503.

Additionally, the Defense ignores the Accused's own words at arraignment when the Accused stated unequivocally that he did not wish to be represented by civilian counsel "for the time being," adding, "Maybe later." Unofficial/Unauthenticated Transcript at 10. The Defense motion inaccurately claims that the Accused requested civilian counsel at arraignment, but was rebuffed by the Government.

Rather than rebuffing the Accused's interest in civilian counsel, the Government specifically asked that the Commission clarify with the Accused his wishes regarding civilian counsel given his dissatisfaction with his military counsel and the Government's desire that any representation issues be resolved once and for all. As recently as 13 November 2013, even the Defense characterized the Accused's position on civilian *pro bono* counsel as an intent to exercise that right in the future, versus a past, unequivocal invocation. AE 053C ("Additionally, Mr. al Iraqi *will be exercising* his right to be represented by a civilian counsel at no expense to the United States.") (emphasis added).

II. Any Initial Continuance Granted Should Only Be Until Mr. Rushforth Receives His Appropriate Clearances.

As referenced in the Defense's conference statement, there was much discussion about the use of the term "lead counsel" as it seems the Defense is now retreating from the averment made in the 18 November 2016 R.M.C. 802 conference that Mr. Rushforth would be detailed as

¹¹ For a more fulsome discussion of those issues, see AE 045A.

lead defense counsel. Whatever the case, it seems once Mr. Rushforth has completed the clearance process, he will be detailed to represent the Accused in some capacity.¹²

In the interim, the Accused is represented by three fully qualified and cleared military defense counsel. Understanding that there is a significant amount of discovery to digest, the military defense counsel will obviously need time to prepare, even if there were not a *pro bono* civilian counsel coming on board. While Mr. Rushforth is awaiting his clearance, the Accused's military counsel can still meet with their client, review the entire record, and begin to review both classified and unclassified discovery.

R.M.C. 906(b)(1) clearly contemplates multiple continuances for discrete periods as necessary. Once Mr. Rushforth is fully cleared, the parties can address the reasonableness of any request for the next discrete period of delay. The Defense's blanket 18-month continuance request, if that is what the Defense is requesting, is unsupported in the record by any facts equaling reasonable cause to grant such a request.

III. The Delay Resulting From a Reasonable Continuance While Mr. Rushforth Obtains the Required Clearances is Simply Excludable Delay, Not Attributable to Either Party.

Even assuming the Accused did not already consent to the delay, or (more precisely) promise not to object to delay resulting from the granting of his request, the Defense cites no rule, statutory or otherwise, to justify its request.

¹² The Defense makes repeated reference in its motion to the inbound DoD civilian counsel, presumably Ms. Premal Dharia, needing time to prepare/be integrated. As the Commission had previously made clear, the Accused does not have a statutory right to be represented by a DoD civilian counsel. Unofficial/Unauthenticated Transcript at 662-663. Rather, it is a discretionary decision by the CDC pursuant to his authority under R.T.M.C. 9-1.a.5. Despite the Commission already informing the Accused, and the Accused agreeing, that DoD civilian counsel preparation would not delay the case, the Defense again ignores the record and the Commission's instruction in an apparent attempt to obfuscate the issues. Additionally, similar rationale would apply to the unnamed, additional *pro bono* civilian counsel, since the Accused clearly does not have the right to multiple *pro bono* civilian counsel. Additional *pro bono* civilian counsel could represent the Accused, but such representation would not be a basis for additional delay.

R.M.C. 707(c) states, “All other pretrial delays approved by the military judge under (b)(4) of this rule . . . shall be excluded when determining whether any time period in section (a) of this rule has run.” Continuances specifically fall under R.M.C. 707(b)(4).

The Defense is conflating Article 10, Uniform Code of Military Justice (which does not apply to a military commission) with Rule 707 in either system. Again, a review of R.C.M. 707 is instructive. (Emphasis added.) As the military’s highest court explained,

[t]he current version of R.C.M. 707 [since 1991] focuses on whether a period of time is excludable because a delay has been granted, which is in contrast to the prior version [1984] that focused on a determination as to which party was responsible for the delay. Under R.C.M. 707(c), all pretrial delays approved by the [appropriate] authority are excludable so long as approving them was not an abuse of . . . discretion. It does not matter which party is responsible.

United States v. Lazauskas, 62 M.J. 39, 41 (C.A.A.F. 2005) (citations omitted) (emphasis added).

As previously stated, even if delay were attributable to one party or another, the Accused expressly agreed not to object to the delay resulting from his voluntary choice to release his counsel—a choice which apparently, at least according to the Defense, should have been based on more robust inquiry by the Commission as to good cause. Presumably, the Defense is not blaming the Government for the Accused’s decision not to object since that decision was made after consulting with the current CDC.

7. Conclusion

For the reasons stated above, the Government opposes the Defense motion in its current form. The Government does not oppose a continuance until such time as Mr. Rushforth obtains the required clearances and can be detailed to represent the Accused. At that time, the parties can litigate any additional requests for delay, and the reasonableness of the length of such additional delay will depend on how long that process takes and other facts not yet known. By rule, delay resulting from the granted continuance is excludable.

8. Oral Argument

The Government desires oral argument.

ATTACHMENT A

Filed with TJ
19 January 2016

Appellate Exhibit 015L
Page 13 of 14

