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WORLDWIDE

May 20, 2016

To: Article 32 Officer - Lt Col. Adam Subervi USMC

From: Civilian Defense Counsel

Subj: OBJECTIONS TO THE ARTICLE 32 HEARING  
ICO U.S. v. MAJOR MARK A. THOMPSON, USMC

This correspondence shall serve to memorialize the objections proffered by the defense on behalf of Major Thompson vis-a-s-vis the conduct of the Article 32 hearing on May 13, 2016. The undersigned is of the opinion that a clear record of the events is necessary for later review.

Maj. Thompson and his counsel submitted an unconditional waiver of the Article 32 hearing. This waiver was rejected by the Convening Authority. At that point Maj. Thompson elected to voluntarily remove himself from the hearing as it became clear that the Government only wished to use the hearing as a public airing of its vitriol toward him.

In almost 40 years of practice, it was the first occasion that the undersigned has seen a Convening Authority reject a waiver to an Article 32 hearing. Either the Convening Authority has unlimited assets to waste on hearings that need not be conducted and his judge advocates need the training or the Convening Authority and/or his Staff Judge Advocate hold truly vindictive motives. Despite the apparent need for training, vindictiveness can be the only conclusion for conducting this hearing over a waiver and a review of the facts will make that clear.

On May 3, 2016, the defense for Maj. Thompson submitted a discovery request that included a request to invite witnesses to appear at the Article 32 hearing. On or about May 5, 2016, the government provided the defense with a list of materials that it intended to use as exhibits at the Article 32. The defense did not object to this list and agreed, in the interest of saving time, that the materials could be provided to you before the hearing for your consideration. On May 6, 2016, the government responded by objecting to every request with the exception of one witness, CID Agent, GySgt Bengs, a witness that the government intended from the onset to call in their case. On May 11, 2016, you addressed the requests and objections in a teleconference wherein you granted each and every one of the government's objections with the exception of Cox, the reporter who is the subject of Specification Two and Charge Two. As to that witness,

you expressed concern about the sufficiency of the pleadings and the allied evidence and agreed with the defense that he must be present.

Also during this telephone conference, it was revealed that the government intended to offer the audio recording and allied transcript of the government interview of Major Michael Pretus, the putative co-conspirator, perjurer and alleged indecent actor, through the testimony of GySgt Bengs, in an open hearing. The defense offered to allow you to receive the same evidence early, to review at your own leisure. The government refused and you indicated that as a Preliminary Hearing Officer, you could not dictate how they could present their case.

We subsequently learned via e-mail from the government on May 12, 2016 that the lawyers for Cox' paper would not allow him to testify.

In that no evidence would be offered by the government that the defense did not already have and it had refused to present Major Pretus as a live witness, the defense was compelled to waive the hearing in order to avoid a public show trial. In light of all of the prior press relating to the case and the personal involvement of the author of that press, the defense tried to prevent further contamination of the prospective member pool by submitting the waiver. Implicit in that waiver request was the effort to close the hearing to the public.

Again, you sided with the government and accepted the Convening Authority's right to deny a waiver as a legal certainty and the defense was compelled to listen to your rendition of Maj. Thompson's rights at a such a hearing before taking leave as was his right.<sup>1</sup>

As of the date of this objection, the undersigned has had the opportunity to listen to the recording of the show trial. In this recording, the government is heard arguing to you that he will seek a specific sentence at trial. If you have ever heard of that being done at an Article 32 in the past, please provide me with the name of the defendant and his counsel as I never have. As the undersigned doubts any counsel has ever heard of such an argument at an Article 32 hearing, it is just another example of the government pandering to the press.

Further, it is heard on the recording that the government is imploring you to provide guidance as to the sufficiency of the charges and specifications. Another example as to the rush to push the spectacle. It is difficult to imagine that the government, with all of its apparent resources to burn on a hearing that the defendant offered to waive, doesn't have the collective legal intelligence to craft valid and sufficient specifications and charges. The undersigned believes such a request runs afoul of the new language governing the conduct of an Article 32. In particular, the latest language required you to make a "determination" rather than a "recommendation" as to the sufficiency of the charges.

Additionally, it is gleaned from reviewing the record that you questioned the circumstances under which three government prosecutors spent 45 minutes off the record discussing with Major Pretus his unsolicited and unadvised testimonial grant of immunity<sup>2</sup>. As a career federal

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<sup>1</sup> We have yet to see the Convening Authority's signature on a document denying the waiver. As the undersigned recalls, that was promised. It is requested that you obtain the denial by the CA and attach it to the record

<sup>2</sup> The entire discussion contained herein:


prosecutor, you must have reasoned that it was strange to claim that 45 minutes was necessary to exchange pleasantries before turning on the recorder. It is hoped that you also took note of the three prosecutors denying Major Pretus' request to discuss the grant with counsel. The sum total of the exchange, to include the assertion that Major Pretus did not need an attorney as he was clear of any charges, was coercion and deception at its baldest and statements taken under such circumstances are hardly truthful or accurate. My reading of the grant tells me it only covers testimony and NOT transactions. Hence, Pretus can be prosecuted and either government counsel are ignorant of the law or were intentionally deceptive.

The defense would object to you considering the statement obtained from Major Pretus for the reasons described above and request that you forward an ethics complaint to the appropriate legal authorities highlighting the unethical conduct of the counsel involved.

In all, the hearing was a sham and served no purpose whatsoever to assist your analysis and understanding of the charges and the evidence. Under Article 32, Maj. Thompson had the absolute right to waive the hearing.<sup>3</sup> You elected to agree with the government that he did not. Your actions and the actions of the Convening Authority was collectively an attempt to appease the press.

My client was denied a meaningful Article 32 hearing and must be granted a new hearing.

LAW OFFICES OF KEVIN BARRY Mc DERMOTT



BY KEVIN BARRY Mc DERMOTT  
KBM/jj

cc: Trial Team  
Defense Team

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Kaza: Was there any discussion about what was discussed on the recording prior to the beginning of the tape?

Agent: No, he was not asked any questions. He sat there and listened. It was only a short time before the recording started, approximately 45 minutes.

Kaza: What was discussed?

Agent: We explained the process and immunity

Kaza: So on April 8<sup>th</sup> you first went to the SJA office to obtain the Grant of Immunity in order to cooperate, correct?

Agent: Yes. Then went to Samson Hall for the interview.

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Agent: He was handed the Grant of Immunity and he read it over several times and it was explained that anything he said in his testimony could not be used against him. The tone was conversational.

Kaza: What was his reaction?

Agent: He asked to speak to a lawyer, he said "why can't I speak to a lawyer" or "can I speak to a lawyer" ..

Kaza: and it was explained to him that he was given immunity and that he was not facing a criminal liability which would give him a right to an attorney and he just needed to test..speak truthfully?

Agent: Correct.

<sup>3</sup> 10 U.S.C. §832 (a) (1)