

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

UNITED STATES OF AMERICA

v.

ABD AL HADI AL-IRAQI

AE 051B

Government Response
To Defense Motion To Continue the 21
September 2015 Hearing

14 September 2015

1. Timeliness

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

2. Relief Requested

The Government respectfully requests that the Commission deny the Defense Motion for a Continuance. The Government further respectfully requests that the Commission specifically inquire of both the Accused and Defense Counsel what steps, if any, have been taken to explore retaining a civilian counsel, as originally mentioned by the Accused in June of 2014, and again mentioned by the Accused in September of 2014. The Government further respectfully requests that the Commission order the Chief Defense Counsel (“CDC”) or a supervisory counsel the CDC designates to be present for the currently-scheduled September hearing for the purpose of providing advice to the Accused, if he desires it, as to the quality of representation by his currently detailed counsel for the purpose of informing the Accused’s decision on counsel. The Government further respectfully requests that the Commission require the Accused to make a firm election, on the record, on whether or not to restore LtCol Thomas F. Jasper, Jr., USMC and

¹ The Defense conferenced the proposed motion on Friday, 11 September 2015 at 1441, Eastern Daylight Time (“EDT”). R.C. 3.5.k. requires the opposing party be provided a minimum of 24 hours to concur or object with the requested relief. R.C. 3.6 specifically excludes the weekends from time computation. R.C. 3.6.a., c. The Defense filed its motion at 0848 EDT, 14 September 2015. Even assuming the conference requirements of R.C. 3.5.k. do not exclude the weekend, as discussed *infra*, the filed motion contains two substantive changes from the motion as conferenced.

Maj Robert B. Stirk, JA, USAF to full representational duties. If the Accused chooses not to restore his counsel or refuses to make an election, the Government respectfully requests the Commission find good cause to excuse both counsel from further action in the case, order the CDC to execute such excusal, and request the CDC to assign new military counsel and assist the Accused in obtaining civilian counsel, should the Accused desire it. The Government further respectfully requests the Commission again ask the Accused on the record whether he intends to elect his right to be represented by civilian counsel at no expense to the United States. Finally, should the Commission deny the Defense Motion for a Continuance, the Government respectfully requests further guidance on which issues the Commission anticipates addressing during the September hearing.

3. Overview

The Government opposes the Defense Motion for Continuance. The Commission has twice ruled that LtCol Jasper and Maj Stirk are free of any conflict previously alleged by the Defense, thus advice to the Accused by “independent” civilian counsel is unnecessary as to the alleged, but non-existent, conflict with his current counsel. Unofficial/Unauthenticated Transcript (“Tr.”) at 634 (22 July 2015); Appellate Exhibit (“AE”) 049I at 7. The Commission has repeatedly advised the Accused over the course of several months of his rights to counsel, specifically: detailed military counsel, military counsel of his own selection provided that counsel is reasonably available, and civilian counsel at no expense to the United States. Tr. at 5-10 (18 June 2014); Tr. at 22-23 (15 September 2014). Presumably, his currently-detailed, conflict-free counsel have also repeatedly advised the Accused on his rights to counsel. “Independent” civilian counsel is no more qualified to advise the Accused on his rights to counsel than the Commission or his currently-detailed, conflict-free counsel. Thus, a continuance to afford the Accused the opportunity to consult “independent” counsel is completely unnecessary. A request to continue the upcoming September hearing simply to explore the possibility of hiring civilian counsel to represent him along with his currently-

detailed, conflict-free military counsel is also completely unnecessary and unsupported by procedural rule or law.

4. Facts

At a Rule for Military Commission (“R.M.C.”) 802 conference on 19 July 2015, as summarized by the Commission, LtCol Jasper opined that “his investigation into the facts and research into the ethical canons may necessitate the *detailling of an independent counsel* to advise his client *on the issue of conflicts of interest of Lieutenant Colonel Gleason and conflicts of interest of his currently detailed defense team.*” Tr. at 609 (22 July 2015) (emphasis added). At the 22 July 2015 hearing, LtCol Jasper stated that his client “is requesting . . . at the very least he be given the *opportunity of conflict-free counsel, someone outside of OCDC, someone not wearing the uniform*, that can give him *independent advice on this particular conflict matter.*” Tr. at 621 (emphasis added). LtCol Jasper further stated,

I don't even know how they are going to view that *conflict* and whether they want to *waive the conflict* or what Hadi al-Iraqi is going to *decide* after hearing from Lieutenant Colonel Gleason. And, again, we are asking for an *independent counsel to come in and advise*. This is a man from a foreign country in a foreign system. These are complex legal issues, very complicated for lawyers to understand. A lot of gray in this area. And to ask for a reasonable amount of time to flesh it out even further and *ensure that he is getting conflict-free counsel* is paramount before going forward at all.

Tr. at 625 (emphasis added).

Not until after the Commission ruled that no conflict existed with LtCol Jasper or Maj Stirk and that the July hearings would continue as scheduled (Tr. at 638) did the Accused “temporarily” excuse his counsel by stating, “I do not want Colonel Jasper to represent me, nor . . . Major Stirk.” Tr. at 639. After consulting with counsel, the Accused then clarified by stating, “I do not want to confer with Colonel Jasper nor with Major Stirk, at least temporarily, until I have an option for independent counsel. I do not want to be represented – I don't want them to represent me at this time.” Tr. at 640. After subsequent questioning by the Commission, the Accused consented to LtCol Jasper and Maj Stirk attempting to arrange a meeting with LtCol Sean M. Gleason, USMC, as requested by the Accused, and also consented to LtCol Jasper and

Maj Stirk filing notices with the Commission as to the results of any such conversations with LtCol Gleason. Tr. at 643-644.²

On 28 August 2015, the Commission ruled, contrary to repeated representations by the Defense, that LtCol Gleason, was properly excused from representing the Accused on 31 May 2013. AE 049I at 3, 7. The Commission ordered LtCol Jasper and Maj Stirk to inform the Accused of the Commission's ruling and to inform the Commission via written notice, not later than 11 September 2015, as to "whether Mr. Hadi al Iraqi has restored the Defense's full scope of representational duties." AE 049I at 7.

On 11 September 2015, the Defense, including MAJ Kincaid, filed AE 049J, informing the Commission that the Defense had informed the Accused via letter of the Commission's ruling. The Defense further stated that they attempted to meet with the Accused on 9 September 2015, but the Accused declined the meeting. AE 049J at 1. In the same filing, bearing all three counsels' signatures, the Defense reminded the Commission that the Accused "has not restored the Defense's full scope of representational duties."³ *Id.* (emphasis in original). The Defense further stated, "*As Mr. Hadi al Iraqi stated in court*, on the record, he continues to desire independent civilian legal counsel prior to making a decision regarding representation," citing the Tr. at 640.⁴ *Id.* (emphasis added).

² At the time of the July hearings, MAJ Robert T. Kincaid, III, JA, USA, was apparently detailed to represent the Accused, as his digital signature appeared on AE 045B, filed 30 June 2015. *The Government has never received a letter, notice, or pleading from any appropriate authority detailing MAJ Kincaid to the Accused's case.* On information and belief, MAJ Kincaid had not formed an attorney client relationship with the Accused by the time of the July hearings, and may still not have done so, pending the required clearance process.

³ Indeed, in AE 049E, the Defense filing, signed only by LtCol Jasper and Maj Stirk, asserted that the Defense did not have "standing" to even file an objection to a motion filed by LtCol Gleason.

⁴ This assertion by the Defense is inaccurate. Nowhere on page 640 of the transcript, nor indeed anywhere on the record during the July hearings did the Accused personally ask for independent "civilian" legal counsel. However, as discussed, *supra*, LtCol Jasper made repeated references to "independent" counsel and at least one reference to the accused's desire to consult "someone not wearing a uniform" specific to the conflict issue.

5. Law and Argument

As a threshold matter, it is not clear that the Defense has “standing” (as they previously phrased it) to request a continuance. The scope of their representation was limited, per the expressed desires of the Accused, to communicating with LtCol Gleason and then the Commission concerning communications with LtCol Gleason. Tr. at 643-644. The Defense acknowledges they communicated the Commission’s order to the Accused via legal mail as ordered by the Commission, but were unable to meet with the Accused due to his declining to meet them. Thus, it is not clear that the Accused has expanded the scope of their representation to include authority to request a continuance.⁵ If the Accused did, in fact, expand the scope for this purpose, it highlights the gamesmanship⁶ the Accused is attempting to employ regarding his counsel rights.

⁵ Even assuming MAJ Kincaid is, in fact, authorized to file a motion on behalf of a client he may or may not have yet met and with whom he may or may not have formed an attorney-client relationship, LtCol Jasper’s and Maj Stirk’s signatures also appear on the present motion for continuance, begging the question of whether the Accused expanded their scope of representation.

⁶ To further demonstrate the Defense’s gamesmanship, the conferenced version of the motion by the Defense offered as the sole rationale for a continuance the Defense’s efforts in “attempting to facilitate the hiring of a civilian attorney to *independently counsel* Mr. Hadi al Iraqi *regarding his rights to both representation by military counsel and civilian counsel.*” Attachment B at 2 (emphasis added). The filed version of the motion modified the language from “attempting to facilitate the hiring of” to “is hiring,” but added “and [sic] if Mr [sic] Hadi al Iraqi so chooses, represent him along with military counsel throughout the trial.” AE 051A at 2. It is possible that between nearly 1500 on Friday and 0800 the following Monday, the Defense identified a civilian defense counsel with the requisite qualifications willing to work at no expense to the United States, as implied by the change. If so, the Government applauds the Defense’s successful, albeit overdue, efforts. That still does not explain adding the entirely separate (and somewhat stronger) rationale of possible ongoing representation by civilian counsel without re-conferencing the motion. Regardless, as discussed, *infra*, a continuance is not warranted even if the Accused has already retained such a civilian counsel.

I. The Accused Has No Right To Consult With “Independent Civilian Legal Counsel” Concerning the Issue of an Alleged Conflict.

There is no conflict. There never was a conflict with respect to LtCol Jasper or Maj Stirk. The Defense Motion for Continuance is a thinly-veiled attempt at delay for delay’s sake. The “temporary” firing of his counsel in July was the only way the Accused could delay that hearing, having lost on the issue of the alleged conflict, with the Commission then ready to proceed.

As previously stated, on 11 September 2015, the Defense, on behalf of the Accused re-asserted the Accused’s in-court expression of his desire to consult “independent civilian legal counsel” Yet, *every single reference* by the Accused or his counsel during the July hearing to consulting independent counsel, in whatever form, was *specific* to the issue of the alleged conflict. Despite having lost on the issue of an alleged Defense team conflict, the Accused continues to seek “independent counsel” to advise him on the issue of the alleged conflict. The Defense’s attempt to re-characterize the Accused’s July requests for independent counsel as a broader desire to “make a decision regarding representation” beyond the conflict issue is a fiction.

If the Accused were truly dissatisfied with the quality of his current representation, he would have fired them outright, rather than “temporarily” excusing them. Rather, it was a last-ditch effort to delay, having lost on the conflict issue and faced with proceeding with the July hearing. Alternatively, the Accused was free to consult with his counsels’ supervisory counsel if he was concerned about the quality of representation he has received. The Accused remains free to speak with supervisory counsel, in order to make a final determination on whether or not to restore LtCol Jasper and Maj Stirk to “full representational duties.” Indeed, Rule 9-1.a. of the Regulation for Trial by Military Commission (“R.T.M.C.”) requires the CDC to “supervise all defense activities and the efforts of detailed defense counsel . . . and facilitate the proper representation of all accused referred to trial before a military commission” R.T.M.C. 9-1.a.2.

The R.T.M.C. also authorizes the CDC to “structure the [command] to include subordinate supervising attorneys who may incur confidentiality obligations in the context of fulfilling their supervisory responsibilities with regard to defense counsel.” R.T.M.C. 9-1.a.7. The CDC may have already done that, given that Mr. Billy L. Little, Jr. previously served as the Acting CDC, and may be designated as the Deputy CDC with authority to act under R.T.M.C. 9-1.a.7. If the CDC has not already designated such a subordinate supervisory attorney, it should be a very simple matter for him to do so, and that person could easily advise the Accused regarding his current representation. The R.T.M.C. further provides that the CDC “*shall* take appropriate measures to ensure that each detailed defense counsel is capable of zealous representation and unencumbered by any conflict of interest.” R.T.M.C. 9-1.a.9.

Clearly, these regulations provide for supervision of detailed counsel and, just like military practice, afford an Accused dissatisfied with his detailed representation to seek advice from his detailed counsel’s supervisory attorney, in addition to requesting Individual Military Counsel or hiring civilian counsel. Accordingly, the Government respectfully requests the Commission order the CDC or his designee pursuant to R.T.M.C. 9-1.a.7. to be present during the currently-scheduled September hearing for the purpose of providing any advice to the Accused regarding the performance of his detailed counsel which may inform his decision to restore them to full representational duties.

II. The Commission Has Repeatedly Advised the Accused of His Rights To Counsel, and the Accused Has Repeatedly Expressed That He Understands His Rights To Counsel. A Request for a Continuance in Order To Seek a Civilian Attorney To Further Explain Counsel Rights the Accused Has Already Stated Numerous Times He Understands Is Disingenuous.

The Accused clearly has a right to be represented by civilian counsel, in accordance with R.M.C. 506(a). As previously stated, the Commission has repeatedly advised him of that right. Indeed, the Accused twice indicated interest in obtaining civilian counsel well prior to the July hearings. At his arraignment, the Accused stated that he was “in need of another civilian counsel” Tr. at 6 (18 June 2014). Given the anticipated excusal of LTC Christopher Callen, JA, USA, the lead Defense Counsel at the time, the Commission acknowledged it was “probably

prudent” to have other counsel, “military or civilian.” Tr. at 7. After explaining to the Accused his rights to counsel, including, in great detail, his right to civilian counsel, the Commission asked the Accused, “At this time, do you want to be represented by any other qualified counsel, either military or civilian?” Tr. at 10. The Accused responded, “Not for the time being. Maybe later.” *Id.*

On 15 September 2014, the Commission again explained to the Accused his rights to counsel. Tr. at 22-23. The Accused stated that he had no questions about his right to counsel, “but as far as a civilian attorney, I feel that he will be helpful to my defense team.” Tr. at 23. The Commission specifically advised the Accused that “if you desire to retain civilian counsel, that’s a matter you need to take up with your detailed military defense counsel to pursue that option for you.” *Id.* The Government respectfully asks this Commission to inquire of both the Accused and Defense counsel what actions to obtain civilian counsel have been taken in the last fifteen months since the Accused first mentioned on the record an interest in obtaining civilian counsel, to include whether any civilian defense counsel approached the Defense or their agents expressing interest in representing the accused, and whether the Defense communicated such interest to the Accused. Depending on the Defense’s answers to the Commission, representations made by the Defense to the Government following the January hearing may become relevant.

III. Should the Accused Obtain Civilian Counsel to Represent Him in Accordance with R.M.C. 506(a), a Continuance, at this Phase, Is Still Not Warranted.

To be clear, the Government in no way wishes to impede the Accused’s right to be represented, at no expense to the United States, by civilian counsel before this Commission. That is not what the Defense has requested. The Defense seeks to delay the proceeding so that the Accused can consult with “independent” civilian counsel on the issue of his rights “to representation by military counsel” (AE 051A at 2), “prior to making a decision regarding

representation”⁷ (AE 049J at 1). Re-styling the request now as an additional possibility “if he chooses” of having a civilian counsel “represent him along with military counsel throughout the trial” is a red herring. Should the Accused or the Defense choose to follow up on the matter about which the Accused has twice inquired over the last fifteen months, the Government is prepared to offer any assistance it can. However, the responsibility to administer the civilian defense counsel pool and assist the Accused in obtaining civilian counsel rests solely with the CDC, pursuant to R.T.M.C. 9-1.a.12.

The Government concedes that even with an already-identified, qualified civilian counsel, the process to secure the appropriate clearances and other necessary pre-requisites for that civilian counsel to actually represent the Accused could be a lengthy one. The same is true for counsel representing the Government.

However, even if this civilian counsel had already been retained and cleared, R.M.C. 805(c) clearly authorizes the Commission to proceed in his absence. The rule requires at least one qualified counsel, which might be satisfied solely with the presence of MAJ Kincaid. *But see* Note 2, *supra*. The Discussion under R.M.C. 805(c) does state that “ordinarily” no proceeding should take place without all defense counsel present, unless the Accused consents. The Discussion continues, however, stating, “The military judge may, however [sic] proceed in the absence of one or more defense counsel, without the consent of the accused, if the military judge finds that, under the circumstances, a continuance is not warranted and that the accused’s right to be adequately represented would not be impaired.”

As discussed during the telephonic R.M.C. 802 conference held on 1 September 2015 between all parties, the Government anticipated very few substantive issues being litigated during the September hearings. Principally, the Government requested to have the Accused’s election regarding LtCol Jasper and Maj Stirk be placed on the record. Litigating the outstanding

⁷ Reading the AE 049J request from 4 days ago in conjunction with the motion filed yesterday is not only reasonable, given that the request was never withdrawn, but logical, given the language of the motion conferred the same day the AE 049J request was filed.

Miranda motion, AE 045, and some Military Commission Rules of Evidence 505 issues were also discussed as possible “add-ons” to more efficiently use the Commission’s time. However, if those “add-ons” create a circumstance where a continuance *would* be warranted under the discussion of R.M.C. 805(c), the Government would rather focus on the principal issue—the Accused stating on the record his election regarding his currently-detailed counsel—which clearly does not warrant a continuance. As discussed, *infra*, the Accused’s rights to be adequately represented would not be impaired, thus the Commission should proceed with the currently-scheduled hearing.

IV. The Currently-Scheduled September Hearings Will, At a Minimum, Afford the Commission the Opportunity To Place the Accused’s Election Regarding His Still-Detailed Counsel on the Record.

The Accused had the opportunity to inform the Commission of his decision on whether or not to restore LtCol Jasper and Maj Stirk to full representational duties. He refused to meet with his counsel. The Accused could quite easily continue to refuse to meet with counsel. The only way to prevent further unnecessary delay is to bring the Accused before the Commission and require him to make his election on the record. To not force the Accused to make an election on the record as to whether he wants to retract his “temporary” firing of his counsel would allow the Accused to play a virtually endless shell game of counsel hirings and firings or indecision thereon.

Despite the Accused limiting their representation, LtCol Jasper and Maj Stirk remain detailed to the case. He has adequate representation during the September hearing if he chooses it. Given the Defense’s representation at the recent telephonic R.M.C. 802 Conference, MAJ Kincaid may be fully cleared by the time of the hearing, ensuring further adequate representation with no limitations apparently having been mandated by the Accused.

The Government respectfully requests that the Commission require the Accused to make his election as to his current counsel on the record on 21 September 2015. If he chooses to not restore LtCol Jasper and Maj Stirk to full representational duties or if he refuses to make an choice, the Government requests that the Commission find good cause, pursuant to R.M.C.

505(d)(2)(B)(ii), to excuse LtCol Jasper and Maj Stirk from further representation of the Accused, and order the Chief Defense Counsel to excuse them and appoint substitute counsel. If the Accused restores LtCol Jasper and Maj Stirk to full representational duties, the Commission can then hear argument from counsel for both sides as to possible scheduling and docketing of future sessions of the Commission. Finally, the Government respectfully requests the Commission again place on the record the Accused's wishes with regard to civilian counsel.

6. Conclusion

For the previously stated reasons, the Commission should deny the Defense Motion for Continuance. The Accused's rights to counsel have been fully explained to him multiple times, and he indicated his understanding of those rights multiple times. The Accused does not have the right to consult with "independent" civilian counsel prior to making his election as to whether to restore his currently-detailed, conflict-free counsel to full representational duties. The Accused's right to be represented by civilian counsel before the Commission is not a valid basis for a continuance of the September hearings, pursuant to R.M.C. 805. The 21 September 2015 hearing can, at a minimum, fully and finally resolve the current representational status of LtCol Jasper and Maj Stirk, and, regardless of the Accused's election, limit further delay in the proceedings by providing a clear way ahead.

7. Oral Argument

The Government does not desire oral argument.

ATTACHMENT A

Filed with TJ
15 September 2015

Appellate Exhibit 051B (al Hadi)
Page 13 of 18

ATTACHMENT B

Filed with TJ
15 September 2015

Appellate Exhibit 051B (al Hadi)
Page 15 of 18

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MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA

v.

ABD AL HADI AL-IRAQI

AE05X

Defense Motion to Continue
the 21 September 2015 Hearing

14 September 2015

1. Timeliness: This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 906 and is timely pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.c.(1).

2. Relief Sought: The defense requests that the Commission cancel the scheduled 21 September 2015 hearings and continue the hearing until a later date so that the defense may attempt to re-establish and preserve the attorney-client relationship with Mr. Hadi al Iraqi.

3. Burden of Proof: The defense bears the burden, by a preponderance of the evidence. *See* R.M.C. 906(b)(1).

4. Facts: In AE049I the Commission found that there was no current attorney client relationship between Lt Col Sean Gleason and Mr. Hadi al Iraqi, and that there was no conflict of interest between Mr. Hadi al Iraqi and his currently detailed defense counsel. The Commission ordered the defense to inform Mr. Hadi al Iraqi of its holding, and to inform the Commission

whether or not Mr. Hadi al Iraqi had decided to restore current defense counsel to full representational duties by 11 September 2015. The defense did so in AE049J.

5. Law and Argument :

Rule for Military Commission 906 provides in relevant part:

(a) *In general.* A motion for appropriate relief is a request for a ruling to cure a defect which deprives a party of a right or hinders a party from preparing for trial or presenting its case.

(b) *Grounds for appropriate relief.* The following may be requested by motion for appropriate relief. This list is not exclusive:

(1) Continuances. A continuance may be granted only by the military judge.

The Discussion section of this rule further provides that:

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. Whether a request for a continuance should be granted is a matter within the discretion of the military judge.

At this time, the defense is attempting to facilitate the hiring of a civilian attorney to independently counsel Mr. Hadi al Iraqi regarding his rights to both representation by military counsel and civilian counsel. That simply cannot happen between now and the scheduled 21 September hearing. However, we believe that we will be able to have a civilian counsel advise Mr. Hadi al Iraqi prior to the scheduled November hearings.

The Government has previously indicated that they desired to go on the record regarding Mr. Hadi al Iraqi's representation on 21 September 2015 regardless of the contents of the notice provided by the defense in AE049J. We believe this would prejudice the rights of the accused to counsel of his choice, in that he has not had an opportunity to be independently advised and may be forced between a rock and a hard place regarding the way forward – essentially he would be forced to choose on the spot whether to proceed pro se, request different military counsel, or perhaps boycott the entire proceeding, all without the benefit of his requested independent advice.

Continuing the 21 September 2015 hearing, the docket for which is modest, at best, would serve the interests of justice by allowing Mr. Hadi al Iraqi to be fully advised and in a position to make an intelligent decision regarding his choice of counsel.

6. Oral Argument: The defense does not request oral argument on this motion.
7. Witnesses: none.
8. Conference with Opposing Counsel: The prosecution opposes/does not oppose this motion.
9. List of Attachments:
 - A. Certificate of Service

Respectfully Submitted,

//s//

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Detailed Defense Counsel

//s//

ROBERT B. STIRK, Maj, USAF
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/s//

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