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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

STATUTES AND RULES

OTHER MATERIALS

ISSUES PRESENTED

I. NO MILITARY OR CIVILIAN JURISDICTION RECOGNIZES THE "UNILATERAL, UNREVIEWABLE AUTHORITY" ASSERTED BY THE CHIEF DEFENSE COUNSEL "TO EXCUSE FOR GOOD CAUSE" ANY DEFENSE COUNSEL AT ANY TIME AFTER APPEARANCE BEFORE A COMMISSION. DID THE MILITARY JUDGE CORRECTLY RULE THAT HE, NOT THE CHIEF DEFENSE COUNSEL, IS THE APPROPRIATE AUTHORITY TO DETERMINE IF THERE IS "GOOD CAUSE SHOWN ON THE RECORD" TO WARRANT EXCUSAL OF A DEFENSE COUNSEL WHO HAS FORMED AN ATTORNEY-CLIENT RELATIONSHIP WITH THE ACCUSED AND APPEARED BEFORE THE COMMISSION?

II. THE MILITARY JUDGE RULED THAT A CAPITAL ACCUSED HAS THE QUALIFIED STATUTORY RIGHT TO BE REPRESENTED "TO THE GREATEST EXTENT PRACTICABLE" BY LEARNED COUNSEL, BUT THAT IN-COURT REPRESENTATION IS NOT "PRACTICABLE" DURING CERTAIN SESSIONS BECAUSE THE LEARNED COUNSEL HAS ABSENTED HIMSELF AS PART OF A TRIAL STRATEGY, AND CONTINUES TO IGNORE THE MILITARY JUDGE'S REPEATED RULINGS TO APPEAR BEFORE THE COMMISSION, AND THE MILITARY JUDGE HAS FOUND THAT GOOD CAUSE ON THE RECORD TO TERMINATE THE ATTORNEY-CLIENT RELATIONSHIP BETWEEN THE ACCUSED AND THE LEARNED COUNSEL DOES NOT PRESENTLY EXIST. THE MILITARY JUDGE ALSO FOUND THAT THE MILITARY COMMISSION DEFENSE ORGANIZATION WAS STRATEGICALLY UNDER-RESOURCING THE ACCUSED'S DEFENSE TEAM. DID THE MILITARY JUDGE CORRECTLY RULE, UNDER THESE CIRCUMSTANCES, THAT REPRESENTATION BY LEARNED COUNSEL AT THIS TIME IS NOT "PRACTICABLE"?

III. THE MILITARY JUDGE, FRUSTRATED WITH THE LENGTH OF TIME WITHOUT RESOLUTION OF THE LEARNED AND CIVILIAN COUNSEL REPRESENTATION OF APPELLEE ISSUE, AS WELL AS THE LACK OF ANY MEANINGFUL RESPONSE FROM THE DEPARTMENT OF DEFENSE SUPERVISORY CHAIN FOR M.C.D.O., IDENTIFIED AND CONSIDERED SANCTIONS TO SPUR GOVERNMENT ACTION AND APPELLATE REVIEW. WHILE STATING HE DID NOT WANT TO REWARD DEFENSE COUNSELS' ACTIONS, THE MILITARY JUDGE ABATED THE PROCEEDINGS INDEFINITELY UNTIL A SUPERIOR COURT DIRECTED OTHERWISE, AND CEASED COMMUNICATIONS WITH THE PARTIES DURING THE ABATEMENT. DID THE MILITARY JUDGE ABUSE HIS DISCRETION IN CHOOSING A SANCTION THAT REWARDED THE DEFENSE WITH THE ABATEMENT THEY SOUGHT AFTER LEARNED COUNSEL AND CIVILIAN COUNSEL ABANDONED APPELLEE?

IV. DID THE MILITARY JUDGE CORRECTLY RULE ON APPELLEE'S CLAIMS OF ALLEGED INTRUSIONS INTO ATTORNEY-CLIENT COMMUNICATIONS AND APPROPRIATELY DENY RELIEF ON THOSE CLAIMS? (*SEE* RESPONSE TO APPELLEE'S MOTION TO DISMISS AND APPELLANT'S CLASSIFIED BRIEF.)

STATEMENT OF STATUTORY JURISDICTION

The Military Judge's verbal ruling indefinitely abating the proceedings is appealable under 10 U.S.C. § 950d(a)(1) because it "terminates [the] proceedings of the military commission with respect to a charge or specification." Military courts of appeal interpreting the corresponding U.C.M.J. interlocutory appeal provision, 10 U.S.C. § 862, permit interlocutory appeal of a military judge's abatement order or ruling if that action "is the functional equivalent" of a ruling that "terminates the proceedings with respect to a charge or specification."[1] *United States v. True*, 28 M.J. 1, 2 (C.M.A. 1989). *See also United States v. Hohman*, No. 2010000563, 2011 CCA LEXIS 14 (N-M. Ct. Crim. App. Jan. 31, 2011) (App. 4687), *aff'd*, 70 M.J. 98 (C.A.A.F. 2011) (per curiam).[2]

Abatement orders may terminate a proceeding and be appealed under interlocutory authority where they are for unspecified periods of time or are conditioned on the occurrence of an unlikely event. *See United States v. Johnson*, 76 M.J. 673, 679 (A.F. Ct. Crim. App. 2017). It is the effect of the abatement order that controls whether it may be appealed. *Id.*

Here, the indefinite term of the abatement and the defense team's intractable refusal to obey the Military Judge's orders and other misconduct occurring over the course of more than five months make this abatement tantamount to a termination of the proceedings under 10 U.S.C. § 950d.

The Military Judge verbally issued his ruling on February 16, 2018, at approximately 10:13 AM EST. Unofficial/Unauthenticated Transcript ("Tr.") at 12376–77 (Mil. Comm'n Feb. 16, 2018) (App. 2672–2673). The abatement was indefinite: "I am abating . . . these proceedings indefinitely until a superior court orders me to resume." *Id.*

Appellant provided timely notice of its appeal of the Military Judge's verbal ruling to the Military Judge on February 21, 2018 at 8:00 AM EST, and it timely filed the notice directly with

[1] *See also* Appellant's Opposition to Appellee's Motion to Dismiss for Want of Jurisdiction Under 10 U.S.C. § 950d at 8–12 (Mar. 5, 2018).

[2] The *Hohman* decisions are discussed in the Appellant's motion response, *supra* note 1, at 9–10.

this Court at approximately 8:33 AM EST the same day. AE 395 (App. 4304); 10 U.S.C. § 950d(e) (App. 33); Regulation for Trial by Military Commission ("R.T.M.C.") ¶ 25-5f (App. 106); U.S.C.M.C.R. Rule of Practice 15(c)(1).

STATEMENT OF THE CASE

The Military Judge made findings of fact supported by the evidence and drew appropriate conclusions of law regarding civilian defense counsels' voluntary abandonment of their client. He properly found that defense counsel were engaged in a strategy to block the proceedings by, *inter alia*, under-resourcing the defense, and by failing to perform basic trial tasks such as cross-examining witnesses or challenging evidence. After reviewing the evidence, the Military Judge found defense counsel did not have good cause to withdraw. The Military Judge initially declined to reward these tactics by correctly identifying them as such and warning both Appellee and detailed military defense counsel that the tactics were ill-advised. His findings of fact on these matters should not be disturbed as they are not clearly erroneous.

The Military Judge properly determined that the Chief Defense Counsel ("CDC") did not have the "unilateral, unreviewable authority" he asserts to excuse defense counsel after those counsel entered appearances before the Commission, and that, despite potential ambiguity in the rules, excusal of counsel was ultimately a decision for the Military Judge. His conclusions of law in this regard are supported by the applicable statutes, relevant precedent, and sound principles of statutory interpretation.

Having made these findings of fact and conclusions of law, the Military Judge's decision to indefinitely abate the proceedings was an abuse of discretion, as it was unnecessary and was tantamount to dismissal of the charges. Instead, given the defense strategy, the Military Judge should have allowed the case to proceed and addressed the misconduct of the defense counsel.

For these reasons and those more fully set forth below, Appellant requests this Court affirm the Military Judge's findings, reverse the Military Judge's abatement order as an abuse of his discretion, order that the proceedings be promptly resumed with the presently detailed counsel, and grant whatever other relief the Court deems appropriate.

STATEMENT OF FACTS

I. THE ALLEGATIONS AGAINST APPELLEE

The charges allege that Appellee, a Saudi Arabian citizen, planned a complex series of attacks in the Arabian Peninsula known as the "boats operation" with Usama Bin Laden and other members of al Qaeda, and that he executed the attacks with assistance and participation from various named and unnamed individuals. *See* Referred Charge Sheet at 6 (App. 2680). These attacks resulted in 18 deaths. *See id*. at 9 (App. 2683).

II. THE COMPOSITION OF APPELLEE'S DEFENSE TEAM

The current members of Appellee's defense team who have appeared on the record are as follows: Richard Kammen, a DoD-appointed learned counsel compensated by the government; Rosa Eliades, a DoD civilian counsel detailed to the case as assistant defense counsel; Mary Spears, a DoD civilian counsel detailed to the case as assistant defense counsel; and U.S. Navy LT Alaric Piette, detailed military defense counsel. *See, e.g.*, AE 389A at 1 (App. 3419) ("Mr. Kammen, Ms. Eliades, and Ms. Spears remain counsel of record in this case. . . ."); AE 339G (App. 2968) (providing notice of LT Piette's appearance).

Mr. Kammen has represented Appellee since December 2008. *See* AE 389, Attach. B (App. 3377). On April 27, 2011, the Convening Authority appointed Mr. Kammen as Appellee's learned counsel. AE 077A, Attach. C (App. 2753).

The Military Commission convened to try Appellee (the "Commission") opened its proceedings on November 9, 2011, at which time Mr. Kammen appeared on the record and was designated as lead counsel. Tr. at 1–14 (App. 121–134). Before this proceeding, he submitted Military Commission Form 9-2, "Affidavit and Agreement by Civilian Defense Counsel" to the Commission. AE 008 (App. 2700). By the Military Judge's estimate, Mr. Kammen spent "10,000 hours representing Mr. al Nashiri over nine years" before his purported excusal in October 2017. Tr. at 11035 (App. 1331).

Ms. Eliades and Ms. Spears are DoD civilians employed by the Military Commission Defense Organization ("M.C.D.O."). *See id.* at 6152 (App. 149) ("Ms. Eliades and Ms. Spears are

GS [General Schedule] employees, approved by the convening authority at the request of the chief defense counsel."). In 2016, Appellee's defense team requested that the Convening Authority approve hiring Ms. Eliades and Ms. Spears to mitigate the disruption caused by the turnover of military personnel assigned to Appellee's case. *See* AE 350B at 1–2 (App. 3187–3188).

Appellee's counsel filed notices of detailing for both Ms. Eliades and Ms. Spears. AE 339E (Oct. 17, 2016) (App. 2958) and AE 339F (Dec. 12, 2016) (App. 2963), respectively. Both notices of detailing contained a memorandum from the CDC as Attachment B, denoting their assignment as "Assistant Defense Counsel." The memorandum specified that their detailing would become effective upon signature of a document called "Acknowledgment of Responsibilities."[3] Ms. Eliades and Ms. Spears first appeared before the Commission on October 17, 2016 and December 12, 2016, respectively, and Appellee expressed that he wanted them on his defense team. Tr. at 6619, 7159 (App. 151, 153).

On July 11, 2017, the defense filed a notice of detailing for LT Piette. AE 339G (App. 2968). A memorandum dated April 17, 2017 from the CDC detailing LT Piette as "Defense Counsel" was attached to the notice. *Id.*, Attach. B (App. 2972). On July 31, 2017, LT Piette made his first appearance before the Commission, and Appellee indicated that he wanted LT Piette to be part of his defense team. Tr. at 9743–45 (App. 155–157).

III. LITIGATION CONCERNING ALLEGED INTRUSIONS INTO ATTORNEY-CLIENT CONFIDENCES

[Please refer to the statement of facts in the separate, classified brief and the recently declassified statement of relevant facts at App. 18–19.[4]]

[3] For both DoD civilian counsel, the documents referenced in the detailing memoranda submitted as part of their appearance were not made part of the record. On February 9, 2018, however, their counsel attached a document entitled "Acknowledgment of Responsibilities" to the reply brief each filed in support of motions to quash subpoenas. *See* AE 389VV, Attach. B (App. 4192); AE 389WW, Attach. B (App. 4219). The agreement differs from Military Commission Form 9-2, Affidavit and Agreement of Counsel.

[4] Appellant informs the Court that the statement of declassified facts at App. 18–19 is provided for the Court's information and to aid its understanding of voluminous classified litigation, but the statement is not of record before the Commission.

IV. THE DEPOSITION OF AHMED MOHAMMED AHMED HAZA AL-DARBI

On March 17, 2017, the Military Judge authorized the deposition of Ahmed Mohammed Ahmed Haza al-Darbi and scheduled it to begin during the July 31–August 4, 2017 sessions, with cross-examination scheduled for the September 11–29, 2017 sessions. Tr. 9838-39 (App. 250-251); Tr. 10005 (App. 301). Mr. al-Darbi agreed to provide testimony pursuant to a pretrial agreement, which also allowed him to seek transfer to Saudi Arabia on February 20, 2018. Tr. 11076 (App. 2002).

On August 22, 2017, Appellee moved to continue the September 11–29, 2017 sessions due to Learned Counsel's personal obligations, which the Military Judge granted, thereby cancelling the September 2017 sessions in their entirety and setting an additional week of sessions for November 2017, rescheduling the cross-examination of al-Darbi to this extended session. AE 356G (App. 3213); AE 388 (App. 3359).

V. MR. KAMMEN, MS. ELIADES, AND MS. SPEARS APPLY TO WITHDRAW, AND THE CDC PURPORTS TO EXCUSE THEM

Mr. Kammen obtained an unofficial ethics opinion letter dated October 5, 2017 from Hofstra University law professor Ellen Yaroshefsky. AE 339L, Attach. B (App. 3058–3067). Ms. Yaroshefsky opined that Mr. Kammen could not continue to represent Appellee. *Id*. (App. 3067). Ms. Yaroshefsky's opinion relied on Learned Counsel's numerous allegations of governmental intrusions into the attorney-client relationships between defense counsel and detainees at Guantanamo. *Id.* (App. 3068–3076). The Military Judge found these allegations to be inaccurate. Tr. at 10818 (App. 1114) ("[W]hat [Ms. Yaroshefsky] was told appears different than the universe that learned counsel knew at the time.").

Mr. Kammen, Ms. Eliades, and Ms. Spears submitted written requests to the CDC to withdraw from Appellee's case. *See* AE 339J (App. 2985); AE 339K (App. 3019); AE 339L (App. 3053). Each request cited Ms. Yaroshefsky's letter as justification. *See* AE 339J, Attach. B (App. 2990); AE 339K, Attach. B (App. 3024); AE 339L, Attach. B (App. 3058). None of the attorneys submitted opinions from their respective bar authorities, as they had on a prior unrelated occasion. *See* Tr. at 1569–77 (App. 136–144).

At the time Mr. Kammen, Ms. Spears, and Ms. Eliades submitted their requests to withdraw to the CDC, the Military Judge had not ruled on AE 369AAA.[5] The defense was frequently permitted to hold confidential meetings with Appellee in the courtroom. *See* Tr. at 10023 (App. 319); *see also Id*. at 11034 (App. 1330).

On October 11, 2017, the CDC notified the three defense counsel that he granted their withdrawal requests, purporting to excuse them under the authority of Rule for Military Commissions ("R.M.C.") 505(d)(2)(B); the counsel submitted notices of the purported excusal to the Commission two days later, each also containing Ms. Yaroshefsky's opinion. AE 339J (App. 2985); AE 339K (App. 3019); AE 339L (App. 3053). Before this, excusal of counsel who appeared before the Commission was without exception presented to the Commission by motion, supported by essential facts, and approved by the Military Judge on the record in the presence of Appellee. *See, e.g.*, AE 339A (App. 2876). None of the notices stated whether Appellee consented to their departures.

VI. THE MILITARY JUDGE VOIDS THE CDC'S PURPORTED EXCUSALS

On October 16, 2017, LT Piette submitted AE 389, "Defense Motion to Abate Proceedings Pending the Detailing of Learned Counsel." The motion asserted that the CDC possessed unreviewable authority to unilaterally excuse defense counsel. AE 389 at 2–3 (App. 3370–3371). The Military Judge ruled that he "has not found 'good cause' to authorize the termination of the attorney-client relationship between the Accused and any of his Civilian Defense Counsel who have appeared before this Commission." AE 389A at 1 (App. 3419). The Military Judge stated that "Mr. Kammen, Ms. Eliades, and Ms. Spears remain counsel of record in this case, and are ordered to appear at the next scheduled hearing of this Commission, unless otherwise excused by this Commission." *Id.* On October 27, 2017, the Military Judge determined that the CDC possessed no authority to unilaterally excuse counsel after they appeared before the Commission, and he voided the CDC's directive excusing counsel. AE 389F at 5 (App. 3476); *see also* Tr. at

[5] "Defense Motion to Allow Mr. Al-Nashiri to Meet with his Counsel in the Courtroom and Enforce Mr. Al-Nashiri's Right to Counsel and Privileged Attorney-Client Communications."

10064 (App. 360). The Military Judge noted that "thus far no evidence has been presented to demonstrate intrusions [into the attorney-client relationship] in this case affecting this Accused which would ethically require the withdrawal or disqualification of Learned Counsel." AE 389F at 5–6 (App. 3476–3477).[6] The Military Judge also reiterated that "no good cause exists to warrant the excusal" of the civilian counsel, and he denied the motion to abate the proceedings. *Id.* at 4–5 (App. 3474–3475).

VII. THE NOVEMBER 2017 SESSIONS

On October 29 and 30, 2017, the CDC informed the government that Mr. Kammen, Ms. Eliades, and Ms. Spears "do not intend to travel to Guantanamo" and would not be participating in the November 2017 sessions. AE 389G, Attach. F (App. 3512); AE389I (App. 3529); Tr. at 10026 (App. 322). On October 31, 2017, the Military Judge reiterated his AE 389A findings on the record. *Id.* at 10025 (App. 321).

A. The CDC's Contemptuous Conduct

On October 31, 2017, the Military Judge called the CDC, U.S. Marine BGen John G. Baker, to testify about the absence of the three civilian attorneys. *Id.* at 10028–29 (App. 324–325). The CDC then categorically asserted a general privilege not to testify, refusing multiple orders to take the witness stand. *Id.* at 10039–42 (App. 335–338). The Military Judge next turned to the issue of the three defense attorneys the CDC purported to excuse, ordering him to rescind his excusal, which order the CDC refused. *Id.* at 10042 (App. 338). The Military Judge then instructed the CDC "to send [the attorneys] a memo telling them their withdrawal is not approved," to which the CDC replied "[o]h, I'm definitely not going to . . . I am definitely not . . ." and that he "refuse[d] to follow th[e] order." *Id.* at 10042–43 (App. 338–339). The following day, November 1, 2017, the Military Judge held the CDC in contempt under summary procedures pursuant to R.M.C. 809. *See* Tr. at 10052–64 (App. 348–364). The Military Judge described the CDC's contemptuous conduct as "an affront to the process of justice" because he "refused to obey

[6] In reaching this conclusion, the Military Judge was aware of the classified facts allegedly giving rise to the purported withdrawals. These facts are the subject of the separate classified brief.

the commission's order to testify" and "willfully refused to obey the commission's order to rescind [the] excusal of counsel," causing "a significant disorder to the [Commission's] process," "disorder and havoc," and that the refusals "constituted . . . disorders that disturbed these proceedings significantly." *Id.* at 10055–56, 10060–64 (App. 351–352, 356–360).

B. The Defense Team Defies Further Orders and Selectively Refuses To Participate in the Proceedings

On November 1, 2017, the Military Judge ordered Mr. Kammen, Ms. Eliades, and Ms. Spears to appear on behalf of Appellee on November 3, 2017, by video-teleconference ("VTC") at a government facility in Alexandria, Virginia, or to provide notice to the Commission of planned travel to Guantanamo Bay to participate in the sessions, offering to "consider delaying the proceedings until their arrival" if it received such notice. AE 389J at 2 (App. 3534). None of the three civilian counsel appeared; indeed, instead of appearing, Mr. Kammen filed a habeas petition in the U.S. District Court for the Southern District of Indiana the day after the Military Judge issued the order to appear.

On November 3, 2017, LT Piette announced that he would not examine or cross-examine witnesses or otherwise participate in the proceedings in the absence of a learned counsel, including a witness who travelled from the Middle East to Guantanamo at the defense's request to testify on a defense motion to suppress. *Id.* at 10080–81, 10152–54 (App. 376–377, 448–450). On November 7, 2017, LT Piette declined to cross-examine Mr. al-Darbi, the deposition witness. *Id.* at 10244 (App. 540). Earlier on November 1, 2017, the Military Judge had cautioned LT Piette that he considered such decisions to be strategic choices, and he warned that it was one that had worked poorly for defense counsel in the past, suggesting that LT Piette should discuss it with Appellee. Tr. at 10067 (App. 363). LT Piette has consistently declined to examine the government's foundational witnesses since that time.[7]

[7] *See infra* p. 32.

C. Efforts To Secure Additional Counsel

On November 17, 2017, the Military Judge ordered the acting CDC, U.S. Army COL Wayne Aaron, to appear. AE 389O (App. 3948); Tr. at 10983 (App. 1279). COL Aaron reluctantly confirmed that M.C.D.O. was in the process of securing a new learned counsel for Appellee. Tr. at 10986–87 (App. 1282–1283).

In a *sua sponte* reconsideration of a prior ruling, AE 348L, the Military Judge ordered the Convening Authority to "work to bring" Appellee's previously-released counsel, U.S. Navy CDR Brian Mizer, to active duty to resume representation. Tr. at 11042 (App. 1338). The Military Judge noted that CDR Mizer was learned in the law of capital cases, familiar with the facts of Appellee's case, and had a security clearance. *Id.* at 11042–43 (App. 1338–1339); *see also* AE 348M at 2 (App. 3125).

VIII. THE JANUARY AND FEBRUARY 2018 SESSIONS

A. Counsel Continue To Disobey Court Orders and Process To Appear

The Military Judge ordered Ms. Eliades and Ms. Spears to appear at Guantanamo for the January 2018 sessions to "continue representing the Accused . . . or show cause as to why [they] cannot continue representing the Accused" and invited Mr. Kammen to appear at the sessions "to represent his client or show cause as to why he believes he is ethically obligated to withdraw from this case." AE 389AA (App. 3984); AE 389BB (App. 3985); AE 390A at 1 (App. 4228). The Military Judge did not order Mr. Kammen to appear due to an outstanding order of the U.S. District Court for the Southern District of Indiana. *Id.* at 1 n.2 (App. 4228). Similar orders were issued for the February 2018 sessions. AE 393 (App. 4235). Mr. Kammen, Ms. Eliades, and Ms. Spears have not appeared before the Commission since their purported excusals.[8] In addition, Ms. Eliades and Ms. Spears have refused requests and duly-served subpoenas[9] to testify.

[8] *See infra* note 27 and accompanying text.

[9] AE 389RR at 4 (App. 4075) (acknowledging personal service on Ms. Eliades); AE 389SS at 4 (App. 4095) (acknowledging personal service on Ms. Spears).

B. M.C.D.O. Removes Resources from Appellee's Defense Team

COL Aaron informed the Military Judge that he had un-detailed more experienced counsel from Appellee's defense team, leaving LT Piette as the sole defense counsel, and he did so knowing of the Military Judge's order for those counsel to appear on the record. Tr. at 11060–68, 11070, 11131, 11545–48 (App. 1356–1364, 1366, 1427, 1841–1844). Moreover, COL Aaron announced that he did not intend to detail additional counsel to the case to assist LT Piette because "it is the position of the defense that [the] case cannot proceed and additional counsel could not be accepted or meet with the client unless and until learned counsel is present." *Id.* at 11060–61 (App. 1356–1357). The Military Judge asked COL Aaron "why [he] believe[s] it's okay to ignore [the Commission's] ruling[s]" and force Appellee to have LT Piette as his sole counsel, to which COL Aaron replied: "Because, Your Honor, that ruling we believe to be erroneous." *Id.* at 11063 (App. 1359).

C. The Military Judge Abates the Proceedings Indefinitely

On February 16, 2018, the Military Judge "abat[ed] the proceedings indefinitely . . . until a superior court orders [it] to resume." Tr. at 12376 (App. 2672). The Military Judge explained that he considered various options and decided that moving forward with the case would not promote "the efficient administration of justice." *Id.* at 12375 (App. 2671). The Military Judge concluded that the issues presented by defense counsels' absence need to be answered by "a court superior to me." *Id.*

STANDARD OF REVIEW

This Court applies the "same standard of review as our superior court in its review of government interlocutory appeals under 18 U.S.C. § 3731." *United States v. Al-Nashiri*, 62 F. Supp. 3d 1305, 1306 (U.S.C.M.C.R. 2014) (per curiam). The Court defers "under an abuse of discretion standard to the military commission's findings of fact . . . , including determinations of credibility, and a purely legal question under [18 U.S.C. §] 3731 is reviewed *de novo*." *Id.* (citations and internal quotations omitted).

"We review a military judge's ruling to abate a court-martial for an abuse of discretion." *United States v. Johnson*, 76 M.J. 673, 680 (A.F. Ct. Crim. App. 2017) (citing *United States v. Ivey*, 55 M.J. 251, 256 (C.A.A.F. 2001); *United States v. Wright*, 75 M.J. 501, 508-09 (A.F. Ct. Crim. App. 2015)).

"A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010). "We may not overturn the military judge's findings of fact unless they are clearly erroneous or unsupported by the record. If findings necessary to the resolution of the legal issues are incomplete or ambiguous, we must remand for clarification or additional findings." *Johnson*, 76 M.J. at 680 (citing *United States v. Lincoln*, 42 MJ 315, 320 (C.A.A.F. 1995)).

ARGUMENT

I. THE MILITARY JUDGE CORRECTLY RULED THAT HE—NOT THE CDC—IS THE APPROPRIATE AUTHORITY TO DETERMINE IF THERE IS "GOOD CAUSE SHOWN ON THE RECORD" TO WARRANT EXCUSAL OF A DEFENSE COUNSEL WHO HAS FORMED AN ATTORNEY-CLIENT RELATIONSHIP WITH THE ACCUSED AND APPEARED BEFORE THE COMMISSION

For three reasons, the Military Judge correctly ruled that he—not the CDC—is the appropriate authority to determine if there is "good cause shown on the record" to warrant excusal of a defense counsel who has formed an attorney-client relationship with the Accused *and* appeared before the Commission. First, the rules governing the excusal of defense counsel—R.M.C. 505(d)(2)(B), as supplemented by local Military Commissions Trial Judiciary Rules of Court ("R.C.") 4.2.b., R.C. 4.2.c., and R.C. 4.4.b.—require good cause to be shown on the record, as approved by a military judge, before the excusal of any defense counsel who has formed an attorney-client relationship with an accused and appeared before a commission. Second, the case law and rules of practice of military and Article III district courts demonstrate that, after defense counsel has entered an appearance, the trial judge determines whether good cause exists to warrant excusal. Third, the CDC's assertion that R.M.C. 505(d)(2)(B) vests him with the "unilateral,

unreviewable authority" to "excuse for good cause" any defense counsel at any time after appearance before a commission undermines the structural integrity of military commissions by removing control of the proceedings from the military judge, renders certain rules for military commissions incongruous or superfluous, and permits the CDC, without judicial approval, to obstruct proceedings at any time "until counsel is replaced and prepared to proceed," thereby frustrating the fair and efficient administration of justice.

A. The Military Judge's Ruling on Excusal of Defense Counsel

On October 27, 2017, after receiving briefing from the government and the CDC, the Military Judge determined that the CDC's assertion that he had the "unilateral, unreviewable authority" to excuse defense counsel after they have appeared before the Commission was "untenable" and void. *See* AE 389F at 5 (App. 3476); *see also* Tr. at 10064 (App. 360) (Spath, J.). Recognizing some "ambiguity in R.M.C. 505(d)(2)(B)," the Military Judge reasoned that it "cannot be read so as to conflict with other provisions within the R.M.C., rendering some superfluous, or read in a way that may directly prejudice the Accused if no judicial oversight is permitted." AE 389F at 5 (App. 3476). The Military Judge determined that "in conformity with federal and military case law, the Commission is the appropriate authority to determine if good cause is shown on the record to warrant excusal of counsel pursuant to R.M.C. 505(d)(2)(B)." *Id.*[10]

B. The Rules Governing the Excusal of Defense Counsel Require Good Cause To Be Shown on the Record, as Approved by a Military Judge, After a Defense Counsel Has Formed an Attorney-Client Relationship with an Accused and Appeared Before a Commission

The rules governing the excusal of defense counsel—R.M.C. 505(d)(2)(B), as supplemented by R.C. 4.2.b., R.C. 4.2.c., and R.C. 4.4.b.—require good cause to be shown on the record, as approved by a military judge, after a defense counsel has formed an attorney-client relationship with an accused and appeared before a commission. R.M.C. 505(d)(2)(B) governs

[10] The Military Judge further explained his ruling in AE 389F. *See, e.g.*, Tr. at 11035–36 (App. 1331–1332) (Nov. 17, 2017); *id.* at 12263 (App. 2559) (Feb. 15, 2018); *id.* at 12339–40 (App. 2635–2636) (Feb. 15, 2018).

changes of detailed defense counsel after the formation of an attorney-client relationship with an accused and provides as follows:

> (B) After formation of attorney-client relationship. After an attorney-client relationship has been formed between the accused and detailed defense counsel or associate or assistant defense counsel, an authority competent to detail such counsel may excuse or change such counsel only:
>
> (i) Upon request of the accused or application for withdrawal by such counsel; or
>
> (ii) For other good cause shown on the record.[11]

R.M.C. 505(d)(2)(B) (App. 51).

R.M.C. 505(d)(2)(B) is supplemented by R.C. 4.2.b., R.C. 4.2.c., and R.C. 4.4.b. R.C. 4 "governs the entry of appearance of counsel and the presence, excusal, relief, and withdrawal of counsel." R.C. 4.1 (App. 110).[12] With respect to detailed military counsel (such as LT Piette), R.C. 4.2.a.(3) (App. 110) provides that "[i]f detailed military counsel makes an appearance before a Military Judge, excusal must be approved by the Military Judge. (*See* RC 4.4.b.)." With respect to DoD General Schedule civilian defense counsel (such as Ms. Eliades and Ms. Spears),[13] R.C.

[11] R.M.C. 505(d)(2)(B)(ii)'s requirement that good cause be shown "on the record" clearly contemplates judicial review. *See, e.g.*, *Nesbitt v. Holder*, 34 F. Supp. 3d 192, 195 (D.D.C. 2014) (finding the phrase "on the record," in the context of Fed. R. Civ. P. 39(a), means "in open court" and citing consistent cases).

[12] R.M.C. 108 (App. 46) provides that "[t]he Chief Trial Judge for Military Commissions may make rules of court not inconsistent with these rules for the conduct of the military commission's proceedings." The R.C. "apply to all cases referred to trial by Military Commission." R.C. 1.1 (App. 109).

[13] Ms. Eliades and Ms. Spears have attempted to avoid the requirements of the R.M.C. and R.C. by claiming that their designation as "assistant defense counsel" exempts them from complying with R.C. 4.4.b. and other rules directed at particular classes of defense counsel other than "assistant defense counsel." *See* AE 389RR at 7 (App. 4078); AE 389SS at 7 (App. 4098); *see also* AE 389KK at 5–7 (App. 4014–4016); AE 389LL at 5–7 (App. 4024–4026). Their designation as "assistant defense counsel," however, merely defines their roles and does not relieve them from complying with the rules and regulations applicable to other classes to which they belong, especially when they have each formed an attorney-client relationship with the Appellee and appeared before the Commission. For example, Ms. Eliades and Ms. Spears are also governed by rules applicable to "attorneys," "defense counsel," "detailed defense counsel," "assistant detailed defense counsel," and "GS civilian defense counsel" in certain circumstances. Most pertinently, R.M.C. 505 specifically applies to the excusal of "assistant defense counsel," and R.C. 4.2.b. specifically applies to "GS civilian defense counsel," under which they qualify. *See* R.M.C. 505(d)(2)(B) (App. 51) (governing excusal of "detailed defense counsel" and "associate or assistant defense counsel"); R.C. 4.2.b. (App. 110) ("The rules applicable to detailing and

4.2.b. (App. 110) provides that "[t]he rules applicable to detailing and appearance of military counsel (RC 4.2.a) are equally applicable to GS civilian defense counsel." With respect to civilian learned counsel (such as Mr. Kammen),[14] R.C. 4.2.c. (App. 110) provides that "[i]f detailed civilian defense counsel makes an appearance before a Military Judge, excusal must be approved by the Military Judge. (*See* RC 4.4.b.)." Learned counsel, moreover, "will be detailed and make an appearance in accordance with RC 4.2.a-b." R.C. 4.2.d (App. 111). Finally, R.C. 4.4.b. (App. 112) broadly provides that "[a] defense counsel who has entered an appearance in a Commissions session will not be excused without permission of the Military Judge. (*See also* RC 4.2.a. and RC 4.2.b.)." *See also* R.C. 4.3.b.(1) (App. 111) ("Any counsel seeking authorization for absence from a session will request, by motion, permission from the Military Judge and provide a signed waiver by the client or an on-the-record waiver of the presence of counsel.").

The requirement of R.C. 4.2.b., R.C. 4.2.c., and R.C. 4.4.b. of approval by a military judge before the excusal of any defense counsel who has made an appearance before a commission is consistent with R.M.C. 505(d)(2)(B).[15] R.M.C. 505(d)(2)(B) (App. 51) provides the minimum conditions *necessary* for changes to a defense team "[a]fter an attorney-client relationship has been formed between the accused and detailed defense or associate or assistant defense counsel." R.M.C. 505(d)(2)(B)'s minimum conditions, however, are not *sufficient* to excuse a defense counsel after that defense counsel has made an appearance before a commission. In short, R.M.C. 505(d)(2)(B) addresses only the effect of the formation of an attorney-client relationship; it does not address the effect of an appearance on an attorney's excusal from representation. R.C. 4.2.b., R.C. 4.2.c., and R.C. 4.4.b. supplement R.M.C. 505(d)(2)(B) to address the latter contingency.

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appearance of military counsel (RC 4.2.a) are equally applicable to GS civilian defense counsel."). As members of both classes, Ms. Eliades and Ms. Spears require the approval of the Military Judge before excusal. *See* AE 389F at 5–6 (App. 3476–3477).

[14] Ms. Eliades and Ms. Spears concede that "the approval of the presiding Military Judge" is "required to excuse civilian defense counsel or military counsel who have made an appearance before the Military Judge." AE 389KK at 4 (App. 4013) (filed Jan. 18, 2018); AE 389LL at 4 (App. 4023) (filed Jan. 18, 2018).

[15] The R.C. must be interpreted consistently with the M.C.A. and the R.M.C., if such an interpretation is possible. *See* R.C. 1.2. (App. 109).

Here, the CDC purported to excuse three defense counsel—one learned counsel (Mr. Kammen) and two DoD civilian defense counsel (Ms. Eliades and Ms. Spears)—each of whom had formed an attorney-client relationship with the Accused and appeared before the Commission. AE 339J at 5 (App. 2989); AE 339K at 5 (App. 3023); AE 339L at 5 (App. 3057). Therefore, R.M.C. 505(d)(2)(B), R.C. 4.2.b., R.C. 4.2.c., and R.C. 4.4.b. apply. Read in unison, these rules require that "[i]f detailed civilian defense counsel makes an appearance before a Military Judge, excusal must be approved by the Military Judge." R.C. 4.2.c. (App. 110); *see also* R.C. 4.4.b. (App. 112) ("A defense counsel who has entered an appearance in a Commissions session will not be excused without permission of the Military Judge."). Accordingly, after appearing before a commission, the rules governing the excusal of defense counsel—R.M.C. 505(d)(2)(B), as supplemented by R.C. 4.2.b., R.C. 4.2.c., and R.C. 4.4.b.—require that defense counsel cannot be excused from representing an accused without the approval of a military judge.

C. Case Law and Rules of Practice Governing Excusal of Defense Counsel Provide that, After Defense Counsel Enters an Appearance, the Trial Judge Determines Whether Good Cause Exists To Warrant Excusal

The case law and rules of practice of military and Article III district courts demonstrate that, after defense counsel has entered an appearance, the trial judge determines whether good cause exists to warrant excusal. In military commissions, the case law established by the military judges in the referred cases of *United States v. Mohammad* and *United States v. Abd al Hadi al-Iraqi* demonstrates that good cause must be shown on the record, as approved by a military judge, before the excusal of any defense counsel who has formed an attorney-client relationship with an accused and appeared before a commission.

The Chief Judge of the Military Commissions Trial Judiciary, acting in his capacity as the *Mohammad* military judge, recently interpreted R.M.C. 505(d)(2)(B) and R.C. 4.4.b. in this context. The *Mohammad* military judge concluded as follows:

> To ensure there is no ambiguity on this issue, the Commission reiterates its rulings that R.M.C. 505(d)(2)(B) and RC 4.4(b) require good cause to be shown on the record (i.e. found by the Military Judge) prior to any excusal of any defense counsel who has formed an attorney-client relationship with an Accused and who has entered an appearance before the Commission. In this case, Major Wareham has

> done both. Any purported excusal of Major Wareham by the CDC, prior to the Military Judge finding good cause on the record, is an *ultra vires* act by the CDC, is void, and is not recognized by the Commission.

AE 004AA at 2, *United States v. Mohammad* (Mil. Comm'n Feb. 9, 2018) (App. 4448) (Pohl, J.) (footnote omitted); *see also* Tr. at 1313, *United States v. Mohammad* (Mil. Comm'n Jan. 28, 2013) (App. 4420) (Pohl, J.) ("[T]he rules do require that counsel file a motion . . . to be released."); Tr. at 1770, *United States v. Al Nashiri* (Mil. Comm'n June 11, 2013) (App. 146) (Pohl, J.) ("In my view, once counsel appear before the commission, you still need the judge's permission" to excuse defense counsel.). Indeed, it appears that recently even the CDC endorsed the view that the "good cause" requirement of R.M.C. 505(d)(2)(B)(ii) is intrinsic to any action under R.M.C. 505(d)(2)(B)(i), highlighting the recent self-serving and strategic reading of that rule by M.C.D.O. and the defense in this case.[16]

The then-presiding *Hadi al-Iraqi* military judge also interpreted R.M.C. 505(d)(2)(B) and R.C. 4.4.b. in this context. The military judge concluded that "once counsel have made an appearance before a tribunal, the military judge gets the final say on whether they should be released or not." Tr. at 667, *United States v. Abd al Hadi al-Iraqi* (Mil. Comm'n Sept. 22, 2015) (App. 4404) (Waits, J.); *id.* at 668 (App. 4405) (Waits, J.) ("But it is inconceivable -- based on that reading of the rule, we could be in the middle of . . . instructions, prior to sending members back to deliberate in a commission, and based on that reading of the rule, if the accused said, 'I don't want these lawyers anymore,' the chief defense counsel could excuse them. And that is an absurd

[16] Tr. at 12504–06, *United States v. Mohammad* (Mil. Comm'n July 20, 2016) (App. 4428–4430) (statement of the CDC) (arguing that in order for an accused to sever the attorney-client relationship pursuant to R.M.C. 505(d)(2)(B)(i), the good cause requirement in R.M.C. 505(d)(2)(B)(ii) must be found by the military judge). *See also* AE 380MM(CDC) at 7, *United States v. Mohammad* (Mar. 21, 2016) (App. 4662) (speaking of the "good cause" requirement broadly applicable to R.M.C. 505(d)(2)(B)). The only place where "good cause" appears in R.M.C. 505(d)(2) is in subsection (B)(ii) (App. 51), thus demonstrating that when it served his purposes, the CDC accepted the plain reading of the rule: the "good cause shown on the record" requirement applies to the entirety of R.M.C. 505(d)(2)(B) and refers to the record of trial. Because the establishment of the record is one of a military judge's core functions, 10 U.S.C. § 949o(a) (App. 31), the CDC's previous statements about the "good cause shown on the record" requirement reveal that even M.C.D.O. previously recognized that a military judge cannot be excluded from the good-cause determination once counsel formed an attorney-client relationship and appeared before a commission.

reading of that rule. So the commission, with all respect to the chief defense counsel, takes exception to that reading, and it's inconsistent with case law and the practice of military tribunals and civilian courts in our system."). The current presiding *Hadi al-Iraqi* military judge has ruled similarly. *See, e.g.*, Tr. at 1581, *United States v. Abd al Hadi al-Iraqi* (Mil. Comm'n Jan. 30, 2018) (App. 4415) (Rubin, J.) (rejecting CDC's purported excusal).

In courts-martial, the case law interpreting Rule for Courts-Martial ("R.C.M.") 505 (App. 116) and R.C.M. 506 (App. 118) demonstrates that excusal of defense counsel for good cause must be accomplished by the military judge on the record. *See United States v. Bevacqua*, 37 M.J. 996, 1003 (C.G.C.M.R. 1993) (holding "that, once a trial commences, the severing of the attorney-client relationship by excusal of a defense counsel for good cause under R.C.M. 505(d)(2)(B)(iii) must be accomplished by the military judge on the record"); *id.* at 1002 ("[W]e believe that after the trial commences it is only the military judge who may sever the attorney-client relationship, except in the limited circumstance under R.C.M. 506(b)(3) . . . .").[17]

In Article III courts, the case law demonstrates that, after counsel has entered an appearance, the trial judge determines whether good cause exists to warrant excusal. *See, e.g.*, *United States v. Williams*, 717 F.2d 473, 475 (9th Cir. 1983) ("[A] trial court's decision to release counsel is an exercise of its discretion."); *Laster v. District of Columbia*, 460 F. Supp. 2d 111, 113 (D.D.C. 2006) ("The decision to grant or deny counsel's motion to withdraw is committed to the discretion of the district court." (citing *Whiting v. Lacara*, 187 F.3d 317, 320 (2d Cir. 1999); *Fleming v. Harris*, 39 F.3d 905, 908 (8th Cir. 1994); *Washington v. Sherwin Real Estate, Inc.*, 694

[17] *See also United States v. Hutchins*, 69 M.J. 282, 289 (C.A.A.F. 2011) (articulating the military judge's "critical role" in the withdrawal or replacement of defense counsel); *id.* at 290–91 (noting the military judge's responsibility under R.C.M. 813(c) (App. 120) to ensure "that the record contained an accounting of [defense counsel's] absence and departure that was *accurate as a matter of law and fact*") (emphasis added); *United States v. Acton*, 38 M.J. 330, 336–37 (C.M.A. 1993) (finding detailed defense counsel's "purported unilateral withdrawal" from representation improper and noting "defense counsel may be excused only with the express consent of the accused, or by the military judge upon application for withdrawal by the defense counsel for good cause shown"); *United States v. Blaney*, 50 M.J. 533, 540 (A.F. Ct. Crim. App. 1999) (finding "in view of appellant's professed desire for [trial defense counsel's] continued representation of him, [defense counsel's] letter of withdrawal was no more than an application for withdrawal subject to approval by the military judge").

F.2d 1081, 1087 (7th Cir. 1982))); *Stair v. Calhoun*, 722 F. Supp. 2d 258, 264 (E.D.N.Y. 2010) ("Whether to grant or deny a motion to withdraw as counsel 'falls to the sound discretion of the trial court.'" (quoting *In re Albert*, 277 B.R. 38, 47 (Bankr. S.D.N.Y. 2002))).

All U.S. jurisdictions—military and civilian—require defense counsel to obtain leave from the court when withdrawal would leave the defendant without qualified counsel. *See* App. 4711–4713 (cataloguing the rules of practice of the Army, Navy and Marine Corps, Air Force, and Coast Guard regarding excusal of defense counsel in courts-martial); App. 4714–4732 (cataloguing the rules of practice of the 94 U.S. federal district courts regarding excusal of defense counsel).[18]

D. The CDC's Asserted Authority Frustrates the Fair and Efficient Administration of Justice

The CDC asserts that R.M.C. 505(d)(2)(B) vests him with the "unilateral, unreviewable authority" to "excuse for good cause" any defense counsel at any time after appearance before a commission. AE 389C at 11 (App. 3438); *accord* AE 339A at 3 (App. 2878). The CDC's interpretation of R.M.C. 505(d)(2), however, undermines the structural integrity of military commissions by removing control of the proceedings from the Military Judge, renders certain rules for military commissions incongruous or superfluous, and permits the CDC, without judicial approval, to obstruct proceedings at any time "until counsel is replaced and prepared to proceed," thereby frustrating the fair and efficient administration of justice.

The CDC's cynical interpretation of R.M.C. 505(d)(2) undermines the structural integrity of military commissions by removing control of the proceedings from the military judge[19] in three

[18] *See also* AE 389F at 6 n.7 (App. 3477) ("The Commission notes that under the Indiana Rules of Professional Conduct Rule 1.16(c), 'A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.'").

[19] Congress intended for military judges to have powers "more closely allied" to the powers of Article III judges, and the powers of a military judge under the U.C.M.J. are modeled after those of a federal district court judge. *See, e.g.*, 10 U.S.C. §§ 826, 836, 839 (App. 22, 23, 24); S. COMM. ON ARMED SERVICES, INCREASING THE PARTICIPATION OF LAW OFFICERS AND COUNSEL ON COURTS-MARTIAL, S. REP. NO. 90-1601, at 3 (1968) (App. 4697) (describing, as the purpose of what became the Military Justice Act of 1968, PUB. L. NO. 90-632, 82 Stat. 1335, "to redesignate the law officer of a court-martial as a 'military judge' and give him functions and powers more closely allied to those of Federal district judges").

ways. First, the military judge "is the presiding officer in a military commission." R.M.C. 801(a) (App. 62); *accord* 10 U.S.C. § 948j(a) (App. 28); *United States v. Nivens*, 21 C.M.A. 420, 425 (C.M.A. 1972). Second, the military judge "is responsible for ensuring that military commission proceedings are conducted in a fair and orderly manner, without unnecessary delay or waste of time or resources." R.M.C. 801(a), Discussion (App. 62). Third, the military judge must "exercise reasonable control over the proceedings." R.M.C. 801(a)(3) (App. 62). R.M.C. 505(d)(2)(B) should not be interpreted in a manner divorced from other provisions of the R.M.C. and the legal framework of which it is a part. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 99 (1992) ("We must not be guided by a single sentence or member of a sentence [of a statute], but look to the provisions of the whole law."). Thus, the CDC's asserted authority usurps the power granted by Congress (and the Secretary of Defense) to a military judge by removing control of the proceedings from that military judge and placing it in the hands of one of the parties to the dispute.

The CDC's interpretation of R.M.C. 505(d)(2) also renders certain rules for military commissions incongruous or superfluous. *Freytag v. Comm'r*, 501 U.S. 868, 877 (1991) ("Our cases consistently have expressed a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.") (internal quotation omitted). Other provisions of the R.M.C. make clear that a military judge has a role in the excusal of defense counsel once proceedings commence. *See, e.g.*, R.M.C. 805(c) (App. 68–69) ("As long as at least one qualified counsel for each party is present, other counsel for each party may be absent from a military commission session with the permission of the military judge."); R.M.C. 813(c) (App. 73) ("Whenever there is a replacement of . . . counsel, either through the appearance of new personnel or personnel previously absent or through the absence of personnel previously present, the military judge shall ensure the record reflects the change and the reason for it."); *see also United States v. Hohman*, 70 M.J. 98, 99 (C.A.A.F. 2011) (requiring a military judge to determine on the record whether good cause exists when excusing counsel under R.C.M. 505(d)(2)(B)). The R.M.C., when read together, belie the broad authority the CDC claims to derive from R.M.C. 505(d)(2)(B) alone.

The involvement of the Military Judge in the excusal of defense counsel is consistent with the R.M.C., and R.M.C. 505(d)(2) should not be interpreted as an anomaly.

The CDC's interpretation of R.M.C. 505(d)(2) permits the CDC, without judicial approval, to obstruct proceedings at any time "until counsel is replaced and prepared to proceed," thereby frustrating the fair and efficient administration of justice. AE 389F at 5 (App. 3476). The defense, through its notices to the Commission (AE 339J (App. 2985), AE 339K (App. 3019), and AE 339L (App. 3053)) and its motion to abate (AE 389 (App. 3369)), claims the authority to unilaterally halt commission proceedings. *See, e.g.*, AE 389 at 2–3 (App. 3370–3371) ("[T]he Chief Defense Counsel, . . . the only authority competent to excuse defense counsel, agreed and accepted their withdrawal requests, and excused Mr. Kammen and the other civilian counsel from Mr. Al-Nashiri's case . . . . A hearing in this case is scheduled for three weeks, beginning 30 October 2017. AE 356G. Mr. Al-Nashiri will not have a learned counsel by that time."); *see also* AE 389C at 3 (App. 3430) ("Under the R.M.C., the determination and exercise of the power to excuse for good cause is entirely vested in the Chief Defense Counsel, and upon excusal counsel's participation in the commission is terminated."). Under that interpretation, this asserted authority could be exercised at any time whether before trial, on the eve of trial, or during trial. Such a result is "untenable" because it would provide one party the power to unilaterally halt the proceedings at will.

Put simply, R.M.C. 505(d)(2)(B) does not vest the CDC with the "unilateral, unreviewable authority" to excuse defense counsel who have appeared before a commission because it would allow the CDC, without judicial approval, to obstruct proceedings at any time "until counsel is replaced and prepared to proceed," thereby frustrating the fair and efficient administration of justice. For the foregoing reasons, the Military Judge correctly ruled that he—not the CDC—is the appropriate authority to determine if there is "good cause shown on the record" to warrant excusal of a defense counsel who has formed an attorney-client relationship with the Accused *and* appeared before the Commission.

II. THE MILITARY JUDGE CORRECTLY RULED THAT THIS CAPITAL ACCUSED HAS THE QUALIFIED STATUTORY RIGHT TO BE REPRESENTED BY LEARNED COUNSEL, BUT THAT IN-COURT REPRESENTATION IS NOT "PRACTICABLE" AT THIS TIME

A. The Military Judge's Actions To Ensure Learned Counsel Was Present During the Proceedings

The Military Judge decisively rejected the CDC's purported excusal of Learned Counsel. The defense notified the Military Judge of Learned Counsel's purported excusal on Friday, October 13, 2017 and filed a motion to abate the proceedings on Monday, October 16, 2017, based on that purported excusal. *See* AE 339L (App. 3053); AE 389 (App. 3369). The Military Judge repudiated the CDC's excusal that same day. *See* AE 389A at 1 (App. 3419). After briefing from the CDC regarding his purported authority under R.M.C. 505, the Military Judge again repudiated the purported excusal of Learned Counsel. *See* AE 389F at 5 (App. 3476); *see also* Tr. at 10064 (App. 360). These rulings and orders maintained the status quo and left unchanged the Military Judge's prior scheduling order for the November 2017 sessions.

Before the start of those sessions, the Military Judge attempted to accommodate the Learned Counsel's concerns regarding the attorney-client meeting space. Specifically, the Military Judge made clear that he "has no objection to the Defense coordinating with the Guard Force to obtain the use of the ELC Courtroom to meet with the Accused during such times in which the Military Judge is not in session." AE 369OOOO at 1 n.3 (App. 3236). The Military Judge noted this accommodation, despite rejecting the defense argument that there were any intrusions into attorney-client communications in the current meeting space. *See* AE 369YYY (Class. App. 447); AE 369ZZZ (Class. App. 451).

Notwithstanding the Military Judge's voiding of the CDC's purported excusal of Learned Counsel and the Military Judge's efforts to ameliorate the defense concerns over the attorney-client meeting space, Learned Counsel did not travel to Guantanamo for the November 2017 sessions as ordered. *See* Tr. at 10015–16 (App. 311–312). The Military Judge found that Learned Counsel's failure to appear was willful and with the knowledge that the Military Judge had held

his purported excusal to be void. *See* Tr. at 10065 (App. 361). The Military Judge also indicated that the defense's non-participation was strategic in nature. *See infra* Section III.

In an effort to obtain Learned Counsel's presence for the remainder of the November 2017 sessions, the Military Judge directed the CDC to rescind his purported excusal and issue a memorandum rejecting Learned Counsel's application to withdraw. Tr. at 10042 (App. 338). The CDC refused that order, Tr. at 10042–43 (App. 338–339), and the next day, November 1, 2017, the Military Judge ordered Learned Counsel "to appear at Military Commission at the Mark Center, 4800 Mark Center Drive, Alexandria, Virginia 22350, on 3 November 2017 at 0800 hours to serve as Mr. al Nashiri's counsel during that hearing and for subsequent hearing continuing on 6 November 2017." AE 389J at 2 (App. 3534). *See also* R.T.M.C. ¶ 13-5.b. (App. 100) ("A civilian may not be compelled by subpoena to leave the United States and travel to a foreign country[.]").

Rather than complying with the Military Judge's lawful directive, Learned Counsel filed a petition for habeas corpus in federal district court on November 2, 2017, claiming that the Military Judge had issued a "writ of attachment" for him and that he was in "custody" for purposes of the habeas statute. *See* Habeas Petition at 4, *Kammen v. Mattis*, No. 17-cv-3951 (S.D. Ind. Nov. 2, 2017), ECF No. 6. Learned Counsel's claim was incorrect. No such writ or warrant had been issued, and Learned Counsel had not been served with a subpoena, a condition precedent to a warrant of attachment. *See* R.M.C. 703(e)(2)(G)(ii) (App. 59). Based on Learned Counsel's inaccurate representations, the federal district court issued an order staying "any purported requirement . . . that Mr. Kammen travel to Virginia on November 3, 2017 and/or on November 6, 2017 or on any future date" and provided that any "writ of attachment or . . . warrant [that] issues from a military commission in Guantanamo Bay for Mr. Kammen . . . be held in abeyance and not served or otherwise executed until this Court holds a hearing on the merits . . . ." *See* Entry Following Initial Hearing at 1–2, *Kammen v. Mattis*, No. 17-cv-3951 (S.D. Ind. Nov. 3, 2017), ECF No. 15.

In light of the district court's order, the Military Judge continued to invite Learned Counsel to appear at Guantanamo on a non-compulsory basis. *See, e.g.*, AE 390A at 1 & n.2 (App. 4228). The Military Judge also used moral suasion to obtain Learned Counsel's appearance, appealing to his ethical obligation to represent Appellee. *See, e.g., id.* at n.2 (App. 4228) ("[T]his Commission has not released Mr. Kammen from this case and believes that Mr. Kammen has voluntarily abandoned his client in contravention of multiple orders and is ethically obligated to represent his client."). These actions were unsuccessful, and Learned Counsel failed to attend any of the proceedings after his purported excusal.

In addition to taking these measures to secure Learned Counsel's attendance, the Military Judge took other measures to have a new learned counsel appointed to represent the Accused. For example, the Military Judge (1) directed the defense to provide bi-weekly updates on the status of M.C.D.O.'s search for replacement counsel (AE 389OO (App. 4066)); (2) ordered the Acting CDC to appear before the Military Judge to "update the Commission on M.C.D.O.'s efforts to secure an additional outside appointed learned counsel . . . [and] provide a timeline by which they expect to have such counsel appointed and prepared to represent the Accused" (AE 389OO (App. 4066)); (3) ordered the Convening Authority to work to bring CDR Mizer back on orders to represent the Accused (AE 348M (App. 3124); Tr. at 11042–43 (App. 1338–1339)); (4) ordered the government to provide weekly updates on the status of the Convening Authority's efforts to recall CDR Mizer (AE 348M at 2 (App. 3125)); and (5) noting her capital qualifications (*see, e.g.*, Tr. at 11564–65 (App. 1860–1861)), attempted to compel Ms. Eliades to attend the proceedings (*see, e.g.*, AE 389AA (App. 3984); Tr. at 11052 (App. 1348)). Against this backdrop of extensive effort, the Military Judge determined that proceeding with learned counsel present was not "practicable" and continued with the session he had previously scheduled.

B. The M.C.A. Provides a Capital Accused with a Qualified Statutory Right To Be Represented "to the Greatest Extent Practicable" by Learned Counsel, which Courts Have Interpreted as a Non-Mandatory Statutory Requirement

The M.C.A. provides a capital accused with a qualified statutory right to be represented "to the greatest extent practicable" by learned counsel, which courts have interpreted as a non-

mandatory statutory requirement. Section 949a(b)(2)(C)(ii) of the M.C.A. provides that "[w]hen any of the charges sworn against the accused are capital," the accused has a statutory right "to be represented before a military commission . . . *to the greatest extent practicable*, by at least one additional counsel who is learned in applicable law relating to capital cases." 10 U.S.C. § 949a(b)(2)(C)(ii) (App. 29) (emphasis added).

In Article III courts, the law provides that a defendant facing capital charges "shall [be] assign[ed]" two counsel, "of whom at least 1 shall be learned in the law applicable to capital cases." 18 U.S.C. § 3005 (App. 34) (mandating that a capital defendant "shall" be assigned at least one learned counsel) (alterations added). In courts-martial, a servicemember facing capital charges under the U.C.M.J. does not yet have the qualified statutory right to learned counsel. *See United States v. Akbar*, 74 M.J. 364, 422 (C.A.A.F. 2015) (Baker, J., dissenting) ("[E]ven persons accused of committing terrorist acts against the United States are entitled, 'to the greatest extent practicable,' to at least one 'counsel who is learned in applicable law relating to capital cases' under the Military Commissions Act. . . Yet no similar requirement exists for service members accused of a capital crime.").

In December 2016, Congress amended the U.C.M.J. by enacting the "Military Justice Act of 2016." PUB. L. NO. 114-328, div. E, 130 Stat. 2894 (App. XXX). Although not yet in effect,[20] the Military Justice Act of 2016 amends U.C.M.J. Article 70 (10 U.S.C. § 870) by adding at its end the following new subsection:

> (f) *To the greatest extent practicable*, in any capital case, at least one defense counsel under subsection (c) shall, as determined by the Judge Advocate General, be learned in the law applicable to such cases. If necessary, this counsel may be a civilian and, if so, may be compensated in accordance with regulations prescribed by the Secretary of Defense.

Id., div. E, tit. LIX, § 5334, 130 Stat. 2936 (App. 42) (emphasis added); *see also id.* div. E, tit. LV, § 5186, 130 Stat. 2902 (App. 41) (amending U.C.M.J. Article 27 (10 U.S.C. § 827) in nearly

[20] *See* Military Justice Act of 2016, PUB. L. NO. 114-328, div. E, tit. LXIII, § 5542, 130 Stat. 2967 (App. 43).

identical terms).[21] Thus, on January 1, 2019, the U.C.M.J. (as amended by the Military Justice Act of 2016) will provide a servicemember facing capital charges under the U.C.M.J. with the statutory right to learned counsel "[t]o the greatest extent practicable"—the same statutory right the M.C.A. provides.

The C.A.A.F. recently interpreted the amended U.C.M.J., and it unanimously concluded that the phrase "to the greatest extent practicable" is not a statutory requirement. *United States v. Hennis*, 77 M.J. 7, 9 (C.A.A.F. 2017) ("We recognize that the Military Justice Act of 2016 . . . requir[es]'[t]o the greatest extent practicable, in any capital case, at least one defense counsel . . . be learned in the law.' However, the 'to the greatest extent practicable' language makes plain that *there is no statutory requirement* for learned counsel.") (first alteration added) (emphasis added) (citation omitted).

The U.S. Court of Appeals for the District of Columbia Circuit, in other contexts, has confirmed the C.A.A.F.'s interpretation: the phrase "to the extent practicable" does not create a statutory requirement. *See Oceana, Inc. v. Locke*, 670 F.3d 1238, 1242–43 (D.C. Cir. 2011) (reading a statutory provision as mandatory where, in contrast to a neighboring provision, the duty imposed was not modified by the phrase "to the extent practicable"); *see also Cope v. Scott*, 45 F.3d 445, 450 (D.C. Cir. 1995) ("Even if the standards were relevant to the condition . . . the manual notes that they are applicable only 'to the extent practicable.' To us, this caveat means that the standards are applicable only when no competing priorities exist. Such flexibility is the essence of discretion.") (citation omitted). The adjective "greatest," which modifies the phrase "extent practicable," is similarly non-mandatory. *See, e.g.*, *Biodiversity Legal Found. v. Babbitt*, 146 F.3d 1249, 1253–54 (10th Cir. 1998) (concluding that the phrase "to the maximum extent practicable" in § 4(b)(3)(A) of the Endangered Species Act indicates the non-mandatory character of the provision); *see also Friends of Blackwater v. Salazar*, 691 F.3d 428, 433 (D.C. Cir. 2012)

[21] The "Military Justice Review Group" recommended specific amendments to U.C.M.J. Articles 27 and 70. *See* MIL. JUSTICE REV. GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP: UCMJ RECOMMENDATIONS 280 (Dec. 22, 2015) (App. 4705); *id.* at 645 (App. 4710).

(citing approvingly *Biodiversity Legal Found.*, 146 F.3d at 1253–54).[22] Thus, Section 949a(b)(2)(C)(ii) of the M.C.A. is not a mandatory requirement that learned counsel must be provided in all cases and at all times.

C. R.M.C. 506(b) Does Not Create a Greater Right to Learned Counsel than Congress Provided in Section 949a(b)(2)(C)(ii) of the M.C.A.

R.M.C. 506(b) does not create a greater right to learned counsel than Congress provided in Section 949a(b)(2)(C)(ii) of the M.C.A. R.M.C. 506(b) implements Section 949a(b)(2)(C)(ii) of the M.C.A. and provides as follows:

> In any case in which the trial counsel makes a recommendation to the convening authority pursuant to R.M.C. 307(d) that a charge be referred to a capital military commission . . . the accused has the right to be represented [by civilian counsel if provided at no expense to the Government or by detailed military counsel] and by at least one additional counsel who is learned in applicable law relating to capital cases. . . . Such appointment of learned counsel shall be in accordance with regulations prescribed by the Secretary of Defense.

R.M.C. 506(b) (App. 53) (alteration added).

Although neither the M.C.A. nor the amended U.C.M.J. strictly requires learned counsel, M.C.D.O. interprets R.M.C. 506(b) to impose a mandatory requirement—to provide learned counsel at all times at every phase of representation—because R.M.C. 506(b) omits the qualifying phrase "to the greatest extent practicable." This interpretation is incorrect for two reasons. First, R.M.C. 506(b) simply acknowledges the statutory right to be represented by learned counsel, which Congress established in Section 949a(b)(2)(C)(ii) of the M.C.A. R.M.C. 506(b) does not create a mandatory requirement as it does not use directive language, such as "the accused *shall* be represented by at least one learned counsel *at all times*." Second, R.M.C. 506(b) makes clear that the provision of learned counsel shall be accomplished per the requirements of the implementing "regulations prescribed by the Secretary of Defense," which impose a practicability requirement. *See* R.T.M.C. ¶ 9-1.a.6.B. (App. 83) ("If it is practicable to detail a military or civilian attorney assigned to, or employed by, the MCDO as learned counsel, the Chief Defense

[22] This statutory right is consistent with the sense of the 111th Congress that enacted the M.C.A. *See* Military Commissions Act of 2009, PUB. L. NO. 111-84, div. A, tit. XVIII, § 1807, 123 Stat. 2574, 2614 (App. 38).

Counsel shall detail such counsel . . . ."); *id.* ¶ 9-1.a.6.C. (App. 83) ("If it is not practicable to detail an attorney assigned to, or employed by, the MCDO, the Chief Defense Counsel shall select a member of the civilian pool, or other civilian counsel not yet a member of the civilian defense pool, who has the appropriate qualifications as outside learned counsel and forward a request for approval of funding for this counsel to the Convening Authority."). Thus, when R.M.C. 506(b) is read in conjunction with the M.C.A. and the R.T.M.C., it is clear that the Secretary of Defense did not create, and did not intend to create, a greater right to learned counsel than Congress provided in Section 949a(b)(2)(C)(ii) of the M.C.A. Thus, when R.M.C. 506(b) is read in conjunction with the M.C.A., it is clear that the Secretary of Defense neither created nor intended to create a greater right to learned counsel than Congress provided in Section 949a(b)(2)(C)(ii) of the M.C.A.

Further, the argument that the Accused is without learned counsel is specious because the Military Judge has ruled that Learned Counsel shall be retained and remain available to represent the Accused, including in-court representation. That Learned Counsel has chosen to voluntarily absent himself from in-court sessions does not make representation "to the greatest extent practicable" unfulfilled. Detailed Military Counsel has indicated that Learned Counsel remains available for consultation and advice. *See* Tr. at 11565 (App. 1861). The Accused has indicated that he supports Learned Counsel's actions and cannot force him to travel to Guantanamo. *See* Tr. at 11041 (App. 1337). The CDC has notified all parties that the Learned Counsel remains in a representational capacity to permit employment of other counsel. AE 389, Attach. C (App. 3385).

III. THE MILITARY JUDGE CORRECTLY DETERMINED THAT APPELLEE'S PRESENT TRIAL DEFENSE REFLECTS DELIBERATE, STRATEGIC DECISIONS OF THE DEFENSE TEAM AND M.C.D.O. AND THUS CORRECTLY DECIDED TO CONTINUE WITH PRETRIAL LITIGATION

A. The Military Judge Correctly Made Findings of Fact that Appellee's Trial Defense and M.C.D.O. Are Purposefully Undermining the Military Commissions System

The Military Judge repeatedly ruled that none of the alleged intrusions into privileged communications ever occurred.[23] To the contrary, the Military Judge correctly made numerous

[23] *See supra* p. 9 and the separate, classified brief.

factual findings that Appellee's trial defense team and M.C.D.O. made deliberate, strategic choices[24] resulting in abandonment of Appellee by learned and civilian counsel and the under-resourcing of Appellee's trial defense.[25] A military judge's findings of fact are reviewed for an abuse of discretion. They are "entitled to substantial deference and will be reversed only for clear error." *United States v. Edmond*, 41 M.J. 419, 420 (C.A.A.F. 1995) (quoting *United States v. Taylor*, 487 U.S. 326, 335–36 (1988)).

1. The Record Supports that Appellee's Counsel and M.C.D.O. Have Abandoned Appellee as a Strategic Choice

Despite Appellee's claim that proceedings cannot be conducted without learned counsel, the Military Judge did not abuse his discretion in his findings that as matters of strategic choice: (1) learned and civilian counsel have voluntarily abandoned Appellee, and (2) M.C.D.O. is intentionally under-resourcing Appellee's defense. Appellee should have learned counsel to the greatest extent practicable, but the law does not require the performance of futile acts, particularly where the government's good faith has been met with M.C.D.O.'s and defense counsels' intransigence. *See generally United States v. Crockett*, 21 M.J. 423, 430 (C.M.A. 1986) (observing that the prosecution's obligation of good faith does not require performance of a futile act).

The Military Judge made numerous findings of and references to abandonment.[26] Counsels' abandonment of Appellee is self-evident from even a cursory examination of the

[24] The record is replete with dozens of such findings and discussions of the defense's strategic choices stemming from the purported withdrawal of counsel in October 2017. *See, e.g.*, Tr. at 10187, 10629, 11568 (App. 483, 925, 1864).

[25] As the Military Judge found, it is not coincidental that the abandonment occurred on the eve of the cross-examination of Mr. al-Darbi. Based on the timeline of events in this case, the deposition hastened the use of this "nuclear option" in an attempt to defeat the later admission of that testimony at trial. As LT Piette noted in his motion to dismiss this appeal, the process to obtain additional learned counsel will take months, conveniently long after Mr. al-Darbi is scheduled to be repatriated. Consistent with this strategy will be the inevitable attack on admission of Mr. al-Darbi's deposition as an unavailable witness, with defense counsel arguing they did not have the opportunity to cross examine Mr. al-Darbi and thus the deposition is inadmissible. Though LT Piette protested defense counsel would not use the nuclear option tactic just to avoid cross-examining a witness, he recognized it could be seen that way. Tr. at 10629 (App. 925).

[26] Tr. at 10493, 10576, 10578, 10584–85, 10669, 10817 (App. 789, 872, 874, 880–881, 965, 1113). The defense's own expert appears not to know how the ABA Guidelines apply to abandonment. *See* Tr. at 10601 (App. 897).

record.[27] The Military Judge's "abandonment" findings are also supported by the defense's failure to appeal orders to continue representation and to continue with pretrial litigation—instead, they simply did not appear in court, casting aside legal norms.[28] Indeed, as the Military Judge observed, Learned Counsel was not only refusing to follow the Military Judge's orders to appear and continue representation, but also was actively fighting that order in a United States District Court.[29]

Further, the Military Judge found that the broader military commissions defense community deployed "the nuclear option" by abandoning Appellee.[30] For example, on October 31, 2017, the Military Judge observed that the actions of the CDC made it impracticable to have learned counsel's participation in Appellee's defense "in the near term, if ever,"[31] in light of his contemptuous refusal to rescind his order purporting to release Learned Counsel and civilian counsel,[32] and his unfounded belief that his authority to release counsel is unilateral and unreviewable.[33] It is further evinced by the Acting CDC's removal of three more experienced counsel[34] from the defense team to thwart the Military Judge's order for those already-detailed, physically present, and more-experienced counsel to appear and provide legal counsel and representation to Appellee.[35]

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[27] *See* AE 389A (App. 3419); AE 389F (App. 3472); Tr. at 10015–16, 10185, 10252, 10482, 10580, 10759, 11052–56, 11273–74, and 11534–35 (App. 311–312, 481, 548, 778, 876, 1055, 1348–1349, 1569–1570, 1830–1831).

[28] *See, e.g.*, Tr. at 10049 (App. 345) (noting filing a writ versus ignoring court orders); *id.* at 12321-22 (App. 2617–2618) (noting findings of fact adverse to counsel's bar licenses); *id.* at 11716 (App. 2012) (noting law license requirement to obey court orders).

[29] Tr. at 10754 (App. 1050); *see* Habeas Pet., *Kammen v. Mattis*, No. 17-cv-3951 (S.D. Ind. Nov. 2, 2017), ECF No. 6.

[30] Tr. at 10629 (App. 925).

[31] Tr. at 10048–49 (App. 344–345).

[32] Tr. at 10042–43 (App. 338–339).

[33] Tr. at 10053 (App. 349); AE389C at 2, 4 (App. 3429, 3431); AE389A (App. 3419); AE389F (App. 3472).

[34] Tr. at 11060–63 (App. 1356–1359), 11545–48 (App. 1841–1844).

[35] Tr. at 11064–70, 11547 (App. 1360–1366).

The Military Judge also concluded that the remaining detailed military counsel is furthering the defense's strategic choices, through repeated refusals to cross-examine evidentiary foundation witnesses on chains of custody, training and experience, and other rudimentary matters.[36] Indeed, detailed military counsel claims an inability to perform these elemental trial tasks without Learned Counsel's guidance, despite having the demonstrated ability to cross-examine a witness competently,[37] as noted by the Military Judge in support of his conclusion that failure to cross-examine was strategic.[38] The facts that detailed military counsel continues to meet with and represent Appellee, that M.C.D.O. at least claims to be seeking replacement learned counsel, and that defense teams in other commissions cases continue to meet with and represent their clients together belie the purported ethical quandary of Learned and civilian counsel, revealing the quandary to be a cynical ploy to gain strategic advantage, block the eventual admission of Mr. al-Darbi's testimony, and undermine the military commissions process.

2. The Record Supports the Military Judge's Findings that M.C.D.O. Is Under-Resourcing Appellee's Defense as a Deliberate, Strategic Choice

The Military Judge found that M.C.D.O. was deliberately under-resourcing Appellee's defense: "the defense team has significant resources that they have chosen not to bring to court, and they continue to choose not to bring to court by choice" and that doing so was "voluntary, intentional, and . . . strateg[ic]."[39] The Military Judge characterized M.C.D.O.'s "de-resourcing" of Appellee's trial defense as tactical and strategic decisions.[40] The same facts of record support these findings—the continued refusals of Learned and civilian counsel to attend proceedings, the actions of the CDC purporting to excuse Learned and civilian counsel, detailed military counsel's refusals to engage in fundamental pretrial litigation, and the Acting CDC's decisions to remove

[36] *See, e.g.*, Tr. at 10478, 10522, 10572, 10651, 10752, 10832, 10853, 10896, 10979, 11208, 11221, and 12346–47 (App. 774, 818, 868, 947, 1048, 1128, 1149, 1192, 1275, 1504, 1517, 1542–1543).

[37] Tr. at 10604–06 (App. 900–902).

[38] Tr. at 10670 (App. 966).

[39] Tr. at 10187 (App. 483).

[40] Tr. at 11274, 11524 (App. 1570, 1820).

three additional counsel from Appellee's defense team. Regardless whether Appellee disagrees with the Military Judge's conclusions, they are supported by the record of counsels' and M.C.D.O.'s own making, and are not abuses of the Military Judge's discretion. *Edmond*, 41 M.J. at 420.

B. The Military Judge's Decision To Proceed with Pretrial Matters in the Absence of Learned Counsel Was Consistent with *Strickland v. Washington*

The Military Judge observed on numerous occasions that M.C.D.O. and the defense are strategically pursuing their own agenda[41] and are willing to achieve that agenda through almost any means.[42] That agenda includes broadly undermining the military commissions process, halting the only military commission case addressing pretrial evidence admission, and impeding the deposition of a critical government witness.[43] Because the Military Judge correctly determined the defense's and M.C.D.O.'s abandonment of Appellee and the under-resourcing of his defense team were strategic decisions, it was—and remains—proper for the Military Judge to proceed with litigation and move towards trial.

As the government noted before the Commission,[44] a defendant may be forced to accept such intransigence and other behavior as a chosen trial strategy, regardless of whether with the benefit of full hindsight such choices might appear to have been unwise. As the Supreme Court noted in *Strickland v. Washington*, 466 U.S. 668 (1984), the defense is given "wide latitude . . . in

[41] *See supra* note 24.

[42] *See, e.g.*, Tr. at 10031 (App. 327) ("Apparently you all struggle with this. I get to interpret the law and I get to rule . . . That is how it works. And that is how it works anywhere. This isn't some weird session, even down here, and I know you all do that. This is a normal proceeding."); *id.* at 12113 (App. 2409) ("And again, I more than recognize there's always going to be a community that, whatever finding of fact I make, they're going to ignore because they have a different agenda."); *id.* at 12347–48 (App. 2643–2644) ("After years of effort, we now have a single detailed military defense counsel. No end in sight to the behavior of the Military Commissions Defense Organization, a defense community that believes it can exercise, and did, unilateral authority to excuse defense counsel at any stage of the proceeding, to include learned counsel"); *id.* at 12352 (App. 2648) ("We need to know are there going to be any actions taken against what could be viewed as kind of the lawless defense function who defy orders, defy subpoenas, and ignore rulings. We need some answers there, or it's going to continue, and it will slow this process down for another decade.").

[43] Tr. at 12342–46 (App. 2638–2642).

[44] AE 389G at 15 (App. 3492).

making tactical decisions" such as those at issue here, and these decisions are not to be second-guessed by the judiciary. *Id.* at 689.

In *Strickland*, the Supreme Court required deference towards the defense's decisions on how to structure its trial strategy, and instructed courts to presume "that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* *Strickland* has been applied in the context of counsel who appear to have abandoned their clients to greater or lesser degrees. In one such case, defense counsel filed no pretrial motions and refused to make an opening statement, make a closing argument, cross-examine witnesses, or make objections to the admission of evidence. In refusing to find the defendant entitled to constitutional relief, the court noted that silence can constitute trial strategy. *Id*. at 625. *See also United States v. Sanchez*, 790 F.2d 245, 247, 248 (2d Cir. 1986) (refusing to find limited defense activity to be an inadequate defense strategy) *cert. denied*, 479 U.S. 989 (1986).

Reasonable minds might disagree with the strategy pursued by Appellee's Learned Counsel, civilian counsel, and M.C.D.O. However, taken as a whole, *Strickland* requires after-the-fact analysis, rather than application to isolated events in ongoing litigation. At this point, the Military Judge has correctly followed *Strickland*'s command to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," 466 U.S. at 689, and has done so by declaring counsel's conduct to be strategic. Absent a "result of the proceeding" such that a full *Strickland* analysis might be conducted, and given the possibility for the defense and M.C.D.O. to change course between this pretrial stage and the completion of trial, the Military Judge's decision to continue with pretrial matters in the absence of learned counsel is supported by the record and consistent with *Strickland* and 10 U.S.C. § 949a(b)(2)(C)(ii). *See, e.g., United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996) ("We will reverse for an abuse of discretion if the military judge's findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law.").

IV. INDEFINITE ABATEMENT WAS AN ABUSE OF DISCRETION BECAUSE IT WAS UNNECESSARY TO CORRECT ONGOING MISCONDUCT WHERE LESS ONEROUS MEASURES WERE AVAILABLE

A. The Decision To Abate the Proceedings Indefinitely Was an Abuse of Discretion

The Military Judge identified seven options available to address learned and civilian counsels' abandonment of their client and disobedience of his orders after he rejected defense counsels' contrived attorney-client communication intrusion allegations.[45] He chose abatement. Before the abatement order, the Military Judge determined that the case should proceed with LT Piette. This decision was correctly based on the finding that the defense had made a strategic decision to abandon the Appellee. Implicit in this decision was the belief that the military judge should not ordinarily interfere with choice of trial strategies by defense counsel. *See supra* Section III.B. It also recognized that any denial of learned counsel was self-imposed and that the defense could, at any time, reverse the situation. The Military Judge's approach was reasoned and appropriate under these circumstances. The extraordinary act of indefinite abatement was not justified as it terminated the regular course of the proceedings without providing any guidance as to what specific wrong required correction or what action, short of seeking guidance from an appellate court, the Military Judge wanted the prosecution to take to restart the proceedings. This constituted an abuse of discretion.

Significantly, the abatement rewards Appellee's counsel for their bad behavior, recalcitrance, purposeful disregard of court orders, and blatant disrespect for the Military Judge. Rather than encourage the efficient administration of justice, the abatement again delays the proceedings and denies the public, the victims, and the victims' families an open and public trial.

[45] The Military Judge said he could (1) issue warrants of attachment to the two DoD civilian counsel; (2) subpoena the Secretary of Defense to address the "rogue defense organization within the process" that was under the Secretary's supervision; (3) abate the proceedings; (4) dismiss the charges and specifications with prejudice; (5) dismiss the charges and specifications without prejudice; (6) take no affirmative action; or (7) release the three civilian counsel and continue with LT Piette as sole counsel until an appellate court stops the proceedings. Tr. at 12349 (App. 2645).

It is a rule of criminal law that an accused should never benefit from his own bad behavior.[46] In short, the Military Judge disregarded this principle, rewarded the defendant, and punished the wrong party. The Military Judge clearly identified the recalcitrant and disobedient defense counsel as the party at fault.[47] The Military Judge abated the proceedings to force action from Appellant or a superior court. Nevertheless, where, as here, abatement is indefinite and uncertain and brings forward movement to an indefinite halt, it effectively terminates the proceedings and is tantamount to dismissal. *True*, 28 M.J. at 2.

Notably, previous defense behavior convincingly supports the Military Judge's finding that the current defense ploys are part of an overarching strategy. Since as early as 2013, when an inadvertent information technology glitch caused certain defense emails to be routed to the prosecution, the defense has sought to exploit every inconsequential hiccup to seek delay, inject specious and time-consuming non-issues, leverage ambiguity in rulings between military commission cases,[48] and discredit the military commissions process. The only party that benefits from a delayed process is Appellee because every day he and his counsel can delay trial is another

[46] *See, e.g.*, *United States v. Harris*, 2 F.3d 1452, 1456 (7th Cir. 1993) ("[T]o allow a defendant by his own misconduct to terminate his trial even temporarily would be to allow him to profit for his own wrong." (quoting *United States v. Chaussee*, 536 F.2d 637, 641 (7th Cir. 1976))); *see also United States v. Trevino-Rodriguez*, 994 F.2d 533, 535 (8th Cir. 1993); *United States v. Bamberger*, 456 F.2d 1119, 1128 (3d Cir. 1972); *State v. Montgomery*, 427 N.J. Super. 403, 406–10 (App. Div. 2012) (citing and discussing various state and federal cases). "Were the rule otherwise, a defendant could, in effect, ensure a mistrial by the simple expedient of disrupting the proceedings. This would reward bad behavior and, thus, create perverse incentives." *United States v. Rodriquez-Velez*, 597 F.3d 32, 43 (1st Cir. 1976).

[47] In the context of discussing dismissal with or without prejudice as options, he asked "[a]re you going to really reward recalcitrance and ignoring orders [by Appellee's counsel] with punishment to the prosecution?" Tr. at 12351 (App. 2647). The Military Judge did not dismiss the charges, though it appears he seriously contemplated it because, as he said, "that will force the government to go get all the answers I want. Because then I guarantee you someone will file in federal court, someone will file with CMCR, and somebody will go get some assistance." *Id*.

[48] *See* AE 155P at 143–44, *United States v. Mohammad* (Mil. Comm'n Aug. 23, 2013) (App. 4591–4592). Attachment CC is an April 4, 2013 email from the then-Chief Defense Counsel to defense counsel, including Appellee's Learned Counsel Mr. Kammen, reference subject of "Update on activities concerning information management," and stating, "I know that many of you are in search of details concerning the activities of EITSD involving all aspects of the information management . . . I am not worried about getting 'different answers', as I know that such ambiguity can be beneficial to us." (App. 20).

day a witness grows older. Rewarding that behavior with an abatement sets a dangerous precedent that is unwarranted by the circumstances and will only beget more of the same tactics and strategy because when tactics succeed, they are repeated.[49]

B. Denying Commission Filings Forestalled Informing the Commission of Appellant's Due Course Efforts To Resolve Appellee's Representation

By indefinitely abating these proceedings, the Military Judge has punished the wrong party just as surely as if he had dismissed the charges. In fact, Appellant has been working and informing the Commission of its due course actions to ensure Appellee is properly represented. Despite the fact that Appellee continues to have learned counsel available to him and Learned Counsel's absence is a strategic choice and an attempt to frustrate the advance towards trial on the merits, Appellant continues to undertake efforts to provide Appellee with additional learned counsel and resolve the situation created by Appellee. Although Appellant does not concede it is legally required to do anything further to satisfy the requirements of the M.C.A. or the R.M.C. with regard to "learned counsel," Appellant has initiated the review process regarding CDR Mizer's activation, as ordered by the Military Judge. Although involuntarily activating a reservist can take time, the process, with the proper authority, may be in effect in as little as 45 days.[50] While Appellant cannot commit to the ultimate decision, Appellant has identified a potential solution to activate CDR Mizer and is actively engaged in pursuit of that objective.

Further, Appellant has sought to release as much information as possible, again, as requested by the Military Judge, regarding defense counsels' claimed "intrusion," so as to further expose its contrived and strategic nature. These efforts include declassifying to the maximum

[49] Even the Military Judge recognized that once this occurs and goes unanswered with any viable sanction against defense counsel who usurp the process, there is nothing preventing it from happening again. *See* Tr. at 11555 (App. 1851).

[50] The process for bringing a reservist involuntarily to active duty is complicated, but Appellant has explored every option to expedite the process. The Military Judge has declined to accept updates to this process, however, through this abatement and follow-on communication to the parties directing them not to file updates with the Commission. This, too, is a factor showing the Military Judge abused his discretion because it stymies the very efforts the Military Judge said he wanted to force through this abatement by giving Appellant no means of communicating with the commission to seek reconsideration of his abatement order when the facts have changed.

extent possible and as quickly as possible, the information the Military Judge seeks to have in the public record. *See, e.g.*, Tr. at 12112 (App. 2408). However, abating the case and precluding all communication with the parties[51] have made providing information to the Military Judge impossible and contributed to the abuse of the Military Judge's discretion in this abatement decision.

CONCLUSION

For these reasons and those more fully set forth above, Appellant requests this Court affirm the Military Judge's findings, specifically hold that the Military Judge is the sole authority to determine if there is good cause shown on the record to warrant excusal of a defense counsel who has formed an attorney-client relationship with an accused and appeared before the Commission; hold that there is no absolute right to representation by learned counsel; reverse the Military Judge's abatement order as an abuse of his discretion; order that the proceedings be resumed with the presently detailed counsel; and grant whatever other relief the Court deems appropriate.

Respectfully submitted,

//s//

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[51] *See* App. 1–3.

CERTIFICATE OF COMPLIANCE

This brief complies with the Court's February 27, 2018 grant of the United States' motion for leave to file an outsize brief.

1. This brief complies with the type-volume limitation of U.S.C.M.C.R. Rule of Practice 15(g), as modified by the Court's grant of February 27, 2018 because:

This brief, combined with the separate, classified brief, contains 17,072 words.

2. The brief complies with the typeface and type style requirements of U.S.C.M.C.R. Rule of Practice 15(e) because:

This brief is written in 12-point Times New Roman font.

//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. In addition, I certify that the Appendix was either hand- or electronically delivered to the Clerk of Court and Counsel for Appellee on March 5, 2018.

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

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

Under U.S.C.M.C.R. Rule of Practice 15(d), Appellant United States of America will file an Appendix accompanying its Brief. Rule 15(d) permits a party, without moving the Court for leave, to attach in its appendix unpublished opinions, references that are not readily available, and extracts of statutes, rules, and regulations. For other documents, Rule 15(d) requires a party to move the Court for leave to attach them in its appendix. The U.S.C.M.C.R. Rules provide that, with leave of the Court, a party may attach "extracts from the record of trial" for the Court's convenience. U.S.C.M.C.R. Rules of Practice, Appendix 1 (The "appendix may set forth matters for the convenience of the CMCR, such as extracts from the record of trial, statutes, rules, or regulations; copies of decisions of other courts; and unpublished decisions.") Appellant moves the Court for leave to attach certain appellate exhibits and excerpts of transcripts in its Appendix, as extracts from the record of trial. Appellant also moves this Court for leave to attach other

documents, all of which will be relevant to the issues involved in this appeal, including certain excerpts from legislative history; and appellate exhibits and excerpts of transcripts from military commissions cases convened under the Military Commissions Act of 2009. Because U.S.C.M.C.R. Rules permit Appellant to attach these documents in its Appendix, the Court should grant the motion for leave.

WHEREFORE, Appellant moves the Court to grant the requested relief.

Respectfully submitted,

//s//

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CERTIFICATE OF SERVICE

I certify that this Motion to Attach Documents in Appellant's Appendix was filed electronically with the United States Court of Military Commission Review on March 5, 2018 and a copy of the foregoing was sent by electronic mail to defense counsel for Abd Al Rahim Hussayn Muhammad Al Nashiri on March 5, 2018.

//s//

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