

MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI</p>	<p>AE 346A</p> <p><b>Government Response</b> To Defense Motion To Preclude The United States Air Force From Transferring Lt Col ██████████ From The Office Of The Chief Defense Counsel To Another, Unrelated Assignment</p> <p>26 June 2015</p>
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**1. Timeliness**

This response is filed timely pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.d.(1).

**2. Relief Sought**

The government respectfully requests the Commission deny the relief requested in AE 346.

**3. Burden of Proof<sup>1</sup>**

As the moving party, the defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

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<sup>1</sup> The defense merely asserts that denial of the motion will violate various rights of the accused, including rights that have not been extended to any detainee by any United States court. AE 346 at 2. The Commission should reject such boilerplate language without any explanation as to how those rights are implicated in the defense motion, or under what authority they are asking this Commission to act. *See Harding v. Illinois*, 196 U.S. 78, 87 (1904) (reasoning that when “no authorities were cited nor argument advanced in support of the assertion that [a] statute was unconstitutional . . . the point, if it could otherwise be considered was to be deemed waived”); *United States v. Heijnen*, 215 F. App’x 725, 726 (10th Cir. 2007) (“We nevertheless reject these arguments because they are unsupported by legal argument or authority or by any citations to the extensive record of the proceedings . . . [A]ppellant’s issues are not supported by any developed legal argument or authority, and we need not consider them.”); *Bob Willow Motors, Inc. v. General Motors Corp.*, 872 F.2d 788, 795 (7th Cir. 1989) (“A litigant who

#### 4. Overview

The defense requested the Commission issue an order precluding the Air Force from reassigning Lieutenant Colonel (Lt Col) [REDACTED], United States Air Force, from the Office of the Chief Defense Counsel (OCDC) until her work on this case is concluded. *See* AE 346. The defense fails to provide any authority that would authorize the Commission to grant such a request. *Id.* The government is not aware of any such authority. Both the Military Commissions and the United States Air Force have clear regulations governing the assignment of personnel. Regulation for Trial by Military Commission (R.T.M.C.) 9-4; Air Force Instruction (AFI) 36-2110 (17 Dec. 2007). The defense has presented no authority or justification to circumvent those regulations. Additionally, it would be inappropriate to interfere with the Air Force's ability to control its personnel in a manner that best suits the needs of the service. The defense should have access to necessary resources in accordance with the R.T.M.C.; however, they must request these resources from the appropriate authority. The defense fails to do so here. Accordingly, the defense motion should be denied.

#### 5. Facts

The government charged Abd Al Rahim Hussayn Muhammad Al Nashiri ("the accused") with multiple offenses under the Military Commissions Act of 2009, 10 U.S.C. §§ 948a *et seq.*, relating to terrorist attacks against the United States and its allies. The accused is charged with the attempted attack on USS THE SULLIVANS (DDG 68) on 3 January 2000, and the attacks on USS COLE (DDG 67) on 12 October 2000 and the French supertanker MV *Limburg* on 6

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fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority or in the face of contrary authority, forfeits the point.”).

October 2002. These attacks resulted in the deaths of 18 people, serious injury to dozens of others, and significant property damage.<sup>2</sup>

Substantial resources have been provided to the defense to assist with its preparation for trial. *See* AE 262A. In June 2015, the accused will have been represented by military counsel for over five years and learned counsel for approximately four years.<sup>3</sup> *Id.* at 2. The accused currently has four detailed counsel and one learned counsel representing him. AE 339. The government has provided the defense with at least eight different experts to perform various investigative functions. AE 262, Attach. B at 2-3. These experts include: a mitigation specialist, an assistant mitigation expert, a consultant on investigation in Saudi Arabia and Yemen, a capital defense investigator and two victim outreach specialists. *Id.* In addition to these assets, defense has two full-time military investigators to assist with its investigation. *Id.* The defense has

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<sup>2</sup> The Commission dismissed the separate charges relating to the accused's alleged participation in the attack on MV *Limburg* (Charge IV, Specification 2, and Charges VII-IX). AE 168G; AE 241C. The government moved for reconsideration of the Commission's order dismissing those charges. AE 168H; AE 241D. The Commission granted reconsideration and, on reconsideration, denied the government's requested relief while modifying the initial Order to state dismissal of the charges was without prejudice. AE 168K; AE 241G. The Order does not affect the Conspiracy charge (Charge V), which includes overt acts comprising the attack on MV *Limburg*. On 29 September 2014, the government filed an interlocutory appeal with the United States Court of Military Commission Review ("U.S.C.M.C.R."), causing AE 168K/241G to be stayed automatically pending disposition by the U.S.C.M.C.R. On 12 November 2014, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") granted the defense request to stay the proceedings before the U.S.C.M.C.R. Order, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. Nov. 12, 2014). On 10 February 2015, the D.C. Circuit heard oral argument on the defense petition for a writ of mandamus and prohibition to the U.S.C.M.C.R. On 23 June 2015, the D.C. Circuit denied the petition and dissolved the stay. Order, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. June 23, 2015). On 26 June 2015, the U.S.C.M.C.R. granted the government's unopposed motion to stay the proceedings—suspending oral argument in the first interlocutory appeal and suspending the briefing schedule in the second interlocutory appeal—while the government explores options for re-nomination and re-confirmation of the military judges as U.S.C.M.C.R. judges. Order, *United States v. Al Nashiri*, No. 14-001 (U.S.C.M.C.R. June 26, 2015). The U.S.C.M.C.R. also ordered the government to keep the Court apprised of "efforts to change the appointment of the military judges" and to "file a motion every 30 days, providing the status of this action and whether the parties request continuation of the suspension of litigation." *Id.*

<sup>3</sup> This period does not include time prior to the swearing of charges, when learned counsel was retained by the John Adams Project to work on this case. During that time, learned counsel traveled to Yemen to investigate the case.

indicated that one of those full-time military investigators is Lt Col [REDACTED]. *See* AE 346 at 2. The defense stated that Lt Col [REDACTED] was assigned, pursuant to military orders, to the OCDC of the Office of Military Commissions in 2013. *Id.* According to the defense, Lt Col [REDACTED] was recently notified that she will be transferred to a new assignment in mid-August 2015. *Id.* The defense has not provided any information about whether Lt Col [REDACTED] upcoming transfer is anything but a standard military rotation at the conclusion of military orders. *Id.* Also, the defense has not provided any information about Lt Col [REDACTED] initial orders to OCDC, including the length of her orders. *Id.* Additionally, the defense has not provided any information about Lt Col [REDACTED] orders from OCDC to her new, gaining command. *Id.* Further, the defense has not provided any information about whether Lt Col [REDACTED] will be replaced with a new investigator. *Id.* Finally, the defense has not provided any evidence demonstrating an attempt to extend Lt Col [REDACTED] orders at the OCDC. *Id.*

## **6. Law and Argument**

The proper method for the defense to submit a personnel request is through the Convening Authority, via the Chief Defense Counsel (CDC), and not through this Commission. R.T.M.C. ¶ 9-4. Matters of military assignments, orders, extensions and separations for United States airmen are within the sole purview of the United States Air Force. It is not appropriate for this Commission to administrate these matters that are so distinctly within the Air Force's scope of authority. The defense fails to provide any authority supporting the Commission's intervention in this matter. Furthermore, the defense has cited no authority or justification for the Commission assuming the role of the Air Force in making personnel decisions in accordance with AFI 36-2110. The defense has similarly failed to demonstrate they would be unfairly prejudiced by Lt Col [REDACTED] reassignment. While the government has no reason to oppose Lt

Col [REDACTED] continuing to work at the OCDC, the government opposes this motion because the defense has failed to utilize the appropriate procedures to extend Lt Col [REDACTED] tour. Instead, the defense requests this Commission take an action for which there is no authority.

There are clear regulations for the assignment of military personnel, both generally and specific to the OCDC of the Military Commissions. The assignment of personnel to the OCDC at the Military Commissions is regulated by R.T.M.C. section 9-4, which states the CDC is responsible for informing the Convening Authority of “all requirements for personnel, office space, equipment and supplies to ensure the successful functioning and mission accomplishment of the OCDC.” R.T.M.C. ¶ 9-4. This regulation applies to requests for investigators. The Convening Authority is responsible for ensuring investigative resources are available to defense counsel as deemed necessary for a fair trial. R.T.M.C. ¶ 2-3.a.10. Once personnel are made available to the CDC by the Convening Authority, the CDC is responsible for managing the assigned personnel and allocating such personnel appropriately across trial teams. R.T.M.C. ¶ 9-4. The defense has not presented any evidence showing a request to preclude Lt Col [REDACTED] transfer or extend her orders was made to the CDC, Convening Authority, or the Air Force. When faced with a similar issue, the Commission in *United States v. Khalid Shaikh Mohammed, et al.*, declined to interfere with the personnel decisions of the Convening Authority. AE 283B at 2, *United States v. Mohammed* (Mil. Comm’ns Sept. 3, 2014) (recognizing the lack of authority to order the Convening Authority to hire a former detailed defense counsel, the Commission stated, “[t]he accused has cited no authority for the Commission to provide any of the requested relief. The Commission is aware of no such authority.”). Similarly, the defense in this case has cited no authority to order the Commission to preclude the transfer of Lt Col [REDACTED] and the government is aware of no such authority. The defense request not only ignores the clear

procedures outlined in the R.T.M.C, it also attempts to circumvent the Air Force's fundamental ability to manage its personnel.

The United States Air Force, along with all branches of the military, has legitimate and fundamental interests in controlling the assignments of its personnel. *See* U. S. Dep't of Def., Directive 1315.07, *Military Personnel Assignments* (Jan. 12, 2005). The ability to assign and transfer military personnel is essential to maintaining a high degree of combat capability and readiness. *See* U.S. Dep't of Def., Instruction 1315.18, *Procedures for Military Personnel Assignments* (Jan. 12, 2005) [hereinafter DoDI 1315.18]. There is clear authority governing permanent change of station (PCS) assignments in the Air Force. *See* U.S. Dep't of Air Force, Instruction 36-2110, *Personnel Assignments* (Sept. 22, 2009) [hereinafter AFI 36-2110]. Under this Instruction, Air Force Personnel Center (HQ AFPC) is designated as the assignment authority for lieutenant colonels and officers of lesser rank. *Id.* at 24. These service members are assigned to various positions via the Air Force Assignment System. *Id.* at 364. The defense has failed to cite a single authority, and the government has found no such authority, that would justify diverging from this longstanding rule that military branches control their respective personnel assignments. *See* AE 346. Instead, the defense mistakenly asks the Commission to take an action which is clearly within the purview of the Convening Authority and the United States Air Force.

There are other avenues available to the defense to have Lt Col ██████ continue working at the OCDC without the Commission's involvement. The defense, via Lt Col ██████, has the opportunity to request an extension of Lt Col ██████ orders. *See* AFI 36-2110 ¶¶ 1.4-1.5. The Department of Defense policy pertaining to personnel assignments is "service members shall be permitted to complete prescribed tours of duty and, when possible,

shall be allowed to extend any assignment voluntarily beyond the prescribed tour.” DoDI 1315.18 ¶ 6.1.5. Air Force regulations also allow for exceptions and waivers of the Air Force personnel policies that require transferring duty stations. AFI 36-2110 ¶¶ 1.4-1.5. Again, the government does not oppose Lt Col ██████ continuing to work as a defense-team investigator for the accused; however, the defense should use the appropriate channels to achieve that end. Nothing in the record suggests the defense or Lt Col ██████ have made any attempt to properly request an extension of Lt Col ██████ tour at the OCDC.

However, even if the Air Force decided not to grant an extension to Lt Col ██████, her prospective loss is not “[d]ue to the government’s personnel mismanagement” and does not “[preclude] continuity and institutional knowledge” as the defense asserts. AE 346 at 2. The defense has not presented any evidence that Lt Col ██████ transfer is anything other than the standard rotation of a military service member at the conclusion of their military orders. *See id.* The defense ignores the simple fact that military orders are finite in nature. The defense has presumably been on notice since 2013 when Lt Col ██████ was assigned as a defense team investigator that her service would be limited due to service rotation. *Id.* Periodic rotations should come as no surprise to the defense, as the defense asserts a number of its detailed counsel have been reassigned to different, unrelated commands pursuant to military orders. *Id.* The defense’s failure to properly prepare for her transfer cannot be attributed to the government. The defense also has multiple other investigators, including another full-time military investigator, to provide continuity to their team. AE 262, Attach. B at 2-3.

In sum, the defense has not provided any authority or justification to grant the requested relief, nor have they demonstrated that Lt Col ██████ transfer would unfairly prejudice the defense. Accordingly, the defense motion should be denied.

**7. Conclusion**

The defense has cited no authority or valid reason for the Commission to circumvent the Air Force's authority to assign personnel. *See* AE 346. In its five page motion, the defense fails to cite one case, statute, or secondary authority to authorize this Commission to order the Air Force not to transfer Lt Col ██████. Also, the defense has not presented any evidence suggesting an extension of Lt Col ██████ orders was sought. The government does not oppose the defense seeking an orders modification for Lt Col ██████ to extend her orders through the appropriate channels; however, a Commission order is not the appropriate mechanism to remedy the defense's concern or grant the requested relief. Accordingly, the Commission should deny the defense's motion and defer to the Convening Authority to provide investigative resources to the defense as deemed necessary for a fair trial.

**8. Oral Argument**

The government does not request oral argument. The Commission can decide this matter without oral argument. *See* Military Commissions Trial Judiciary Rule of Court 3.9(a). If the Commission grants the defense an opportunity to present oral argument, however, the government requests an opportunity to do the same.

**9. Witnesses and Evidence**

The government does not have any witnesses or evidence in support of this response.

**10. Additional Information**

The government has no additional information.



# ATTACHMENT A

Filed with TJ  
26 June 2015

Appellate Exhibit 346A (Al-Nashiri)  
Page 10 of 11

**CERTIFICATE OF SERVICE**

I certify that on the 26th day of June 2015, I filed AE346A, **Government Response** To Defense Motion To Preclude The United States Air Force From Transferring Lt Col [REDACTED] [REDACTED] From The Office Of The Chief Defense Counsel To Another, Unrelated Assignment, with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

*//s//*

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Robert C. Moscati  
Trial Counsel  
Office of the Chief Prosecutor  
Office of Military Commissions