MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI**	**AE 248S** **RULING** **GOVERNMENT MOTION TO RECONSIDER AE 248G, ¶ 5, AND ALLOW THE GOVERNMENT TO PROVE THE ACCUSED'S "WANTON DISREGARD FOR HUMAN LIFE" BY INTRODUCING RELEVANT AND PROBATIVE EVIDENCE RELATING TO FOREIGN NATIONALS LOCATED ON OR AROUND USS COLE (DDG 67) AT THE TIME OF THE ATTACK** **25 MARCH 2015**

1. The Accused is charged with multiple offenses in violation of the Military Commissions Act (MCA) of 2009, 10 U.S.C. §§ 948 *et seq.*, Pub. L. 111-84, 123 Stat. 2574 (Oct. 28, 2009). He was arraigned on 9 November 2011.

2. The Government charged the Accused with violating 10 U.S.C. § 950t(24), Terrorism. (Charge IV, page 4 Charge Sheet, *United States of America v. Abd al Rahim Hussayn Muhammad al Nashiri*). The Government must prove beyond a reasonable doubt the following elements under Charge IV, Specification 1:

(1) The Accused engaged in an act that evinced a wanton disregard for human life;

(2) The Accused did so in a manner calculated to influence or affect the conduct of the United States government by intimidation or coercion, or to retaliate against government conduct; and

(3) The wanton disregard for human life took place in the context of, and was associated with, hostilities.

See 10 U.S.C. § 950t(24). Under the first element, the Government listed their theory of liability for the Accused's disregard for human life as "intentionally detonating an explosives-laden boat alongside USS COLE (DDG 67), resulting in the deaths of seventeen persons onboard USS COLE (DDG 67)." (Specification 1, Charge IV, Charge Sheet, *U.S. v. al Nashiri*). The Commission ruled in AE 248B[1] that Charge IV, Specification 1, as alleged on the charge sheet is sufficient to meet the requirements of Rule for Military Commission (R.M.C.) 307. The Commission went on to clarify, based on an exchange with trial counsel on 24 April 2014,[2] that "[t]he Prosecution is limited to introducing evidence and arguing the remaining crewmembers onboard the USS COLE at the time of the attack are who were unlawfully and substantially endangered as a result of the alleged attack." (AE 248B at 3). The Prosecution filed a bill of particulars (AE 248C) which expanded this group of individuals beyond the specified United States Sailors not listed on the charge sheet as deceased or wounded but on board the USS COLE (DDG 67) to also include "the foreign-national individuals located on or around the refueling dolphin and USS COLE (DDG 67), including those foreign-national individuals on the boats servicing USS COLE (DDG 67)..." (AE 248C). In its ruling (*see* AE 248G) on the Defense's motion to strike the bill of particulars,[3] the Commission found it could not factually distinguish between a foreign national on board the USS COLE (DDG 67) and a United States Sailor not listed on the charge sheet as deceased or wounded and on board the USS COLE (DDG 67), thus it expanded the group of individuals about whom the Prosecution could present evidence. (*See* AE 248G at 3). This Commission also found that foreign nationals on vessels other than the USS

[1] "The Commission does not view the aggravating factors of R.M.C. 1004(c) as being elements of the offense. The aggravating factors and any evidence tending to prove a factor and any extenuating or mitigating evidence presented at a sentencing hearing [are] for the providence of the panel to use in deciding whether or not to impose the death penalty." (AE 248B at 2-3.)

[2] *See* Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 24 April 2014 from 2:59 P.M. to 4:54 P.M. at pp. 3918 – 19.

[3] *See* AE 248D, Defense Motion To Strike: AE248C Government Notice of Bill Of Particulars (Charge IV, Specification 1).

COLE (DDG 67) were not included within the definition and thus not for consideration in proving aggravating factor #1. *Id.*

3. The Government in AE 248H requested "the Commission reconsider its Ruling on the Defense Motion to Strike AE 248C: Government Notice of Bill of Particulars (Charge IV, Specification 1)" in accordance with R.M.C. 905(f). (AE 248H at 1). The Government argued the Commission's ruling in AE 248G[4] "resulted in the improper exclusion of evidence that is relevant and probative to an element of Charge IV, Specification 1, [in that] . . . the government [must] . . . prove on the merits, beyond a reasonable doubt, that the accused 'evinced a wanton disregard for human life.' 10 U.S.C. § 950t(24)." The Government asserted the Accused's wanton disregard for human life was evinced by him "attacking USS COLE (DDG 67) with a huge bomb in a crowded harbor with protected persons in close proximity to the attack." (AE 248H at 1-2). The Government also emphasized that it "will not focus on the military members, but rather the presence of foreign nationals located both on USS COLE (DDG 67) and near USS COLE (DDG 67) at the time of the attack." (AE 248H at 13).

4. The Defense response requested the Commission deny the Government requested relief in AE 248H and argued "it is clear from the charge as alleged, and the subsequent record of this Commission, that the focus of Charge IV, Specification 1 is the accused's actions directed at the U.S. Government and the U.S. Naval Vessel USS COLE (DDG 67), not against protected persons or the civilian population." (AE 248I at 7). A reply was not filed. The motion was argued on 3 March 2015.[5]

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[4] In AE 248G, the Commission granted the Defense's motion to strike; limiting the Prosecution to "consider[ing] only the U.S. Navy crewmembers on board the USS COLE (DDG 67) along with the foreign-national individuals also located on board the USS COLE (DDG 67) to be the individuals whom the accused had a 'wanton disregard for human life' when attacking USS COLE (DDG 67) and killing 17 United States Sailors." (AE 248G at 3).

[5] *See* Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 4 March 2015 from 1:34 P.M. to 2:43 P.M. at pp. 6060 - 94.

5. The Government now argues, for essentially the third time, the focus of its proof of the Accused's wanton disregard will be on protected persons, i.e. foreign nationals located on the USS COLE (DDG 67), on refueling dolphins and boats servicing the USS COLE (DDG 67), not United States Sailors. The Government charged the Accused with Terrorism, specifically that he displayed a wanton disregard for human life "in a manner calculated to influence and affect the conduct of the United States government by intimidation and coercion and to retaliate against the United States government …" (Specification 1, Charge IV, Charge Sheet, *U.S. v. al Nashiri*). The Government in its charging decision chose not to include any comment about a civilian population, or a group of protected persons in the specification, despite this charging option and theory of liability being specifically allowed in the statute. *See* 10 U.S.C. §950t(24) and 2012 Manual for Military Commissions, Part IV, pg IV-19. "Clearly, an accused cannot be convicted of a crime different from that charged." *United States v. Wray*, 17 M.J. 375, 376 (C.M.A. 1984). Given the charging theory chosen by the Government, the argument that evidence of protected persons, especially foreign nationals, not on board the USS COLE (DDG 67) being relevant and probative of a showing of wanton disregard for human life which was "to influence and affect the conduct of the United States government by intimidation and coercion and to retaliate against the United States government" is not persuasive. Therefore this Commission is not going to reconsider its previous ruling. There is no error in the Commission's application of law or new facts that warrant reconsideration. The Government is left with the words they decided to charge within Charge IV, Specification 1 and not their newly-defined meaning of "persons onboard USS COLE (DDG 67)."

6. Accordingly, AE 248H is **DENIED**. The limitations of AE 248G remain in effect.

So ORDERED this 25th day of March, 2015.

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VANCE H. SPATH, Colonel, USAF
Military Judge
Military Commissions Trial Judiciary