

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

**UNITED STATES OF AMERICA**

**v.**

**ABD AL RAHIM HUSSAYN  
MUHAMMAD AL NASHIRI**

**AE 272C**

**RULING**

**DEFENSE MOTION FOR  
APPROPRIATE RELIEF: INQUIRY  
INTO THE EXISTENCE OF A  
CONFLICT OF INTEREST  
BURDENING COUNSEL'S  
REPRESENTATION OF THE  
ACCUSED BASED ON ONGOING  
EXECUTIVE BRANCH  
INVESTIGATIONS**

**22 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). He was arraigned on 9 November 2011.

**2. PROCEDURAL HISTORY.**

a. On 22 April 2014, Defense filed AE 272 and requested the Commission perform three (3) distinct acts:

(1) conduct a thorough inquiry into potential conflicts of interests arising from an FBI investigation of military commission defense teams;

(2) order any current or past member of Mr. al-Nashiri's Defense Team who was contacted and/or interviewed by agents or contractors of any federal governmental agency, including the FBI, concerning any defense related matter to disclose said contact and/or communication to learned counsel immediately, irrespective of any non-disclosure agreements, which may have been signed; and,

(3) order the Special Review Team, assembled in response to AE 292 in the case of *United States v. Mohammad, et al.*, to make a factual submission in Mr. al-Nashiri's case disclosing the actual nature of the [REDACTED] and the extent to which it impacts members of Mr. al-Nashiri's Defense Team.

b. The Prosecution response (AE 272A) requested the relief be denied because the Defense failed to provide any evidence of an actual conflict in this case. The Prosecution stated it was not aware of any investigation of any defense counsel in this case, nor of any conduct by defense counsel, which might tend to disqualify them from representing the Accused. The Prosecution did not oppose the issuance of an interim order similar to the one issued in *United States v. Mohammed, et al.*, (AE 292C) directing any current or past members of the Defense Team who were contacted by any federal investigators on any defense-related matter disclose that information to the lead defense counsel. A reply was not filed. The Defense presented limited oral argument on 28 May 2014 concerning a proposed interim order and rested on its motion.<sup>1</sup> The Prosecution represented it could not participate in any factual discussion as it was walled off and did not present argument, but reaffirmed its lack of opposition to the issuance of an interim order.<sup>2</sup>

c. On 9 June 2014, the Commission issued AE 272B, an Interim Order directing

“any current or former member of Mr. al-Nashiri's Defense Team who was contacted and / or interviewed by agents of any federal governmental agency, including the FBI, [REDACTED] under circumstances which may violate this Commission's Protection of Classified Information Throughout All Stages of Proceedings Order with Amendment and Supplemental Ruling (AE 013E, AE 013L and AE 013M) must not later than 30 June 2014, disclose this contact and / or communication to Learned Defense Counsel or the Military Judge, irrespective of any sensitive information non-

<sup>1</sup> See Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 28 May 2014 from 2:42 P.M. to 4:27 P.M. at pp. 4445 - 4448. Defense presentation is at pp 4445-48.

<sup>2</sup> *Id.* at 4446-47.

disclosure agreements which may have been signed. The Lead Defense Counsel will immediately cause a copy of this order to be provided to all current or former members of Mr. al-Nashiri's Defense Team."

d. As of 20 August 2014, the Commission has not received any communications in response to the Interim Order (AE 272B).

### 3. LEGAL ANALYSIS:

a. The Accused is entitled to the undivided loyalty of his counsel, and by extension, of the paralegals and other support members of the Defense Team who fall under the umbrella of privilege, as a critical component of his right to assistance of counsel.<sup>3</sup> Defense counsel facing a conflict of interest may deprive an accused of representation by competent counsel unless a judicial inquiry finds there is no actual conflict or there is an affirmative waiver, by an accused on the record, after an appropriate appraisal of his right to conflict free counsel.<sup>4</sup>

b. If there is no ongoing investigation of a Defense Team member, there can be no actual conflict of interest.<sup>5</sup> Colloquially, the basis for the impact of an actual conflict in a criminal trial has been defense counsel "pulling punches"<sup>6</sup> in furtherance of their own interests<sup>7</sup> as opposed to unbridled loyalty towards their client.<sup>8</sup> This premise, however, is built upon the proposition the defense *knows* of the conflict and reacts to that stimulus. Thus, when defense counsel is unaware of an investigation, it cannot be the catalyst for any subsequent action or inaction and,

---

<sup>3</sup> Discussion to R.M.C 901(d) (3): "Counsel may be disqualified because...of actions which are inconsistent with the role of counsel." See also Para (B), Discussion to R.M.C. 502(d) (7): "Defense counsel must: ... disclose to the accused any interest defense counsel may have in connection with the case, any disqualification, and any other matter which might influence the accused in the selection of counsel; represent the accused with undivided fidelity and may not disclose the accused's secrets or confidences except as the accused may authorize..."

<sup>4</sup> *United States v. Jones*, 662 F.3d 1018 (8th Cir. 2011); *Ausler v. United States*, 545 F.3d 1101 (8th Cir. 2008); *United States v. Blount*, 291 F.3d 201 (2nd Cir. 2002); *United States v. Lee*, 589 F.2d 980 (9th Cir. 1979).

<sup>5</sup> *Harrison v. Motley*, 478 F.3d 750 (6th Cir. 2007); *Moss v. United States*, 323 F.3d 445, 473 (6th Cir. 2003); *United States v. Taylor*, 657 F.2d 92 (6th Cir. 1981), *cert. denied*, 454 U.S. 1086 (1981).

<sup>6</sup> *Blake v. United States*, 723 F.3d 870, 883 n.11 (7th Cir. 2013).

<sup>7</sup> *United States v. Marin*, 630 F. Supp. 64 (ND Ill. 1985).

<sup>8</sup> *Strickland v. Washington*, 66 U.S. 668 (1984); *Taylor v. United States*, 985 F.2d 844 (6th Cir. 1993); *United States v. Balzano*, 916 F.2d 1273, 1292 (7th Cir. 1990) *citing* *United States v. Ellison*, 798 F.2d 1102, 1106 (7th Cir. 1986); *United States v. Noble*, 754 F.2d 1324, 1333 (7th Cir. 1985); *United States ex rel. Williams v. Franzen*, 687 F.2d 944, 948 (7th Cir. 1982).

consequently, cannot be the basis of a conflict-of-interest between the defense counsel and the client.<sup>9</sup> Any FBI investigation of members of the Defense Teams representing defendants in *United States v. Mohammad, et. al.* did not become known to either Mr. al-Nashiri or the members of his Defense Team until sometime on or after 13 April 2014, the date AE 292 in *United States v. Mohammad, et. al.* was filed. There is no evidence Defense Counsel for Mr. al-Nashiri have provided anything less than zealous and professional representation on behalf of their client prior to or since the filing of that motion. Because they lacked knowledge regarding any FBI inquiry, it could not have had an impact on any decisions made during that period of time. Without impact or influence on the Defense, there cannot be any conflict - actual or potential.

c. Mr. al-Nashiri's Defense Team averred it felt a "chilling" effect by the knowledge the FBI was conducting an investigation. Again, none of the parties in this proceeding were aware of the FBI investigation until on or about 13 April 2014, the date AE 292 in the case of *United States v. Mohammad, et. al.* was filed. While working in this enhanced security environment, all, including the Commission, must be acutely aware of the need to be prudent and to observe and follow the parameters for using classified information in the trial environment. The *fear* of misstepping, while possibly understandable in a lay sense, does not create a legal basis for conflict in the choices made by counsel in representing their client. A fear of what *might occur* does not create an actual conflict since what does occur is within the control of counsel. Specifically pertinent here, "[t]here lacks any controlling authority to support the proposition that an attorney's *fear* of investigation may give rise to a conflict of interest."<sup>10</sup>

---

<sup>9</sup> *Lafuente v. United States*, 617 F.3d 944 (7th Cir. 2010).

<sup>10</sup> *Harrison v. Motley*, 478 F.3d 750, 758 (6th Cir. 2007) *citing Moss v. United States*, 323 F.3d 445, 473 (6th Cir. 2003); *see also United States v. Garcia-Pastrana*, 584 F.3d 351 (1st Cir. 2009), *cert. denied*, 559 U.S. 986 (2010),

## 4. FINDINGS:

a. Neither the Accused nor his counsel knew of an FBI inquiry until AE 292 in the case of *United States v. Mohammad, et. al.* was filed on 13 April 2014. The Defense motion in this case was filed on 22 April 2014.

b. Given the lack of communication from current or past Defense Team members concerning contact by agents of any federal governmental agency, including the FBI, the Commission finds no member of Mr. al-Nashiri's Defense Team has been contacted by federal investigators. Given this lack of contact, the Commission finds it unnecessary to require the Special Review Team, assembled in response to AE 292 in the case of *United States v. Mohammad, et. al.*, to file a factual submission.

c. The Prosecution in this case did not know of the inquiry, and, since the filing of AE 292 in the case of *United States v. Mohammad, et. al.*, have been effectively "walled off" from any knowledge pertaining to this motion.<sup>11</sup>

d. The Commission finds there is no actual or potential conflict between Counsel and their client based upon information available to the Commission. Nothing indicates any member of the Defense Team was implicated in the FBI inquiry as no member of the Defense Team has responded to the Commission's Interim Order (AE 272B) of 9 June 2014. Defense Counsel were not aware of an inquiry prior to 13 April 2014. Any "chilling" that may have occurred is de minimus given the length of time since arraignment<sup>12</sup> and the relatively short period of time that has lapsed since the inquiry surfaced. Moreover the "walling off" of the Prosecution acts as a protective buffer for the trial process.

---

*and cert. denied*, 560 U.S. 916, (2010); *United States v. Murray*, 2009 WL 1382292 (N.D. N.Y. 2009), *aff'd*, 414 Fed. Appx. 318 (2d Cir. 2011).

<sup>11</sup> See Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 28 May 2014 from 2:42 P.M. to 4:27 P.M. at pp. 4446-47

<sup>12</sup> Mr. al-Nashiri was arraigned on 9 November 2011.

**IT IS HEREBY ORDERED:**

a. The Commission's Interim Order (AE 272B) is **RESCINDED**;

b. The Defense request for an order to the Special Review Team, assembled in response to AE 292 in the case of *United States v. Mohammad, et. al.*, to make a factual submission in Mr. al-Nashiri's case disclosing the actual nature of the [REDACTED] and the extent to which it impacts members of Mr. al-Nashiri's Defense Team is **DENIED**;

c. The Defense request for the Commission to conduct a thorough inquiry into potential conflicts of interests arising from an FBI investigation of military commission defense teams is **DENIED**; and,

d. As a precautionary measure, the Prosecution will cause federal law enforcement and intelligence investigative agencies to understand that in the future, no law enforcement or intelligence investigation, other than a routine renewal of a security clearance, will be initiated concerning any member of the al-Nashiri Defense Team without the filing of an *ex parte, in camera*, notice to the Commission by a detailed Special Prosecutor; such notice will include a proposal for Commission approval as to the segregation of information gathered as part of the investigative effort. This is not intended to thwart properly conceived law enforcement or intelligence inquiries, but to properly ensure the integrity of this trial.

So **ORDERED** this 22nd day of August, 2014.

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