

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

UNITED STATES OF AMERICA

v.

ABD AL RAHIM HUSSAYN
MUHAMMAD AL NASHIRI

AE 172C

ORDER

**DEFENSE MOTION FOR APPROPRIATE
RELIEF: PREVENT THE CONVENING
AUTHORITY FROM PRE-SELECTING
THE MEMBERS OF THIS CAPITAL
MILITARY COMMISSION**

28 April 2014

1. The Accused is charged with multiple offenses in violation of the Military Commissions Act of 2009, 10 U.S.C. §§ 948 *et seq.*, Pub. L. 111-84, 123 Stat. 2574 (Oct. 28, 2009)(hereafter “2009 MCA”). He was arraigned on 9 November 2011.

2. Procedural History. On 13 September 2013, the Defense filed AE 172 requesting the Commission preclude the Convening Authority from “pre-screening and pre-selecting the members of Mr. Nashiri’s capital military commission panel.” The Prosecution responded (AE 172A) requesting the relief be denied. The Defense submitted a reply (AE 172B). The motion was argued on 19 February 2014.¹

3. Discussion. The Defense averred the Convening Authority, rather than acting in a neutral and detached magisterial position, operates as a “quasi-prosecutor.” The Defense assigned this label based on the Convening Authority’s referral of the case for a capital trial after reviewing substantial aggravation evidence and before the Defense could submit a fully investigated pre-referral mitigation application. This, according to the Defense, demonstrated an apparent or

¹ See Unofficial/Unauthenticated Transcript of the Al Nashiri (2) Motions Hearing Dated 19 February 2014, from 2:52 PM to 4:16 PM at 2705 – 40.

purported bias against the Accused. The Defense further argued this predisposition will manifest itself in the Convening Authority's vetting of potential panel members (equivalent to jurors) who will be presumptively more inclined to find the Accused guilty of the charged offenses and impose a substantial punishment, including death.

4. The Prosecution based its position on long-standing military practice. The Prosecution noted the procedure prescribed by 10 U.S.C. §948i(b) (2009 MCA) mirrors the procedure prescribed by Article 25, UCMJ, for the selection and detailing of court-martial members, as Congress expressly intended. The Prosecution also argued this Congressional intent has been affirmed by military appellate courts repeatedly, and noted "[t]hese procedures and criteria have been utilized in more than 47 military capital cases since 1984." AE 172A, at 3.

5. The criteria for selection of members of a Military Commission "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament" (10 U.S.C. § 948(b)) mirrors the criteria for selecting court-martial panel members in Article 25(d)(2), UCMJ. While antiquity does not necessarily bequeath virtue in every case, because the Article 25 criteria has withstood constitutional muster on appeal and has been utilized in thousands upon thousands of military courts-martial lends some credence to the due process viability of the procedure. If the Defense could show the Convening Authority did, in fact, pre-select members using criteria other than those supplied by the statute, for example, a likelihood to presume guilt based on the charges or a predisposition toward the death penalty or a demonstrated inability to consider lesser forms of punishment, clear grounds for judicial relief would exist. Absent a showing of an improper application of the statutory criteria for member selection, the Convening Authority is presumed to act lawfully, in accordance with his oath of

office, and the presumed impartiality of his member selections are owed deference. (*See Withrow v. Larkin*, 421 U.S. 35, 47 (1947)).

6. The Accused, is, in fact, entitled to an impartial panel, a component of due process engrafted into the 2009 MCA. Here, there is no showing, other than an unconvincing structural argument, that the procedure prescribed by 10 U.S.C. §948i(b) necessarily results in bias on the panel. The Convening Authority, on 28 September 2011, detailed 37 members to this Military Commission - 12 primary and 25 alternate members. As stated during oral argument, this Commission will not hesitate to use its authority under 10 U.S.C. §949f(a) to excuse members for cause, all of them, if necessary, upon a proper showing of improper selection or bias, either by motion supported by evidence or after *voir dire*.²

7. The Commission finds:

a. The procedure described in the 2009 MCA at 10 U.S.C. §948i for detailing members to the Commission is lawfully sufficient and consistent with long-standing military practice;

b. The procedure described in the 2009 MCA at 10 U.S.C. §948i does not, absent a specific showing of bias or bad faith in the selection of the members for the purpose of shaping or predetermining a particular outcome adverse to the Accused, violate due process notions;

c. Robust *voir dire* will be available to the parties as a check against bias within the panel; and,

d. There has been no showing the Convening Authority has departed from his neutral and detached role in selecting the members detailed in Military Commission Convening Order 11-02.

² Unofficial/Unauthenticated Transcript of the Al Nashiri (2) Motions Hearing Dated 19 February 2014, from 2:52 PM to 4:16 PM at 2721 - 23.

8. Accordingly, AE 172 is **DENIED**.

SO ORDERED this 28th day of APRIL, 2014.

//s//
JAMES L. POHL
COL, JA, U.S. Army
Military Judge