MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

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	AE342B(WBA) **Defense Reply** to Government Response to AE342(WBA), Defense Motion to Compel Discovery Related to Defense Access to Witnesses Date Filed: 19 February 2015

1. Timeliness: This Reply is timely filed.

2. Law and Argument:

A. Deliberative Process Privilege

The Government's Response mirrors its earlier discovery response; it does not contest the materiality of the requested discovery. The Government argues that material discovery should be withheld from Mr. bin 'Atash because of a claimed deliberative process privilege, barring all discovery at issue in AE342(WBA). The Prosecution incorrectly states the position of Mr. bin 'Atash. The prosecution misstates that Mr. bin 'Atash posits that "the deliberative process privilege is inapplicable to military commissions." AE342A(GOV) at 3. In fact, Mr. bin 'Atash makes no such claim. Mr. bin 'Atash notes that the deliberative process privilege, like other executive privileges, is a common law privilege. Mr. bin 'Atash further notes that the deliberative process privilege is a qualified privilege; its usage in serious criminal cases must

yield to "the fundamental demands of due process of law in the fair administration of criminal justice." *United States v. Nixon,* 418 U.S. 683, 713 (1974).

The very few cases cited by the Government where courts have relied upon the deliberative process privilege to deny discovery in a criminal case are neither analogous to nor dispositive of the issue in the instant case. The three cases cited by the Government involve defense requests for discovery that goes to the heart of prosecutorial discretion – decisions related to selective prosecution claims or questions regarding the decision to seek the death penalty. These cases deny discovery seeking to pierce the process of who to prosecute and to what extent, protecting the prosecution's discretion in those preliminary processes. Such concerns are wholly absent here where Mr. bin 'Atash seeks only material discovery related to the interview of and production of witnesses.

The defense discovery requirements in a selective prosecution claim are different and more burdensome than those discovery requests seeking information related to witnesses. In order for a defendant to prevail when seeking discovery on a selective prosecution claim, a defendant has a threshold burden of presenting "some evidence" of selective prosecution. *United States v. Armstrong,* 517 U.S. 456, 465 (1996); *see also United States v. Edelin,* 134 F. Supp. 2d 59, 87 (D.D.C. 2001). In *Edelin,* the Court declined to direct discovery on selective prosecution because the defendant had "failed to provide any evidence of racial discrimination in his case" and therefore had "not met the minimum requirements established by the Supreme Court in *Armstrong* for discovery." 134 F. Supp. 2d. at 88. Only in that limited context did the Court note in passing that the materials in question might be "largely privileged" under either the attorney client privilege, the work product doctrine, or the deliberative process privilege. *Id.* at 89. The Court did not further analyze the deliberative process privilege or its precise

applicability or lack thereof; it did not need to analyze the privilege because the defendant, having made no showing of materiality or need, was simply not entitled to discovery.

Similarly, in *United States v. Fernandez,* 231 F.3d 1240, 1246 (9th Cir. 2000), the Court refused to order discovery of the "death penalty evaluation form and prosecution memorandum" utilized by the U.S. Attorney's Office in its decision to seek the death penalty because it found that the death certification procedures in the U.S. Attorney's Manual did "not create any substantive or procedural rights, including discovery rights." Only within that context did the Court find that the documents in question were also covered by the deliberative process and work product privileges. Given that application of the deliberative process privilege in any case involves a balancing test, it is easy to see why a court would tilt the scales heavily in favor of the Government where the defendant failed to make even a threshold showing of materiality of or entitlement to the materials – whether or not the materials were privileged. However, that is not the case at bar.

In the present case, Mr. bin 'Atash has made his threshold showing of entitlement, and the Government itself does little to contest materiality (indeed, the Government has already provided some discovery on the issue). As such, the Commission (assuming the *per se* misconduct exception is inapplicable), must conduct a "flexible" and "ad hoc" balancing test to determine whether the privilege must give way to Mr. bin 'Atash's demonstrated need in this capital prosecution. *In re Sealed Case,* 121 F.3d 729, 745 (D.C. Cir. 1997).

With respect to the applicability of the *per se* misconduct exception, the Prosecution misapprehends the scope of Mr. bin 'Atash's discovery request. The Prosecution states that the defense seeks evidence "in the form of attorney notes" showing that the "Prosecution improperly discourage[d] witnesses from participating in pretrial interviews with the Defense."

AE342A(GOV) at 5. However, the defense request is broader than the Prosecution suggests. Mr. bin 'Atash seeks notes of communications "between *and amongst*" members of JTF-GTMO and the Office of the Chief Prosecutor regarding defense access to witnesses – not simply the notes of Trial Counsel. AE342(WBA) at 1 (emphasis added). Additionally, while the Government focuses exclusively on alleged misconduct involving members of the Office of the Chief Prosecutor, Mr. bin 'Atash's request is designed to elicit material demonstrating misconduct on the part of any entity with control over Mr. bin 'Atash's access to witnesses – including JTF-GTMO itself. Thus, while the Prosecution makes great effort to demonstrate that the "policy of OCP" with respect to defense access to witnesses is in compliance with law, its conclusory statements (even if they are to be believed) are far from determinative on the issue of misconduct, Government motive, or Government intent. The Prosecution simply regurgitates its bench brief from *United States v. Hadi al Iraqi* in an attempt to demonstrate that no misconduct exists. However, the fact that the defense disagrees with the Prosecution's positions in its bench brief makes the misconduct exception applicable – the purpose of the exception being that the Government should not simply be able to hide evidence of misconduct behind conclusory statements and blanket claims of privilege.

With respect to the procedural requirements for invocation of the deliberative process privilege, the Prosecution rests on the nonsensical and conclusory statement that "[a]s the trial counsel in a military commission, all deliberative discussions are protected." AE342A(GOV) at 4. However, the Prosecution's response does nothing to demonstrate that the privilege has been properly invoked in this case. The Prosecution notes that M.C.R.E. 501(c) permits any "*appropriate* representative of the Federal Government" to invoke a privilege, but it ignores the law with respect to what constitutes an *appropriate* representative for purposes of the

deliberative process privilege. AE342A(GOV) at 4 (emphasis added). Contrary to the Prosecution's suggestion, an "appropriate representative" does not simply equate to any representative that Trial Counsel so chooses. Instead, it must be, at minimum, a senior official with policy-making authority – not a member of the same office that hopes to exercise the privilege to advance its position in litigation. The Government cites *Landry v. F.D.I.C.,* 204 F.3d 1125, 1135 (D.C. Cir. 2000), where the Court permitted a regional director of the FDIC to invoke the privilege on the Agency's behalf. Courts have interpreted *Landry* as permitting delegation only to a senior individual within the agency – *not* a trial-level prosecutor. *See, e.g., Marriott International resorts, L.P. v. United States,* 437 F.3d 1302, 1308 (Fed. Cir. 2006).

The Government's Response also raises questions as to whether the Prosecution has complied with other procedural requirements for invocation of the privilege, including the requirement that the individual invoking the privilege personally review the documents involved and make an individualized assessment of the consequences of disclosure. *Northrop Corp. v. McDonnell Douglas Corp.,* 751 F.2d 395, 405 n.11 (D.C. Cir. 1984). The Response repeatedly states that the notes in question are not discoverable "to the extent such notes exist," raising questions as to whether the individual purportedly invoking the privilege has even searched for and conducted an individualized review of the materials in question. AE342A(GOV) at 1. If the Prosecution has failed to perform the required search and individualized review, then the Commission should disregard any claim of privilege.

B. Work Product Privilege

The Government's Response claims, for the first time, a work product privilege. However, work product protection in this case will not preclude discovery of the requested materials. The purpose of the work product doctrine is to protect the "files and the mental

impressions of an attorney" as he prepares for litigation, because "[i]n performing his various duties…it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor,* 329 U.S. 495, 510 (1947). The work product doctrine is enshrined in R.M.C. 701(k), which states that "[n]othing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives." Work product protection can extend to material prepared by a client as well as by "agents for the attorney…" *United States v. Nobles,* 422 U.S. 225, 238 (1975).

In this case, the material in question is not covered by R.M.C. 701(k)'s definition of work product. Notes reflecting communications by and amongst members of JTF-GTMO concerning defense access to witnesses are not materials prepared by counsel, counsel's assistants, or counsel's representatives – they are related to an entity wholly separate from the Prosecution. Attorney's working for the Office of the Chief Prosecutor do not represent JTF-GTMO; rather, JTF-GTMO is a separate organization with its own chain of command and its own Staff Judge Advocate, and there is no attorney-client relationship between members of OCP and members of JTF-GTMO. *See, e.g.,* Army Regulation 27-26, Rules of Professional Conduct for Lawyers (1 May 1992), Rule 1.13(a) ("an Army lawyer represents the Department of the Army acting through its authorized officials…when an Army lawyer is *assigned to such an organizational elements and designated to provide legal services to the head of the organization*, the lawyer-client relationship exists between the lawyer and the Army as represented by the head of the organization as to matters within the scope of the official business of the organization.") (emphasis added). To find that work product protection exempts from discovery all communications amongst members of an entity outside the Prosecution , in this case JTF-

GTMO, concerning defense access to witnesses would provide the Prosecution permission to hide from the defense material far beyond that contemplated by R.M.C. 701(k) or the common law, and it would impermissibly constrict defense access to evidence in this case.

Even in instances where work product protection is applicable, the various exceptions to the work product doctrine must be considered. Work product protection, like deliberative process, is only a qualified privilege. As with the deliberative process privilege, there is a misconduct exception to the work product doctrine. *See, e.g., In re Sealed Case,* 676 F.2d 793, 807 (D.C. Cir. 1982) (noting that privileges do not apply where "a privileged relationship is used to further a crime, fraud, or other fundamental misconduct."). In order to invoke the crime, fraud, or misconduct exception, "courts do not require proof beyond a reasonable doubt that someone has committed a crime or fraud. Rather, they undertake a simplified two-step inquiry. First, there must be a *prima facie* showing of a violation sufficiently serious to defeat the work product privilege. Second, the court must find some valid relationship between the work product under subpoena and the *prima facie* violation." *Id.* at 814-15. The *prima facie* showing may be a made where a party "proffers evidence that, if believed by a trier of fact, would establish the elements of some violation that was ongoing or about to be committed when the work product was prepared." *Id.* at 815.

Here, Mr. bin 'Atash has undoubtedly proffered evidence that, if believed, would demonstrate that the Government has impermissibly interfered with defense access to witnesses. As noted in the underlying motion, a member of OCP previously "stated that there was a policy from the JTF staff that witnesses don't talk to defense counsel." AE342(WBA) at 10 (quoting *United States v. Hadi al Iraqi,* Tr. at 173). While this policy was supposedly later changed, or "clarified," the continued chilling effect of misrepresentations concerning counsel's ability to

interview critical witnesses has inhibited counsel from interviewing witnesses with respect to AE254Y(WBA) and a variety of other motions that remain pending before the Commission. Defense requests to interview witnesses from JTF-GTMO are commonly met with complete silence, rather than a polite refusal from the witness himself or herself. Cleared defense counsel are repeatedly prohibited from discovering the identities or even existence of relevant defense witnesses. Mr. bin 'Atash having made a *prima facie* showing of misconduct, the Commission need only conclude that the work product at issue in the instant motion is related to the misconduct, and it is obvious that notes concerning defense access to witnesses are related to interference with defense access to witnesses. Thus, the Commission should find that, to the extent the work product doctrine is applicable in this case, most, if not all, of the materials in question are covered by the misconduct exception.

In addition to the misconduct exception, the common law recognizes an exception to the work product doctrine designed to avoid "undue manipulation of the privilege" in cases where a party reveals a certain amount of privileged material but then withholds the remainder. *In re Sealed Case,* 676 F.2d at 808; *see also Id.* at 818 ("[w]hen a party reveals part of a privileged communication in order to gain an advantage in litigation, it waives the privilege as to all of the communications relating to the same subject matter because 'the privilege of secret consultation is intended only as an incidental means of defense and not as an independent means of attack, and to use it in the latter character is to abandon it in the former.'") (citation omitted); *Nobles,* 422 U.S. at 240 n.14 (when counsel attempts to make "testimonial use" of work product, "the normal rules of evidence come into play with respect to cross-examination and production of documents."); *In re Martin Marietta Corp,* 856 F.2d 619, 624 (4th Cir. 1988) (work production protection is "only a qualified privilege subject to waiver" subject to waiver when a party

"attempt[s] to make testimonial use of work-product materials."). This common law exception to the work product doctrine is codified at M.C.R.E. 510, which indicates that a person "waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege."

In this case, the Government has made testimonial use of a "significant part of the matter or communication" by disclosing to the defense, in response to Mr. bin 'Atash's discovery request, numerous emails amongst individuals including the Staff Judge Advocate and Assistant Staff Judge Advocates for JTF-GTMO, various JTF-GTMO Litigation Support personnel, and attorneys from the Office of the Chief Prosecutor. *See* AE342(WBA), Attachment B. "Testimonial use" includes not only in-court testimony but also the disclosure of documents to an adversary. *In re Martin Marietta Corp.,* 856 F.2d at 625. The emails voluntarily disclosed to Mr. bin 'Atash concern the same subject matter at issue in the instant motion and, to the extent that work product protection even applies under these circumstances, would be as much covered by work product protection as the notes memorializing oral communications that the Prosecution declined to produce (the only difference being the format – emails versus notes of oral communications). Having revealed a significant quantity of communications concerning the same subject matter at issue in this request, the Prosecution cannot now avail itself of the work product doctrine simply because, for example, it prefers the contents of the disclosed emails over the contents of its notes memorializing oral communications. Under these circumstances, the Commission should find that the Prosecution has waived any work product protection to which it otherwise might have been entitled.

C. Conclusion

The materials requested in the underlying motion are material to the preparation of the defense, and neither the deliberative process privilege nor the work product privilege should bar discovery in this case. The Commission should direct the Prosecution to provide Mr. bin 'Atash with the requested materials or, at minimum, the Commission should direct the Prosecution to diligently search for all responsive materials and provide the materials to the Commission for *in camera* examination. Military practice favors *in camera* review whenever there is a question concerning the appropriate application of a privilege. *See, e.g. United States v. Romano,* 46 M.J. 269, 275 (C.A.A.F. 1997) ("we would expect the military judge to examine *in camera* any documents for which the work-product privilege is claimed. The military judge should determine which documents fall under the work-product privilege…"); *see also United States v. Bowser,* 73 M.J 889, 897 (A.F. Ct. Crim. App. 2014) ("[w]here discovery obligations potentially impact a recognized privilege, an *in camera* review is generally the preferred method for resolving the competing compulsions."). In this case, the various exceptions to both the work product protection and deliberative process privilege make is nearly certain that most, if not all, of the documents in question are not protected and should be disclosed to the defense.

3. Oral Argument: Mr. bin 'Atash reiterates his request for oral argument on AE342(WBA).

4. Attachments:

A. Certificate of Service

//s//
CHERYL T. BORMANN
Learned Counsel

//s//
TODD M. SWENSEN
Maj, USAF
Defense Counsel

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

Attachment A

CERTIFICATE OF SERVICE

I certify that on 19 February 2015, I electronically filed the **Defense Reply to Government Response to AE342(WBA), Defense Motion to Compel Discovery Related to Defense Access to Witnesses** with the Trial Judiciary and served it on all counsel of record by e-mail.

//s//
CHERYL T. BORMANN
Learned Counsel