

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

UNITED STATES OF AMERICA

AE 0002.037 (LEP)

V.

**DEFENSE MOTION
to Order a New Arraignment**

**ENCEP NURJAMAN;
MOHAMMED NAZIR BIN LEP;
MOHAMMED FARIK BIN AMIN**

14 September 2021

1. Timeliness.

This Motion is filed timely in accordance with R.C. 3.7.

2. Relief Sought.

Mr. Bin Lep respectfully requests this Commission find the previous arraignment, conducted on 30 – 31 August 2021, defective on three distinct and independent bases. As a result of these defects, Mr. Bin Lep respectfully requests a new arraignment be conducted in accordance with R.M.C. 707 and Mr. Bin Lep’s repeated requests for a speedy, fair trial.

3. Overview.

On 30 August 2021, this Commission convened for the purpose of conducting Mr. Bin Lep’s long-delayed arraignment on military commission charges following his over eighteen years in government custody. The arraignment could not be conducted on that day, however, because despite the extraordinary amount of time the Government has had to prepare for the prosecution of this case, they had not secured a competent Malay interpreter to provide real-time translation of the proceedings into the only language Mr. Bin Lep reliably understands. The

transcript from this hearing is replete with evidence that Mr. Bin Lep did not reliably understand what was being said by the military judge or by anyone else in the courtroom.

Due to the demonstrated deficiencies in the Malay interpretation, and in a desperate attempt to understand what was happening around him, Mr. Bin Lep resorted to listening to the interpreter speaking Indonesian, which is not his native language. While this improved matters somewhat, Mr. Bin Lep was still only able to comprehend approximately 70% of what was said. But this translation was fatally compromised by the bias of the Indonesian language interpreter, who stated just last year: “I don’t know why the government is wasting so much money on these terrorists; they should have been killed a long time ago.” This Commission then wrongly denied Mr. Bin Lep’s counsel the opportunity to voir dire this interpreter, whose real and apparent bias prevented her from functioning as a true, accurate, and impartial voice of the court.

Finally, both of these errors were compounded by Mr. Bin Lep’s lack of a Defense interpreter to facilitate attorney-client communications during the arraignment. While Mr. Bin Lep had previously relied upon a Government-provided interpreter, Mr. Bin Lep’s attorneys could not ethically utilize this individual because of specific and egregious Government interference with contracted Defense interpreters prior to the hearing. Additionally, the Government’s conduct during the hearing revealed that Mr. Bin Lep could not safely rely upon the confidentiality of his attorney-client communications through those interpreters.

These ethical and procedural concerns were validated when, on the morning of 30 August 2021, after nearly two decades awaiting his first day in court, Mr. Bin Lep saw a former interpreter –*with whom he had previously had confidential communications* – sitting next to the lead prosecutor at the Government’s table. The Government knew or should have known about

this conflict, but proceeded to utilize that interpreter anyway. This individual, whose function was never revealed and who may have provided confidential communications to the Government, was allowed to stay in court, and at Government counsel table, despite repeated Defense objections.

In summary: (1) Mr. Bin Lep could not reliably understand the court proceedings in his native language; (2) had to switch to listening to a language he only somewhat understands and was spoken by someone who wanted him and his co-accused summarily executed a decade ago; and (3) was entirely unable to communicate with, or ask substantive questions of, his attorneys, despite multiple attempts to do so during the two-day arraignment. All told, the hearings held on 30 – 31 August 2021 were conducted in clear violation of Mr. Bin Lep’s rights under the Fifth and Sixth Amendments, the Military Commissions Act, and the Rules for Military Commissions. The arraignment was fatally defective because Mr. Bin Lep was present in body only, not in mind. Because Mr. Bin Lep “was never arraigned, ... procession to trial [is] unauthorized.”¹ The proceedings must be conducted again, and correctly; otherwise, the taint of this defective arraignment will be unrectified, and the shared goal of a fair and legitimate trial will be unrealized.

4. Burden of Proof.

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted.²

5. Facts.

Mr. Bin Lep speaks and understands Malay, and his English is rudimentary at best. In

¹ *United States v. Price*, 48 M.J. 181, 182 (C.A.A.F. 1998).

² R.M.C. 905(c); R.C. 3.8.

fact, after Mr. Bin Lep was being brutally tortured and interrogated in the so-called “black sites,” the Government finally admitted that his lack of comprehension in any language other than Malay may have misled them into believing he was being deceptive.³ Then as now, the Government did not bother to employ a competent Malay linguist when one was manifestly necessary, which previously led to Mr. Bin Lep’s increasingly harsh treatment at the hands of his torturers, and now to the denial of his fundamental rights at his arraignment.

By no later than January 2010, the Government began the process of preparing Mr. Bin Lep’s case for a military commission. But Mr. Bin Lep remained detained without charge for over a decade. Finally, on 21 January 2021, charges were finally referred against Mr. Bin Lep, and he was served with them on 24 January 2021. Mr. Bin Lep then began immediately and repeatedly asking for a speedy trial.⁴ However, the Government and Mr. Bin Lep’s co-accused asked for a continuance, which was granted by the prior military judge on 2 February 2021.⁵

On 30 August 2021, the Military Commission conducted a session pursuant to R.M.C. 904 for the purpose of arraigning Mr. Bin Lep and his co-accused. However, within seconds of Trial Counsel beginning to read the guide,⁶ it became readily apparent that Mr. Bin Lep could not reliably understand the Government-provided Malay court interpreter.⁷ At one point, Mr.

³ “Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program,” dated 9 December 2014, at 109.

⁴ See AE 0002.022 (LEP).

⁵ AE 0002.007 (TJ).

⁶ While Mr. Bin Lep acknowledges that the Military Judge appropriately used the prepared document as a guide, this was clearly not apparent to the court translators, who often read verbatim from the document as if it were a required script.

⁷ Transcript from 30 August 2021, at 3; *see also* at 8 ([Mr. Bouffard:] “We’re hearing that our client cannot understand the Malay translation at this time.”); at 9 ([Mr. Bouffard:] “He’s not understanding what’s being said now.”); at 10 ([Mr. Bin Lep:] I could hear it, but I don’t understand it a hundred percent.”); at 11 ([Mr. Bin Lep:] I understand, but -- but not -- not too well.”); at 13 ([Mr. Bin Lep:] “I would say about 30 percent I can understand.”); at 31 ([Mr. Bouffard:] “I’m hearing from the other end of my table that my client is not being able to understand what is being said now.”); at 108 ([Mr. Bouffard:] “I had a halting conversation with him, obviously, in the absence of an interpreter, and my understanding from what he said is that he has understood about half of what has transpired

Bin Lep estimated that he was only understanding approximately 30% of what was being said.⁸ The only time when Mr. Bin Lep’s comprehension improved was when the interpreter was reading off of a pre-prepared script instead of interpreting the words uttered in the courtroom. The Defense objected to this behavior, but the interpreter continued to read, instead of translate, despite repeated admonishments by the Commission.⁹ In fact, at multiple points after such admonitions, the interpreter remained so dedicated to simply reading off the script that she ended up several seconds *ahead* of the actual court proceedings.¹⁰

Additionally, it was obvious to even non-Malay counsel that the interpreter wasn’t correctly translating Mr. Bin Lep’s words. For instance, when describing how bad the translation was, Mr. Bin Lep – in Malay – said something that included the phrase “Google Translate.” However, when the interpreter translated that exchange for the Commission, she made no mention of “Google Translate,” but instead merely said “[i]t's words that's not -- not required. Not needed. Not required.”¹¹ And on another instance, she clearly didn’t understand what her job actually was when she translated what Mr. Bin Amin said as: “As far as so far, he said literally verbatim, he said the structure is reversed, upside-down as far as I understand he says.”¹² Mr. Bin Amin’s lawyer then rightfully pointed out: “in case there's any confusion, everything she is interpreting for the court must literally be what my client said, not a summary

here today in sort of in fits and starts. He right now is not able to have a sufficient translation for him to understand in his native language and I am not confident that he has fully understood everything that has gone on up to this point.”); and at 112 ([Mr. Bouffard:] “I just do wish to state for the record, I know it's not my call, it's obviously the commission's call, but I personally, as his counsel, I am not confident that he, given -- given the situation has understood sufficiently what has happened here today. And so I believe that an arraignment under these circumstances would be a defective arraignment.”).

⁸ *Id.*, at 13.

⁹ *Id.*, at 5-6, 29-30, and 35.

¹⁰ *Id.*, at 35.

¹¹ *Id.*, at 10.

¹² *Id.*, at 23.

or an approximation.”¹³ This also revealed that the interpreter was having difficulty understanding Mr. Bin Amin when she candidly admitted she was only translating things “as far as I understand.” Finally, on numerous occasions, both interpreters failed to translate questions or responses that others were providing, preventing Mr. Bin Lep from hearing what his co-accused were saying.¹⁴

The difficulties with the Malay interpreter left only the Indonesian interpreter to relay the whole of the proceedings in any language other than English. But Mr. Bin Lep does not speak Indonesian. While he has a passing familiarity with it, he could only reliably understand approximately 70% of what was being said.¹⁵ And yet, this was his only option for trying to understand the Government’s proceedings against him with charges that carry the potential of a life sentence.

But the Indonesian interpreter, while perhaps technically competent, was fatally compromised by bias, as she stated just last year: “I don’t know why the government is wasting so much money on these terrorists; they should have been killed a long time ago.”¹⁶ Counsel for Mr. Bin Lep sought to explore her bias on the record, and proffered an affidavit attesting to the statement above, but the Commission denied the Defense an opportunity for voir dire.¹⁷

Despite all of the aforementioned issues with the interpreters, the Commission found them qualified and suitable for translation duties.¹⁸ Unfortunately, there were additional language issues that clouded the proceedings. Specifically, in the days prior to the arraignment,

¹³ *Id.*

¹⁴ *Id.*, at 11, 14, 18

¹⁵ *Id.*, at 110.

¹⁶ Attachment B (Under Seal).

¹⁷ Transcript from 30 August 2021, at 109; *see also* at 94.

¹⁸ *Id.*, at 27.

counsel for Mr. Bin Lep learned that the Government was ordering the team-assigned interpreter for Mr. Nurjaman to do things against that trial team's wishes. Furthermore, an additional MCDO-assigned interpreter was ordered by the Government to fly to Guantanamo, despite the MCDO having never requested or authorized her to do so. As a result, counsel for Mr. Bin Lep was unable to determine the scope of the official relationship they had with their previously-utilized interpreter, and were therefore ethically unable to use her in any further attorney-client privileged communications.

It also came to the attention of Mr. Bin Lep, as well as both Mr. Nurjaman and Mr. Bin Amin, that an individual who had previously translated confidential communications between them and their personal representatives and advocates was now sitting next to the lead prosecutor at the Government's table.¹⁹ While Mr. Bin Lep and his co-accused objected to this individual's presence, and no justification for his presence was ever given, he was allowed to stay throughout the entirety of the two-day proceedings as a member of the prosecution team. When the Defense objected again to this individual's presence, noting that the Commission had not definitively ruled on the issue, the military judge again deferred, stating that he didn't want the day to "devolv[e] into a free-for-all."²⁰

Mr. Bin Lep also repeatedly requested to ask questions of his counsel.²¹ However, because the Defense did not have an interpreter they could ethically use, Mr. Bin Lep was unable to ask those questions. Instead, the Commission interposed itself and tried to answer Mr. Bin Lep's questions directly, curtailing Mr. Bin Lep's ability to speak with counsel.²² When lead

¹⁹ *Id.*, at 39-41; *see also* at 90-91.

²⁰ *Id.*, at 91.

²¹ *Id.*, at 43-44, 45-46, 54, and 111-12.

²² *Id.*, at 44, 46.

counsel for Mr. Bin Lep repeatedly raised his concerns about his inability to provide assistance to his client, the Commission again demurred, reiterating its desire to avoid issues which would turn the Commission “into a free-for-all.”²³

On 31 August 2021, proceedings resumed. Counsel for Mr. Bin Lep attempted to register an objection to the prior day’s proceedings due to Mr. Bin Lep’s lack of comprehension, but was summarily denied.²⁴ Mr. Bin Lep also attempted to ask his attorneys a question relating to his rights to counsel, but he was also denied.²⁵ And again, there were multiple issues with the Malaysian interpreter not accurately or clearly translating the proceedings.²⁶ The charges were then read, and with the permission of the court, Mr. Bin Lep deferred the entry of his pleas.

6. Law and Argument.

These proceedings were defective for three distinct reasons, which would each independently justify the necessity of a new arraignment. First, the Government’s failure to translate the proceedings into a language Mr. Bin Lep could reliably understand renders his presence meaningless in violation of both the R.M.C. and the fundamental norms of any legitimate legal system. Second, the Government’s use of a biased interpreter (and the Commission’s deliberate refusal to engage on the appearance and reality of that bias) irreparably taints the proceedings. And third, the Government’s failure to facilitate, and in fact its active prevention of, proper attorney-client communications deprived Mr. Bin Lep of his right to counsel.

A. The Government’s failure to provide a capable Malay interpreter resulted in

²³ *Id.*, at 112.

²⁴ Transcript from 31 August 2021, at 149-50.

²⁵ *Id.*, at 160-61.

²⁶ *Id.*, at 170-71.

Mr. Bin Lep failing to understand the proceedings against him.

It goes without saying that arraignment is a critical element of a criminal proceeding, serving to protect and educate the parties about the accused's rights at the onset of trial.²⁷ Recognizing this, Congress required not only that an accused in a military commission be present for his arraignment, but that defense counsel also be physically located with the accused during the proceeding.²⁸ Further, this Commission has rightly articulated that “[t]he purpose of arraignment . . . is to ensure that the accused, through the interpreter, can understand the proceedings.”²⁹ But these rights are clearly meaningless if an accused cannot participate with “a reasonable degree of rational understanding” because the proceedings are in a language he does not understand.³⁰

Additionally, “[n]o person may be brought to trial by military commission if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against him or her or to conduct or cooperate intelligently in the defense of the case.”³¹ And an accused must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and . . . a rational as well as factual understanding of the proceedings against him.”³² R.M.C. 909 addresses an accused's capacity to stand trial by military commission, although it contemplates situations where an accused suffers from a mental disease or defect that renders him incompetent, which we are not alleging here. But that rule and the above-cited cases

²⁷ *United States v. Doty*, 51 MJ 464 (CAAF 1999).

²⁸ R.M.C. 804.

²⁹ Transcript from 30 August 2021, at 93.

³⁰ *U. S. ex rel. Negron v. State of N. Y.*, 434 F.2d 386, 389 (2d Cir. 1970).

³¹ R.M.C. 909(a).

³² *United States v. Proctor*, 37 M.J. 330, 336 (CMA 1993) (quoting *Dusky v. United States*, 362 U.S. 402 (1960)).

are nevertheless informative because the underlying basis for competency determinations is to ensure that the accused reliably understands the nature of the proceedings against him and is able to cooperate intelligently in his defense. In Mr. Bin Lep's case, the facts clearly indicate neither of those elements were met.

Specifically, Mr. Bin Lep repeatedly expressed that he could not understand the Malaysian interpreter, estimating his comprehension in the range of 30 – 50%. The interpreter's inability to perform her function negatively impacted both Mr. Bin Lep and Mr. Bin Amin, and was so obvious that even non-Malay counsel, as well as the media in the gallery, could tell the translation was being done incorrectly.³³ When combined with the lack of a defense-assigned interpreter, it was clear then and remains clear now that Mr. Bin Lep did not understand what was being said in and by the Commission during his first opportunity to appear in court after two decades of unlawful detention and torture.

While R.M.C. 909 doesn't specifically contemplate competency in the context of attorney-client language barriers, federal courts have previously addressed the issue of competency against the backdrop of attorney-client language barriers. In *United States ex rel. Negron v. State of New York*, the accused neither spoke nor understood English, and his court-appointed lawyer did not speak the accused's native language; as a result, the accused was unable to participate in any manner in his case.³⁴ The court opined that to the accused, "most of

³³ See Ben Fox, "Bali bomb case starts in Guantanamo 18 years after capture," AP News, 30 August 2021, available at <https://apnews.com/article/us-guantanamo-bali-bombings-military-commission-e309b757057f42ecba60eaae073c4d19>. ("The arraignment went off course early, with attorneys for the Malaysians telling the judge that the men couldn't understand their interpreter, who seemed to speak haltingly in both English and Malay.")

³⁴ *Negron*, 434 F.2d 386 (affirming grant of habeas relief to petitioner defendant when the trial was not translated for the benefit of petitioner, who neither spoke nor understood English).

the trial must have been a babble of voices.”³⁵ They went on to state:

[A]s a matter of simple humaneness, [the accused] deserved more than to sit in total incomprehension as the trial proceeded. Particularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language handicap of a newcomer to its shores, whose life and freedom the [Government] by its criminal processes chooses to put in jeopardy . . . Nor are we inclined to require that an indigent, poorly educated Puerto Rican thrown into a criminal trial as his initiation to our trial system, come to that trial with a comprehension that the nature of our adversarial processes is such that he is in peril of forfeiting even the rudiments of a fair proceeding unless he insists upon them.³⁶

Similarly, in a case challenging the lack of an interpreter at pretrial proceedings, *United States v. Cirrincione*, the Court held that a defendant in a criminal proceeding is denied due process when: (1) what is told him is incomprehensible; (2) the accuracy and scope of a translation at a hearing or trial is subject to grave doubt; (3) the nature of the proceeding is not explained to him in a manner designed to insure his full comprehension; or (4) a credible claim of incapacity to understand due to language difficulty is made and the trial court fails to review the evidence and make appropriate findings of fact.”³⁷ All of these elements are present here, as the transcript is replete with evidence that the Government-procured Malay interpreter’s translation was profoundly unintelligible for large portions of the proceeding. And the only portions that were comprehensible were when she was utilizing the script, which the Commission allowed her to keep in front of her over repeated Defense objections, and which she read from despite repeatedly being told not to by the Commission.

R.M.C. 804 requires Mr. Bin Lep to have been present for 100% of the arraignment, and purely in a bodily sense this was true; he was brought into the courtroom, charges were read, and

³⁵ *Id.* at 388.

³⁶ *Id.* at 390.

³⁷ *United States v. Cirrincione*, 780 F.2d 620, 634 (7th Cir. 1985) (relying on *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (“The hearing must be ‘at a meaningful time in a meaningful manner.’”)).

the Commission asked him (in English) “how do you plead?” But in reality, Mr. Bin Lep was nothing more than an “insensible object” throughout these proceedings.³⁸ In particular, and as expressed multiple times on the record, he only understood 30 – 50% of the interpretation in his native language, rendering his physical presence meaningless for the purposes of complying with the rules. While it no doubt proved convenient for the Government to continually torture and/or deny Mr. Bin Lep his substantive rights by not communicating with him in a language he reliably understands, neither this Commission nor *any* court of law should condone such behavior. There are tens of millions of Malay speakers around the world,³⁹ and the Defense is confident that the Government can find among those at least one who is capable of properly translating the proceedings of an international terrorism trial which could result in Mr. Bin Lep spending the rest of his life in jail. But until that time, Mr. Bin Lep should not be forced to rely upon a wholly inadequate substitute.

B. The Commission’s failure to allow voir dire into the Indonesian interpreter’s bias irrevocably tainted the proceedings.

As a matter of fundamental fairness, court interpreters must have no personal interest in the case.⁴⁰ Accordingly, courts routinely provide an opportunity to voir dire interpreters on questions of bias and qualifications as a necessary part of due process.⁴¹ An interpreter’s bias is both relevant and potentially disqualifying.⁴²

³⁸ *Negron*, 434 F.2d at 389.

³⁹ Department of Statistics Malaysia Official Portal, “Current Population Estimates, Malaysia, 2021,” 15 July 2021, available at https://www.dosm.gov.my/v1/index.php?r=column/cthemByCat&cat=155&bul_id=ZjJOSnpJR21sQWVUcUp6ODRudm5JZz09&menu_id=L0pheU43NWJwRWVSZklWdzQ4TlhUUT09.

⁴⁰ *United States v. Donati*, 34 C.M.R. 15, 19 (CMA 1963).

⁴¹ *NLRB v. Bakers of Paris, Inc.*, 929 F.2d 1427 (9th Cir. 1991).

⁴² *See, e.g., Prince v. Beto*, 426 F.2d 875, 877 (5th Cir. 1970) (“It was clearly possible to secure a disinterested interpreter in the instant case. Fundamental fairness requires no less.”); *United States v. Karake*, 443 F. Supp. 2d 8, 92 (D.D.C. 2006); Wright & Miller, 27 Fed. Prac. & Proc. Evid. § 6053 n.8 (5th ed. 2019).

In the present case, while the Commission stated on numerous occasions that it was satisfied with the translators' qualifications, requests for voir dire were repeatedly denied, and the issue of translator bias was never addressed. Specifically, Mr. Bin Lep and his co-accused repeatedly objected to the lack of opportunity to voir dire the Indonesian interpreter. This was especially problematic because, as a result of the defective Malay translation, Mr. Bin Lep was forced to rely on the Indonesian translation, of which he understood only 70%.

Had Mr. Bin Lep been afforded the opportunity for voir dire, his counsel could have asked the Indonesian interpreter about why she said this Commission is a waste of money, or why the accused should have been executed without trial years ago. Counsel could have asked what she meant by those statements, why she felt that way, and if she currently holds those beliefs. Perhaps she feels that none of the accused deserve any due process. Or perhaps she was personally affected by the bombings allegedly committed by the accused, although the Government's charge sheet doesn't allege that Mr. Bin Lep helped plan or even knew anything about them.

Regardless, because of the denial of voir dire and the lack of import the Commission gave to potential interpreter bias, we don't know the answers to any of those questions. All the Commission had before it during the hurried arraignment of Mr. Bin Lep was simply the certification provided by the interpreter herself. While the Commission stated it was satisfied with her qualifications (akin to being satisfied that, solely because one was once issued a driver's license, one is necessarily a good driver), the Commission would not consider any evidence that could determine whether the interpreter would be swayed to omit words, change responses, or shade statements differently based upon context (akin to ignoring any evidence of bad driving

because, again, the driver was once issued a license to drive, and that’s literally all that matters).

In short, Mr. Bin Lep should have been given the opportunity to test the interpreter’s bias, as well as her qualifications, in order to allow the Commission to make a proper determination as to whether she could fairly and impartially translate the proceedings. In absolutely no sense would doing so have constituted any kind of “free-for-all.” The Commission’s failure to even entertain this issue rendered the Indonesian translation, as well as the arraignment itself, defective.

C. Mr. Bin Lep’s inability to ask questions of counsel, as a result of the Government’s behavior, deprived him of his fundamental right to effective assistance of counsel.

Mr. Bin Lep has a constitutional, statutory, and regulatory right to be present at all sessions of the military commission in which he has not been lawfully excluded in the interests of national security.⁴³ He also has the right and obligation to be present at his own arraignment.⁴⁴ But that right is meaningless if he is unable to participate with “a reasonable degree of rational understanding” because the proceedings are in a language he does not reliably understand.⁴⁵

Mr. Bin Lep also has a right to the assistance of counsel.⁴⁶ This right, a core tenet of any fair judicial system, “requires the guiding hand of counsel at every step in the proceedings.”⁴⁷ The right to confer with counsel extends to representation during any “critical stage” of the proceedings.⁴⁸ And the American Bar Association’s Model Rules of Professional Conduct

⁴³ 10 U.S.C. § 949b(2)(B).

⁴⁴ R.M.C. 804(a).

⁴⁵ *Negron*, 434 F.2d at 389.

⁴⁶ 10 U.S.C. § 949a(b)(2)(C)(i).

⁴⁷ *Powell v. Alabama*, 287 U.S. 45 (1932).

⁴⁸ *United States v. Cronin*, 466 U.S. 648, 659 (1984) (“The presumption that counsel’s assistance is essential

impose an affirmative duty on attorneys to confer with their clients.⁴⁹

In this case, because Mr. Bin Lep and his counsel speak different languages, the assistance of an interpreter is required. But in the days immediately prior to arraignment, Mr. Bin Lep's counsel learned that the Government had, and was choosing to actually exercise, operational control over those interpreters. Specifically, another co-accused's interpreter acted in opposition to his counsel's stated wishes, while another MCDO interpreter attended hearings because they were ordered to do so by the Government. These actions stood in stark contrast to the interpreters being privileged members of the Defense teams, protected under the umbrella of attorney-client privilege. As a result, Mr. Bin Lep's counsel could no longer be confident that all communications with him were in fact covered under attorney-client privilege, and thus were subsequently ethically prohibited from continuing to use the only method they had for consulting with their client.⁵⁰

To be clear, it was the Government's own actions that caused the current situation, which still leaves the Defense in a state of limbo regarding the extent of the translators' responsibilities. For instance, if a translator can be ordered to appear at a hearing over Defense objections, or even ordered to fly down to Guantanamo, what more can the Government do? Could they order a translator to discuss when client meetings were had? Or to reveal the nature of topics discussed? Counsel for Mr. Bin Lep cannot say, and the lack of such knowledge presents

requires us to conclude that a trial is unfair if the accused is denied counsel at a critical state of his trial.”).

⁴⁹ ABA Rule 1.4 (“A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter.”).

⁵⁰ ABA Rule 1.6 (“A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”).

significant ethical concerns. Attorneys are expected to confer with their clients and maintain attorney-client privilege, but at present, the Defense can do neither. And as a result, the Government put Mr. Bin Lep in a position where not only was he unable to understand the proceedings, but he was also unable to effectively confer with his counsel.

This flagrant infringement on Mr. Bin Lep's rights is also not conjecture or mere speculation. To the contrary, evidence for how confidentiality could deteriorate was before the Commission in its very own courtroom. As discussed, the Government allowed a previous translator for the accused to sit at *their* counsel table, an act which was concerning for both intimidation purposes and for the real threat it poses if confidential communications have been passed on to the Government. Therefore, to the extent Mr. Bin Lep and his counsel had concerns about using their interpreters *prior* to coming into court, their fears were more than validated upon seeing the Government's choice for its at-the-table interpreter. This, too, was an issue raised timely and refused by the Commission to even entertain when it mattered. The resulting lack of effective assistance of counsel abrogated perhaps Mr. Bin Lep's most fundamental right at the very first hearing in this Commission, and requires immediate remediation through a new arraignment with confidential, privileged translators.

7. Conclusion.

The analysis of whether the arraignment was successful should begin and end with whether Mr. Bin Lep understood and was able to participate in the proceedings. And while the Defense does not gainsay the Commission's interest in moving with alacrity – indeed Mr. Bin Lep has been demanding a speedy trial for years – speed should not and cannot come at the cost

of the fundamental fairness of the proceedings.⁵¹

The Government cannot credibly blame the Defense for this issue; indeed, it has had nearly two decades to prepare its case for trial. In fact, this Commission granted the Government – over Mr. Bin Lep’s objections – more than six extra months to prepare for this arraignment. It therefore had ample time to accomplish the seemingly easy task of obtaining an interpreter who was both (1) competent and (2) not openly advocating for Mr. Bin Lep to be murdered without trial. Unfortunately, the Government failed on both accounts, and even took the further step of actively precluding Mr. Bin Lep from receiving proper assistance of counsel. Any one of these defects, much less all three, renders the arraignment a legal nullity.

A defective arraignment precludes further trial proceedings.⁵² Because the purported arraignment on 30-31 August 2021 was fundamentally defective and Mr. Bin Lep was constructively absent, this Commission must properly arraign him before any further proceedings may be conducted. And at that arraignment, Mr. Bin Lep is entitled to have the proceedings translated into the only language he reliably understands by a competent, disinterested interpreter, to be afforded the right to consult with his counsel with a reliably privileged interpreter, and thus to be able to participate meaningfully in the proceedings.

8. Oral Argument.

The Defense requests the Commission grant the requested relief herein as soon as practicable and does not request oral argument.

9. Witnesses and Evidence.

⁵¹ *United States v. Murguia-Rodriguez*, 815 F.3d 566, 573 (9th Cir. 2016) (“The error committed by the district judge, although motivated by a concern for judicial efficiency, is precisely the type of error the statute was designed to prevent. The Court Interpreters Act seeks to protect the basic rights of litigants who are summoned into court by the United States and cannot fully comprehend the proceedings.”).

⁵² *Price*, 48 M.J. at 182.

The Defense does not request witnesses or plan to provide further evidence.

10. Certificate of Conference.

The Government objects to the proposed relief.

11. Additional Information.

No additional information is provided.

12. List of Attachments.

- A. Certificate of Service.
- B. Declaration of Mr. Praxedes A. Kennedy, dated 28 August 2021. (Under Seal)
- C. Draft Order.

Respectfully Submitted,

//s//

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ATTACHMENT A

CERTIFICATE OF SERVICE

We certify that on **14 September 2021**, we filed **AE 0002.037 (LEP), Defense Motion** to Order a New Arraignment with the Office of the Military Commissions Trial Judiciary and served the foregoing on all counsel of record by email.

//s//

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ATTACHMENT B

United States v. Nurjaman et al.

APPELLATE EXHIBIT 0002.037 (LEP)

(Pages 22 - 23)

Under Seal

Attachment B

**APPELLATE EXHIBIT 0002.037 (LEP) is
located in the original record of trial.**

**POC: Chief, Office of Court Administration
Office of Military Commissions**

ATTACHMENT C

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

UNITED STATES OF AMERICA

v.

**ENCEP NURJAMAN;
MOHAMMED NAZIR BIN LEP;
MOHAMMED FARIK BIN AMIN**

AE 0002.0XX (TJ)

RULING

Defense Motion to Order a New Arraignment

__ September 2021

1. Procedural History.

a. On 21 January 2021, the Government referred Mr. Bin Lep's case for trial. He was served notice of these charges on 24 January 2021.

b. From 30 – 31 August 2021, this Commission convened for the purpose of arraigning Mr. Bin Lep and his co-accused. The proceeding closed, with the Commission stating at that time that the accused had been arraigned.

c. On 10 September 2021, Mr. Bin Lep filed AE 0002.037 (LEP), a Motion to Order a New Arraignment, based on various defects from the 30 – 31 August 2021 proceedings. The Government responded on _____. The Defense replied on _____.

2. Findings of Fact.

a. As a result of the ineffectiveness of the Government-provided Malaysian court interpreter, Mr. Bin Lep did not properly understand the proceedings of 30 – 31 August 2021.

b. As a result of the statements she previously made to a MCDO employee, the Indonesian court interpreter's bias rendered her unsuitable for her duties.

c. As a result of various Government actions, Mr. Bin Lep did not have a translator to facilitate attorney-client communications on 30 – 31 August 2021.

3. Law and Analysis.

a. The Government was required to translate the proceedings into Mr. Bin Lep's native language of Malaysian. Their failure to do abrogated his rights, codified in R.M.C. 804, to be present at every hearing of his Commission.

b. As a matter of fundamental fairness, the Government should also have ensured that all translators were unbiased and free of prejudice towards the accused. Their failure to do so, and the failure of the Commission to allow voir dire into this matter, was in error.

c. The right to effective assistance of counsel is enshrined in every tenet of American law, and for the Military Commissions in 10 U.S.C. § 949a(b)(2)(C)(i). When an accused does not speak the same language as his counsel, it goes without saying that effective assistance cannot be provided without an interpreter. However, counsel must still ensure all communications are confidential, and any infringement upon that confidentiality renders the attorney-client relationship ineffective.

4. Ruling.

Because of the three distinct violations of Mr. Bin Lep's rights, the Defense's motion for new arraignment, AE 0002.037 (LEP) **is granted**. The Government will immediately consult with the Defense, and report back to the Commission within _____ days as to potential new dates for an arraignment.

So ORDERED this ___ day of September, 2021.

HAYES C. LARSEN
CDR, JAGC, USN
Military Judge