

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

ABD AL HADI AL-IRAQI

AE 035B**Government Reply**To Defense Response To Government
Motion *In Limine* To Consider Evidence
During Preliminary Matters and To Admit
Evidence for Trial On the Merits

7 May 2015

1. Timeliness

This reply is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.e.(2).

2. Background

Between 21 and 22 April 2015, the Government filed nine Motions *In Limine* listing numerous items of evidence for the Commission to consider when determining whether the Government has proved this Commission properly exercises *in personam* jurisdiction over the Accused, as well as when assessing any motion to suppress the Accused's statements to law enforcement, and requested the Commission admit the same items into evidence for the trial on the merits. See AE 035 – AE 043. The Defense filed nine virtually identical Responses to the Government's Motions *In Limine* on 1 May 2015. See AE 035A – AE043A.

3. Law and Argument

In its Responses to the Government's Motions *In Limine*, the Defense opposes the admission of any evidence presented by the Government without the Government first laying the "necessary and appropriate foundations" for each piece of evidence and establishing the evidence is not inadmissible hearsay. AE 035A – AE 043A at 1. The Defense further asserts that the Government has not established that "the interests of justice" allow a pretrial hearing, outside of the presence of the members, for the purposes of pre-admitting evidence for the trial on the

merits. AE 035A – AE 043A at 1, 3. The Defense Responses misapprehend the Government’s proposed course of action, as well as the relief the Government seeks.

During the Commission’s pretrial hearing to determine whether it exercises *in personam* jurisdiction over the Accused and to address any motion to suppress the Accused’s statements to law enforcement, the Government will present the witnesses and other evidence detailed in its Motions *In Limine* to provide appropriate background and context to allow the Commission to properly assess each item of evidence listed in the Motions *In Limine* for the purposes of *in personam* jurisdiction and suppression of the Accused’s statements. By doing so, the Government will present the Commission with sufficient facts to find that each item is also admissible for trial on the merits.

As described more fully below, and in the Government’s nine Motion’s *In Limine*, the Government’s proposed course of action provides numerous benefits for the Commission, the panel of members, and the Accused.

I. It Is Appropriate, and in the Interests of Justice, for the Commission To Admit Evidence as a Preliminary Matter Pursuant to Military Commission Rules of Evidence (“M.C.R.E.”) 104(a) and (c) and Rules for Military Commissions (“R.M.C.”) 906(b)(11)

The Government’s nine Motions *In Limine* simply invoke the Commission’s gatekeeper function by asking the Military Judge to determine whether the items of evidence listed therein are admissible prior to their presentation to the panel of members. *See* M.C.R.E. 104 (“Preliminary questions concerning . . . the admissibility of evidence . . . shall be determined by the military judge.”); R.M.C. 906(b)(11) (identifying “[p]reliminary rulings on the admissibility of evidence” as an appropriate pretrial motion).

Contrary to the Defense assertion (*see* AE 035A – AE 043A at 3), the interests of justice favor a pretrial hearing to consider the admissibility of evidence outside the presence of the panel of members. Conducting pretrial hearings safeguards the members from hearing inadmissible evidence, avoids unjustified expense and delay, maximizes predictability, minimizes surprise, and provides advance notice to the Defense, allowing them to know what evidence it will need to

confront at trial. *See* R.M.C. 906(b)(11), Discussion (explaining “the purpose of [a motion to pre-admit evidence] is to avoid the prejudice which may result from bringing inadmissible matters to the attention of court members. Whether to rule on an evidentiary question before it arises during trial is a matter within the discretion of the military judge.”); *see also* M.C.R.E. 102 (mandating that the M.C.R.E. be construed to eliminate unjustifiable expense and delay and to ensure that the truth may be ascertained and proceedings justly determined).

The Government agrees with the Defense that “[p]re-admission by the Commission will not foreclose the defense’s right to attack the weight and credibility of the evidence before the members or the defense’s right to argue, by establishing facts through witness testimony, before the members” AE 035A – AE 043A at 3. Both M.C.R.E. 901(b) and 104(e) allow the Defense the opportunity to challenge the weight of the evidence before the panel of members during the trial on the merits. Though the Government may not call every foundation and authentication witness at trial on the merits, the Government will call a universe of foundation and authentication witnesses at trial sufficient to provide the panel of members with background and context for each of the items of evidence. The Defense will have the opportunity to cross examine those witnesses before the panel of members. Further, the Defense may call any additional relevant and necessary foundation and authentication witnesses at trial on the merits should the Defense find the Government’s witness list omits a witness it wishes to question. *See* R.M.C. 703(b)(1).

The Defense failed to identify any authority that prevents the Commission from admitting the subject evidence at a pretrial hearing once the Government has laid the proper foundation. Indeed, all relevant authority holds to the contrary. *See* AE 035 at 13. Additionally, the Defense failed to identify any authority to support their claim that the Government is always required to lay a full foundation for a piece of evidence in the presence of the members for every piece of evidence they seek to introduce, and that the testimony required to establish the proper foundation “should occur during the trial itself.” *See* AE 035A – AE 043A at 2.

For these reasons, the Government's proposal is consistent with the interests of justice. The preliminary admissibility of the items of evidence is a matter completely within the Commission's discretion and not appropriate for the members' consideration. *See* M.C.R.E. 104(a); *see also* AE 035 at 13-14.

II. The Government Will Prove the Items of Evidence are Authentic, Relevant, and Not Inadmissible Hearsay

The Government further agrees that it bears the burden to establish the authenticity and relevance of any item of evidence it seeks to admit for trial on the merits. *See* AE 035 – AE 043 at 2. As explained in the Government's nine Motions *In Limine*, the Government will lay the "necessary and appropriate foundations" (*see* AE 035A – AE 043A at 1) for each item of evidence listed therein by a preponderance of the proof through witness testimony and other evidence. *See* AE 035 – AE 043.

Moreover, as discussed in greater detail in AE 035 – AE 043, none of the items of evidence the Government seeks to admit for trial on the merits is hearsay because each is the Accused's own statement (*see* M.C.R.E. 801(d)(2)(A)); is "a statement by a co-conspirator . . . [made] during the course and in furtherance of the conspiracy; . . ." (*see* M.C.R.E. 801(d)(2)(E)); is otherwise "able to be admitted under the rules of evidence applicable in trial by general courts-martial..." (*see* M.C.R.E. 803(a)); or is admissible pursuant to M.C.R.E. 803(b)(2).¹ *See* AE 035 – AE 043.

4. Conclusion

For the reasons stated above and those stated in the Governments Motions *In Limine*, it is in the interests of justice for the Commission to consider each item of evidence in AE 035 through AE 043 when determining whether the Government has proved this Commission properly exercises *in personam* jurisdiction over the Accused, as well as when assessing any

¹ The Defense raised issue of hearsay generally in its relief requested (*see* AE 035A – AE 043A at 1); however, it makes no further mention of the issue nor offers any argument to suggest the proffered items of evidence are, in fact, hearsay.

motion to suppress the Accused statements, and to admit each item into evidence for trial on the merits after the Government properly authenticates the evidence, proves its relevance, and demonstrates it is not inadmissible hearsay during the pretrial hearing.

5. Witnesses and Evidence

The Government does not anticipate relying on any witnesses or evidence in support of this Reply, except for the witnesses and evidence identified in the Government's Motions *In Limine*. AE 035 – AE 043.

6. Attachments

A. Certificate of Service, dated 7 May 2015.

Respectfully submitted,

 //s//

Mikeal M. Clayton
Trial Counsel
LTC David J. Long, JA, USA
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Office of the Chief Prosecutor
Office of Military Commissions

ATTACHMENT A

Filed with TJ
7 May 2015

Appellate Exhibit 035B (al Hadi)
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CERTIFICATE OF SERVICE

I certify that on the 7th day of May, 2015, I filed **AE 035B, Government Reply To Defense Response To Government Motion In Limine To Consider Evidence During Preliminary Matters and To Admit Evidence for Trial On the Merits**, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//

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Office of the Chief Prosecutor
Military Commissions