

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

UNITED STATES OF AMERICA

v.

ABD AL RAHIM HUSSAYN
MUHAMMAD AL NASHIRI

AE 317D

RULING

DEFENSE MOTION TO CONTINUE
THE HEARING SCHEDULED FOR
7-10 OCTOBER AND TO ABATE
PROCEEDINGS PENDING
RESOLUTION OF GOVERNMENT'S
APPEAL OF AE 168K/AE 241G

29 SEPTEMBER 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. On 16 September 2014, the Commission granted the Prosecution's request to reconsider its Order of 11 August 2014 (AE 168G/AE 241C) dismissing Specification 2 of Charge IV and Charges VII, VIII, and IX as a result of the Prosecution's failure to meet its burden of persuasion on the interlocutory issue of subject-matter jurisdiction. Upon reconsideration (AE168K/AE241G), the Commission denied the request to hold an evidentiary hearing on subject - matter and personal jurisdiction. Under the Commission's ruling (AE168K/AE241G), Specification 2 of Charge IV and Charges VII, VIII, and IX remain dismissed without prejudice. On 19 September 2014, the Prosecution filed a Certificate of its Notice of Appeal (AE 168L/241H) of the Commission's 16 September 2014 ruling. On 23 September 2014, the Defense requested the Commission "abate further proceedings pending resolution of the government's appeal of AE 168K/AE 241G" because "the dismissed counts [charges and specifications] affect virtually every issue that will be heard by the Commissions in the next few months." (AE 317 at 1 and 4). The Prosecution response (AE 317B) argued "the chances are

remote that any of the eight appellate exhibits docketed for the October session [*See* AE 316] will be impacted by the government’s interlocutory appeal. ... None of the eight motions relate to the question of subject-matter jurisdiction over Charges IV.2 [sic], VII, VIII, or IX, the focus of the government’s interlocutory appeal.” (AE 317B at 1-2). The Defense reply (AE 317C) continued to argue the motions docketed for argument during the October 2014 hearings “are obviously and substantially affected by [the Government’s] appeal” (AE 317C at 3). Additionally, the Defense asserted it did not have the attorney manpower to “competently represent the accused before the commission and the [Court of Military Commission Review] CMCR simultaneously,” going so far as to request the Commission excuse three of the four counsel from attending the Commission’s October 2014 session.

3. Rule for Military Commissions (R.M.C.) 908(b)(4) states

Effect on the military commission. Upon written notice to the military judge under subsection (b)(3) of this rule, the ruling or order that is the subject of the appeal is automatically stayed and no session of the military commission may proceed pending disposition by the Court of Military Commission Review of the appeal, except that solely as to charges and specifications not affected by the ruling or order:

(A) Motions may be litigated, in the discretion of the military judge, at any point in the proceedings;

The limitations placed on the motions and matters currently scheduled to be litigated during the October 2014 session will not be affected by the Court of Military Commission Review’s decision on the appeal of the Commission’s ruling in AE168K/AE241G dismissing Specification 2 of Charge IV (Terrorism); Charge VII (Attacking Civilians); Charge VIII (Attacking Civilian Objects); and, Charge IX (Hijacking or Hazarding a Vessel or Aircraft).

4. However, after balancing the timeline for the various filings in connection with the appeal, the assertion of Defense Counsel, as officers of the court, they cannot “competently represent the accused before the commission and the CMCR simultaneously” (AE 317C at 3), and the volume

and relative import¹ of the matters on the docket, the Commission determines it is in the interest of justice to cancel the October 2014 hearings.

Accordingly, so much of AE 317 as requests the October 2014 hearings at Guantanamo Bay Naval Base be cancelled is **GRANTED**. The hearings scheduled for November 2014 and December 2014 will proceed as per AE 203D, unless ordered abated by the Court of Military Commission Review.

So **ORDERED** this 29th day of September, 2014.

//s//

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

¹ All motions and issues raised by the parties are important to the Commission. The issues presented in the October 2014 docket can be litigated during the November 2014 session without prejudicing either party.