

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

<p><b>UNITED STATES OF AMERICA</b></p> <p><b>v.</b></p> <p><b>ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI</b></p>	<p><b>AE 237C</b></p> <p><b>RULING</b></p> <p><b>DEFENSE MOTION TO COMPEL EVIDENCE OF INPUT RELIED UPON BY THE OFFICE OF THE SECRETARY OF DEFENSE IN CREATION OF ITS 18 JULY 2013 MEMO</b></p> <p><b>1 DECEMBER 2014</b></p>
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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). He was arraigned on 9 November 2011.

2. The Defense in AE 237 requested the Commission compel the Prosecution to produce the following information:

- a. All documents and information referencing or memorializing any meetings between OMC personnel and other DOD personnel regarding OMC access to JWICS and SIPRNet.
- b. Previous drafts of the [18 July 2013] memo with accompanying comments.
- c. A comprehensive list of which United States employees and which United States government agencies contributed to the substance of the [18 July 2013] memo or were allowed the opportunity to comment on the memo and their contributions and comments.
- d. Any written notice, memo, e-mail, etc., given by the Office of the Secretary of Defense to any other government agency indicating that this memo was in the works either seeking input on this [18 July 2013] memo or otherwise.

The Defense made the request because their access to the Joint Worldwide Intelligence Communications Systems (JWICS) and Secret Internet Protocol Router Network (SIPRNet) was limited by the Secretary of Defense in a memorandum dated 18 July 2013. (AE 237 at

Attachment C). The request was based on the belief the Chief Prosecutor had advance notice of the policy memorandum and evidence of “any undue influence, motives to disadvantage or keep from the defense, or anything of the like by public officials...are relevant to an examination of the lawfulness of the decision.” (AE 237 at 3). The Prosecution responded opposing the motion. (AE 237A). Specifically, they argued the 18 July 2013 memo did not prejudice the Accused and the requested information is not relevant or material to the case. Defense reply (AE 237B) argued the potential “motives to disadvantage or keep evidence from the defense,” and potential “undue influence” were reasonable concerns based on the DoD 18 July 2013 memorandum. The motion was argued on 24 April 2014.<sup>1</sup> During oral argument the Defense clarified its request as “what we would want is, with respect to these individual items, some understanding of how [the 18 July 2013 memorandum] occurred.” (Unofficial/Unauthenticated Transcript Dated 24 April 2014 from 02:29 P.M. to 4:54 P.M. at p. 3864).

3. Each party is entitled to production of evidence which is relevant, necessary and noncumulative. Rule for Military Commission (R.M.C.) 703(f). The Prosecution is responsible for producing to the defense all required discovery, to include classified information. *See, e.g., Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *United States v. Bagley*, 473 U.S. 667, 675 (1985).

4. The Defense’s ultimate request would enable it to have complete access to classified systems, thus rendering meaningless the core responsibility of the Prosecution to provide discovery, as well as the process established in Military Commission Rule of Evidence 505. As the moving party, the Defense bears the burden of persuasion as to any factual issues relevant to the disposition of this motion, which it must demonstrate by a preponderance of the evidence.

R.M.C. 905(c). The Defense has failed to articulate how the requested information meets the

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<sup>1</sup> *See* Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 24 April 2014 from 02:29 P.M. to 4:54 P.M. at pp 3863 -3812.

standards required by R.M.C. 701(c) and 703(f)(1). Further, nothing in the Defense request will lead to any relevant and material evidence in regards to findings, mitigation, or extenuation. *See* R.M.C. 703(f)(1) and AE 177.

Accordingly, AE 237 is **DENIED**.

So **ORDERED** this 1st day of December, 2014.

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