

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

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL HADI AL-IRAQI</p>	<p>AE 059B</p> <p>Government Response</p> <p>To Defense Motion for Appropriate Relief: Requiring Verbatim Recording and Transcription of R.M.C. 802 Conferences and Request for Compressed Briefing Schedule</p> <p>13 July 2016</p>
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1. Timeliness

The Government timely files this Response pursuant to Military Commissions Trial Judiciary Rules of Court (“RC”) 3.7.d.(1).

2. Relief Sought

The Government respectfully requests that that the Commission deny AE 059, Defense Motion for Appropriate Relief: Requiring Verbatim Recording and Transcription of R.M.C. 802 Conferences and Request for Compressed Briefing Schedule (“Defense motion”).

3. Overview

Requiring a verbatim recording and transcription of all conferences under Rule for Military Commissions (“R.M.C.”) 802 is contrary to the rules governing military commissions, relevant case law, and traditional military practice. Under R.M.C. 802 and Chapter 17-5 of the Regulation for Trial by Military Commission (2011 Edition) (“R.T.M.C.”), the Commission has the authority to order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial. Under these rules and applicable military case law, there is no right to a verbatim transcript of R.M.C. 802 conferences. Consistent with traditional military practice and at the discretion of the Commission, any R.M.C. 802 conferences held in this case can be fairly and adequately summarized on the record by the Commission, with the opportunity for counsel to note any objection, correction, or addition to the summary. More important, this

unorthodox requirement would delay the proceedings and undercut the explicit intent of R.M.C. 802 in promoting a fair and expeditious trial at the Commission's discretion.

The Defense's tired practice of maligning the integrity of this Commission is inexcusable.¹ For instance, the Defense statement, that "omissions and errors on the record—*presumptively* accidental—but, where humans are involved, probably not always" (emphasis added), connotes malfeasance on the part of the Commission. The implication, without a scintilla of evidence or example, that the Military Judge has purposely omitted information does nothing to support the Defense motion but rather demonstrates a complete lack of respect for the process and this Commission. The errors and omissions to which the Defense alludes, if true, expose the Defense's own lack of diligence as they were provided an opportunity to ". . . add anything to the commission's summary . . ." Unofficial/Unauthenticated Transcript ("Tr.") at 689 (17 May 2016) (following the Commission summary of the 18 November 2015 R.M.C. 802 conference);² Tr. at 693 (17 May 2016) (following the Commission summary of the 16 May 2016 R.M.C. 802 conference).³

The Government respectfully requests that the Commission deny the Defense request that all conferences held by the Commission pursuant to R.M.C. 802 be recorded and transcribed verbatim.

¹ The Defense continues to be emboldened by a sense of impunity in accusing the Commission of nefarious motives. *See* AE 055E at 16-17; *see also* AE 055C at 10-14 (listing failures by the Defense to follow the orders of this Commission and the rules and regulations of the military commissions).

² The Commission asked: "Do counsel for either side wish to add anything to the commission's summary of the 802 conference at this time?" In response, both the Government and the Defense placed additional information, and disagreement, regarding their understanding of the continuance related to additional counsel. Other than to acknowledge the disagreement, the Commission did not rule or otherwise indicate that the issue was resolved in the conference. Due to the disagreement, the Commission indicated that the disputed issue would have to be litigated, and the topic was, in fact, docketed for the July 2016 hearing, and oral argument was heard.

³ Both parties were able to clarify the Commission's summary. Tr. at 693 (17 May 2016).

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).

5. **Facts**⁴

This Military Commission has held a number of R.M.C. 802 conferences since the Accused was arraigned on 18 June 2014. Some of these conferences have taken place at Naval Station Guantanamo Bay, Cuba, while others have been telephonic. Subsequent to each R.M.C. 802 conference, the Commission has, pursuant to the controlling rules, orally summarized the subject matter of the conference on the record. Tr. at 3 (17 June 2014), 23 (15 September 2014), 63 (17 November 2014), 234-35, 237 (26 January 2015), 601, 607, 610, 613 (22 July 2015), 648-49, 654 (22 September 2015), 687, 690 (17 May 2016). Furthermore, after the Commission summarized the subject matter of R.M.C. 802 conferences on the record, the Commission gave both the Government and the Defense an opportunity to object, correct, or add to the Commission's summary. Tr. at 16 (17 June 2014), 26 (15 September 2014), 66 (17 November 2014), 235, 237-238 (26 January 2015), 606, 610, 612-13 (22 July 2015), 649, 651, 656 (22 September 2015), 689, 693 (17 May 2016).

6. **Law and Argument**

I. A Verbatim Recording and Transcription of All R.M.C. 802 Conferences is Not Required Under the Controlling Rules and Military Case Law

A. R.M.C. 802

R.M.C. 802(a) provides that: "after referral, the military judge may, upon request of any party or *sua sponte*, order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial." The corresponding Discussion section explains that the purpose of such conferences, which may be held as needed before or during trial, are to

⁴ The great majority of the Defense's "facts" are nothing more than an irrelevant commentary totally inappropriate for a court pleading. The Defense's accusatory, editorialized rhetoric is disjointed and not germane to their request for verbatim transcription of *all* conferences held by the Commission pursuant to R.M.C. 802.

“inform the military judge of anticipated issues and to expeditiously resolve matters on which the parties can agree, not to litigate or decide contested issues.” R.M.C. 802, Discussion.

The Discussion section also provides examples of appropriate subject matter to be addressed at R.M.C. 802 conferences, which include resolving scheduling difficulties that may otherwise inconvenience witnesses and members, as well as other matters that will “ultimately be in the military judge’s discretion,” such as “the conduct of voir dire, seating arrangements in the courtroom, or procedures when there are multiple accused.” *Id.* Moreover, the Discussion section explains that R.M.C. 802 conferences can be used to “advise the military judge of issues or problems, such as unusual motions or objections, which are likely to arise during trial.” *Id.*

R.M.C. 802(b) explicitly addresses “matters on the record,” and directs that R.M.C. 802 conferences “need not be made part of the record, but matters agreed upon at a conference shall be included in the record orally or in writing.” The related Discussion section explains that “occasionally it may be appropriate to resolve certain issues, in addition to routine or administrative matters, if this can be done with the consent of the parties.” R.M.C. 802, Discussion. The example given involves a witness request that the parties can agree upon during the conference instead of litigating during trial, which could cause delay in the proceedings and result in unnecessary expense or inconvenience to the parties and witnesses. *Id.* The Discussion section emphasizes that such a resolution at an R.M.C. 802 conference can only be the result of an agreement by the parties and “must be included in the record.” *Id.*

B. Rule for Courts-Martial (“R.C.M.”) 802 and Federal Rule of Criminal Procedure (“Fed. R. Crim. P.”) 17.1

The language of R.M.C. 802 is exactly the same as that of R.C.M. 802. The analysis section of R.C.M. 802 explains that the rule is based on Fed. R. Crim. P. 17.1, but is broader and more detailed than its Federal counterpart.⁵ *See* Manual for Courts-Martial United States (2012

⁵ Fed. R. Crim. P. 17.1 (Pretrial Conference), directs that:

On its own, or on a party’s motion, the court may hold one or more pretrial conferences to promote a fair and expeditious trial. When a conference ends, the court must prepare and file a memorandum of any matters agreed to during the conference. The government may not use any statement made during the

Edition) (“M.C.M.”) at p. A21-45. Furthermore, it discusses that conferences are “needed more frequently in courts-martial” than in Federal practice, “because in many instances the situs of the trial and the home bases of the military judge, counsel, and the accused may be different” and that “even when all the participants are located at the same base, conferences may be necessary.” *Id.* Also, according to the drafter’s analysis of R.C.M. 802, the requirement of Fed. R. Crim. P. 17.1 for a written memorandum following the pretrial conference was “rejected as too inflexible and unwieldy for military practice,” and that in courts-martial, the “interests of the parties can be adequately protected by placing matters on the record orally.” *Id.*

C. Regulation for Trial by Military Commission

R.T.M.C. 17-5 which is entitled “Communication among Trial Participants and Military Judge,” implements R.M.C. 802. R.T.M.C. 17-5 explains that R.M.C. 802 conferences in the context of military commissions will enable all participants to “exchange their various viewpoints on legal matters and references.” R.T.M.C. 17-5.c. Similar to R.M.C. 802, R.T.M.C. 17-5 also outlines appropriate issues for discussion at these conferences, such as scheduling and continuances, and other matters on which the parties can agree and will “prevent undue delay in the proceedings.” The R.T.M.C. also provides that: “such conferences may be in person, telephonic, by video, or a combination thereof.” R.T.M.C. 17-5.b.

R.T.M.C. 17-5 does not, however, grant the right to a verbatim transcription of conferences under R.M.C. 802, as the Defense has requested in this case. Instead, the chapter provides a procedure consistent with R.M.C. 802 and with standard military practice in declaring in subsection (e) that:

A summary of the conference, including any matter resolved or agreed upon, will be entered into the record of proceedings by the military judge, either orally or in writing at the military judge’s discretion, at or before the next commission session in the case. Counsel may note any objection, correction, or addition to the summary. Failure to do so will waive any issue as to the summary of the matters addressed at the conference.

conference by the defendant or the defendant’s attorney unless it is in writing and is signed by the defendant and the defendant’s attorney.

D. Military Commissions Trial Judiciary Rules of Court (5 May 2014)

The RC also do not grant a right to a verbatim transcription of conferences held under R.M.C. 802, with the limited exception of RC 11.3, which deals with classified information: “Any conferences conducted IAW R.M.C. 802 or *ex parte* discussions with either party in regard to a review under M.C.R.E 505 will be recorded by a court reporter, transcribed, and sealed as part of the Record of Trial. The requisite security classification will be applied to the transcription.” The RC also provide several circumstances in which counsel must discuss certain matters with the Commission in an R.M.C. 802 conference before trial, such as with the proposed use of electronic media and courtroom electronic devices. *See* RC 7; *see also* 10 U.S.C. § 949p-4(b)(2) and M.C.R.E. 505(f)(2)(B) (providing the statutory and rule-based authority for an “*ex parte* oral conference or hearing” within the specific context of the military commission’s classified information procedures, which also contain a specific requirement for verbatim transcription).

E. Relevant Military Case Law

The Court of Appeals for the Armed Forces (C.A.A.F.) has recognized the importance of the military judge and his responsibility to avoid unnecessary delay in the proceedings. In *United States v. Loving*, the C.A.A.F. held that “the military judge is not a mere figurehead or simply an umpire in a contest between the government and accused.” 41 M.J. 213, 252 (C.A.A.F. 1994). The military judge has the responsibility to “exercise reasonable control over the proceedings” (*citing* R.C.M. 801(a)(3), which is analogous to R.M.C. 801(a)(3)), and “should prevent unnecessary waste of time . . .” *Loving*, 41 M.J. at 252-53. R.M.C. 802 is a useful tool for the Commission as it is essentially a codification of the Commission’s inherent power to manage the litigation before it. *See United States v. Coia*, 719 F.2d 1120, 1123 (11th Cir. 1983) (referencing R.M.C. 802’s Federal counterpart, Fed. R. Crim. P. 17.1).

Furthermore, military appellate courts have routinely upheld the unrecorded use of conferences under R.C.M. 802 as a means of expeditiously resolving routine and administrative matters, as well other issues with the consent of the parties. *See United States v. Cordell*, 37 M.J.

592, 594 (A.F.C.M.R. 1993) (stating that the absence of verbatim recording of R.C.M. 802 conferences did not render record incomplete); *see also United States v. Myers*, 25 M.J. 573, 575-76 (A.F.C.M.R. 1987) (rejecting the argument that because the conference sessions were unrecorded, the record of trial was not verbatim and no punitive discharge could be approved); *United States v. Leaver*, 32 M.J. 995, 1001 (C.G.C.M.R. 1991) (holding that verbatim record of conference, during which military judge informed counsel of guilty plea concerns was not required); *United States v. McQuinn*, 47 M.J. 736, 737 (N-M. Ct. Crim. App. 1997) (stating that there was no requirement for verbatim record of pretrial conferences discussing providency of plea, where conferences were conducted with parties' consent and summarized by military judge on the record with concurrence by counsel).⁶

Some military courts have indicated that unrecorded R.C.M. 802 conferences are permissible as long as they are not used to handle substantive portions of the trial. *See United States v. Garcia*, 24 M.J. 518, 519-20 (A.F.C.M.R. 1987) (acknowledging that R.C.M. 802 authorizes unrecorded conferences between the military judge and one or more counsel, but holding that “when matters beyond the scope of the rule have been discussed in an R.C.M. 802 conference, subsequent failure to include them in the record may render it nonverbatim”); *see also United States v. Washington*, 35 M.J. 774, 776-77 (A.C.M.R. 1992) (recognizing that conferences conducted under the provisions of R.C.M. 802 need not be recorded unless certain matters have been agreed upon; however, the court cautions military judges that R.C.M. 802 conferences should be limited to their intended purpose, and if there is doubt, then an Article 39(a) session should be used instead).

⁶ *Cf.* Unofficial/Unauthenticated Transcript at 1202-1204, *United States v. Mohammed* (19 October 2012) (holding the Defense does not have a right to a verbatim record of all R.M.C. 802 conferences, but granting as a “normal course of business” having a court reporter record R.M.C. 802 conferences “as far as practicable”).

II. Requiring Verbatim Transcripts of All R.M.C. 802 Conferences is Both Unnecessary and Contrary to the Purpose of Promoting a Fair and Expeditious Trial

As discussed above, R.M.C. 802 is an important and useful tool for the Commission as it is essentially a codification of the Commission's inherent power to manage the litigation before it. *See Coia*, 719 F.2d at 1123. Moreover, as the Court in *Loving* found, and as indicated in R.M.C. 801(a)(3), the Commission has the authority and responsibility to "exercise reasonable control over the proceedings," and "should prevent unnecessary waste of time . . ." 41 M.J. at 252-53. Given the various counsel of record in this matter, and the great disparity in their locations, the use of R.M.C. 802 conferences at certain points during all phases of trial, particularly those conducted by telephone or other remote means, will presumably be of significant value to the parties and to the Commission.

Consistent with traditional military practice, and at the discretion of the Commission, any such conferences in this case can be fairly and adequately summarized on the record by the Commission, with the opportunity for counsel to note any objection, correction, or addition to the summary. *See United States v. Jones*, 34 M.J. 899, 912 n.8 (N-M.C.M.R. 1992) (explaining that the military custom following an R.C.M. 802 conference is "for the military judge to state for the record the substance of the 802 conference and then afford counsel the opportunity to concur, dispute, amend, or embellish").

Furthermore, as discussed in detail above, the applicable rules (R.M.C. 802, R.T.M.C. 17-5, and the RC) do not require a verbatim transcript of all R.M.C. 802 conferences, as requested by the Defense. Moreover, as previously discussed, military appellate courts have routinely upheld the unrecorded use of conferences under R.C.M. 802 as a means of expeditiously resolving routine and administrative matters, as well other issues with the consent of the parties.

Additionally, there are numerous and meaningful safeguards incorporated into R.M.C. 802. For example, R.M.C. 802(c) provides that "no party may be prevented under this rule from

presenting evidence or from making any argument, objection, or motion at trial.”⁷ Also, the Discussion section of R.M.C. 802 provides that “no party may be compelled to resolve any matter at a conference.” Furthermore, R.M.C. 802(d) directs that the presence of the Accused is “neither required nor prohibited at a conference.”⁸ Moreover, R.M.C. 802(e) directs that “no admissions made by the accused or defense counsel at a conference shall be used against the accused unless the admissions are reduced to writing and signed by the accused and defense counsel.” Additionally, under R.M.C. 802(f), no such conferences are permitted “in the case of an accused who is not represented by counsel.” These important safeguards effectively help protect the interests of the parties, including most significantly, those of the Accused.

Requiring a verbatim recording and transcription of all conferences held under R.M.C. 802 will, at times, delay the proceedings and create an unnecessary logistical burden on the qualified court reporters detailed by the Convening Authority. Most important, this requirement would defeat the central purpose of the rule as a means of promoting a “fair and expeditious trial” through the use of these conferences, under the appropriate circumstances and at the Commission’s discretion.

While the Government would not object if the Military Judge, in his sole discretion, determines it is appropriate to record and/or transcribe some or all R.M.C. 802 conferences in this case, it is simply not required by the rules. Such unrecorded and untranscribed R.C.M. 802 conferences happen nearly every day in courts-martial around the world, and have no impact on the fairness, transparency, or justice of those proceedings.

Therefore, the Government respectfully requests that the Commission deny the Defense motion that all R.M.C. 802 conferences held during this trial be recorded and transcribed verbatim.

⁷ As explained in the drafter’s analysis of R.C.M. 802(c), which mirrors R.M.C. 802(c), “this subsection does not appear in the federal rule,” and “it is intended to ensure that conferences do not become a substitute for Article 39(a) sessions.” M.C.M. at p. A21-45.

⁸ The corresponding Discussion comment explains that: “normally the defense counsel may be presumed to speak for the accused.” R.M.C. 802(d), Discussion.

7. Conclusion

For the above-stated reasons, the Government opposes the Defense motion. The Defense has failed to demonstrate by a preponderance of evidence why the Military Judge's discretion should be subrogated to an inflexible order requiring a verbatim transcript of all conferences held pursuant to R.M.C. 802.

8. Oral Argument

Oral argument on this issue is not requested. However, should the Commission allow oral argument from the Defense, the Government would likewise request oral argument.

9. Witnesses and Evidence

None.

10. Additional Information

The Government has no additional information.

11. Attachments

A. Certificate of Service, dated 13 July 2016.

Respectfully submitted,

//s//

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ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 13th day of July, 2016, I filed **AE 059B, Government Response To Defense Motion for Appropriate Relief Requiring Verbatim Recording and Transcription of R.M.C. 802 Conferences and Request for Compressed Briefing Schedule** with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

_____/s/_____
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