

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

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**UNITED STATES OF AMERICA**

**v.**

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

**AE 0002.045 (GOV)**

**Government Response**  
To Mr. Bin Amin’s Motion For a Hearing  
with Witnesses to Determine the  
Sufficiency of the 30 and 31 August  
Proceedings

11 January 2022

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**1. Timeliness**

The Prosecution timely files this Response pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.

**2. Relief Sought**

The Prosecution respectfully requests that the Commission deny the relief requested in AE 0002.044 (AMI), Mr. Bin Amin’s Motion For a Hearing with Witnesses to Determine the Sufficiency of the 30 and 31 August Proceedings. The Commission has already considered this matter and determined that it “is satisfied that the rights of the Accused were not violated during the proceedings,” “the requirements of R.M.C. 904 have been met, and each Accused has been properly arraigned.”<sup>1</sup>

**3. Burden of Proof**

The burdens of proof and persuasion remain with Mr. Bin Amin as the moving party. *See* Rule for Military Commissions (R.M.C.) 905(c)(1)–(2).

**4. Facts<sup>2</sup>**

The Prosecution adopts the facts set forth in AE 0002.041 (GOV), Government Response to AE 0002.037 (LEP), Defense Motion to Order a New Arraignment.

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<sup>1</sup> AE 0002.043 (TJ), Ruling: Defense Motion to Order a New Arraignment.

<sup>2</sup> Counsel for Mr. Bin Amin continues to note in their filings that they lack sufficient resources for effective representation of their client. AE 0002.044 (AMI) at 1 n.1. Notably, to

On 14 September 2021, Counsel for Mr. Bin Lep filed a motion requesting the Commission order a new arraignment, arguing, *inter alia*, that Mr. Bin Lep failed to understand the arraignment due to inadequate Malay interpretation of the proceedings.<sup>3</sup> On 17 September 2021, Mr. Nurjaman filed a notice of declination of joinder.<sup>4</sup> On 20 September 2021, Counsel for Mr. Bin Amin filed a motion requesting the Commission grant the Defense a 60-day extension of time to file a notice of joinder in part and declination in part to Mr. Bin Lep’s filing AE 0002.037 (LEP).<sup>5</sup> The Commission denied Mr. Bin Amin’s request for an extension on 23 September 2021.<sup>6</sup> On 4 November 2021, the Commission denied Mr. Bin Lep’s request for the production of witnesses and a new arraignment, finding “1) the interpretation provided by the commission interpreters was adequate to insure Mr. Bin Lep and Mr. bin Amin understood the proceedings, 2) any potential inadequacy of the interpretation was appropriately addressed by the Commission during the proceedings, and 3) the proceedings were fundamentally fair.”<sup>7</sup>

After the Defense raised objections regarding the Malay interpretation at the 30 August 2021 session, the Prosecution consulted with its interpreter, P/I, who indicated that IN1 was experiencing some difficulty with the interpretation. The Prosecution then moved P/I to counsel table in order to more easily confer with P/I regarding the interpretation as the session continued. Later, the Commission acknowledged “perhaps this is just—in the Navy we would say ‘getting

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date, Mr. Bin Amin has not filed a motion to compel or requested any other relief from this Commission in order to resolve this contention. Mr. Bin Amin currently has three attorneys detailed to his case, and it is the Prosecution’s understanding that Mr. Bin Amin has two additional military counsel assigned to his defense team that have not yet been detailed to his case.

<sup>3</sup> AE 0002.037 (LEP), Defense Motion to Order a New Arraignment.

<sup>4</sup> AE 0002.038 (NUR), Defense Notice of Declination of Joinder to AE 0002.037 (LEP).

<sup>5</sup> AE 0002.039 (AMI), Mr. bin Amin’s Motion For Leave to File Joinder and Declination In Part Out of Time.

<sup>6</sup> AE 0002.040 (TJ), Ruling: Mr. bin Amin’s Motion For Leave to File Joinder and Declination In Part Out of Time.

<sup>7</sup> AE 0002.043 (TJ), Ruling: Defense Motion to Order a New Arraignment, at 7.

our sea legs.’ We’re just kind of stretching things here and understanding how it will work.”<sup>8</sup>  
As the proceedings progressed on 30 August 2021, P/I conveyed to the Prosecution that IN1’s interpretation was improving and intelligible.

Since the arraignment, the Prosecution had its interpreters assess the record to determine the quality of IN1’s interpretation of the 30–31 August 2021 proceedings. The Prosecution’s interpreters assessed that portions of IN1’s interpretation of the proceedings prior to the arraignment were flawed and incomplete; however, the arraignment portion of the proceedings was accurately interpreted.

Prior to the arraignment proceeding, the Prosecution provided the Commission interpreters with the charge sheet and the procedural guide for the arraignment session to help orient the interpreters to the proceedings. It is common for commission interpreters to read filings and court documents ahead of commission sessions to orient themselves to the matters being discussed.<sup>9</sup>

The audio recordings of Commission proceedings in Indonesian and Malay are classified because the classification authority does not speak Indonesian or Malay, and thus is unable to review the audio recordings for declassification purposes without an English transcript of the audio. The same standard is applied to the Arabic audio recordings of proceedings before other military commissions. This is standard practice for all military commission cases and has nothing to do with the Prosecution’s assessment of the quality of the interpretation.

## **5. Law and Argument**

Mr. Bin Amin requests an evidentiary hearing based on the Government’s purported failure to provide a capable Malay interpreter for the in-court interpretation of the Commission

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<sup>8</sup> Unofficial/Unauthenticated Transcript (Tr.) at 33.

<sup>9</sup> Interpreting takes place under extreme time constraint, and interpreters have to solve as many problems as possible before they actually interpret by anticipating potential solutions to such problems. It is useful for interpreters to prepare as much as possible before Commission sessions in order to think through words that do not have a direct translation into the interpreted language.

sessions held on 30–31 August 2021. Counsel for Mr. Bin Amin argue this resulted in Mr. Bin Amin not understanding the proceedings. Similar to Mr. Bin Lep’s motion for a new arraignment,<sup>10</sup> the legal basis for this motion is Mr. Bin Amin’s right to be present at the arraignment and his right to be able to understand the proceedings.<sup>11</sup>

In the Military Commissions Act of 2009 (M.C.A.), Congress provided an accused alien unprivileged enemy belligerent facing trial by military commission with extensive protections, which guarantee many of the same procedural and substantive rights the Uniform Code of Military Justice affords U.S. servicemembers.<sup>12</sup> Notwithstanding these unprecedented protections, Mr. Bin Amin bases his request for relief on Fifth and Sixth Amendment grounds.<sup>13</sup> Consistent with the canons of constitutional avoidance, however, the Commission need not reach the Accused’s constitutional arguments to decide the motion.<sup>14</sup> This is because the M.C.A. and applicable rules of procedure and evidence afford the Accused a fair trial that satisfies all rights to due process, confrontation, and presentation of the defense that the Accused may have.

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<sup>10</sup> AE 0002.037 (LEP).

<sup>11</sup> AE 0002.044 (AMI) at 6–8 (citing 10 U.S.C.S. § 948l, *United States ex rel. Negron v. State of N.Y.*, 434 F.2d 386, 389 (2d Cir. 1970), and *United States v. Cirrincione*, 780 F.2d 620, 634 (7th Cir. 1985)).

<sup>12</sup> *See, e.g.*, 10 U.S.C. § 949a(b)(2) (granting an accused the right to present evidence in the accused’s defense; to be present at all appropriate sessions of the military commission; to counsel; to self-representation; to suppression of evidence that is not reliable or probative; and to suppression of evidence that is unduly prejudicial); *id.* § 949c(b) (granting an accused the right to counsel); *id.* § 949h (granting an accused the right to not be tried twice for the same offense); *id.* § 949j (granting an accused opportunity to obtain witnesses and other evidence); *id.* § 949s (granting an accused the right against cruel or unusual punishments); *id.* § 950g (granting an accused the right to review by the U.S. Court of Appeals for the District of Columbia Circuit); *id.* § 950h (granting an accused the right to appellate counsel).

<sup>13</sup> AE 0002.044 (AMI) at 2 (asserting “Mr. Bin Amin is entitled to both be present and participate in his own defense under the Fifth and Sixth Amendments to the U.S. Constitution”)

<sup>14</sup> *See, e.g., Clinton v. Jones*, 520 U.S. 681, 690 & n.11 (1997) (“It is not the habit of the court to decide any constitutional question in advance of the necessity for its decision.”).

Citing *United States ex rel. Negron v. State of N.Y* and *United States v. Cirrincione*, Mr. Bin Amin argues that he did not understand the proceedings and was denied due process.<sup>15</sup> Even assuming, *arguendo*, the Due Process Clause applies to Guantanamo detainees, Mr. Bin Amin is still not entitled to the requested relief. Although the defendant in *Cirrincione* argued the lack of an interpreter at pre-trial proceedings denied him due process, the U.S. Court of Appeals for the Seventh Circuit affirmed the conviction, finding the record demonstrated the appellant spoke and understood English.<sup>16</sup> The Commission previously ruled *Negron* is also factually distinguishable from the current issue, as the defendant there was not provided any real-time interpretation of the proceeding and was only provided two brief summaries of the testimony over a four-day trial.<sup>17</sup> Like *Negron*, *Cirrincione* is applicable insofar as it stands for the proposition that an accused must be able to understand the proceedings.<sup>18</sup>

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<sup>15</sup> AE 0002.044 (AMI) at 7–9.

<sup>16</sup> *Cirrincione*, 780 F.2d at 634–44.

<sup>17</sup> AE 0002.043 at 6; *Negron*, 434 F.2d at 388. Here, a Commission interpreter provided real-time interpretation for the entirety of the proceedings.

<sup>18</sup> The Accused have a statutory right to consult with an attorney, confront their accusers, and knowingly, intelligently, and voluntarily waive their rights, but the cases cited by Mr. Bin Amin generally do not support these premises or are not analogous to this case. AE 0002.044 (AMI) at 1 & nn.16–24; *Snyder v. Massachusetts*, 291 U.S. 97 (1934) (holding it was not a violation of the Fourteenth Amendment for the trial judge to deny the defendant’s request to be present when the jury viewed the crime scene); *Dusky v. United States*, 362 U.S. 402 (1960) (finding the record insufficiently supported the defendant was mentally competent to stand trial); *Mendoza v. United States*, 755 F.3d 821 (7th Cir. 2014) (finding the defendant was not denied due process when the district court moved one of his Spanish-speaking interpreters from the defense table to interpret for a Spanish-speaking witness at trial); *Faretta v. California*, 422 U.S. 806 (1975) (holding the state could not constitutionally force a lawyer upon the defendant because he was literate, competent, and understanding, and voluntarily exercised his informed free will in waiving his right to the assistance of counsel); *Lewis v. United States*, 146 U.S. 370 (1892) (holding the trial judge erred when not allowing the defendant to be present in court during the preliminary challenges to the jury); *United States v. Mayans*, 17 F.3d 1174, 1181 (9th Cir. 1994) (holding it was error for the trial judge to allow the interpreter to withdraw despite defendant’s counsel stating the defendant could not express himself in English and without making a proper assessment of the defendant’s language skills); *United States v. Carrion*, 488 F.2d 12, 15 (1st Cir. 1973) (finding no error when an interpreter was not provided to a defendant who had “some ability to understand and communicate [in English], but clearly has difficulty”); *United States v. Yee Soon Shin*, 953 F.2d 559, 560 (9th Cir. 1992) (holding that as a constitutional matter, the

Accordingly, just as raised by Mr. Bin Lep in AE 0002.037, the issue again before the Commission is not the lack of interpretation as in *Negron* or the need for an interpreter in *Cirrincone*, but rather the *adequacy* of the interpretation. As the Commission has already stated, “[w]hen determining the adequacy of interpretation, courts have consistently found ‘while the general standard for interpreters requires continuous word-for-word translation, occasional lapses in the standard will not necessarily contravene a defendant’s constitutional rights.’”<sup>19</sup> The ultimate question is whether any inadequacy in the interpretation made the arraignment proceedings “fundamentally unfair.”<sup>20</sup>

Here, Mr. Bin Amin fails to provide any evidence of an inaccurate interpretation of the arraignment—the reading of the charges and specifications to the accused and calling on the accused to plead<sup>21</sup>—despite having two linguists review the record.<sup>22</sup> Mr. Bin Amin has also not demonstrated misinterpretation of Mr. Bin Amin’s right to counsel, his right to be present at

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appointment of interpreters was within the lower court’s discretion and that the lower court did not abuse its discretion in assigning one interpreter to both defendants); *id.* (finding no support in the record for defendants’ contention that the translation provided by the interpreter was inadequate); *In re Oliver*, 333 U.S. 257 (1948) (finding the defendant’s due process rights were violated when defendant’s trial for criminal contempt was held in secret and the defendant had no opportunity to secure counsel, cross-examine the witnesses, or summon witnesses to refute the charge against him); *United States v. Johnson*, 248 F.3d 655, 663 (7th Cir. 2001) (finding individual interpreters were not required at defense counsel table where there was simultaneous interpretation of the proceedings and the defendants could communicate with their counsel on breaks); *Chavez-Murillo v. Wasden*, 2009 U.S. Dist. LEXIS 88112, at \*12 (D. Idaho Sept. 24, 2009) (dismissing with prejudice defendant’s claim that in pretrial meetings with his counsel the interpreter improperly gave her opinion about the merit of his case, and that counsel did not offer a full translation of all documents and pleadings that were received in discovery. The defendant’s “actual allegations did not raise a genuine issue of material fact as to whether he was unable to participate in his defense.”); *Lyons v. Hompe*, 2008 U.S. Dist. LEXIS 106896, at \*22 (W.D. Wis. Nov. 30, 2008) (holding that “notwithstanding [the defendant’s] hearing impairment, he was able to hear and understand the proceedings against him”).

<sup>19</sup> AE 0002.043 (TJ) (citing *United States v. Long*, 301 F.3d 1095, 1105 (9th Cir. 2002)).

<sup>20</sup> *Valladares v. United States*, 871 F. 2d 1564, 1565–66 (11th Cir. 1989).

<sup>21</sup> The arraignment portion of the session consists of “reading the charges and specifications to the accused and calling on the accused to plead.” R.M.C. 904.

<sup>22</sup> AE 0002.044 (AMI) at 8.

open hearings, or his rights at the arraignment. Mr. Bin Amin seems to attribute the accurate interpreting of these rights and the arraignment portion of the proceeding to IN1 having access to the procedural guide provided to the parties by the Commission.<sup>23</sup> Regardless of whether this portion of the proceedings was in the procedural guide, the interpretation was accurate.

As the Commission noted in its ruling, “[t]he Commission conducted both scripted and unscripted colloquies with each Accused throughout the arraignment hearing to ensure each understood their right to counsel, right to be present at open hearings, the charges against them and their rights at the arraignment. Both Mr. Bin Lep and Mr. bin Amin responded to the Commission’s questions throughout the entire proceeding.”<sup>24</sup> Mr. Bin Amin even asked the Commission to repeat a question when he did not understand.<sup>25</sup> As the Commission has already ruled, “such responses belie the contention that the Accused did not understand the arraignment proceedings to such a degree that the arraignment was fundamentally unfair.”<sup>26</sup> Based on Mr. Bin Amin’s responses to the Commission’s questions, the record evidences that Mr. Bin Amin was present and understood the proceedings.

Pursuant to R.M.C. 905(c)(2), Mr. Bin Amin has the burden of persuasion for any factual issue the resolution of which is necessary to decide the motion. Although not titled as such, Mr. Bin Amin’s motion is essentially a motion for reconsideration of the Commission’s ruling in AE 0002.043 (TJ). The granting of such a request is in the Military Judge’s discretion and is generally limited to a showing of a change in material facts or controlling law, to correct clear error, or prevent manifest injustice.<sup>27</sup> Mr. Bin Amin has not demonstrated inadequacy in the

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<sup>23</sup> See *id.* at 4.

<sup>24</sup> AE 0002.043 (TJ) at 6; Tr. at 45, 47–49, 58.

<sup>25</sup> Tr. at 58.

<sup>26</sup> AE 0002.043 (TJ) at 7.

<sup>27</sup> While not binding, the Commission has previously found persuasive the analytical approach used to determine when reconsideration is warranted as articulated in *United States v. Libby*, 429 F. Supp. 2d 46 (D.D.C. 2006), and *United States v. McCallum*, 885 F. Supp. 2d 105 (D.D.C. 2012). See AE 0002.031 (TJ) at 3 n.10.

interpretation of the arraignment and the colloquy between the Commission and Mr. Bin Amin, or any change in law or material fact that rendered the arraignment fundamentally unfair or that calls for further fact-finding.<sup>28</sup>

## **6. Conclusion**

For the reasons stated above, the Prosecution respectfully requests this Commission deny Mr. Bin Amin's request to convene a hearing with witnesses to determine the sufficiency of the arraignment.

## **7. Oral Argument**

The Prosecution does not request oral argument.

## **8. Witness and Evidence**

The Prosecution will not rely on any witnesses or evidence in support this response.

## **9. Additional Information**

The Prosecution has no additional information.

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<sup>28</sup> Even if the Commission were to find that in an abundance of caution further inquiry on this matter would be prudent, an evidentiary hearing is not necessary. A simple colloquy with Mr. Bin Amin to reconfirm that he understood all relevant information, i.e., the charges against him, his election to defer his entry of pleas, and his rights going forward in this case, would suffice. To be clear, it is the Prosecution's position that the facts, including Mr. Bin Amin's statements to the Commission on the record, demonstrate that Mr. Bin Amin adequately understood the proceedings. Mr. Bin Amin was provided the sworn charge sheet in his native language in 2019, and the referred charge sheet in his native language seven months before the arraignment. Mr. Bin Amin had ample opportunity to prepare for the arraignment and to consult with his defense counsel about the charges he is facing and the rights he has before this Commission, and he has failed to demonstrate prejudice from any alleged failure to understand portions of the pre-arraignment proceedings. *See* AE 0002.043 (TJ) at 11 ("In light of the straightforward nature of an arraignment, and the long period the Parties had to prepare, the Commission is satisfied that the rights of the Accused were not violated during the proceedings.")





# ATTACHMENT A

