MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI**	AE 184B ORDER Defense Motion for Appropriate Relief: To Issue Subpoena to Mr. Rodriguez in Accordance with R.M.C. 703(e)(2)(A) 26 February 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 M.C.A."). He was arraigned on 9 November 2011.

2. Procedural History. The Defense filed AE 184, requesting the Commission issue a subpoena to Mr. Jose Rodriquez, who resides in Virginia, ordering him to testify before the Commission at Naval Station Guantanamo Bay, Cuba, at a date and time to be determined by the parties and the Commission. The Defense asserted 10 U.S.C. § 949j(a)(2) and Rule for Military Commissions (R.M.C.) 703(e)(2) authorize the Commission to issue subpoenas to individuals living in the United States and compel their in-person attendance and testimony at Naval Station Guantanamo Bay, Cuba. The Prosecution responded (AE 184A) requesting the motion be denied because the issue is not ripe, or in the alternative, because the Commission does not have the authority to compel the presence of a civilian witness to a foreign country. The Defense did not file a reply. The motion was argued on 19 February 2014.[1]

[1] *See* Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing 19 February 2014, from 1:09 PM to 2:35 PM, at pp. 2636-2659.

3. Analysis. The Commission is without legal authority to subpoena a civilian witness to personally appear at a Commissions hearing at Naval Station Guantanamo Bay, Cuba. As a result, the Commission will neither address the ripeness issue,[2] nor make any findings whether Mr. Rodriguez' testimony "would be relevant and necessary" in accordance with R.M.C. 703(b)(1).

4. The 2009 M.C.A. allows the Defense a reasonable opportunity to obtain witnesses and evidence in a manner comparable to that which is available to a criminal defendant "in a court of the United States under article III of the Constitution." 10 U.S.C. § 949j(a). Similarly, the process by which witnesses are compelled to appear and testify is also designed to reflect the courts of the United States.[3]

5. R.M.C. 703(a) states, "[t]he defense shall have reasonable opportunity to obtain witnesses and other evidence as provided in these rules." The process to compel appearance of witnesses and production of evidence is a subpoena. (*See* R.M.C. 703(e)). With respect to civilian witnesses, a subpoena may be served at any place in the United States. (*See* R.M.C. 703(e)(2)(E)). A subpoena may be served to a civilian witness in a foreign territory if the witness is a national or resident of the United States. 28 U.S.C. § 1783(a). R.M.C. 703 does not state a United States citizen located within the United States may be compelled to appear and testify at a court sitting in a foreign territory. Likewise, this authority is not expressly granted in 10 U.S.C. § 949j(a). The 2011 Department of Defense Regulation for Trial by Military Commission (R.T.M.C.) contains specific language relating to Commission's ability to subpoena a civilian witness to testify at

[2] AE 184 at page 6 (Defense asserted Mr. Rodriguez was the architect of the CIA detention program from 2001 to 2006, has first-hand knowledge of the Accused's treatment while in custody during this period of time, and may be used to impeach government witnesses).

[3] "Process issued in military commissions under this chapter to compel witnesses to appear and testify and to compel the production of other evidence -- (A) shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue; and (B) shall run to any place where the United States shall have jurisdiction thereof." 10 U.S.C. § 949j(a)(2).

Guantanamo Bay. "A civilian may not be compelled by subpoena to leave the United States and travel to a foreign country; therefore, a subpoena issued to a civilian to testify at Guantanamo Bay may not be enforced in the United States." R.T.M.C., 2011 Edition, Section 13-5b. In accordance with R.T.M.C. Section 1-1a, the Commission finds there is no conflict between the R.T.M.C and the M.M.C. or the 2009 M.C.A., and thus, no legal reason to disregard the regulation.

6. In *United States v. Bennett,* 12 M.J. 463 (1982), the United States Court of Military Appeals[4] upheld a military judge's ruling that a United States citizen residing in the United States who was stationed in the Philippines prior to trial, but who no longer held a military status, could not be subpoenaed to return to the Philippines to testify. *See also United States v. Daniels*, 23 U.S.C.M.A. 94, 48 C.M.R. 655 (1974) (discussing the court-martial's lack of authority to compel a U.S. citizen military dependent residing in Belgium to appear and testify, because the witness and the location of the trial were outside the United States).

7. The Commission has the authority to require a civilian witness, whose testimony is determined to be relevant and necessary, to testify at a site within the United States through the use of video teleconference or similar technology or attend a deposition scheduled pursuant to R.M.C 702. *See* R.M.C.s 702(b) and703(c)(3) and (e)(2). *See also* R.T.M.C 13-5(b). The Commission does not have the authority to subpoena Mr. Rodriguez, or any other civilian witness for either party, to personally appear at Naval Station Guantanamo Bay, Cuba.

8. For the reasons stated, the Defense Motion is **DENIED**.

[4] Now the United States Court of Appeals for the Armed Forces (C.A.A.F.).

So ORDERED this 26th day of February, 2014.

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