



Written by [Joe Wolverton, II, J.D.](#) on November 4, 2011

Prosecutors Say Gitmo Detainee Can Be Held Even if Acquitted

While refueling in the Yemeni port of Aden on October 12, 2000, the *USS Cole* was attacked by terrorists claiming to be members of al-Qaeda. As a result of the bombing, 17 American sailors were killed and 39 others were wounded.

Saudi-born Abd al-Rahim al-Nashiri is alleged to have been the mastermind of that deadly attack, as well as that carried out on the French civilian oil tanker *MV Limburg*, and the attempted attack on the *USS The Sullivans* earlier in 2000.



In November 2002, al-Nashiri was [captured](#) in the United Arab Emirates by the Central Intelligence Agency's Special Activities Division. After being held and interrogated at one of the CIA's infamous rendition facilities (where he was waterboarded and questioned at gunpoint and threatened with a power drill), al-Nashiri was transferred to the Guantanamo Bay prison, where he remains to this day.

Documents obtained as result of a Freedom of Information Act request made by the American Civil Liberties Union [indicate](#) that while in the custody of the CIA (which reportedly included time in a "black site" prison north of Warsaw, Poland), al-Nashiri was subject to inhuman torture tactics that led him to sign a confession admitting to having participated in the planning of the attack on the *USS Cole*.

Despite such chilling allegations of reprehensible behavior on the part of agents of the United States government, on August 9, 2007 (five years after his capture and confinement), the United States Department of Defense announced that all of the Guantanamo prisoners classified as "high-value detainees" were to officially be designated as "enemy combatants" and would be tried on their respective charges by military tribunal.

In December of 2008, the Guantanamo Military Commission officially charged al-Nashiri for conspiring to bomb the *USS Cole*. On February 5, 2009, however, the charges were dropped without prejudice.

Since that date, the government of the United States has requested that the charges be reinstated and that al-Nashiri face the death penalty. If the convening authority under the command of retired Admiral Bruce McDonald authorizes the renewal of charges and the accompanying possibility of the death penalty should he be found guilty of the charges, Abd al-Rahim al-Nashiri will become the first Guantanamo prisoner to face the death penalty.

The tribunal wherein the charges against al-Nashiri will be formally read is to occur on November 9,



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2011. This will be the first time one of the prisoners designated as a “high-value detainee” will stand before the tribunal.

In filings submitted prior to the convening of the tribunal, Lieutenant Commander Stephen Reyes, one of al-Nashiri’s defense attorneys, moved for a hearing to determine if the trial in this case is one from which the defendant may meaningfully be acquitted. Reyes argues that if his client may be detained despite being acquitted, then the proceedings are merely a show “that lacks meaningful reprieve, and that jurors have the right to be informed that they are simply playing a role in a pre-determined political decision.”

In its [response](#) to that motion filed with the tribunal, lawyers for the United States insist that the military commission is not the proper venue to consider the defense’s motion. Prosecutors aver that the tribunal that will preside over the trial is limited by Congress and that after the jury’s ultimate determination of al-Nashiri’s guilt or innocence and its subsequent decision whether or not to sentence him to death, the jurisdiction of the tribunal terminates and the legality of his continued detention should rightly be heard elsewhere, by another authority.

Further, the U.S. prosecutors argue that if the government is able to prove by a preponderance of the evidence (that it is more likely than not) that al-Nashiri “was a part of or substantially supported al-Qaeda, the Taliban, or associated forces when captured, than [he] may be detained ... for the duration of hostilities.”

That is to say, that as he has been classified as an enemy combatant (or “an unprivileged belligerent”) by the government, al-Nashiri has no rights to the legal protections afforded others and may rightly (and should rightly, they declare) be imprisoned until the War on Terror ends and the chance that he might return to the battlefield has expired.

The question of why al-Nashiri and his fellow detainees are not being tried by an appropriate federal court is not addressed by the prosecution.

Trying this citizen of Saudi Arabia before a military commission is a legal anomaly and subject to a slew of challenges regarding legitimate questions about not only the commission’s personal jurisdiction over the defendant, but about unsettled issues of rules of evidence and subject matter jurisdiction that would not exist were this matter being tried before a federal bench.

Regarding the questions of jurisdiction, many observers are hopeful that the al-Nashiri case ultimately will result in legal challenges that will once and for all determine whether or not such exists. According to federal law, military commissions have very limited jurisdiction: namely, the trying of war crimes committed during armed conflict.

The authority granted to these commissions is found In the [Authorization to Use Military Force](#) (AUMF) that was passed by Congress and enacted on October 16, 2002, two years after the deadly *Cole* bombing, of which al-Nashiri is accused of having masterminded.

In fact, according to the government’s complaint against him, al-Nashiri is a member of al-Qaeda, a group that was not an enumerated “enemy” of the United States until after the passage of the Iraq Resolution of 2002, therefore, his affiliation with that organization is not actionable as of the date of the carrying out of the crimes of which he is accused.

Assuming that government relies upon al-Nashiri’s alleged participation in the attack on the *MV Limburg* in 2002 for the existence of jurisdiction under the AUMF, should it then not be required to



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demonstrate how an attack on a French merchant vessel that occurred outside the theatre of conflict between the United States and al-Qaeda (or the Taliban, the other named belligerent) was part of the armed conflict known as the “War on Terror?”

If, on the other hand, the tribunal holds that the attacks on the *Cole* and *The Sullivans* were acts of war, then the al-Nashiri defense' position would be strengthened as surely international rules of warfare would consider U.S. naval vessels legitimate targets in a war and thus attempts to bomb them are appropriate acts of war by one belligerent against another and not a war crime.

Furthermore, as one commentator accurately observed:

Additionally, not only are many of the crimes al-Nashiri is charged with — terrorism and conspiracy — not considered war crimes under international law, but they also have been created to apply retroactively in the military commissions. Prosecuting people for conduct that was not a crime when they committed the act violates the ex post facto prohibition enshrined in the US Constitution and the international legal principle of legality.

Finally, trying al-Nashiri, and the other detainees grouped with him, in federal court would eliminate all of these vexing legal and constitutional issues. There is precedence for such proceedings as the other men accused of conspiring to bomb the *USS Cole* and *USS The Sullivans* have already been indicted in federal court. These courts are able and authorized to adjudicate in all kinds of crimes — war crimes and others — and have years of experience in doing so without the need to make up the law as they go.

Photo of *USS Cole*: AP Images



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