

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

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p>AE 595EE</p> <p>RULING</p> <p>Mr. bin ‘Atash’s Motion to Disqualify Colonel Keith A. Parrella, USMC, as Military Judge Presiding in United States v. Mohammad, et al.</p> <p>and</p> <p>Mr. bin ‘Atash’s Motion to Transfer AE 595W(WBA), Mr. bin ‘Atash’s Motion to Disqualify Colonel Keith A. Parrella, USMC, as Military Judge, to Colonel Douglas K. Watkins, USA, Chief Judge of the Military Commissions</p> <p>15 March 2019</p>
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1. Procedural History.

a. On 27 August 2018, the undersigned was detailed as Military Judge in this case.¹ On 10 September 2018, counsel for all parties were afforded extensive *voir dire* to evaluate whether grounds for challenge existed.² On 11 September 2018, the Commission denied a motion to disqualify by all Accused, except Mr. Hawsawi.³ A subsequent separate motion to recuse by Mr. Hawsawi was denied on 19 November 2018.⁴

¹ AE 001A, OMC-TJ Memorandum, Subj: 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, dated 27 August 2018.

² Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 10 September 2018 from 9:03 A.M. to 10:38 A.M. at p. 20420 (start of *voir dire*), and from 1:32 P.M. to 2:34 P.M. at p. 20589 (end of *voir dire*). For brevity’s sake, cites to the unofficial / unauthenticated transcript will hereinafter be by reference to page number only (e.g., “Transcript 00000.”)

³ Specifically, on 11 September 2018 an oral motion to disqualify by all Accused save for Mr. Hawsawi was denied on the record from the bench. Transcript 20605.

⁴ AE 595O Ruling, Defense Motion to Recuse Military Judge, Colonel Parrella, dated 19 November 2018. On 28 November 2018, Mr. Hawsawi filed with the Court of Military Commission Review (U.S.C.M.C.R.) a petition to stay these proceedings and issue a writ of mandamus directing recusal of the military judge. AE 595P (MAH), Mr. Hawsawi’s Notice of Filing of Petition and Application for Stay in The Court of Military Commission Review, filed 28 November 2018. Mr. Ali filed a notice of joinder with Mr. Hawsawi’s petition on 10 December 2018. AE 595Q

b. On 27 February 2019, Mr. bin ‘Attash filed a second motion to disqualify (AE 595W (WBA)), which (1) “move[d] to disqualify Colonel Keith Parrella as Military Judge in the instant case because his impartiality has been reasonably questioned,” and (2) requested the matter be detailed to a different judge.⁵ On the same day, Mr. bin ‘Attash filed a separate motion (AE 595X (WBA)) asking that the issue of judicial disqualification in this case be transferred to another judge, arguing doing so was necessary to avoid actual or perceived bias or partiality.⁶ On 5 March 2019, Mr. Ali (a.k.a. al Baluchi) moved to decline joinder to AE 595X (WBA).⁷ The Government filed a consolidated response to Mr. bin ‘Attash’s motions on 6 March 2019.⁸ Mr. bin ‘Attash replied with regard to AE 595X (WBA) on 8 March 2019.⁹ Mr. bin ‘Attash filed no reply with regard to AE 595W (WBA).

(AAA), Mr. Al Baluchi’s Notice of Filing a Notice of Joinder to Mr. Hawsawi’s Petition and Application for Stay in the Court of Military Commission Review, filed 10 December 2018. On 13 February 2019 Mr. Mohammad also filed a petition for mandamus relief with the U.S.C.M.C.R. *See* Petition for Extraordinary Relief in the Nature of a Writ of Mandamus, *Mohammad v. United States*, U.S.C.M.C.R. Case No. 19-001 (13 Feb 2019). So far as the Commission is aware, these petitions remain pending before the U.S.C.M.C.R. at present.

⁵ AE 595W (WBA), Mr. bin ‘Atash’s Motion to Disqualify Colonel Keith A. Parrella, USMC, as Military Judge Presiding in *United States v. Mohammad, et al.*, filed 27 February 2019, p. 1.

⁶ AE 595X (WBA), Mr. bin ‘Atash’s Motion to Transfer AE 595W (WBA), Mr. bin ‘Atash’s Motion to Disqualify Colonel Keith A. Parrella, USMC, as Military Judge, to Colonel Douglas K. Watkins, USA, Chief Judge of the Military Commissions, filed 27 February 2019. The following day (28 February 2019), Mr. bin ‘Attash also sent a letter to the Chief Judge of the Military Commissions, reiterating his request that the disqualification decision be assigned to another judge. AE 595Z, Notice of Receipt of Letter Sent to Chief Trial Judge, dated 1 March 2019.

⁷ AE 595AA (AAA), Mr. al Baluchi’s Motion to Decline Joinder to AE 595X (WBA), filed 5 March 2019. The Rules of Court (R.C.) presume joinder by co-Accused in motions, absent filing of a notice of non-joinder. R.C. 3-5.i(1). The Commission will treat AE 595AA (AAA) as such a notice. Consequently, Mr. Ali is unjoined from AE 595X (WBA).

⁸ 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, filed 6 March 2019.

⁹ AE 595CC (WBA), Mr. bin ‘Atash’s Reply to AE 595BB (GOV), Government Response to AE 595X (WBA), Mr. bin ‘Atash’s Motion to Transfer AE 595W (WBA) to Colonel Douglas K. Watkins, USA, Chief Judge of the Military Commissions, filed 8 March 2019. Mr. bin ‘Attash’s reply in part addresses a Government request to strike AE 595X (WBA) due to what it asserts is a misleading characterization of its position—which counsel for Mr. bin ‘Attash argue is itself a misrepresentation of *their* position. AE 595BB (GOV), fn 27; AE 595CC (WBA), para. 3.d. Suffice to say the language the Government objects to is sufficiently ambiguous that neither position is persuasive. Accordingly, the Commission declines to grant any relief requested regarding this specific issue, and sees no value in addressing it further.

c. Counsel for Mr. bin ‘Attash requested oral argument on both motions.¹⁰ Mr. Ali declined oral argument regarding his motion for non-joinder and AE 595X (WBA), but “reserve[d] the right to be heard on any oral argument relating to [the] Military Judge[]’s . . . disqualification.”¹¹ Defense Counsel did not request additional *voir dire* as a remedy. The Government did not request oral argument, but requested an opportunity to respond to any oral argument by Defense Counsel.¹² Oral argument is not necessary to resolve the issues presented here.

2. Law.

a. **Burden of Proof.** Mr. bin ‘Attash bears the burden of proving by a preponderance of the evidence any facts prerequisite to the relief he seeks.¹³

b. **Oral Argument.** The opportunity to orally argue in support of pretrial motions is afforded at the discretion of the military judge.¹⁴

c. **Reconsideration.** The Commission may reconsider any ruling (except the equivalent of a finding of not guilty) prior to authentication of the record of trial.¹⁵ Either party may move for reconsideration, but granting of the request is in the Military Judge's discretion. Generally, reconsideration should be based on a change in the facts or law, or instances where the ruling is inconsistent with case law not previously briefed. Reconsideration may also be appropriate to correct a clear error or prevent manifest injustice.¹⁶ Motions for reconsideration are not appropriate to raise arguments that could have been, but were not, raised previously and

¹⁰ AE 595W (WBA), para. 7; AE 595X (WBA), para. 6.

¹¹ AE 595AA (AAA), para. 5.

¹² AE 595BB (GOV), para. 7.

¹³ Rule for Military Commissions (R.M.C.) 905(c)(1)-(2).

¹⁴ R.M.C. 905(h); R.C. 3.5 m.

¹⁵ R.M.C. 905(f).

¹⁶ See *U.S. v. Libby*, 429 F. Supp. 2d 46 (D.D.C. 2006); *U.S. v. McCallum*, 885 F. Supp. 2d 105 (D.D.C. 2012).

arguments the Commission has previously rejected.¹⁷ Nor are motions for reconsideration appropriate for the proffer of evidence available when the original motion was filed, but, for unexplained reasons, not proffered at that time.¹⁸

d. Disqualification of Military Commission Judges. The Commission adopts and incorporates its statement of law on this subject from AE 595O, an earlier written ruling in this series.¹⁹

3. Analysis: Transfer of Disqualification Motion. As is evident from the language of the relevant Rule for Military Commissions, when a military judge is challenged, that judge ordinarily decides whether recusal is appropriate: “[t]he military judge shall, upon motion of any party or sua sponte, decide whether *the military judge* is disqualified.”²⁰ The Commission has previously articulated detailed findings supporting its decision against recusal, and (for reasons explored below) nothing presented in the motion at issue here significantly disturbs its prior conclusions. Assuming *arguendo* that detailing a different judge for this purpose would be procedurally viable, there is no sufficient reason here to depart from the normal procedure called for in the rule.²¹ The motion to transfer this matter to another judge is therefore denied, and the Commission will consider the motion to disqualify.

¹⁷ See *U.S. v. Booker*, 613 F. Supp. 2d 32 (D.D. C. 2009); *U.S. v. Bloch*, 794 F. Supp. 2d 15, 19 (D.D.C. 2011).

¹⁸ See *Bloch*, 794 F. Supp. 2d at 19-20.

¹⁹ AE 595O, para. 3.

²⁰ R.M.C. 902(d)(1) (emphasis added).

²¹ The Commission notes the letter submitted by Mr. bin ‘Attash to the Chief Judge, requesting that he detail himself for purposes of considering this particular matter. See AE 595Z, Attach. A. The Commission is presently unaware of the Chief Judge’s intended resolution of that request. Presumably, if he determines the factual circumstances and applicable law justify intervention, he may do so regardless of any action taken by this Commission. Accordingly, the pendency of Mr. bin ‘Attash’s request to the Chief Judge does not militate against the Commission proceeding here.

4. Analysis: Reconsideration of Prior Ruling Regarding Disqualification.

a. As a threshold matter, the Commission notes the Defense motion to disqualify in fact amounts to a motion to reconsider its 11 September 2018 denial of a prior disqualification motion to which Mr. bin ‘Attash was joined.²² The overall factual basis for the challenge is unchanged. As the Defense motion presents at least some additional facts not available to Mr. bin ‘Attash at the time of the original motion, the Commission will grant Mr. bin ‘Attash’s request for reconsideration.²³ Nevertheless, for reasons discussed below, no differing disposition is warranted.

b. Mr. bin ‘Attash argues certain additional information obtained as a result of Defense investigation requires disqualification. The additional information is of two general sorts: (1) information concerning my prior dealings with Mr. Jeffrey Groharing, a reservist in the U.S. Marine Corps and member of the Prosecution; and (2) information concerning the Counterterrorism Section (CTS) of the Department of Justice’s (DOJ’s) National Security Division (NSD)—at which I worked during a year-long (July 2014-July 2015) military fellowship. However, nothing presented materially conflicts with the Commission’s prior findings supporting its declination to recuse.

c. Additional Information Regarding Mr. Groharing.

²² See fn 3, *supra*; Transcript 20605. Counsel for Mr. bin ‘Attash aver he was also automatically joined to Mr. Hawsawi’s subsequent motion to recuse, which the Commission denied on 19 November 2018. AE 595W (WBA), p. 13. The Rules of Court do ordinarily presume joinder in motions as between co-Accused. R.C. 3-5.i. In this instance, however, it is clear from the record that Mr. Hawsawi’s motion was expressly intended to be separate from that of the other four Accused, in particular with regard to reconsideration. Transcript 20606-08. Furthermore, Mr. Hawsawi has not sought reconsideration of the Commission’s denial of his recusal motion, having elected instead to seek review through a petition for mandamus to the U.S.C.M.C.R. See fn 4, *supra*. Accordingly, the presumption of joinder is inapplicable, and reconsideration here is limited to the Commission’s 11 September 2018 bench ruling.

²³ Much of the material submitted by Mr. bin ‘Attash appears to be publicly-available information that was likely accessible online well before the Commission’s 10 September 2018 *voir dire*. See, e.g., AE 595W (WBA), Attach.’s D-I. Some of the information, however, consists of CTS case documents, which may have only been obtained by Mr. bin ‘Attash recently. AE 595W (WBA), Attach.’s J-L. Furthermore, the materials submitted include a declaration of a Defense investigator that relates the contents of several interviews, a few of which were obtained after the Commission’s 11 September 2018 bench ruling. AE 595W (WBA), Attach. U, paras. 9-11.

(1) The additional information presented regarding Mr. Groharing merely affirms (and in some cases reinforces) information already provided during *voir dire*. In sum, my dealings with Mr. Groharing consisted of the following: (1) superficial and infrequent contact while he and I worked at neighboring installations from the late 1990s to early 2000;²⁴ (2) competing together in the All Wilderness Military Challenge (a 2-day athletic event) on two occasions (one in 2007, the other in 2008);²⁵ and (3) superficial and infrequent contact at official social events during my above-referenced 2014-2015 fellowship at DOJ.²⁶

(2) The additional information concerning Mr. Groharing focuses on the racing events, and confirms that (1) he and I participated in only two such annual events together;²⁷ (2) we did not train together;²⁸ (3) the team only assembled shortly before each event and departed soon after;²⁹ and (4) each event spanned only a single weekend.³⁰ Counsel for Mr. bin ‘Attash place great emphasis on three group photos of the racing team (only two of which include Mr. Groharing).³¹ However, these photos do nothing more than confirm, in unsurprising fashion, events already disclosed during *voir dire*. Tellingly, while during *voir dire* I was unable to recall who had proposed adding Mr. Groharing to the team,³² a Defense interviewee (Colonel ██████████ ██████████ U.S. Marine Corps) specifically recalled it was he, not I, who first mentioned Mr. Groharing as a potential candidate.³³

²⁴ Transcript 20503-06, 20531-32.

²⁵ Transcript 20506-11.

²⁶ Transcript 20455-56, 20531-33.

²⁷ AE 595W (WBA), Attach. U, paras. 9 f, g; Attach.’s V, W.

²⁸ AE 595W (WBA), Attach. U, paras. 9.j.

²⁹ AE 595W (WBA), Attach. U, paras. 9 k; 11 h, i.

³⁰ AE 595W (WBA), Attach. Q.

³¹ AE 595W (WBA), pp. 2, 19-21, Attach.’s V, W, X (arguing that “[a] reasonable person . . . in particular upon reviewing [the referenced] photographs . . . would perceive [an] appearance of partiality.” *Id.* at 2).

³² Transcript 20508.

³³ AE 595W (WBA), Attach. U, para. 11.g. Colonel ██████████ also noted his belief that the undersigned “already knew Groharing from San Diego, but not very well.” *Id.*

(3) Ultimately, the new information only underscores how little actual contact or connection there has been during what the Defense somewhat hyperbolically characterizes as a “two-decade long friendship.”³⁴ The Defense claims of a substantial relationship forming any basis for actual or perceived bias are, in short, unpersuasive. As I unequivocally stated on the record during *voir dire*, there is nothing that would cause me to give Mr. Groharing’s input any greater or lesser weight than any other counsel for any party.³⁵ Nothing presented here undercuts that conclusion, or reasonably creates any contrary appearance.³⁶

d. Additional Information Regarding NSD/CTS.

(1) The additional information Mr. bin ‘Attash offers with regard to NSD can be broken down roughly into three categories: (a) general public information regarding the origin and/or mission of NSD and/or CTS;³⁷ (b) documents concerning a CTS case with which I assisted (*United States v. Khan*);³⁸ and (c) interviews with several present and former CTS personnel and (in some cases) their thumbnail biographies.³⁹

(2) The first category of information is so broad as to be of limited practical relevance, and was certainly available to the Defense well in advance of *voir dire*. In any event,

³⁴ AE 595W (WBA), p. 11.

³⁵ Transcript 20510.

³⁶ *See, e.g., U.S. v. Sullivan*, 74 M.J. 448 (C.A.A.F. 2015)(finding military judge who “had professional and/or social contacts with a significant number of the court-martial participants” had not abused discretion by failing to recuse when the relationships were fully described on the record and “those . . . that had a social component occurred years prior to the court-martial and were not close or intimate.” *Id.* at 454); *see also U.S. v. Wright*, 52 M.J. 136 (C.A.A.F. 1999)(“Judges have broad experiences and a wide array of backgrounds that are likely to develop ties with other attorneys, law firms, and agencies. These relationships may be professional or social. Where such concerns arise regarding court members, a former professional relationship is not *per se* disqualifying.” *Id.* at 141).

³⁷ AE 595W (WBA), Attach.’s D-H.

³⁸ AE 595W (WBA), Attach.’s I-L.

³⁹ AE 595W (WBA), Attach.’s R-T, U paras. 4-7.

it is not materially inconsistent with any information already provided by the Commission in its *voir dire*.⁴⁰

(3) The *Khan* documents establish no information inconsistent with the Commission's *voir dire*. The *Khan* case was a prosecution of an aspiring Islamic State of Iraq and Syria (ISIS) affiliate for conspiracy to materially support terrorism.⁴¹ The alleged misconduct in that case occurred in 2013, and involved the Accused's attempt to travel to Syria for purposes of supporting ISIS.⁴² My involvement, to the extent I recall, was the drafting of documents in support of an associated search warrant. There is nothing so much as hinting at any material connection between *Khan* (or any similar case I may have worked on) and the events of 9/11 or this Commission.⁴³

(4) The statements of CTS personnel are likewise of little import. To the extent they are relevant at all (*e.g.*, one individual, a Mr. [REDACTED] left the organization four years before I arrived),⁴⁴ they are long on speculation and short on specifics. In sum, they are so vague and inconsistent with each other that they do not meaningfully contradict what has already been set forth in *voir dire*. I reaffirm and clarify my experience at CTS as described in *voir dire*—that is, I

⁴⁰ As for the indication that 9/11 Commission report was “required reading” for all NSD assignees (AE 595W (WBA), Attach. H), apparently this policy did not apply to military research fellows—as I am quite confident I have never read the report, nor been directed to do so. *See* Transcript 20457.

⁴¹ AE 595W (WBA), Attach. J.

⁴² *Id.*

⁴³ It is possible the Defense relies on a passing reference to al Qaeda (AQ) in the *Khan* pleadings as being inconsistent with the assertion during *voir dire* that I worked on no military commission related case while at CTS. AE 595W (WBA), Attach. J, p. 1; Transcript 20498-99. However, the context of the AQ reference makes clear that it is purely historical. The Accused in *Khan* was an aspiring member of ISIS, and those pleadings tangentially reference AQ in discussing the historical development of ISIS. The Commission expressly referenced having been involved in ISIS prosecutions during *voir dire*. Transcript 20479. Further, the Commission finds unlikely any substantial connection between the misconduct in *Khan* and the charges here, given that the *Khan* defendant was approximately 6 years old at the time of the 9/11 attacks. AE 595W (WBA), Attach. J, para. 2.

⁴⁴ AE 595W (WBA), Attach. U, para. 4.b.

did not work in proximity to Commissions prosecutors; have any visibility on their practice (to include this case); or encounter them outside infrequent office social functions (if at all).⁴⁵

(5) Essentially all of this information was available to the Defense prior to the Commission's 11 September 2018 ruling.⁴⁶ Given that fact, the lack of any material inconsistency with its *voir dire*, and the strong presumption of the Military Judge's impartiality,⁴⁷ the Commission concludes the additional information regarding NSD/CTS presents insufficient basis for relief.

e. In light of the foregoing, the Commission, having reconsidered its 11 September 2018 bench denial of the initial Defense motion to disqualify, concludes that nothing presented here warrants any differing result. To the extent it may not have clearly done so before, the Commission expressly articulates its determination that, here, "a reasonable [person] knowing all the circumstances [would not conclude] that the judge's impartiality might reasonably be questioned."⁴⁸ Disqualification pursuant to R.M.C. 902(a) therefore remains unwarranted.

5. Ruling.

a. The Defense requests for oral argument are **DENIED**.

b. The motion for this matter to be referred to a different judge is **DENIED**.

c. The motion to disqualify—or, more accurately, to reconsider the Commission's 10 September 2018 bench ruling—is **GRANTED IN PART**, in that the Commission has

⁴⁵ Transcript 20453-58, 20478-79, 20489-503, 20521-36, 20542-58.

⁴⁶ The Commission notes that two of the Defense Investigator's interviews with NSD/CTS personnel were apparently conducted after *voir dire* on 10 September 2018, but before the Commission's oral ruling the following day. AE 595W (WBA), Attach. U, paras. 6, 7. Counsel for Mr. bin 'Attash did not bring these interviews to the Commission's attention, or request additional *voir dire* based thereon, before the Commission ruled, despite apparently having the opportunity to do so.

⁴⁷ See *U.S. v. Quintanilla*, 56 M.J. 37 (C.A.A.F. 2001) ("There is a strong presumption that a judge is impartial." *Id.* at 44).

⁴⁸ *U.S. v. Martinez*, 70 M.J. 154, 158 (C.A.A.F. 2011) (quoting *U.S. v. Kincheloe*, 14 M.J. 40, 50 (C.M.A. 1982)).

reconsidered that ruling based on Mr. bin 'Attash's filings, and determined that no differing result is warranted. The motion is otherwise **DENIED**.

So **ORDERED** this 15th day of March, 2019.

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