MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **KHALID SHAIKH MOHAMMAD;** **WALID MUHAMMAD SALIH** **MUBARAK BIN 'ATTASH;** **RAMZI BINALSHIBH;** **ALI ABDUL AZIZ ALI;** **MUSTAFA AHMED ADAM** **AL HAWSAWI**	**AE 595BB (GOV)** **Government Consolidated Response** To Mr. Bin 'Attash's Motion to Disqualify Colonel Keith A. Parrella, USMC, as Military Judge Presiding in *United States v. Mohammad, et al.* **and** Mr. Bin 'Attash's Motion to Transfer AE 595W (WBA), Mr. Bin 'Attash's Motion to Disqualify Colonel Keith A. Parrella, USMC, as Military Judge, to Colonel Douglas K. Watkins, USA, Chief Judge of the Military Commissions 6 March 2019

1. Timeliness

The Prosecution timely files this Response pursuant to AE 595Y, Expedited Briefing Order.

2. Relief Sought

The Prosecution respectfully requests that this Commission deny the requested relief set forth in AE 595W (WBA), Mr. Bin 'Attash's Motion to Disqualify Colonel Keith A. Parrella, USMC, as Military Judge Presiding in *United States v. Mohammad, et al.*, as well as AE 595X (WBA), Mr. Bin 'Attash's Motion to Transfer AE 595W (WBA), Mr. Bin 'Attash's Motion to Disqualify Colonel Keith A. Parrella, USMC, as Military Judge, to Colonel Douglas K. Watkins, USA, Chief Judge of the Military Commissions.

3. Burden of Proof

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted in both AE 595W (WBA) and AE 595X (WBA). *See* Rule

for Military Commission ("R.M.C.") 905(c)(1)–(2). In AE 595W (WBA), the Defense must demonstrate that "the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding," or that "the military judge has acted as counsel, legal officer, staff judge advocate, or convening authority as to any offense charged or in the same case generally." R.M.C. 902(b)(1)–(2); *see also* 28 U.S.C. §§ 455(b)(1),(3) (stating similar grounds for disqualification).

4. Facts

On 27 August 2018, Colonel Keith A. Parrella, USMC, was detailed to preside over the military commission case of *United States v. Mohammad, et al.* as the Military Judge.[1] On the same day, Judge Parrella provided all parties with his summarized biography.[2] In response to requests for discovery related to him,[3] Judge Parrella provided all parties with copies of his United States Marine Corps Fitness Report and a memorandum pertaining to his 2014–2015 fellowship with the National Security Division ("NSD") of the U.S. Department of Justice ("DOJ").[4] In so doing, the Military Judge made clear on the record that he provided the additional information "in an effort to promote expeditious resolution of any concerns of the parties."[5]

On 10 September 2018, all parties, including Mr. Bin 'Attash's counsel, conducted extensive *voir dire* of Judge Parrella, lasting from 9:03 a.m. until 2:34 p.m.[6] During Judge Parrella's *voir dire*, counsel for all five Accused, to include Mr. Bin 'Attash, extensively questioned Judge Parrella on, *inter alia*, his 2014–2015 fellowship with NSD, his past acquaintance with one of the trial counsel (Mr. Jeffrey D. Groharing), his limited past

[1] AE 001A.

[2] AE 001B.

[3] AE 595 (MAH); AE 595A (WBA).

[4] AE 595B.

[5] AE 595G, Ruling, at 2; *see also* Unofficial/Unauthenticated Transcript ("Tr.") at 20416.

[6] Tr. at 20420–568; *see also* AE 595G at 2.

interactions with intelligence community ("IC") and law enforcement agencies, and his recollection of his reaction to the events of September 11, 2001.[7] On 11 September 2018, Judge Parrella denied (1) a combined Defense motion for him to disqualify or recuse himself and (2) a Defense request to abate the proceedings until the Military Judge had completely reviewed all prior pleadings and transcripts in the case.[8] The Commission, however, stated that it would "allow counsel to move the commission for reconsideration based upon the discovery of additional evidence." Tr. at 20605.

In his oral 11 September 2018 ruling, Judge Parrella concluded that his one-year tour as a Fellow at the DOJ did not create a situation where his impartiality "might reasonably be questioned pursuant to Rule for Military Commission ('R.M.C.') 902(a)," and that his time at the DOJ did not meet any of the specific grounds for disqualification under R.M.C. 902(b).[9] In reaching this conclusion, Judge Parrella also specifically found, *inter alia*: (1) he did not have a personal bias or prejudice toward any party; (2) he did not possess personal knowledge of disputed evidentiary facts concerning this proceeding as a result of his time at the DOJ; (3) he did not act as counsel on this matter or any other military commission case in any capacity while at the DOJ; (4) he did not have professional interaction with any of the DOJ attorneys assigned to this Commission while serving as a Fellow at the DOJ; (5) he was never employed by the DOJ, but rather "worked there pursuant to a memorandum of understanding between the Marine Corps and the DOJ"; (6) his tenure at the DOJ was "limited to an academic year" and was part of an established Marine Corps program to send senior officers to "government agencies, private corporations, and various think tanks in order to observe, inform, and exchange ideas"; (7) he did not undergo any type of hiring process or training within the DOJ; (8) he was not evaluated by any DOJ employee, nor did any DOJ employee have "the ability to influence his evaluation or career in a negative way"; (9) his Fitness Report for his time at the DOJ was an "unobserved

[7] Tr. at 20420–568.

[8] *Id.* at 20598–605; *see also* AE 595G at 3.

[9] Tr. at 20602.

fitness report," meaning that although a DOJ employee's name appears on the report, there are no markings associated with the report; (10) he was "always co-detailed" to DOJ cases, meaning that he always worked alongside a DOJ attorney; and (11) he "never worked on any matter involving 9/11 or any other commissions case."[10]

On 19 October 2018, Defense counsel for Mr. Hawsawi filed AE 595I (MAH), Defense Motion to Recuse Military Judge, Colonel Parrella. In doing so, the Defense alleged that the following thirteen facts demonstrated that the Military Judge must recuse himself from this case:

1. "'As a CMC Fellow, [Colonel] Parrella worked in the Department of Justice's (DOJ) National Security Division as a Counterterrorism Prosecutor and with the Office for Overseas Prosecutorial Development Assistance and Training (OPDAT) within DOJ's Criminal Division.'" AE 595I (MAH) at 5 (quoting AE 001B).

2. "The National Security Division is a product of post-9/11 congressional action. The Congress mandated the creation of the Department of Justice's National Security Division (NSD) in 2006, with passage of a reauthorization of the PATRIOT Act." AE 595I (MAH) at 5.

3. Per its own mission statement, the focus of the NSD Counterterrorism Section is on:

   [. . .] the design, implementation, and support of law enforcement efforts, legislative initiatives, policies and strategies relating to combating international and domestic terrorism. The Section seeks to assist, through investigation and prosecution, in preventing and disrupting acts of terrorism anywhere in the world that impact on significant United States interests and persons. The Section's responsibilities include:

   a. investigating and prosecuting domestic and international terrorism cases;

   b. investigating and prosecuting terrorist financing matters, including material support cases;

   c. participating in the systematic collection and analysis of data and information relating to the investigation and prosecution of terrorism cases;

   [. . .]

[10] *Id.* at 20602–04.

> d. investigating and prosecuting matters involving torture, genocide and war crimes that are linked to terrorist groups and individuals;
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> [. . .]
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> e. assisting the Anti-Terrorism Task Force Coordinators in the U.S. Attorney's Offices through the Regional Coordinator system by facilitating information sharing between and among prosecutors nationwide on terrorism matters, cases and threat information;
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> [. . .]
>
> f. sharing information and trouble-shooting issues with international prosecutors, agents and investigating magistrates to assist in addressing international threat information and litigation initiatives; and
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> g. providing legal advice to federal prosecutors concerning numerous federal statutes. [11]

4. "Colonel Parrella's Marine Corps 'Fitness Report' for that period lists his primary duties as including 'work with partners in the intelligence community including [Federal Bureau of Investigation (FBI)], [Central Intelligence Agency (CIA)], [National Security Agency (NSA)], and [Department of Defense (DoD)].'" AE 595I (MAH) at 7.

5. "The NSD's [Counterterrorism] Section has been inextricably involved with the prosecution of Mr. al Hawsawi and the co-accused since at least April 2012 (when charges were referred in this case), and thus including the time period when Colonel Parrella was working at the NSD. The NSD has been and continues to be represented by a number of prosecutors on this case." *Id.* at 7.

6. "During voir dire, Colonel Parrella was evasive and refused to answer counsel's questions regarding his access to the CIA while he worked with the National Security Division, where he carried out a document review at the CIA." *Id.* at 9.

7. "Also during voir dire, Colonel Parrella acknowledged knowing and/or having worked at NSD when several current and a former prosecutor appearing in this case were also working at NSD." *Id.* at 10–11. Notably, "[h]is contacts with [Mr. Groharing] are long-standing." *See id.* at 11 (outlining contact between the Military Judge and Mr. Groharing during a two-day athletic endurance event).

8. "Colonel Parrella was on active duty in the U.S. Marine Corps, at the time of the attacks on [September 11, 2001]." *Id.* at 12.

9. "At the present time, Colonel Parrella is retirement eligible from the U.S. Marine Corps, and has not determined whether, upon leaving the Marine Corps, he

[11] Paragraph 3 is quoted from AE 595I (MAH) at 6.

would seek employment with the Department of Justice, including the Federal Bureau of Investigation, or the National Security Agency." *Id.* at 14.

10. "The NSD's [Counterterrorism] Section, along with the FBI, the NSA and the CIA, are deeply involved in reviewing information and determining what discovery in this case, including classified discovery, falls within the Government's obligation to turn over to the defense." *Id.* at 15.

11. "As military judge on this case, Colonel Parrella would be solely responsible for . . . *ex parte* reviews of classified information that NSD prosecutors provide to him for defense discovery." *Id.* at 16.

12. "In an early show of a propensity to turn to the prosecution for counsel, and of his undue familiarity with this prosecution, Colonel Parrella has turned the *ex parte* process under [M.C.R.E.] 505 on its head: he has *sua sponte* and outside the rule, invited the prosecution to brief him ex parte regarding all prior ex parte sessions already conducted before this Commission." AE 595I (MAH) at 16.

13. "Also notable from voir dire, Colonel Parrella acknowledged that he has an on-going duty of loyalty to the CIA with respect to classified matters he learned there." *Id*. at 16 (citing Tr. at 20564).

Among the thirteen facts Defense counsel for Mr. Hawsawi cited as grounds for recusal, all but one of them (the Commission's order directing an *ex parte* hearing with the Prosecution in AE 542Q), were, at least in sum and substance, already addressed in *voir dire*, and considered by the Military Judge in denying Mr. Bin 'Attash's original motion for recusal on 11 September 2018.

On 19 November 2018, the Commission issued AE 595O, Ruling, which denied Mr. Hawsawi's recusal motion and motion to abate the proceedings.[12] In the ruling, the Commission "adopt[ed] and incorporate[d] its September 11, 2018 on-record recitation of facts" and provided additional findings of fact related to the distinct allegations that Mr. Hawsawi raised.[13]

In these additional findings of fact, the Commission adopted "for the purposes of the current ruling" five of the thirteen facts asserted by Mr. Hawsawi in his motion for recusal,

[12] AE 595O at 10.

[13] *Id.* at 2–5.

describing those five facts as "generally accurate."[14] Regarding the remaining eight facts alleged by Mr. Hawsawi, Judge Parrella clarified or rejected the "mischaracterization" of his answers to certain questions during *voir dire*. Specifically, while Judge Parrella "accept[ed] that members of the prosecution team are employed" at NSD, Judge Parrella reiterated that he "did not work on any military commission matter while at DOJ."[15] Further, Judge Parrella found that because the detailed DOJ prosecutors on this case have at all times since at least 2012 been "explicitly assigned to the Department of Defense's Office of the Chief Prosecutor," the "Military Judge and the DOJ prosecutors assigned to this case effectively worked for two separate government agencies during the Military Judge's fellowship year (2014–2015)."[16] Judge Parrella further found that he harbors "no favoritism toward any entity within the IC, and nothing about [his] interactions" with the IC will impact his ability to "dispassionately decide the issues presented in this case."[17] Regarding any purported "interference" by the IC with the Commission's proceedings, "nothing, including [his] service at NSD, predisposes [him] to decide" any such issues that come before him "one way or the other."[18]

Judge Parrella also corrected Mr. Hawsawi's mischaracterization of his answers as "evasive" regarding questions about the Military Judge's access to a CIA facility during his

[14] *Id.* at 2 (These facts include: (1) that, in 2014, the Military Judge was selected for the Commandant of the Marine Corps' (CMC) Fellowship Program to fulfill his top-level school assignment, and specifically that the Military Judge's fellowship involved a one-year tour working in NSD at the DOJ and with the Office for Overseas Prosecutorial Development Assistance and Training ("OPDAT") in the DOJ's Criminal Division; (2) that the NSD was created in 2006 as part of a reauthorization of the PATRIOT Act; (3) the mission statement and "About the Office" information from NSD's Counterterrorism Section web page; (4) that the Military Judge's "Fitness Report" for his fellowship year listed his duties as working with partners in the IC, providing guidance on FBI operations, and drafting legal memoranda on the merits of terrorism cases and topics of current relevance to counterterrorism prosecutors; and (5) that the Military Judge is retirement eligible and has not determined whether, upon leaving the Marine Corps, he would seek employment with the DOJ, including with the FBI or NSA.). *See* AE 595I (MAH) ¶¶ 5.a.–5.d., 5.i.

[15] AE 595O at 2–3.

[16] *Id.* at 3.

[17] *Id*.

[18] *Id*.

fellowship year and his recollection of his specific emotions on September 11, 2001. Concerning the precise details of his access to a CIA facility during his fellowship year, Judge Parrella reiterated that he had ruled such particulars were "simply irrelevant to any issue of judicial bias."[19] Regarding his recollection of his feelings during the September 11, 2001 attacks, Judge Parrella explained that his answers were "fully responsive" to counsel's questions and "were simply an accurate statement of [his] recollection of events that occurred nearly 20 years ago."[20]

Judge Parrella also explained that his purported "duty of loyalty and confidentiality to certain agencies," which Mr. Hawsawi highlighted as a basis for recusal, is simply the duty to protect classified information, which "applies uniformly to all Government employees who receive such information as part of their official duties," including all defense counsel. Judge Parrella reiterated that he could "foresee no way in which" such a duty of non-disclosure "will interfere or conflict with [his] duties as a military judge in this commission."[21] Finally, in addition to his answers and analysis on the record during and following *voir dire*,[22] Judge Parrella indicated that, while it is "accurate" that he had a past "friendly" relationship with Mr. Groharing through "a four person team in an athletic event some ten years ago," since that time his interactions with Mr. Groharing "have been infrequent and only in passing" and that they had not discussed this case.[23] As such, Judge Parrella found that he was "certain" that no aspect of his acquaintance with Mr. Groharing will impact "any decision" he will make as Military Judge.[24]

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[19] *Id.*

[20] *Id.* at 4.

[21] *Id.* at 4–5.

[22] *See* Tr. at 20420–568.

[23] AE 595O at 3–4. *See also* Tr. at 20509–10 (stating in *voir dire* answers that the team did not train together but came together for "just the race," that he and Mr. Groharing "got along well" during the times of the race, but that since then [2008], he had only seen Mr. Groharing "a couple of times" during 2014 when he was a Fellow at DOJ and that at no time did he ever discuss this case with Mr. Groharing.).

[24] AE 595O at 4.

On 27 February 2019, Defense counsel for Mr. Bin 'Attash filed AE 595W (WBA), and stated that Mr. Bin 'Attash intended for his motion to be heard by the Chief Trial Judge of the Military Commissions, Colonel Douglas K. Watkins, USA. AE 595W (WBA) at 1. The Defense acknowledged that Judge Parrella denied a joint oral motion by the Defense for recusal on 11 September 2018 and a similar written motion by the Defense on 19 November 2018. *See* AE 595W (WBA) at 1. Nonetheless, and without seeking reconsideration on an issue that the Defense surely knows is *res judicata*, the Defense claims that "[b]ecause Judge Parrella has demonstrated inability or unwillingness to recognize the facts that would cause a reasonable person to question his impartiality, the Chief Judge of the Military Commissions should hear the instant motion for disqualification and ensure that the Rules for Military Commission are enforced." AE 595W (WBA) at 1–2. The Defense further claims that the Military Judge failed to disclose certain facts that require his recusal, which were discovered during a Defense investigation; namely photographs of the Wilderness Challenge Races that Judge Parrella ran over a decade ago, and purported statements of current and former DOJ employees.

5. <u>Law and Argument</u>

In a motion that once again glaringly underscores the Defense's tremendous waste of time and government resources, and which symbolizes why this Commission will continue, *ad infinitum*, in perpetual pre-trial litigation if it does not immediately set motions deadlines and a trial date, the Defense dispatched its taxpayer-funded investigator to investigate a sitting judge's answers that he gave during *voir dire* in an attempt to determine if he lied, and then months after the completion of the investigation filed a written motion to recuse on the exact same grounds alleged five months ago, and which had already been denied twice by the Military Judge.

The Commission should let those facts sink in for a minute, take stock of the Defense's true strategic aims, set firm deadlines and a trial date, and then immediately discount any further pleas for defense delay, knowing the Defense has spent much of the last seven years attempting to disrespect, discredit, and dismantle this congressionally-authorized, bipartisan military justice system, and all who would administer it, in lieu of preparing to meet the Prosecution's evidence.

And in the end, what did the Defense investigation achieve? Nothing. This is despite the Defense interviewing several witnesses[25] from the Department of Justice and the United States Marine Corps, and unearthing photographs showing Judge Parrella with Mr. Groharing, in team pictures taken in 2007 and 2008, after a military team competition that Judge Parrella had informed the parties of during *voir dire* he had participated in, and fully considered in declining to recuse himself. There are no new "facts" in the Defense motion and the Defense knows as much. The Military Judge was fully aware of his own involvement in the Wilderness Challenge, presumably including that he was present in after-event team photographs, so the Defense knows its motion will not change Judge Parrella's analysis on recusal. Instead, with a complete lack of understanding of the lawful limits of the Chief Trial Judge's detailing authority, or any military legal authority that would authorize its relief, the Defense now also seeks review by the Chief Trial Judge of the Military Commissions, who is not detailed to this case, and has never been detailed to this case, to decide this motion in the desperate hope for a different outcome.[26] Both AE 595W (WBA) and AE 595X (WBA) should be summarily denied by Judge Parrella.

Let there be no doubt, this motion was filed in an attempt to embarrass[27] (and by implication threaten) the Military Commission and parties as well as demonstrate that the

[25] The Defense was fully able to conduct an extensive investigation primarily telephonically, *see* AE 595W (WBA), Attach. U, despite their claims in the AE 524 series of motions, after the issuance of Protective Order #4, that conducting telephonic interviews would be ineffective.

[26] *See generally* AE 595X (WBA).

[27] As further evidence of the gratuitous nature of the Defense filing, Defense counsel also intentionally misrepresented the Prosecution's position in the conference for AE 595X (WBA), and then failed to correct the record despite being requested to do so. *See* Attach. B. The Prosecution's stated position was that the Prosecution will oppose any separate motion for relief to transfer AE 595W (WBA) to a different military judge. *Id.* However, the Defense set forth in its certificate of conference that "The Prosecution objects to the transfer of AE 595W(WBA), Mr. Bin 'Attash's Motion to Disqualify Colonel Keith A. Parrella, USMC, *to a neutral and disinterested judge*." AE 595X (WBA) at 12 (emphasis added). As the Prosecution's position has always been that Judge Parrella is a neutral and disinterested judge, and since Judge Parrella has in fact so ruled twice (and the United States Court of Appeals for the District of Columbia Circuit refused to stay the proceedings on mandamus), the Defense certificate of conference is an intentional misrepresentation of the Prosecution's position, and is a gratuitous and petty comment aimed to discredit the United States' commitment to justice in this case. The Defense motion should not be accepted until this material misrepresentation of the United States' position is corrected.

Defense is fully capable and willing to send its taxpayer-funded investigators to peer into the personal lives of all of the parties, and interview all past associates of the parties, in an attempt to take down the entire legal system. That is all this motion is. Nothing more. It should be denied by Judge Parrella for a third time, and completely disregarded by Chief Judge Watkins, posthaste.

I. The Grounds Alleged by the Defense as a Basis for Recusal Have Been Raised, the Denial of Recusal on Those Grounds is *Res Judicata,* and This Motion is an Improper Motion to Reconsider Prior Rulings of the Military Commission

The issue of recusal on the grounds alleged by the Defense is *res judicata* in this case and this motion (notwithstanding the "new" decade-old photographic spread received in December 2018 and interviews of DOJ witnesses that occurred prior to the Military Judge's 11 September 2018 recusal ruling) is an improper motion for reconsideration.

R.M.C. 905(f) permits the Military Judge to reconsider any ruling, other than one amounting to a finding of not guilty, prior to the authentication of the record of trial. However, granting of the request for reconsideration is in the Military Judge's discretion.[28] Generally, courts grant motions for reconsideration where "there has been an intervening change in controlling law, there is new evidence, or there is a need to correct clear error or prevent manifest injustice."[29]

For AE 595W (WBA), the instant motion seeking recusal, and for AE 595X (WBA), the motion to transfer AE 595W (WBA) to the Chief Trial Judge, there is no separate motion for reconsideration, and no attempt to satisfy the criteria for a motion to reconsider as set forth above. There are no new grounds or facts alleged in the Defense motion to recuse, just photographs of an event that was already disclosed *sua sponte* and considered by Judge Parrella,

[28] *See* AE 155F at 1 ("Either party has the right [to] move for reconsideration but granting of the request is in the discretion of the Military Judge.").

[29] *United States v. Libby*, 429 F. Supp. 2d 46, 46-47 (D.D.C. 2006) (internal quotation marks omitted); *accord Nat'l Ctr. for Mfg. Scis. v. Dep't of Defense*, 199 F.3d 507, 511 (D.C. Cir. 2000); *see also* AE 108AA at 2 ("Generally, reconsideration should be limited to a change in the facts or law, or instances where the ruling is inconsistent with case law not previously briefed.").

as well as DOJ personnel interviews from September 2018 that confirm what Judge Parrella and the DOJ prosecutors assigned to this case have already stated as officers of the court: There is no evidence that Judge Parrella[30] worked on any military commissions matters, let alone the prosecution of this case while at DOJ, because he simply did not do so.

The Defense admits they had what they claim was a "1.5-page summary of the academic and military career of Colonel Parrella . . . of unknown provenance" prior to the 11 September 2018 hearings.[31] Why the Defense believes anyone other than Colonel Parrella would have written this document is unclear, but what is clear is that all of the information on the summary was also available for use during *voir dire*, which Mr. Montross conducted extensively on behalf of Mr. Bin 'Attash. Furthermore, all of the interviews of DOJ members appear to have been completed before the Military Judge's 11 September 2018 recusal ruling, and could have been presented and argued before then had they been of any value at all. All of the website information regarding the mission of the National Security Division[32] and the Counterterrorism Section, attached to the Defense motion, was available long before September 2018, and thus also do not constitute "new facts" that warrant reconsideration five months after the first recusal motion was denied. As such, the motion for recusal should be denied as an improper motion for reconsideration.

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[30] AE 595W (WBA) at 3. Despite Colonel Parrella stating that he may have met undersigned Managing Trial Counsel at the Department of Justice, Managing Trial Counsel has no recollection of ever meeting or seeing Judge Parrella at the Department of Justice, or anywhere else, and to the best of his knowledge saw Colonel Keith Parrella for the first time at Joint Base Andrews prior to the flight to the first hearing he presided over in September 2018. Managing Trial Counsel, and Mr. Groharing, began working on *United States v. Mohammad, et al*, from its inception as a potential military commission case in 2006, prior to working for the Department of Justice, and undersigned counsel has worked on the case continuously for that time, including managing the case since 2010. Both Managing Trial Counsel and Mr. Groharing are 100 percent certain that Judge Parrella has never had any involvement with *United States v. Mohammad, et al*.

[31] *See* AE 595X (WBA) at 3.

[32] The Defense makes the argument that "The very point of creating CTS was to prosecute the *United States v. Mohammad, et al*., a capital case." AE 595W (WBA) at 31 (citing *id.*, Attach. G). This statement is so inaccurate that it defies a simple response. Suffice it to say, the statement is false, unsupportable, not evidenced by any of the Defense's attachments, and is more accurately characterized as an argument of facts not in the record.

II. The Defense's Declaration Raises No New Grounds for Recusal

Even assuming, for purposes of argument, that the DOJ and U.S. Marine Corps personnel interviewed were accurately quoted in Mr. Pipe's declaration, the declaration is still lacking in many ways,[33] and the date of the declaration is misleading. Despite the declaration being signed on 24 February 2019, it is important to note that all of the telephonic interviews with the DOJ attorneys and staff occurred prior to the Military Judge's recusal ruling, and prior to counsel's first and second challenge of Judge Parrella on these grounds (as a result of being joined to Mr. Hawsawi's motion). As such, none of this information constitutes "new" evidence to justify reconsideration or recusal.

Secondly, all of the information regarding the 2007–2009 Wilderness Challenge races was raised by Judge Parrella during the September 2018 *voir dire*. There is also no explanation as to why the Defense waited more than three months after *voir dire* to conduct its investigation of the Wilderness Challenge Team, or why they then waited more than two months after conducting said interviews and receiving the pictures to file these motions. Even if this was not a motion to reconsider (which it clearly is) it would also not be a timely motion to recuse, as Judge Parrella has been on the case for six months and has issued multiple rulings.

The declaration is also lacking in additional ways, in that it is in "bulleted" format and does not purport to be verbatim statements of what was said by the interviewees. The declaration also completely lacks context, to the point where it can be misleading. For example, take Ms. Courtney Sullivan's "statement," for instance. Ms. Sullivan was indeed a Deputy Chief Prosecutor for a period of time while she was detailed from DOJ to the Office of Military Commissions as part of the Office of the Chief Prosecutor (OCP) (although she had extremely

[33] The declaration of Mr. Pipe indicates that he conducted a telephonic interview of Mr. Benjamin Towbin, who is further identified as a paralegal who worked for DOJ's Counterterrorism Section in 2009 and 2010 (four years before Colonel Parrella arrived). *See* AE 595W (WBA), Attach. U at 1. Apparently, none of the defense counsel for Mr. Bin 'Attash felt it necessary to ask any supervisory attorney if it was permissible for its investigator to speak to a former government paralegal to elicit non-public information about DOJ personnel, office structure, how cases are assigned, or the other deliberative processes of the Department of Justice that apparently were discussed.

limited involvement with the 9/11 case due to the fact that the actual Chief Prosecutor was, and still is, detailed to the case). However, in November 2013, Ms. Sullivan left the Office of Military Commissions and returned to the Department of Justice in order to continue her work with the Counterterrorism Section prosecuting federal criminal cases, and had no further involvement with the 9/11 case (as this case was, and still is, being prosecuted solely by Department of Defense's Office of the Chief Prosecutor). Ms. Sullivan then left DOJ in August 2014. Despite these relevant and easily discernible facts, the declaration claims that Ms. Sullivan left CTS in August 2014, and that "part of her role was the deputy chief prosecutor for *United States v. KSM, et al*."[34] Without context, one could be lead to believe that while working at CTS in 2014 (the year Judge Parrella arrived for his fellowship) Ms. Sullivan continued in her role as Deputy Chief Prosecutor for the Office of Military Commissions while working at the Department of Justice, which is patently false. Once she returned to DOJ in November 2013, Ms. Sullivan had no other involvement with the prosecution of this, or any other, military commission case. As such, the declaration is misleading, even if that was not the intent.

Neither Mr. Asuncion's nor Mr. Mullaney's purported statements aid the Defense in its baseless quest for recusal either. While Mr. Asuncion's "statement" claims that it is "conceivable" that Colonel Parrella could have attended briefings where military commissions cases were discussed, he has no specific recollection of him doing so.[35] Mr. Asuncion and Mr. Mullaney further stated that it was "possible" Colonel Parrella worked on, or heard information about, military commission cases, although he has no specific recollection of it.[36]

As set forth in the legal brief below, and despite the fact that the only ground for recusal for past employment is working on the actual case over which one then presides as a judge,

[34] *See* AE 595W (WBA), Attach. U at 3.

[35] *See id.*, Attach. U at 4.

[36] *See id.*, Attach. U at 4; *id.*, Attach. U at 5 ("Mr. Mullaney believes that [Colonel Parrella] could have worked on, or heard information about, commission[] cases, but he has no specific recollection about it.").

Mr. Pipe's declaration presents zero evidence that Judge Parrella worked on the case or any military commissions' matter because it simply did not occur.[37] As such, Mr. Pipe's declaration presents no "new" evidence that warrants either reconsideration of Judge Parrella's two recusal rulings, a transfer of the motion to Chief Judge Watkins, or recusal itself.

III. The Military Judge Appropriately Declined to Recuse Himself from the Case Following *Voir Dire*, and Should Once Again Decline to Do So Now.

Both Defense motions should be denied without oral argument. In filing the instant motion, the Defense fails once again to produce any evidence demonstrating that Judge Parrella meets the recusal criteria set forth in R.M.C. 902, or its federal counterpart 28 U.S.C. § 455. As such, his recusal from this case is unjustified, inappropriate, and simply unnecessary.

Rule for Military Commission 902(a) is clear and states that a military judge "shall disqualify himself or herself in any proceeding in which the military judge's impartiality might reasonably be questioned."[38] The Rule also sets forth very specific grounds for disqualification:

> (1) Where the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (2) Where the military judge has acted as counsel, legal officer, staff judge advocate, or convening authority as to any offense charged or in the same case generally;
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> (3) Where the military judge has been or will be a witness in the same case, is the accuser, has forwarded charges in the case with a personal recommendation as to disposition, or, except in the performance of duties as military judge in a previous trial of the same or a related case, has expressed an opinion concerning the guilt or innocence of the accused;
>
> (4) Where the military judge is not eligible to act because the military judge is not qualified under R.M.C. 502(c) or not detailed under R.M.C. 503(b);
>
> (5) Where the military judge, the military judge's spouse, or a person within the third degree of relationship to either of them or a spouse of such person:

[37] As officers of this court, the Military Judge and the DOJ prosecutors assigned to this case know, and have stated, with 100 percent certainty, that Judge Parrella did not work on the instant case, but it is impossible to prove a negative other than by so stating.

[38] R.M.C. 902(a).

> (A) Is a party to the proceeding;
>
> (B) Is known by the military judge to have an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding; or
>
> (C) Is to the military judge's knowledge likely to be a material witness in the proceeding.[39]

When deciding whether or not to recuse him or herself from a case, a military judge should "broadly construe grounds for challenge, but not step down from a case unnecessarily."[40]

Similar to R.M.C. 902(a), 28 U.S.C. § 455 establishes the standard for a federal judge to recuse him or herself from a particular case. Specifically, § 455(a) states that "[a]ny justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." It further details specific circumstances under which a judge must recuse him or herself from a case.[41] For example, § 455 states that a judge must disqualify him or herself in instances, "where he [the judge] has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding," or "[w]here he has served in governmental employment and in such capacity participated as counsel, advisor or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy."[42]

In *United States v. Gipson*, 835 F.2d 1323 (10th Cir. 1988), the United States Court of Appeals for the Tenth Circuit highlighted the relationship between 28 U.S.C. §§ 455(a) and (b) and stated:

> Viewing subsections 455(a) and (b) together, we come to the conclusion that a judge must recuse himself when two kinds of circumstances are present. First, recusal is mandatory when any fact reasonably suggests the judge appears to lack impartiality. Second, recusal is mandatory when past or present associations of the

[39] R.M.C. 902(b)(1)–(5).

[40] R.M.C. 902(d)(1), Discussion.

[41] *See* 28 U.S.C. § 455.

[42] 28 U.S.C. § 455(b)(1), (b)(3).

> judge specifically enumerated in § 455(b) create the presumption the judge lacks impartiality. If either circumstance exists, recusal is mandatory.[43]

Any party bringing a motion for recusal "'carries a heavy burden of proof,'" because "'a judge is presumed to be impartial and the party seeking disqualification bears the substantial burden of proving otherwise.'"[44] Second, a party seeking recusal for an appearance of bias, must make a sufficient showing such that a "'reasonable and informed observer would question the judge's impartiality.'"[45] A "reasonable person" is "well-informed, thoughtful and objective," rather than "hypersensitive, cynical, and suspicious."[46] In applying this standard, a court need not accept as true the allegations set forth by the party seeking recusal,[47] and should rather "scrutinize[] with care"[48] the alleged facts so that recusal is not based on "unsupported, irrational, or highly tenuous speculation."[49] Thus, "disqualification should not be allowed on the bases of rumors, innuendos, unsupported allegations, or claims that like blind moths, flutter aimlessly to oblivion when placed under the harsh light of the full facts."[50]

Third, requiring the facts to be verified by the judge is vital to ensuring that a litigant cannot achieve "recusal on demand" by providing the press or a litigant a de facto "veto against unwanted judges"[51] by resorting to the standard of "'Caesar's wife, the standard of mere

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[43] *Gipson*, 835 F.2d at 1325.

[44] *Doe v. Cabrera*, 134 F. Supp. 3d 439, 444 (D.D.C. 2015) (quoting *United States v. Ali*, 799 F.3d 1008, 1017 (8th Cir. 2015)). *See also United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001) (explaining that there is a "strong presumption" that a military judge is impartial, and a party seeking to demonstrate otherwise must "overcome a high hurdle").

[45] *SEC v. Loving Spirit Found.*, 392 F.3d 486, 493 (D.C. Cir. 2004) (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 114 (D.C. Cir. 2001)) (en banc) (per curiam).

[46] *Cabrera*, 134 F. Supp. 3d at 445 (quoting *Sensley v. Albritton*, 385 F.3d 591, 599 (5th Cir. 2004)).

[47] *Id.*; *see also In re Martinez-Catala*, 129 F.3d 213, 220 (1st Cir. 1997).

[48] *In re Aguinda*, 241 F.3d 194, 201 (2d Cir. 2001).

[49] *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987); *see also In re Martinez-Catala*, 129 F.3d at 220.

[50] *In re San Juan Dupont Plaza Hotel Fire Litig.*, 129 F.R.D. 409, 413–14 (D.P.R. 1989).

[51] *In re Boston's Children First*, 244 F.3d 164, 167 (1st Cir. 2001); *see also Cheney v. U.S. Dist. Ct.*, 541 U.S. 913, 923, 927 (2004) (characterizing the notion that a judge must recuse "because a significant portion of the press, which is deemed to be the American public, demands it" as "staggering," and ultimately rejecting the idea as "intolerable," as it "would give elements

suspicion.'"[52] Protection from such a situation is especially important because, just as there is an important public policy interest in ensuring judicial proceedings that appear impartial, there is an equally important public policy interest in "prevent[ing] parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking."[53]

Courts have long identified this public policy interest in preventing disqualification of a judge based on unreasonable, irrational, or speculative claims, and, as a result, have recognized that "'a judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is.'"[54] This "duty to sit"[55] and the overall requirement to "narrowly construe" § 455 aims to combat a party's improper "judge shopping,"[56] as well as to avoid situations where a litigant is able to "employ" a petition for a writ of mandamus seeking recusal of a judge for "its strategic value, regardless of the merits of their cause."[57]

Just as it is important to ensure the public appearance of impartiality in the judiciary, "[b]y like token, courts cannot afford to spawn a public perception that lawyers and litigants will benefit by undertaking such machinations" of seeking recusal for improper reasons.[58]

Because he did not work in OCP, either during his fellowship term or at any other time, Judge Parrella has never worked for the "office [that] was prosecuting" the Accused, as defense

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of the press a veto over participation" of any judge who "had social contacts with, or were even known to be friends of," a person named in a case).

[52] *United States v. Nixon*, 267 F. Supp. 3d 140, 148 (D.D.C. 2017) (quoting *In re Allied-Signal Inc.*, 891 F.2d 967, 970 (1st Cir. 1989)).

[53] *In re Allied-Signal Inc.*, 891 F.2d at 970.

[54] *Cabrera*, 134 F. Supp. 3d at 446 (quoting *In re Drexel Burnham Lambert*, 861 F.2d 1307, 1312 (2d Cir. 1988)).

[55] *United States v. Snyder*, 235 F.3d 42, 46 (1st Cir. 2000) ("Thus, under § 455(a), a judge has a duty to recuse himself if his impartiality can reasonably be questioned; but otherwise, he has a duty to sit.").

[56] *Phillip Morris USA, Inc. v. United States FDA*, 156 F. Supp. 3d 36, 48 (D.D.C. 2016) (quoting *In re Letters Rogatory*, 661 F. Supp. 1168, 1172 (E.D. Mich. 1987)).

[57] *In re Cargill*, 66 F.3d 1256, 1262 (1st Cir. 1995).

[58] *Id.* at 1263.

counsel claims. Defense counsel for Mr. Bin 'Attash cite no case suggesting that a military judge, previously assigned as an attorney at a government agency, which had also assigned one or more of its own attorneys to work for a separate government agency, could be considered "counsel, legal officer, staff judge advocate, convening authority," or even generally as a prosecutor in the same office as the other prosecutors, and that therefore the military judge is disqualified under R.M.C. 902 or some other applicable standard. Indeed, as no case law seems to exist, counsel for Mr. Bin 'Attash resort to continually mischaracterizing NSD/CTS as the "same office" as the one prosecuting his case in an attempt to find any legal support for their claim. *See* AE 595W (WBA) at 29, 31.

Moreover, even if Judge Parrella's fellowship at NSD could be construed as working in the "same office" as the prosecutors on this case, courts have widely recognized that such a scenario alone still does not require recusal. For example, where a former Assistant U.S. Attorney ("AUSA") sits as a judge on a case that his former office handled while the judge was employed there, neither the specific scenario articulated in § 455(b)(3), nor the appearance of bias described by § 455(a) requires recusal if the judge did not have any involvement in the case brought by other prosecutors in the office.[59] Judge Parrella, and the prosecutors assigned to OCP, which is the office that is prosecuting this case, have repeatedly averred as officers of the court that Judge Parrella did not work on, or have any involvement with, any military commission cases during his fellowship at NSD, let alone this case in particular.[60] This is not surprising, as OCP, a DoD entity, prosecutes military commission cases, not NSD/CTS.[61] In

[59] *See United States v. Norwood*, 854 F.3d 469, 471–72 (8th Cir. 2017) (distinguishing [*Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016)] and holding §§ 455(a) and 455(b)(3) do not require recusal for prior service as an AUSA where judge had "no significant personal involvement in a critical decision" on a case over which judge presided); *United States v. Di Pasquale*, 864 F.2d 271, 278–79 (3rd Cir. 1988) (holding recusal not required even where judge was a supervisory AUSA in same office prosecuting case now before him); *United States v. Champlin*, 388 F. Supp. 2d 1177, 1184 (D. Haw. 2005) (same, and finding that §§ 455(a) and 455(b)(3) do not require different standards for recusal for prior service as an AUSA).

[60] *See supra* notes 30, 37.

[61] *See generally* Regulation for Trial by Military Commission ("R.T.M.C."), ch. 8 (2011).

light of these facts, counsel's allegation that Judge Parrella's fellowship at NSD/CTS would cause a reasonable person to question his impartiality is too speculative[62] to overcome the "strong presumption" that a military judge is impartial.[63]

Although not styled as a motion to reconsider, every issue was raised by Defense counsel for Mr. Bin 'Attash and others during *voir dire*, or in Mr. Hawsawi's recusal motion, and considered by the Military Judge before denying the motions for recusal made by those counsel. The Prosecution continues to assert that there is nothing on the record, including that which is raised in the instant motion, to warrant recusal, and hereby also incorporates its argument, made on the record on 10 September 2018 in opposition to the Defense's claims. *See* Tr. at 20580–85. However, the Prosecution will again factually address Judge Parrella's fellowship at the Department of Justice and his participation with Mr. Groharing in the Wilderness Challenge, in an effort to ensure clarity for purposes of the record and/or in the event, contrary to the Prosecution's position, the Chief Trial Judge considers the Defense motion or details another military judge to do so.

A. The Military Judge's Prior Fellowship with the National Security Division within the Department of Justice Does Not Require Recusal

Both the Prosecution team (three of whom began working on the military commission case against these five Accused at its inception in 2006) and the Military Judge have confirmed, as officers of the court, that the Military Judge has never worked on or had any involvement with the case against the five Accused for their alleged involvement in the September 11, 2001 attacks. This Military Commission has been convened by the Department of Defense—and prosecuted out of the Office of the Chief Prosecutor—from 2006 to 13 November 2009,[64] and then again beginning in January 2010 to present. While certain NSD Counterterrorism Section attorneys have worked and continue to work on the instant case, they are explicitly assigned to

[62] *Cabrera*, 134 F. Supp. 3d at 445.

[63] *Quintanilla*, 56 M.J. at 44; *see also Cabrera*, 134 F. Supp. 3d at 445–46.

[64] This was the date that Attorney General Holder made the forum decision, determining the case would be tried in the Southern District of New York and not by military commission.

the Department of Defense's Office of the Chief Prosecutor while doing so.[65] Judge Parrella was clearly and unquestionably never a part of any NSD/CTS affiliation with OCP, and any Defense suggestion otherwise is entirely incorrect.

Contrary to the Defense claim, merely working as a prosecutor in the "same office"—indeed, even being the chief prosecutor in that office—is not by itself a sufficient ground to require disqualification of a judge. "[A] party seeking disqualification must show that the judge actually participated as counsel. Mandatory disqualification then is restricted to those cases in which a judge had previously taken a part, albeit small, in the investigation, preparation, or prosecution of a case."[66] As averred to as officers of the court, Judge Parrella had no involvement with this case or in any way "participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy" during his brief fellowship with the NSD/CTS.[67] The Defense's investigation did not change those facts. Unlike the trial judge in *Gipson*, the Military Judge in this case was not the chief prosecutor of any office or division overseeing the prosecution of this case. However, like the judge in *Gipson*, Judge Parrella "had no connection with the defendant or the substance of his prosecution prior to the filing of the instant case."[68] In the absence of such a connection, recusal pursuant to R.M.C. 902(b) or 28 U.S.C. § 455(b)(3) is not required.

B. Judge Parrella's Involvement in a Two-Day Marine Corps Wilderness Challenge Race in 2007 and 2008 With Mr. Groharing Does Not Require Recusal

Contrary to Mr. Bin 'Attash's unsupported claim, case law establishes that a judge's relationships, past or present, professional or social, with attorneys, witnesses, jurors, or anyone

[65] Trial Counsel Ryan was never employed by CTS, but rather is on detail from the U.S. Attorney's office for the Western District of North Carolina, and thus never worked for the same office where Judge Parrella had his fellowship.

[66] *Gipson*, 835 F.2d at 1326 (holding trial judge who was the former U.S. Attorney in the district when and where defendant was convicted of a similar crime did not require recusal because the judge did not participate as counsel in the previous prosecution).

[67] *See* 28 U.S.C. § 455(b)(3); R.M.C. 902(b)(2),(3).

[68] *Gipson*, 835 F.2d at 1326.

else involved in a case over which he is presiding do not ordinarily require recusal.[69] The same rule applies in the military context.[70] Noting the unique nature of the military justice system, military courts of review have long acknowledged that military judges are "likely to develop ties with other attorneys, law firms, and agencies,"[71] and "[p]ersonal relationships between members of the judiciary and witnesses or other participants in the court-martial process do not necessarily require disqualification."[72] Instead, the test is an objective one that encompasses the "judge's statements concerning his intentions and the matters upon which he will rely."[73] Judge Parrella fully disclosed every matter upon which Mr. Bin 'Attash purports to seek this further review; and Judge Parrella repeatedly determined that these facts will not impact his ability to impartially preside over this case.

Judge Parrella has acknowledged on the record that he had a past "friendly" relationship with Mr. Groharing while on a four-person team in an athletic event ten years ago, that they both participated in as then-active duty Marines.[74] The fact that the Defense has now unearthed

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[69] *See, e.g.*, *United States v. Murphy*, 768 F.2d 1518, 1537 (7th Cir. 1985) (observing that friendships among judges and lawyers "are more than common; they are desirable" and that "a judge need not disqualify himself just because a friend—even a close friend—appears as a lawyer") (citations omitted); *United States v. Salemme*, 164 F. Supp. 2d 86, 104–05 (D. Mass. 1998) (concluding that friendship with witnesses generally does not require recusal because "the public understands that judges are usually long-standing members of the community in which they serve" and can ignore experiences of getting to know other members of that community and "decide the matters before them impartially"); *United States v. Kehlbeck*, 766 F. Supp. 707, 712–13 (S.D. Ind. 1990) (collecting cases and finding it a "well established principle that a judge is not required to forego a private life in order to sit" as a judge).

[70] *United States v. Wright*, 52 M.J. 136, 141 (C.A.A.F. 1999). *See also United States v. Norfleet*, 53 M.J. 262, 268–70 (C.A.A.F. 2000).

[71] *Norfleet*, 53 M.J. at 270 (quoting *Wright*, 52 M.J. at 141 (C.A.A.F. 1999)).

[72] *Id.* (citing *United States v. Hamilton*, 41 M.J. 32, 38–39 (C.M.A. 1994)). *See also United States v. Sullivan*, 74 M.J. 448, 454 (C.A.A.F. 2015).

[73] *See United States v. Campos*, 42 M.J. 253 (C.A.A.F. 1995) (Where the military judge makes full disclosure on the record and affirmatively disclaims any impact on him, where the defense has full opportunity to *voir dire* the military judge and to present evidence on the question, and where such record demonstrates that appellant obviously was not prejudiced by the military judge's not recusing himself, the concerns of Rule for Courts-Martial ("R.C.M.") 902(a) are fully met).

[74] *See* AE 595O at 3–4.

photographs of the team after the competition does nothing to change that relationship. However, Judge Parrella further stated that since the races, his interactions with Mr. Groharing "have been infrequent and only in passing," that they had not "discussed this case," and that he is "certain no aspect of [their] acquaintance will impact any decision before [him] in this commission."[75]

Judge Parrella clearly disclaimed any impact of his relationship with Mr. Groharing on his ability to impartially preside over this case,[76] and he submitted to extensive *voir dire* on this issue from counsel for the five co-Accused. Thus, in such a situation, the Court of Appeals for the Armed Forces has previously held that the concerns in Rule for Courts-Martial ("R.C.M.") 902(a) "are fully met" and as a result recusal is not required.[77] Any attempt by the Defense to cast the relationship as anything other than what the Military Judge stated as an officer of the court during *voir dire*, is the textbook type of innuendo that an objective, reasonable observer would disregard in determining the appearance of bias.

IV. There is No Legal Requirement for Judge Parrella to Transfer this Motion to the Chief Trial Judge, Nor Does He Have the Legal Authority to Do So.

According to the Defense, due to the fact that Judge Parrella does not agree with the Defense's unsupported legal analysis on recusal, he has thus "demonstrated inability or unwillingness to recognize the facts that would cause a reasonable person to question his impartiality."[78] Another way of stating this is that everyone who does not question Judge Parrella's impartiality is simply "unreasonable" if they are unable or unwilling to see the world as the Defense sees it; such view entitling the Accused to a different military judge to decide the issue until some judge, in the Defense's view, finally "gets it right." Although the Defense does not state what would occur if Chief Judge Watkins also disagrees, logic seems to dictate that he

[75] *Id*.

[76] *See id.* at 4 (stating that he was "certain" that no aspect of his acquaintance with Mr. Groharing will impact "any decision" he will make as Military Judge).

[77] *Norfleet*, 53 M.J. at 270.

[78] *See* AE 595W (WBA) at 2.

too would be thrown into the lot of those with an "inability or unwillingness to recognize" that the facts require recusal, and another recusal challenge would spring forth elsewhere. No system of justice can work this way, which is why the statute establishes an objective, rather than subjective standard, and applies it to the reasonable person, not to any view of a party to the dispute. Further, there is actually case law that establishes the grounds for when recusal is necessary, and why the federal system, contrary to Defense claims, also requires sitting judges to make their own determinations on whether recusal is required.

The Defense's claim that "a review of the federal system demonstrates that the determination of motions to disqualify by the target judges are disfavored" is not at all accurate.[79] In federal courts, Congress has provided the statutory basis for recusal of judges at 28 U.S.C. §§ 144 and 455. Although the same substantive standard governs recusal under each statute (whether a reasonable person with knowledge of the relevant facts would conclude that the judge's impartiality might reasonably be questioned) the procedure for requesting recusal under each statute is different.[80]

It is true that 28 U.S.C § 144 mandates recusal on the issue of whether a judge should remain on the case once a litigant timely files an affidavit stating sufficient facts and reasons for the belief that the presiding judge has a personal bias or prejudice sufficient to mandate disqualification, and when counsel files a certificate stating that the motion is made in good faith.[81] However, 28 U.S.C. § 455, on the other hand, requires the judge to evaluate his or her own actions.[82]

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[79] *See* AE 595X (WBA) at 8.

[80] *See Givens v. O'Quinn*, 2005 U.S. Dist. LEXIS 31597, *4-5 (W.D. Va. Dec. 7, 2005) (citing *Davis v. United States*, No. 1L99-CV-00842, 6:95-CR-284, 2002 WL 1009728, at *2 (M.D.N.C. 2002), *appeal dismissed*, 55 Fed. Appx. 192 (4th Cir. 2003)).

[81] *Id.*

[82] *Id*. (citing *Liljeberg v. Health Svcs. Acquisition Corp.*, 486 U.S. 847, 871 n.3, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988) (Rehnquist, C.J., dissenting); *In re Beard,* 811 F.2d 818, 827 & n.15 (4th Cir. 1987)).

Thus, it is only in situations where a party alleges a personal bias against or in favor of any adverse party, which is also supported by an affidavit and a "good faith" certificate by counsel, that the issue of the judge's recusal must be sent to another judge under the federal rules.[83] Furthermore, only one such affidavit can be filed in the case, and it generally must be filed within 10 days of the beginning of the session unless good cause is shown.[84] These circumstances are simply not present in the instant case; where no affidavit has been filed; this is now the third challenge on identical grounds; the Defense has been aware of the facts since September 2018; and Judge Parrella has presided as the Military Judge in this case for over six months and has issued multiple rulings.

Conversely, all other motions for recusal of a federal judge fall under the procedures set forth in 28 U.S.C. § 455, and are handled identically to the recusal motions already heard and denied by Judge Parrella in this case; with the judge making the decision on whether to recuse. "Plaintiff moves the Court to assign the present motion to a different judge for decision. § 455 of 28 U.S.C. includes no provision for referral of the question of recusal to another judge; if the judge sitting on a case is aware of grounds for recusal under § 455, that judge has a duty to recuse himself or herself."[85] ". . . Section 455, on the other hand, requires the judge to evaluate his or her own actions."[86]

The R.M.C. incorporate the judicial recusal statute, 28 U.S.C. § 455, but not the affidavit and mandatory recusal provisions of § 144.[87] R.M.C. 902 replicates the structure of § 455 by

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[83] *See* 28 U.S.C § 144.

[84] *Id.*

[85] *See Union Independiente de Empleados de Servicios Legales v. Puerto Rico Legal Services, Inc*., 550 F. Supp. 1109, 1110–11, 1982 U.S. Dist. LEXIS 15791, *1–2 (D.P.R. 1982) (citing *United States v. Sibla*, 624 F.2d 864 (9th Cir. 1980)).

[86] *Givens*, 2005 U.S. Dist. LEXIS 31597, at *4–5 (citing *Liljeberg*, 486 U.S. at 871 n.3).

[87] In previously denying the recusal motions, the Commission correctly noted that, although 28 U.S.C. § 455 does not directly apply to military commission judges, *see Khadr v. United States*, 62 F. Supp. 3d. 1314, 1318–20 (U.S.C.M.C.R. 2014), R.M.C. 902 is essentially the same as its court-martial counterpart, R.C.M. 902, which largely incorporates the standards and judicial construction of 28 U.S.C. § 455, with slight modifications to account for the unique

dividing requirements for recusal between a general "appearance of bias"[88] and five enumerated factual situations mandating recusal.[89] The relevant rules here are R.M.C. 902(a) and R.M.C. 902(b)(2). Although the language in R.M.C. 902(b)(2) differs somewhat from its counterpart in 28 U.S.C. § 455(b)(3), the basis for disqualification is essentially the same: only when a military judge previously worked directly in a governmental capacity as "counsel, legal officer, staff judge advocate, or convening authority as to any offense charged or in the same case generally" is the military judge disqualified.[90] As such, no judge would be under any legal obligation to send this motion to another judge, whether a federal court judge being challenged under 28 U.S.C. §455, or in the military commissions system under R.M.C. 902.

V. There is No Authority in the Military Commissions Act, Manual for Military Commissions, Regulation for Trial by Military Commissions, or the Rules of Court That Authorize the Chief Trial Judge to Rule on a Motion in a Military Commissions Case to Which He is Not Detailed

The Chief Trial Judge of the Military Commissions has certain enumerated authorities under the relevant provisions of the Military Commissions Act and its subordinate authorities. Ruling on motions in cases to which he is not detailed, and never has been detailed, is not one of those authorities.

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purposes and context of courts-martial. *See* AE 595G (citing *United States v. Mitchell*, 39 M.J. 131, 143 (C.M.A. 1994)).

[88] *Compare* R.M.C. 902(a) ("[A] military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned."), *with* 28 U.S.C. § 455(a) ("Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.").

[89] R.M.C. 902(b)(1)–(5). *See also* 28 U.S.C. § 455(b)(1)–(5).

[90] R.M.C. 902(b)(2). *See also* 28 U.S.C. § 455(b)(3), which states that a judge shall be disqualified where "he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding . . . ." Notably, § 455(b)(2) also concerns recusal due to previous employment where the judge served as a lawyer or practiced law with a lawyer concerning the matter in controversy, but this paragraph applies only to situations "in private practice."

The Chief Trial Judge's authorities include supervising and administering the trial judiciary, which includes detailing military judges,[91] prescribing rules of court, [92] and directing military magistrates.[93] However, unlike a federal judge presiding over a federal district court, the Chief Trial Judge does not have standing subject matter or personal jurisdiction to hear all cases or controversies arising under said jurisdiction or any military commission. The Chief Trial Judge's authorities derive from statute and regulation, and trigger only upon convening orders and subsequent detailing orders he may issue. [94] As such, the Chief Trial Judge's authorities in military commissions are far more limited than a federal district court judge, just as the jurisdiction of this military commission is far more limited than a federal district court.

As set forth by the R.T.M.C., the Chief Trial Judge of the Military Commissions, as a designee of the Secretary of Defense or his designee, is responsible for the supervision and administration of the Military Commissions Trial Judiciary.[95] The Regulation specifies that the Chief Trial Judge will detail a military judge from the Military Commissions Trial Judiciary for each military commission trial.[96] The Military Commissions Act of 2009 sets forth the detailing of military judges, and in pertinent part states, "The military judge *shall preside* over each military commission to which such military judge *has been detailed*."[97] The M.C.A. further states that:

> Any ruling made by the military judge upon a question of law or an interlocutory question (other than the factual issue of mental responsibility of the accused) is

[91] R.T.M.C. 6-2.

[92] R.M.C. 108.

[93] R.M.C. 502 (e)(3)(C).

[94] *See Quintanilla*, 56 M.J. at 39 ("There are important distinctions . . . between a military judge and a federal civilian judge . . . . A federal civilian judge typically has jurisdiction over all cases arising under applicable federal law, but a military judge does not exercise general jurisdiction over cases arising under the [Uniform Code of Military Justice]. A military judge may exercise authority only over the specific case to which he or she has been detailed.") (internal citations omitted).

[95] R.T.M.C. 1-3.

[96] R.T.M.C. 6-2.

[97] 10 U.S.C. § 948j (emphasis added).

> conclusive and constitutes the ruling of the military commission. However, a military judge may change such a ruling at any time during the trial.[98]

None of the above-enumerated authorities grant the Chief Trial Judge the power to rule on recusal motions, or reconsider another military judge's prior ruling declining to recuse, or rule on any other motions that are properly before a detailed military judge. Federal district court judges are likewise constrained from sending recusal motions to other judges if recusal is sought under 28 U.S.C § 455, and not the separate procedures set forth in 28 U.S.C. § 144.[99]

R.M.C. 902, which is the only legal standard that actually governs recusal of a military judge in the military commissions, also *mandates* that the detailed military judge decide the issue on his own. "The military judge *shall*, upon motion of any party or *sua sponte*, decide whether the military judge is disqualified."[100] As such, and with all due respect to the authorities the Chief Trial Judge does have in the military commissions process, the Chief Trial Judge cannot, as an undetailed military judge, decide either AE 595W (WBA) or AE 595X (WBA). Nor does Judge Parrella have the authority to send the motion to the Chief Trial Judge for him to decide. Pursuant to R.M.C. 902, Judge Parrella *shall* decide whether or not to recuse himself from this case.[101] Judge Parrella can either recuse himself or deny the Defense motions, but he does not have authority to send AE 595W (WBA) or AE 595X (WBA) to another military judge to decide.

The Defense is wholly incorrect when it claims that "at a minimum, the Rules for Military Commission do not prohibit the Chief Judge from hearing the instant Motion to Disqualify or, in the alternative, detailing another military judge to hear it."[102] As stated above,

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[98] 10 U.S.C. § 949l.

[99] *See Union Independiente de Empleados de Servicios*, 550 F. Supp. at 1110–1111 ("Plaintiff moves the Court to assign the present motion to a different judge for decision. Section 455 of 28 U.S.C. includes no provision for referral of the question of recusal to another judge; if the judge sitting on a case is aware of grounds for recusal under Section 455, that judge has a duty to recuse himself or herself.").

[100] R.M.C. 902(d) (emphasis added).

[101] *See id.*

[102] *See* AE 595X (WBA) at 8.

the Rules most certainly do prohibit it.[103] Contrary to Defense argument, the only fair reading of R.M.C. 902 is to read the actual words of the rule, including the word "shall", which retains its common, non-discretionary meaning.

Consistent with what C.A.A.F. stated in *Quintanilla*, unlike federal district courts, military commissions are not standing courts; they must be specifically convened for a specific purpose.[104] Military judges derive their legal authority to hear cases from the M.C.A, convening orders, and detailing orders.[105] Absent specific authorization from those authorities, the Chief Trial Judge simply does not have the legal authority to rule on a motion to recuse that Judge Parrella has denied twice, and retains the sole authority to consider for a third time. As such, the Prosecution respectfully requests Judge Parrella deny AE 595W (WBA) and AE 595X (WBA), and that Chief Judge Watkins have no involvement with the resolution of either motion.

6. Conclusion

For the reasons stated above, the Defense Motion for Recusal of the Military Judge (AE 595W (WBA)) and to transfer the motion to Chief Judge Watkins (AE 595X (WBA)) should be denied.

7. Oral Argument

The Prosecution does not request oral argument. Further, the Prosecution strongly posits that this Commission should dispense with oral argument as the facts and legal contentions are adequately presented in the material now before the Commission and argument would not add to the decisional process. However, if the Military Commission decides to grant oral argument to the Defense, the Prosecution requests an opportunity to respond.

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[103] R.M.C. 902(d) ("The military judge *shall*, upon motion of any party or *sua sponte*, decide whether the military judge is disqualified.").

[104] *See Quintanilla*, 56 M.J. at 39 ("There are important distinctions between a military judge and a federal civilian judge . . .. A federal civilian judge typically has jurisdiction over all cases arising under applicable federal law, but a military judge does not exercise general jurisdiction over cases arising under the [Uniform Code of Military Justice]. A military judge may exercise authority only over the specific case to which he or she has been detailed.")(internal citations omitted).

[105] *See id.*

8. Witnesses and Evidence

The Prosecution will not rely on any witnesses or additional evidence in support of this motion.

9. Additional Information

The Prosecution has no additional information.

10. Attachments

A. Certificate of Service, dated 6 March 2019

B. Email from Managing Trial Counsel to Counsel for Bin 'Attash Requesting a Correction to the Record, dated 27 February 2019

Respectfully submitted,

//s//
Clay Trivett
Managing Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 6th day of March 2019, I filed AE 595BB (GOV), Government Consolidated Response To Mr. Bin 'Attash's Motion to Disqualify Colonel Keith A. Parrella, USMC, as Military Judge Presiding in *United States v. Mohammad, et al.* and Mr. Bin 'Attash's Motion to Transfer AE 595W (WBA), Mr. Bin 'Attash's Motion to Disqualify Colonel Keith A. Parrella, USMC, as Military Judge, to Colonel Douglas K. Watkins, USA, Chief Judge of the Military Commissions, with the Office of Military Commissions Trial Judiciary, and I served a copy on counsel of record.

_____//s//_____
Christopher Dykstra
Major, USAF
Assistant Trial Counsel

ATTACHMENT B

Christopher M. Dykstra

From: CLAYTOGT
Sent: Wednesday, February 27, 2019 4:46 PM
To: 'Montross, William CIV (US)'; 'Perry, Edwin A CIV (USA)'; 'Connell, James G III CIV (USA)'; [redacted] 'Swann, Robert Lee CIV OSD OMC OCP (USA)'; Christopher M. Dykstra; 'Clay Trivett (clayton.trivett[redacted]'; CLIFFODJ; 'Cox, Dale J (John) CIV OSD OMC OCP (US)'; DALEJC; 'Dastoor, Neville F CPT USARMY OSD OMC OCP (US)'; 'Dykstra, Christopher M Maj USAF OSD OMC OCP (US)'; EDWARDR; 'Furr, Jeffery C SSgt USMC OSD OMC OCP (US)'; 'Gibbs, Rudolph P Jr CIV OSD OMC OCP (US)'; 'Groharing, Jeffrey D CIV OSD OMC OCP (USA)'; [redacted] TR OSD OMC OCP (US)'; [redacted] CIV OSD OMC OCP (US)' [redacted] MSgt USAF OSD OMC OCP (USA)'; 'Jeff Groharing (jeffrey.groharing[redacted] EFFERCF; JEFFREDG; [redacted] Jr SSgt USMC OSD OMC OCP (USA)'; [redacted] SSG USARMY (US)'; BENJAMM3; 'Martins, Mark S BG USARMY OSD OMC OCP (US)'; [redacted]'; 'Mills, Benjamin A Maj USMC OSD OMC [redacted] os V CIV DLSA (US)'; NEVILLFD; NICOLEAT; 'O'Sullivan, Michael J CIV OSD OMC OCP (US)'; 'Tavarez-Patin, Pascual A CIV OSD OMC OCP (USA)'; PASCUALT; ROBERTLS; [redacted] LTC USARMY OSD OMC OCP (USA)'; RUDOLPPG; 'Ryan, Ed (USANCW)'; 'Ryan, Edward R CIV (US)'; 'Tate, Nicole A CIV (US)'; 'Hall, Jackson T Capt USAF OSD OMC OCP (USA)'; 'Trivett, Clayton G CIV (USA)'; 'Zelnis, Charles R CIV OSD OMC OCP (US)'
Cc: 'OSD NCR OMC List MCDO Motions Distro'
Subject: RE: Request for Position -- Motion to Transfer AE 595W(WBA) to Chief Judge Douglas Watkins

Mr. Montross,

I am writing to request that you correct the record in AE 595W (WBA) regarding your certificate of conference.

As set forth below, the Prosecution's position on AE 595W (WBA) was as follows: The Prosecution will oppose any separate motion or relief to transfer AE 595W (WBA) to a different military judge.

However, you set forth in your motion: The Prosecution objects to the transfer of AE 595W(WBA), Mr. bin 'Atash's Motion to Disqualify Colonel Keith A. Parrella, USMC, to a neutral and disinterested judge.

As the Prosecution's position has always been that Colonel Parrella is a neutral and disinterested judge, and Colonel Parrella has in fact so ruled, your certificate of conference is both a misrepresentation of the Prosecution's position in the conference and a gratuitous comment.

I am giving you the opportunity to correct the record on your own but intend to file a motion to strike your filing if you do not do so by the end of the week.

Clay Trivett

-----Original Message-----
From: CLAYTOGT
Sent: Tuesday, February 26, 2019 5:35 PM
To: 'Montross, William CIV (US)' <william.montross3.civ[redacted]; Perry, Edwin A CIV (USA) <edwin.a.perry5.ci[redacted]; Connell, James G III CIV (USA) <james.g.connell7.civ[redacted]

[redacted] Swann, Robert Lee CIV OSD OMC OCP (USA) <robert.l.swann4.civ[redacted]; Christopher M. Dykstra <CHRISMD8[redacted]>; Clay Trivett (clayton.trivett[redacted] <clayton.trivett[redacted]; CLIFFODJ [redacted]; Cox, Dale J (John) CIV OSD OMC OCP (US) <dale.j.cox.civ[redacted]; DALEJC <dalejc[redacted]; Dastoor, Neville F CPT USARMY OSD OMC OCP (US) <deprov.neville.f.dastoor.mil[redacted]; Dykstra, Christopher M Maj USAF OSD OMC OCP (US) <christopher.m.dykstra4.mil[redacted]>; EDWARDR <edwardr[redacted]; Furr, Jeffery C SSgt USMC OSD OMC OCP (US) <jeffery.c.furr.mil[redacted]; Gibbs, Rudolph P Jr CIV OSD OMC OCP (US) <rudolph.p.gibbs.civ[redacted]; Groharing, Jeffrey D CIV OSD OMC OCP (USA) <jeffrey.d.groharing.civ[redacted]>; [redacted] OMC OCP (US) [redacted] CIV OSD OMC OCP (US) [redacted] MSgt USAF OSD OMC OCP (USA) [redacted]; Jeff Groharing (jeffrey.groharin[redacted] <jeffrey.groharing[redacted]; JEFFERCF <JEFFERCF[redacted]; JEFFREDG <jeffredg[redacted]> [redacted] SSgt USMC OSD OMC OCP (USA) [redacted] SSG USARMY (US) [redacted]; BENJAMM3 <BENJAMM3[redacted]; Martins, Mark S BG USARMY OSD OMC OCP (US) <mark.s.martins.mil[redacted]> [redacted]; Mills, Benjamin A Maj USMC OSD OMC OCP (US) <benjamin.a.mills12.mi[redacted]>; HARIDIVT <HARIDIVT[redacted]; Thravalos, Haridimos V CIV DLSA (US) <haridimos.v.thravalos.civ[redacted]>; NEVILLFD <NEVILLFD[redacted]>; NICOLEAT <nicoleat[redacted]>; O'Sullivan, Michael J CIV OSD OMC OCP (US) <michael.j.osullivan14.civ[redacted]; Tavarez-Patin, Pascual A CIV OSD OMC OCP (USA) <pascual.a.tavarez-patin.civ[redacted]; PASCUALT <pascualt[redacted]; ROBERTLS <robertls[redacted]; [redacted] LTC USARMY OSD OMC OCP (USA) [redacted] RUDOLPPG <rudolpp[redacted]; Ryan, Ed (USANCW) <Ed.Ryan[redacted]>; Ryan, Edward R CIV (US) <edward.r.ryan20.civ[redacted]>; Tate, Nicole A CIV (US) <nicole.a.tate4.civ[redacted]; Hall, Jackson T Capt USAF OSD OMC OCP (USA) <jackson.t.hall.mil[redacted] Trivett, Clayton G CIV (USA) <clayton.g.trivett.civ[redacted]; Zelnis, Charles R CIV OSD OMC OCP (US) <charles.r.zelnis.civ[redacted]>
Cc: OSD NCR OMC List MCDO Motions Distro[redacted]
Subject: RE: Request for Position -- Motion to Transfer AE 595W(WBA) to Chief Judge Douglas Watkins

Mr. Montross,

The Prosecution still does not have enough information regarding your claimed factual basis to disqualify Colonel Parrella to state a position on AE 595W.

The Prosecution will oppose any separate motion or relief to transfer AE 595W (WBA) to a different military judge.

Regards,

Clay Trivett

-----Original Message-----
From: Montross, William CIV (US) <william.montross3.civ[redacted]>
Sent: Tuesday, February 26, 2019 4:39 PM
To: CLAYTOGT <claytog[redacted]; Perry, Edwin A CIV (USA) <edwin.a.perry5.civ[redacted]>; Connell, James G III CIV (USA) <james.g.connell7.civ[redacted]; [redacted] Swann, Robert Lee CIV OSD OMC OCP (USA) <robert.l.swann4.civ[redacted]>; Christopher M. Dykstra <CHRISMD8[redacted]; Clay Trivett (clayton.trivett[redacted]) <clayton.trivett[redacted] [redacted]; Cox, Dale J (John) CIV OSD OMC OCP (US) <dale.j.cox.ci[redacted]>; DALEJC <dalejc[redacted]>; Dastoor, Neville F CPT USARMY OSD OMC OCP (US) <deprov.neville.f.dastoor.mil[redacted]; Dykstra, Christopher M Maj USAF OSD OMC OCP (US) <christopher.m.dykstra4.mi[redacted]; EDWARDR <edwardr[redacted]; Furr, Jeffery C SSgt USMC OSD OMC OCP (US) <jeffery.c.furr.mi[redacted]; Gibbs, Rudolph P Jr CIV OSD OMC OCP (US) <rudolph.p.gibbs.civ[redacted]>; Groharing, Jeffrey D CIV OSD OMC OCP (USA) <jeffrey.d.groharing.ci[redacted]>; [redacted] CTR OSD OMC OCP (US) [redacted] CIV OSD OMC OCP (US) [redacted] MSgt USAF OSD OMC OCP (USA [redacted]; Jeff Groharing (jeffrey.groharin[redacted] <jeffrey.groharin[redacted]; JEFFERCF <JEFFERCF[redacted]>; JEFFREDG

<jeffred [redacted]>; [redacted]SSgt USMC OSD OMC OCP (USA) [redacted]
[redacted] SG USARMY (US [redacted] BENJAMM3 <BENJAMM3 [redacted]>; Martins, Mark S BG
USARMY OSD OMC OCP (US) <mark.s.martins.mil [redacted]>; [redacted]
[redacted]; Mills, Benjamin A Maj USMC OSD OMC OCP (US)
<benjamin.a.mills12.mi [redacted]>; HARIDIVT <HARIDIVT [redacted]; Thravalos, Haridimos V CIV DLSA (US)
<haridimos.v.thravalos.c [redacted]; NEVILLFD <NEVILLFD [redacted]>; NICOLEAT <nicoleat [redacted]>; O'Sullivan,
Michael J CIV OSD OMC OCP (US) <michael.j.osullivan14.civ [redacted]; Tavarez-Patin, Pascual A CIV OSD OMC OCP
(USA) <pascual.a.tavarez-patin.civ [redacted]>; PASCUALT <pascualt [redacted]>; ROBERTLS <robertls [redacted]; [redacted]
[redacted]LTC USARMY OSD OMC OCP (USA) [redacted]>; RUDOLPPG <rudolppg [redacted]>;
Ryan, Ed (USANCW) <Ed.Ryan [redacted]; Ryan, Edward R CIV (US) <edward.r.ryan20.civ [redacted]>; Tate, Nicole A CIV
(US) <nicole.a.tate4.civ [redacted]; Hall, Jackson T Capt USAF OSD OMC OCP (USA) <jackson.t.hall.mil [redacted]
Trivett, Clayton G CIV (U [redacted]ton.g.trivett.civ [redacted]; Zelnis, Charles R CIV OSD OMC OCP (US)
<charles.r.zelnis.civ [redacted]>
Cc: OSD NCR OMC List MCDO Motions Distro [redacted]
Subject: Request for Position -- Motion to Transfer AE 595W(WBA) to Chief Judge Douglas Watkins

Trial Counsel:

AE 595W(WBA), Mr. bin 'Atash's Motion to Disqualify Colonel Keith Parrella as Military Judge Presiding in United States v. Mohammad, et al., will be filed on 27 February 2019.

Counsel for Mr. bin 'Atash intend to file a motion to transfer AE 595W(WBA) to Chief Judge Douglas Watkins.

Please state your position.

William Montross
Defense Counsel
Military Commissions Defense Organization
1620 Defense Pentagon
Washington, DC 20301-1620
(O [redacted]
NIPR: william.montross3.civ [redacted]
SIPR: william.montross3.civ [redacted]

-----Original Message-----
From: CLAYTOGT <claytogt [redacted]>
Sent: Friday, February 22, 2019 2:52 PM
To: Perry, Edwin A CIV (USA) <edwin.a.perry5.civ [redacted]>; Connell, James G III CIV (USA)
<james.g.connell7.civ [redacted]>; [redacted]; Swann, Robert Lee CIV OSD OMC OCP (USA)
<robert.l.swann4.civ [redacted]>; Christopher M. Dykstra <CHRISMD8 [redacted]; Clay Trivett (clayton.trivett [redacted]
<clayton.trivett [redacted]; CLIFFODJ <CLIFFOD [redacted]>; Cox, Dale J (John) CIV OSD OMC OCP (US)
<dale.j.cox.civ [redacted]>; DALEJC <dalejc [redacted]; Dastoor, Neville F CPT USARMY OSD OMC OCP (US)
<neville.f.dastoor.mil [redacted]>; Dykstra, Christopher M Maj USAF OSD OMC OCP (US)
<christopher.m.dykstra4.mi [redacted]; EDWARDR <edwardr [redacted]; Furr, Jeffery C SSgt USMC OSD OMC OCP (US)
<jeffery.c.furr.mil [redacted] udolph P Jr CIV OSD OMC OCP (US) <rudolph.p.gibbs.civ [redacted]; Groharing,
Jeffrey D CIV OSD OMC OCP (USA) <jeffrey.d.groharing.civ [redacted]; [redacted]CTR OSD OMC OCP (US)
[redacted]
[redacted]CIV OSD OMC OCP (US [redacted]MSgt USAF OSD OMC OCP (USA)
[redacted]; Jeff Groharing (jeffrey.groharing [redacted] <jeffrey.groharing [redacted]; JEFFERCF
<JEFFERCF [redacted]; JEFFREDG <jeffred [redacted]; [redacted]SSgt USMC OSD OMC OCP (USA)
[redacted]SSG USARMY (US) [redacted]>; BENJAMM3
<BENJAMM3 [redacted]; Martins, Mark S BG USARMY OSD OMC OCP (US) <mark.s.martins.mi [redacted] [redacted]

[redacted] Mills, Benjamin A Maj USMC OSD OMC OCP (US) <benjamin.a.mills12.mil [redacted]; HARIDIVT <HARIDIVT [redacted]; Thravalos, Haridimos V CIV DLSA (US) <haridimos.v.thravalos.civ [redacted]>; NEVILLFD <NEVILLFD [redacted]; NICOLEAT <nicoleat [redacted]; O'Sullivan, Michael J CIV OSD OMC OCP (US) <michael.j.osullivan14.civ [redacted] Tavarez-Patin, Pascual A CIV OSD OMC OCP (USA) <pascual.!
a.tavarez-patin.ci [redacted]; PASCUALT <pascualt [redacted]; ROBERTLS < robertls [redacted]; [redacted] LTC USARMY OSD OMC OCP (USA) [redacted] RUDOLPPG <rudolppg [redacted]; Ryan, Ed (USANCW) <Ed.Rya [redacted]; Ryan, Edward R CIV (US) <edward.r.ryan20.civ [redacted]; Tate, Nicole A CIV (US) <nicole.a.tate4.civ [redacted]>; Hall, Jackson T Capt USAF OSD OMC OCP (USA) <jackson.t.hall.mil [redacted] Trivett, Clayton G CIV (USA) <clayton.g.trivett.civ [redacted]; Zelnis, Charles R CIV OSD OMC OCP (US) <charles.r.zelnis.civ [redacted]>
Cc: OSD NCR OMC List MCDO Motions Distro [redacted]
Subject: [Non-DoD Source] RE: Request for Position -- Motion to Disqualify Military Judge Keith Parrella ~~(UNCLASSIFIED)~~

Mr. Perry,

Without knowing the purported factual basis of your motion to disqualify Colonel Parrella, the Prosecution cannot state its position on the motion.

Regards,

Clay Trivett

-----Original Message-----
From: Perry, Edwin A CIV (USA) <edwin.a.perry5.civ [redacted]>
Sent: Friday, February 22, 2019 1:00 PM
To: Connell, James G III CIV (USA) <james.g.connell7.civ [redacted]; [redacted] Swann, Robert Lee CIV OSD OMC OCP (USA) <robert.l.swann4.civ [redacted]; Christopher M. Dykstra <CHRISMD8 [redacted]; Clay Trivett (clayton.trivett [redacted] <clayton.trivett [redacted]>; CLAYTOGT <claytogt [redacted]; CLIFFODJ <CLIFFODJ [redacted]; Cox, Dale J (John) CIV OSD OMC OCP (US) <dale.j.cox.civ [redacted]; DALEJC <dalejc [redacted]; Dastoor, Neville F CPT USARMY OSD OMC OCP (US) <neville.f.dastoor.mi [redacted]; Dykstra, Christopher M Maj USAF OSD OMC OCP (US) <christopher.m.dykstra4.mil [redacted]; EDWARDR <edwardr [redacted]; Furr, Jeffery C SSgt USMC OSD OMC OCP (US) <jeffery.c.furr.mi [redacted]>; Gibbs, Rudolph P Jr CIV OSD OM [redacted] S) <rudolph.p.gibbs.civ [redacted]; Groharing, Jeffrey D CIV OSD OMC OCP (USA) <jeffrey.d.groharing.civ [redacted]; [redacted] CTR OSD OMC OCP (US) [redacted] IV OSD OMC OCP (US) <! [redacted] MSgt USAF OSD OMC OCP (USA) [redacted]>; Jeff Groharing (jeffrey.groharing [redacted] <jeffrey.groharing [redacted]>; JEFFERCF <JEFFERCF [redacted]; JEFFREDG <jeffredg [redacted]; [redacted] SSgt U [redacted] MC OCP (USA) [redacted] SSG USARMY (US) [redacted] BENJAMM3 <BENJAMM3 [redacted]; Martins, Mark S BG USARMY OSD OMC OCP (US) <mark.s.martins.mi [redacted]>; MICHASW6 <MICHASW6 [redacted]; Mike Warbel [redacted] Mills, Benjamin A Maj USM [redacted] MC OCP (US) <benjamin [redacted]; Thravalos, Haridimos V CIV DLSA (US) <haridimos.v.thravalos.civ [redacted]>; NEVILLFD <NEVILLFD [redacted]; NICOLEAT <nicoleat [redacted]; O'Sullivan, Michael J CIV OSD OMC OCP (US) <michael.j.osullivan14.civ [redacted]; Tavarez-Patin, Pascual A CIV OSD OMC OCP (USA) <pascual.a.tavarez-patin.civ [redacted] [redacted] PASCUALT <pascualt [redacted]; ROBERTLS <robertls [redacted] LTC USARMY OSD OMC OCP (USA) [redacted] RUDOLPPG <rudol [redacted]) <Ed.Ryan [redacted]; Ryan, Edward R CIV (US) <edward.r.ryan20.civ [redacted]>; Tate, Nicole A CIV (US) <nicole.a.tate4.civ [redacted]>; Hall, Jackson T Capt USAF OSD OMC OCP (USA) <jackson.t.hall.mil [redacted] Trivett, Clayton G CIV (USA) <clayton.g.trivett.civ [redacted]>; Zelnis, Charles R CIV OSD OMC OCP (US) <charles.r.zelnis.civ [redacted]>
Cc: OSD NCR OMC List MCDO Motions Distro [redacted]

Subject: Request for Position -- Motion to Disqualify Military Judge Keith Parrella (~~UNCLASSIFIED~~)

CLASSIFICATION: ~~UNCLASSIFIED~~

Trial Counsel:

Counsel for Mr. bin 'Atash intend to file a motion to disqualify Military Judge Keith Parrella, pursuant to R.M.C. 902(d)(1), cmt.

Please state your position.

Edwin A. Perry
Defense Counsel
Military Commissions Defense Organization Washington, DC Office: [redacted]
Cell: [redacted]

CLASSIFICATION: ~~UNCLASSIFIED~~