UNITED STATES OF AMERICA	)	IN THE UNITED STATES COURT OF
	)	MILITARY COMMISSION REVIEW
Appellant,	)	
	)	APPELLANT'S OPPOSITION TO
	)	APPELLEE'S MOTION TO DISMISS FOR
	)	WANT OF JURISDICTION UNDER
	)	10 U.S.C. § 950d
	)	
	)	U.S.C.M.C.R. Case No. 18-002
v.	)	
	)	Arraigned at Guantanamo Bay, Cuba
	)	on November 9, 2011
	)	
	)	Before a Military Commission
	)	convened by Vice Admiral (ret.)
	)	Bruce E. MacDonald, USN
	)	
ABD AL RAHIM HUSSAYN	)	Presiding Military Judge
MUHAMMAD AL NASHIRI	)	Colonel Vance H. Spath, USAF
	)	
Appellee.	)	DATE: March 5, 2018

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW

COMES NOW, the United States of America, and pursuant to Rules 21(c) and (d) of this Court's Rules of Practice, requests leave to file and thereby opposes Appellee Abd Al Rahim Hussayn Muhammad Al Nashiri's Motion to Dismiss Appellant's Interlocutory Appeal for Want of Jurisdiction under 10 U.S.C. § 950d (the "Motion") filed on February 27, 2018 at 6:02 p.m. This opposition is timely filed. The Motion offers no law or facts which, if true, would permit this Court to ignore that Appellant had yet to even file its appeal on the date of Appellee's Motion—the United States had only provided notice of its appeal. Moreover, until such time as the briefing cycle is complete, the Court should not judge the merits of the jurisdiction question because, as even Appellee grudgingly acknowledges, there is substantial precedent for the interlocutory appeal of abatement under 10 U.S.C. § 862. Further, the Motion offers no legal basis for this Court to grant extraordinary relief. Finally, the facts and circumstances of this case—largely of the Military Commission Defense Organization's ("M.C.D.O.") and Appellee's own creation—make an

interlocutory appeal proper under 10 U.S.C. § 950d(a)(1). Accordingly, the Motion should be denied.

OVERVIEW OF PROCEDURAL AND LITIGATION HISTORY, PERTINENT FACTS, AND ARGUMENT

As set forth at length in Appellant's brief filed this date, M.C.D.O. and Appellee's trial defense counsel are engaged in a strategic effort to undermine the military commissions process, erode the public's trust and confidence in this system of justice, obstruct and delay progress in Appellee's trial, impede the deposition of a key government witness, and prevent the admission of that deposition at trial. To achieve these ends, M.C.D.O. and Appellee's defense team have asserted the authority to exercise unilateral control over whether defense counsel deign to participate in Appellee's capital military commission, construed court orders as optional, refused to appear pursuant to lawful and duly served process, engaged in contemptuous conduct and been held in contempt, and abandoned Appellee and his legal defense.[1] Indeed, to this latter point, while M.C.D.O. stripped Appellee's trial defense down to the least-experienced single attorney,[2] M.C.D.O., Appellee, Appellee's counsel, and others are fully engaged in collateral and third-party attacks[3] on the Commission and the Military Judge's efforts to maintain control of his courtroom in the face of M.C.D.O.'s "revolution to the system."[4] Whatever the ultimate outcome of Appellee's military commission, M.C.D.O.'s and counsels' strategy to-date has proven destructive

[1] *See generally* Brief of Appellant at 4-11.

[2] *Id*, at 11.

[3] *See, e.g.*, Motion for Temporary Restraining Order, *Al Nashiri v. Trump*, No. 08-cv-1207 (D.D.C. Nov. 1, 2017), ECF No. 278; Notice of Filing, Supplemental Petition for Habeas Corpus, *Al Nashiri v. Trump*, No. 08-cv-1207 (D.D.C. Nov. 14, 2017), ECF No. 286; *Kammen v. Mattis*, No. 17-cv-3951 (S.D. Ind. Nov. 2, 2017), ECF No. 6 (Learned Counsel's petition for writ of habeas corpus filed against the Secretary of Defense, the Convening Authority, and the Military Judge); *Baker v. Spath*, No. 17-cv-2311 (D.D.C. Dec. 1, 2017), ECF No. 1 (the Chief Defense Counsel's petition for writ of habeas corpus filed against the Military Judge and Secretary of Defense); *Yaroshefsky v. Mattis*, No. 17-cv-8718 (S.D.N.Y. Nov. 9, 2017), ECF No. 1 (habeas petition filed against the Secretary of Defense and the Military Judge by the law professor whose letter was used by the defense to "excuse" Learned and civilian counsel); AE 389MM, Third Party Motion To Quash Deputy Chief Prosecutor's Subpoena on Rosa A. Eliades (Jan. 19, 2018); AE 389NN, Third Party Motion To Quash Deputy Chief Prosecutor's Subpoena on Mary E. Spears (Jan. 19, 2018).

[4] Unofficial/Unauthenticated Transcript ("Tr.") at 12373.

of the rule of law, so handcuffing and frustrating the Military Judge that he has indefinitely abated the proceedings below and is contemplating retirement from active military service because of his shaken faith in the law and what it means to be a lawyer.[5]

As Appellee readily concedes, the abatement of proceedings was directly precipitated by the Chief Defense Counsel's purported excusals of counsel in October 2017.[6] Far from rendering the interlocutory appeal improper, however, Appellee's recitation of the Chief Defense Counsel's belief that he possesses unilateral and unreviewable authority to excuse defense counsel at any time[7] makes this appeal vital—if the Chief Defense Counsel indeed possesses that authority, and if the right to learned counsel is as absolute as Appellee maintains, the Commission will never proceed in any meaningful way past this abatement.[8]

This is no mere hypothetical worst-case scenario. While Appellee's Motion claims that all will be well later in 2018 when CDR Brian Mizer is activated to serve as learned counsel,[9] not six weeks ago this very same counsel who filed the Motion opposed the notion that CDR Mizer would serve in that role.[10] Adding to the defiance and lawlessness, the acting Chief Defense Counsel is in lockstep with the Chief Defense Counsel and claims the authority to do as he pleases with assignments of counsel, presumably including declining to detail CDR Mizer to Appellee's case even if he is returned to active duty.[11] Appellee's Motion reflects what selective facts are momentarily expedient, and in the same breath that it denies the propriety of this appeal, it

[5] Tr. at 12372–74, 12377.

[6] Motion at 2.

[7] Motion at 2; AE 389C.

[8] Tr. at 10049 (finding that "learned counsel are not practicable in the near term, if ever, by the actions of General Baker").

[9] Motion at 1; *see also* AE 348M (ordering Convening Authority to work to bring CDR Mizer to active duty to resume defense of Appellee).

[10] Tr. at 11133.

[11] Tr. at 11060–63, 11545–48 (describing acting Chief Defense Counsel's un-detailing of three experienced counsel from Appellee's defense team after the Military Judge ordered that they appear on the record). Shortly after one of these colloquies, trial counsel questioned whether M.C.D.O. would assign CDR Mizer to Appellee's case, which acting Chief Defense Counsel has failed to address since. Tr. at 11074.

acknowledges the "rare cases" where an abatement order is properly appealed under interlocutory authority.[12] In the Motion's parlance, this is one of those "rare cases"—and it is so by virtue of Appellee's counsels' and M.C.D.O.'s unprecedented defiance of the law.[13]

Against this factual and procedural backdrop, Appellee seeks an order dismissing this interlocutory appeal before the Court considers any of its context or merit. Such a process neither comports with the law nor deters Appellee's counsels' and M.C.D.O.'s continued misconduct. Under the Military Commissions Act of 2009, the United States is entitled to consideration of its appeal, and nothing but full consideration of the merits of this appeal will move the proceedings below past M.C.D.O.'s and Appellee's counsels' triumphant stalemate.[14]

Even before the filing of the Notice of Appeal, the Military Judge below cut off all communication with the parties, going so far as to reject the Government's notices on the status of the Convening Authority's efforts to recall CDR Mizer to active duty.[15] The Military Judge previously ordered these notices,[16] and the resolution of CDR Mizer's recall to active duty is a matter the Military Judge noted in his decision to abate the proceedings.[17] The refusal of the trial judiciary to accept additional notices from the parties also leaves the government unable to notify the Military Judge of the recent declassification of facts and circumstances surrounding the attorney-client meeting spaces, the alleged "intrusion" into which directly spawned the contrived

[12] Motion at 7–8.

[13] Tr. at 11064 (addressing the acting Chief Defense Counsel, the Military Judge stated, "I know you disagree with my ruling. In this case, I think I've issued 320 of them. Across my career, I think I've issued thousands. Somebody disagrees every time. Somebody is unhappy. What rarely happens is one side simply ignores them and acts in the opposite, or contrary to the ruling I've issued. That doesn't happen very often. Frankly, in the last seven and a half years, I can think of one place and one team and one group that has done it, and that's yours.").

[14] *See supra* at 2–5.

[15] Appendix to Brief of Appellant at App. 1-3.

[16] AE 348U, Order (Jan. 23, 2018).

[17] Tr. at 12375–76 ("And then, of course, the other issue is learned counsel."); *see also* Tr. at 12353–54 ("I ordered Commander Mizer recalled to active duty months ago, and what I hear now is, oh, it might take seven or eight months. We need demonstrated real movement on recalling him or not doing it.").

"ethical quandary" that resulted in the abatement. The Military Judge's frustration with his inability to publicly address those circumstances was yet another circumstance that bore on the Military Judge's decision to abate.[18] Those declassified facts and circumstances are set forth below:

> In 2013, the defense team for Mr. al Nashiri requested accommodation to conduct privileged attorney-client meetings outside of designated meeting locations that are specially configured for that purpose, and used by other detainees in military commissions cases. Joint Task Force-Guantanamo (JTF-GTMO) found a location acceptable to the defense team and approved it for their use. Meetings between Mr. al Nashiri and his attorneys in that location began in April 2014 and continued until June 2017. During this period, Mr. al Nashiri used one specific room at that location for his attorney-client meetings, except when he met with his counsel in several locations in and around the Expeditionary Legal Complex (ELC), which is away from the detention facilities entirely.
>
> The new meeting location was not built or specifically designed for attorney-client meetings. Prior to the defense team's request, rooms in this building—including the one ultimately used by Mr. al Nashiri—were configured for detainee interviews. The rooms in the building in April 2014 thus included disconnected, legacy microphones that were not connected to any audio listening/recording device. While it was apparent that this room serving as the new meeting location had been previously configured for interviews, no audio equipment was used while Mr. al Nashiri was in the room. According to routine meeting logs, counsel used this room for meetings with Mr. al Nashiri on more than 50 days during this period, sometimes more than once in a day; the disconnected, legacy microphones in the meeting room were never in use during these meetings.
>
> The new meeting location was previously used for interviews of general-population (non-HVD) detainees as late as 2011. The meeting room is located in a building in a compound that JTF-GTMO exclusively controls. There are no records of the use of the building to conduct interviews after 2011.
>
> Like many buildings that JTF-GTMO maintains, the building housing the new meeting location had not been designed to accommodate privileged attorney-client meetings. With limited funds available to build such facilities over the last decade, repurposing existing structures was often the only feasible option when new requirements emerged. Various court orders and Department of Defense directives to preserve evidence and structures potentially relevant to litigation further limited

[18] Tr. at 12363–64 ("I've asked you for five months, I'm asking you again, to the extent possible, declassify matters surrounding the alleged intrusion.").

the JTF's ability and inclination to remove old equipment and confirm that it had been removed.

In late April 2017, in an entirely separate location not used by Mr. al Nashiri, the JTF Commander learned that attorney-client communications occurring outside of designated locations may have been overheard. After the Commander immediately stopped allowing attorney-client privileged meetings at this location, United States Southern Command (USSOUTHCOM) conducted an investigation into the facts and circumstances of the incident. The investigation formally commenced on 10 May 2017. This investigation concluded that a small number of detainees—none of whom were in contested military commission proceedings—were allowed to meet with their attorneys outside of designated meeting locations. This accommodation for the detainee legal teams resulted in attorney-client meetings being unintentionally overheard. The investigation further concluded that no one involved in legal proceedings or the JTF chain of command overheard these communications, and that this incident did not result from the culpable negligence or misconduct of any U.S. Government personnel. JTF-GTMO has implemented safeguards to ensure that this situation cannot reoccur. Again, this incident and subsequent investigation did not involve Mr. al Nashiri, his attorneys, or the meeting location that they used. Mr. al Nashiri has never met with his attorneys at the other location, i.e., the one where attorney-client communications were unintentionally overheard. No intrusions into attorney-client privilege occurred in any meeting between Mr. al Nashiri and his attorneys.

Following report of this incident, the Joint Detention Group (JDG) Commander executed a declaration on 30 June 2017, wherein he stated that Standard Operating Procedures (SOPs) strictly prohibit any compromise of privacy in attorney-client meetings spaces, and he offered—as his predecessor did in 2013—to allow defense counsel to personally inspect legal meeting rooms. Accepting this offer, Mr. al Nashiri's counsel conducted this inspection on 2–3 August 2017. During that inspection, they located a legacy microphone that, although not in use and not connected to any audio listening/recording device, had not been removed from the room.

Afterward, the defense team refused to meet in this room with Mr. al Nashiri. The JTF then offered several alternative meeting locations which would meet their needs. Since October 2017, members of Mr. al Nashiri's defense team have conducted their meetings with Mr. al Nashiri in and around the ELC—away from the detention facilities entirely. This was one of the options provided by the JTF.

Starting in late October 2017, the JTF removed flooring, walls, and fixtures in the new meeting location. The JTF confirmed that legacy microphones, which were not connected to any audio listening/recording device nor in an operable condition, were removed.

For these reasons, and those set forth below, the Court should deny Appellee's Motion.

ARGUMENT

I. THE MOTION IS JURISDICTIONALLY DEFECTIVE, PREMATURE, AND SHOULD BE DISMISSED

Appellee requests this Court to "dismiss Appellant's interlocutory appeal."[19] However, on the date Appellee filed his Motion there was no appeal, only notice of such an appeal. In other words, the notice of appeal is merely a procedural step to effect the taking of the appeal and notify this Court, the Commission, and Appellee that the appeal is forthcoming.[20] The actual process of appealing anticipates full briefing in accordance with this Court's Rules of Practice, and Appellee may argue against this Court having jurisdiction in his response to Appellant's brief, but not before. Effectively, Appellee requests a remedy for which he cites no authority: pre-appeal dismissal. This is akin to a request for extraordinary relief, and indeed the Motion acknowledges that in substance it is a restyled request for relief in the nature of a writ of mandamus.[21]

A. As a Restyled Request for Relief Under the All Writs Act, the Motion Is Jurisdictionally Defective

The nature of the Motion demands that the Court inquire into its jurisdiction to grant the Motion.[22] This Court has been vigilant in policing the boundaries of jurisdiction under the All

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[19] Motion at 1.

[20] *Compare* Rule for Military Commissions ("R.M.C.") 908(b)(2) (describing decision process for taking appeal and filing notice thereof), *with* R.M.C. 908(b)(7) (describing manner of effecting appeal by filing same directly with this Court) *and* R.M.C. 908(b)(8) (describing decision to not consummate appeal by filing with this Court). *Compare also* 10 U.S.C. § 950d(e) (describing method of notice and timing of taking the appeal) *with* § 950d(f) (describing the method of appeal directly to this Court). *See also* Regulation for Trial by Military Commission ("R.T.M.C.") at ¶ 25-5c (noting that in order to file an interlocutory appeal, a notice must first be filed).

[21] Motion at 9 ("[A]ppellee may need to seek a *writ of mandamus* on the question of whether this Court has confined itself 'to a lawful exercise of its prescribed jurisdiction.'").

[22] *In re Asemani*, 455 F.3d 296, 299, 372 (D.C. Cir. 2006) ("Before considering whether mandamus relief is appropriate . . . we must be certain of our jurisdiction.").

Writs Act, 28 U.S.C. § 1651(a).[23] A party cannot expand this Court's jurisdiction by styling a request for extraordinary relief as a motion.[24]

While this Court's Rules of Practice permit a party to seek an extraordinary writ,[25] a party requesting relief of that nature must at least provide "[t]he jurisdictional basis for relief sought and the reasons why the relief sought cannot be obtained during the ordinary course of appellate review."[26] Moreover, a party invoking the All Writs Act must establish that the requested writ is "in aid of" the Court's preexisting jurisdiction and that the requested writ is "necessary or appropriate." *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008), *aff'd*, 556 U.S. 905 (2009).

The Motion does not explain the jurisdictional basis for this Court to grant the relief it requests or how the requested relief is "necessary or appropriate," particularly at this time before briefing is completed. Appellant submits that is because the relief Appellee seeks *can* be obtained during the ordinary course of appellate review. Appellant briefed this Court's authority to hear the interlocutory matter in accordance with this Court's Rules of Practice[27] in its Brief of Appellant, filed on this date, and has provided further briefing below.[28] Should the Court determine it lacks jurisdiction, the Court need not address the merits. The Court should therefore deny Appellee's premature Motion to Dismiss.

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[23] *See* Order, *Miami Herald, et al., v. United States*, No. 13-002 (U.S.C.M.C.R. Mar. 27, 2013) (declining to find extraordinary writ jurisdiction under All Writs Act, 28 U.S.C. § 1651(a)); Order, *American Civil Liberties Union v. United States*, No. 13-003 (U.S.C.M.C.R. Mar. 27, 2013) (same).

[24] *Randolph v. HV*, 76 M.J. 27, 31 (C.A.A.F. 2017) ("[A]ppellant cannot use that article and the All Writs Act to artificially extend this Court's existing statutory jurisdiction."); *LRM v. Kastenberg*, 72 M.J. 364, 367 (C.A.A.F. 2013) ("The All Writs Act is not an independent grant of jurisdiction, nor does it expand a court's existing statutory jurisdiction." (citing *Clinton v. Goldsmith*, 526 U.S. 529, 534–35 (1999))).

[25] U.S.C.M.C.R. Rules of Practice, R. 22(a).

[26] U.S.C.M.C.R. Rules of Practice, R. 22(a)(7).

[27] U.S.C.M.C.R. Rules of Practice, R. 15(e)(2) & App. 1 (requiring appellant to "set forth the statutory basis of the CMCR's jurisdiction" in appellant brief).

[28] *See infra* at 10.

B. The Motion Should Not Be Adjudicated Before Completion of the Normal Briefing Cycle

As Appellee concedes, the government may appeal an abatement in what he characterizes as "rare cases."[29] Thus, the Court should fully consider whether this is such a case and whether the abatement is tantamount to dismissal, rather than accepting (1) the Motion's one-sentence assertion that it is not and (2) the Motion's circular argument that assumes this abatement is not tantamount to a dismissal and therefore the abatement cannot be appealed.[30] Insofar as an appellant is required to establish this Court's jurisdiction in the ordinary course of briefing any appeal—regardless whether the non-appealing party moves to dismiss—the issue of jurisdiction can be addressed at any time, but need not and should not be addressed until the Court considers the remarkable record of proceedings briefly summarized above,[31] and in light of that record, whether the abatement in this case satisfies United States v. True, 28 M.J. 1 (C.A.A.F. 1989) and related cases.

Appellee's summary dismissal of True carries no burden on a motion to dismiss, insofar as the Motion claims that this particular abatement is "neither tantamount to dismissal nor intended to be,"[32] while ignoring the remarkable intransigence and unlawful conduct of M.C.D.O. and Appellee's counsel that makes this case uniquely "intractable" within the meaning of *True* and other decisions that permit interlocutory appeal of abatement orders.[33] Indeed, that intransigence and unlawful conduct resulted directly in the abatement and the Court must consider it in the full context of the parties' briefs.

While not directly applicable, the ripeness doctrine illustrates other reasons why the Court should defer ruling. The doctrine "exists to prevent the courts from wasting . . . resources by prematurely entangling [themselves] in abstract disagreements[.]" *Nat'l Treasury Emps. Union v.*

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[29] Motion at 7.

[30] *Id.* (arguing that the abatement is not a dismissal because "the Military Judge did not abate until such time as the sun rises in the west").

[31] *See supra* p. 2.

[32] Motion at 7.

[33] *See supra* p. 2; *infra* Section II at 10; Brief of Appellant at 2–3.

United States, 101 F.3d 1423, 1431 (D.C. Cir. 1996) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967)). The United States Court of Appeals for the District of Columbia Circuit applies a two-part test to determine whether the facts of a particular case are sufficiently ripe for adjudication. This test considers "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* If the facts of a particular case are "not fully crystallized," and the party bringing suit does not "feel [the] effects [of the challenged conduct] in a concrete way," deferral is appropriate because the court may not need to adjudicate the dispute and can "protect the expenditure of judicial resources . . . ." *Id.*

Appellant respectfully suggests that there are no benefits to early adjudication of the Motion for the Court or either party, insofar as making the jurisdictional issue "fully crystalized" requires virtually the same briefing as the merits of the appeal. Considering the Motion at this stage saves no "resources," while nevertheless inviting the Court to decide the issue uninformed by the parties' full briefing. *Id.* The Motion presents no dispositive law or fact, acknowledges the propriety of interlocutory appeal of abatement orders in defined circumstances, and summarily asserts that those circumstances are not present in this case. That assertion is unsurprising, proves nothing, and does not merit dismissal of the appeal before it is briefed.

II. THE UNITED STATES PROPERLY APPEALED THE ABATEMENT UNDER 10 U.S.C. § 950d(a)(1)

Should the Court finds that it has jurisdiction and that the Motion is not premature, the Motion should be denied because the Military Judge's abatement is appealable under 10 U.S.C. § 950d. That statute provides, in relevant part, that "the United States may take an interlocutory appeal to the United States Court of Military Commission Review of any order or ruling of the military judge . . . that terminates proceedings of the military commission with respect to a charge or specification[.]"[34]

[34] 10 U.S.C. § 950d(a)(1).

Interpreting a nearly identical statute, the Court of Appeals for the Armed Forces has held that Article 62 of the Uniform Code of Military Justice ("U.C.M.J.")[35] provides jurisdiction for interlocutory appeal of abatement orders. For example, in *True*, the court upheld the government's ability to appeal abatement under 10 U.S.C. § 862. 28 M.J. at 4. The court reasoned that such an abatement was "not akin to a continuance" and that its effect was "more readily equated with other remedies such as dismissal or exclusion of the Government's expert evidence which were otherwise available and subject to appeal." *Id.* (citations omitted). On remand, the service court granted the appeal. *See United States v. True*, 28 M.J. 1057, 1062 (N-M.C.M.R. 1989).

The court reached a similar conclusion in *United States v. Hohman*, 70 M.J. 98 (C.A.A.F. 2011). There, the government's interlocutory appeal challenged an abatement imposed after the judge determined the government had inappropriately severed the accused's attorney-client relationship with his military defense counsel by releasing him from active duty. *Id.* at 99. The abatement was conditioned on the restoration of the attorney as defense counsel, who had by then been separated from active duty and become a reservist. *Id.* The service court first considering the interlocutory appeal noted that although the government had the means to resolve the dispute, the government's refusal to do so made the case more like a dismissal than a continuance. *United States v. Hohman*, No. 201000563, 2011 CCA LEXIS 14, at *5 (N-M. Ct. Crim. App. Jan. 31, 2011) (noting that where the government has—but refuses to use—the ability to meet the conditions that would end the abatement, "intractability has set in, [and] abatement is less like a continuance and more like a dismissal").

Like the abatements in *True* and *Hohman*, the abatement here is not akin to a mere continuance in either duration or effect. The Military Judge abated the proceedings "indefinitely" and indicated that he even "debated . . . for hours" whether to dismiss the charges outright.[36] Since

[35] U.C.M.J. Article 62(a)(1)(A), 10 U.S.C. § 862(a)(1)(A), provides, in relevant part, as follows: "In a trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal . . . [a]n order or ruling of the military judge which terminates the proceedings with respect to a charge or specification."

[36] Tr. at 12376.

abating the case, the Military Judge has held no proceedings, has refused to accept further filings he previously ordered be made, and, therefore, has been unwilling to receive newly declassified facts and circumstances around the alleged "intrusions" into attorney-client meeting spaces, information the Military Judge specifically sought be made public.[37] *Cf. United States v. Browers*, 20 M.J. 356, 359 (C.M.A. 1985) (finding no jurisdiction under Article 62 where the government did not contend "that the denial of the continuance terminated the proceeding, for there were further proceedings after this ruling was made"). The Military Judge's abatement and subsequent actions demonstrate that the courthouse is closed and Appellant cannot proceed with any aspect of its case. *Cf. United States v. Redding*, 11 M.J. 100, 104 (C.M.A. 1981) (finding extraordinary writ jurisdiction where "the trial judge dismisses the charges, or *takes other action that effectively precludes prosecution of them*, because he concludes that a command determination of unavailability [of individual military counsel] was wrong") (emphasis added). Therefore, this abatement is effectively a dismissal, rather than a mere continuance, and it gives this Court jurisdiction under 10 U.S.C. § 950d.

Moreover, the present abatement is more susceptible to interlocutory appeal than even those entertained by the courts in *True* and *Hohman*. First, the Military Judge did not impose clear conditions on lifting the abatement. In *True* and *Hohman*, the government was at least on clear notice of the basis for the abatement and the conditions that the government could satisfy to cause the lifting of the abatement. *Hohman*, 70 M.J. at 99 (abatement pending restoration of detailed defense counsel); *True*, 28 M.J. at 4 (abatement pending convening authority's compliance with trial court's order); *see also United States v. Harding*, 63 M.J. 65, 67 (C.A.A.F. 2006) (abatement pending enforcement of warrant of attachment). Although Appellee claims the Military Judge abated the case until one of three conditions were met,[38] the Military Judge's order lacked any

[37] Those facts are set forth *supra* at 5–6.

[38] Motion at 7 (noting two of the collateral attacks on the military commission, the potential for this Court or the U.S. District Court for the District of Columbia to issue a writ, or completion of "administrative paperwork" for the Appellee to receive a second learned counsel). Conspicuously absent from this list in the Motion are the Military Judge's numerous comments

such specificity. The only clear condition imposed by the Military Judge is that a superior court must order the proceedings to resume.[39] The Military Judge issued no written ruling to elaborate on these conditions, leaving it unclear what actions, if any, are directly available to Appellant to lift the abatement.

Second, and further highlighting the intractable nature of the abatement, is the fact that the Military Judge conditioned relief from the abatement on the attainment of actions that Appellant cannot satisfy. In *Harding*, the trial judge abated the case pending the execution of a warrant of attachment. *Harding*, 63 M.J. at 67. On interlocutory appeal of that abatement, the Court of Appeals for the Armed Forces found there was no jurisdiction under U.C.M.J. Article 62, because the government possessed means to end the abatement. *Id.* ("The responsibility for enforcing the warrant of attachment rests with officers of the Executive Branch. The rulings of the Military

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about a "62 appeal," referring to the parallel U.C.M.J. Article 62 provision for government interlocutory appeal. *See, e.g.*, Tr. at 10058, 10059, 10161, 11549, 12110.

[39] Tr. at 12376 ("I am abating these . . . proceedings indefinitely until a superior court orders me to resume."); *id* at 12377 ("We're done until a superior court tells me to keep going. It can be [the] CMCR. It can be the . . . the District [court] in D.C. They're all superior to me. But that's where we're at."). The military judge could not resolve M.C.D.O.'s intransigence and refusals to follow his oral and written orders on (1) whether the Military Judge possessed the authority to excuse counsel under R.M.C. 505(d)(2)(B) after counsel formed attorney-client relationships and appeared before the military commission, and (2) whether Appellee is entitled to learned counsel only insofar as "practicable" given M.C.D.O.'s unwillingness to provide counsel, learned counsel's improper excusal and purported withdrawal, and the plain language of 10 U.S.C. § 949a(b)(2)(C)(ii) (granting representation by learned counsel "to the greatest extent practicable").

These latter two issues are subjects of Appellant's Brief filed on this date, and are the decisions of the Military Judge that resulted most directly in the abatement. The Court must decide whether the Military Judge made these decisions correctly. If he correctly decided (1) only the military judge has the authority to excuse counsel after formation of attorney-client relationships and appearances before the commission, and (2) that the right to learned counsel is not an absolute requirement, but only "to the greatest extent practicable," then he abused his discretion in abating the proceedings indefinitely.

However, if the Military Judge was incorrect, and if an accused has an absolute right to learned counsel in capital military commissions, and if the Chief Defense Counsel has unilateral and unreviewable authority to excuse counsel at any time, then indefinite abatement was within the judge's discretion, because the case would grind to a halt upon the strategic exercise of that power. Indeed, that is precisely what happened when the Chief Defense Counsel claimed and exercised that power in October 2017.

Judge in the present case demonstrate that he is prepared to move forward with the trial if and when the warrant is executed."); *see also United States v. Wright*, 75 M.J. 501, 509 (A.F. Ct. Crim. App. 2015) (distinguishing *Harding* and finding jurisdiction under U.C.M.J. Article 62 where "military judge's abatement order came in response to a situation where 'intractability' had set in because the Government had definitively decided it would not produce the responsive correspondence"). Thus, in *Hohman*, *Harding*, and *True*, it was Executive Branch entities that refused to comply with the judge's order and Executive Branch entities that had the ability to satisfy the conditions that would lift the abatement.

This case is very different. Here, satisfaction of the "condition" imposed by the Military Judge is possible only by action of a superior court, affirming that (1) only a military judge may release counsel who have formed an attorney-client relationship and appeared before the commission, and (2) that an accused possesses a qualified right to learned counsel only "to the greatest extent practicable." 10 U.S.C. § 949a(b)(2)(C)(ii). Appellant cannot force M.C.D.O. to detail counsel and cannot resolve these issues and cause the abatement to be lifted. The requisite "intractability" has set in for this Court's jurisdiction, particularly given M.C.D.O.'s acts and unwillingness to abide by the Military Judge's orders. *Wright*, 75 M.J. at 509.

Under these conditions, the abatement in this case has indefinitely "terminate[d] [the] proceedings . . . with respect to a charge or specification," within the meaning of 10 U.S.C. § 950d and as that phrase has been interpreted by the Court of Appeals for the Armed Forces and the service courts. The intractability of the abatement is highlighted by its lack of clear conditions and the fact that its resolution lies outside Appellant's authority. Accordingly, this Court has jurisdiction under 10 U.S.C. § 950d and should deny the Motion.

CONCLUSION

Therefore, this Court should deny Appellee's Motion to Dismiss Appellant's Interlocutory Appeal for Want of Jurisdiction under 10 U.S.C. § 950d.

Respectfully submitted,

//s//

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by electronic mail to Counsel for Appellee on March 5, 2018.

//s//
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