

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

UNITED STATES OF AMERICA v. ENCEP NURJAMAN	AE 0053.005 (TJ) / AE 0054.005 (TJ) / AE 0055.004 (TJ) COMBINED RULING Defense Motion for Appropriate Relief Regarding Continued Discovery Violations 17 November 2023
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1. Procedural History.

a. On 24 April 2023, the Commission held a hearing at Naval Station Guantanamo Bay, Cuba (NSGB), that discussed the issues associated with discovery delays.¹ After hearing oral arguments on motions within the AE 0036 and AE 0045 Series, where two-for-one day administrative sentencing credit was requested by the Defense, the Commission reiterated to the Defense that any request for sentencing credit for discovery violations had not been sufficiently raised. All previous requests for sentencing credit arose during the Response-Reply portion of a briefing cycle² and the Commission requested the Defense file a separate motion requesting any desired sentencing relief for discovery violations.³ On 10 May 2023, Mr. Bin Lep filed AE 0053.001 (LEP) requesting sentencing credit for government discovery violations, misconduct, and other pretrial delays.⁴ On 11 May 2023,

¹ Unofficial / Unauthenticated Transcript of the *United States vs Nurjaman, et al.* motions hearing dated 24 April 2023 (hereinafter "Tr.") at pp. 1–323.

² See AE 0024.040 (TJ), Order, Discovery, 19 May 2022 at 7; AE 0018.031 (TJ) / AE 0024.045 (TJ), Ruling, Government Motion for Appropriate Relief Regarding Timelines Ordered in AE 0024.016 (TJ), AE 0024.035 (TJ) and AE 0018.022 (TJ), 19 October 2022, at 3; AE 0036.010 (TJ), Order, Extension of Deadlines Established in AE 0036.004 (TJ) Discovery Related to Interagency Cooperation, 19 October 2022, at 3; and AE 0036.018 (TJ) / AE 0024.051 (TJ), Ruling, Government Motion for Extension of Time to Provide Discovery Ordered in AE 0036.004 (TJ) and AE 0036.010 (TJ) and Government Motion for Appropriate Relief Regarding Timelines Ordered in AE 0024.045 (TJ), 31 May 2023, at 4.

³ See *Id.* and Tr. at 302–03.

⁴ AE 0053.001 (LEP), Defense Motion for Administrative Sentencing Credit for Government Discovery Violations, Misconduct, and Pretrial Delays, filed 10 May 2023.

Mr. Nurjaman filed AE 0054.001 (NUR) requesting similar relief.⁵

b. The Government filed a consolidated response to both AE 0053.001 (LEP) and AE 0054.001 (NUR) on 25 May 2023.⁶ Mr. Bin Lep filed his reply to the consolidated response on 31 May 2023⁷ and Mr. Nurjaman filed his reply on 1 June 2023,⁸ concluding the initial briefing cycle for both the AE 0053 and AE 0054 Series.

c. On 31 May 2023, Mr. Bin Amin filed a similar motion for sanctions in AE 0055.001 (AMI).⁹ The Government responded on 14 June 2023.¹⁰ Mr. Bin Amin filed his reply on 21 June 2023.¹¹

d. On 29 August 2023, the charges against Mr. Bin Amin were severed from this Commission.¹² On 3 October 2023, the charges against Mr. Bin Lep were severed from *U.S. v. Nurjaman [et. al]* and joined to *U.S. v. Bin Amin [et. al]*.¹³

2. Findings of Facts.

a. Charges were preferred in this case on 5 April 2019 and referred on 21 January 2021. On 11 February 2021, the Commission ordered the Government to file a notice detailing the discovery provided as of 10 March 2021, along with a proposed schedule to meet their various

⁵ AE 0054.001 (NUR), Defense Motion for Appropriate Sanctions in Response to Government Discovery Violations, filed 11 May 2023.

⁶ AE 0053.002 (GOV)/AE 0054.002 (GOV) Government Consolidated Response to AE 0053.001 (LEP) and AE 0054.001 (NUR), Motions for Sanctions, 25 May 2023.

⁷ AE 0053.003 (LEP) Defense Reply to AE 0053.002 (GOV) / AE 0054.002 (GOV), Government Consolidated Response to AE 0053.001 (LEP) and AE 0054.001 (NUR), Motion for Sanctions, 31 May 2023.

⁸ AE 0053.004 (NUR) / AE 0054.004 (NUR) Defense Reply to Government Consolidated Response to AE 0053.001 (LEP) and AE 0054.001 (NUR), Motions for Sanctions, 1 June 2023.

⁹ AE 0055.001 (AMI), Motion for Pretrial Sanctions Due to Government delay and Violation of Court Orders, filed 31 May 2023.

¹⁰ AE 0055.002 (GOV), Government Response to AE 0055.001 (AMI) Motion for Pretrial Sanctions Due to Government Delay and Violation of Court Orders, filed 14 June 2023.

¹¹ AE 0055.003 (AMI), Defense Reply to AE 0055.002 (GOV) Government Response to AE 0055.001 (AMI) Motion for Pretrial Sanctions Due to Government Delay and Violation of Court Orders, filed 21 June 2023.

¹² AE 0060.003 (GOV), Notice of Severance, filed 30 August 2023.

¹³ AE 0067.003 (GOV), Notice of Severance, 4 October 2023. Given the severance of charges against Mr. Bin Amin and Mr. Bin Lep from the trial of Mr. Nurjaman, this ruling will only address the concerns applicable to Mr. Nurjaman.

discovery obligations.¹⁴ The Accused were arraigned on 31 August 2021.

Unclassified and Non-M.C.R.E. 505 Classified Discovery

b. On 10 March 2021, the Government filed its required notice¹⁵ informing the Commission of the discovery provided to Defense Counsel for each Accused as of 10 March 2021. The Government further proposed the following discovery schedule to meet its obligations under Rule for Military Commissions (R.M.C.) 701: 1) disclosure of all unclassified discovery by *17 December 2021*; 2) subject to the procedures set forth in Military Commission Rule of Evidence (M.C.R.E.) 506, disclosure of all relevant but privileged non-classified government information by *17 December 2021*; and 3) disclosure of all classified discovery that does not need to go through the procedures set forth in 10 U.S.C. § 949p-4 and M.C.R.E. 505(f) by *10 March 2022*, (hereinafter “Non-M.C.R.E. 505 Classified Discovery”).¹⁶

c. The Government was able to meet the *17 December 2021* discovery deadline for the unclassified portions of initial discovery.¹⁷ The Government failed to comply with the Commission’s order to produce the Non-M.C.R.E. 505 Classified Discovery on *10 March 2022*, instead electing to request from the Commission a last-minute extension to the deadline on 10 March 2022.¹⁸ This extension request sought a new deadline of 8 July 2022¹⁹ stating, “[s]ince asserting it could meet the deadlines in AE 0024.016 (TJ), the Government has worked diligently to meet the discovery deadlines ordered by the Commission, but despite efforts, unforeseen administrative delays in the reviewing and processing of this material have made it impossible to meet the Commission’s

¹⁴ AE 0010.001 (TJ), Interim Order, Pre-Arraignment Matters, dated 11 February 2021, at 2.

¹⁵ AE 0014.001 (GOV), Government’s Notice of Proposed Arraignment Date, Discovery Schedule, and Initial Litigation Schedule, filed 10 March 2021.

¹⁶ M.C.R.E. 505 Discovery was also included in these filings but for clarity that matter will be detailed separately below.

¹⁷ AE 0024.017 (GOV), Government Notice of Completion of Discovery of Unclassified Information, filed 17 December 2021.

¹⁸ See AE 0024.016 (TJ), Order, Discovery, Paragraph 2(a)(2), dated 9 December 2021.

¹⁹ AE 0024.030 (GOV), Government Motion for Appropriate Relief Regarding Discovery Deadlines, filed 10 March 2022.

deadlines and require the Government to request relief.”²⁰

d. Mr. Nurjaman’s Counsel responded on 24 March 2022²¹ and concurred with the Government’s request for delay proffering Defense Counsel could not ethically represent their client without proper discovery. Mr. Bin Lep opposed the Government’s request for delay because the Government failed to provide sufficient justification for the delay.²² The Government represented in its motion that Mr. Bin Amin joined Mr. Bin Lep’s objection to the Government’s requested relief.²³

e. The Government filed a consolidated reply responding to Mr. Nurjaman’s and Mr. Bin Lep’s responses on 31 March 2022.²⁴ In that reply, the Government provided some elaboration for the basis of its request referencing the “complexities and requirements of interagency coordination” as a basis for the request. However, no additional evidence was provided about what those “complexities” were nor was any evidence provided that would demonstrate how a four-month delay would overcome these obstacles.

f. On 15 April 2022, the Commission issued a ruling granting in part the Government’s request for extension of the 10 March 2022 deadline to provide the Defense the Non-M.C.R.E. 505 Classified Discovery to 20 May 2022 and *noted that any additional requests for extensions should be filed prior to the actual deadline.*²⁵

g. On 4 May 2022, the Government filed another motion for appropriate relief, requesting that the Commission relieve the Government of the 20 May 2022 deadline to produce all Non-M.C.R.E. 505 Classified Discovery and grant an extension to *15 July 2022.*²⁶ In its motion, the Government

²⁰ *Id.* at 3.

²¹ AE 0024.032 (NUR), Defense Response to AE 0024.030 (GOV) Government Motion for Appropriate Relief Regarding Discovery Deadlines, filed 24 March 2022.

²² AE 0024.033 (LEP), Defense Response to AE 0024.030 (GOV) Government Motion for Appropriate Relief Regarding Discovery Deadlines, filed 24 March 2022.

²³ AE 0024.030 (GOV), at 5.

²⁴ AE 0024.034 (GOV), Government Consolidated Reply to Defense Responses to AE 0024.030 (GOV), Government Motion for Appropriate Relief Regarding Discovery Deadlines, filed 31 March 2022.

²⁵ AE 0024.035 (TJ), Order, Discovery, dated 15 April 2022.

²⁶ AE 0024.036 (GOV), Government Motion for Appropriate Relief from 20 May 2022 Discovery Deadline, filed 4 May 2022.

noted that all three Defense Teams either objected to the relief requested or opposed the motion.

Additionally, Mr. Nurjaman's team noted,

“...Mr. Nurjaman has been in the custody of the United States Government for approximately 19 years during which time the government investigated and attempted to document alleged crimes. The prosecution preferred essentially these same charges 5 years ago which would indicate a readiness for trial. At this late date to continue to pursue extensions for something as simple as discovery would indicate that the prosecution is not ready for trial.”²⁷

h. On 11 May 2022, Mr. Bin Lep filed a response requesting that the Commission impose a two-for-one-day sentence credit for the discovery delays.²⁸ Defense Counsel for Mr. Nurjaman joined that request.²⁹ On 16 May 2022, the Government filed a consolidated reply to these responses.³⁰ On 19 May 2022, the Commission granted the Government's requested extension, to produce the non-M.C.R.E. 505 discovery and denied the two-for-one sentencing credit request.³¹ The Government was able to meet the 15 July 2022 deadline for Non-M.C.R.E. 505 Classified Discovery.³²

M.C.R.E. 505 Classified Discovery

i. The most challenging aspect of discovery in this case deals with classified discovery that must be reviewed by the Commission pursuant to the procedures set forth in 10 U.S.C. § 949p-4 and M.C.R.E. 505(f) (“M.C.R.E. 505 Classified Discovery”). On 7 October 2021, the Commission ordered the Government to file notice of the anticipated timeline for providing all remaining

²⁷ *Id.* at 7.

²⁸ AE 0024.037 (LEP), Defense Response to AE 0024.036 (GOV) Government Motion for Appropriate Relief from the 20 May 2022 Discovery Deadline, filed 11 May 2022.

²⁹ AE 0024.038 (NUR), Defense Notice of Joinder to AE 0024.037 (LEP), filed 11 May 2022.

³⁰ AE 0024.039 (GOV), Government Consolidated Reply to AE 0024.037 (LEP) and AE 0024.038 (NUR) Defense Responses to Government Motion for Appropriate Relief from the 20 May 2022 Discovery Deadline, filed 16 May 2022.

³¹ AE 0024.040 (TJ), Order, Discovery, dated 19 May 2022. In that order the Commission stated, “Should the Defense feel compelled to file a separate motion citing additional case law supporting two-for-one day sentencing credit for discovery issues, or other pretrial case issues, they may do so.”

³² The 15 July 2022 deadline was eventually established after the Government filed a third request for an extension of time on the original 10 March 2022 deadline. (See AE 0024.030 (GOV), *supra* note 19. The Commission granted a continuance until 20 May 2022. See AE 0024.035 (TJ), *supra* note 25. On 4 May 2022, the Government requested the 20 May 2022 deadline be extended to 15 July 2022, See AE 0024.036 (GOV), *supra* note 26, which was granted. See AE 0024.040 (TJ), *supra* note 31).

M.C.R.E. 505 Classified Discovery no later than 29 October 2021.³³

j. On 9 November 2021, the Government filed the required notice proposing deadlines for its compliance with M.C.R.E. 505 Classified Discovery obligations.³⁴ According to the Government's notice, the last of this discovery would be provided to the Commission for review no later than *31 October 2022*. On 9 December 2021, the Commission ordered the Government to provide to the Commission all M.C.R.E. 505 Classified Discovery for review no later than *31 October 2022*.³⁵

k. On 10 March 2022, the Government requested the 31 October 2022 deadline be extended to 28 February 2023.³⁶ The Commission denied this request.³⁷ Then on 15 September 2022, in AE 0024.042 (GOV), the Government requested the 31 October 2022 date be changed to 31 January 2024. That request was granted in part setting a new deadline of *15 June 2023*.³⁸ The Government in AE 0024.049 (GOV)³⁹ next requested that the 15 June 2023 deadline be extended again to *31 January 2024*⁴⁰ which was granted. The 31 January 2024 extension was granted while the Commission considered the administrative sentencing credit relief requested here in the AE 0053, AE 0054, and AE 0055 Series.⁴¹

³³ AE 0024.001 (TJ), ORDER, Discovery, dated 7 October 2021.

³⁴ AE 0024.011 (GOV), Government's Second Notice of Anticipated Timeline for Providing Classified Discovery Subject to 10 U.S.C. §949p-4 and M.C.R.E. 505(f), filed 9 November 2021. The Government sought to file the notice ordered in AE 0024.001 (TJ) on the due date of 29 October 2021, however due to administrative errors, the filing was rejected. The Government filed for an extension of time in AE 0024.005 (GOV), filed 1 November 2021. The Commission granted an extension of time to file the notice until 3 November 2021. AE 0024.007 (TJ), dated 2 November 2021. The Government filed their required notice on 3 November 2021, but it was filed *ex parte*, *in camera*, and under seal. AE 0024.008 (GOV). The Commission ordered the Government to file their notice in such a manner that it would not need to be filed *ex parte*, *in camera* and under seal. AE 0024.009 (TJ), dated 4 November 2021.

³⁵ AE 0024.016 (TJ), ORDER, Discovery, dated 9 December 2021.

³⁶ AE 0024.030 (GOV), Government Motion for Appropriate Relief Regarding Discovery Deadlines, filed 10 March 2022.

³⁷ AE 0024.035 (TJ), ORDER, Discovery, dated 15 April 2022.

³⁸ AE 0018.031 (TJ) / AE 0024.045 (TJ), Ruling, dated 19 October 2022.

³⁹ AE 0024.049 (GOV) Government Motion for Appropriate Relief Regarding Timelines Ordered in AE 0024.045 (TJ), filed 11 April 2023.

⁴⁰ AE 0036.018 (TJ) / AE 0024.051 (TJ), RULING, Government Motion for Extension of Time to Provide Discovery Ordered in AE 0036.004 (TJ) and AE 0036.010 (TJ) and Government Motion for Appropriate Relief Regarding Timelines Ordered in AE 0024.045 (TJ), dated 31 May 2023.

⁴¹ The Commission also notes that additional discovery was ordered within the AE 0036 Series and the imposed deadlines for that discovery has shifted multiple times to the current 31 January 2024 deadline.

Detailing of Military Judge

1. Colonel Charles Pritchard, United States Army, was properly appointed to this Commission on 22 January 2021 by then-Chief Trial Judge, Military Commissions Trial Judiciary, Colonel Douglas Watkins.⁴² COL Pritchard served in that capacity until he was replaced by then-Commander Hayes Larsen, United States Navy, on 6 May 2021.⁴³ After CDR Larsen was promoted to Captain (O-6) in 2022, the Navy reassigned him to a new mission in San Diego, CA.⁴⁴ CAPT Larsen was ultimately replaced as the Commission by Lieutenant Colonel Wesley Braun, the current detailed military judge.⁴⁵

3. Law and Analysis.Combining Requests

a. Throughout this Commission, each Accused, at various times, has requested sentencing credit in response to different Government action, inaction, perceived failure, and actual failure in complying with Commission orders. Until the filing of AE 0053.001 (LEP) on 10 May 2023, each of these requests had been made during the Response-Reply portion of the standard briefing cycle. In response to these requests, the Commission refused to rule on the requested relief until the appropriate motions were properly filed and the issue fully briefed. Each Defense team has now filed separate motions requesting specific relief through the AE 0053, AE 0054, and AE 0055 Series. Each of these motions contains a request for sentencing credit for discovery violations. This ruling addresses any issues raised in the three AE Series that are applicable to Mr. Nurjaman only.

⁴² AE 0001.001 (TJ), Memorandum for Colonel Charles L. Pritchard, USA, dated 22 January 2021.

⁴³ AE 0001.003 (TJ), Memorandum for Commander Hayes C. Larsen, USN, dated 6 May 2021.

⁴⁴ AE 0042.001 (TJ), Notice to the Parties, Military Judge's Anticipated Permanent Change of Stations, dated 19 October 2022.

⁴⁵ See AE 0001.005 (TJ), Memorandum for Record, dated 10 July 2023, and AE 0001.006 (TJ), Memorandum for Lieutenant Colonel Wesley A. Braun, USAF, dated 28 July 2023.

Failure to Comply with Discovery Orders

b. Pursuant to R.M.C. 701(a)(3), the military judge may specify the time, place, and manner of discovery and may prescribe such terms and conditions as are necessary to the interests of justice, the protection of national security, and the safety of witnesses. Upon notice of a party's failure to comply with R.M.C. 701, the military judge may "(A) [o]rder the party to permit discovery; (B) [g]rant a Continuance; (C) [p]rohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; [and/or] (D) [e]nter such other order as is just under the circumstances."⁴⁶ When considering the timing of discovery, the military judge must also ensure that no "release of classified information to any person not authorized to receive such information"⁴⁷ occurs.

c. The Commission is well-aware of the difficulty and time intensive process for reviewing and producing M.C.R.E. 505 discovery.⁴⁸ However, thirty-four months after referral, the production of M.C.R.E. 505 Classified Discovery continues to be the most significant discovery issue within this Commission.

d. The Commission considers the following actual failures to comply with its various discovery orders:

(1) 10 March 2022: In AE 0024.030 (GOV), the Prosecution requested a discovery deadline extension on the date that discovery was due to be produced. Filing on the deadline itself prevented a full briefing cycle on the matter and forced the Commission into constructively granting the requested extension, in part.⁴⁹

⁴⁶ R.M.C. 701(l)(3)(A)-(D) (Emphasis added).

⁴⁷ 10 U.S.C. § 949p-1(a); M.C.R.E. 505(a).

⁴⁸ See AE 0024.040 (TJ), Order, Discovery, dated 19 May 2022.

⁴⁹ In granting the extension in AE 0024.035 (TJ), the Commission noted, "The Government filed its request for relief from a Commission imposed deadline on the day of the deadline requesting a four-month extension. It is hard to believe the Government was not aware of the need for this extension at a much earlier time period and therefore, the timing of this request is less than ideal. For all future such requests, the Parties should file requests for relief from Commission deadlines *prior to the actual deadline* or show cause for not filing prior to the deadline." (Emphasis added). AE 0024.035 (TJ), Order, Discovery, dated 15 April 2022.

(2) 31 August 2022: In AE 0036.005 (GOV), the Government filed a discovery deadline extension request on the date that discovery was due to be produced.⁵⁰

(3) 31 August 2022: In AE 0036.005 (GOV) the Government provided no “affidavits or memorandums from the OCAs and/or Office of the Chief Prosecutor leadership” as required in AE 0024.040 (TJ).

(4) 10 February 2023: In AE 0036.011 (GOV), the Government provided no “affidavits or memorandums from the OCAs and/or Office of the Chief Prosecutor leadership” as required in AE 0024.040 (TJ).

e. Additionally, the quarterly updates filed by the Government in the AE 0024 Series concerning the anticipated production of M.C.R.E. 505 Classified Discovery consistently failed to comply with the Commission orders.⁵¹

R.M.C. 701

f. In this case, the Government has repeatedly invoked the protection of national security to justify its failures to comply with Commission imposed discovery deadlines and its repeated requests for substantial extensions of its own proposed deadlines. However, the failure of the Government to comply with discovery dates, even for national security reasons, causes delays which impact the interests of justice. This Commission must now balance the competing interests contained in R.M.C. 701 and those of national security.

g. R.M.C. 701(1)(3) provides this Commission the authority to take action for failures to comply with discovery obligations. The Commission is empowered to take appropriate action without a finding of bad faith or a finding a wrongdoing by the Government. The Commission finds

⁵⁰ Again, the Commission had specifically sought to avoid this issue in AE 0036.004 (TJ) by ordering, “will provide the Defense ...no later than 31 August 2022, or if not feasible, provide the Commission with a reasonable alternate date with specific reasons as to why 31 August 2022 is not feasible.” (Emphasis added).

⁵¹ In AE 0024.052 (GOV), the Government did not have authorization to eliminate the category “FISA-related information” from the example chart as ordered in AE 0024.050 (TJ). Also, the Government did not provide a chart documenting M.C.R.E. 505 discovery that had been provided to the Defense up to that point as described in Section 2(d) and ordered in 3(b) of AE 0024.050 (TJ). Finally, the Commission has not yet received a separate chart accounting for the remaining discovery for the AE 0036 Series as ordered in AE 0036.018 (TJ) / AE 0024.051 (TJ), paragraph 5(c).

the first three remedies suggested in R.M.C. 701(1)(3) do not appropriately address the situation before this Commission – permitting discovery is inapplicable; granting a continuance only exacerbates the situation; and excluding evidence the discovery would establish is too extreme a remedy at this juncture in the proceedings. Therefore, the Commission looks to its authority in R.M.C. 701(1)(3)(D) to “enter such order as is just under the circumstances.”⁵²

h. The remedy of ordering administrative sentencing credit is just under the circumstances. It provides a not-inconsequential accommodation to the Accused in exchange for their inability to properly request a trial date thirty-three months after referral. Further, the Commission gives the Government proper incentive to expeditiously process the remaining M.C.R.E. 505 Classified Discovery and to timely request relief from any deadline. The Commission notes that in all the filings from the Government where it explains its discovery delays, it has never proffered that additional personnel have been hired, nor reassigned to the task of reviewing the M.C.R.E. 505 Classified Discovery. If the Government believes that it can continue processing this discovery and still meet its requested deadline of 31 January 2024, then this sentencing credit relief is a relatively small but *just* motivator. Day-for-day credit is a remedy that leaves options open to the Commission for any potential future discovery issues.

31 August 2022

i. The AE 0036 Series discovery was originally due on 31 August 2022.⁵³ In the ruling establishing the 31 August 2022 deadline, the Commission ordered the Government to provide a reasonable alternate date, with specific reasons, if the 31 August 2022 deadline was not feasible.⁵⁴

⁵² R.M.C. 701(1)(3)(D); see also *U.S. v. Vargas*, 83 M.J. 150, 14 March 2023 (“a military judge need only craft a discovery sanction that was “just under the circumstances” pursuant to R.C.M. 701(g)(3)(D).”

⁵³ AE 0036.004 (TJ), Ruling, Defense Motion to Compel Discovery Related to Interagency Cooperation, dated 10 June 2022.

⁵⁴ *Id.*

Despite previous admonishments by the Commission regarding the appropriate timing of extension requests, the Government filed its request for extension on 31 August 2022. In granting the requested extension, the Commission noted “R.M.C. 701(1)(3)(D) may indeed provide authority to grant this requested relief [i.e. administrative sentencing credit]” but declined to do so until Defense filed separate motions on the matter.⁵⁵

j. The Commission finds it is just under the circumstances to begin awarding administrative sentencing credit to Mr. Nurjaman in the amount of one day for each passing day starting on 31 August 2022, the original deadline and continuing until the M.C.R.E. 505 Classified Discovery is reasonably complete (or when discovery matters are reasonably resolved). Using 31 August 2022 is a direct demonstration, and reminder for all parties, that the failure to comply with Commission orders can carry just consequences.

Other Considerations

k. In its many requests for extensions, the Government has cited the complicated nature of processing discovery with impacts on national security.⁵⁶ The Commission has previously found “[t]his complicated review process has presumably been in place and the Government has been aware of it for some time... [REDACTED]

[REDACTED]⁵⁷

l. Additionally, in the Government’s two responses⁵⁸ to this motion series, it argues that the Defense has not been prejudiced by the discovery delays. The Commission notes the Government’s

⁵⁵ AE 0036.010 (TJ), Order, Extension of Deadlines Established in AE 0036.004 (TJ) Discovery Related to Interagency Cooperation, dated 19 October 2022, at 3.

⁵⁶ See generally, AE 0024.030 (GOV), Government Motion for Appropriate Relief Regarding Discovery Deadlines, filed 10 March 2022; AE 0024.036 (GOV) and Government Motion for Appropriate Relief from 20 May 2022 Discovery Deadline, filed 4 May 2022.

⁵⁷ AE 0024. 040 (TJ), Order, Discovery, dated 19 May 2022.

⁵⁸ See AE 0036.002, Government Response to AE 0036.001 (NUR), Defense Motion to Compel Discovery Related to Interagency Cooperation, filed 4 May 2022 and AE 0036.016, Government Consolidated Reply to Defense

repeated failure to comply with discovery deadlines severely impacts the litigation schedule in the Commission which delays the scheduling of trial. Even without this impact, the Commission finds that prejudice is not necessary to award a remedy under R.M.C. 701(1)(3)(D). Finally, the Commission finds that awarding multiple day-for-day credit (2-for-1 or 3-for-1) is not appropriate at this time.

Non-Discovery Related Requests for Relief

m. Non-discovery related requests for relief are included in various forms within the AE 0053-0055 Series. Outside of requesting relief for discovery-related matters,⁵⁹ Counsel for Mr. Bin Lep requested relief in the form of sentencing credit relating to the appointment of Colonel Pritchard, the Government Hiring of IN7, and the failure to set a trial date. Outside of requesting relief for discovery-related matters, Team Bin Amin requested relief for matters involving speedy trial issues.

n. Military Judges are detailed to the Military Commission in accordance with Rule for Military Commission 503(b)(1).⁶⁰ “A military judge shall be detailed to preside over each military commission by the Chief Trial Judge from a pool of certified military judges nominated for that purpose by The Judge Advocates General of each of the military departments.”⁶¹ Qualifications of a military judge for a Commission require a commissioned officer of the armed forces, serving on active duty, who is admitted to a State or Federal Bar and is certified to be qualified for duty under 10 U.S.C. § 826. Those who are an accuser, a witness, acted as an investigator, or counsel in the same Commission are ineligible to serve as a military judge over a Commission.⁶²

Responses to Government Motion for Extension of Time to Provide Discovery Ordered in AE 0036.004 (TJ) and AE 0036.010 (TJ), filed 3 March 2023.

⁵⁹ The phrasing of all of Mr. Nurjaman’s requests for relief are all associated with discovery-related matters and therefore nothing need be addressed in this section for his request.

⁶⁰ R.M.C. 503(b)(1).

⁶¹ R.M.C. 503(b)(1).

⁶² R.C.M. 502(c)(1)-(2).

o. The Commission finds the detailing of COL Pritchard to this Commission by the Chief Trial Judge and later the detailing of CDR Larsen comply with R.M.C. 503(b)(1) and therefore, are not a basis for relief. Both decisions were within the authority and sole discretion of the Chief Trial Judge. There has been no showing of an improper purpose in these decisions nor an abuse of discretion by the Chief Trial Judge. No matter articulated by Counsel for Mr. Bin Lep or Mr. Bin Amin rises to the level of requiring administrative sentencing credit to properly address it.

p. The Commission has separately addressed all issues with the Government hiring of IN7⁶³ and the failure to set a trial date.⁶⁴ A separate motion addressing speedy trial issues is pending before this Commission and these issues will be addressed in a separate Commission order.⁶⁵ Further, while R.M.C. 701 provides the Commission the authority to address failures to comply relating to discovery issues, the Parties have failed to provide any authority to provide relief for their non-discovery related requests.

4. RULING. The relief requested in AE 0053.001 (LEP) is **GRANTED in part** and **DENIED in part**. The relief requested in AE 0054.001 (NUR) is **GRANTED in part** and **DENIED in part**. The relief requested in AE 0055.001 (AMI) is **GRANTED in part** and **DENIED in part**.

5. ORDER.

a. Mr. Nurjaman is to be credited with day-for-day administrative sentencing credit against any approved sentence to confinement starting on 31 August 2022 and continuing until the date the Government provides the last of the remaining identified M.C.R.E. 505 Classified Discovery *in proper form* to the Commission for its review.

b. The Commission will determine the proper date for ending the awarding of credit when it arrives. The credit to be awarded as of the date of this order is 444 days.

⁶³ AE 0035 Series

⁶⁴ AE 0045 Series

⁶⁵ AE 0046 Series

c. This order does not provide for the production of any additional discovery requested by the Accused.

d. Any issues with discovery beyond the currently projected M.C.R.E. 505 Classified Discovery will be addressed separately.

So **ORDERED** this 17th day of November 2023.

//s//

WESLEY A. BRAUN, Lt Col, USAF
Military Judge
Military Commissions Trial Judiciary