MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA v. ABD AL-RAHIM HUSSEIN MUHAMMED ABDU AL-NASHIRI	**AE 332CC** **DEFENSE REPLY TO GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL DISCOVERY RELATED TO AE332X** 2 July 2015

1. Timeliness: This reply is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905.

2. Reply:

The defense requested this Commission set a timeline for the production of discovery related to its renewed motion to dismiss for unlawful influence, AE 332X. It further requested that information deemed not discoverable be provided to this Commission for in camera review by a set date. See AE 332AA. The prosecution's response claims that such an order is unnecessary and that it already provided all discoverable information in its possession to the defense. See AE 332BB. However, the defense respectfully disagrees and renews its request.

The defense requested information that is material and relevant to the allegations of unlawful influence in a request for discovery dated 7 May 2015. Attachment B. The prosecution provided some of the discovery requested as an attachment to AE 332Y on 22 May 2015. On 10 June 2015, prior to filing a motion to compel the missing discovery, the defense conferenced with the prosecution and was informed that the prosecution opposed the motion, but had some discovery it would provide to the defense "early the next week." Given the history of discovery denials, particularly with respect to the issue of unlawful influence, the defense filed the motion

to compel discovery so that the prosecution could not later argue any such motion was untimely, as it has done before.

After filing the motion, the defense did not receive any additional discovery. Upon following up with the prosecution, on 19 June 2015, the prosecution informed the defense that it would not send the defense the discovery, but would simply wait until it filed its response motion. Attachment C. The discovery the government possessed was finally delivered to the defense on 24 June 2015. The response of the prosecution- to essentially withhold requested discovery in its possession because the defense exercised a right to file a motion- is indicative of the prosecution's attitude with respect to its discovery obligations. Discovery is not meant to be gamesmanship- it should be open and transparent. The discovery the government possessed was finally delivered to the defense on 24 June 2015.

As anticipated by the defense, even after this long awaited production, there is still information that has either been denied to the defense or not yet produced. These items are material and relevant to the issues of unlawful influence raised in AE 332X and it is for this reason that this Commission should set deadlines for the production of discovery.

The heart of the allegations raised in AE 332X involve the Office of the Convening Authority and its legal advisors disregard of this Court's order related to its remedy prescribed in AE 332U. The Commission's order was clear that Mr. Ary was disqualified as the Convening Authority and that his staff of legal advisors was also disqualified. The order was also clear in that the new Convening Authority would seek legal advice "from a legal staff outside the Office of Military Commissions/Office of the Convening Authority". See AE 332U, p. 21. The defense subsequently learned that business as usual continued within the Office of the Convening Authority. Rather than take steps to comply with this Commission's order, the legal advisors took no steps to separate themselves from this case. This case stayed on the same case

tracking document with other commissions cases and this tracker was made available to all legal advisors and was used during meetings to discuss case progress. A recently mobilized member of the Office of the Convening Authority who was not disqualified *by name* was told that he would serve as the new legal advisor for this case, although he was a member of the OCA at the time of the disqualification order. However, this new legal advisor was subject to the supervision and orders of the disqualified legal advisors. Further, when the new legal advisor raised concerns with not only his participation in the case, but with the continued discussion of this case in meetings, he was told there was no problem.

The prosecution provided one case tracking document related to this case. It is dated 18 June 2015. While this demonstrates that the new Convening Authority continues to receive legal advice from a legal staff within the Office of Military Commissions, it does not address the specific items requested in the defense's discovery request. The defense has asked for the production of the document used by the Convening Authority or his legal advisors to track the progress of cases after the order in AE 332U was issued. The prosecution has denied this request as overbroad. The defense maintains that this particular document, which shows that the legal advisors continued to track the progress of this case along with all of the other cases, is crucial to any determination by this Commission relative to unlawful influence. The prosecution should not be allowed to deny the production of this document simply because it commingles information relevant to this case with information regarding other commissions cases. At a minimum, this document should be turned over to the Commission for in camera review. Further a deadline should be set at this information can easily be produced.

Among the other items not yet disclosed to the defense is the rating scheme for the recently removed legal advisor. This officer began work in January and was dismissed at the end of April. The Office of Military Commissions has acknowledged that they will do the fitrep for

this officer. See Bates 10015-00130668. Yet, they have not provided the rating scheme for this officer, an item that is material to the determination of whether or not the legal advisors continued to exert unlawful influence in this case.

The defense also requested electronic Microsoft word versions of any written advice provided to the Convening Authority subsequent to this Commission's order in AE 332U. This particular request is relevant to determine whether or not the disqualified legal advisors continued to participate in this case. This again is an item that should be readily available for production, but has still not been produced to the defense eight weeks after the initial discovery request.

The defense requested the "green notebook" of CPT Matthew Rich, one of the disqualified legal advisors, as he was witnessed taking notes during a meeting of legal advisors in which this case was discussed. This incident happened subsequent to this Commission's order in AE 332U. The prosecution has stated that they've interviewed CPT Rich and asked him on at least two occasions to review his notebook. The prosecution's reply is that there is no discoverable information to provide. The defense, as well as this Commission, has disagreed on numerous occasions with the prosecution as to what constitutes discoverable and relevant evidence. For example, with regard to the previous round of litigation involving unlawful influence the prosecution averred that emails within the Office of the Convening Authority were irrelevant and privileged- those emails were ordered by this Commission to be disclosed to the defense and were highly material and relevant to the issue at stake. In light of this fundamental disagreement and history specific to this issue, the defense asks that this Commission compel the prosecution to turn over CPT Rich's green notebook for in camera review.

The defense has made reasonable requests for relevant information regarding continued unlawful influence. Eight weeks after this request, the defense is still waiting for items such as

electronic Word versions of legal advice and the rating scheme of an officer who was fired over two months ago. These are not onerous requests, and indeed the government was able to recently produce similar electronic records during the most recent UI litigation. The Office of the Convening Authority could easily produce these items. An office concerned with the "pace of litigation" should have no issue to expeditious production of the items sought by the defense. We respectfully ask this Commission to establish deadlines for production of discovery related to our motion in AE 332X.

3. Additional Witnesses: None

4. Additional Attachments:

A. Certificate of Service, dated 2 July 2015 (1 page)

B. Defense Request for Discovery, dated 7 May 2015 (3 pages)

C. Email from Colonel Moscati, dated 19 June 2015 (3 pages)

Respectfully submitted,

/s/ Brian Mizer
BRIAN L. MIZER
CDR, JAGC, USN
Assistant Detailed Defense Counsel

/s/ Richard Kammen
RICHARD KAMMEN
DOD Appointed Learned Counsel

/s/ Allison C. Danels
ALLISON C. DANELS, Maj, USAF
Assistant Detailed Defense Counsel

/s/ Jennifer Pollio
JENNIFER POLLIO
LCDR, JAGC, USN
Assistant Detailed Defense Counsel

ATTACHMENT

A

CERTIFICATE OF SERVICE

I certify that on 2 July 2015, I electronically filed the forgoing document with the Trial Judiciary and served it on all counsel of record via e-mail.

/s/ Jennifer Pollio
JENNIFER L. POLLIO
LCDR, JAGC, USN
Assistant Detailed Defense Counsel

ATTACHMENT

B

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

7 May 2015

MEMORANDUM FOR Trial Counsel

From: LCDR Jennifer Pollio, JAGC, USN, Assistant Detailed Defense Counsel

SUBJECT: DEFENSE REQUEST FOR DISCOVERY ICO UNITED STATES V. MR. AL-NASHIRI (Discovery Related to Unlawful Influence and Commission Order AE 332U)

1. Mr. Al-Nashiri is currently facing charges resulting from his alleged involvement in al-Qaeda and responsibility in the attacks on the USS COLE (DDG-67). Charges were referred as capital by the Office of the Convening Authority for Military Commissions and accordingly Mr. Al-Nashiri faces the ultimate sentence of death if convicted of the alleged crimes. Pursuant to 10 U.S.C. § 949j, Rules for Military Commission 701(c)(1) and 701(e)(l)(C), and the Due Process Clause of the United States Constitution, Mr. Al-Nashiri, through counsel, requests the government furnish all documents or information in its possession, or known or discoverable by the government, which are material to the preparation of Mr. Al Nashiri's defense.

2. On 4 March 2015, the Commission issued AE332U, Order on Defense Motion to Dismiss For Unlawful Influence and Denial of Due Process for Failure to Provide an Independent Judiciary. The Commission made findings that "the actions of the Convening Authority, outside of his appropriate field of action, cast a cloud over the independence of the Military Commission Trial Judiciary." [1]

3. The Commission ruled that the actions of the Convening Authority and his legal staff were central to the findings of unlawful influence and that any future actions by them would appear tainted. The Commission therefore disqualified the Convening Authority and his staff of legal advisors by name. The list of legal advisors included: Mr. Mark Toole; Ms. Alyssa Adams; LTC Patricia Lewis; CDR Raghav Kotval; and CPT Matthew Rich. The ruling stated that a new Convening Authority for this case be appointed and that the new Convening Authority would receive legal advice from outside of the legal staff of the Office of Military Commissions, Office of the Convening Authority.[2]

4. By information and belief, the Defense has concerns that the rulings of AE332U have not been followed and requests that the Government produce the following:

a. All email traffic between Ms. Donna Wilkins, Office of the Trial Judiciary, Mr. Toole, COL [redacted] and LCDR [redacted], Office of the Convening Authority, and any other party with regards to the establishment of a separate drive for subject case and who had permissions to the folders.
b. Any report, record, or document used by the Office of the Convening Authority or its legal advisors to track the progress of cases after the Commission's decision in AE

[1] AE 332U, p. 19
[2] AE 332U, p. 20-21

332U. This request includes the dates any separate reports, records, documents, or trackers were created, who created them, where the electronic and/or hard copy files were located/stored, and the names of individuals who had access to the report, record, and/or document.

c. Notes, minutes or any memorialization of meetings or conferences in which the case of Mr. Al-Nashiri was discussed. This specifically includes, but is not limited to, notes taken by CPT Matthew Rich in his green notebook and notes taken by [redacted].

d. Any electronic or handwritten document, SOP, or other memorialization describing the Office of the Convening Authority's plans, policies, or actions to be taken in order to comply with Commission's Order in AE332U.

e. The names of the current legal advisors for the case of Mr. Al-Nashiri and their current office location and rating/evaluation scheme. This includes any person that has input in the legal advisors rating/evaluation, regardless whether or not that person signs the final rating/evaluation.

f. Electronic MS Word versions of any written advice given to the Convening Authority regarding the case of Mr. Al-Nashiri subsequent to the Commission's Order in AE 332U.

g. Email communication with respect to the case of Mr. Al-Nashiri between LCDR [redacted] Office of the Convening Authority, and Mr. Jason Foster, Office of the General Counsel, Department of Defense, Mr. Toole, Ms. Adams, or Mr. Michael Quinn.

h. Any communications after 2 March 2015 between Mr. Jason Foster, OGC, and Mr. Toole or Ms. Adams regarding the Al-Nashiri case.

i. Briefing binder provided to Mr. Michael Quinn, Office of the Convening Authority, on the case of Mr. Al-Nashiri.

j. Any electronic mail, memorandum, or direction provided by Mr. Michael Quinn to legal advisors within the office regarding the case of Mr. Al-Nashiri; specifically emails addressing the need to segregate the subject case from other cases within the office and any other prophylactic measures taken to comply with the Commission's order in AE 332U.

k. Email from Ms. Donna Wilkins to COL [redacted], Mr. Quinn, and Mr. Toole regarding Commission's Order that an MRI be given to accused in subject case.

l. Email traffic regarding removal of LCDR [redacted] from the Office of the Convening Authority.

m. Email communication from LCDR [redacted] to BG Martins regarding allegations of Unlawful Influence occurring at the CAs office; any subsequent communication (or attempts) by the Office of the Chief Prosecutor to LCDR [redacted] and/or the Office of the Chief Defense Counsel regarding these allegations, and/or the Office of the Convening Authority.

n. Recommendation letter from BG Martins sent to OMC/CA regarding LCDR [redacted] in approximately November 2014.

o. Any communication to/from the OMC/CA office to OJAG Code 67 regarding the removal of LCDR [redacted] and the reasons set forth.

p. Any communications sent to/from OJAG Code 67 to NAVPERSCOM regarding the de-mobilization of LCDR [redacted]. This includes communications regarding orders, reassignment, and allegations of misconduct.

q. Any subsequent communications to/from OMC/CA office regarding the removal of LCDR [redacted] as a legal advisor.
r. Any other documents, information, or evidence related to the actions of the OMC/CA office in seeking a new legal advisor to the subject case.
s. The official date of Mr. Quinn's return to the OMC/CA office.

4. Further, the defense requests that the email account and all electronic data associated to LCDR [redacted] accounts while at OMC/CA be preserved. Please acknowledge receipt of this preservation request and inform the defense once OMC/CA has acknowledged receipt of this preservation request.

5. The Defense considers this request to be ongoing. Please notify the Defense in writing by 15 May 2015 if you do not intend to comply with any part of this request. Thank you for your prompt attention in this matter. If you have any questions about this request or would like to discuss further, please feel free to contact me.

Very Respectfully Submitted,

//s//
JENNIFER POLLIO
LCDR, JAGC, USN
Assistant Detailed Defense Counsel

The above discovery request was delivered to trial counsel via email on 7 May 2015.

ATTACHMENT

C

From: [redacted]
To: Pollio, Jennifer L LCDR USN OSD OMC (US); Moscati, Robert C COL USARMY (US); [redacted]; [redacted]; [redacted]; [redacted]; McMillan, Winston G Maj USMC OSD OMC OCP (US); Morris, Paul B LT USN (US); [redacted]; Sher, Justin T CIV (US); [redacted]
Cc: "Rick Kammen"; Danels, Allison C Maj USAF OSD OMC (US); Mizer, Brian L CIV (US)
Subject: RE: Position of Counsel - AE332AA: Defense Motion to Compel Discovery Related to AE 332X
Date: Friday, June 19, 2015 3:53:27 PM

LCDR Pollio,

Since the defense decided to file its MTC, AE 332AA, regardless of our offer of forthcoming supplemental discovery, the prosecution decided to just include the supplemental discovery with our response.

v/r, COL M

ROBERT C. MOSCATI
COL, JA
Deputy Chief Prosecutor

Office of the Chief Prosecutor of Military Commissions
[redacted]

-----Original Message-----
From: Pollio, Jennifer L LCDR USN OSD OMC (US) [redacted]
Sent: Friday, June 19, 2015 11:05 AM
To: [redacted]; Moscati, Robert C COL USARMY (US); [redacted]; [redacted]; McMillan, Winston G Maj USMC OSD OMC OCP (US); Davis, Bryan M LT USN CNO (US); Morris, Paul B LT USN (US); [redacted]; Sher, Justin T CIV (US); [redacted]
Cc: 'Rick Kammen'; Danels, Allison C Maj USAF OSD OMC (US); Mizer, Brian L CIV (US)
Subject: RE: Position of Counsel - AE332AA: Defense Motion to Compel Discovery Related to AE 332X

Sir,

In your email below you indicated that the prosecution would be providing discovery earlier this week.

Has any additional discovery been made available?

V/R,

Jennifer Pollio
LCDR, JAGC, USN
Office of Military Commissions
Office of the Chief Defense Counsel
[redacted]

-----Original Message-----
From: [redacted]
Sent: Wednesday, June 10, 2015 11:53 AM
To: Jackson, Daphne L Maj USAF OSD OMC (US); Moscati, Robert C COL USARMY (US); [redacted]; [redacted]; McMillan, Winston G Maj USMC OSD OMC OCP (US); Davis, Bryan M LT USN CNO (US); Morris, Paul B LT USN (US); [redacted]; Sher, Justin T CIV (US); [redacted]
Cc: 'Rick Kammen'; Danels, Allison C Maj USAF OSD OMC (US); Mizer, Brian L CIV (US); Pollio, Jennifer L LCDR USN OSD OMC (US)
Subject: RE: Position of Counsel - AE332AA: Defense Motion to Compel Discovery Related to AE 332X

The Govt will oppose your motion, Maj Jackson, but also advises that a supplementary discovery response is forthcoming shortly. I don't know if you want to wait to see what that entails, but we expect to be able to get that to you by early next week at the latest. I would suggest we dialogue once you have received and digested the additional materials, but of course, that is up to you.

v/r, COL M

ROBERT C. MOSCATI

COL, JA

Deputy Chief Prosecutor

Office of the Chief Prosecutor of Military Commissions

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

From: Jackson, Daphne L Maj USAF OSD OMC (US) [redacted]
Sent: Wednesday, June 10, 2015 11:34 AM
To: Moscati, Robert C COL USARMY (US); [redacted]; [redacted]; [redacted]; McMillan, Winston G Maj

USMC OSD OMC OCP (US); Davis, Bryan M LT USN CNO (US); Morris, Paul B LT USN (US); [redacted]; Sher, Justin T CIV (US); [redacted]
Cc: 'Rick Kammen'; Danels, Allison C Maj USAF OSD OMC (US); Mizer, Brian L CIV (US); Pollio, Jennifer L LCDR USN OSD OMC (US); Jackson, Daphne L Maj USAF OSD OMC (US)
Subject: Position of Counsel - AE332AA: Defense Motion to Compel Discovery Related to AE 332X

COL Moscati, et al.

The defense intends to file the following motion:

AE332AA: Defense Motion to Compel Discovery Related to AE 332X

Relief Requested: The defense requests this Commission to set a discovery scheduling order pertaining to AE332X. Specifically, the defense requests a deadline to be set for the government to request and comply with all discovery obligations pertaining to AE332X. Additionally, noting the government's discovery response, the defense requests that any information provided to the government in response to the defense request that the government deems "not discoverable" also be turned over to the Commission for in camera review by a set deadline.

What is the government's position on the filing of this motion?

v/r

DAPHNE LaSALLE JACKSON, Maj, USAF

Defense Counsel

Office of the Chief Defense Counsel

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]