

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 355N

RULING

**Defense Motion**  
To Compel Discovery: *Ex Parte*  
Communications with the U.S.C.M.C.R.

**31 October 2016**

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1. The Accused is charged with multiple offenses in violation of the Military Commissions Act (M.C.A.) 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. On 14 July 2016, the Defense filed AE 355, which is a motion to compel discovery of *ex parte* communications relating to this case between government counsel and the United States Court of Military Commission Review (U.S.C.M.C.R.).<sup>1</sup> On 28 July 2016, the Government responded in AE 355A requesting the Commission deny the Defense motion.<sup>2</sup> The Government argued that the requested information is not relevant and not material to the preparation of the defense and any communication that occurred between government counsel and U.S.C.M.C.R. was administrative. (AE 355A at 14-15).

3. On 9 September 2016, the Commission heard oral argument on the Defense motion.<sup>3</sup> During oral argument, the Government offered to submit to the Commission all potentially responsive documents for *in camera* review. (Transcript at 6603-6604). The Government provided

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<sup>1</sup> AE 355, Defense Motion to Compel Discovery: *Ex Parte* Communications with the U.S.C.M.C.R., filed 14 July 2016.

<sup>2</sup> AE 355A, Government Response to Defense Motion to Compel Discovery: *Ex Parte* Communications with the U.S.C.M.C.R., filed 28 July 2016.

<sup>3</sup> Unofficial/Unauthenticated Transcript of the Al Nashiri (2) Motions Hearing, dated 9 September 2016 from 10:25 A.M. to 11:22 A.M. at pp. 6574-6617

documents to the Commission on 12 September and 29 September 2016.<sup>4</sup> After reviewing the filings, the Commission determined that only Tabs 3 and 10 of Attachment B to AE 355E, also marked as AE 355L, were responsive to the motion to compel in that they constituted *ex parte* communications between government counsel and a U.S.C.M.C.R representative. Although the Commission found these two communications to be purely administrative and benign in nature, and therefore normally not subject to discovery, the Commission ordered them produced to the Defense in the interest of public trust and confidence.<sup>5</sup>

4. The Defense motion to compel discovery of *ex parte* communications (Tabs 3 and 10 of Attachment B to AE 355E) relating to this case between government counsel and the U.S.C.M.C.R. is **GRANTED**.

So ORDERED this 31st day of October, 2016.

//s//

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

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<sup>4</sup> AE 355E, Notice To The Defense of the Government's *Ex Parte*, In Camera, and Under Seal Provision of Information to the Military Judge, filed 9 September 2016; AE 355K, Notice To The Defense of the Government's *Ex Parte*, In Camera, and Under Seal Provision of Information to the Military Judge, filed 29 September 2016.

<sup>5</sup> Transcript, dated 19 October 2016 from 11:34 A.M. to 12:05 P.M. at 7104; *see, e.g., United States v. Casey*, 825, F.3d 1, 56-57 (1st Cir. 2016) (citing the judicial code of conduct exception to *ex parte* communications "for administrative purposes, only if it is limited to non-substantive matters and the judge reasonably believes no party will gain an advantage as a result."); *see also Paylor v. Winter*, 600 F. Supp. 2d 117 (D.D.C. 2009) (*ex parte* communications that are administrative in nature are not prohibited). The Government also voluntarily produced Tab 9 of Attachment B to AE 355E, which was marked as AE 355M and entered into the record.