

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA v. ABD AL-RAHIM HUSSEIN MUHAMMED ABDU AL-NASHIRI	AE 702D Defense First Additional Request for Judicial Notice 24 September 2026
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1. Timeliness: This Notice is timely filed pursuant to Military Commission Rule of Evidence (“M.C.R.E.”) 201.¹

2. Request for Judicial Notice:

a. M.C.R.E. 201 provides for judicial notice of adjudicative facts: “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known universally, locally, or in the area pertinent to the event or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.”² “The military judge *shall* take judicial notice if requested by a party and supplied with the necessary information.”³ M.C.R.E. 201A provides for judicial notice of domestic and foreign law. The defense thus makes the following additional request for judicial notice:

b. *Even if Mr. Al-Nashiri is found not guilty of all charges and specifications, this will not automatically lead to his release from United States custody. Because the United States is holding Mr. Al-Nashiri as a “law of war” detainee, any such determination as to his continued confinement*

¹ M.C.R.E. 201(f) provides that judicial notice may be taken at any stage of the proceeding.

² M.C.R.E. 201(b).

³ M.C.R.E. 201(d) (emphasis added).

will be made independent of any outcome of this military commission. In AE 011, the Defense raised the issue of whether Mr. Al-Nashiri could be meaningfully acquitted at this military commission. The military judge ultimately denied the requested relief of ordering from the Government a factual statement on what will happen should Mr. Al-Nashiri be acquitted but granted “leave to make an amended pleading on this issue.”⁴ The Commission expressed understanding and agreement with the concerns raised by the Defense on this issue: “I understand in my view how it would necessarily impact on the members”⁵ and “If the accused were acquitted today, there is no legal prohibition from the government to take him under the authorization of use of military force straight back to the cell he came from. Today.”⁶ The prosecution did not disagree with these factual assertions, nor could it because the facts are clear. While the discussion in court surrounding the AE 011 series focused on a potential jury instruction—which is certainly appropriate—this is a fact that is not subject to reasonable dispute that the members must be made aware of from the outset because it runs contrary to how any American would understand any criminal proceeding to occur. In addition, the 2012 National Defense Authorization Act allows indefinite detention of any person accused of supporting Al Qaeda. In particular, §1021(c)(2) is a permissive structure that allows for four non-exclusive, possible dispositions under the law of war for “A person who was a part of or substantially supported al-Qaeda.” There is no mandate on the Department of Defense to release a “covered person” based on a verdict or any sentence adjudged by Commission Members. Therefore, and recognizing past statements of both the Military Judge and Government representatives on the record in proceedings covering AE 011, the ability of the

⁴ Tr. at 67.

⁵ Tr. at 66.

⁶ Tr. at 65.

Government to detain Mr. Al-Nashiri contrary to the determination of the Commission Members is *both* a fact not subject to reasonable dispute *and* domestic law *requiring* judicial notice.

3. Certificate of Conference: The government opposes this request.

4. List of Attachments:

A. Certificate of Service, dated 24 September 2026.

//s//
ALLISON MILLER
Learned Counsel

//s//
JESSICA MANUELE
Defense Counsel

//s//
CASEY SECOR
Defense Counsel

//s//
JOSHUA NETTINGA, Lt Col, USAF
Detailed Defense Counsel

//s//
MATTHEW BARTHOLOMAUS
CDR, JAGC, USN
Detailed Defense Counsel

//s//
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LT, JAGC, USN
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ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on 24 September 2026, I filed the attached AE 702D, **Defense First** Additional Request for Judicial Notice, with the Chief Clerk, Trial Judiciary and to all parties of record.

//s//

JOSHUA NETTINGA, Lt Col, USAF
Detailed Defense Counsel