



Written by [Joe Wolverton, II, J.D.](#) on February 20, 2012

## Judge in Gitmo Tribunal Refuses to Subpoena Yemeni President

On Thursday, the presiding judge in the military tribunal of Guantánamo Bay detainee Abd al-Rahim al-Nashiri (left) denied the request made by al-Nashiri's counsel to issue a subpoena to Yemeni President Ali Abdullah Saleh. The defendant argues that Saleh is a material witness in the case against him and should be compelled to testify. Army Colonel James Pohl is the judge in the case, and in his order denying al-Nashiri's motion he declined to offer the reasons behind his decision, stating merely that he would "explain his decision later."



Both the motion to subpoena Saleh and the military judge's refusal to issue the same are under seal at the Pentagon's war court.

When questioned by reporters during a press conference as to whether Saleh would be afforded diplomatic immunity while in the United States for medical treatment, [State Department officials responded](#) that "Ali Abdullah Saleh is still the President of Yemen and will be accorded those privileges and immunities accorded to any head of state until a new Yemeni president is sworn in following elections on February 21."

Diplomatic immunity is a policy affording foreign diplomats immunity from prosecution. These agreements are made between governments and guarantee safe passage of government representatives, as well as freedom from lawsuits. The present iteration of the internationally recognized guidelines for diplomatic immunity was agreed as international law in the Vienna Convention on Diplomatic Relations (1961).

The lawyer for al-Nashiri, Lieutenant Commander Stephen Reyes, argued that Saleh should not benefit from the protection afforded by diplomatic immunity because he was not being sought as a suspect, rather merely for the purpose of providing crucial testimony in the trial of another person.

Lt. Commander Reyes told reporters that he would consult with the other members of al-Nashiri's legal advisors and decide whether to appeal Colonel Pohl's ruling. "Our inability to have his testimony available at trial, or to have him testify at trial," he said Tuesday, "greatly prejudices our ability to mount a capital defense in the case."

The U.S. government has charged al-Nashiri with war crimes related to his alleged role in the suicide bombing of the *USS Cole* in 2000, an attack that killed 17 sailors. The defendant is additionally charged with the bombing of a French merchant vessel in 2002, and a planned attack on the American naval warship the *USS The Sullivans*, also in 2000.

Saleh was President of Yemen at the time of the attack on the *USS Cole*. On January 28, he arrived in the United States to seek medical treatment for burns suffered in an assassination attempt last June.



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As [reported by The New American](#), al-Nashiri was arraigned before a military tribunal in November of last year.

The arraignment of al-Nashiri is historic in that it is the first of such tribunals to be held since the system was created during the George W. Bush administration in response to the attacks of September 11, 2001. The proceeding is especially noteworthy in that not only is it the first military tribunal of a Guantánamo prisoner, but, if convicted, al-Nashiri faces the death penalty.

Al-Nashiri is charged with war crimes and murder relating to the above-mentioned terrorist activities.

[Reportedly](#), al-Nashiri's legal counselors intend to produce evidence that their client was tortured severely while being held by the CIA (including during detention in secret facilities outside the United States). This brutal treatment on the part of the U.S. government should be viewed as a mitigating factor sufficient to disqualify the defendant from facing the death penalty.

In addition to the relevant issues of coercion and hearsay regarding the evidence to be presented by the prosecution, Lt. Commander Reyes and his colleagues will likely challenge the jurisdiction of the military tribunal to hear the case against their client. According to the laws establishing the military commissions, they are granted very limited jurisdiction: to try war crimes.

The crimes with which al-Nashiri is charged by the United States were committed before the "War on Terror" was officially begun by the enactment of the Authorization to Use Military Force. That is to say, no war crime can be committed during a time when there is no war; therefore, the military commission has no legal authority to hear the case against al-Nashiri or any other prisoner in similar circumstances.

Additionally, there are federal courts where questions of jurisdiction would not be an issue and where problems with unusual procedures would not arise. For this reason, many argue that al-Nashiri and his fellow "high-value detainees" should be tried in federal court and not by a military commission with disputable jurisdiction and untested rules of procedure.

Upon concluding the arraignment and dealing with motions, Judge Pohl announced back in November that the tribunal hearing the case against al-Nashiri would convene on November 9, 2012. This date was set pending the accused's waiving of his right to a speedy trial as set forth in § 707(a)(3) and (c) (8) of the Uniform Code of Military Justice. Al-Nashiri waived that right and the order was entered.

Prior to that date, Colonel Pohl has scheduled a hearing for April. In a sealed order entered earlier this week, Pohl prohibited government mail screeners at Guantánamo from revealing to anyone but himself information gathered from confidential correspondence exchanged between al-Nashiri and his attorneys.

As [reported last December in The New American](#), the commander of the Guantánamo Bay detention facility, Rear Admiral David Woods, issued a fundamental rule change regarding the military's right to access and review written communication exchanged between "high-value detainees" (HVDs) being held at Gitmo and the attorneys representing them. According to details of the rules published by the Associated Press, all the covered correspondence sent back and forth between any of the HVDs and their legal counsel would be thoroughly reviewed by law enforcement and Department of Defense personnel.

In January, the head of the Office of the Chief Defense Counsel for Guantánamo Bay military tribunals, Colonel J.P. Colwell, sent [an e-mail](#) ordering all lawyers under his command to defy rules authorizing and requiring officials at the naval facility's detention center to open and read all correspondence



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between lawyers and the HVDs.

According to Lt. Commander Reyes, Judge Pohl's order regarding the mail requires every member of al-Nashiri's legal team to sign a non-disclosure agreement that forbids them from discussing the contents of all covered correspondence with anyone but a fellow defense attorney or with Pohl himself. Upon reviewing the intercepted documents, if Judge Pohl decides that any of the disclosed information poses a threat to the security of the base or the nation, then he may contact the commander of the detention facility, Rear Admiral David Woods.

Curiously, in a statement released by the Department of Defense on Tuesday, it was announced that Woods was to be reassigned to San Diego to assume command of the Pacific strike force training facility. The statement made no mention of who would replace Woods at Gitmo.

According to [reports](#):

Woods' spokeswoman said from Guantánamo that the announcement was part of the admiral's "career progression" and that he was expected to stay at the base in Cuba for a full year "to offer appropriate continuity and overlap" of the prison camp leadership.



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