

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

UNITED STATES OF AMERICA

v.

ABD AL HADI AL-IRAQI

AE 054C

Government Response
To Defense Motion for a Continuance

20 January 2016

1. Timeliness

The Government timely files this response pursuant to the Commission's order, AE 054B.

2. Relief Sought

While the Government takes issue with a number of the allegations levied by the Defense its most recent continuance motion, under the circumstances, the Government does not object to the Defense motion to continue the hearing currently scheduled for 26-27 January 2016.

3. Overview

Pursuant to the Commission's order, AE 054, the purpose of the 26-27 January 2016 hearing is to litigate the Defense Motion for Continuance, AE 015K.¹ The Defense bases its most recent request for a continuance on three reasons, only one of which directly relates to litigating AE 015K. The other two reasons are merely restatements of arguments made in AE 015K. The Government takes issue with a number of misstatements and mischaracterizations the

¹ In a Rule for Military Commission ("R.M.C.") 802 conference held on 18 November 2015, the Commission indicated a desire to hear from the Accused regarding his counsel election, although this was not reflected in the Commission's order, AE 053D, issued as a result of that R.M.C. 802 conference, nor in the docketing order for the January hearings, AE 054. The Government is satisfied with the Chief Defense Counsel ("CDC") representations, both in his filed declarations (AE 053A, Enclosure (1); AE 053C, Attachment B) and during the November R.M.C. 802 conference, that he discussed with the Accused his *pro bono* civilian counsel options, that the Accused elected to be represented by Mr. Brent Rushforth and others, and that the Accused was aware of and did not object to potentially significant delay in procuring a fully qualified defense team.

Defense makes in AE 54A. However, the Government agrees with the Defense that the need to thoroughly litigate AE 015K weighs in favor of granting the Defense request to continue the January hearing. Additionally, based on the new allegations raised by the Defense in its current motion, the Government intends to request permission, by separate filing, to supplement AE 015L, its response to the Defense's previous continuance motion, AE 015K.

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).

5. Facts²

On 10 December 2015, the Defense filed a notice informing the Commission that Mr. Rushforth "has completed and submitted his security clearance paperwork," and "[t]he paperwork was submitted on 8 December 2015." AE 053E. On 11 December 2015, the Defense sought and received permission to make "textual changes" to its earlier notice. AE 053F; AE 053G. On 18 December 2015, the Defense amended its previous notice, informing the Commission that "[o]n 08 December 2015, Mr. Brent Rushforth submitted a complete application, as required by R.T.M.C. 9-5c, to join the Military Commission Defense Organization's Civilian Counsel Pool." The amended notice further states, "The Deputy Chief Defense Counsel then immediately submitted to the Washington Headquarters Service, through the Convening Authority's Office, an expedited request that Mr. Rushforth, who possesses a Secret clearance, be promptly granted the required TS/SCI clearance." *Id.*

Upon information and belief, on 6 January 2016, security personnel at Washington Headquarters Service ("WHS") received a request from the Convening Authority's office to issue a security clearance to Mr. Rushforth. On 8 January 2016, WHS emailed the electronic application required by the Department of Defense for all security clearances to Mr. Rushforth.

² As in its previous continuance motion, the Defense fails to include a "facts" section, as required by R.C. 3.7.c.(3) and 3.10.a. 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.

See Attachment B. The same day, WHS personnel called Mr. Rushforth and left a voicemail requesting that he complete the required electronic security clearance application. *Id.* As of 19 January 2016, Mr. Rushforth has failed to complete the required electronic security clearance application. *Id.*

6. Law and Argument

As a threshold matter, it should be noted that the Defense's motion contains many inaccurate statements and arguments,³ most of which are utterly irrelevant⁴ to the issue at hand – namely whether the hearing currently scheduled for 26-27 January 2016 should be continued.

I. The Defense Has Not Complied With the Required Procedures For Mr. Rushforth to Obtain the Necessary Security Clearances.

The National Industrial Security Manual, dated 28 February 2006, provides that a Single Scope Background Investigation is required for Top Secret and Sensitive Compartmented Information access (as required to represent the Accused). DoD 5220.22-M, 2-201.a. The Manual further provides that the request for the required investigation must be done using the electronic questionnaire, commonly known (since 2009) as Electronic Questionnaire for Investigations Processing (“e-QIP”). *Id.* See also Attachment C.

Regulation for Trial by Military Commission (“R.T.M.C.”) 9-1.a.15. states that the CDC is responsible for ensuring Defense personnel possess the appropriate security clearances. See

³ Some such allegations are addressed in this response, but most are relevant, if at all, to AE 015K. The Government is in the process of gathering affidavits and/or declarations from multiple individuals with first-hand knowledge of facts salient to the proper disposition of those allegations. It is for this reason, and the Government's desire to thoroughly litigate and fully lay bare these baseless allegations, that the Government believes a continuance is warranted.

⁴ The Defense's reliance on *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) is entirely misplaced. In *Gonzalez-Lopez*, a federal criminal defendant hired a California attorney to represent him in connection with a drug charge. However, the district court prohibited the California attorney from representing the Defendant supposedly for violating a state rule of professional conduct. The case proceeded to a *jury trial* with a local attorney, and the defendant was found guilty (emphasis added). In other words, in *Gonzalez-Lopez*, the Defendant was forced to proceed to *trial* without the presence of his counsel of choice (emphasis added). Obviously the facts in this case are very different. Here, the Government is not, in any way, denying the Accused his choice of counsel. In fact, as explained in AE 015K, just the opposite is true.

also R.T.M.C. 9-1.a.6.c.ii. (which, though under the heading of “Learned Counsel,” references the CDC’s responsibility to ensure that “outside civilian counsel . . . to be assigned . . . ha[ve] executed and submitted application for Security Clearance, SF-86, and other *necessary* documents”) (emphasis added). Given the plethora of outside civilian counsel currently under the supervision of the CDC who possess the required clearances, surely the CDC is aware of the nearly 10-year old DoD requirement that security clearance applications be submitted electronically.

Interestingly, nothing in the amended Defense notice, AE 053H, states that Mr. Rushforth actually completed his security clearance application. Indeed, the amended notice, read in conjunction with the Defense’s desire to correct previously provided inaccurate information, conflicts with Mr. Rushforth’s account in his affidavit in support of AE 054A. Regardless, by Mr. Rushforth’s own admission, it was Defense personnel that directed him to mail his application to a Pentagon address (the affidavit lists an incomplete zip code). That the mail room at the Pentagon may have been confused as to where the application was supposed to go only delayed the process by a day or two. The Convening Authority’s office taking a few weeks (during a period with multiple federal holidays) to process Mr. Rushforth’s application is not unreasonable. Conversely, Mr. Rushforth’s failure to respond to repeated requests by WHS to complete his electronic application is unreasonable.

II. Neither the Defense Nor the Government Is Prepared to Fully Litigate AE 015K, But For Different Reasons

The Defense avers that it needs the most recently requested continuance for three reasons:⁵ 1) to obtain additional evidence in support of its motion,⁶ 2) to afford Mr. Rushforth the opportunity to fully complete his security clearance process and meet with the Accused, and

⁵ The following three bases are paraphrased from AE 054A, para. 2.a.-2.c.

⁶ AE 054A references the need for witnesses to resolve “this motion,” which would typically refer to the present motion. The Government presumes the Defense intended to refer instead to AE 015K.

3) to afford “the Accused’s entire team of currently qualified attorneys who have entered an appearance have received all clearances required for full, competent and zealous representation.”⁷

The Government has previously conceded that proceeding on substantive matters prior to Mr. Rushforth completing the required security clearance process, even if technically permissible,⁸ is imprudent. AE 015L; AE 053D. However, the Government has consistently maintained that further delay to wait for other *pro bono* counsel and DoD-employed civilian counsel is unnecessary and unsupported by law or regulation. *Id.* The issues raised in AE 015K actually relevant to the continuance motion are not substantive issues and do not require Mr. Rushforth to have completed his clearance process. Indeed, AE 015K requests delay until that time, thus if the Commission does not afford the Government the opportunity to litigate AE 015K prior to Mr. Rushforth receiving his full clearances, AE 015K becomes largely moot. The Government agrees that additional time is required by both parties to obtain evidence and witnesses relevant to a thorough resolution of AE 015K. Mr. Rushforth need not be fully cleared to participate in the litigation of that motion. In fact, the Government would request that the Commission take testimony from Mr. Rushforth, either in-person⁹ or via video teleconferencing, on the issues relevant to the continuance requested in AE 015K.

Lastly, even if Mr. Rushforth had completed the clearance process, had met with the Accused, and formed an attorney-client relationship with the Accused, the parties could still litigate AE 015K in Mr. Rushforth’s absence pursuant to the discussion of R.M.C. 805(c). The

⁷ Of note, only the three military counsel (who currently possess all required clearances) and Mr. Rushforth have “entered an appearance” in this case. Either the Defense errantly repeated its second requested basis for a continuance, or it intended to restate its request from AE 015K, namely that all *pro bono* counsel and the DoD-employed civilian counsel also be fully cleared and up to speed prior to proceeding.

⁸ See AE 015L at 7-8; R.M.C. 805(c), Discussion.

⁹ There should be no barrier to Mr. Rushforth obtaining a country clearance in order to be permitted to travel to Guantanamo Bay, Cuba. A completed security clearance process is not required to gain access to the island or to view the proceedings, as evidenced by the myriad of non-government agency personnel and foreign nationals that are present for every hearing, but do not possess U.S. security clearances.

Accused is more than adequately represented by three qualified and certified military counsel who are clearly capable of litigating the non-substantive issues surrounding the need for a continuance.

7. Conclusion

For the reasons stated above, the Government does not oppose continuing the 26-27 January 2016 hearing. The Government proposes litigating AE 015K at the next scheduled session of the Commission, currently 18-22 April 2016. Lastly, the Government requests the Commission order Mr. Rushforth to complete the e-QIP application not later than 1 February 2016.

8. Oral Argument

The Government does not desire oral argument.

9. Attachments

- A. Certificate of Service, dated 20 January 2016.
- B. Email of Mr. [REDACTED] dated 19 January 2016.
- C. Office of the Secretary of Defense Memorandum, dated 18 May 2009.

Respectfully Submitted,

//s//
Felice J. Viti
Trial Counsel
LTC David J. Long, JA, USA
Deputy Trial Counsel

CDR Kevin L. Flynn, JAGC, USN
LCDR B. Vaughn Spencer, JAGC, USN
Maj Kristy N. Milton, USMC
Assistant Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

ATTACHMENT A

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ATTACHMENT B

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From: [REDACTED] CIV WHS (US)
To: [Spencer, B Vaughn LCDR USN OSD \(US\)](#)
Cc: [Bumpus, Tyrone A CIV WHS \(US\)](#); [REDACTED]
Subject: RFI Response: Defense Counsel Affidavit (U//FOUO)
Date: Tuesday, January 19, 2016 1:21:00 PM

LCDR Spencer,

Good afternoon. On 15 January 2016 and on 19 January 2016, the WHS/OSS verified that Mr. Rushforth does not currently have an approved security clearance or access to classified information. That an application for a Top Secret clearance with SCI eligibility in E-QIP was sent via email to Mr. Rushforth on 08 January 2016, additionally, a voice mail was provided the same date from WHS requesting completion. The application is still awaiting conclusion by Mr. Rushforth as of this date (Tuesday, 19th of January 2016).

An interim clearance cannot be issued until Mr. Rushforth completes and releases his application in eQIP, submits fingerprints to WHS, and his clearance package is forwarded to OPM by WHS PSOD for a National Agency Check (NAC).

WHS/OSS has not yet received a request to expedite his investigation with OPM from the Convening Authority to the OPM Liaison to expedite his Single Scope Background Investigation (SSBI).

BLUF: He needs to complete his eQIP application already emailed to him. MCDO has to submit a request for expedite of his clearance through CA who will in turn approve/disapprove and provide it to WHS/OSS for action. As it stands, he cannot view classified material until he possesses an Interim Secret clearance.

Please let me know if I can be of further assistance.

V/r,

[REDACTED]
Office of Special Security (Washington Headquarters Services)
4800 Mark Center Drive, Suite 11F09-02
Alexandria, VA. 22350-2100

Office: [REDACTED] / Office DSN: [REDACTED]
BB: [REDACTED]

[REDACTED]

GTMO/ELC: [REDACTED]

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ATTACHMENT C

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21 January 2016

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OFFICE OF THE SECRETARY OF DEFENSE

WASHINGTON, DC 20301

MAY 18 2009

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
COMMANDERS OF THE COMBATANT COMMANDS
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF
DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF
DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, PROGRAM ANALYSIS AND EVALUATION
DIRECTOR, NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Department of Defense (DoD) Implementation and Transition to the Office of Personnel Management (OPM) Electronic Questionnaires for Investigations Processing (e-QIP)

The Office of the Under Secretary for Personnel and Readiness and the Office of the Under Secretary of Defense for Intelligence (OUSD(I)) are moving forward with the implementation of e-QIP within DoD. The use of e-QIP is fundamental to meeting the timelines established in the Intelligence Reform and Terrorism Prevention Act of 2004 and is a requirement of the Office of Management and Budget e-Clearance initiatives. All DoD will transition to e-QIP by October 1, 2009, for all investigative processing forms including Standard Form (SF) 85, SF-85 Public Trust and SF-86.

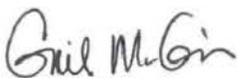
The OUSD(I) Security Directorate will lead the Department's implementation of e-QIP with the assistance of a working group of representatives from the DoD Components' Security and Human Resources (HR) staffs. It is crucial that the Components fully support the e-QIP working group and the Security Directorate in the implementation and transition to e-QIP.

Each Component is required to submit an e-QIP implementation plan to OUSD(I) no later than 90 calendar days from date of this memorandum, using the template that has been provided to the e-QIP working group. Components should ensure their implementation plans are coordinated with relevant stakeholders, including both the



security and HR communities for both appropriated and nonappropriated fund employees.

If not already provided, the name of your security and HR representatives for the working group should be furnished, no later than 10 working days following the date of this memorandum, to Ms. [REDACTED]



Gail McGinn
Performing the Duties of the
Under Secretary of Defense for
Personnel and Readiness



James R. Clapper, Jr.
Under Secretary of Defense for Intelligence