

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

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	AE 006M RULING Defense Request For Excusal of Detailed Defense Counsel 8 February 2019
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1. Procedural History.

a. On 6 June 2016, the Chief Defense Counsel (CDC) detailed Captain (Capt) Brian Brady, USAF, as “Assistant Defense Counsel, under supervision of Defense Counsel” to represent Mr. bin ‘Attash.¹ Capt Brady entered an appearance before the Commission at the commencement of the March 2017 hearings.²

b. On 22 January 2019, Counsel for Mr. bin ‘Attash moved³ to excuse Capt Brady from further representation of Mr. bin ‘Attash pursuant to Military Commissions Rule of Court (RC) 4.4(b) (1 September 2016). In support of the motion, Counsel for Mr. bin ‘Attash asserted (1) the CDC on 3 January 2019, determined that Capt Brady was operating under a conflict of interest with respect to his ongoing representation of Mr. bin ‘Attash and found good cause to warrant his excusal; and (2) Counsel for Mr. bin ‘Attash who are signatories to the motion (Ms. Cheryl T. Bormann, Learned Counsel; Major Matthew H. Seeger, Detailed Military Defense Counsel; and Messrs. Edwin A. Perry and William R. Montross, Jr., Detailed Defense Counsel) agree that

¹ AE 004W (WBA), Mr. bin ‘Atash’s Notice of Detailing of Assistant Defense Counsel, filed 6 June 2016.

² Unofficial/Unauthenticated Transcript of the *U.S. v. Khalid Shaikh Mohammad*, et al. Motions Hearing Dated 20 March 2017 from 8:59 A.M. to 10:17 A.M. at pp. 14604-14605.

³ AE 006I (WBA), Mr. bin ‘Atash’s Request for Excusal of Detailed Defense Counsel, filed 22 January 2019. Although styled as a request, the Commission considers this filing to be a motion requesting relief.

Captain Brady has a conflict of interest and consent to his excusal from further representation of Mr. bin ‘Attash.⁴

c. Counsel for Mr. bin ‘Attash did not provide the Commission with the factual basis for the conflict of interest found by the CDC. The Commission deferred decision⁵ on whether to permanently excuse Capt Brady because it had insufficient information to determine whether there is good cause on the record to permanently excuse Capt Brady. Accordingly, the Commission ordered Counsel for Mr. bin ‘Attash to file with the Commission the factual basis for the CDC’s determination.⁶

d. On 6 February 2019, Counsel for Mr. bin ‘Attash complied with the Commission’s order and submitted an *ex parte* filing setting forth the factual basis for the CDC’s determination that Capt. Brady was operating under a conflict of interest.

2. Law.

a. The Military Commissions Act of 2009 requires a Military Defense Counsel be detailed to represent the Accused facing trial by Military Commission. 10 U.S.C. § 948k(a)(1). For cases referred capital, the Accused has a right, “to the greatest extent practicable[,]” to be represented by a counsel who is “learned in applicable law relating to capital cases....” 10 U.S.C. § 949a(2)(C)(ii). Assistant and associate defense counsel “may” be detailed to represent the Accused. 10 U.S.C. § 948k(a)(2).

b. Rule for Military Commissions 505(d)(2)(B) and RC 4.4(b) require good cause to be shown on the record (*i.e.*, found by the Military Judge) prior to excusal of any defense counsel

⁴ Counsel for Mr. bin ‘Attash have not advised their client on the issue nor sought his consent for Capt Brady’s excusal.

⁵ AE 006K, Ruling, Defense Request For Excusal of Detailed Military Defense Counsel, dated 25 January 2019.

⁶ *Id.* at 2.

who has formed an attorney-client relationship with an Accused and who has entered an appearance before the Commission.⁷

3. Findings of Fact. The Commission has considered the filings by Counsel for Mr. bin ‘Attash, to include the factual basis for the CDC’s determination that Capt Brady was operating under a conflict of interest, and makes the following findings of fact.

a. In accordance with 10 U.S.C. § 948k(a)(1) and 10 U.S.C. § 949a(2)(C)(ii) respectively, Major Seeger represents Mr. bin ‘Attash as detailed Military Defense Counsel and Ms. Bormann represents him as Learned Counsel.

b. The CDC detailed Capt Brady to represent Mr. bin ‘Attash as an Assistant Defense Counsel under the supervision of Defense Counsel. Capt Brady is not a statutorily required defense counsel.

c. Capt Brady formed an attorney-client relationship with Mr. bin ‘Attash and entered an appearance before the Commission.

d. The CDC determined that Capt Brady was operating under a conflict of interest.

e. Counsel for Mr. bin ‘Attash agree with the CDC’s determination and have requested that the Commission permanently excuse Capt Brady.

4. Conclusion. Under the circumstances of this case, Counsel for Mr. bin ‘Attash have established good cause on the record to permanently excuse Capt Brady from further representation of Mr. bin ‘Attash before this Commission. The Commission finds that Mr. bin ‘Attash will continue to be adequately represented by his detailed Military Defense Counsel, his Learned Counsel, and other defense counsel that have been detailed to his Defense Team.

⁷ See AE 380CC, Short Form Order Right to Counsel, dated 4 December 2015; Unofficial/Unauthenticated Transcript of the *U.S. v. Khalid Shaikh Mohammad, et al.* Motions Hearing Dated 29 October 2015 from 9:06 A.M. to 9:35 A.M. at p. 8945; AE 380KK, Order Attorney/Client Severance, dated 8 March 2016 (*Ex Parte*/Under Seal).

5. **Ruling.** The motion to permanently excuse Capt Brady is **GRANTED**. The granting of this motion, however, shall not constitute justification for a delay in the proceedings.

So **ORDERED** this 8th day of February, 2019.

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K. A. PARRELLA
Colonel, U. S. Marine Corps
Military Judge