

UNCLASSIFIED//FOR PUBLIC RELEASE
MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI</p>	<p>AE 257G</p> <p>ORDER</p> <p>DEFENSE MOTION TO STRIKE: AE 257C GOVERNMENT NOTICE OF BILL OF PARTICULARS (APPLICATION OF AGGRAVATING FACTOR #5)</p> <p>21 APRIL 2015</p>
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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, pursuant to this Commission's order (AE 257B) filed AE 257C, a bill of particulars, defining the term "civilian population" in Aggravating Factor #5. The Government defined the term "civilian population" as "any non-military or legal resident of the United States of America or any non-military citizen or legal resident of a 'Coalition Partner' as defined in the Military Commission Act of 2009. See 10 U.S.C. § 948a(3)." (AE 257C). The Defense filed AE 257D complaining the bill of particulars "only replaces the term 'global population of civilians' with 'Coalition Partner[s] population of civilians. The term 'Coalition Partner,' as used by the government, is subject to different levels of interpretation and in effect does nothing to eliminate the possibility that this Commission will hear aggravating evidence relevant to the 'global population of civilians.'" (AE 257D at 1). The Defense noted, "'Coalition Partner' is defined in legalese language in the 2009 MCA and is not defined with any specificity or particularity, which opens the door to varying arguments and interpretation. Because of the unique nature of this iteration of military commissions, there exist no prior cases aiding the defense or

Commission in defining ‘Coalition Partner’ as that term is used in the 2009 MCA.”¹ *Id.* at 3-4. The current bill of particulars arguably violates “both R.M.C[.] 307 and R.M.C. 1004 [which] require[s] that sufficient facts be alleged in the charge and specification to support the aggravating factor, in order to provide the accused with fair notice.” The Government did not “provide actual substantive notice . . . [nor] . . . any additional facts or information as to which civilian population was intended for intimidation to support Aggravator #5.” *Id.* at 4. The Government response (AE 257E) argued the Defense “did not demonstrate how the bill of particulars does not comply with the Commission’s Order or the requirements of the Rules for Military Commissions (‘R.M.C.’)” as it took the definition for “Coalition Partner” directly from the statute. (AE 257E at 1-2). The Government also argued it “should not be required to further define ‘civilian population’ for aggravating factor #5 because the defense fails to demonstrate that it is unable to prepare for trial (or sentencing, should it become necessary) or that the bill of particulars provided by the government is inadequate.” (AE 257E at 8). The Defense reply (AE 257F) maintained the position that “[t]he government, rather than provide sufficient facts allowing [the Accused] to defend against the death penalty, continues its persistence in providing bare minimum and vague notice and in doing so continues to fail to meet its pleading requirements under R.M.C. 307 and R.M.C. 1004.” (AE 257F at 1). The motion was argued on 2 March 2015.²

3. A bill of particulars has three purposes: (1) inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, (2) avoid or minimize the danger of surprise at the time of trial, and (3) enable the accused to plead the acquittal or conviction in bar

¹ 10 U.S.C. § 948a(3) COALITION PARTNER-The term ‘coalition partner,’ with respect to hostilities engaged in by the United States, means any State or armed force directly engaged along with the United States in hostilities or providing direct operational support to the United States in connection with such hostilities.”

² See Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 2 March 2015 from 2:17 P.M. to 3:26 P.M. at pp. 5956 - 67.

of another prosecution for the same offense when the specification itself is too vague and indefinite for such purposes. (Rules for Courts-Martial (“R.C.M.”) 906(b)(6), Discussion). So much of the Government’s bill of particulars (AE 257C) as defines “civilian population” as “any non-military citizen or legal resident” is clear. However, the inability of the Defense and this Commission to ascertain what countries were the “Coalition Partners” of the United States in October 2000 indicates the Government’s current bill of particulars (AE 257C) is insufficient to satisfy the purposes set forth in the discussion to R.C.M. 906(b)(6).

4. Accordingly, the Government is ordered to file an amended bill of particulars listing the “Coalition Partners” of the United States as the Government uses the term in modifying or defining the term “Civilian Population” in AE 257C and Aggravating Factor #5. The Government will file the amended bill of particulars **NLT 21 May, 2015**.

So **ORDERED** this 21st day of April, 2015.

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