

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

AE595AA (AAA)

Mr. al Baluchi’s Motion to Decline Joinder
to AE595X (WBA)

5 March 2019

1. **Timeliness:** This motion is timely filed, per RC 3.5(i)(1) and AE595Y Expedited Briefing Order.
2. **Relief Sought:** Pursuant to RC 3(5)(i)(1), Mr. al Baluchi respectfully declines joinder to AE595X (WBA) Mr. bin ‘Atash’s Motion to Transfer AE595W (WBA) Mr. bin ‘Atash’s Motion to Disqualify Colonel Keith A. Parella, USMC, as Military Judge, to Colonel Douglas K. Watkins, USA, Chief Judge of the Military Commissions.
3. **Facts:** Mr. al Baluchi adopts the facts set forth in AE595X ¶4.
4. **Argument:**

Military Judge Parella should recuse himself from consideration of this case; *after* he does so, Chief Trial Judge Watkins should detail a new judge. Until Military Judge Parella is undetailed, Chief Trial Judge Watkins does not have authority to detail an additional military judge to this military commission, whether himself or someone else.

Although AE595X makes powerful arguments as to the unsuitability of Military Judge Parella to address questions of his own disqualification, the military commissions structure does not permit two military judges to be detailed to a military commission at the same time. If Chief Trial Judge Watkins detailed himself to hear AE595W, he would act outside the authorization of

statute and deprive the military commission of jurisdiction. Furthermore, the detailing of a second military judge situationally superior to the first military judge, would threaten the judicial independence of the military commission, deny due process of law, and raise the possibility of unlawful influence.

Accordingly, Mr. al Baluchi respectfully declines joinder to AE595X. Mr. al Baluchi remains joined to AE595W (WBA) Mr. bin ‘Atash’s Motion to Disqualify Colonel Keith A. Parella, USMC, as Military Judge, except as to ¶ 2. To the extent necessary, Mr. al Baluchi declines joinder to AE595Z Notice of Receipt, Attachment A.

The role of military judges in a military commission is not analogous to District Judges in an Article III court. A District Court, rather than any particular instance of that District Court, possesses jurisdiction over a case. Barring a conflict of interest, all the judges of a District Court are equally eligible to preside over any case—or portion of a case—before that District, and which judge or judges preside over a case is simply a matter of administrative convenience.

Military judges, in contrast, are not interchangeable with respect to a specific military commission. The Judge Advocates General nominate a pool of military judges, which constitutes the Military Commissions Trial Judiciary, in addition to whatever other duties those military judges may be assigned.¹ In contrast to a District Court, a military tribunal “is called into existence for a special purpose and to perform a particular duty.”² The military judges in the Military Commissions Trial Judiciary do not collectively preside over all cases before any military

¹ RTMC 6-1(b).

² *Runkle v. United States*, 122 U.S. 543, 555 (1887).

commission; any particular military judge has no relationship to a military commission unless detailed to that military commission.

By statute and regulation, each military commission is presided over by exactly one military judge at a time. Under 10 U.S.C. § 948j(1), “A *military judge* shall be detailed to each military commission under this chapter.”³ As directed by Congress, RTMC 6-2 implements the requirement of a single judge for each military commission: “The Chief Trial Judge will detail *a military judge* from the Military Commissions Trial Judiciary for each military commission trial.”⁴ The Chief Trial Judge does not have statutory authority to detail more than one military judge, even if one of those military judges is him- or herself, to this military commission. Nor does the Chief Trial Judge have supervisory or appellate authority to review substantive legal decisions of any detailed military judge.

Like a court-martial, a military commission must comply with “the exacting requirements necessary to creation and maintenance of a valid military tribunal.”⁵ As a “creature of statute,” a military tribunal “must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction.”⁶ If a military judge acts in a case without statutory authorization, the action deprives the military tribunal of jurisdiction.⁷ Detailing a second

³ Emphasis added.

⁴ Emphasis added.

⁵ *United States v. Durham*, 35 C.M.R. 451, 453 (C.M.A. 1965).

⁶ *McClaghtry v. Deming*, 186 U.S. 49, 62 (1902).

⁷ *See, e.g., United States v. Singleton*, 21 C.M.A. 431, 434 (C.M.A. 1972).

military judge to this military commission would exceed the statutory authorization in § 948j(1) and eliminate whatever jurisdiction this military commission currently possesses.

At the same time, detailing a second, situationally superior military judge to the same military commission would further threaten the judicial independence of Military Judge Parella and raise the threat of unlawful influence. Title 10 U.S.C. § 949b(2) prohibits any person from influencing the action of a military commission; a separate review by a Chief Trial Judge is not one of the exceptions contained in § 949b(a)(3). In fact, the actions of legal superiors with respect to military trial judges have a history of threatening the independence of those military trial judges.⁸ Until Military Judge Parella is undetailed, review of his decision not to recuse himself must come by extraordinary writ, rather than an extra-statutory approach which assigns a portion of Military Judge Parella's judicial authority elsewhere.

Make no mistake: Mr. al Baluchi fully agrees with Mr. bin 'Atash's position that Military Judge Parella's professional and personal associations disqualify him from presiding over this case. In fact, Mr. al Baluchi has joined Mr. al Hawsawi's effort in the Court of Military Commission Review to enforce the right to a tribunal which is unbiased in both appearance and fact. The proposed detailing of a second military judge to this military commission, however, would compound rather than resolve the serious threat to judicial independence and rob this military commission of whatever jurisdiction it currently possesses.

⁸ See, e.g., *United States v. Ledbetter*, 2 M.J. 37, 42 (C.M.A. 1976); *United States v. Hutchinson*, 2015 CCA LEXIS 269, *33-34 (A.F. C.C.A. June 29, 2015) (unpublished decision).

5. **Request for Oral Argument:** Mr. al Baluchi does not independently request oral argument on AE595X or AE595AA, but reserves the right to be heard on any oral argument relating to Military Judge Parella's disqualification.

6. **Request for Witnesses:** None.

7. **Conference with Opposing Counsel:** Exempt under RC 3(5)(i)(3).

8. **Attachments:**

A. Certificate of Service

Very respectfully,

//s//

JAMES G. CONNELL, III
Learned Counsel

//s//

STERLING R. THOMAS
Lt Col, USAF
Defense Counsel

//s//

ALKA PRADHAN
Defense Counsel

//s//

BENJAMIN R. FARLEY
Defense Counsel

//s//

MARK E. ANDREU
Capt, USAF
Defense Counsel
Counsel for Mr. al Baluchi

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 5th day of March, 2019, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//

JAMES G. CONNELL, III
Learned Counsel