

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

UNITED STATES OF AMERICA

v.

ABD AL HADI AL-IRAQI

AE 032I

Government Response
To Defense Supplement To AE 032H

20 March 2015

1. Timeliness

This response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.d.(1). *See also* AE 021R (establishing procedural precedent for accepting a Defense response to a Government supplement); *cf.*, Unofficial/Unauthenticated Transcript (“Tr.”) at 237 (memorializing, and ultimately sustaining, a Defense objection to a subsequent Government reply to the accepted Defense response to a Government supplement).

2. Facts

On 9 March 2015, the Commission ordered the parties to update the Commission in light of the following orders in other military commissions: Order, AE 343C, *United States v. Mohammad* (Mil. Comm’n Feb. 25, 2015); Order, AE 343E, *United States v. Mohammad* (Mil. Comm’n Feb. 27, 2015); and Order, AE 332U, *United States v. Al Nashiri* (Mil. Comm’n Mar. 4, 2015). *See* AE 032C. On 11 March 2015, the Defense filed its Notice in Response to the Military Judge’s Order in AE 032C. *See* AE 032D. On the same day, the Government filed its Update Concerning the Defense Motion to Dismiss for Unlawful Influence and Denial of Due Process for Failure to Provide an Independent Judiciary (“Update”), and it attached the Deputy Secretary of Defense’s Memorandum of 26 February 2015 which rescinded Change 1 to the Regulation for Trial by Military Commission. *See* AE 032E.

On 11 March 2015, the Defense filed a Motion for Leave to Supplement AE 032. *See* AE 032F. The Commission granted the Defense motion on 12 March 2015. *See* AE 032G. On 17 March 2015, the Defense filed its Supplement to AE 032. *See* AE 032H.

Following the Government's Update, and the Defense Supplement to AE 032, Mr. Vaughn A. Ary resigned his position as Convening Authority for Military Commissions, effective 21 March 2015. The Honorable Paul L. Oostburg-Sanz was designated as Acting Convening Authority for Military Commissions, effective 23 March 2015. *See* AE 034.

3. Overview

In AE 032H, the Defense alleges the Commission should compel live, in-person testimony from Mr. Vaughn A. Ary. *See* AE 032H at 1. If denied as a live witness, the Defense argues the Commission should enter the transcript of Mr. Ary's prior testimony in *United States v. Al Nashiri* (the "Nashiri commission") into the record of this Commission.

Given the thorough examination of Mr. Ary on these same facts in the *Nashiri* commission, additional live, in-person testimony is unnecessary. The Government does not, however, object to the Defense request to enter the transcript of Mr. Ary's testimony into the record and to consider it when deciding AE 032.

The Defense also objects to the Government calling retired United States District Court Judge Michael B. Mukasey as a witness during the evidentiary hearing on AE 032, arguing that Judge Mukasey's testimony is not relevant. *See* AE 032H at 2.

As detailed below, the Government anticipates Judge Mukasey will provide testimony that directly addresses questions the military judges raised in Order, AE 343C, *United States v. Mohammad* (Mil. Comm'n Feb. 25, 2015); and Order, AE 332U, *United States v. Al Nashiri* (Mil. Comm'n Mar. 4, 2015). Specifically, Judge Mukasey will testify concerning the influence-neutral benefits Change 1 and the associated resourcing requests would have provided a trial judge in a complex national-security case such as this one. Given the high burden the Government must carry on the issue of unlawful influence—proof beyond a reasonable doubt (*see, e.g., United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002))—the Government should be allowed to present such relevant and necessary testimony.

4. Law and Argument

I. Live, In-Person Testimony from Mr. Ary Is Unnecessary; however, the Government Does Not Object to the Commission Considering the Transcript of Mr. Ary's Testimony from the 23 February-2 March 2015 Sessions in *United States v. Al Nashiri*

For the reasons stated in the Government's Update (AE 032E), and because Mr. Ary will no longer be the Convening Authority for Military Commissions as of 21 March 2015, it is not necessary for Mr. Ary to testify again concerning Change 1 to the Regulation for Trial by Military Commission ("Change 1") and his associated recommendations. Mr. Ary was thoroughly examined during the 23 February-2 March sessions in the *Nashiri* commission, producing nearly 200 pages of testimony. *See Nashiri* Tr. at 5519-5698. The underlying facts are the same for this Commission. Indeed, the allegations raised by the Defense in this Commission are almost identical to those raised by the defense in the *Nashiri* commission. *Compare* AE 032, *United States v. Abd al Hadi al-Iraqi*, with AE 332, *United States v. Al Nashiri*. There is little value to additional live, in-person testimony from Mr. Ary.

The Government does not object, however, to the Defense request that the Commission enter Mr. Ary's nearly 200 pages of testimony into the record and consider it when deciding AE 032. Specifically, the Government calls the Commission's attention to those portions of the transcript cited throughout the Government's Update. *See* AE 032E.

II. Judge Mukasey's Testimony Is Relevant and Necessary

Rule for Military Commissions ("R.M.C.") 703(b)(1) states "[e]ach party is entitled to the production of any available witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary." Judge Mukasey's anticipated testimony meets both criteria.

A. Judge Mukasey's Anticipated Testimony Is Relevant

Military Commissions Rule of Evidence ("M.C.R.E.") 402 mandates that "[a]ll evidence having probative value to a reasonable person is admissible." M.C.R.E. 401 defines probative evidence as that which a "reasonable person would regard" as making "the existence of any fact

that is of consequence to a determination of the commission action more probable or less probable than it would be without the evidence.” The threshold for relevance is low. *See, e.g., United States v. Reece*, 25 M.J. 93, 95 (C.M.A. 1987) (interpreting the corresponding Military Rule of Evidence).

The military judges in *United States v. Mohammad* (the “*Mohammad* commission”) and the *Nashiri* commission articulated the reasons Judge Mukasey’s anticipated testimony is relevant. In the *Mohammad* commission, the military judge stated, “The Commission is at a loss as to how assigning the military judge at GTMO will make the litigation proceed at a faster pace.” Order, AE 343C, *United States v. Mohammad* (Mil. Comm’n Feb. 25, 2015). In the *Nashiri* commission, the military judge stated in his bench ruling:

The Commission certainly doesn’t understand how assigning a military judge at GTMO would make the litigation proceed at a faster pace. Hearings require the presence of counsel, including learned counsel, and a large number of support personnel, almost none of whom are or, in the case of learned counsel, can be permanently assigned to GTMO.

Nashiri Transcript at 5893. The military judge reiterated his question in his written order: “The Commission does not understand how assigning the military judge at GTMO would make the litigation proceed at a faster pace.” Order, AE 332U, *United States v. Al Nashiri* (Mil. Comm’n Mar. 4, 2015). It appears both military judges believe they were not presented with sufficient facts concerning Change 1’s connection to its stated purpose. There can be little doubt these are “facts of consequence,” as the military judges expressed concern on three separate occasions.

To that end, Judge Mukasey will provide facts that will address the “loss” expressed by the military judge in the *Mohammad* commission and answer the questions raised by the military judge in the *Nashiri* commission. Given the likelihood that the Defense will rely heavily upon the aforementioned orders, and in light of this Commission’s request for an update following those orders (*see* AE 32C), the Government should be given the opportunity to present facts that address the issues raised therein. Moreover, because such facts are to be assessed by an “objective, disinterested observer fully informed of all the facts and circumstances . . . ,” (*United*

States v. Lewis, 63 M.J. 405, 416 (C.A.A.F. 2006) (emphasis added)), the Government should be allowed to present the “objective observer” with the influence-neutral benefits Change 1 and the associated resourcing requests would have provided a trial judge in complex national-security cases such as those before military commissions.

Judge Mukasey is uniquely qualified to provide the necessary facts. In addition to a number of other complex, national-security matters, Judge Mukasey presided over *United States v. Rahman, et al.*, the case arising out of the 1993 bombing of the World Trade Center.¹ In that case, ten defendants were charged with offenses arising out of plots to bomb the World Trade Center, tunnels, and bridges in New York City, as well as plots to assassinate the President of Egypt and an Israeli citizen. See *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999).

Summarizing the case, the Second Circuit stated:

The trial judge, the Honorable Michael B. Mukasey, presided with extraordinary skill and patience, assuring fairness to the prosecution and to each defendant and helpfulness to the jury. His was an outstanding achievement in the face of challenges far beyond those normally endured by a trial judge.

Rahman, 189 F.3d at 160. Judge Mukasey will testify concerning the “challenges far beyond those normally endured by a trial judge” that one experiences when presiding over complex national-security cases, and in the context of such challenges, what benefits the trial judge, the parties, and the American public alike might realize if certain logistical burdens are cleared in the manner contemplated by Change 1.

For example, concerning the military judges’ question about the effect of making military commissions the exclusive duty of the military judges, the Government anticipates Judge Mukasey will testify that federal district judges assigned to cases of this complexity routinely remove themselves from the judicial assignment rotation. He will testify that complex matters such as these require considerably greater focus and time commitment than ordinary matters. Indeed, eliminating other matters from the trial judge’s docket (as contemplated by Change 1) is

¹ Judge Mukasey’s *curriculum vitae* is attached to the Government’s Update. See AE 32E at Attachment E.

a welcome benefit that affords the trial judge the necessary bandwidth to apply this greater focus and time allotment. Judge Mukasey will testify that, conversely, it is both inefficient—and sometimes ineffective—for the trial judge to be divided between a matter of this complexity and other matters. He will testify that working on a case of this complexity for brief periods, while interrupted by other matters for extended periods, builds in undue time inefficiencies resulting from re-acclimating oneself with the facts and law of the complex case and can potentially compromise the quality of even the most experienced judge's legal analysis.

Judge Mukasey will testify that the trial judiciary's request for additional, experienced staff—and Mr. Ary's efforts to provide such staff—is consistent with, and indicative of, the need for ongoing, sophisticated legal analysis beyond that required in a normal trial. He will testify that a lion's share of a trial judge's work in a complex national-security case occurs outside of the presence of the parties. There are always areas of the law that require additional mastery, and a trial judge can avail himself of the time away from court on this matter, and other matters, to become versed in these nuanced and sometimes unfamiliar areas of the law. For this reason, the trial judge can advance the litigation in a meaningful way even when the case is in a procedural posture that precludes formal forward movement during in-court sessions.

Similarly, concerning the military judges' question about the decision to co-locate the military judges alone to the site of the trials, the Government anticipates Judge Mukasey will testify that he, as an objective observer, was surprised to learn that the military judges were *not* co-located with the site of the trials. He will testify that co-locating the trial judge with the site of the trial is an efficient and surgical way to eliminate the barrier that geography creates to the timely and fair disposition of a complex case. That the parties and staff are not co-located by order of the Deputy Secretary of Defense is of no moment. Judge Mukasey will testify that he frequently had parties before him whose primary offices or residences were not near his courthouse. He never ordered a party to "move" to the location of the courthouse, nor did his lack of authority to do so impede forward movement in a case. By the power of scheduling orders, the trial judge can dictate when, and for how long, the necessary parties are present at the

courthouse.² Further, as noted above, Judge Mukasey will testify there is sufficient work to be done in cases of this complexity that can, and must, occur when the parties are not present.

Concerning the military judges' questions about the desire to "accelerate the pace of litigation" through Change 1, the Government anticipates Judge Mukasey will testify that resourcing and positioning a trial judge to dispose of a matter at a pace consistent with the interests of justice is not nefarious. Indeed, the opposite is true. Consistent with fundamental notions of speedy trial (embodied in R.M.C. 707(a)(2) for military commissions), Judge Mukasey will testify that any delay not specifically undertaken in the interests of justice has a corrosive impact on the trial.³ This corrosive impact is felt equally by the accused, the prosecution, and the American public alike. While the trial judge sets the trial schedule and makes rulings in a manner consistent with the interests of justice, the trial judge properly relies upon others to manage the logistics that allow him to do so. This includes providing a courthouse, ready access to the courthouse at whatever hours may be necessary, and allowing him to focus on the significant case on his docket to the exclusion of other cases. Contrary to the findings by the *Mohammad* and *Nashiri* commissions, Judge Mukasey will testify that the measures implemented by the now-rescinded Change 1 are consistent with the type of logistical measures that would allow him to freely set the pace of litigation consistent with the interests of justice and further minimize the corrosive impact of unnecessary delay attributable to logistical barriers.⁴

² As impliedly recognized by Change 1, only the military judge has the power to order the parties to be present at the location of the trial.

³ Judge Mukasey will testify that federal district judges are prompted by an internal system to turn to matters that have lingered on their docket beyond 90 days. There is a similar 60-day notification system for the circuit courts. At the circuit court level, the "60-day list" is circulated to all judges on the circuit, and the presiding judge on the panel for any matter on the list is expected to explain why the matter lingered beyond 60 days at the subsequent monthly meeting of circuit judges.

⁴ This, as well as that detailed in AE 032E, is only meant to be a general description of the testimony the Government anticipates Judge Mukasey will provide during an evidentiary hearing on AE 032.

B. Judge Mukasey's Anticipated Testimony Is Necessary

Given the rulings in the *Mohammad* and *Nashiri* commissions, the Government rightfully seeks to place the facts identified *supra* into the record through an appropriate witness. The appropriate witness is a trial judge who has experience presiding over a complex national-security case, like this case. The Government cannot call this Military Judge to testify in his own Commission, nor can the Government reasonably expect to call the military judges from either the *Mohammad* or *Nashiri* commissions. Judge Mukasey is the appropriate, necessary witness.

Further, the Government has accepted the burden to prove that the relevant facts do not constitute unlawful influence—actual or apparent—or, alternatively, if any unlawful influence exists as a result of Change 1, the Government intends to prove it had no effect on the proceedings in this Commission. *See* AE 032E. To do so, the Government must meet the highest standard in criminal law: proof beyond a reasonable doubt.⁵ *See e.g., Stoneman, 57 M.J.* at 41. The Government should be given an opportunity to present all relevant evidence necessary to do so. Indeed, the *Nashiri* commission found “[t]he Government chose to present no evidence to demonstrate the absence of [unlawful influence] or that actual, attempted or apparent [unlawful influence] would not taint the proceedings when offered the opportunity to do so.”⁶ Order, AE 332U, *United States v. Al Nashiri* (Mil. Comm’n Mar. 4, 2015) at 17. The *Mohammad* commission issued Order 343C without providing the Government an opportunity to present any evidence at all. The Government should not be placed in the same position in this Commission.

Finally, the Defense asked the Commission to dismiss the charges as a remedy for any unlawful influence resulting from Change 1. *See* AE 032 at 1. Should the Commission grant

⁵ It is important to note, a *prima facie* showing of “some evidence” is not dispositive of the issue. The Government must be allowed to present evidence to rebut the presumption by proving that, when taken on the whole by an “objective observer,” the totality of the facts do not equal unlawful influence, or to prove that any perceived unlawful influence has not had an effect on the proceedings.

⁶ Inexplicably, the military judge in the *Nashiri* commission appeared to disregard the evidence the Government elicited during its cross-examination of Mr. Ary.

this remedy—which it should not—such action would be grounds for an interlocutory appeal. *See* 10 U.S.C. § 950d(a)(1). Given this possibility, the Government should be allowed to make a full record of the facts that meet its burden.⁷ Failure to allow the Government to make a record could deprive the Government of a meaningful review by the United States Court of Military Commission Review, and other reviewing courts, likely leading to remand on that issue alone, thereby creating protracted, piecemeal litigation from which no one benefits.

For these reasons, Judge Mukasey's anticipated testimony is necessary, and he should be allowed to provide these relevant facts to the Commission.

5. Conclusion

The Government does not object to the Defense's request that this Commission consider Mr. Ary's testimony in the *Nashiri* commission and believes it should render his additional testimony unnecessary for AE 032.

Further, Judge Mukasey's anticipated testimony is both relevant and necessary. Thus, he should be allowed to provide the facts above for the Commission to consider when ruling on this matter.

6. Witnesses and Evidence

Aside from the witnesses and evidence noticed in AE 032A, AE 032E, as well as the sections of the transcript from the *Nashiri* commission and the anticipated testimony of Judge Mukasey and VADM DeRenzi cited herein, the Government does not intend to call any other witnesses or introduce evidence on this specific argument.

7. Additional Information

The Government has no additional information.

⁷ As detailed in AE 032E, the Government also intends to call Vice Admiral Nannette M. DeRenzi, JAGC, USN, who the Government anticipates will testify generally that she viewed Change 1 as nothing more than a resourcing and manning issue and did not view it as a comment on the performance or fitness of this Military Judge.

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 20th day of March, 2015, I filed **AE 032I, Government Response To Defense Supplement To AE 032**, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//

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