

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

UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI	AE 020W RULING Defense Motion To Withdraw AE 020 Without Prejudice 9 August 2016
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1. On 1 June 2016, the Defense requested to withdraw AE 020 due to the “total change in the Accused’s Defense Team.” (AE 020U at 1). The Defense argued,

As a result of the foregoing events, the possible defense theories, strategies and courses of action have changed considerably—not only due to the complete replacement of Defense Counsel—but especially in light of the Government’s failure to comply with the commission’s order to produce the entirety of discovery to the Defense no later than 1 September 2014, and its failure to respond to the Defense’s 12 April 2016, Supplemental Discovery Requests. The current Defense Team expects additional changes to the Defense’s theories, strategies, and courses of action will be required once the Government finally fulfills its discovery obligations. (AE 020U at 2).

The Government response requested the Commission deny the Defense request, in part. (AE 020V at 1). The Government stated they did not object “to the Defense withdrawing that portion of AE 020 that was not ruled on by this Commission, namely the issue of whether this Commission has *in personam* jurisdiction over the Accused.” (AE 020V at 1). The Defense did not file a reply. The Commission heard argument on this motion on 12 July 2016 at U.S. Naval Station, Guantanamo Bay, Cuba.¹

2. Through their pleading and oral argument, the Defense indicated their intent to refile a motion related to the subject matter of AE 020. The Defense argues that discovery was not complete at the time AE 020 was submitted, argued, and ruled upon, the Commission should grant their

¹ See Unofficial/Unauthenticated Transcript of the *US v. Abd al Hadi al-Iraqi* Motions Hearing (Transcript) Dated 12 July 2016 from 11:46 A.M. to 12:16 P.M. at pp. 864–82.

request to withdraw without prejudice.² Additionally, the Defense argues the recent decision in *RJR Nabisco, Inc. v. The European Community*, 136 S. Ct. 2090 (2016) is justification to grant their motion to withdraw. Rule for Military Commissions 905(f) permits a military judge to reconsider any ruling, other than one amounting to a finding of not guilty, prior to the authentication of the record of trial. If a party wishes a court to revisit a previous ruling, it must show an intervening change in controlling law, new evidence, or a need to correct clear error, or to prevent manifest injustice. *United States v. Libby*, 429 F. Supp. 2d 46, 46–47 (D.D.C. 2006). Allowing a party to withdraw a ruled upon motion, and later refile a motion on the same issue, is functionally equivalent to a request for reconsideration. To prevail on a motion for reconsideration based upon new evidence, the Defense must show that any new evidence is actually relevant to the Commission's ruling. While new law is another potential basis for reconsideration, the Defense must demonstrate that any new law is relevant to the Commission's decision. The Defense has not met its burden on these bases, nor has it demonstrated a need to correct clear error or to prevent manifest injustice. Changes in the Accused's legal team and potential strategies are not justifications for withdrawal or reconsideration of a ruled upon motion. However, a party may generally withdraw without prejudice a motion that has not been argued or ruled upon.

3. The law-of-the-case doctrine “expresses the practice of courts generally to refuse to reopen what has been decided” *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (quoting *Messenger v. Anderson*, 225 U.S. 436, 444). In AE 020B, the Commission denied the Defense request to dismiss for failure of the Government to conduct a hearing pursuant to Article 5 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, and to order a proper

² During oral argument, the Defense made several references to classified evidence being presented ex parte to the Commission at a 505(h) hearing. (See Transcript at 871 and 877). An ex parte session occurred on 17 November 2014, the same day AE 020 was argued, but this session was unrelated to AE 020.

authority to convene a competent tribunal to conduct such a hearing to determine the Accused's status. (AE 020B at 1). Furthermore, the Commission found it is a competent tribunal to determine *in personam* jurisdiction over the Accused. Finally, the Commission found the Defense raised the issue of *in personam* jurisdiction and directed a future hearing to allow the Government an opportunity to prove *in personam* jurisdiction. (AE 020B at 1–2). This hearing has not taken place and the Commission has not heard argument or ruled on the issue of *in personam* jurisdiction.³

4. The Defense request to withdraw the portion of AE 020 already ruled upon by the Commission is **DENIED**. The Defense's unopposed request to withdraw without prejudice the challenge to *in personam* jurisdiction raised by AE 020 is **GRANTED**. As there is no longer a challenge to the Commission's *in personam* jurisdiction over the Accused, the hearing directed in AE 020B and AE 020D is **CANCELLED**. All outstanding motions in the AE 020 and AE 036 series are **MOOT**. The Government is directed to withdraw the remaining outstanding motions related to the *in personam* jurisdiction hearing or submit pleadings to justify why they are not moot NLT 26 August 2016.

So **ORDERED** this 9th day of August, 2016.

//s//
J. K. WAITS
CAPT, JAGC, USN
Military Judge

³ The Government has taken substantial steps in preparing for this hearing, including submission of evidence. (*See* AEs 035–043). However, they do not object to the Defense's request to withdraw this challenge.