

MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

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

**AE595FF (AAA)**

**Mr. al Baluchi's Motion**  
To Reconsider the Military Judge's  
Denial of Recusal

18 April 2019

1. **Timeliness:** This motion is timely filed.
2. **Relief Sought:** In light of the D.C. Circuit's new decision in *Al-Nashiri*,<sup>1</sup> the Military Judge should reconsider his denials of defense motions to recuse. The Military Judge denied defense motions to recuse on three occasions: (1) on 11 September 2018 in a bench ruling; (2) on 19 November 2018 in AE595O Ruling; and (3) on 15 March 2019 in AE595EE Ruling.<sup>2</sup>
3. **Overview:** In *Al-Nashiri*, the D.C. Circuit determined that a military judge had a conflict of interest due to his employment application with the Department of Justice while presiding over a military commission case in which the DOJ was a participant. The D.C. Circuit specifically held

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<sup>1</sup> *In re Al-Nashiri*, No. 18-1279, 2019 U.S. App. LEXIS 11067 (D.C. Cir. Apr. 16, 2019).

<sup>2</sup> The Rules of Court presume joinder in motions as between co-Accused. R.C. 3-5.i. Mr. al Baluchi acknowledges, but disagrees, with the military commission's finding that the presumption of joinder is inapplicable to Mr. Hawsawi's motion to recuse, which the military commission subsequently denied in AE595O Ruling. See AE595EE Ruling, Mr. bin 'Atash's Motion to Disqualify Colonel Keith A. Parrella, USMC, as Military Judge Presiding in United States v. Mohammad, et al. and Mr. bin 'Atash's Motion to Transfer AE595W (WBA), Mr. bin 'Atash's Motion to Disqualify Colonel Keith A. Parrella, USMC, as Military Judge, to Colonel Douglas K. Watkins, Chief Judge of the Military Commissions at 5, n.22. If the military commission was going to depart from R.C. 3-5.i, Mr. al Baluchi should have been so notified in advance. In any event, joinder to Mr. Hawsawi's motion is inconsequential because the military commission's rulings on 11 September 2018 and 15 March 2019 also addressed the basis for recusal upon which Mr. al Baluchi now seeks reconsideration.

that the DOJ was a “party” to military commissions proceedings. This holding invalidates Military Judge Parrella’s core finding that “the Military Judge and DOJ prosecutors assigned to this case effectively worked for two separate government agencies during the Military Judge’s fellowship year (2014-2015).”<sup>3</sup> Military Judge Parrella is directly associated with a party—the DOJ—and should therefore recuse himself.

**4. Burden of Proof:** Mr. al Baluchi bears the burden of proof on this motion.

**5. Facts:**

a. On 27 August 2018, Colonel Keith Parrella, USMC, was detailed as Military Judge in this case.<sup>4</sup>

b. On 10 September 2018, Mr. al Baluchi moved to recuse the Military Judge.<sup>5</sup>

c. On 11 September 2018, the military commission orally denied Mr. al Baluchi’s motion to recuse.<sup>6</sup> In refusing to recuse himself, the Military Judge found that his time at the Department of Justice did not create a conflict of interest. The Military Judge stated, “I did not act as counsel on this matter or any other commissions cases in any capacity while at the Department of Justice. Additionally, I did not have professional interaction with any of the Department of Justice attorneys assigned to this commission while serving as a Fellow at the Department of Justice.”<sup>7</sup>

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<sup>3</sup> AE5950 Ruling, Defense Motion to Recuse Military Judge, Colonel Parrella at 3.

<sup>4</sup> AE001A, 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.

<sup>5</sup> Unofficial/Unauthenticated Transcript of 10 September 2018 at 20568-79, 20585-89.

<sup>6</sup> Unofficial/Unauthenticated Transcript of 11 September 2018 at 20598-20606.

<sup>7</sup> T. 9/11/18 at 20602-03.

d. On 19 October 2018, Mr. Hawsawi moved to recuse the Military Judge.<sup>8</sup>

e. On 19 November 2018, the military commission issued AE595O Ruling, denying Mr. Hawsawi's motion to recuse.<sup>9</sup> In refusing to recuse himself, the Military Judge reasoned that no conflict existed because "the Military Judge and DOJ prosecutors assigned to this case effectively worked for two separate government agencies during the Military Judge's fellowship year (2014-2015)."<sup>10</sup>

f. On 27 February 2019, Mr. bin 'Atash moved to disqualify the Military Judge.<sup>11</sup>

g. On 15 March 2019, the military commission issued AE595EE Ruling, denying Mr. bin 'Atash's motion to disqualify.<sup>12</sup> In refusing to disqualify himself, the Military Judge reasoned that no conflict existed because his dealings with Mr. Groharing, a DOJ prosecutor assigned to this case, consisted (among other things) of "superficial and infrequent contact at official social events during my above-referenced 2014-2015 fellowship at DOJ."<sup>13</sup>

## **6. Argument:**

Under R.M.C. 905(f), the military commission may reconsider any ruling (except the equivalent of a finding of not guilty) prior to authentication of the record of trial. Generally,

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<sup>8</sup> AE595I (MAH) Defense Motion to Recuse Military Judge, Colonel Parrella.

<sup>9</sup> AE595O Ruling, Defense Motion to Recuse Military Judge, Colonel Parrella.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> AE595W (WBA) Mr. bin 'Atash's Motion to Disqualify Colonel Keith A. Parrella, USMC, as Military Judge Presiding in United States v. Mohammad, et al.

<sup>12</sup> AE595EE Ruling, Mr. bin 'Atash's Motion to Disqualify Colonel Keith A. Parrella, USMC, as Military Judge Presiding in United States v. Mohammad, et al. and Mr. bin 'Atash's Motion to Transfer AE595W (WBA), Mr. bin 'Atash's Motion to Disqualify Colonel Keith A. Parrella, USMC, as Military Judge, to Colonel Douglas K. Watkins, Chief Judge of the Military Commissions.

<sup>13</sup> *Id.* at 6.

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.<sup>14</sup> At least one holding in the D.C. Circuit’s new *Al-Nashiri* decision runs directly contrary to the reasoning of the Military Judge Parrella in refusing to recuse himself. As a result, Military Judge Parrella should reconsider his denials of defense motions to recuse.

In refusing to recuse himself, Military Judge Parrella has made multiple findings regarding his association with the Department of Justice and with Mr. Groharing, a DOJ prosecutor assigned to this case. On 11 September 2018, Military Judge Parrella stated, “I did not act as counsel on this matter or any other commissions cases in any capacity while at the Department of Justice. Additionally, I did not have professional interaction with any of the Department of Justice attorneys assigned to this commission while serving as a Fellow at the Department of Justice.”<sup>15</sup> Military Judge Parrella’s core finding in AE595O Ruling was that “the Military Judge and DOJ prosecutors assigned to this case effectively worked for two separate government agencies during the Military Judge’s fellowship year (2014-2015).”<sup>16</sup> In AE595EE Ruling, Military Judge Parrella further found that his dealings with Mr. Groharing consisted (among other things) of “superficial and infrequent contact at official social events during my above-referenced 2014-2015 fellowship at DOJ.”<sup>17</sup>

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<sup>14</sup> AE595EE Ruling at 3; *See United States v. Libby*, 429 F. Supp. 2d 46, 46-47 (D.D.C. 2006).

<sup>15</sup> T. 9/11/18 at 20602-03.

<sup>16</sup> AE595O Ruling at 3.

<sup>17</sup> AE595EE Ruling at 6.

The new decision in *Al-Nashiri* negates these arguments. The D.C. Circuit has now held that the DOJ is a “party” to military commissions proceedings.<sup>18</sup> In fact, one of the facts behind this conclusion is that the Attorney General “has loaned out one of his prosecutors,”<sup>19</sup> a precise description of Mr. Groharing’s situation. Therefore, from 2014 to 2015, Military Judge Parrella worked for a party to this case. And, contrary to the Military Judge’s previous findings, it is not whether he worked directly on this case, but the fact that he is directly associated with a party that is decisive. The result of his association with a party is a disqualifying appearance of partiality.

*Al-Nashiri* underscores that, “In no proceeding is the need for an impartial judge more acute than one that may end in death.”<sup>20</sup> It also notes that meritorious requests for recusal in the military commissions system are not “a one-time aberration.”<sup>21</sup> Here too the defense has presented a meritorious request for recusal. The military commission should therefore grant Mr. al Baluchi’s motion to reconsider the Military Judge’s denial of recusal.

7. **Oral Argument:** Mr. al Baluchi respectfully requests oral argument.
8. **Certificate of Conference:** The government opposes this motion to reconsider.

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<sup>18</sup> Slip op. at 20-22.

<sup>19</sup> Slip op. at 22.

<sup>20</sup> Slip op. at 27.

<sup>21</sup> Slip op. at 28.

**9. Attachments:**

A. Certificate of Service.

Very respectfully,

//s//

JAMES G. CONNELL, III  
Learned Counsel

//s//

STERLING R. THOMAS  
Lt Col, USAF  
Defense Counsel

//s//

ALKA PRADHAN  
Defense Counsel

//s//

BENJAMIN R. FARLEY  
Defense Counsel

//s//

MARK E. ANDREU  
Capt, USAF  
Defense Counsel

Counsel for Mr. al Baluchi

# Attachment A

**CERTIFICATE OF SERVICE**

I certify that on the 18th day of April, 2019, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//  
JAMES G. CONNELL, III  
*Learned Counsel*