

**Military Commissions:
Pre-Trial Hearings, Abd Al Rahim Hussein Muhammed Abdu Al Nashiri
3DEC2019-6DEC2019**

Events:

A representative from Judicial Watch observed the 3-6 December 2019 hearings for ISN 10015 Abd Al Rahim Hussein Muhammed Abdu Al Nashiri (Al Nashiri) at the telecast facilities at Fort George G. Meade in Maryland. Members of the Military Commissions Defense Office and the Prosecution Litigation Support Team also observed the hearings.

This session was the first open session for Judge Colonel Lanny J. Acosta Jr., who took on the case in February 2019 when Judge Spath was removed for conflict of interest, so he swore himself in and offered voir dire. Once the prosecution and defense teams had finished examining the judge, the sessions addressed multiple appellate exhibits and a disclosure mistake:

- AE 402 – A proposal by the defense to modify the summary substitution method of discovery provision from one where the government meets with the judge ex parte to gain approval of a proposed summary, to a process whereby the defense negotiates a summary with the government and/or attends the government ex parte sessions with the judge.
- AE 311B – “Defense Motion for Reconsideration to Disqualify the Military Judge for Personal Bias and the Appearance of Bias Pursuant to R.M.C. 902” is a revisit of a former defense motion to disqualify the former military judge, Col. Vance Spath. The disqualification would vacate many or all of Spath’s rulings, causing Acosta to re-examine or re-hear arguments on the impacted motions.
- Transmission of Defense Ex-Parte to Prosecution – The government trial team had requested transcripts of its ex-parte meetings with the judge from court administration in order to prepare argument for AE 402. Court administration included the transcript of a defense team ex-parte meeting which the defense has found aligns with the date it presented its entire theory of defense. One member of the government recognized the filename as not belonging to the government and took steps to delete all copies and ensure that no members had accessed the defense document. The defense team requested either evidence or a declaration from IT professionals to indicate

that the document could not be forensically reconstituted and accessed by members of the government.

Observations:

The defense proposal argued in court as AE 402 is a direct reaction to one of Judge Acosta's early rulings,¹ which found the redactions concerning the renditions (RDI) program applied to discovery documents by the CIA were at times applied to avoid embarrassment. The defense had made a similar proposal before that had been partially granted and partially denied, but the determination by Judge Spath was vacated, and this AE 402 proposal appears to be a slightly more aggressive version. The defense team asserted several times that it was not a risk to national security and so access to all documents should be allowed prior to redaction or summary. However, in the other military commissions' cases, spills of classified information increased when unredacted documents were supplied to defense teams. If the judge rules in agreement with the defense's assertions, this will become a factor in the government's calculus deciding "whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets."² Judge Acosta noted that none of his questions to either side indicated agreement with either side, but his questioning did incline toward finding solutions other than government summaries.

Judge Acosta demonstrated commitment to reading all material in familiarizing himself with the Al Nashiri case and did not shy from the prospect of extra consideration inherent in the potential granting of AE 311 B. However, argument of the motion appeared to divide into three parties at times, as Judge Acosta appeared to defend military judges as a group from the comments from both the government and the defense. Neither the government nor the defense made a strong argument on this motion. Ultimately, Judge Acosta granted the defense motion to reconsider disqualification of Spath, but after reconsideration denied the defense request to disqualify Spath and Spath's rulings.³

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[https://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20\(AE400N\(RULING\)\).pdf](https://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(AE400N(RULING)).pdf)

² *Moussaoui*, 365 F.3d at 311.

³ Text of ruling at:

[https://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20\(AE311G\).pdf](https://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(AE311G).pdf).

Al Nashiri attended all open hearing sessions and appeared to take active interest in the proceedings, to include a request to speak to the judge, though the judge indicated hesitation in concern that a defendant speaking without the filter of his counsel might adversely impact his trial and/or sentencing.

Contrary to the tactics on view in the KSM/9-11 commissions, defendant Al Nashiri did not dress in cultural or religious attire, instead choosing to show himself as a western-groomed man of business. Since Al Nashiri's stated level of commitment to Islam has gone through phases during his detention, it is unclear whether this reflects a true preference, or is a calculated attempt to gain connection with the judge and observers.

Similarly, non-military women shown in the courtroom on view in the KSM/9-11 commissions appeared in traditional Islamic covering (jalabiya and head scarves), but this was not evident at Al Nashiri's hearings.