

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

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UNITED STATES OF AMERICA

v.

ABD AL RAHIM HUSSAYN  
MUHAMMAD AL NASHIRI

AE 266C

RULING

**DEFENSE MOTION FOR  
DISCLOSURE OF  
COMMUNICATION BY UNITED  
STATES GOVERNMENT AGENCIES  
AND/OR GOVERNMENT OFFICIALS  
TO THE COMMISSION**

**26 JANUARY 2015**

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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 266 requested

COL James L. Pohl (USA),<sup>1</sup> military judge of this Commission and Chief Judge of the Military Commission Trial Judiciary: disclose in writing all communications he or any member of his staff has had, directly or indirectly, with any official, agent, or agency of the United States concerning this case when a member of the defense team was either not present during, consulted on, or copied on the communication. (AE 266 at 1, footnotes omitted.).

The Prosecution in its response (AE 266A) did

not object to the Military Judge providing all parties with any *ex parte* communication, not including *ex parte* communication authorized by the Military Commissions Act (“M.C.A.”) or the Manual for Military Commissions (“M.M.C.”), between the Military Judge and any government agencies or officials or victims concerning this case. This disclosure should not include any other communications by trial judiciary staff members that are not *ex parte* communications concerning this case, as this request by the defense fails to reach the necessary threshold of relevancy and materiality. (AE 266A at 1).

The Defense reply (AE 266B) argued its “original relief sought should be granted in its entirety”

(AE 266B at 1.) for three reasons.

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<sup>1</sup> COL James L. Pohl was the military judge in this case until 10 July 2014, at which point in time I was detailed. (See AE 302, Detailing Memorandum dated 10 July 2014.)

First, the defense request is broad in light of the unprecedented actions of the some government agencies. Second, the government's reliance on the construct of *ex parte* (sic) unnecessarily complicates the Commission's analysis because any substantive information not appropriate for the defense to see can be redacted. Finally, all of the information is relevant and necessary to discover information about the independence of the trial judiciary that the original motion be granted in its entirety on merits of past behaviors of the government and suspicion that may exist. (AE 266B at 1).

Oral argument on the motion occurred on 28 May 2014.<sup>2</sup>

3. At the end of oral argument, COL Pohl addressed the substance of the Defense motion thusly:

Okay. I am going to issue a written ruling in this -- on this issue, but I would like to put some things on the record now because I think it lends itself to the way this is done. I am not currently aware of any improper *ex parte* (sic) contact by any member of my staff or myself. Well, I know not from myself, for my staff. I will go back and make sure that they understand the rules and that will be included in the ruling.

Now, I do want to address, and I think this is the easiest way to do it, the victim family member issue. When we come down from Andrews and back to Andrews, they segregate the seating. The front of the plane is the [V]ictim [F]amily [M]embers. Immediately behind them is the [T]rial [J]udiciary, and immediately behind them is everybody else. And I'm not sure how that is segregated because I am never back there. I don't speak to the [V]ictim [F]amily [M]embers. I deliberately sit against the window with somebody, a member of my staff, on the aisle.

I have never spoken to any of the [V]ictim [F]amily [M]embers of any substance whatsoever except perhaps an occasional good morning, excuse me, could I use the bathroom, and that's it. So I don't know any other way to put this on the record other than to just say that to that effect.

The way the plane is set up is I deliberately make sure I am not talking to the [V]ictim [F]amily [M]embers. I have never spoken to any of them in any way, shape or form except on a rare occasion, a good morning or something along those lines. Again, like I say, I don't know any other way to put that on the record other than to just say it and then I will issue a written ruling and will go back to members of my staff to make sure that there hasn't been any *ex parte* (sic) contacts that should not have occurred that I don't know about.  
(Unofficial/Unauthenticated Transcript at 4404-05.)

4. I have not engaged in any improper *ex parte* contacts with others. Having reviewed the record and discussed this with my staff, the same staff who worked for COL Pohl, I find no improper *ex parte* contact has occurred between my staff and others. I have adopted COL Pohl's practice of avoiding contact with Victim Family Members, members of the media, the parties and others

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<sup>2</sup> See Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 28 May 2014 from 10:52 A.M. to 12:11 P.M. at pp. 4395 - 4406.

during the flight to and from U.S. Naval Station, Guantanamo Bay, Cuba and while on U.S.

Naval Station, Guantanamo Bay, Cuba.

5. The Commission recognizes there are communications between members of the Trial Judiciary staff and the Office of Military Commission concerning personnel and pay issues, security clearance issues, obtaining housing, vehicles and seats on the flight to and from U.S. Naval Station, Guantanamo Bay, Cuba. There are *ex parte* communications with the parties in this case and other cases concerning requests for and issuance of Appellate Exhibit filing numbers. The Military Commissions Trial Judiciary Rules of Court<sup>3</sup> and the Regulation for Trial by Military Commission<sup>4</sup> contemplate communications between the Trial Judiciary and members of the DoD Review Team as filings are reviewed and classified and other sensitive but unclassified information redacted prior to posting on the Office of Military Commission webpage. Each of these communications are examples of administrative and logistical communications having nothing to do with substantive or procedural issues in this case and are not improper. These communications are necessary in the course of functioning within a bureaucratic organization and in operating a court in a transparent manner.

6. The Commission will not conduct the analysis of communications requested by Defense Counsel in their reply; as such an effort is not warranted based on the defense motion or the known conduct of the Trial Judiciary staff.

Accordingly, AE 266 is **DENIED**.

So **ORDERED** this 26th day of January, 2015.

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VANCE H. SPATH, Colonel, USAF

Military Judge

Military Commissions Trial Judiciary

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<sup>3</sup> See Rule 6.3.d., Military Commissions Trial Judiciary Rules of Court, 5 May 2014.

<sup>4</sup> See Regulation for Trial by Military Commission, 2011 edition, paragraphs 17-1(b)(5), 17-1(c)(3), and 19-4.