

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1087**September Term, 2017****CMCR-18-002****Filed On: May 10, 2018**

Mary E. Spears and Rosa A. Eliades,

Petitioners

v.

United States of America,

Respondent

BEFORE: Millett, Pillard, and Wilkins, Circuit Judges

ORDER

Upon consideration of the emergency motion for stay of proceedings before the United States Court of Military Commission Review pending appeal, the response thereto, and the reply, it is

ORDERED that the United States Court of Military Commission Review's issuance of a final decision on the merits of the government's pending appeal in *United States v. Abd Al-Rahim Hussein Muhammed Abdu al-Nashiri*, CMCR No. 18-002, be administratively stayed pending further order of this court. The purpose of this administrative stay is to give this court sufficient opportunity to consider the emergency motion for stay and should not be construed in any way as a ruling on the merits of that motion. See *D.C. Circuit Handbook of Practice and Internal Procedures* 33 (2018). This administrative stay is limited to barring the issuance of a decision resolving the substantive merits of the issues presented in the government's appeal. The stay does not extend to other case-management matters, including the submission of briefs, the appearance, admission, appointment or release of counsel (and evaluation of any attendant mootness implications), or the disposition of motions. It is

FURTHER ORDERED, on the court's own motion, that the parties file supplemental briefs, not to exceed 6,500 words, by Noon on Monday, May 21, 2018. While not otherwise limited, the parties are directed to address:

- (1) Whether existing rules or procedures applicable to military commissions may permit intervention as of right or any similar procedure. Cf. Military Commissions Trial Judiciary Rule of Court 3.5.q ("A Third Party Filing will be considered by a military commission only when the

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1087**September Term, 2017**

presiding military judge determines it is appropriate or required to be considered.”);

(2) Whether a third party, whose own legal interests both are immediately and directly affected by a commission order and cannot be vindicated at the conclusion of the defendant’s case, has a right to appeal a commission order as applied to that party (i) pursuant to 10 U.S.C. § 950g; (ii) under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); see *Khadr v. United States*, 529 F.3d 1112, 1117-1119 (D.C. Cir. 2008); *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009); (iii) as within this court’s ancillary jurisdiction; or (iv) on any other jurisdictional basis;

(3) Whether there is a legal basis for petitioners’ asserted personal interest, right, or entitlement—distinct from al-Nashiri’s—to communicate confidentially with their client, to preserve the confidentiality of their work process and product, and/or to avoid transgressing rules of professional ethics that supports their claim of injury. See, e.g., Pets. Reply Br. 4-6. Briefing also should address whether and how the Commission’s order for petitioners to continue their representation of al-Nashiri, notwithstanding their release from that representation by Brigadier General John G. Baker, has and/or will imminently cause a cognizable injury to petitioners; and

(4) Whether, if petitioners have a distinct legal right to withdraw from representation, deprivation of that right by an Article I court without any opportunity for judicial review by an Article III court other than through a petition for writ of mandamus, is constitutional.

It is

FURTHER ORDERED that the government submit to the court by Noon on Monday, May 21, 2018, in accordance with procedures governing classified information if warranted, a declaration describing any and all intrusions that have occurred, may have occurred, or that the government believes foreseeably could occur into the confidentiality of (i) petitioners’ communications with their client, (ii) petitioners’ communications with other lawyers, legal personnel, support personnel, or third parties as part of their representation of their client, or (iii) petitioners’ legal work product, legal files, or legal records (electronic or otherwise). In addition, the government is directed to submit to the court:

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1087**September Term, 2017**

(1) Any classified or unclassified information provided by the government to Brigadier General John G. Baker, in his capacity as Chief Defense Counsel for the Military Commission Defense Organization, regarding alleged breaches, accidental or otherwise, of attorney-client confidentiality and/or work product privilege pertaining to the representation by attorneys under his supervision of detainees at Guantanamo Bay, Cuba (see *generally* Oct. 11, 2017, Memoranda, Att. B to Exhs. D & E in Pets.' Corrected Emergency Motion for Stay, No. 18-1087); and

(2) Documents provided by the government to Judge Spath in this case in connection with defendant's motion to compel discovery regarding potential intrusions into attorney-client confidentiality, including, but not limited to docket entries AE369PP, AE369UU, AE369YYY, and AE369ZZZ.

It is

FURTHER ORDERED that this case be calendared for oral argument before this panel at 9:30 a.m. on Thursday, May 24, 2018. The parties are directed to hand-deliver paper copies of the supplemental submissions to the court by the time and date due, and in accordance with procedures governing classified information, where relevant.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk