

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED
ABDU AL-NASHIRI

MOTION FOR APPROPRIATE RELIEF:
TO DETERMINE IF THE TRIAL OF THIS
CASE IS ONE FROM WHICH THE
DEFENDANT MAY BE MEANINGFULLY
ACQUITTED

October 19, 2011¹

1. **Timeliness:** This request is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905.
2. **Relief Requested:** The Defense respectfully requests that this Commission order from the Government a factual statement on what will happen should Mr. Al-Nashiri be acquitted. Specifically Mr. Al-Nashiri, his Counsel, the Prosecution, the Military Judge and the Members need to know if Mr. Al-Nashiri is acquitted, will he be released from custody or subjected to continued incarceration by the United States?
3. **Overview:** If at the conclusion of this proceeding, the United States intends to hold the Defendant, even if he is acquitted, that fact should be disclosed to the Defendant, the Parties, the Commission, the Members and the public.
4. **Burden of Proof:** The defense bears the burden of persuasion as the moving party on this motion. R.M.C. 905(c).
5. **Facts:**

Mr. Al-Nashiri has been held in the custody of the United States since 2002 and subjected to treatment regarded by most as torture. *See* Central Intelligence Agency Inspector General, *Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)*, 2003-7123-IG (May 7, 2004), at 42-44. Capital charges against Mr. Al-Nashiri were referred to

¹This motion was filed outside of normal business hours on 19 October 2011.

this Military Commission on September 28, 2011. Accordingly, the members of the Commission can reach one of several possible verdicts: Guilty/Death Penalty, Guilty/Non Death Sentence, or Not Guilty.

In a variety of contexts, officials of the United States, including the President, have suggested that no matter what the outcome of the trials in Guantanamo, individuals such as Mr. Al-Nashiri will not be released because he is allegedly a terrorist. *See, e.g.*, Remarks by the President on National Security, 21 May 2009;² *United States v. Ghailani*, 743 F.Supp.2d 261, 288 (S.D.N.Y. 2010) (suggesting that even if acquitted for lack of evidence, the government “probably may detain [the defendant] as an enemy combatant as long as the present hostilities continue.”); *United States v. Hamdan*, Government Motion for Reconsideration (Corrected), at 6 (24 September 2008)³ (“[A]fter charges are sworn in a military commission against a detained enemy combatant, those charges may be withdrawn, or the Convening Authority may choose not to refer them for trial, or the commission may dismiss them for one reason or another. Nevertheless, the United States would be fully justified to continue to detain someone adjudged to be an enemy combatant in order to prevent his return to the battlefield”).

It appears that if Mr. Al-Nashiri is acquitted by the Commission, he will not be released, and his detention by the United States will continue, perhaps for the rest of his life.

6. Argument:

A trial, to be meaningful to society and the defendant, must hold the possibility of both punishment and reprieve for the accused. If convicted, a defendant suffers fines, incarceration

² Available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/

³ This document is available via the menus on the Office of Military Commissions’ website <http://www.mc.mil>. No direct link to the document is provided.

and occasionally a death sentence. If acquitted, unless held on other charges, a defendant is released.

In preparation for the war crimes trials that followed World War II, great pains were taken to insure that the United States would not be complicit in show trials. As the Allies began that undertaking, Justice Robert H. Jackson, a sitting justice of the U.S. Supreme Court and ultimately the chief prosecutor of the major Nazi war criminals at Nuremberg, made clear what it meant for a proceeding to be a genuine trial under the American norms of criminal justice:

You must put no man on trial before anything that is called a court, if you are not prepared to establish his personal guilt. . . . But there is no reason for a judicial trial except to reach a judgment on a foundation more certain than suspicion or current rumor. Men of our tradition cannot regard any proceeding as a trial that does not honestly search for the facts, bring forward the best sources of proof obtainable, critically examine testimony. But, further, you must put no man on trial if you are not willing to hear everything relevant that he has to say in his defense and to make it possible for him to obtain evidence from others. Nothing more certainly discredits an inquiry than to refuse to hear the accused, even if what he has to say borders upon the immaterial or improbable.

The ultimate principle is that you must put no man on trial under the forms judicial proceedings if you are not willing to see him freed if not proven guilty. If you are determined to execute a man in any case, there is no occasion for a trial; the world yields no respect to courts that are merely organized to convict. I am not arguing against bringing those accused of war-crimes to trial. I am pointing out hazards that attend such use of the judicial process—risk on the one hand that the decision that most of the world thinks should be made may not be justified as a judicial finding, even if perfectly justified as a political policy; and the alternative risk of damage to the future credit of judicial proceedings by manipulations of trial personnel or procedure temporarily to invest with judicial character what is in fact a political decision. I repeat that I am not saying there should be no trials. I merely say that our profession should see that it is understood that any trials to which lawyers worthy of their calling lend themselves will be trials in fact, not merely trials in name, to ratify a predetermined result.

Justice Robert Jackson, *The Rule of Law among Nations*. 313 AM. BAR. ASSOC. J. 290, 292-93 (1945) (emphasis added).

Each of the participants involved in this case, especially the Members of the Commission, need to know whether they are participating in a trial with real consequences or “merely a trial in name” where the political decision, already made and confirmed, will inform the result. If the latter, the Judge, the prosecutors, defense counsel and importantly the members may say, “I do not want to be a part of such a proceeding.” And for some, their oaths may preclude participation in such a trial.

If Mr. Al-Nashiri is convicted, he may be sentenced to death, or sentenced to be held in punitive custody for as long as the rest of his life. But if the government intends to hold him in perpetuity regardless of the outcome, the sentence of death is the *only* result that changes anything. In all other respects, no matter the outcome, Mr. Al-Nashiri’s life will remain as it is now. For Mr. Al-Nashiri, such a ‘trial’ offers no prospect of reprieve if he will remain incarcerated, for as long as the rest of his life, no matter what happens. And under the circumstances of this case, where it has been publically acknowledged that Mr. Al-Nashiri was tortured by the U.S. government, a trial without any real possibility of reprieve is yet another form of torture.

It is important that everyone involved in the process know whether the only doubt about the outcome is whether Mr. Al-Nashiri will be put to death. In order to know how to address many issues that may arise, the Judge, the Prosecution and the Defendant need to know if Mr. Al-Nashiri will continue to be detained without limitation, possibly for the rest of his life, even if he is acquitted. Most significantly, the defense must know what will happen to Mr. Al-Nashiri in order to adequately advise him on this case. “Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.”

B.M.W. v. Gore, 517 U.S. 559, 574 (1996); *see also Lankford v. Idaho*, 500 U.S. 110 (1991) (“Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure.”); *cf. Padilla v. Kentucky*, ___ U.S. ___ (2010) (defendants must be informed of the collateral consequences of a conviction).

The Government has a duty to be candid with this tribunal. The Prosecution should not be allowed to suggest, even at the earliest stages of the proceedings, that an acquittal will free the Defendant if that is not true. The Prosecution should not be allowed to argue at any time that release of the Defendant is an option if that is not the case. When the case is submitted to the Members, they must be told that if they acquit the defendant he still will be detained for the rest of his life. They must be told that if they convict the defendant but give him a sentence of less than life, he will still be detained for the rest of his life. This truth is necessary for the members to reach an appropriate verdict.

Denial of this motion will violate the defendant’s rights guaranteed by the Military Commissions Act, the Detainee Treatment Act and the Fifth, Sixth and Eighth Amendments to the Constitution of the United States of America.

7. **Oral Argument:** Because the outcome of this motion influences the defense’s preparation of its case, the Defense requests oral argument at the time of arraignment.
8. **Witnesses:** To Be Determined
9. **Conference with Opposing Counsel:** The Defense has notified the Prosecution about the requested relief.
10. **List of Attachments:** NONE

//s//
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//s//

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CERTIFICATE OF SERVICE

I certify that on October 19, 2011, I electronically filed the forgoing document with the Clerk of the Court and served the forgoing on all counsel of record by e-mail. Service was completed after normal business hours on October 19, 2011.

//s//

STEPHEN C. REYES
Lieutenant Commander
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