# UNITED STATES
# COURT OF MILITARY COMMISSION REVIEW

| | | |
|---|---|---|
| United States,<br><br>Appellant<br><br>v.<br><br>Khalid Shaikh Mohammad<br><br>Walid Muhammad Salih Mubarek Bin 'Attash<br><br>Ramzi Bin al Shibh<br><br>Ali Abdul-Aziz Ali AKA Ammar al Baluchi, and<br><br>Mustafa Ahmed Adam al Hawsawi,<br><br>Appellees | ) | ORDER<br><br>APPELLEE MR. MOHAMMAD'S MOTION FOR RECUSAL AND/OR DISQUALIFICATION OF JUDGE SILLIMAN<br><br>USCMCR Case No. 17-002<br><br>June 6, 2017 |

## OPINION AND ORDER

Opinion filed by SILLIMAN, *Judge*.

On May 9, 2017, Appellee Mohammad moved that I recuse or disqualify myself from sitting as a judge or taking part in any proceeding, including assigning a panel of judges, with regard to the Appellant's interlocutory appeal currently before this court. Appellee Motion 1. The motion is predicated upon Appellee's assertion that through my writings, my statements at Duke Law School, my congressional testimony in 2001 and 2006, and my media appearances, all of which predate my being sworn in as a judge on the United States Court of Military Commission Review (USCMCR), show "an actual bias and prejudice against Mr. Mohammad in particular, and suggest a bias against the other defendants in the case as well." Appellee Mohammad Motion 9. To further support his assertion, Appellee cites one additional instance which occurred after I became a judge on this court—my introduction of Brigadier

General Mark Martins, the Chief Prosecutor for Military Commissions, who was a keynote speaker at a 2013 Law, Ethics and National Security Conference held at Duke Law School. Appellee Mohammad Motion 5, 8. Appellee argues that my recusal or disqualification is required pursuant to our court's Rules of Practice; Rule for Military Commissions (R.M.C.) 902; the statute on recusal and disqualification of federal judicial officers, 28 U.S.C. § 455; the Code of Conduct for United States Judges as adopted by the Judicial Conference of the United States; and the Fifth and Eighth Amendments of the United States Constitution. *Id.* All co-Appellees joined Appellee Mohammad in this motion. Appellee Mohammad Motion 2. On May 15, 2017, Appellant opposed the motion for recusal and/or disqualification. Appellant Response Brief 1. On May 22, 2017, Appellee Mohammad filed a reply to Appellant's response. After careful consideration of the facts and applicable law, I do not recuse or disqualify myself from sitting as a judge in these proceedings, and the motion is denied.

**The Allegations**

Appellee sets forth eleven instances which occurred prior to September 12, 2012 when I was sworn in as a judge of this court; and one instance after that date, through which he alleges that my writings, my comments as a Professor of the Practice of Law at Duke Law School, the two occasions when I testified before the United States Senate, and my comments to the media were done in a manner that is incompatible with being a judge who must act impartially. Appellee Mohammad Motion 1, 2-5. The allegations are set forth seriatim.

(1) In this first allegation, Appellee states that "Then-Professor Silliman chose to publicly address students at Duke University School of Law on September 12, 2001, Judge Silliman said 'there is a rage in me, and I suspect within you, that needs to be vented . . .' in reference to the attacks of September 11, 2001."[1]

(2) Appellee cites to my testimony before the United States Senate in 2001:

> On November 28, 2001, then-Professor Silliman testified as a witness before the Senate Committee on the Judiciary regarding facts and law directly at issue in this case and stated: "I maintain that shortly before 9 o'clock in the morning on Tuesday, September 11th, we were not in a

[1] Appellee Mohammad Motion 2 (citing Recusal App. Vol. 2, Tab 1 (*Prof. Silliman addressing students at Duke University School of Law* (Sept. 12, 2001), https://www.youtube.com/watch?v=-UcwEa5g1r0)).

state of armed conflict and we did not enter into a state of armed conflict until some time thereafter, certainly on or after the 7th of October.[2]

(3) Appellee cites a Duke News article of September 11, 2002, in which I was quoted:

> In 2002, in view of the first anniversary of the events at issue in this case, then-Prof. Silliman opined publicly that the United States' treatment of many captives taken in the last year violates provisions of the Geneva Convention as well as U.S. domestic law.[3]

(4) Appellee cites Scott L. Silliman, *On Military Commissions*, 36 Case W. Res. J. Intl. L. 529 (2004), one of my law review articles, and states that "In a law review article in 2004 addressing military commission jurisdiction post 9/11, then-Prof. Silliman opined specifically on Article 36, UCMJ, which is central to the instant appeal, and also on Article 21, UCMJ." [4]

(5) Appellee cites to my testimony before the Senate Armed Services Committee on July 19, 2006:

> On July 19, 2006, then-Professor Silliman testified as a witness before the Senate Committee on Armed Services, again on matters directly relevant to this case, [and] opin(ed) at length on deviations in military commission[s] from the uniformity requirement of Article 36: "All this is easily accomplished in a military commission system under the UCMJ by justifying, via Article 36(b) of the Code, the need to deviate from the MRE procedures."[5]

(6) Appellee refers to an interview I had with the Los Angeles Times, "On February 12, 2008, Judge Silliman was quoted in the Los Angeles Times as saying 'The fact is that we're going to have a military commission for those the

---

[2] Appellee Mohammad Motion 2 (citing Recusal App. Vol. 1, Tab 2 (Testimony of Prof. Scott L. Silliman, Sen. Jud. Comm., *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism*, Sen. Hrg. 107-704 (Nov. 28, 2001).

[3] Appellee Mohammad Motion 2-3 (citing Recusal App. Vol. 1, Tab 3 (Keith Lawrence, (Sept. 2002), *September 11: A campus reflects*, Duke News)).

[4] Appellee Mohammad Motion 3 (citing Recusal App. Vol. 1, Tab 4 (Scott L. Silliman, *On Military Commissions*, 36 Case W. Res. J. Intl. L. 529 (2004)).

[5] Appellee Mohammad Motion 3 (citing Recusal App. Vol. 1, Tab 5 (Testimony of Prof. Scott L. Silliman, Sen. Armed Services Comm., *Military Commissions in Light of the Supreme Court Decision in Hamdan v. Rumsfeld*, Sen. Hrg. 109-881 (July 19, 2006).

United States believes, and most of the world acknowledges, to be ring leaders of the 9/11 attacks . . .'."[6]

(7) Appellee cites to Scott L. Silliman, *Prosecuting Alleged Terrorists by Military Commission: A Prudent Option*, 42 Case W. Res. J. Intl. L. 289, 291-293 (2009), yet another of my law review articles, and asserts:

> [T]hen-Prof. Silliman opined on the significant resources required for security to prosecute someone like Mr. Mohammad in the United States due to the risk of targeting by terrorist cells, specifically expressing concern for the safety of the courtroom hearing Mr. Mohammad's case: "For example, when dealing with very high profile cases such as Khalid Sheikh Mohammed, it is not inconceivable that terrorist cells operating within the U.S. would target the courtroom and prisoner detention facility where he would be kept during trial proceedings."[7]

(8) Appellee references a 2009 C-SPAN interview and says: "On August 18, 2009, then-Professor Silliman appeared on C-SPAN's Washington Journal with Susan Davis, and asserted that bringing Guantanamo detainees to the United States for trial was a more 'dangerous option' in light of the possibility that a 'radicalized' group might stage an attack or protest."[8]

(9) Appellee cites to another media interview:

> On 30 November 2009, Judge Silliman told the Los Angeles Times, "I think it's likely KSM will want to use the trial as a forum for himself and to put the government on trial. I will be very surprised if he pleads guilty . . . . We should expect a long, convoluted trial full of difficulties for the government."[9]

(10) Appellee refers to yet another media interview: "On November [1]8, 2010, then-Prof. Silliman was quoted in the media stating an opinion on the guilt or innocence of the Appellees in this case: 'We've got the major

---

[6] Appellee Mohammad Motion 3 (citing Recusal App. Vol. 1, Tab. 6 (Los Angeles Times Staff Writer, *9/11 Suspects May Face Death Penalty*, L.A. Times (Feb. 12, 2008))).

[7] Appellee Mohammad Motion 3-4 (citing Recusal App. Vol. 1, Tab 7 (Scott L. Silliman, *Prosecuting Alleged Terrorists by Military Commission: A Prudent Option*, 42 Case W. Res. J. Intl. L. 289, 291-293 (2009)).

[8] Appellee Mohammad Motion 4 (citing Recusal App. Vol. 2, Tab 2 (Susan Davis, *Washington Journal*, C-SPAN (Aug. 18, 2009)).

[9] Appellee Mohammad Motion 4 (citing Recusal App. Vol. 1, Tab 8 (David G. Savage, *Death penalty in 9/11 trials may be difficult*, L.A. Times (Nov. 30, 2009).

conspirators in the 9/11 attacks still at Guantanamo Bay – Khalid Sheikh Mohammed and four others . . .'"[10]

(11) Appellee cites a final media interview in Time Magazine's on-line forum: "On April 5, 2011, then-Prof. Silliman was quoted discussing the manner in which Mr. Mohammad 'will be' executed. He said, referencing lethal injection executions carried out by the military in the United States, 'I'm assuming the same pattern will be followed, except for the location.'"[11]

(12) In the twelfth and last allegation, and the only one which followed my being sworn in as a judge of this court, Appellee cites my comments while introducing Brigadier General Mark Martins, the Chief Prosecutor for Military Commissions, who was a keynote speaker at a 2013 Center on Law, Ethics and National Security conference held at Duke Law School:

> "One of our colleagues, close colleagues, Bobby Chesney, professor of law at University of Texas, I think said it well. He said if in 2001, after 9/11, if we had had the 2009 Military Commissions Act, and if we had had General Martins as the chief prosecutor, much of the dialogue back and forth arguing about military commissions probably would have been minimized. And I think that's a very fair statement."[12]

**The Applicable Law**

The parties agree that the terms for recusal or disqualification are set forth in Rule 25 of the Rules of Practice of the USCMCR (Feb. 3, 2016). Appellee Mohammad Motion 6; Appellant Response Brief 2. Rule 25 provides:

> (a) **Grounds**. Judges may recuse themselves under any circumstances considered sufficient to require such action. Judges must disqualify themselves under circumstances set forth in 28 U.S.C. § 455, R.M.C. 902, or in accordance with Cannon 3C, Code of Conduct for United States Judges as adopted by the Judicial Conference of the United States . . . . For purposes of R.M.C. 902, the same disqualification standards which apply to military judges shall also apply to civilian judges appointed under 10 U.S.C. § 950f.

---

[10] Appellee Mohammad Motion 4 (citing Recusal App. Vol. 1, Tab 9 (Eleanor Hall, *Gitmo detainee acquitted of 284 charges, guilty of one*, The World Today (Nov. 18, 2010)).

[11] Appellee Motion 4-5 (citing Recusal App. Vol. 1, Tab 10 (Mark Benjamin, *Gitmo Trial May Mean Obama Will Sign Off on KSM's Death*, Time (Apr. 5, 2011)).

[12] Appellee Mohammad Motion 5 (citing Recusal App. Vol. 1, Tab 11 (Duke University Law School; Law, Ethics and National Security (LENS) Conference 2013, Hon. Scott Silliman, LENS Executive Director Emeritus, introducing BG Mark Martins; Mar. 1, 2013); Vol. 2, Tab 3)).

> (b) **Procedure**. A motion to disqualify a judge shall be referred to that judge for a final decision. If an initiating judge is recused or disqualified, that judge will notify the clerk of court, who will arrange for assignment of a substitute judge.

Appellee argues that 28 U.S.C. §§ 455(a), 455(b)(1), or 455(b)(3), were violated by my public statements. Appellee Mohammed Motion 7. Those three subsections provide:

> (a) Any justice, judge, or magistrate judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> * * *
>
> (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.

Rule for Military Commissions 902 provides, in part:

> (a) *In general*. Except as provided in section (e) of this rule, a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned.
>
> (b) *Specific grounds.* A military judge shall also disqualify himself or herself in the following circumstances:
>
> (1) Where the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.

Appellee cites and quotes the Code of Conduct for U.S. Judges, Commentary for Canon 2A[13] to support his disqualification argument. The Commentary for Canon 2A states, "Canon 2A. An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty,

[13] The *Guide to Judiciary Policy* (rev. Mar. 20, 2014) contains the Code of Judicial Conduct for U.S. Judges and Commentary for the various canons. U.S. Courts website, http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges.

integrity, impartiality, temperament, or fitness to serve as a judge is impaired. . . ." Appellee Mohammad Motion 7-8.

Appellee also cites and quotes Canon 3(C)(1)(e):

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which: . . . (e) the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

Appellee Mohammad Motion 7 (quoting Canon 3(C)(1)(e)).

Canon 3(A)(6) states, "The prohibition on public comment on the merits does not extend to public statements made in the course of the judge's official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education." Canon 3(C)(3)(d) states, "(d) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation."

A "recusal inquiry" under 28 U.S.C. § 455 must be "made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances."[14]

**Discussion**

It is important to put the twelve instances cited by Appellee in the full context in which they were either spoken or written, and I now do so in the order in which they were listed in Appellee's motion.

As to the first allegation cited, my comments to the students at Duke Law School on September 12, 2001, the day following the terrorist attack on the World Trade Center and the Pentagon, were done at the request of the Dean of the Law School who asked me and one of my colleagues to try to allay the fears and anxieties of our student body, many of whom were foreign students from Arab countries. My comments, which lasted only 10 minutes, were quite general in nature and addressed, among other things, the legal issues regarding the possible use of force against whoever was responsible for the attack. At that

[14] *Cheney v. United States*, 541 U.S. 913, 924 (2004) (quoting from *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000) (Rehnquist, C.J.) and citing *Liteky v. United States*, 510 U.S. 540 (1994)). *See also S.E.C. v. Loving Spirit Foundation Inc.*, 392 F.3d 486, 493 (D.C. Cir. 2004)( "Section 455(a) permits a litigant to seek recusal of a judge 'in any proceeding in which his impartiality might reasonably be questioned.' In assessing section 455(a) motions, this circuit applies an 'objective' standard: Recusal is required when 'a reasonable and informed observer would question the judge's impartiality.' *United States v. Microsoft Corp.*, 253 F.3d 34, 114 (D.C. Cir. 2001) (en banc) (per curiam).").

time, the identity and the nationality of the perpetrators was unknown so I could not have made, nor did I make, any reference to, or comment about, the Appellee. With regard to the one comment about "rage", it was clearly a reference to the emotion welling up within all United States citizens following such a horrendous attack occurring within our country. It clearly reflects no bias against the Appellees since he was completely unknown to me at that time.

As to the second allegation, my November 28, 2001 testimony before the United States Senate Judiciary Committee, in looking at both my oral comments before the Committee, as well as my submitted written statement, it is clear that I was referring to the required legal predicate for the application of the President Bush's Military Order of November 13, 2001 regarding the use of military commissions; i.e. that violations of the law of war--the *jus in bello*--do not occur within a vacuum; they must by definition occur within the context of a recognized state of armed conflict. I went on to opine my belief at that time that at shortly before 9:00 am on the morning of September 11, 2001, we were not in a state of armed conflict and we did not enter into such a state until sometime thereafter. The state of armed conflict is not before our court, and in the event that the issue of the timing of the initiation of armed conflict should be before the USCMCR, I have an open mind and expect that determination to be based on the law and evidence of record. As with my comments to the Duke Law Student Body two months earlier, nothing I said before the Senate Judiciary Committee reflects any bias against Appellees or any reason why I could not act impartially as an appellate judge in these proceedings.

With regard to the third allegation, my comments in a September 11, 2002, Duke News article, following the quoted section in Appellee's motion, I went on to say in the article:

> Among the most troubling cases are those of Yaser Hamdi and Jose Padilla, two U.S. citizens who have been detained for months without benefit of counsel and without any specific charges lodged against them . . . . Further, he said, the United States, although claiming to be a nation under the rule of law, is seemingly not satisfying its commitments under international law. "I am troubled by our continued refusal to adhere to the Geneva Convention."[15]

From what I said, I was clearly worried about American citizens being detained in the United States without being afforded Constitutional protections, as well as the failure to comply with Common Article 3 of the Geneva Conventions with regard to those non-U.S. persons held in detention by the United States abroad. My expression of concern about the U.S. Government's conduct does not show bias against Appellees.

[15] Note 3, *supra*, Vol. 1, Tab 3 at 3-5.

In the fourth allegation, an excerpt from my 2004 article *On Military Commissions* in the Case Western Reserve Journal of International Law, I was discussing the historical roots of Article 21 and said:

> What is clear from General Crowder's testimony is that Article 15 of the Articles of War (and its successor, Article 21 of the Uniform Code of Military Justice) was not meant to constitute any grant of authority from Congress to the President with regard to military commissions. Rather, it was meant only to ensure that military commissions, predicated not upon a specific statutory grant but rather upon historical usage under the President's Commander-in-Chief authority, were not divested of their jurisdiction because of the creation of a new court-martial system which would have overlapping jurisdictional coverage.
>
> * * *
>
> Since Congress has not attempted to legislate with regard to military commissions following President Bush's Military Order, and since the only applicable statute (Article 21 of the Uniform Code of Military Justice) simply *recognizes* the previously existing jurisdiction of military commissions under common law, President Bush, as Commander-in-Chief, has clear authority to authorize the use of commissions, as he did on November 13, 2001.

Silliman, 36 Case W. Res. J. Intl. L. at 535-36 (internal citation omitted; emphasis in original).

With regard to Article 36 of the Uniform Code of Military Justice, I said in the article:

> The third statutory reference, Article 36 of the Uniform Code of Military Justice, is simply a general delegation of authority to the President to prescribe trial procedures, including modes of proof, for courts-martial, military commissions, and other military tribunals and states that he should, "so far as he considers practicable, apply the principles of law and rules of evidence" generally used in criminal cases in federal district courts. Rather than citing this provision as empowering him to authorize military commissions, the President clearly intended it to refer to his decision that use of those principles of law and rules of evidence was *not* practicable, "given the danger to the safety of the United States and the nature of international terrorism."

*Id*. at 533 (internal citation omitted; emphasis in original).

Appellee does not explain how my comments in this article are incorrect on the status of the law in 2004, or in any event, how those statements show bias 12 years later in the current proceeding. In referencing both codal provisions, I

was discussing President's Bush's claimed statutory authority in his November 13, 2001 Military Order to convene military commissions and to direct use of certain procedures that were inconsistent with the Uniform Code of Military Justice, and not the application of either provision to any particular case before this court.

As to the fifth allegation, my 2006 testimony before the Senate Armed Services Committee, my statement is obviously true and accurate, made in the context of the Congressional debate over how the 2006 Military Commissions Act should be enacted, and what provisions should be included. There was clearly no reference to any particular trial, especially the one at bar.

With regard to the sixth allegation, my interview in the February 12, 2008 Los Angeles Times, my full quote was "The fact is that we're going to have a military commission for those the United States believes, and most of the world acknowledges, to be ring leaders of the 9/11 attacks . . . . That should not be delayed simply because we're in an election year."[16] The writer of the article went on to say:

> Silliman conceded there are probably political considerations to the timing of the charges but said he doubted the trial would get underway before the election. Military defense attorneys will make challenges on their clients' behalf and demand access to classified evidence and faraway witnesses, which would probably delay the process, Silliman said.[17]

The context for the article was the charging of the Appellee and four others with alleged crimes under the 2006 Military Commissions Act. My statement was accurate and unbiased since charges would not have been brought unless there was some evidence supporting them, and the question posed to me was as to the timing of any forthcoming trial, not whether there would be a conviction.

As to the seventh allegation, an excerpt from my 2009 Case Western Reserve Journal of International Law article, Appellee omitted the immediate preceding sentence to what he quoted. That sentence was "Ensuring court security and guaranteeing the safety of witnesses and jurors would also require significant additional resources." 42 Case W. Res. J. Intl. L. at 292. In an article weighing the two possible forums for trials of alleged terrorists, trial in federal district court and trial by military commission, I was using Appellee's possible trial in federal court to be illustrative of security concerns, which would not be applicable in a military commission trial held at Guantánamo Bay. There was certainly no comment, or even an implication, on what the outcome of a trial in either forum should be or would be.

---

[16] Note 6, *supra*, Vol. 1, Tab 6 at 2.

[17] *Id*.

As to the eighth allegation, my comments in a 2009 C-SPAN interview, those comments were with regard to the benefits and/or risks in prosecuting alleged terrorists in either federal district court or in a military commission. They were not, nor were they intended to be, comments upon the guilt or innocence of anyone. Those comments do not show bias against Appellees.

In reference to the ninth allegation, my comments in a 2009 Los Angeles 8Times interview, Appellee once again failed to cite the preceding sentence in the article, which reads "Earlier this year, Mohammed said at a Guantanamo hearing that he wished to plead guilty. But Duke University law professor Scott Silliman said the government should not count on him and his four alleged co-conspirators to plead guilty now."[18] Thus, I was commenting on the Appellee's own statement, at that time, that he wished to plead guilty to the charges before the military commission. I suggested that he might not, and in fact he did not plead guilty. My comments reflect no bias or pre-judgment of his guilt or innocence.

In the tenth allegation, Appellee cites to my interview with Eleanor Hall from The World Today. The context of this interview was the trial in federal district court of Ahmed Ghailani in 2010 and the interviewer asked me if the Ghailani trial was an indication that President Obama would use federal district court trials for those at Guantánamo Bay. I replied

> . . . I think that the Obama administration is also signal[ing] that it also wants to use the military commission system. We've got the major conspirators in the 9/11 attacks still at Guantanamo Bay - Khalid Sheikh Mohammed and four others - and no decision has been made yet as to whether they will be prosecuted by a military commission or trial in the Federal Courts.[19]

Obviously, the entire interview was focused on the Ghailani case and the choice of prosecutorial options available to the Obama administration, and not whether those yet to be tried in one forum or the other were guilty or innocent.

With regard to the eleventh allegation, my comments in the April 5, 2011 on-line Time Magazine forum, as with previous allegations of bias, it is important to put the above cited quotation in context. The article states:

> Attorney General Eric Holder's announcement Monday that Khalid Shaikh Mohammed and four other *alleged* 9/11 plotters will be tried in military commissions rather than civilian courts means that KSM *might* face lethal injection at Guantanamo, and the President *might* have to personally sign off on his death . . . . That law is silent on the method of execution, but lethal injection is the military's official execution method. And while the

[18] Note 9, *supra*, Recusal App. Vol. 1, Tab 8 at 1.

[19] *Id*. at 2.

> Army's death row is at Fort Leavenworth in Kansas, experts in military law suspect KSM's lethal injection would probably be carried out at GTMO. "I'm assuming the same pattern will be followed, except for the location," says Scott Silliman of Duke Law School.[20]

When looked at in the full context of the article, i.e. what method of execution would probably be used for an accused approved by the President for the death penalty following a conviction by military commission and exhaustion of all appeals, what I said was merely responsive to the interviewer's prior comments and not in any way prejudging the guilt or innocence of the Appellee. *See* Army Reg. 190–55, *U.S. Army Corrections System: Procedures for Military Executions* (July 23, 2010), ¶ 3-1a ("Military executions will be by lethal injection."). I recognized then, of course, that the U.S. military has not executed anyone for violations of the law of war in more than five decades and my prediction about the method of execution may not be accurate because my only knowledge about this issue was from the Army regulation.

The first 11 allegations relate to my public statements before I became a USCMCR judge. Appellee emphasizes two cases, *Williams v. Pennsylvania*, 579 U.S. ___, 136 S. Ct. 1899 (2016) and *Caperton v. A. T. Massey Coal Co.*, 556 U. S. 868 (2009), as precedential support for my recusal. Appellee Mohammad Reply 2-3. In *Williams*, the prosecutor was subsequently an appellate judge on Williams' case. The Supreme Court found this to be an intolerable situation stating, "The due process guarantee that 'no man can be a judge in his own case' would have little substance if it did not disqualify a former prosecutor from sitting in judgment of a prosecution in which he or she had made a critical decision." *Williams*, 136 S. Ct. at 1905 (citation omitted). I was not a prosecutor in Appellees case; I have never worked in the Office of Military Commissions; and I did not make any decisions regarding their cases. In *Caperton*, a person running for election to be an appellate judge received campaign contributions of $3,000,000 from an employee of Massey Coal, which dwarfed the contributions received by any other judicial candidate, and the Court held the judge was disqualified from acting in a case involving Massey Coal. *Caperton*, 556 U. S. at 878-79, 884-85, 887-88. (holding "On these extreme facts the probability of actual bias rises to an unconstitutional level."). I was appointed to my position, and I did not receive any campaign contributions. The *Williams* and *Caperton* decisions do not support my recusal.

The twelfth and last allegation, my introductory comments for Brigadier General Martins at the Law, Ethics and National Security Conference in 2013, is the only one cited after I was sworn in as a judge of this court. In 2013, I was the Executive Director of the Center on Law, Ethics and National Security and was therefore the host for the conference at the Duke Law School. In introducing General Martins as the keynote speaker, I first read from his formal profile which his office had provided, and I went on to use the words of

[20] Note 10, *supra*, Recusal App. Vol. 1, Tab 10 at 1 (emphasis added).

University of Texas law professor Bobby Chesney to describe what could have been if, in 2001, Brigadier General Martins had become the first chief prosecutor and, more importantly, Congress had enacted a statutory military commission system rather than one created solely by presidential authority. Professor Chesney referred to the statute first, and Brigadier General Martins second in his comments, indicating which he believed more important.

One has only to look to the debates and the case law up to the passage of the 2006 Military Commissions Act to see the truth in what Professor Chesney said. The military commission process was delayed after a U.S. District Court issued a stay on November 8, 2014, *see Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004), followed by stays issued by the Appointing Authority.[21] The military commission process was further delayed after the Supreme Court decision in *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006) because that decision made it necessary for the Congress to enact legislation and for the Secretary of Defense to issue the Manual for Military Commissions and Regulation for Military Commissions. Appellee cites to no precedent where a judge made brief complimentary introductory remarks about a government official and then recused himself from acting in cases involving that government official. Accordingly, my introductory comments on that occasion, citing to Professor Chesney, in no way indicated any bias against the Appellees, towards the prosecution or Brigadier General Martins, or any inability to sit impartially as a judge in the proceedings now pending before our court. Having a favorable view of a prosecutor or a defense counsel without more is not a basis for disqualification. *United States v. Bosch*, 951 F.2d 1546 (9th Cir. 1991).

Even though the Code of Conduct for United States Judges did not directly apply to my activities prior to September 12, 2012 when I was sworn in as a judge of this Court, Canon 4 of the Code does relate to the permissibility of my participation in the 2013 conference. Canon 4 of the Code of Conduct for United States Judges states, in part:

> A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations set forth below.
>
> (A) *Law-related Activities.*

---

[21] *See* Office of Military Commissions website, USCMCR History page, *History of USCMCR*, http://www.mc.mil/ABOUTUS/USCMCR History.aspx.

> (1) *Speaking, Writing, and Teaching*. A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice;
>
> (2) *Consultation*. A judge may consult with or appear at a public hearing before an executive or legislative body or official:
>
>> (a) on matters concerning the law, the legal system, or the administration of justice;
>
> * * *
>
> (3) *Organizations*. A judge may participate in and serve as a member, officer, director, trustee, or nonlegal advisor of a nonprofit organization devoted to the law, the legal system, or the administration of justice and may assist such an organization in the management and investment of funds. A judge may make recommendations to public and private fund-granting agencies about projects and programs concerning the law, the legal system, and the administration of justice.

The commentary to Canon 4 recognizes the importance of practitioners educating the public about legal matters. My efforts over the years to educate the public enhanced the confidence of the public in legal procedures. The debate over legal procedures helped Congress and the public determine how to handle the alleged violations of the law of war. Canon 4 states:

> [A] judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so . . . ."

Canon 4, cmt. As the Judicial Council of the Ninth Circuit explained:

> Engaging in such law-related activities -- including speeches that comment on current events and legal developments -- is permitted not only because judges are citizens, but because they are particularly knowledgeable on such topics. Their speech may thus enhance the public discourse and lead to a more informed citizenry.

*In re Complaint of Judicial Misconduct*, 632 F.3d 1289, 1289 (9th Cir. Jud. Council 2011); *see id.* (holding that a judge's speeches about "the direction of immigration law and a campaign finance controversy" did not violate the Code of Conduct or constitute misconduct). In *In re Charges of Judicial Misconduct*, 769 F.3d 762 (D.C. Cir. 2014) the Court of Appeals for the District of Columbia noted:

> [T]he Code of Conduct encourages judges to "speak, write, lecture, and teach on both law-related and nonlegal subjects," Canon 4, and "to contribute to . . . revising substantive and procedural law and improving criminal and juvenile justice," Canon 4, cmt. This authorization extends to commenting on "substantive legal issues." Comm. on Codes of Conduct, Advisory Op. No. 93, at 3 (2009). As Advisory Opinion 93 states: "The evolution and exposition of the law is at the core of a judge's role. Judges, therefore have the ability to make a unique contribution to academic activities such as teaching and scholarly writing, which similarly serve to advance the law." *Id.*

*Id.* at 785.

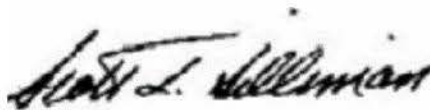
In testing each of the 12 allegations of bias and lack of impartiality cited in the Appellee's motion against the standards set forth in Rule 25 of our court's rules, 28 U.S.C. § 455, Rule for Military Commissions 902, and Canons 3C and 4 of the Code of Conduct for United States Judges, those allegations are baseless.

**Conclusion**

Appellee argues that "Judge Silliman's statements and writings show an actual bias and prejudice against Mr. Mohammad in particular, and suggest a bias against the other defendants in this case as well." Appellee Mohammad Motion 9. To the contrary, as indicated in my responses to each of the twelve allegations of bias or partiality, *supra*, neither my statements nor my writings reflect any bias toward Appellee Mohammad or any of his co-defendants. When tested against *Cheney*'s objective informed reasonable observer standard, there is no evidence of actual or even apparent prejudice in anything I said or wrote. Accordingly, none of the twelve allegations of bias or prejudice against the Appellee have been proven, and recusal pursuant to Rule 25 of our Rules of Practice is not appropriate or required.

Based upon the foregoing, I decline to recuse or disqualify myself from the case at bar. Therefore, it is hereby

**ORDERED** that Appellee Mohammad's motion that I recuse or disqualify myself is DENIED.



Scott Silliman
Acting Chief Judge
U.S. Court of Military Commission Review