

UNCLASSIFIED//FOR PUBLIC RELEASE
MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

ABD AL HADI AL-IRAQI

AE 074C

RULING

Defense Motion
To Allow Waiver of Appearance at Initial
Commission Session

5 May 2017

1. Procedural History

In AE 074, the Accused requested the “Commission allow him to waive his right to be present at Commission sessions, including the initial session of every hearing, by submitting a signed, written waiver prior to the session and/or through the representation of counsel, in lieu of personally appearing.” (AE 074 at 1). The Government response argued, “Under Rule for Military Commissions (‘R.M.C.’) 804, the Accused, in military custody, may only expressly waive his right to be present at some stage of the proceeding for good cause on the record, after an extensive colloquy with the Military Judge.” (AE 074A at 1). The Defense replied in AE 074B. The Commission heard oral argument on 24 and 25 April 2017.¹

2. Law

R.M.C. 804(c) states, “an accused shall be considered to have waived the right to be present whenever an accused: (1) is voluntarily absent after arraignment;” The Rule goes on to state, “An accused who is in military custody or otherwise subject to military control at the time of trial or other proceeding may not properly be absent from the trial or proceeding without securing the permission of the military judge on the record.”

¹ See Unofficial/Unauthenticated Transcript of the Abd al Hadi al-Iraqi Motions Hearing (Transcript) Dated 4/24/2017 from 3:47 PM to 4:17 PM at pp. 1213–34 and 4/25/2017 from 9:03 AM to 10:07 AM at pp. 1235–45.

3. Analysis

To date, this Commission has required the Accused be present at the first session of each scheduled hearing. At the first session, the Commission has advised the Accused of his right to be present under R.M.C. 804, and allowed the Accused to waive his presence at subsequent sessions of the same hearing. A plain reading of R.M.C. 804(c) allows an accused to voluntarily waive their right to be present at a military commission proceeding with permission from the military judge on the record.² When this waiver will be accepted and the manner in which permission may be granted is at the discretion of the military judge. Permission is only granted on a case-by-case basis. Factors considered include, but are not limited to, the nature of the hearing in question, whether the totality of the circumstances indicates the accused's waiver is voluntary, and whether the accused's absence will frustrate the progress of trial.

4. Ruling

The Defense Motion to Allow Waiver of Appearance at Initial Commission Session is **GRANTED in part.**

5. Order

a. The Commission may allow the Accused to waive his right to be present at the first session of a hearing if he submits a written waiver executed in the presence of his defense counsel after counsel advise him of his right to be present at the specific hearing. Permission will be granted by the Commission on a case-by-case basis.

b. After the Accused attends a session of a hearing and is advised by the military judge of his right to be present, or after securing permission from the military judge in accordance with

² Case law cited by the Government, including *Cross v. United States*, 325 F.2d 629 (D.C. Cir. 1963), dealt with Federal Rule of Criminal Procedure 43 which, unlike R.M.C. 804, is silent on the voluntary absence of an accused in custody.

paragraph 4.a of this ruling, the Commission may allow the Accused to waive his right to be present at a subsequent session if he submits a written waiver. Permission will continue to be granted on a case-by-case basis.

So **ORDERED** this 5th day of May, 2017.

//s//
P. S. RUBIN
Col, USMC
Military Judge