

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA****UNITED STATES OF AMERICA****v.****ABD AL RAHIM HUSSAYN  
MUHAMMAD AL NASHIRI****AE 224C****RULING****DEFENSE MOTION TO COMPEL THE  
PRODUCTION OF DISCOVERY  
(ABDUL AZIZ BIN ATTASH)****12 August 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, in AE 224, requested the Commission compel production of “any and all information surrounding the facts and circumstances” of the death of Abdul Aziz bin Attash (hereafter Mr. bin Attash) (AE 224 at 1). The Defense also requested “all of the information in the possession of the United States or the government of any country that assisted in his killing” (AE 224 at 1). The Prosecution requested the motion be denied because, “[t]he government is not aware, or in possession, of any relevant and material information relating to the circumstances of Mr. Bin Attash’s media-reported death” and further stated, “[t]he government cannot provide what it does not have” (AE 224A at 3, 1). In its reply (AE 224B), the Defense claimed the Prosecution, in avowing it does not have any information, is simply isolating itself from other U.S. Governmental agencies who have information about the death of Mr. bin Attash. The motion was argued on 23 April 2014.<sup>1</sup>

<sup>1</sup> See Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 23 April 2014 from 10:45 A.M. to 11:59 A.M. at 3564 - 75.

3. To the extent, if at all, that the Defense motion requests the Commission order the production of information in the custody of a foreign nation, the Commission is without authority under the 2009 M.C.A. to issue or enforce such an order.<sup>2</sup> The Prosecution is also limited in what it may compel as opposed to what it may simply ask for.<sup>3</sup>

4. During oral argument, the Defense requested the Commission find it met its burden under R.M.C. 701 concerning whether the information is material to the preparation of the defense. The Commission will not issue such a finding.

5. The Commission cannot compel production of information that does not exist. The defense has not presented any evidence to demonstrate this information, if it exists, is in the possession of the U. S. Government. Based on the Prosecution's representations, as officers of the court, the Commission finds that as of 23 April 2014 the requested information does not exist in the possession of the U. S. Government.

6. Accordingly, AE 224 is **DENIED**.

So **ORDERED** this 12th day of August, 2014.

//s//  
VANCE H. SPATH, Colonel, USAF  
Military Judge  
Military Commissions Trial Judiciary

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<sup>2</sup> See 10 U.S.C. § 949j(a)(2) ("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.") See also R.M.C. 703(f)(2)(A) ("A party is not entitled to the production of evidence that is destroyed, lost, or otherwise *not subject to compulsory process*")(emphasis added). In both AE 184 and AE 214, the Commission determined it was without authority to issue subpoenas and compel witnesses to travel to Guantanamo Bay, Cuba. The reasoning is equally applicable here.

<sup>3</sup> See *United States v. Mejia*, 448 F.3d 436, 444 (D.C. Cir. 2006) (holding trial transcripts and tapes from Costa Rican trial of a co-conspirator were not "within the government's possession, custody, or control, which would have triggered the government's disclosure obligations under [the applicable rule of federal criminal procedure]" even under circumstances where the U.S. and Costa Rican governments had a "Mutual Legal Assistance Treaty" where the U.S. government could *seek* the documents' production as opposed to *compel* their production).