

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

**ABD AL RAHIM HUSSAYN
MUHAMMAD AL NASHIRI**

AE 261C

RULING

**MOTION TO COMPEL INFORMATION
FROM THE DEPARTMENT OF
DEFENSE RELEVANT A
DETERMINATION OF THE
APPROPRIATENESS OF THE JURY
PANEL SELECTED BY THE
CONVENING AUTHORITY**

27 OCTOBER 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). He was arraigned on 9 November 2011.

2. The Defense in AE 261 requested “the Commission order the Department of Defense to produce unclassified statistical information¹ relevant to a determination of the appropriateness of the panel of prospective jurors selected by the Convening Authority. Alternatively, the defense requests that the Commission approve a subpoena *duces tecum* to the Department of Defense directing the DoD to produce the requested information at the defense offices in Rosslyn Va.” (AE 261 at 1). The Prosecution in AE 261A asserted both requests should be denied because the information requested is irrelevant and immaterial to the panel selection process employed by the Convening Authority. The Defense, in its reply (AE 261B), attacked the panel selection process writ large and the Prosecution’s specific responses to the motion. The motion was argued on 27 April 2014.²

¹ The Defense requests the following information: “(1) The total number of officers and warrant officers in the Army, Navy, Air Force, Marines, National Guard, and Coast Guard by rank, gender, race, religion, education, age, military occupational specialty, and sexual orientation; and, (2) The total number of officers and warrant officers in the Army, Navy, Air Force, Marines, National Guard, and Coast Guard with Secret, Top Secret, and TS/SCI security clearances.” (AE 261 at 2).

² See Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 27 April 2014 from 09:02 A.M. to 10:57 A.M. at pp. 4124 - 48.

3. The standard established by Congress and the President for the Convening Authority to employ in selecting individual panel members³ to sit as a military commission is set forth in 10 U.S.C. § 948i(b).⁴ “[T]he convening authority shall detail as members thereof such members of the armed forces eligible under subsection (a) who, in the opinion of the convening authority, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.” The statute disqualifies service members from serving as members of a military commission if they were “the accuser or a witness for the prosecution or has acted as an investigator or counsel in the same case.” The statistical data concerning the make-up of the United States Armed Forces does not factor into the statutorily mandated selection process. The information thusly cannot be “material to the preparation of the defense” as is the standard for discovery in Rule for Military Commission (R.M.C.) 701.

4. Only if the Military Commission abandoned the process established by Congress and the President, rule it improper and either mandate a new random selection process or require the Convening Authority to create a random selection process would the information requested become “material to the preparation of the defense.” Such an order would necessitate the Commission “legislating from the bench,” an action it will not take. Additionally the Commission will not approve a subpoena *duces tecum* to otherwise accomplish what it will not order.

Accordingly, AE 261 is **DENIED**.

So **ORDERED** this 27th day of October, 2014.

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

³ In courts-martial and military commission jurors are entitled “panel members.”

⁴ The Commission notes the method of choosing jurors in this forum is almost identical to that used to select jurors for courts-martial trying members of our Armed Forces facing criminal charges. Compare 10 U.S.C. § 948i(b), R.M.C. 502(a) and R.M.C. 503(a) with 10 USC § 825(d)(2) (Article 25(d)(2), U.C.M.J.) and Rule for Court Martial 502(a)(1).