

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

UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI	AE149K ORDER DEFENSE MOTION FOR APPROPRIATE RELIEF: DETERMINE THE EXTENT OF PAST MONITORING AT CAMP ECHO II AND ORDER THAT NO FUTURE MONITORING OCCUR IN JTF- GTMO FACILITIES: DEFENSE MOTION TO ABATE THE PROCEEDINGS IN ORDER TO RESOLVE THE ISSUE OF THIRD PARTY MONITORING OF DEFENSE COMMUNICATIONS AND CENSORSHIP OF COMMISSIONS HEARINGS 5 August 2013
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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)(hereafter “2009 MCA”). He was arraigned on 9 November 2011.

2. Procedural background.

a. The accused, through counsel, filed a motion (AE149) on 1 February 2013 to abate the proceedings in this case to resolve apparent issues regarding third party monitoring of defense communications and censorship of commission hearings. On 15 March 2013, the Defense moved (AE149A) to compel discovery of information germane to alleged electronic surveillance of attorney-client communications within the Expeditionary Legal Complex (ELC) courtroom and in the meeting rooms within the Joint Task Force detention facility. The Prosecution’s Response (AE149B) claimed that the Prosecution has searched for records and permitted a

defense technical expert to examine “the locations at issue for evidence of audio or video monitoring,” AE149B, p.2, and found no discoverable records beyond those already disclosed to the Defense.

b. The Defense then filed a new, related motion, AE149C, requesting an evidentiary hearing “to determine the extent of past monitoring during attorney-client legal visits” within the detention facility, *see* AE149C, p. 1, and seeking an order requiring the Commander JTF-Guantanamo to prevent future monitoring of attorney-client legal consultation visits. The Prosecution’s filing AE149D amended a prior Prosecution contention about the capacity to audio-video record acts or conversations within the ELC holding cells, admitting that security officers can video record the activity within the holding cells, but do not monitor or record the audio portion of meetings there. The Prosecution subsequently filed AE149E, a response to the defense motion for an evidentiary hearing, noting that the Defense had produced no evidence of government audio monitoring of attorney-client meetings and requesting denial of the Defense request for an evidentiary hearing. The defense replied to AE149E by filing AE149G, and moved to compel witnesses for the evidentiary hearing (AE149F).

c. This Commission ordered the production of certain relevant witnesses (AE149H), the identity of whom were established during oral argument in the June 2013 session in this case: Captain Thomas Welsh, JAGC, USN, the JTF Guantanamo Staff Judge Advocate, and Colonel John Bogdan, Commanding Officer of the Joint Detention Group, JTF Guantanamo. Those two officers testified on 13 June 2013. Unofficial Transcript, pp. 2275-2343 and pp. 2344-2425.

3. Attorney-client confidential and privileged communications are at the root of the transparency and credibility of the U.S. system of justice at every level, from state court through federal court, to the military courts and other Article I and administrative proceedings. *See* MODEL RULES OF

PROF'L CONDUCT R. 1.4, 1.6; *see also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), citing 8 J. Wigmore, *Evidence* § 2290 (McNaughton rev.1961)(“The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.”) This Commission recognizes the sacrosanctity of confidential attorney-client communications, a legal right as much in force in these Commission proceedings as if the accused were on trial in a court-martial, state court or Article III federal court. Unwarranted and unlawful invasion of attorney-client communications would be viewed very dimly by this Commission.

4. The Defense’s specific request for relief in AE149 is that this Commission order “an evidentiary hearing to determine the extent of past monitoring during attorney-client legal visits at Camp Echo II [within the detention facility], and JTF-GTMO [sic] take the actions necessary to prevent future monitoring of attorney-client legal visits in all JTF-GTMO facilities by any U.S. government agency.”

a. Evidentiary hearing. For the purposes of this order, this portion of the relief requested is moot. An evidentiary hearing occurred on 13 June 2013 producing evidence sufficient to resolve the legal issues presented by the Defense motion.

b. Past monitoring. Captain Welsh and Colonel Bogdan testified convincingly that attorney-client communications have never been monitored within the detention facility, to the best of either of their knowledge. While neither officer could possibly testify to what may have happened for the prior ten years of detention at Guantanamo Bay, their testimony established

beyond the required evidentiary threshold that monitoring has not occurred while either of them has been assigned to JTF Guantanamo. Unofficial Transcript pp. 2327, 2365-2385, 2392-93. Captain Welsh has been assigned to JTF Guantanamo for about twenty-four months, and Colonel Bogdan has commanded the JDG for about twelve months. Both officers collectively would be in the best position to know whether monitoring of attorney-client communications has occurred over the past twenty-four months in the detention facility, and both testified under oath to an absence of monitoring. In the absence of evidence impeaching their testimony effectively or extrinsic evidence relevant to establish the existence of monitoring prior to their tenures at JTF Guantanamo, this Commission finds that no monitoring has occurred for at least the prior two years from the date of the hearing, well beyond the 15 September 2011 date of the referral of charges in this case.

c. Future monitoring.

i. In the absence of evidence of past monitoring, issuing an order prohibiting future monitoring would constitute judicial overreach and issuance of an advisory opinion. The JTF Commander and his subordinates have a preexisting legal duty not to monitor attorney-client communications, and issuing an order requiring them to execute their duties would be superfluous.

ii. During oral argument, the JDG Commander Colonel Bogdan agreed to permit limited inspections of the attorney-client meeting rooms to reassure the attorneys and the accused that no monitoring capability has been established or reestablished in the rooms. Unofficial Transcript pp. 2393-94.

(a) This Commission declines to issue an order memorializing that agreement because there is no legal right at issue to be protected by the Commission; rather, the

agreement to permit inspection is an act of good faith by the commander to reassure counsel of his above-board intentions. The commander could have good reason in the future to discontinue the inspections, and a judicial order could then interfere with his exercise of command discretion to fulfill his responsibility to provide for the safety and security of his guard force and the detainees themselves. This Commission will issue orders compelling certain actions or restraining the commander's authority only when required to ensure the accused receives a fair trial, or to protect some other cognizable legal right. In the absence of a showing of prejudice to a right, this Commission will not issue prophylactic orders.

(b) The Commission invites the Defense to renew its motion for appropriate relief upon inspection if a new or renewed monitoring capability is discovered in rooms designated for attorney-client meetings.

5. Accordingly, AE149C is GRANTED in part to the extent that this Commission ordered and conducted an evidentiary hearing on alleged past attorney-client monitoring, and DENIED in part with respect to the issuance of a prospective order.

SO ORDERED this 5th day of August, 2013.

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JAMES L. POHL
COL, JA, U.S. Army
Military Judge