

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY**

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID
MUHAMMAD SALIH MUBARAK BIN
‘ATTASH, RAMZI BIN AL SHIBH, ALI
ABDUL-AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

AE380MM(CDC)

**Amicus Brief and Report of Chief Defense
Counsel Regarding Status of AE380II**

21 March 2016

1. **Timeliness:** This report is timely filed.
2. **Relief Requested:** None.
3. **Interest and Qualifications of Amicus Brigadier General John G. Baker, USMC**
 - a. I am licensed to practice law in Pennsylvania.
 - b. I am not a party to any Commission case in any capacity, I do not have an attorney-client relationship with any person whose case has been referred to a Military Commission, I am not currently nor do I intend to seek to be a habeas counsel for any such person, and I am not currently nor do I intend to seek to be next-friend for such person.
 - c. I certify my good faith belief as a licensed attorney that the law in the attached brief is accurately stated, I have read and verified the accuracy of all points of law cited in the brief, and I am not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.
 - d. The Chief Defense Counsel (“CDC”) is a position created by the Military Commissions Act of 2009 (MCA). 10 U.S.C. § 948k(d)(2). By regulation, the CDC is charged with supervising “all defense activities and the efforts of detailed defense counsel” including detailing military defense counsel to represent individual accused in military commission

proceedings and supervising, facilitating, ensuring the qualifications and competence of, and evaluating the detailed defense counsel. RTMC 9-1(a) and (b)(1); 9-3. The CDC is also charged with ensuring the qualifications of civilian defense counsel to represent accused in commission proceedings. RTMC 9-5(c).

e. In particular, the CDC is charged with the duties to “facilitate the proper representation of all accused referred to a trial before a military commission,” RTMC 9-1(a)(2); to “take appropriate measures to preclude defense counsel conflicts of interest arising from the representation of accused before military commissions,” *id.* 9-1(a)(8); and to “take appropriate measures to ensure that each defense counsel is capable of zealous representation, unencumbered by any conflict of interest.” *Id.* 9-1(a)(9).

f. In order to ensure the proper representation of each accused and to ensure zealous representation by each defense counsel, the CDC is required to inform the Convening Authority of requirements for personnel, equipment, logistical support and office space to “ensure the successful functioning and mission accomplishment of the [Military Commissions Defense Organization].” RTMC 9-4.

4. Overview:

On 21 February 2016, the Military Commission ordered the CDC to appoint an independent counsel “to advise and assist Mr. bin ‘Attash regarding his desire to sever his attorney/client relationship with Ms. Bormann and Mr. Schwartz.” AE380II. On 08 March 2016, the Commission issued an order that explained in significant detail why Mr. Bin ‘Attash “has not established a justifiable dissatisfaction to establish good cause to sever either Ms. Bormann’s or Mr. Schwartz’s representation.” AE380KK. In addition, the Commission found that Ms. Bormann had not stated a conflict of interest or otherwise established good cause to

withdraw. *Id.* Independently, pursuant to his duties under the Regulation for Trial by Military Commission, the CDC similarly found no good cause for severance of the relationship. AE380GG.

In these circumstances, for the reasons explained below, appointment of an independent counsel for the specific purpose of facilitating Mr. Bin ‘Attash’s desire to sever his existing attorney-client relationship would violate the RTMC, which requires the CDC to “facilitate the proper representation of all accused referred to trial before a military commission,” “take appropriate measures to preclude defense counsel conflicts of interest arising from the representation of accused before military commissions,” and “take appropriate measures to ensure that each detailed defense counsel is capable of zealous representation and unencumbered by any conflict of interest.” RTMC 9-1(a)(2), (8), and (9). The appointment of an independent counsel would also violate the MCA’s prohibition of unlawful influence, 10 U.S.C. § 949(a)(2)(C), and the CDC’s Professional Rules of Conduct, JAGINST 5803.1E, Rule 5.1.

Because of these legal obstacles, in lieu of appointing an independent counsel, the CDC intends to detail a second learned counsel to Mr. Bin ‘Attash who, along with her other duties, will be able to assist Mr. Bin ‘Attash with the concerns addressed by AE380II subject to her independent professional judgment. 10 U.S.C. § 949a(b)(2)(C)(ii) (requiring representation by “at least one” learned counsel); RTMC 9-1(a)(6) (same). Whereas appointment of an independent counsel has, in the past, led to *de facto* abatement of proceedings,¹ appointment of a second learned counsel, as part of the existing defense team, will allow Mr. bin ‘Attash to receive the advice of a different counsel without the need for abatement.

¹ See *e.g.* Order, AE312C at 3-4 ¶ 4 (13 August 2014) (holding other motions in abeyance pending resolution of AE292)

There is no suitable learned counsel available among current MCDO personnel and the Convening Authority has been informed that the CDC is now actively seeking an appropriate outside attorney qualified to serve in that role for Mr. Bin 'Attash. The CDC will inform the Commission and the Convening Authority as soon as one is identified and provide the Commission regular updates about the status of the hiring process.

5. Burden of Proof and Persuasion: Not applicable.

6. Facts:

The essential factual and procedural background concerning the Commission's determination that no good cause exists to sever Mr. Bin 'Attash's relationships with his counsel is set forth in AE380KK at paragraphs 2.(a)–(g). Specifically, after considering Mr. Bin 'Attash's requests to sever on 5 December 2015 and 17 February 2016, and holding an *ex parte* hearing on the matter, the Commission found no good cause to sever the relationships with his counsel. *Id.*; *see also* AE380BB; Unofficial/Unauthenticated Transcript of the Khalid Sheik Mohamad et al Motions Hearing Dated 2/17/2016 from 9:35 AM to 11:00 AM, at 10244. The CDC, acting pursuant to his duties under the RTMC, reached the same conclusion. AE380GG.

Subsequently, the Commission issued AE380II, which required the CDC to “file a memorandum of appointment for an appropriately cleared independent defense counsel to advise and assist Mr. bin 'Attash regarding his desire to sever his attorney/client relationship with Ms. Bormann and Mr. Schwartz to include any potential impacts from such a severance.” The Commission further ordered that “[i]f appointment of independent counsel is not accomplished by 21 calendar days, the Chief Defense Counsel shall notify this Commission denoting the status of the appointment process and the anticipated day of the appointment.” AE380II, ¶ 6. The Commission extended that deadline until 21 March 2016. AE380NN.

On 29 February 2016, the CDC notified the Convening Authority of the Commission's order directing the appointment of an independent counsel and that CDC did not have an available learned counsel to appoint as an independent counsel to Mr. Bin 'Attash. Att B. On 08 March 2016, the Commission issued AE380KK which explained in significant detail why there was no good cause to sever the attorney-client relationship between Mr. Bin 'Attash and Ms. Bormann or Mr. Schwartz. As a consequence of AE380KK, on 16 March 2016, the CDC notified of the Convening Authority that the CDC no longer intended to detail an independent counsel to Mr. Bin 'Attash, but would instead be detailing a second learned counsel to Mr. Bin 'Attash's existing defense team. Att C.

As requested by the Convening Authority, and as required by the RTMC, the CDC previously completed a comprehensive requirements analysis of the MCDO. Relevant to this matter, the CDC determined that Mr. Bin 'Attash, and his co-accused, each required to be detailed, *inter alia*, two learned counsel in order to provide effective and zealous representation in this capital military commission.² Att. D and E. Pursuant to that determination and the specific needs of Mr. Bin 'Attash's defense team at this time, the CDC is now actively seeking a qualified counsel to serve in that role. Att. C.

² The CDC's assessment of the minimum personnel resources required to defend capital commission cases is based on the authorities governing capital cases, including the Fifth, Sixth, and Eighth Amendments to the United States Constitution. Due process requires "that an indigent criminal defendant is entitled to the minimum assistance necessary to assure him 'a fair opportunity to present his defense' and 'to participate meaningfully in [the] judicial proceeding,'" *Medina v. California*, 505 U.S. 437, 444-45 (1992) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 76) (1986), including the personnel required to carry out the defense mission. *Ake* (reversing for failure to appoint a defense mental health expert); *Little v. Armontrout*, 835 F.2d 1240, 1243 (8th Cir. 1987); see also *Rojem v. Gibson*, 245 F.3d 1130, 1139 (10th Cir. 2001) ("A state must provide an indigent defendant with the basic tools to present an adequate defense or appeal."); *Terry v. Rees*, 985 F.2d 283, 284 (6th Cir. 1993) ("Criminal trials are fundamentally unfair if a state proceeds against an indigent defendant without making certain that he has access to the raw materials integral to building a defense."); *Castro v. Ward*, 138 F.3d 810, 826 (10th Cir. 1998) ("*Ake* also requires that the State provide to indigent defendants the 'basic tools of an adequate defense or appeal.'").

7. Argument:

Because the Commission has found that there is no good cause to sever Mr. Bin ‘Attash’s relationships with Ms. Bormann and Mr. Schwartz, the CDC is prohibited by law from appointing an independent counsel. Appointment of an independent counsel is warranted in certain circumstances, such as when a potential conflict of interest exists that requires independent investigation and advice to the client regarding the existence of the conflict and possible waiver.³ *See e.g.* Order, AE292LL (3 July 2014). Outside of these limited circumstances, the appointment of an independent counsel to investigate the conduct of existing counsel is not warranted and is, in fact, impermissible.

The CDC’s duties under the RTMC are to “facilitate the proper representation of all accused referred to trial before a military commission,” “take appropriate measures to preclude defense counsel conflicts of interest arising from the representation of accused before military commissions,” and “take appropriate measures to ensure that each detailed defense counsel is capable of zealous representation and unencumbered by any conflict of interest.” RTMC 9-1(a)(2), (8), and (9). Given the Commission’s specific findings in AE380KK that Mr. Bin ‘Attash’s loss of trust in counsel is “not objectively reasonable” and that Ms. Bormann had not stated a “legitimate conflict of interest that would prevent appropriate representation,” appointment of an independent counsel for the purpose of assisting Mr. Bin ‘Attash’s efforts to break that representation would not “ensure that each detailed defense counsel is capable of zealous representation and unencumbered by any conflict of interest,” RTMC 9-1(a)(8), it would do the opposite. It would create a conflict of interest for Ms. Bormann and Mr. Schwartz because their

³ In such cases proceedings are generally abated until the conflict question is resolved. *See e.g.* Order, AE312C at 3-4 ¶ 4 (13 August 2014) (holding other motions in abeyance pending resolution of potential conflict issue). *See also* AE 380LL. Here, because the commission has held that there is no good cause for an interruption of representation and the relationship issue is being addressed by adding an additional counsel to the existing team, no abatement is necessary.

representation of Mr. Bin 'Attash would be burdened by an investigation into their own conduct as his counsel.

By the same token, appointment of an independent counsel would violate the MCA bar on unlawful influence. The MCA prohibits any “person . . . , by any unauthorized means, [from] influencing . . . the exercise of professional judgment by trial counsel or defense counsel.” 10 U.S.C. § 949(a)(2)(C). While the RTMC clearly authorizes the CDC to appoint an independent counsel to resolve the question of whether good cause exists for a detailed counsel to be dismissed, it just as clearly does not authorize such appointment where there has been a definitive finding, such as that made in AE380KK, that good cause does *not* exist. Absent such authorization, appointment of independent counsel for the purpose of influencing the conduct of the defense – especially in a matter as sensitive as an existing attorney-client relationship – would clearly be unlawful.

Finally, the CDC cannot, consistent with his professional-ethical duties as a supervising attorney, facilitate the disruption of a subordinate attorney’s relationship with her client. Navy JAGINST 5803.1E, Rule 5.1, requires the CDC to “make reasonable efforts to ensure that [a subordinate attorney] conforms to [the Rules of Professional Conduct],” Rule 5.1(b); and makes him responsible for a subordinate attorney’s ethical violations that he has ordered, ratified, or failed to remediate. Rule 5.1(c). Absent the good cause required by Rule for Military Commission 505(d)(2)(B), deliberate interference with a subordinate attorney’s established client relationship would blatantly violate these provisions.⁴

⁴ In effect, the Commission’s direction to appoint an independent counsel “to advise and assist Mr. bin 'Attash regarding his desire to sever his attorney/client relationship with Ms. Bormann and Mr. Schwartz” amounts to a direction to create good cause for Rule 505(d) purposes where none otherwise exists. Having found no good cause for their dismissal, Ms. Bormann and Mr. Schwartz remain Mr. bin 'Attash’s counsel. If an independent counsel were appointed, she would join as a member of an existing legal team for the express purpose of helping the client create that very good cause. That procedure would turn the principle that an indigent accused has no right to counsel

Accordingly, the CDC cannot appoint an independent counsel for the purpose stated in AE380II. However, the MCA and RTMC authorize him to detail a second learned counsel to capital accused when warranted by the needs of the case. 10 U.S.C. § 949a(b)(2)(C)(ii); RTMC 9-1(a)(6). The CDC has previously determined that Mr. Bin ‘Attash and his co-accused each require, *inter alia*, two learned counsel in order to provide effective and zealous representation in this capital military commission (Att. E at p. 2-3), and has notified the Convening Authority that he is actively seeking a qualified attorney to act as second learned counsel for Mr. Bin ‘Attash. Att. C. This second learned counsel will better address the concerns raised by the Commission in AE380II.

8. **Oral Argument:** Oral argument is not requested.
9. **Witnesses:** None.
10. **Conference with Opposing Counsel:** Because this is a notice pleading, no conference is required.
11. **List of Attachments:**
 - A. Certificate of Service
 - B. Memorandum from Brigadier General John G. Baker to Convening Authority re: Appointment of Independent Counsel (29 February 2016).
 - C. Memorandum from Brigadier General John G. Baker to Convening Authority re: Update on the Independent Counsel Issue (16 March 2016).
 - D. Memorandum from Brigadier General John G. Baker to Convening Authority re: Request for Authorization for Additional Year of Services for Learned Counsel (14 March 2016).
 - E. Memorandum from Brigadier General John G. Baker to Convening Authority re: Initial Assessment of Military Commissions Defense Organization (2 December 2015).

of choice on its head. The Commission presumably did not intend its ruling in AE380II to undermine its analysis and findings in AE380KK, but that is AE380II’s practical effect.

UNCLASSIFIED//FOR PUBLIC RELEASE

Very respectfully,

//s//

Brigadier General John G. Baker
Chief Defense Counsel
Military Commissions Defense Organization

Attachment A

Filed with TJ
21 March 2016

Appellate Exhibit 380MM (CDC)
Page 10 of 31

CERTIFICATE OF SERVICE

I certify that on the 21st day of March, 2016, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing by e-mail on all parties.

//s//

Brigadier General John G. Baker

Chief Defense Counsel

Military Commissions Defense Organization

Attachment B

Filed with TJ
21 March 2016

Appellate Exhibit 380MM (CDC)
Page 12 of 31



DEPARTMENT OF DEFENSE
CHIEF DEFENSE COUNSEL FOR MILITARY COMMISSIONS
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

29 February 2016

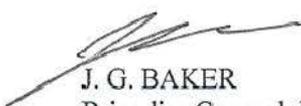
MEMORANDUM FOR CONVENING AUTHORITY

SUBJECT: Appointment of Independent Counsel

On 21 February 2016, the military judge in *United States v. Khalid Shaikh Mohammad, et. al.* entered an order (AE 380II) directing me to appoint an "appropriately cleared independent defense counsel to advise and assist" Mr. Walid Muhammand Salih Mubarek Bin 'Atash regarding his 16 February 2016 request to sever his attorney/client relationship with Ms. Cheryl Bormann, his learned counsel, and Mr. Michael Schwartz, a civilian attorney assigned to his case. I have attached the order to this memorandum.

In accordance with RTMC 9-1(a)(6)(C), I am notifying you that it is not practical for me to detail an attorney assigned to, or employed by, the Military Commissions Defense Organization (MCDO) as the independent counsel for Mr. Bin 'Atash. This is because the MCDO does not have an available counsel who is qualified as learned in the law relating to capital cases. Accordingly, I will be appointing the independent counsel from outside the MCDO. A request for funding approval will be submitted as soon as I have identified such counsel.

If you have any questions about this matter, please contact me at [REDACTED] or john.baker [REDACTED]


J. G. BAKER
Brigadier General, U.S. Marine Corps
Chief Defense Counsel for
Military Commissions

Attachment:
As stated

cc:
DGC (P&HP)

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

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p>AE 380II</p> <p>ORDER</p> <p>APPOINTMENT OF INDEPENDENT COUNSEL</p> <p>21 February 2016</p>
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1. This Order applies only to the case of *United States v. Walid Muhammand Salih Mubarak bin 'Attash*.
2. During the October 2015 Commission proceedings, Mr. bin 'Attash advised the Commission he wished to sever his attorney/client relationship with his Learned Counsel, Ms. Cheryl Bormann. After holding a colloquy *ex parte* with Mr. bin 'Attash on 28 October 2015, this Commission issued an *ex parte* sealed Order (AE 380BB) holding that Mr. bin 'Attash did not establish good cause for severance.¹ Again, during the December 2015 Commission proceedings, Mr. bin 'Attash voiced several objections to Ms. Bormann's continuing representation.²
3. On 12 February 2016, prior to the start of Commission proceedings scheduled to take place 16-26 February 2016, Ms. Bormann advised the Commission that Mr. bin 'Attash still wished to sever his attorney/client relationship with her and now also wished to sever his attorney/client relationship with Mr. Michael Schwartz. Mr. Schwartz represented Mr. bin 'Attash as his

¹ AE 380BB, ORDER RIGHT TO COUNSEL (*ex parte* and under seal), dated 4 December 2015.

² Unofficial/Unauthenticated Transcript of the *Khalid Sheik Mohammad et al* Motions Hearing Dated 12/8/2015 from 9:07 AM to 10:36 AM, at 9336 and 9337; Unofficial/Unauthenticated Transcript of the *Khalid Sheik Mohammad et al* Motions Hearing Dated 12/9/2015 from 9:08 AM to 10:35 AM, at 9571; Unofficial/Unauthenticated Transcript of the *Khalid Sheik Mohammad et al* Motions Hearing Dated 12/10/2015 from 9:05 AM to 10:13 AM, at 9708 – 9709.

Detailed Military Defense Counsel until his release from active duty on or about January 2016. He continues to represent Mr. bin 'Attash as Assistant Defense Counsel in his civilian capacity.³

4. On 16 February 2016, the Commission held a colloquy with Mr. bin 'Attash, who renewed his request to sever his attorney/client relationship with Ms. Bormann and Mr. Schwartz. In support of his request to sever, Mr. bin 'Attash submitted to the Commission, a letter with seven attachments and a second letter. These letters and attachments were accepted by the Commission *ex parte* and under seal as AE 380EE (WBA) and AE 380FF (WBA).⁴ Ms. Bormann also filed a Declaration from the Chief Defense Counsel, Brigadier General (BG) John G. Baker, dated 17 February 2016, a letter from BG Baker to Mr. bin 'Attash dated 11 February 2016, and a memorandum from BG Baker to the Convening Authority dated 2 December 2015 as evidence for the Commission to consider regarding Mr. bin 'Attash's request for severance. These documents were accepted by the Commission as AE 380GG (WBA).⁵

5. The Commission makes the following findings based on the current state of the record:

a. The Commission considers Mr. bin 'Attash's renewed request for severance of his attorney/client relationship with Ms. Bormann to be a request for Reconsideration of the Commission's Order in AE 380BB and a new request to sever his relationship with Mr. Schwartz.

³ Upon Mr. Schwartz' release from active duty, Major Matthew Seeger was detailed as Mr. bin 'Attash's Detailed Military Defense Counsel.

⁴ AE 380EE (WBA), Letter To: The Military Judge, James Pohl dated 9 February 2016, filed 17 February 2016 (*ex parte*, under seal); AE 380FF (WBA), Letter To: The Military Judge, James Pohl, filed 17 February 2016 (*ex parte*, under seal).

⁵ AE 380GG (WBA), Declaration of Brigadier General John G. Baker, filed 17 February 2016.

b. As the Commission ruled on the record on 17 February 2016, the submissions by Mr. bin 'Attash provided new matter for the Commission to consider.⁶ The Commission **GRANTED** Mr. bin 'Attash's request for Reconsideration of AE 380BB and **DENIED** Mr. bin 'Attash's request to sever his attorney/client relationship with Ms. Bormann and Mr. Schwartz.⁷ This denial was based upon the newly submitted documents, the 17 February 2016 colloquy, and the evidence considered in AE 380BB, which failed to establish good cause for severance.

c. A represented party seeking relief from the Commission normally submits such request by filing a motion. Only in the most unusual of circumstances does the Commission consider letters and other evidence in the absence of a motion for relief. Mr. bin 'Attash is not a lawyer and the Commission does not expect him to be able to compose legal briefs in support of his position. Although Mr. bin 'Attash is represented by counsel and the Commission has not found good cause to sever the attorney/client relationship, the Commission agrees with Mr. bin 'Attash that it is unreasonable for him to rely on his counsel to help him file a motion to establish good cause to sever their relationship with him.

d. The Commission finds it appropriate to appoint an independent defense counsel to advise Mr. bin 'Attash regarding his desire to sever his attorney/client relationship with Ms. Bormann and Mr. Schwartz and assist him in filing any motions deemed appropriate after consultation.

6. It is hereby **ORDERED**: The Chief Defense Counsel, Office of the Military Commission, will, within **21 calendar days of the date of this Order**, file a memorandum of appointment for an appropriately cleared independent defense counsel to advise and assist Mr. bin 'Attash

⁶ Unofficial/Unauthenticated Transcript of the *Khalid Sheik Mohammad et al* Motions Hearing Dated 2/17/2016 from 9:35 AM to 11:00 AM, at 10243.

⁷ Unofficial/Unauthenticated Transcript of the *Khalid Sheik Mohammad et al* Motions Hearing Dated 2/17/2016 from 9:35 AM to 11:00 AM, at 10244.

regarding his desire to sever his attorney/client relationship with Ms. Bormann and Mr. Schwartz to include any potential impacts from such a severance. If appointment of independent counsel is not accomplished by 21 calendar days, the Chief Defense Counsel shall notify this Commission denoting the status of the appointment process and the anticipated day of the appointment. The independent defense counsel will advise Mr. bin 'Attash only on his desire to sever his attorney/client relationship with Ms. Bormann and Mr. Schwartz. The independent counsel will not be aligned with the rest bin 'Attash legal team.

So **ORDERED** this 21st day of February, 2016.

//s//
JAMES L. POHL
COL, JA, USA
Military Judge

Attachment C

Filed with TJ
21 March 2016

Appellate Exhibit 380MM (CDC)
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DEPARTMENT OF DEFENSE
CHIEF DEFENSE COUNSEL FOR MILITARY COMMISSIONS
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

16 March 2016

MEMORANDUM FOR THE CONVENING AUTHORITY

SUBJECT: Update on the Independent Counsel Issue

On 21 February 2016, the military judge in *United States v. Khalid Shaikh Mohammad, et. al.* entered an order, AE 380II, directing me to appoint an "appropriately cleared independent defense counsel to advise and assist" Mr. Walid Muhammad Salih Mubarek Bin 'Attash regarding his 16 February 2016 request to sever his attorney/client relationship with Ms. Cheryl Bormann, his learned counsel, and Mr. Michael Schwartz, a civilian attorney assigned to his case.

On 29 February 2016, I notified you that because the Military Commissions Defense Organization (MCDO) does not have an available counsel who is qualified as learned in the law relating to capital cases, it was not practical for me to detail an attorney assigned to, or employed by, the MCDO and that I would be appointing an independent counsel from outside the MCDO. On 8 March 2016, the military judge issued the attached order (AE 380 KK), which more fully explained his ruling that no good cause exists to sever the attorney-client relationship between Mr. Bin 'Attash and his defense team. As will be more fully explained in my notice to the military judge (AE 380 MM(CDC)), given his findings in AE 380 KK, I do not intend to appoint an independent counsel for Mr. Bin 'Attash, but will, consistent with my 2 December 2015 and 14 March 2016 memos to you, detail a second learned counsel to Mr. Bin 'Attash's defense team. A request for funding approval will be submitted as soon as I have identified such counsel.

If you have any questions about this matter, please contact me at [REDACTED] or by e-mail at john.baker [REDACTED]

A handwritten signature in black ink, appearing to read "J. G. Baker".

J. G. BAKER
Brigadier General, U.S. Marine Corps
Chief Defense Counsel for
Military Commissions

Attachment:
As stated

cc:
DGC (P&HP)
Bin 'Attash Defense Team
MCDO Admin

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

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p>AE 380KK</p> <p>SHORT FORM ORDER ATTORNEY/CLIENT SEVERANCE</p> <p>8 MARCH 2016</p>
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1. This order applies only to the case of *United States v. Walid Muhammad Salih Mubarak bin 'Attash*.

2. Background

a. From arraignment, on 5 May 2012, to date, Mr. bin 'Attash has been represented by Ms. Cheryl Bormann, as Appointed Learned Counsel, and by (then) Major Michael Schwartz as detailed military counsel. On or about January 2016, Mr. Schwartz was released from active duty and continued to serve as an Assistant Defense Counsel for Mr. bin 'Attash in his civilian capacity. Major Matthew Seeger was detailed to represent Mr. bin 'Attash as an Assistant Defense Counsel in August 2015.¹

b. During the October 2015 hearing, Mr. bin 'Attash requested information about *pro se* representation, however, he later stated he wished only to sever his relationship with his Learned Counsel, Ms. Bormann.² Over Government objection, the Commission ordered a closed, *ex parte* hearing with Mr. bin 'Attash and his Defense Team to allow Mr. bin 'Attash to inform the

¹ AE 006B, detailing as Defense Counsel in the Military Commission Case of United States v. Walid Muhammad Salih Mubarek bin 'Attash, filed 9 October 2015.

² Unofficial/Unauthenticated Transcript of the Khalid Sheik Mohammad et al Motions Hearing Dated 10/28/2015 from 9:32 AM to 10:03 AM, at 8858.

Commission of the reasons he believed established good cause to sever his attorney/client relationship with Ms. Bormann.³

c. The Commission determined Mr. bin ‘Attash did not establish good cause to sever his attorney/client relationship with Ms. Bormann, and subsequently issued a detailed order setting forth the findings of fact and conclusions of law that led the Commission to decide that Mr. bin ‘Attash had not established good cause to sever his attorney/client relationship with Ms. Bormann.⁴

d. The Commission reconvened 7 – 11 December 2015, for further proceedings. Mr. bin ‘Attash continued to voice his objection to his counsel.⁵ On 12 February 2016, prior to the start of the Commission proceedings scheduled to take place 16 – 26 February 2016, Ms. Bormann advised the Commission⁶ that Mr. bin ‘Attash still wished to sever his attorney/client relationship with her and that he now also wished to sever his relationship with Mr. Schwartz. Ms. Bormann further advised the Commission that Mr. bin ‘Attash drafted a letter with attachments for *ex parte* consideration by the Commission on the issue of attorney/client severance. The letter with six attachments was accepted by the Commission as an appellate exhibit.⁷

e. During the initial session of the Commission hearings on 16 February 2016, the Commission held a colloquy with Mr. bin ‘Attash regarding attorney/client severance.⁸ Mr. bin ‘Attash advised the Commission that he now also wished to sever his relationship with Mr.

³ Unofficial/Unauthenticated Transcript of the Khalid Sheik Mohammad et al Motions Hearing Dated 10/28/2015 from 11:43 AM to 11:53 AM, at 8918-8919. *See also* AE 380Z, ORDER Closure of *Ex Parte* Proceeding Held 28 October 2015, dated 30 October 2015.

⁴ AE 380BB, ORDER RIGHT TO COUNSEL, dated 4 December 2015 (*ex parte* and under seal).

⁵ Unofficial/Unauthenticated Transcript of the *Khalid Sheik Mohamad et al* Motions Hearing Dated 12 /8/2015 from 9:07 AM to 10:36 AM, at 9334-9337; Unofficial/Unauthenticated Transcript of the Khalid Sheik Mohamad et al Motions Hearing Dated 12 /9/2015 from 9:08 AM to 10:35 AM, at 9571; Unofficial/Unauthenticated Transcript of the Khalid Sheik Mohamad et al Motions Hearing Dated 12 /10/2015 from 9:05 AM to 10:13 AM, at 9708-9709.

⁶ *See* Attachment A to this Order.

⁷ AE 380EE (WBA), Letter from WBA, filed 16 February 2016 (*ex parte*/under seal).

⁸ Unofficial/Unauthenticated Transcript of the *Khalid Sheik Mohamad et al* Motions Hearing Dated 2/16/2016 from 9:14 AM to 10:32 AM, at 10196-10208.

Schwartz as well as Ms. Bormann.⁹ Mr. bin 'Attash did not request to sever his relationship with Major Seeger but advised the Commission that he met with Major Seeger only once, on 15 February 2016, and viewed Major Seeger as part of the defense team under the control of Ms. Bormann.¹⁰ Mr. bin 'Attash also stated a desire to submit another letter drafted in Arabic for the Commission to consider in furtherance of his desire to sever his relationship with Ms. Bormann.¹¹ The Commission ordered Mr. bin 'Attash's letter translated into English and provided to the Commission.¹² The translation was completed and the Commission accepted this new letter as an appellate exhibit.¹³ The Commission considered both letters filed *ex parte* and placed both letters under seal.¹⁴

f. The Commission denied Mr. bin Attash's request for attorney/client severance for the second time.¹⁵ The Commission advised Mr. bin 'Attash of its ruling on the record and further advised him that a detailed, *ex parte*, under seal written order would be forthcoming explaining the reasons why the Commission arrived at its decision.¹⁶ The Commission also ordered an independent counsel be appointed to assist Mr. bin 'Attash in preparing future filings on this matter.¹⁷

g. Following that announcement, Ms. Bormann requested to withdraw from representing Mr. bin 'Attash as Learned Counsel.¹⁸ Ms. Bormann listed a number of events and systemic

⁹ *Id.* at 10197.

¹⁰ *Id.* at 10200 and 10208.

¹¹ *Id.* at 10198-10199.

¹² *Id.* at 10229-10230.

¹³ AE 380FF (WBA), Letter from WBA, filed 16 February 2016 (*ex parte*/under seal).

¹⁴ AE 380HH, SEALING ORDER - AE 380EE (WBA) Letter from Mr. bin 'Attash dated 9 February 2016 and AE 380FF (WBA) Letter from Mr. bin 'Attash, dated 18 February 2016. The Commission also considered a portion of AE 380GG submitted on behalf of Mr. bin 'Attash by Counsel, *See* AE 380GG, Declaration of BG Baker, filed 17 February 2016. Unofficial/Unauthenticated Transcript of the *Khalid Sheik Mohamad et al* Motions Hearing Dated 2/17/2016 from 9:35 AM to 11:00 AM, at 10237-10238.

¹⁵ Unofficial/Unauthenticated Transcript of the *Khalid Sheik Mohamad et al* Motions Hearing Dated 2/17/2016 from 9:35 AM to 11:00 AM, at 10244.

¹⁶ *Id.*

¹⁷ AE 380II, ORDER APPOINTMENT OF INDEPENDENT COUNSEL, dated 21 February 2016.

¹⁸ Unofficial/Unauthenticated Transcript of the *Khalid Sheik Mohamad et al* Motions Hearing Dated 2/17/2016 from 9:35 AM to 11:00 AM, at 10248.

issues involving alleged government intrusion into the attorney/client relationship she believed necessitated her withdrawal request.¹⁹ She argued these situations affected Mr. bin 'Attash's perception of her and her team and chipped away at his trust in her and the team. When asked by the Commission whether there was anything Ms. Bormann has done to indicate a lack of trust, counsel responded: "I have tried my very hardest."²⁰

3. Law

a. To sever an attorney-client relationship with defense counsel, an accused must establish good cause. "Good cause" means a "truly extraordinary circumstance rendering virtually impossible the continuation of the established relationship." *United States v. Smith*, 35 M.J. 138, 141 (C.M.A. 1992). Examples of good cause have included "a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication." *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991). To establish good cause an accused must establish "justifiable dissatisfaction" with counsel's representation. See *United States v. Young*, 482 F.2d 993, 995 (5th Cir. 1973); *United States v. Calabro*, 467 F.2d 973, 986 (2d Cir. 1972), cert. denied, 410 U.S. 926 (1973); *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970). "The focus of the justifiable dissatisfaction inquiry is the adequacy of counsel in the adversarial process, not the accused's relationship with his attorney." *United States v. Barrow*, 287 F.3d 733, 738 (8th Cir. Iowa 2002) (citing *Wheat v. United States*, 486 U.S. 153, 159 (1988)).

b. An accused is guaranteed the assistance of competent counsel; not the right to a "meaningful relationship" with counsel. *Morris v. Slappy*, 461 U.S. 1, 13-14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983). Loss of trust or confidence in an attorney or attorneys, absent an objective, legitimate reason, is insufficient cause to warrant assignment of substitute counsel. *United States v. Allen*, 789 F.2d 90, 93 (1st Cir. 1986), cert. denied, 479 U.S. 846, 107 S. Ct. 164, 93 L. Ed. 2d 103 (1986). Disagreements over trial tactics and defense strategy, or even a personality conflict

¹⁹ *Id.* at 10249-10268.

²⁰ *Id.* at 10269.

between counsel and client, will not impair the right to effective representation. *United States v. Lindsey*, 48 M.J. 93, 98 (C.A.A.F. 1998). Similar analysis is used by federal, state, and military courts to determine severance issues where a defendant requests to sever his relationship with his attorney and where an attorney wishes to withdraw from the representation. *See Thompson v. Special Enforcement, Inc.*, 2008 U.S. Dist. LEXIS 91364, *4 (C.D. Cal. Oct. 27, 2008) (holding where an attorney seeks to withdraw the moving party has the burden to establish good cause and demonstrate the ends of justice require severance); *United States v. Porter*, 405 F.3d 1136, 1140 (10th Cir. 2005) (permitting “substitution or withdrawal of counsel only when there is good cause, such as a conflict of interest, a complete breakdown of communication or an irreconcilable conflict...”); *United States v. Barnes*, 63 M.J. 563 (A.F. Ct. Crim. App. 2006) (holding despite the strong bonds of an attorney-client relationship, an attorney may withdraw when there is good cause shown on the record.).

4. Findings

a. Mr. bin ‘Attash’s claim of loss of trust in his counsel is not objectively reasonable. Mr. bin ‘Attash’s claims alleged in AE 380EE and AE 380FF are contextual and not justifiable dissatisfactions. He has not established good cause. In her request to withdraw, Ms. Bormann argued that the system prevented her from having a trusting relationship with Mr. bin ‘Attash. Nothing she alleged was a reasonable legitimate reason for a client to distrust an attorney. Following Ms. Bormann’s argument to its logical conclusion, no attorney would be able to represent any of the accused in these Commission proceedings. Mr. bin ‘Attash may not like the decisions of the Commission. He may not like the forum in which the Commission is being conducted nor the conditions of confinement under which he is being held. Mr. bin ‘Attash may erroneously believe a more able attorney could have persuaded the Commission to reach decisions more favorable to him, particularly regarding conditions of confinement. None of this

provides legitimate cause to sever a relationship from a learned, experienced, zealous advocate who has represented Mr. bin 'Attash for more than four years.

b. Although, Mr. bin 'Attash's concerns appear to be sincerely held, that does not mean his distrust equates to justifiable dissatisfaction with the representation of Ms. Bormann or Mr. Schwartz. Similarly, the reasons Ms. Bormann cites to withdraw as learned counsel for Mr. bin 'Attash also appear also to be sincerely held. However, her concerns stem from situations that are not unique to Mr. bin 'Attash. Ms. Bormann has not stated a legitimate conflict of interest that would prevent appropriate representation. The focus of attorney/client severance analysis is not on whether the accused has a meaningful relationship with counsel but instead on the adequacy of the representation by counsel. *See Barrow*, 287 F.3d at 738. In this case, there is no evidence Ms. Bormann has not effectively and zealously represented Mr. bin 'Attash.

5. RULING.

a. Mr. bin 'Attash has not established a justifiable dissatisfaction to establish good cause to sever either Ms. Bormann's or Mr. Schwartz's representation. Ms. Bormann and Mr. Schwartz will remain counsel for Mr. bin 'Attash. Mr. bin 'Attash's request for severance is **DENIED**.

b. Ms. Bormann has not established good cause to withdraw, and will remain as Learned Counsel for Mr. bin 'Attash. Ms. Borman's request to withdraw as counsel is **DENIED**.

c. The Commission has issued an *ex parte* under seal Long Form Order with respect to Attorney Severance. The Defense Team for Mr. bin 'Attash will have the Long Form Order translated into Arabic and give the translated order to Mr. bin 'Attash.

So **ORDERED** this 8th day of MARCH, 2016.

//s//
JAMES L. POHL
COL, JA, USA
Military Judge

Attachment D

Filed with TJ
21 March 2016

Appellate Exhibit 380MM (CDC)
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DEPARTMENT OF DEFENSE
CHIEF DEFENSE COUNSEL FOR MILITARY COMMISSIONS
MILITARY COMMISSIONS DEFENSE ORGANIZATION
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

March 14, 2016

MEMORANDUM FOR THE CONVENING AUTHORITY

SUBJECT: Request for Authorization of Additional Year of Services for Learned Counsel

Pursuant to my duties under Regulation for Trial by Military Commission 9-4, I request that the option year on the contract that provides reimbursement for expert services for the Learned Counsel representing clients in *United States v. Khalid Sheikh Mohammad, et al.* (9/11 cases) and *United States v. Abd al-Nashiri* be exercised and that you authorize an additional twelve months of funding for each Learned Counsel.

Additionally, as a follow-up to my 2 December 2015 memorandum, where I explained that I had determined that each of the 9/11 cases must be resourced with two learned counsel in order to provide effective representation, I am notifying you that it is not practical for me detail an attorney assigned to, or employed by, the Military Commissions Defense Organization as a second learned counsel for any 9/11 accused because the MCDO does not have any available counsel who is qualified as learned in the law relating to capital cases. Accordingly, I shall select an appropriately qualified civilian counsel for each 9/11 accused and forward an approval of funding for this counsel to you in the near term.

A handwritten signature in black ink, appearing to read "J. G. Baker", is positioned above the typed name.

J. G. BAKER
Brigadier General, U.S. Marine Corps
Chief Defense Counsel for
Military Commissions

cc:
DGC (P&HP)
All Learned Counsel
MCDO Admin

Attachment E

Filed with TJ
21 March 2016

Appellate Exhibit 380MM (CDC)
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UNCLASSIFIED//FOR PUBLIC RELEASE
DEPARTMENT OF DEFENSE
CHIEF DEFENSE COUNSEL FOR MILITARY COMMISSIONS
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

2 December 2015

MEMORANDUM FOR THE CONVENING AUTHORITY

SUBJECT: Initial Assessment of the Military Commissions Defense Organization

- Refs: (a) Regulation for Trial by Military Commission, "Ch. 9, para. 9.4 - Logistical Support of Defense Counsel," 2011
(b) Deputy Secretary of Defense Memorandum "Equitable Resourcing of the Office of Military Commissions," May 7, 2014
(c) Convening Authority, Office of Military Commissions, Memorandum "Reassessment of Personnel Requirements," February 6, 2015
(d) Military Commissions Defense Organization Memorandum "Request for Additional Personnel – Senior Information Technology Specialist," October 5, 2015

As discussed during my August in-call and consistent with my authority under reference (a), I have conducted a comprehensive assessment of the Military Commissions Defense Organization (MCDO).¹ The results of that assessment, which I have shared with the Deputy General Counsel (Personal and Health Policy) of the Department of Defense (DoD), are troubling. In simplest terms, my assessment reveals that the MCDO is an organization in crisis. While I have four broad areas of concern – an unacceptable command climate, inadequate resourcing, significant systemic obstacles that prevent me from providing the required oversight and supervision of my personnel, and classification rules and security clearance processes that have proven unworkable, this memorandum will focus almost exclusively on the personnel requirements that I have determined necessary "to ensure the successful functioning and mission accomplishment" of the MCDO. RTCM 9-4. In the coming months, I anticipate submitting similar requests for additional logistical support.

Shortly after being appointed the Chief Defense Counsel (CDC), I ordered a DEOMI command climate survey of the MCDO be conducted. This survey provided startling and extremely troubling data concerning the level of exhaustion and "burnout" among both military and civilian members assigned.² The survey found that MCDO personnel's level of exhaustion registered well-below service average; for example, 53% of respondents answered that they "feel mentally worn out"; 63% feel "physically worn out"; and 59% "feel emotionally worn out." Further, our senior officers registered below DoD averages for being comfortable in engaging in help seeking behaviors. This level of exhaustion is consistent with the metrics we have gathered regarding the workloads and travel schedules of our personnel. For example, our civilian paralegals average approximately 30 hours of overtime during hearing weeks at U.S. Naval Station Guantanamo Bay, Cuba (GTMO). In the five 9/11 capital cases, the U.S. Government has already produced approximately 14,000,000 megabytes of electronic discovery, much of which is classified, and has disclosed approximately 46,000 documents in discovery comprised of over 300,000 pages, of which 13,000 are classified. In *United States v. al Nashiri*, the U.S. Government has produced 20,167 documents including 246,000 pages, of which 42,000 are classified. These numbers do not include the still-classified 6,900 page

¹ Among other things, my assessment was based on previous CDC resourcing requests; the Feb 15 CA resourcing decision paper; reviews of federal capital resourcing models; discussions with federal capital resource counsel; the limited metrics available of the cases as they exist now – with limited classified discovery, motion practice that has been focused on systemic issues and not the individual cases; interviews with learned counsel and long-term civilian MCDO staff members; meetings with the JTF, OCP, OUSD(I), WHS, and other critical stakeholders; a review of the records, as well as my and CAPT Filbert's background and experiences.

² The survey also revealed a significant lack of trust in leadership, systemic failures in communication, and well below DoD averages in organizational effectiveness. I have taken affirmative action to address the many non-resource related issues identified by the survey.

full SSCI report on the RDI program or the 6,000,000 documents on which it is based or the other additional discovery that we know will be forthcoming or the subject of significant litigation. The witnesses involved in these active cases are spread throughout the world, requiring frequent CONUS and OCONUS travel by each trial team. This travel is in addition to the regular travel to GTMO by team members for client meetings and pretrial hearings. To date, in the 9/11 cases, there have been over 1800 defense pleadings filed, totaling more than 25,000 pages. In *United States v. al Nashiri*, there have been over 700 pleadings filed to date, totaling more than 10,000 pages. The overall takeaway from the command climate survey, other relevant metrics, and my own personal assessment is that the extreme workload and pace of litigation³ has created an unmanageable situation for our personnel that must to be addressed now.

The untenable situation that exists for MCDO personnel is directly related to two factors: (1) the lack of sufficient manning to address the staggering demands of these cases; and (2) the fundamental facts and circumstances of the seven active commission cases (six of which are capital cases). As has been well documented for several years, the services have failed to meet their obligations in providing judge advocates. Currently, the services are only providing 30 judge advocates for the recently revalidated 51 judge advocate billets. At least 16 of the military counsel are scheduled to PCS next year, creating the strong likelihood that MCDO's military manning shortage will continue to get worse. Simply sending more judge advocates won't solve the MCDO's attorney problem, as the additional judge advocates the services would ultimately provide will not have the skills necessary or the ability to stay with the MCDO to see these cases through conclusion. Instead of more judge advocates, the MCDO requires more qualified civilian attorneys be assigned.

In February, your predecessor took an important first step in addressing the MCDO's attorney shortfall when he authorized the hiring of eight additional DoD civilian attorney billets. We have used these billets to hire highly qualified attorneys with team specific needs that the services have been unable and unwilling to provide. While the February hiring approvals was a step in the right direction, it did not go far enough to address the MCDO's attorney shortfall in capital cases where our trial teams do not meet the minimum standards of federal capital cases of far less complexity and magnitude. For example, in *United States v. Moussaoui*, the only 9/11-related federal court case, the court funded over 100 contract attorneys to deal with unclassified discovery in addition to the six counsel of record. Moreover, federal courts have routinely appointed two learned counsel in capital cases where charges were based on a single incident with a single victim. Two learned counsel in complex capital cases not only ensures that the substantial responsibilities and obligations of learned counsel, as set forth by the American Bar Association are met,⁴ but also helps avoid cases grinding to a halt or being substantially delayed if one learned counsel becomes ill or unavailable. We have already experienced situations in the 9/11 cases where the proceedings had to be stopped because the single learned counsel for an accused was sick or not available.⁵ In addition to a second learned counsel for each capital case and additional DoD civilian attorney billets, the MCDO requires significantly more civilian paralegals to address the massive discovery in these cases and to reduce the exhaustion and burnout caused by unmanageable workloads and excessive travel. The MCDO also needs additional full-time interpreter support and true criminal defense investigators, including the specialized mitigation investigators require in capital cases vice the

³ The pace and demands of the 9/11 cases will surely increase as the litigation moves forward and ultimately enters the trial phase. The focus of the litigation to date has primarily been on motions addressing the commissions system itself. Going forward, the defense teams will address individual case issues through motions practice. The 9/11 trial will likely last a minimum of 12 months and could very well last much longer depending on a multitude of factors.

⁴ American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

⁵ Hearings in one 9/11 case were unexpectedly cancelled for two days in September 2013 after one Learned Counsel was hospitalized with an upper-respiratory infection. Hearings intended to be scheduled in December 2012 were delayed one month due to the unavailability of one learned counsel who was out of the country adopting a child. At the last 9/11 hearing, a learned counsel spent what was supposed to be a hearing day in bed with strep throat.

investigators hired through the current contract. I will address the MCDO's interpreter and investigator requirements in future correspondence.

It is my view that the failure to address the inadequacies of MCDO's personnel structure will significantly increase the likelihood that active cases will be derailed prior to or during trial or be overturned on appeal. Historically, death penalty verdicts in the military are extraordinarily vulnerable on appeal. The reversal rate of military death sentences is 81% since the imposition of the modern death penalty system in 1984. One-third of all reversed capital cases in the military occurred, at least in part, because of ineffective assistance from counsel. I believe that addressing personnel requirements now is essential to avoiding the problems commonly seen on appeal in military death penalty cases.

After conducting my assessment, I have determined that the MCDO should be resourced with 64 attorneys (38 military counsel + 26 GS attorneys), 54 paralegals (33 military paralegals and 21 GS paralegals), 2 GS Information Technology Specialists (reference (d) contains my request for a second GS IT specialist), and 8 Operations and Administrative support personnel.⁶ Additionally, I have determined that each capital case, less *Nashiri*⁷, should be resourced with two learned counsel. This level of resourcing would allow me to assign personal as follows:

	Judge Adv.	GS Attorney	Military Paralegal	GS Paralegal	Support Staff
Capital Cases ⁸ *	3 (18)	3 (18)	4 (24)	3 (18)	0
Contested					
Non-Capital	3	2	3	1	0
G Plea					
Non-Capital	2 (4)	0	1 (2)	0	0
Appellate**	2	4	1	1	0
Pending cases***	1 (7)	0	0	0	0
Front Office	<u>4</u>	<u>2</u>	<u>3</u>	<u>1</u>	<u>8</u>
Totals	38	26	33	21	8

* Plus 2 learned counsel (less al *Nashiri* who requires 1 at this stage)

** Numbers will need to increase when the trials are concluded

*** Cases identified in Aug 14 Chief Prosecutor Memo

I look forward to discussing these issues with you.

J. G. BAKER
Brigadier General, U.S. Marine Corps
Chief Defense Counsel for
Military Commissions

cc:

DGC (P&HP)
Service JAGs
SJA to CMC

⁶ Compared to current structure, this represents 13 fewer judge advocates and 12 additional GS attorneys, 15 additional GS paralegals, and 1 additional GS IT specialist.

⁷ Until the stay in *al Nashiri* is resolved, a second learned counsel in that case is not required.

⁸ This assessment of the minimum personnel resources for our capital commissions is based on the authorities governing capital cases, including the Fifth, Sixth, and Eighth Amendments to the United States Constitution. Due process requires 'that an indigent criminal defendant is entitled to the minimum assistance necessary to assure him "a fair opportunity to present his defense' and 'to participate meaningfully in [the] judicial proceeding,'" *Medina v. California*, 505 U.S. 437, 444-45 (1992) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 76) (1986)), including the personnel required to carry out the defense mission. *Ake v. Oklahoma*, 470 U.S. 68 (1986) (reversing for failure to appoint a defense mental health expert); *Little v. Armontrout*, 835 F.2d 1240, 1243 (8th Cir. 1987); see also *Rojem v. Gibson*, 245 F.3d 1130, 1139 (10th Cir. 2001) ("A state must provide an indigent defendant with the basic tools to present an adequate defense or appeal."); *Terry v. Rees*, 985 F.2d 283, 284 (6th Cir. 1993) ("Criminal trials are fundamentally unfair if a state proceeds against an indigent defendant without making certain that he has access to the raw materials integral to building a defense."); *Castro v. Ward*, 138 F.3d 810, 826 (10th Cir. 1998) ("*Ake* also requires that the State provide to indigent defendants the 'basic tools of an adequate defense or appeal.'").