UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL-AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI

AE 173(WBA)
DEFENSE MOTION TO COMPEL THE PRODUCTION OF WITNESSES LISTED IN DEFENSE REQUEST FOR PRODUCTION OF WITNESSES, DATED 31 MAY 2013, TO TESTIFY AT MOTION HEARING 17-21 JUNE 2013 AND IN SUBSEQUENT HEARINGS

12 June 2013

1. **Timeliness**: This motion is timely filed

2. **Relief Requested**: The defense respectfully requests that the Commission compel the production of all Officers, Commanders, Watch Commanders, guards, and other personnel who ordered, or were involved with, the search and seizure of Mr. bin 'Attash's attorney-client communications and/or other privileged information on or about 11-13 February 2013, and the subsequent command inquiry, to include guards [redacted] and [redacted] to testify at the hearing on 17-21 June 2013, regarding AE 032, AE 133, AE 144, and other pending motions. Additionally, the defense requests the Commission compel the production of Mr. [redacted] Col Karen Mayberry, Mr. [redacted] Ms. [redacted] Mr. [redacted] CAPT Mary McCormick, Mr. [redacted] Mr. Paul L. Oostburg Sanz, BG Mark S. Martins, and Mr. Ron G. Bechtold, to testify at the hearing on 17-21 June 2013, regarding AE 155A and AE 155L.

3. **Overview.** The testimony of the above-mentioned witnesses is relevant and necessary to the motions hearing on 17-21 June 2013. Without these witnesses, Mr. bin 'Attash's right to present a defense will be denied.

4. Burden of Proof and Persuasion: As the moving party, the defense bears the burden on this motion. R.M.C. 905(c).

5. Facts:

a. On 11 and 12 February 2013, while a hearing in this case was ongoing, and while Mr. bin 'Attash was forced to attend the 11 February hearing against his will, JTF-GTMO ordered and conducted a search of Mr. bin 'Attash's attorney-client communications and other privileged materials stored in his cell. JTF-GTMO seized attorney-client privileged materials during these searches

b. On 5 April 2013, the defense filed AE 32 (WBA 2d Sup), Defense Supplement to Joint Defense Motion for Appropriate Relief to Protect Right to Counsel by Barring Invasion of Privileged Attorney-Client Communications.

c. On 12 April 2013, the defense filed and served AE 155A, Defense Motion to Abate Proceedings Due to the Government's Violation of Privilege as it Pertains to Electronic Files, Communications, and Investigation, and on 30 May 2013, filed and served AE 155L, Defense Response to Government Motion For Military Judge to Compel Defense Counsel to Provide Written Notice of Lost Data Impacting Motions Docketed for June 2013 and Attorney-Client Communications Allegedly Accessed by the Prosecution.

d. On 3 June 2013, the defense submitted a request pursuant to R.M.C. 703 for the production of the witnesses named in paragraph 1 above to testify regarding AE 32 (WBA 2d Sup), AE 155A, and AE 155L at the 17-21 June 2013 hearing (Attachment B).

e. On 10 June 2013, the Prosecution denied the request to produce all witnesses named in the defense request for production of witnesses indicating that the defense request fails

"to establish that the witness testimony of personnel in . . . the request is relevant and necessary for the upcoming hearing" (Attachment C).

6. Argument:

Denial of this motion is a violation of the accused's rights under the Military Commissions Act, the Detainee Treatment Act, and the Fifth, Sixth and Eighth Amendments to the Constitution. The testimony of all officers, commanders, watch commanders, guards, and other personnel who ordered or were involved with the search and seizure of Mr. bin 'Attash's attorney-client communications and/or other privileged materials on or about 11-13 February 2013, to include guards [redacted] and [redacted] is necessary and relevant. The Prosecution's denial of these witnesses states that the defense request "does not provide a synopsis as to what the personnel list in the Commander's Inquiry would be expected to testify about in regard to the cited motions, nor does the Defense request offer a synopsis of the expected testimony for guards [redacted] and [redacted]."

The prosecution's assertion is disingenuous: the prosecution has refused to provide the names of the witnesses despite the requests of defense counsel to do so. Without the names of the individuals, defense counsel is unable to interview guards [redacted] and [redacted] so is unable to provide a "synopsis" of expected testimony. The prosecution is directly responsible for the problem and should not be permitted to benefit from its obstruction of defense investigation and procurement of testimony. The prosecution has concealed the witnesses' identities from the defense. The prosecution urges the defense to rely on the prosecution's unsubstantiated assertion that the Summary of Findings contains all information concerning the illegal search of Mr. bin 'Attash's privileged documents. The prosecution alleges that defense counsel interviews of

personnel will reveal no new information. The defense cannot provide a "synopsis" in its witness request because the prosecution has obstructed access to these witnesses.

With regard to the 11 witnesses requested in paragraph 2 of the Defense Request for Production of Witnesses, the Prosecution denied these witnesses as not necessary for the 17 June 2013 hearings, as AE 155 and AE 155 L are not listed on the docket for the 17 June 2013 hearings. However, the docket for the 17 June 2013 hearings has not yet been finalized. The docket will likely be finalized on 16 June 2013, during an 802 conference with the military judge. As such, neither party knows what the docket will be and, therefore, must be prepared to argue AE 155L if the military judge so decides. Further, the prosecution is unaware of the substance of certain *ex parte* motions the defense has filed. These witnesses are necessary for the litigation of matters raised in AE 157. The defense requests and opportunity to make an *ex parte* argument as to the relevance of these witnesses to those matters.

Lastly, on 16 May 2013, the Prosecution filed AE 155I, asking the military judge to compel the defense to provide written notice of what data was lost in the IT crisis. The requested 11 witnesses noted below will provide the Prosecution and Defense with the information concerning the lost data. Following is the justification and necessity of each of the 11 witnesses requested by the defense on 3 June 2013:

a. **Mr.** [redacted]

Mr. [redacted] is the IT Branch Chief for the Office of the Convening Authority. He is the supervisor of the IT personnel assigned to the Office of Chief Defense Counsel. His testimony is necessary and relevant because he administers the O-drive and other IT systems that have demonstrated a history of instability now culminating in the loss of files from the O-drive. Mr. [redacted] worked to institute the replication of data from the DC server to the GTMO server and oversaw the work by

EITSD. He has knowledge of what other agencies under the umbrella of OMC have been affected. He can testify that the problem is ongoing and that at least 7 gigabytes of data may have permanently been deleted.

b. **Unnamed individual**

The individual responsible for EITSD's "Back-up Solutions" has not been identified by counsel for Mr. bin 'Attash because Mr. [redacted] when interviewed, did not know the individual's name and directed counsel to OCDC IT manager [redacted] Mr. [redacted] has not yet provided the contact information. The individual responsible for EITSD's "Back-up Solutions" can testify to what solutions, if any, are available to assist in restoring the necessary and relevant data to Mr. bin 'Attash's electronic folder. The individual responsible for EITSD's "Back-up Solutions" would testify to which persons need access to the content of the bin 'Attash lost data in order to have it restored, and would inform the Commission as to how long rebuilding the lost data might take.

c. **Col Karen Mayberry, Chief Defense Counsel**

The testimony of Col Mayberry is relevant and necessary to demonstrate the impact on defense counsel, including counsel for Mr. bin 'Attash, of the data loss. Col Mayberry can also inform the commission of the steps taken by OCDC to rectify the situation and comply with ethical requirements of defense counsel to protect confidential information.

d. **Mr.** [redacted] OCDC IT Manager and EITSD Contractor

Mr. [redacted] testimony is necessary and relevant because he can describe the history of O- and H-drives' technical failures, how and to whom he addressed them, and why OCDC is just learning of the 7 gigabytes of data lost in February 2013. Mr. [redacted] can also inform the

Commission of the name and contact information of the "individual responsible for 'Back-Up Solutions'" referenced in (b) above.

e. **Ms.** [redacted] OCDC Network Analyst Master and EITSD Contractor

Ms. [redacted] testimony is relevant and necessary because she has interfaced regularly with various contracting IT personnel about the O- and H-dive issues, has fielded the complaints of OCDC counsel and support staff, and has witnessed the loss of data affecting counsel's abilities to prepare. Ms. [redacted] is also an IT expert and can answer the commission's queries regarding the stability and accessibility of the files stored on the system.

f. **Mr.** [redacted] EITSD

Mr. [redacted] testimony is relevant and necessary because he has familiarity with the manner by which OCDC data should be backed up, how often such data should be backed up, and whether that back up has regularly been accomplished with respect to OCDC files. He will testify that the O-drive is backed up to another drive, and then further backed up to a "tape" drive. Mr. [redacted] is knowledgeable about the loss of many gigabytes of data. Mr. [redacted] will inform the Commission about the existence of an After Action Report that was completed after the February 2013 loss of data. Mr. [redacted] can also inform the Commission about what data might be recovered, what data is unlikely to be recovered, and what data will never be recovered.

g. **CAPT Mary McCormick**, JAGC, USNR, OCDC

CAPT Mary McCormick's testimony is relevant and necessary because she will testify to the havoc wreaked by the IT problems with a file belonging to her. CAPT McCormick can also inform the commission about the history of EITSD's ability to gather privileged defense documents and tender them to the government simply upon receipt of a request from a prosecutor. CAPT McCormick can testify about the mixing of defense and prosecution data and

EITSD's placement of prosecution files on the defense O-drive. CAPT McCormick can inform the commission about her investigation into the use of email search requests by the prosecution. Specifically, CAPT McCormick can testify that EITSD has turned over emails subsequent to requests by the prosecution on numerous other occasions.

h. **Mr.** [redacted] OMC IA Manager

Mr. [redacted] testimony is relevant and necessary because before he was the Information Assurance Manager for all of OMC, he was the manager for OCDC. Mr. [redacted] oversaw the assignment of access privileges to various team members into the bin 'Attash O-drive folder. Mr. [redacted] can inform the commission what steps he took to preserve the confidentiality of defense work product prior to his departure from OCDC in approximately summer of 2012. Mr. [redacted] can testify to the problems with the O-drive and what he did to address them. He can advise the Commission as to what other areas beyond the bin 'Attash folder have been affected. He can also advise the commission as to why OCDC just now was informed of the 7 gigabytes of data lost in February 2013 and whether other data replicated between January and March might also be permanently deleted.

i. **Mr. Paul L. Oostburg Sanz**

Mr. Oostburg Sanz' testimony is relevant and necessary because he participated in a meeting in which, according to the Prosecution, the Chief Defense Counsel stated: "I do not disagree that I have an obligation" to disclose what harm the Defense has suffered and what data it has lost, adding that she believed everyone needs to acknowledge a problem exists, and that ". . . part of the fix is to have [motions] hearings take place." Mr. Oostburg Sanz can rebut this allegation. Mr. Oostburg Sanz can also testify that he has received information from EITSD and other sources corroborating the defense allegation that the IT system has failed and that the defense

teams are missing material as a result of those failures. The testimony of Mr. Oostburg Sanz would disprove the spurious and meritless allegations made by the prosecution in AE155I.

j. **BG Mark S. Martins**

BG Martins' testimony is relevant and necessary because he participated in a meeting in which, according to the Prosecution, the Chief Defense Counsel stated: "I do not disagree that I have an obligation" to disclose what harm the Defense has suffered and what data it has lost, adding that she believed everyone needs to acknowledge a problem exists, and that ". . . part of the fix is to have [motions] hearings take place." Mr. Oostburg Sanz can rebut this allegation. BG Martins can inform the court as to why the prosecution alleged in AE 155I that "Ignoring the truth, defense counsel have falsely suggested, both to this Commission and publicly, a system-wide compromise of their attorney-client protected materials and direct access by Prosecutors." BG Martins can explain to the commission why he alleges the defense for Mr. bin 'Attash is lying and what information he possesses that would backup such a claim. This commission should hear the facts that led BG Martins to make such a claim.

k. **Mr. Ron G. Bechtold**

Mr. Bechtold's testimony is relevant and necessary to establish that according to the EITSD data back-ups on 25 November 2012, 28 December 2012, and 4 March 2013 were comprised of 904 GB, 1340 GB, and 2810 GB respectively; that not each backup was complete; rather, that the March backup was the first "successful" backup; and that EITSD still does not have a mechanism by which the 'bin Attash team can compare current files with back-up files to determine what is missing. Mr. Bechtold is the director of EITSD, the directorate charged with designing, maintaining and repairing OCDC's IT system. He can describe the former and ongoing problems with OCDC's IT system, what material was lost, what material was backed

up, what processes, if any, are in place for data restoration, how the security of defense files was breached by prosecutors requests for emails, and whether the real-time monitoring of defense computers is continuing.

7. Oral Argument: The Defense requests oral argument in connection with this motion.

8. Witnesses: See paragraph 6 above.

9. Conference with Opposing Counsel: The defense has requested production of the witnesses requested in paragraph 6. The prosecution has refused to produce the witnesses.

10. List of Attachments:

A. Certificate of Service

B. Defense R.M.C. 703 Request for Production of Witnesses, dated 31 May 2013

C. Prosecution Response to Defense Request for Production of Witnesses, dated 10 June 2013

Respectfully submitted,

//s//
CHERYL BORMANN
Learned Counsel

//s//
JAMES E. HATCHER, LCDR, USNR
Defense Counsel

//s//
MICHAEL A. SCHWARTZ, Capt, USAF
Defense Counsel

Counsel for Mr. bin 'Attash

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 12th day of June, 2013, I electronically filed the foregoing document with the Clerk of the Trial Judiciary and served the foregoing on all counsel of record by email.

//s//
CHERYL T. BORMANN
Learned Counsel

Attachment B

31 May 13

From: Captain Michael Schwartz, USAF, Defense Counsel for Mr. bin 'Attash ICO, *United States v. Mohammad, et al.*

To: Trial Counsel

Subj: Request for Production of Witnesses for Motions the Defense is Prepared to Litigate at the 17-21 June 2013 Hearings[1]

1. Pursuant to the Fifth, Sixth and Eighth Amendments to the U.S. Constitution, the undersigned defense counsel in the subject case requests production of the following witnesses at the hearing scheduled to begin 17 June 2013. These witnesses are listed in the Defense's Motion AE 32 (WBA 2d Sup), filed and served on 5 April 2013:

> The Defense requests the production of all Officers, Commanders, Watch Commanders, guards, and other personnel who ordered, or were involved with, the search and seizure of Mr. bin 'Attash's attorney-client communications on or about 11-13 February 2013, and the subsequent command inquiry, to include guards [redacted] and [redacted].

The Defense is unable to name these personnel because the government has concealed their identities. The production of these witnesses is necessary for a thorough and transparent examination of all issues pertaining to the facts raised in AE 32 (WBA 2d Sup), Paragraph 3, facts supporting the relief sought in the original motion, AE 32.

2. Additionally, the government should note the potential need for testimony from witnesses relevant to AE 155A , filed and served on 12 April 2013, and AE 155L, filed and served on 30 May 2013. Neither motion is listed on AE 159, Docketing Order, but any litigation of IT issues raised in AE 155A or AE 155L will require the presence of the following witnesses:

a. Mr. [redacted] Branch Chief, Information Technology, Office of the Convening Authority

Mr. [redacted] is the IT Branch Chief for the Office of the Convening Authority. He is the supervisor of the IT personnel assigned to the Office of Chief Defense Counsel. His testimony is necessary and relevant because he administers the O-drive and other IT systems that have demonstrated a history of instability now culminating in the loss of files from the O-drive. Mr. [redacted] worked to institute the replication of data from the DC server to the GTMO server and oversaw the work by EITSD. He has knowledge of what other agencies under the umbrella of OMC have been affected. He can testify that the problem is ongoing and that at least 7 gigabytes of data may have permanently been deleted.

[1] Counsel for Mr. bin 'Attash submit this request for witnesses pursuant to the Commission's Order in AE 36D, which incorrectly ignores the Military Commissions Act of 2009's requirement that Mr. bin 'Attash's opportunity to obtain witnesses shall be comparable to the opportunity available to a criminal defendant in an Article III Court. In being forced to obtain witnesses through the process herein, which divulges to the government Defense strategy well in advance of motion hearings, Mr. bin 'Attash is denied the opportunity afforded him by law.

b. The individual responsible for EITSD's "Back-Up Solutions," as identified by Mr. [redacted]

The individual responsible for EITSD's "Back-up Solutions" has not been identified by counsel for Mr. bin 'Attash because Mr. [redacted] when interviewed, did not know the individual's name and directed counsel to OCDC IT manager [redacted] Mr. [redacted] has not yet provided the contact information. The individual responsible for EITSD's "Back-up Solutions" can testify to what solutions, if any, are available to assist in restoring the necessary and relevant data to Mr. bin 'Attash's electronic folder. The individual responsible for EITSD's "Back-up Solutions" would testify to which persons need access to the content of the bin 'Attash lost data in order to have it restored, and would inform the Commission as to how long rebuilding the lost data might take.

c. Col Karen Mayberry, Chief Defense Counsel

The testimony of Col Mayberry is relevant and necessary to demonstrate the impact on defense counsel, including counsel for Mr. bin 'Attash, of the data loss. Col Mayberry can also inform the commission of the steps taken by OCDC to rectify the situation and comply with ethical requirements of defense counsel to protect confidential information.

d. Mr. [redacted] OCDC IT Manager and EITSD Contractor

Mr. [redacted] testimony is necessary and relevant because he can describe the history of O- and H-drives' technical failures, how and to whom he addressed them, and why OCDC is just learning of the 7 gigabytes of data lost in February 2013. Mr. [redacted] can also inform the Commission of the name and contact information of the "individual responsible for 'Back-Up Solutions'" referenced in (b) above.

e. Ms. [redacted] OCDC Network Analyst Master and EITSD Contractor

Ms. [redacted]s testimony is relevant and necessary because she has interfaced regularly with various contracting IT personnel about the O- and H-dive issues, has fielded the complaints of OCDC counsel and support staff, and has witnessed the loss of data affecting counsel's abilities to prepare. Ms. [redacted] is also an IT expert and can answer the commission's queries regarding the stability and accessibility of the files stored on the system.

f. Mr. [redacted] EITSD

Mr. [redacted]s testimony is relevant and necessary because he has some familiarity with the manner by which OCDC data should be backed up, how often such data should be backed up, and whether that back up has regularly been accomplished with respect to OCDC files. He will testify that the O-drive is backed up to another drive, and then further backed up to a "tape" drive. Mr. [redacted] is knowledgeable about the loss of many gigabytes of data. Mr. [redacted] will inform the Commission about the existence of an After Action Report that was completed after the February 2013 loss of data. Mr. [redacted] can also inform the Commission about what remedies might exist for determining the extent of the loss.

g. CAPT Mary McCormick, JAGC, USNR, OCDC

CAPT Mary McCormick's testimony is relevant and necessary because she will testify to the havoc wreaked by the IT problems with a file belonging to her. CAPT McCormick can also inform the commission about the history of EITSD's ability to gather privileged defense documents and tender them to the government simply upon receipt of a request from a prosecutor. CAPT McCormick can testify about the mixing of defense and prosecution data and EITSD's placement of prosecution files on the defense O-drive. CAPT McCormick can inform the commission about her investigation into the use of email search requests by the prosecution. Specifically, CAPT McCormick can testify that EITSD has turned over emails subsequent to requests by the prosecution on numerous occasions.

h. Mr. [redacted] OMC IA Manager

Mr. [redacted] testimony is relevant and necessary because before he was the Information Assurance Manager for all of OMC, he was the manager for OCDC. Mr. [redacted] oversaw the assignment of access privileges to various team members into the bin 'Attash O-drive folder. Mr. [redacted] can inform the commission what steps he took to preserve the confidentiality of defense work product prior to his departure from OCDC in approximately summer of 2012. Mr. [redacted] can testify to the problems with the O-drive and what he did to address them. He can advise the Commission as to what other areas beyond the bin 'Attash folder have been affected. He can also advise the commission as to why OCDC just now was informed of the 7 gigabytes of data lost in February 2013 and whether other data replicated between January and March might also be permanently deleted.

i. Mr. Paul L. Oostburg Sanz

Mr. Oostburg Sanz' testimony is relevant and necessary because he participated in a meeting in which, according to the Prosecution, the Chief Defense Counsel stated: "I do not disagree that I have an obligation" to disclose what harm the Defense has suffered and what data it has lost, adding that she believed everyone needs to acknowledge a problem exists, and that ". . . part of the fix is to have [motions] hearings take place." Mr. Oostburg Sanz can rebut this allegation.
Mr. Oostburg Sanz can also testify that he has received information from EITSD and other sources corroborating the defense allegation that the IT system has failed and that the defense teams are missing material as a result of those failures. The testimony of Mr. Oostburg Sanz would disprove the spurious and meritless allegations made by the prosecution in AE155I.

j. BG Mark S. Martins

BG Martins' testimony testimony is relevant and necessary because he participated in a meeting in which, according to the Prosecution, the Chief Defense Counsel stated: "I do not disagree that I have an obligation" to disclose what harm the Defense has suffered and what data it has lost, adding that she believed everyone needs to acknowledge a problem exists, and that ". . . part of the fix is to have [motions] hearings take place." Mr. Oostburg Sanz can rebut this allegation.
BG Martins can inform the court as to why the prosecution alleged in AE 155I that "Ignoring the truth, defense counsel have falsely suggested, both to this Commission and publicly, a system-wide compromise of their attorney-client protected materials and direct access by Prosecutors."

BG Martins can explain to the commission why he alleges the defense for Mr. bin 'Attash is lying and what information he possesses that would backup such a claim.

k. Mr. Ron G. Bechtold

Mr. Bechtold's testimony is relevant and necessary to establish that according to the EITSD data back-ups on 25 November 2012, 28 December 2012, and 4 March 2013 were comprised of 904 GB, 1340 GB, and 2810 GB respectively; that not each backup was complete; rather, that the March backup was the first "successful" backup; and that EITSD still does not have a mechanism by which the 'bin Attash team can compare current files with back-up files to determine what is missing. Mr. Bechtold is the director of EITSD, the directorate charged with designing, maintaining and repairing OCDC's IT system. He can describe the former and ongoing problems with OCDC's IT system, what material was lost, what material was backed up, what processes, if any, are in place for data restoration, how the security of defense files was breached by prosecutors requests for emails, and whether the real-time monitoring of defense computers is continuing.

3. Please contact LCDR James Hatcher at [redacted] if you have any questions about this request.

//s//
MICHAEL A. SCHWARTZ, Capt, USAF
Defense Counsel for Mr. bin 'Attash

Attachment C

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

OFFICE OF THE
CHIEF PROSECUTOR

10 June 2013

MEMORANDUM FOR Counsel for Walid bin 'Attash

SUBJECT: United States v. Mohammad et al – Request for Production of Witnesses

1. Although dated 31 May 2013, the Prosecution is in receipt of your witness request received 3 June 2013 (hereinafter "Request") for the production of camp "Officers, Commanders, Watch Commanders, guards, and other personnel," to include "guards [redacted] and [redacted]" as witnesses relating to AE 032 (WBA 2d Sup), as well as eleven (11) "potential" witnesses relating to IT issues raised in AE 155A and AE 155L. As such, this response is within the seven day deadline set by the Military Judge in his ruling in AE 036C. For the reasons discussed below, based on the information provided, the requests for production of these witnesses are denied.

2. Rule for Military Commission (R.M.C.) 703 provides procedures for the production of witnesses for military commissions. The defense is required to submit to the trial counsel a written list of witnesses whose production by the government the defense requests. *See* R.M.C. 703 (c)(2)(A). The request must include "a synopsis of the expected testimony sufficient to show its relevance and necessity." *See* R.M.C. 703 (c)(2)(B). Testimony is *relevant* "when a reasonable person would regard the evidence as making the existence of any fact that is of consequence to the determination of the commission action more probable or less probable than it would be without the evidence." M.C.R.E. 401.

3. Military jurisprudence has further recognized that relevant testimony is only *necessary* "when it is not cumulative and when it would contribute to a party's presentation in some positive way on a matter in issue." *See* R.C.M. 703(b)(1), Discussion. The accused has no right to compel the attendance of witnesses whose testimony would be cumulative with other evidence already available to the defense and which would better and more directly address the interlocutory question at issue. *See United States v. Williams*, 3 M.J. 239, 243 (C.M.A 1977); *see also United States v. Allen*, 31 M.J. 572, 610 (N.M.C.M.R. 1990).

4. The procedures set forth by R.M.C. 703 as to non-expert witnesses comports with military law and provides the Accused in this case the same safeguards afforded to members of our Armed Forces. *See* Ruling, AE 036C, at 4-6, citing *United States v. Arias,* 3 M.J. 436 (C.M.A. 1977); *United States v. Williams*, 3 M.J. 239, 243 (C.M.A. 1977); *United States v. Dixon* 8 M.J. 858 (N.M.C.M.R. 1980). R.M.C. 703(c)(2) requires the Defense to give the trial counsel a written list of witnesses they want and to provide contact information as well a synopsis of the expected testimony sufficient to show each witness' relevance and necessity. *See* Ruling, AE 036C, at 4-5.

5. In paragraph 1 of the request, which you state pertains to AE 032 (WBA 2d Sup), no synopsis is provided for any of the requested witnesses. The applicable rules require more than providing a topic of the witnesses' testimony. *See United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999) ("[T]he requirement of RCM 703(c)(2)(B)(i) for a synopsis of expected testimony is not satisfied

by merely listing subjects to be addressed; rather, it must set out what the witness is expected to say about those subjects.").

6. Counsel for the Accused in paragraph 1 of their request for witnesses cites to AE 032 (WBA Sup). However, it is unclear as to why each of these broadly-listed categories of individuals is necessary to the cited motion. It also remains unclear as to how each of the listed individuals will contribute to the Defense presentation on the cited motions. The Prosecution respectfully refers defense counsel to the Commanders Inquiry Summary of Findings, dated 21 February 2013. The Commanders Inquiry Summary of Findings provides a detailed and thorough report—to include sworn statements—relating to the facts surrounding the events of February 2013. The Defense request does not provide a synopsis as to what the personnel listed in the Commander's Inquiry would be expected to testify about in regard to the cited motions, nor does the Defense request offer a synopsis of the expected testimony for "guards [redacted] and [redacted] " To the extent you seek to admit statements or other sections of the Commander's Inquiry into evidence for resolution of AE 032, the Prosecution will not object. However, based on the above-stated reasons, you have failed to establish that the witness testimony of personnel in paragraph 1 of the request is relevant and necessary for the upcoming hearing. Absent additional justification, your request is denied.

7. In paragraph 2, you request 11 additional witnesses, and state that "any litigation of IT issues raised in AE 155A or AE 155L will require the presence of the following witnesses." As the Defense acknowledges, AE 155 and AE 155L are not listed on the Docket. Furthermore, in your request to amend the docket (AE 159A), you did not request that AE 155L be included on the docket, but instead requested that this Commission rule on AE 155I "based on the pleadings alone." AE 155L, at 13. This Commission has already ruled on AE 155A, when it granted the Defense request for a continuance and denied the Defense request to abate the proceedings. As such, neither motion can be considered a matter in issue at the 17 June upcoming hearings for which you now request witnesses. Because the motions referred to as the justification for the witnesses have either been ruled upon or otherwise not docketed, the testimony cannot be regarded as necessary for the upcoming 17 June hearings. As such, your request for witnesses in paragraph 2 at the hearing scheduled to begin 17 June 2013 is denied. Should the Docketing Order change, the Prosecution will reconsider your request at that time as necessary.

8. The Prosecution appreciates the Defense need for production of witnesses; however we are obligated to require that requests meet the minimum requirements prior to approval. Should you wish to provide additional information in support of any of the subject witness requests, we would be happy to reconsider your request.

Respectfully submitted,

//s//

Clay Trivett
Deputy Trial Counsel

Michael J. Lebowitz
Captain, JA, USA
Assistant Trial Counsel